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**Notice of Appeal to the Court of Errors
and Appeals.**

(Filed, Dec. 26th, 1918.)

10

New Jersey Prerogative Court.

IN THE MATTER

of

The Estate of JESSIE GORDON SAGE,
Deceased.

On Appeal.

20

The Young Women's Christian Association, Hudson County Branch, a corporation named as legatee in a certain paper writing purporting to be the last will and testament of Jessie Gordon Sage, deceased, hereby appeal to the Court of Errors and Appeals of New Jersey, from so much of a decree made in the Prerogative Court, in the above entitled matter, on the 16th day of December, 1918, as finds that the said paper writing was not executed in accordance with the statute in such case made and provided and therefore cannot be admitted to probate as the last will and testament of the above named decedent, and they appeal from so much of said decree as orders, adjudges and decrees that the judgment and decree of the Hudson County Orphans' Court denying probate to the paper writing purporting to be the last will and testament of Jessie Gordon Sage, deceased, be affirmed, and that the record be remitted to the Hud-

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son County Orphans' Court to be proceeded with in accordance with this decree and the practice of said court.

Dated, December 20th, 1918.

CONDICT, CONDUCT & BOARDMAN,
Proctors for and of Counsel with Appellant.

I conceive that there is good cause for appeal in the above entitled cause.

10 RICHARD BOARDMAN,
Proctor for and of Counsel with Appellant.

Petition of Appeal.

(Filed, Dec. 26th, 1918.)

NEW JERSEY COURT OF ERRORS AND APPEALS

IN THE MATTER

of

20

The Paper Writing Purporting to
be the Last Will and Testament
of JESSIE GORDON SAGE.

Deceased.

TO THE HONORABLE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

30 The humble petition of the Young Women's Christian Association, Hudson County Branch, a corporation named as legatee in a certain paper writing purporting to be the last will and testament of Jessie Gordon Sage, deceased, respectfully shows that your petitioners find themselves aggrieved by a decree made in the Prerogative Court on the 16th day of December, 1918, in a matter entitled, "In the Matter of the Estate of Jessie Gor-

40

Petition of Appeal.

don Sage, deceased, on Appeal", in these respects, to wit:

1. Because it is thereby found that the said paper writing (meaning the paper writing purporting to be the last will and testament of Jessie Gordon Sage, deceased) was not executed in accordance with the statute in such case made and provided, and therefore cannot be admitted to probate as the last will and testament of the above named decedent. 10

2. That it was thereby ordered and decreed that the judgment and decree of the Hudson County Orphans Court, denying probate to the paper writing purporting to be the last will and testament of Jessie Gordon Sage, deceased, be affirmed, and that the record be remitted to the Hudson County Orphans' Court to be proceeded with in accordance with said decree and the practice of said Orphans' Court. 20

3. That the said Prerogative Court did not, by said decree, find that the paper writing purporting to be the last will and testament of Jessie Gordon Sage, deceased, was in fact executed in accordance with the statute in such case made and provided, and therefore should be admitted to probate as the last will and testament of said decedent.

4. That the said Prerogative Court did not order, adjudge and decree that the judgment and decree of the Hudson County Orphans' Court denying probate of the said paper writing should be reversed and for nothing holden, and that the records be remitted to the Hudson County Orphans' Court to the end that the said paper writing purporting to be the last will and testament of Jessie Gordon Sage, deceased, should be admitted to probate as such last will and testament. 30 40

Your petitioners therefore pray that the said decree may be reversed in the matters aforesaid and set aside and for nothing holden in respect to said matters, and that your petitioners may have such other relief in the premises as to this court shall seem meet.

CONDICT, CONDICT & BOARDMAN,
Proctors for and of Counsel with Appellant.

10 **Answer to Petition of Appeal.**

(Filed, Dec. 31, 1918.)

NEW JERSEY COURT OF ERRORS AND APPEALS

20	<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;">of</p> <p style="text-align: center;">The Estate of JESSIE GORDON SAGE.</p> <p style="text-align: center;"><i>Deceased.</i></p>	} On Appeal.
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The Answer of John Sage, respondent, to the petition of appeal of the Young Women's Christian Association, Hudson County Branch, appellant in the above stated matter, respectfully shows:

30 This respondent not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto says and admits that a decree was made and entered in the Prerogative Court of the State of New Jersey, on the 16th day of December, 1918, and as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

This respondent is advised and believes and submits that the said decree is just and in accordance with the law and denies that said decree, or any part thereof is erroneous, improper or illegal, but

on the contrary says that said decree and every part thereof, is legal, proper and correct.

He therefore prays that said decree may be in all things affirmed with costs to be adjudged to this respondent.

HARRY LANE,
Of Counsel.

ZIEGENER & LANE,
Proctors with Respondent.

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**TRANSCRIPT FROM ORPHANS'
COURT.**

(Filed Dec. 7, 1917.)

Caveat Against Probate of Will.

HUDSON COUNTY SURROGATE'S OFFICE.

IN THE MATTER

of

The Probate of the Alleged Will of
JESSIE GORDON SAGE, Deceased.

20

To James F. Norton,

Surrogate of the County of Hudson.

I, John Sage, the husband of Jessie Gordon Sage, late of Jersey City, who died on the 28th day of January, 1917, do hereby caveat and protest against admitting to probate any paper purporting to be the last will and testament of the said Jessie Gordon Sage, until examination and decree thereon by the Orphan's Court of the said County of Hudson.

30

Dated, Jersey City, N. J., May 11, 1917.

JOHN SAGE.

Witness.

Harry Lane.

40

*Caveat Against Probate of Will.***HUDSON COUNTY ORPHANS' COURT.**

To the Orphan's Court of The County of Hudson :

The petition of the Young Women's Christian Association, Hudson City Branch of Jersey City, Hudson County, New Jersey, respectfully shows :

10 1. That Jessie G. Sage, late of the City of Jersey City, in the County of Hudson and State of New Jersey, departed this life on the day of February, 1917, having first made and executed a paper writing purporting to be her last will and testament, bearing date July 12, 1913, wherein your petitioner is named, among others, as a beneficiary.

20 2. The said paper writing has been deposited in the office of the Surrogate of Hudson County, and is now in the custody and under the control of the said Surrogate.

3. The said Jessie G. Sage left her surviving a husband, John Sage, who resides at and whose post office address is No. 43 Zabriskie Street, Jersey City.

4. A caveat against the probate of the will of the said Jessie G. Sage has been filed by the said John Sage.

30 Your petitioner therefore prays that said writing be admitted to probate as and for the last will and testament of the said Jessie G. Sage, and that letters testamentary thereon be issued to James A. Gordon and Henry Reinhard, the executors named therein, or in the alternative that letters of administration c. t. a. may be issued to some other suitable person or persons, as the court in its discretion may decide.

Dated, Jersey City, June 29, 1917.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION,

Hudson City Branch.

By Henrietta Fuchs,

President.

CONDUCT, CONDUCT & BOARDMAN,
Proctors & of Counsel.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

10

Henrietta Fuchs, being duly sworn according to law, upon her oath deposes and says that she is the president of the Hudson City Branch of the Young Women's Christian Association of Jersey City, formerly on Central Avenue, the petitioner in the foregoing petition named, and that the matters and things contained therein are true to the best of her knowledge and belief.

HENRIETTA FUCHS.

20

Subscribed and sworn to this 29th day of June, 1917, at Jersey City, aforesaid, before me.

Francis V. D. Maney,

Master in Chancery, of New Jersey.

Citation and Affidavit of Service.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

30

(L. S.)

The State of New Jersey

To James A. Gordon, Isabella L. Gordon, Mrs. Leslie Gordon Clark, William S. Gordon, Sr., William S. Gordon, Jr., Stephen Gordon, John Sage, Mrs. A. C. Hart, Annie Hopkins,

40

Citation and Affidavit of Service.

Martha K. Bellows, Clara E. Banks, Emma Van Beuschoten, Sarah J. Beebe, Christ Hospital, Jersey City Hospital, Old Ladies Home, Children's Home, Young Women's Christian Association, Henry Reinhard, Greeting:

10 We cite and command you that you personally be and appear before the Judge of the Orphans' Court, Part 1, to be held at the Court House in Jersey City, in and for Hudson County, on Friday, the 21st day of September, A. D. 1917, at the hour of 10 A. M., to answer unto a caveat filed against the probate of any paper writing purporting to be the last Will and Testament of Jessie G. Sage, deceased, and to abide the judgment and decree of the said court in the premises.

Witness:

20 MARK A. SULLIVAN,
Judge.
JOHN F. CALLAHAN,
Deputy Surrogate.

Dated, July 30, 1917.

NEW JERSEY, }
Hudson County. } ss.:

30 P. H. Murphy, of full age, being duly sworn, says: that on the 6th day of August, 1916, he served the within citation on the Young Women's Christian Association by leaving a true copy thereof with Francis E. Baier, the secretary of said association, on the 9th day of August, 1917, he served Mrs. Leslie Gordon Clark personally; on the 10th day of August, 1917, he served William S. Gordon, Sr., and John Sage each personally, and on the same day he served William S. Gordon, Jr., and Stephen Gordon, by leaving a true
40 copy for each at their home with their mother.

Citation and Affidavit of Service.

On August 14, 1917, he served Sarah J. Beebe personally and Christ Hospital by leaving a true copy with the superintendent, Edith Hooper, and on the City Hospital by leaving a true copy with Dr. McDonald, superintendent, on the Old Ladies' Home by leaving a true copy with Matron Barclay and on the Children's Home by leaving a true copy with Matron Fox, on August 16th, 1917, he served Clara E. Banks by leaving a true copy thereof at her place of abode with Lucy Williams, a resident thereof, over the age of fourteen years. On August 28, 1917, he served Martha K. Bel- lows and Henry Reinhard each personally. On the 7th day of September, 1917, he served Emma Van Beuchoten personally, and on September 10, 1917, he served James A. Gordon personally, and on September 11, 1917, he served Isabella L. Gordon by leaving a true copy at her home with Catherine Crosby, a resident thereof, over the age of fourteen years.

Deponent further says that he has made dili- gent search and inquiry for Annie Hopkins with- in named but has been unable to learn her place of abode.

P. H. MURPHY.

Sworn to before me }
 Sept. 12th, 1917. }

Robert G. Wiencke,
 Attorney at Law of N. J.

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Exhibit P. 1.

Jersey City, New Jersey, May 11th, 1917.

To James F. Norton, Surrogate of the County of Hudson.

10 I, John Sage, the husband of Jessie Gordon Sage, late of Jersey City, who died on the 28th day of January, 1917, do herewith file with you a paper writing found by me, which purports to be the last Will and Testament of the said Jessie Gordon Sage, but which was not signed by the said deceased or executed in conformity with the statutes of this State, and which is therefore void and of no force, effect or validity whatever.

Witness.

Harry Lane.

JOHN SAGE.

20

Exhibit P. 2.

43 Zabriskie St., Jersey City Hts., N. J.

Will of

In the name of God, Amen:

I, J. _____, being of sound mind, memory and understanding, do make and publish this my last will and testament in manner following.

30 I will and bequeath to my sister Isabell Leslie Gordon, all money in Excelsior Savings Bank, New York, in my name, Jessie Gordon Sage, all my jewelry, watch, my Quilts—2 silk, 1 patchwork quilt, tidys, cut glass, solid silver my laces, mother's chair, little bed. Afghan all the things marked in boxes and those I brought from home.

I will and bequeath to Miss Leslie Gordon, Mr. William S. Gordon, Jr., and Stephen Gordon, \$100. each, children of my brother William Stuart Gordon.

40

I will and bequeath to John Sage, Annaconda Copper Stock, in my name, Jessie Gordon Sage.

I will and bequeath to Mrs. A. C. Hart of Atlantic Highlands—Mrs. Martha K. Bellows—Miss Clara E. Banks of Mount Kisco—Mrs. Fannie Cumming Henry, wife of K. J. Henry of Ottawa, Canada, each the sum of \$500. Miss E. Van Beuschoten of 152 Highland Avenue, Orange, and Miss E. A. Wood, 99a Orient Avenue, each \$100.

I will and bequeath to Christ Hospital \$5,000. Jersey City Hospital, Baldwin Avenue, Montgomery Street, \$2,000. North Hudson Hospital, Weehawken, \$2,000. Old Ladies Home, \$500. Childrens' Home, Glenwood Avenue, \$100. Young Womens' Christian Association, Sherman Place, \$500. 10

Exhibit P. 3.

October 3rd, 1900. 20

July 12th, 1913

43 Zabriskie St., J. C. H., N. J.

WILL OF JESSIE GORDON SAGE.

In the name of God, Amen:

I, Jessie Gordon Sage,

Being of sound mind, memory and understanding do make and publish this my last will and testament in manner following:

I will and bequeath to my sister Isabell Leslie Gordon, all money in the Excelsior Savings Bank, New York, in my name, all my Jewelry, my Quilts 3, sofa Pillows, Tidys—Cut Glass—solid silver, my Laces, The Iron Bed—all the things I got from home. 30

I will and bequeath to Miss Leslie Gordon \$100. William Stuart Gordon, Jr. \$100. Stephen Gordon

Exhibit P. 3.

\$100. children of my brother William S. Gordon.

I will and bequeath to John Sage my Anaconda Copper Stock.

I will and bequeath to Mrs. A. C. Hart of Atlantic Highlands \$5000; to Miss Annie Hopkins, \$500; to Mrs. Martha K. Bellows, \$500; to Miss Clara E. Banks, of Mount Kisco, \$500; to Miss Emma Van Benschoten, of 152 Highland Ave., Orange, \$500; to Miss Sarah J. Beebe, \$500.

I will and bequeath to Christ Hospital, Palisade Ave., \$2,000; Jersey City Hospital, Baldwin Ave. and Montgomery St., \$1,000; Old Ladies Home, \$500; Children's Home, Glenwood Ave., \$200; Young Women's Christian Association, Central Ave., \$500.

I will and bequeath \$2,000, as a Memorial to my father and mother, John and Isabella Leslie Gordon, to be used only to put a bell in the belfry, with names engraved on same, to be placed in Westminster Presbyterian Church just as soon as possible of two of founders of said C.

I appoint my brother J. A. G. and Mr. Henry Reinhard, to be and act as my executors in all my affairs my brother James A. Gordon to use any money over and above as he thinks best for Charity after all expenses are paid.

30 Witnesses:

CHARLES DE WITT,

MRS. L. C. DE WITT,

Summit and Zabriskie St.

Proceedings in Orphans' Court.**HUDSON COUNTY ORPHANS' COURT.**

PART I.

<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;"><i>of</i></p> <p style="text-align: center;">The last Will and Testament of JESSIE GORDON SAGE.</p>	}	<p>On Caveat.</p> <p style="text-align: right;">10</p>
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Friday, September 21, 1917.

This cause came on before Hon. Mark A. Sullivan, Judge, in the Hudson County Orphans' Court, in Jersey City, on this 21st day of September, 1917.

RICHARD BOARDMAN, Esq., appears for beneficiaries under the will, namely Young Womens' Christian Association, Home for Aged Women, Jersey City, and Mrs. A. C. Hart. **20**

JOHN MILTON, Esq., appears for the Jersey City Hospital, a beneficiary under the will.

HARRY LANE, Esq., appears for John Sage, the caveator herein.

Miss Sarah J. Beebe appears in person.

Mr. Henry F. Reinhard appears in person, and states that he thinks he is named as executor.

By agreement of all the parties present the hearing was adjourned to September 28, 1917, at 10 A. M. **30**

August Nicklas—Direct.

Friday, September 28, 1917.

SECOND DAY.

Mr. Boardman states that the alleged will was found among the effects of the deceased by her husband, John Sage, who produced it and who is the caveator against the probate of the paper, while the beneficiaries will endeavor to establish its validity.

AUGUST NIKLAS, called by the proponents and sworn, testified as follows:

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You are a clerk in the surrogate's office?

A. I am.

20 Q. You have produced here certain papers at my request this morning? A. Yes, in the Sage will case.

Q. I show you a paper writing which begins "October 3, 1900", and following that are the words "July 12/13", which is the paper pro-
pounded as the will in this case. Did you produce that here in court this morning? A. Yes.

Q. Produced it from the surrogate's files? A. Yes.

30 Q. And the paper attached to it by a clip, did you produce that also? A. Yes, that is the caveat.

Q. And you produced that from the files of the surrogate's office?—A. Yes.

Q. Can you tell us when and by whom they were deposited in the surrogate's office? A. On the same day the application was made for letters.

Q. On the same day application was made for letters on intestacy? A. Yes.

40 Q. What is the date? A. May 11th, 1917,

James A. Gordon—Direct.

this will was produced together with the application for probate.

Q. That is not an application for probate? A. Oh, no; it is an application for administration.

Q. Who deposited that in your office?

MR. LANE: I placed it on file personally that day, and filed the purported will, and also the caveat. 10

MR. BOARDMAN: And the second paper is signed by Mr. Sage?

MR. LANE: Yes, the second paper is also filed by Mr. Sage.

THE COURT: That is the caveat?

MR. BOARDMAN: No.

MR. LANE: The paper attached to the will was filed by me and is signed by Mr. Sage.

MR. BOARDMAN: I offer the second paper 20 in evidence.

(Received, and marked P-1, JM.)

Q. When was the petition for probate on this will proceeding filed? A. June 30th, 1917.

(No cross-examination.)

JAMES A. GORDON, called by the proponents and sworn, testified as follows:

30

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You are a lawyer of this City? A. I am.

Q. And was Jessie Gordon Sage your sister?

A. She was.

Q. Did she leave any children on her death?

A. No.

Q. Her death occurred in January of the present year? A. It did.

Q. Did she leave any real estate? A. Not to 40 my knowledge.

James A. Gordon—Direct.

Q. You have seen your sister's writing, have you, and are familiar with her signature? A. Yes.

Q. And her pen handwriting? A. Yes.

Q. I show you the paper propounded here as her will and ask you if that is in her handwriting, if the body of that is in her handwriting?

10 A. It is all in her handwriting except the signatures of the two witnesses.

Q. That includes her name in the two places at the beginning of the paper? A. It does.

Q. Look at the endorsement on the back of the paper. Is the endorsement in her handwriting? A. It is.

BY MR. LANE:

Q. Date and all? A. Yes.

20 BY MR. BOARDMAN:

Q. I show you another paper. Is that in your sister's handwriting?

Objected to as irrelevant.

THE COURT: What is the relevancy?

MR. BOARDMAN: We will show it was found among her papers and it is a draft, and it will become very relevant as showing that the testatrix was considering where was the proper place to sign a will and the care which she considered necessary in connection with the signing of a will.

30

THE COURT: Do you mean it is a statement by her?

MR. BOARDMAN: No, it is not a declaration of hers in any way.

MR. LANE: Let his Honor see it and consider whether he thinks it should go in.

Paper handed to the Court.

40

THE COURT: Well, it appears to be a draft.

James A. Gordon—Direct.

All right; I will allow the question.

Question read.

A. It is.

Paper offered in evidence.

(Objected to as not relevant. Received and marked P-2, JM.)

Q. How old was your sister at the time of her death? A. Sixty-two, I believe, or near that; I cant give you the exact date from memory. 10

Q. She was a woman of some means? A. Well, I assume about fifteen thousand dollars.

Q. Do you know whether she handled her property or not and her papers? A. She took possession of all of her papers that I know of, excepting a four thousand dollar mortgage she held on which there is a balance of \$3,500.00, I think, and some little stock she had, and both of which I had possession of. 20

Q. Would you consider her a careful woman?

Objected to as irrelevant.

Objection sustained.

Q. Was she a careful woman?

Objected to as irrelevant.

Objection sustained.

Q. Can you tell us anything about her practice in conducting her affairs? 30

Objected to.

A. She generally conducted her own affairs; that is all I know.

Q. What education had she? A. She was sent to public school and to the State Seminary in this city—the City Seminary I think they called it; it was then where the church is on Pavonia Avenue. 40

James A. Gordon—Cross—Re-Direct.

CROSS-EXAMINATION BY MR. LANE:

Q. You were present with me at the time I had a talk with the witnesses to this will, were you not? A. I went up there—

Objected to as not cross-examination.

Objection sustained.

10 MR. LANE: He will be my witness in that respect. He would like to get away.

THE COURT: You may answer.

A. I was there during part of the time.

BY MR. BOARDMAN:

20 Q. You did not go with Mr. Lane? A. No, I went there for the purpose of interviewing the witnesses and found Mr. Lane there ahead of me.

Q. And taking affidavits? A. The affidavits were written before I came there.

RE-DIRECT BY MR. LANE:

Q. You saw the affidavit? A. You asked me to read it.

30 Q. And you read it? A. No, when I came in it was written, and then after I came in you asked them a few questions and they answered, and you read a page or so more and you asked me if I wanted to read it, and I said no.

Q. You were satisfied with what they said? A. I did not think you would put anything in it that was not said by them.

Q. Do you recollect asking the witnesses how this paper was folded at the time? A. No; I don't recollect asking them that.

40 Q. How far away from Mrs. Sage did you live? A. She lived on South Street; I mean on Za-

Charles De Witt—Direct.

briskie Avenue, and I lived on Pavonia Avenue and the Boulevard, about a mile and a half.

BY MR. BOARDMAN:

Q. She lived 46 Zabriskie Street, Jersey City Heights? A. Yes.

CHARLES DEWITT, called by the proponents and sworn, testified as follows: 10

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You are Charles DeWitt? A. Yes.

Q. Of Summit and Zabriskie Street, Jersey City? A. Yes.

Q. I show you a paper writing produced here and ask you is that your signature on it? A. Yes.

Q. Who were present when you signed that? A. My brother's wife. 20

Q. Mrs. Elsie C. DeWitt? A. Yes.

Q. Who else? A. Myself.

Q. Was Mrs. Sage there? Yes, sir.

Q. Did Mrs. DeWitt sign in your presence? A. Yes.

Q. Did you sign it at the request of Mrs. Sage? A. Yes.

Q. What did she say about this paper? A. She said this is her will and wished me to sign it. 30

Q. Can you tell about when that was? A. How many years ago do you mean?

Q. Yes. A. I should judge about eight years or so.

Q. Would looking at the paper refresh your memory? (Paper shown). A. No, sir.

Q. Does that refresh your memory in any way? A. No, sir; not the way you have it.

Q. Have you the branch post office now? A. No, sir. 40

Charles De Witt—Direct.

Q. Did you have at that time? A. Yes.

Q. When was the post office removed? A. Six or seven months after.

Q. Can you tell us the year the post office was taken away from you? A. About four or five years ago, I guess.

10 Q. Was it taken away by the Democratic administration? A. I don't know; I couldn't tell you that.

Q. Can you now tell us just what happened that morning when you signed that paper? A. That I was in that post office and I was attending to my duties there, and Mrs. Sage came into the store and she bought a few articles of groceries, and she came to my brother's wife and she says, "Youse two are here anyway and this is my will, and you must both sign it", and she had it 20 wrapped up, and we could only see the part where our signatures are, and we signed it.

Q. How do you mean it was wrapped up? A. Folded up, doubled a couple of times.

Q. Could you see the word witnesses on it? A. No, sir.

Q. Tell us and show us where and how it was signed; how it was folded at the time (witness folds paper)? A. She had it doubled up like that and like that.

30 THE COURT: He indicates everything covered except the words "after all expenses are paid", "Witnesses: Charles DeWitt, L. C. DeWitt, Summit and Zabriskie St."

No cross-examination.

Mrs. Rose De Witt—Direct.

MRS. ROSE DE WITT, called by the proponents and sworn, testified as follows:

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Are you Mrs. L. C. DeWitt, of Summit and Zabriskie Street? A. Yes.

Q. I show you a paper writing produced here this morning. Is that your signature? A. Yes. 10

Q. You signed that at whose request, if any one's? A. Mrs. Sage's request.

Q. Mrs. Jessie Gordon Sage? A. Yes.

Q. Did Charles DeWitt sign in your presence? A. Yes, and I signed in his presence.

Q. And you both signed in the presence of Mrs. Sage? A. Yes, at the same time.

Q. In the presence of Mrs. Sage? A. Yes.

Q. And that was in the branch post office which was in your store? A. Yes. 20

Q. Will you tell us the circumstances under which this paper was executed? A. Well, she used to come in the store to deal with us, and she came with the paper folded and asked us if we would sign her will, and she had it folded up except just where she wanted us to sign as witnesses.

Q. And you signed it as witnesses? A. Yes.

Q. What did you think you were doing? A. She told us it was her will we were signing. 30

Q. Will you show us as near as you can how the paper you call the will looked and how you saw it when she handed it to you and when you signed it?

(Witness folds it up.)

THE COURT: Witness indicates that it was folded in the same manner as the last witness, except that she leaves out the words "after all expenses are paid." 40

Mrs. Rose De Witt—Cross.

Q. How long was Mrs. Sage in there that morning? A. Not very long. She just came to purchase things and went right out again.

Q. Did she ask you to sign this before or after she made the purchases? A. Before.

Q. How long ago was that? A. I guess six or seven years. I don't quite recollect how long ago, but it is quite some time ago.

Q. Where did she have the will when she came in the store? A. In her bag.

Q. What kind of bag? A. I don't remember the kind of bag.

Q. Did you see her take it out of her bag? A. Yes.

Q. Where did you write? A. Up at the post office desk.

Q. In the main store? A. Yes.

Q. Who signed first? A. Mr. Charles DeWitt.

Q. You signed afterwards? A. I did.

Q. Who held it while he wrote? A. He held it himself, I guess.

Q. Did you hold it while you wrote? A. Yes.

Q. Did he take it from Mrs. Sage and put it on the desk? A. That I don't remember.

Q. Did you after you signed it hand it back to Mrs. Sage? A. She had it holding it and passed it over to me and I signed it, and she took it back again; she did not leave it on the desk.

Q. Did you see her put it in the desk? A. No.

Q. What became of it? A. She put it in her bag.

Q. Did you notice if there was anything on the outside of it? A. No, sir. I did not see anything else.

CROSS-EXAMINATION BY MR. LANE:

Q. You were there some time ago when Mr. Gordon and I were at your store? A. Yes.

Mrs. Rose De Witt—Cross.

Q. And you signed an affidavit there? A. Did I sign an affidavit?

Q. Yes? A. No, I signed nothing at all.

BY THE COURT:

Q. What kind of store was this? A. Grocery store.

Q. Where was this store? A. Summit Avenue and Zabriskie Street. 10

Q. How near to this store was Mrs. Sage's residence? A. About three doors down the street.

Q. Had you known her before? A. Yes.

Q. How long? A. At least eight years; she had been dealing there all that time.

Q. For eight or nine years before she came there—A. No, before her death.

Q. I mean how long before she came in with this paper had you known her? A. About four years. 20

Q. Was anybody else in the store? A. No, sir.

Q. What did she say? A. She came in and asked me whether we would sign her will, which she had folded up, and we saw nothing at all except where we could sign it.

Q. And then what? A. We said yes we would.

Q. And then what? A. Then we signed it, and she seemed to be happy and put it back in her bag. 30

Q. After you had signed it? A. Yes.

Q. Did she say anything else at all to you about it? A. No, sir.

Q. Or to Mr. De Witt in your hearing about the paper? A. No, sir.

Q. Have you stated everything that she said about the paper which you heard at that time? A. Yes.

Q. You can't recollect anything else about that? A. No, sir. 40

John Sage—Direct.

JOHN SAGE, called by the proponents and sworn, testified as follows:

DIRECT EXAMINATION BY MR. BOARDMAN:

Q. You are John Sage? A. Yes.

10 MR. BOARDMAN: I offer the paper writing called the will in evidence.

MR. LANE: I object to its being put in evidence as a will.

THE COURT: I will receive it.

Marked P-3, JM.

Q. You said you are John Sage? A. Yes.

Q. You were the husband of the late Jessie Gordon Sage? A. Yes.

Q. She died January 28th, 1917? A. Yes.

20 Q. You are the caveator? A. Yes.

Q. Did your wife own any real estate at the time of her death? A. Nothing that I ever heard of.

Q. Or personalty? A. Yes.

Q. Her personal estate amounted to about fifteen thousand dollars? A. About fifteen thousand dollars; approximately, it is not quite that.

Q. You filed these two papers, P-1 and P-3, in the office of the surrogate here May 11, 1917?

30 A. My counsel did; I was with him.

Q. Where did you find this paper P-3? A. In a little tin box in a wash stand on the ground—on the floor, you know, back.

Q. In what room? A. In her bed room.

Q. What else did you find in that box? A. A couple of bank books, savings banks.

Q. Anything else? A. No; that was all.

40 Q. I show you exhibit P-2, produced here by your counsel this morning. Where did that come from? A. I found that in a bag that she had.

John Sage—Direct.

After she died I was looking for a will, and naturally I thought her brother would have it, but he did not, and so I was hunting there and I found the bag that she used when traveling, and I found this paper sticking out, and it seemed to me a rough draft, and I took it to her brother and showed it to him.

Q. The pencil note on the second page is your handwriting? A. Yes, simply a memorandum about what the will disposed of. **10**

Q. When did you first see the will itself, P-3; when did you find it? A. I don't recollect exactly. Probably a month or six weeks after she died. You see I did not live there. I moved out of that house right away and left the house locked up and went to board in New York, and it was winter time and I was alone and I was very busy, and I did not have much chance, but once in a while when I had the opportunity I went over there and looked around to see what I could find, and her brother, Mr. James A. Gordon, said he thought she might have a will, and I hunted until I found it. **20**

Q. Which did you find first? A. This one.

Q. P-2? A. Yes.

Q. Had you seen that paper ever before? A. No: not that I remember of.

Q. You lived with your wife at the time of her death? A. Oh, yes. **30**

Q. Occupied the same room? A. No. Adjoining room.

Q. But you had never seen the tin box before? A. Not that I can recollect.

Q. You never saw either of these paper writings before her death? A. No.

John Sage—Cross; Henry F. Reinhard—Direct.

CROSS EXAMINATION BY MR. LANE:

Q. What is your business? A. Banker, Assistant Cashier of the Bank of America, New York.

Q. Can you state how long after you found this P-2 you found the paper P-3? A. I think about a month or six weeks afterwards: I did not make
10 any special note of the date.

Q. After you found these papers what did you do with them? A. I went down to Mr. Gordon and showed them to him as soon as I found them.

Q. Did you also find various other bank books hidden around the house? A. Yes: I found another bank book hidden in back of a drawer.

Q. Do you mean just in the drawer? A. No. It was in the rear. She had made a pocket in the rear of the drawer, that is pulled the drawer all
20 the way out, and a little card board was nailed on the back of the drawer, and that made a little pocket, and unless you pulled it out entirely you would not see it unless as you pulled it out accidentally, and when I found that there that made me look further to see if there was anything more I could find.

HENRY F. REINHARD, called by the proponents and sworn, testified as follows:

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DIRECT EXAMINATION BY MR. BOARDMAN:

Q. Where do you live? A. At the Fairmount Hotel, Jersey City.

Q. Did you know Mrs. Jessie Gordon Sage in her life time? A. Yes.

Q. How long did you know her? A. Probably ten years: I am speaking now of ten years before her death: Beg pardon, I would like to correct
40 that: I would say at least twenty years before her death.

Henry F. Reinhard—Direct.

Q. You are the Henry Reinhard named in this paper produced here marked P-3? A. I presume I am, although my name is Henry F. Reinhard.

Q. When did you first see this paper marked P-3? A. Allow me to look at it?

Q. Look at it. A. This is the first time I had it in my hands, but I saw this I should judge may be seven or eight weeks ago may be. 10

Q. Where was it then? A. In Mr. James A. Gordon's office.

(No cross examination.)

MR. BOARDMAN: We offer the Will for probate.

MR. LANE: We object to it.

MR. BOARDMAN: Have you any evidence?

MR. LANE: No. 20

After discussion, the Court adjourned the matter for a week.

Friday, October 5th, 1917.

THIRD DAY.

The appearances were the same as at the preceding hearings.

Mr. Boardman stated he will offer no further evidence. 30

Mr. Lane stated he would offer no evidence.

Argument on the evidence by Mr. Boardman.

The Court stated he did not want to hear Mr. Lane.

On inquiry by Mr. Boardman the Court said he would reserve decision and would consider any cases of which counsel gave him a memorandum before he decided the question involved. 40

Decision of Orphans' Court Judge.

(Filed Oct. 10, 1917.)

HUDSON COUNTY ORPHANS' COURT.

SULLIVAN, J.

CONDICT, CONDUCT & BOARDMAN, Esqs., (Mr. Boardman), for the Will.

10 ZIEGENER & LANE, Esqs., (Mr. Lane), opposed.

This is an application for the probate of a paper writing alleged to be the last will and testament of Jessie Gordon Sage, who died in Jersey City, in January of this year. The paper offered for probate is holographic, has no testamonium clause, nor signature of the decedent at the foot of the paper, nor has it an attestation clause; but after the word "Witnesses" appear the names of "Charles De Witt and "Mrs. L. C. De Witt"

20 both of whom appeared and testified. The said paper writing was filed with the Surrogate by John Sage, the husband of the decedent, who at the same time filed a caveat against the probate of the said paper writing as the last will and testament of his wife.

Mr. Sage testifies that he found this paper in a tin box which was the property of his wife and in which were some other documents which she considered of value.

30 Mr. De Witt and Mrs. De Witt testify that they attested said document at the request of Mrs. Sage one day about four years ago, the time the alleged will bears date. It appears that they owned a grocery store in the neighborhood in which Mrs. Sage lived, that she traded at this store, and that on the occasion when they signed the paper she came into the store and took this paper out of her bag and told them it was her

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Decision of Orphans' Court Judge.

will and she wanted them to sign as witnesses thereto. She then presented the paper to Mr. Charles De Witt for his signature, it being folded in such manner that he could see nothing thereon except the five words on the last line of the paper writing reading "after all expenses are paid" and the word "Witnesses" on the following line. After Charles L. De Witt had signed the paper it was then signed at the same time and place by Mrs. L. C. De Witt, who testifies that the paper was so folded that she could see nothing thereon except the word "Witnesses" and her husband's signature. 10

Probate is asked for this instrument by certain of the beneficiaries named therein, and it is contended by their counsel that the name "Jessie Gordon Sage", which appears in two places at the beginning of the instrument, must be taken as the signature to the document required by the statute, arguing that by reason of the manner in which said name is written in both those places it is apparent that when she so wrote her name in said places she intended it as her signature to the document. 20

The first part of this document, which is the material part in the light of said contention, reads as follows: 30

"October 3rd, 1900.

July 12th, 1913

43 Zabriskie St., J. C. H., N. J.

WILL OF JESSIE GORDON SAGE.

In the name of God, Amen:

I, Jessie Gordon Sage

Being of sound mind, memory and understanding, do make and publish this my last will and testament in manner following:" 40

Decision of Orphans' Court Judge.

There is a strong inference, and indeed this Court will take it for a fact, that the name "Jessie Gordon Sage" as it appears in the two places shown above, was written after the rest of the will had been completed.

When the document was drawn it undoubtedly read as follows:

10

"Will of

In the Name of God, Amen:

I,

Being of sound mind, memory and understanding,"

and these blanks were filled up at some subsequent time. This conclusion is the more forceful

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when another paper writing which was put in evidence is considered.

This other paper appears to have been the original draft of the alleged will offered here for probate, and the beginning of it is identical with the paper offered for probate except for the fact that there are no dates thereon and there are blanks where the name "Jessie Gordon Sage" appears in the paper offered for probate.

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It is argued that from these circumstances it must be apparent that when Mrs. Sage wrote her name in said blank spaces she intended such writing to be her signature to the document, and did not think that anything further would be necessary except to publish the will in the presence of witnesses and have them attest the same:

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And the Court feels, in view of the other testimony adduced at the hearing as to Mrs. Sage's secretiveness and her personality, that probably this is true, and the Court believes that it should go still further and say that while there is no direct proof or evidence as to when Mrs. Sage

Decision of Orphans' Court Judge.

wrote her name in these blank spaces, yet if she intended it for her signature to the document, which the Court finds she did, the reasonable presumption is that she wrote in her name in these blank spaces before she called upon the witnesses to sign the same. But this is as far as the Court considers it can go.

The vital defect under the proof is that it appears that said signature was not made in the presence of the witnesses, nor was said signature acknowledged by Mrs. Sage in the presence of the witnesses. 10

The statute provides "That all wills * * * shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses present at the same time, who shall subscribe their names thereto, as witnesses, in the presence of the testator" (4 C. S., page 5867). 20

It will be recollected that neither witness saw any part of this paper writing except the last line thereof, and neither of them knew whether or not there was any signature to the document to which they appended their names. Proponent's contention, however, is that when Mrs. Sage said "This is my will" it was equivalent to her saying "This is my testamentary act which I have signed", or "This is my signed, executed will which I now publish and acknowledge to you, and request you to act as witnesses": and a very ingenious argument has been presented to the Court in support of that contention. This Court cannot, however, agree with the conclusion drawn by counsel, for proponents. 30

The statute has always been construed to re- 40

Decision of Orphans' Court Judge.

quire not only the publication of the document in the presence of two witnesses, but also the signing thereof or the acknowledgment of the signature to be in the presence of two witnesses; and to accede to the arguments made for the proponents here would be tantamount to saying that the performance of one of such requirements, namely, the publication of the will in the presence of the witnesses would include the performance of the other requirements, namely, the acknowledgment of the signature thereto.

The Court cannot go that length in construing the statute, and while counsel disclaims that that is the necessary conclusion to be drawn from his argument, the Court believes that it is. Proponent's contention is that because of the peculiar circumstances surrounding the presentation of this paper to the witnesses, the personality and character of the decedent and her habits, her secretiveness and carefulness, the Court should in this case find from the testimony an intent on her part to acknowledge her signature. But such reasoning is making a matter of substance out of a shadow, and the Court is not willing to come to any such conclusion. I will therefore sign a decree denying probate to said paper writing.

Dated, October 10, 1917.

MARK A. SULLIVAN,
Judge.

Order Denying Probate.

(Filed Oct. 25, 1917.)

HUDSON COUNTY ORPHANS' COURT.

IN THE MATTER

of

The probate of a paper writing,
purporting to be the Last Will
and Testament of Jessie Gor-
don Sage.

Deceased.

On Petition
for Probate.

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This matter being opened to the Court by Harry Lane, Esq., of counsel for John Sage, Caveator, in the presence of Richard Boardman, Esq., of counsel for the proponents, and it appearing that the proponents being legatees named in a paper writing purporting to be the last Will and Testament of Jessie Gordon Sage, late of the County of Hudson, deceased, duly presented their petition to the Surrogate of the County of Hudson, aforesaid, for the probate of said paper writing; and it appearing that a caveat against the probate of said paper writing has been duly filed with the said Surrogate, and citations have been issued to all persons in interest and returned served, and the matter coming on to be heard, and the Court having taken testimony, and examined into the matter, and being of the opinion that the said paper writing purported to be the last Will and Testament of the said Jessie Gordon Sage, deceased, was not executed in manner and form as required by the statute in such case made and provided.

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It is thereupon on this 25th day of October,

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A. D., 1917, ordered, adjudged and decreed, that the aforesaid paper writing offered in this matter, is not the last Will and Testament of the said Jessie Gordon Sage, deceased, and that probate of the same is hereby denied.

And it is further ordered that Richard Boardman, counsel for the proponents, be paid the sum of One hundred and fifty (\$150.00) Dollars, as counsel fee together with his costs to be taxed, and Ziegener & Lane, proctors for John Sage, caveator, the sum of One hundred and fifty (\$150) dollars as counsel fee together with their costs to be taxed, which said payments are to be made out of said estate.

MARK A. SULLIVAN,
J.

Notice of Appeal to Prerogative Court.

(Filed Nov. 23, 1917.)

HUDSON COUNTY ORPHANS' COURT.

IN THE MATTER

of

The application for probate of a paper writing purporting to be the Last Will and Testament of Jessie Gordon Sage, deceased.

The Young Women's Christian Association, Hudson City Branch, the proponent and one of the legatees named in a certain paper writing purporting to be the Last Will and Testament of Jessie Gordon Sage, deceased hereby appeals to the Prerogative Court from the decree entered herein on the 25th day of October, 1917, denying probate to a certain paper writing purporting to be the Last Will and

Testament of said Jessie Gordon Sage, deceased, and from so much thereof as ordered, adjudged and decreed that the aforesaid paper writing offered in this matter is not the Last Will and Testament of said Jessie Gordon Sage, deceased, and that probate thereof be denied.

Dated, Jersey City, November 15, 1917.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION,
Hudson City Branch,
by Condict, Condict & Boardman, 10
Its Proctors.

Certificate of Record.

HUDSON COUNTY SURROGATE'S COURT.

STATE OF NEW JERSEY, }
County of Hudson. } ss. :

I, James F. Norton, Surrogate and Clerk of the Surrogate's Court of the said County of Hudson, in said State, do hereby certify that the foregoing is a copy of the caveat, petition for probate of will, citation alleged will (without signature), notice by John Sage, will (unsigned at end), testimony, decision, order denying probate, petition of appeal, and notice of appeal in the matter of the estate of Jessie Gordon Sage, deceased; that I have compared said copy with the record thereof, now remaining in this office, and have found the same to be a true transcript therefrom. 20

In testimony whereof, I have hereunto set my hand and affixed my official seal this 21st day of November, A. D., one thousand nine hundred and seventeen. 30

JAMES F. NORTON,
Surrogate and Clerk of the Surrogate's Court.
(Seal) Per John F. Callahan,
Deputy Surrogate. 40

Petition of Appeal to Prerogative Court.

(Filed Nov. 23, 1917.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER

of

- 10 The appeal from the decree of the Orphan's Court of the County of Hudson denying probate to a certain paper writing purporting to be the last Will and Testament of Jessie Gordon Sage, deceased.
- Sur Appeal.

To the Ordinary of the State of New Jersey:

- 20 The petition of the Young Women's Christian Association, Hudson City Branch, of the City of Jersey City, in the County of Hudson and State of New Jersey, respectfully shows:

1. Petitioner is the proponent and one of the legatees named in a certain paper writing purporting to be the Last Will and Testament of Jessie Gordon Sage, deceased. On the 25th day of October, 1917, the Orphans' Court of the County of Hudson made an order, ordering, adjudging and decreeing that the said paper writing was not
- 30 the Last Will and Testament of the said Jessie Gordon Sage, deceased, and that probate thereof be denied.

2. Your petitioner complains and alleges that the said decree is erroneous, improper and illegal, and that your petitioner is aggrieved thereby in that the said decree orders, adjudges and decrees that the aforesaid paper writing is not
- 40 the last Will and Testament of the said Jessie Gordon Sage, deceased, and that the probate

thereof should be denied, whereas, the said decree should have adjudged that the said paper writing was the last Will and Testament of the said Jessie Gordon Sage, and that the said will should be admitted to probate and that letters testamentary should issue thereon.

Your petitioner therefore prays that the aforesaid decree of the Orphans' Court be reversed in so far as erroneous and to the extent above indicated, or in the alternative, that a decree of this court may be made admitting the said Will to probate, and that your petitioner may have such other relief in the premises as may be equitable and just. 10

YOUNG WOMEN'S CHRISTIAN ASSOCIATION,
Hudson City Branch.
By Condict, Condict & Boardman,
Its Proctors. 20

Memorandum of Conclusion.

(November 29th, 1918.)

NEW JERSEY PREROGATIVE COURT.

<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;"><i>of</i></p> <p>The Appeal from a Decree of the Hudson County Orphans' Court denying probate to a certain paper writing propounded as the last Will and Testament of Jessie G. Sage, deceased.</p>	}	<p>Not to be filed or printed except in case of an appeal. 30</p>
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RICHARD BOARDMAN, Esq., for Appellant.
HARRY LANE, Esq., for Respondent. 40

Memorandum of Conclusion.

STEVENSON, Vice Ordinary:

1. I concur with the learned Judge of the Hudson Orphans' Court in his opinion that the instrument propounded as Mrs. Sage's will was neither signed by her in the presence of the witnesses, nor was the "making" of the signature acknowledged by her in the presence of the witnesses.

10

It is not disputed that Mrs. Sage brought the paper, all in her handwriting, to the witnesses and sufficiently published the paper as her will in their presence, and that they subscribed their names thereupon as witnesses in her presence and in presence of each other.

The narrow question is whether it may be inferred from the evidence, in the absence of any attestation clause, that Mrs. Sage acknowledged her signature in the presence of the witnesses, which testamentary ceremony is made by statute, the alternative to the making of the signature in the presence of the witnesses, Mrs. Sage did not subscribe the will. It is claimed, however, on behalf of the appellant that she sufficiently declared her name, which she had written in two places in the first paragraph of her will, to be her signature to the will. The paper purporting to be a will appears now entirely in the handwriting of Mrs. Sage with the exception of the signature of the two witnesses. It is not denied that if Mrs. Sage filled in her name in the introductory part of the instrument with intent to make her signature to the will, and when the subsequent testamentary ceremonies were performed, acknowledged the signature within the meaning of our statute, the execution of the instrument as a will would be in conformity with our statute although the testatrix did not subscribe the instrument.

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Memorandum of Conclusion.

In re, Phelan's Estate, 83 N. J. Eq., 316; S. C. Aff'd, 83 N. J. Eq., 647.

The important circumstances pertaining to the attempted execution of this alleged will is that Mrs. Sage brought the paper to the witnesses so folded that they did not and in fact could not see her alleged signature. The witnesses subscribed their names and Mrs. Sage placed the paper in her bag and took it away with her without the witnesses being able at any time to see her signature. 10

2. Let us concede for the purpose of this case that if Mrs. Sage had exhibited to the witnesses an instrument bearing on its face her name, and had then published the instrument as her will, and thereupon the two witnesses had signed their names in the manner prescribed by the statute, that such conduct on her part would have been in substance and effect an acknowledgment to the witnesses that what they saw with their own eyes was her genuine signature to the will. See 30 Am. & Eng. Ency., 2nd Ed., p. 589, and particularly the cases cited in Note 7. *Ludlow v. Ludlow*, 35 N. J. Eq., 480, 489; S. C. Aff'd 36 N. J. Eq., 597; *Stewart v. Stewart*, 56 N. J. Eq., 761, 764; *Baskin v. Baskin*, 36 N. Y., 416. 20

Under the wide admission which is only made *arguendo* that the exhibition to the witnesses by a testator of an instrument apparently bearing his signature, accompanied by a distinct publication of the instrument as the testator's will, amounts to the acknowledgment of the signature prescribed by our statute, I am still of the opinion "That there is no sufficient acknowledgment unless the witnesses either see or are able to see the signature." 30 Am. & Eng. Ency. of Law, p., 589. The great weight of authority sustains the prop- 30 40

Memorandum of Conclusion.

osition that where the testator purposely prevents the witnesses from seeing his signature, even the positive declaration by the testator that he has in fact signed the instrument will be of no avail; much less can the acknowledgment in such case be inferred from the testator's declaration that the instrument is his will. In view of

10 the elaborate discussions of this subject in the English and American cases cited below it would seem to be unnecessary to discuss at length the reasons which I think sustain the principle which I have stated. It may be well, however, to refer to the repeated declarations by our courts that the signing of the will is a distinct testamentary ceremony from the publication of the will. There is no alternative to the publication but the statute does prescribe an alternative to the signing

20 in the presence of witnesses, viz: that the signature be acknowledged by the testator in the presence of the witnesses. Where, as in this case, the instrument is so folded that the witnesses cannot see the signature, the most solemn declaration by the testator that in fact the will bears his signature is merely a statement on his part, and all that the witnesses can attest to is that statement. They are not witnesses to whom the testator has acknowledged a certain specific signature as his own signature. They can merely

30 attest that the testatrix informed them that the will was signed by him. As a matter of fact in such case the will may have been left unsigned by mistake or it may have been purposely left unsigned so that the testator at any time in the future, in fraud of the statute, could affix his signature or elect to die intestate.

It is not claimed that Mrs. Sage expressly

40 stated to the witnesses or to anyone that the instrument had been signed by her. The argu-

Memorandum of Conclusion.

ment is that the production of the paper and her declaration to the witnesses that it was her will, under the circumstances, constituted conduct equivalent to an acknowledgment of the signature. Counsel for the appellant contends that Mrs. Sage's declaration: "This is my will," was equivalent to "This is my signed will." Counsel for the appellant states in his brief that: "a careful scrutiny of the will itself shows that in all probability she (Mrs. Sage) kept the paper which is offered for probate, for a period of years after it was written before she filled in her name at the head of the paper." The evidence, I think, fully sustains this proposition. Mrs. Sage made two drafts of a will in her own handwriting and one of them appears with two blanks in the first paragraph, manifestly intended to be filled in with her own name in case she should conclude to execute the instrument as her will. Conceding that Mrs. Sage regarded the writing of her name with her own pen in these spaces, or one of them, as her signature to the will, the significant fact remains that this so-called holographic will remain unsigned by Mrs. Sage for a long period of time, and there is absolutely no evidence when it was signed. We may surmise or think it probable that Mrs. Sage believing that she could sign her will by filling in the blanks, would not have left those blanks unfilled when she declared that the document was her will and caused the witnesses to subscribe their names, but there is no evidence that Mrs. Sage did not procure the attestation of the witnesses first and subsequently, at her convenience, insert her name in the space which she had left for that purpose. The case would bear a different aspect if the paper signed by the witnesses showed on its face that it had been completely written *currento calamo* by Mrs.

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Memorandum of Conclusion.

Sage. In such case there would be no evidence that the body of the instrument had been written first and the signature or signatures inserted subsequently. I see no ground for the affirmative conviction that Mrs. Sage's signature or signatures had been inserted in the will before she brought it to the witnesses which is not mere
10 surmise—a presumption of a fact which the law requires to be proved. Even if Mrs. Sage had said: "This is my signed will", that would not present legal proof of her signature if the witnesses did not and could not see any signature.

The argument of this case on both sides proceeded, I think, with the express or tacit admission that there was evidence from which the inference could be drawn that Mrs. Sage had
20 filled in her name in the reserved space when she presented the document to the witnesses for their attestation, and therefore, I prefer to deal with the case with that presumption which certainly is exceedingly favorable to the appellant. The narrow question to be considered therefore is whether in the absence of any attestation clause there is any evidence that Mrs. Sage, by word or by conduct of any kind, acknowledged what in fact was a signature made by her to her will. I have nothing to add to the
30 lucid discussion of the learned judge of the Hudson Orphans' Court, in which he reaches the conclusion, without referring to the fact, that the paper was folded so as to conceal any signature of Mrs. Sage from the witnesses, that there was no sufficient declaration by word or conduct that she had signed the paper, or that her signature was affixed to it in any way. I intend in this additional opinion merely to deal with the propo-
40 sition that under our law a mere declaration by

Memorandum of Conclusion.

the intended testator that he has signed an instrument which he publishes as his will, is not an acknowledgment of the signature unless the witnesses see or are able to see the signature. A brief glance at the history of our statutes regulating devises and testaments throws light, I think, on this question.

The fifth section of the statute of frauds (29 Car. II., c3) abolished verbal devises and provided that all devises of lands "should be in writing and signed by the party so devising the same, or by some other person in his presence and by his express direction, and should be attested," etc. After a period of some uncertainty the English courts appear to have finally decided that an acknowledgment of the signature to the witnesses satisfied the statute. 1 Jarman on Wills (R. & T. ed.), Ch. VI.-1, p. 208. 10 20

The New Jersey Act of 1713 required devises to be in writing and to be "signed and published by the testator in presence of three subscribing witnesses." Bradford, p. 35, Elmer's Dig. 595. It was settled by our courts that the exhibition of the signature by the testator to the witnesses and a positive declaration by him that the same was his own signature, did not meet the requirements of the statute—that the signature must actually be made in the presence of the witnesses. 30
Den. v. Milton, 12 N. J. Law, 70 (1830). *Den. v. Matlack*, 17 N. J. Law, 86 (1839). *Combs v. Jolly*, 3 N. J. Eq., 625 (Prerog. Ct., 1835).

It will be observed that the English statute of Charles allowed an alternative to the signature of the testator in the presence of the witnesses, viz: the writing of the testator's signature by some other person in his presence, and by his express direction. The New Jersey stat- 40

Memorandum of Conclusion.

ute provided no alternative. Neither statute expressly recognized the acknowledgment of the signature as the equivalent of making the signature in the presence of the witnesses. The establishment of this equivalent was reached in England by construction, no doubt recognizing the established custom supported by convenience and common sense of having a signature to a document attested by witnesses after the maker of the signature has exhibited the same to the witnesses and declared that the signature was his. There is an exact equivalent in point of fact. No doubt cases of hardship were liable to arise under the New Jersey statute which ignored a well settled custom pertaining to the execution of solemn instruments and the exact equivalence of the two methods by which a party executing an instrument could procure that fact to be attested by witnesses.

When the English law of wills covering devises of real estate and bequests of personalty was passed in 1837, the propriety of allowing the exhibition of the signature and contemporaneous acknowledgment of it as the equivalent of signing was expressly recognized. The same course was taken in the New Jersey Statute of Wills, passed in 1850 (P. L. 1850, p. 280). The statutes regulating wills in other States quite generally exhibit the same feature. In this manner the statute law of England and America was made to conform with the natural habits and customs of men.

If by any construction of our statute the declaration by a party attempting to make a will to the witnesses whom he called in to the effect that the instrument had been signed by him, when in fact the witnesses could not possibly see any

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signature, should be held to be an acknowledgment of the signature, it seems to me quite evident that a third method of having a testator's signature attested would be established not by any means equivalent to the others but far less forceful and significant as a testamentary ceremony.

No New Jersey decision dealing with the subject under consideration has been cited by counsel or has in any way come to my knowledge. The following are a few only of the decisions of courts of other jurisdictions which support the view which I have expressed. 10

Lewis v. Lewis, 11 N. Y., 220 (1854).

The New York statute of wills construed in this case is to the matter now under consideration, the same as our own. The case seems to be on all fours with the one at bar. The testator folded the will so that the witnesses could not see whether it was signed by him or not. The opinion of the Court (p. 225) contains the following paragraph: 20

"If the party does not subscribe in their presence (the presence of the witnesses) then the signature must be shown to them and identified and recognized by the party and in some apt and proper manner acknowledged by him as his signature." 30

In the matter of the Probate, etc., of Mackay, deceased, 110 N. Y., 611 (1888).

In this case, Judge Earle delivered the unanimous opinion of the New York Court of Appeals directly holding that where the testator so folded the instrument that the witnesses could not and 40

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did not see his signature, or any part thereof, the will was not properly executed however distinctly it was published. The Court held (p. 614) that: "There would undoubtedly have been a formal execution of the will in compliance with the statute if the witnesses had at the time seen the signature of the testator to the will." This
 10 decision is directly in point.

In re Goods of Mary Gunstan.

Blake v. Blake, L. R. P. D., 102 (1882).

In this case the English Court of Appeal unanimously sustain the probate Court and hold that an acknowledgment of a signature to an instrument purporting to be a will is insufficient unless the witnesses are able to see the signature. Master
 20 of Rolls Jessel approves Mr. Jarman's proposition that "there is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will," and then adds his opinion that "it is not sufficient even if the testator were to say: 'My signature is inside the paper' unless the witnesses were able to see the signature."

30 One of the most recent elaborate discussions of the subject in hand may be found in the opinion of Judge Loring, speaking for the Massachusetts Supreme Court in *Munn v. Elbrett*, 218 Mass., 471 (1914). The Massachusetts statute has by construction been held to require as the alternative to the making of the signature of the testator in the presence of the witnesses, the acknowledgment of the signature by him in the presence of the witnesses, thus giving as much
 40 force in New Jersey to Massachusetts decisions as can be attributed to decisions of the English

courts or the New York Courts. The five judges of the Massachusetts court who heard the case last cited hold directly that "a will is not attested lawfully by a subscribing witness if the person who intended and attempted to execute the instrument as his will concealed the signature from the subscribing witness so that he could not see it or know it was there." Judge Loring states (p. 72) that the case "presents the question whether a will is duly attested when the signature of the deceased is hidden from the witnesses when they attest and subscribe the will." It is this question which the Court unanimously answers in the negative. I agree with the Massachusetts Court in disregarding the Michigan case *In re Doherty Estate*, 168-281, in which it appears an "opposite conclusion" was reached. 10

The decree of the Hudson Orphans' Court will be affirmed. 20

Final Decree of Prerogative Court.

(Filed Dec. 16, 1918.)

NEW JERSEY PREROGATIVE COURT.

<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;">of</p> <p style="text-align: center;">the Estate of JESSIE GORDON SAGE, Deceased.</p>	}	<p>On Appeal.</p>	30
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This cause coming on regularly to be heard on the appeal of the Young Women's Christian Association, Hudson County Branch, from the decree of the Hudson County Orphan's Court denying probate to the paper writing purporting to be the Last Will and Testament of Jessie Gor-

Final Decree of Prerogative Court.

don Sage, deceased, and the matter having been duly argued before the Prerogative Court in the presence of Richard Boardman, Esquire, of counsel with appellant, and Harry Lane, Esquire, of counsel with John Sage, respondent; and the Court having heard the argument of counsel and considered same and being of the opinion that

10 the said paper writing was not executed in accordance with the statute in such case made and provided and therefore cannot be admitted to probate as the Last Will and Testament of the above named decedent;

It is thereupon on this sixteenth day of December, A. D. 1918, ordered, adjudged and decreed, that the judgment and decree of the Hudson County Orphans' Court denying probate to the

20 paper writing purporting to be the Last Will and Testament of Jessie Gordon Sage, deceased, be affirmed, and that the record be remitted to the Hudson County Orphans' Court to be proceeded with in accordance with this decree and the practice of said Court.

And it is further ordered that Conduct, Conduct & Boardman, Proctors for Appellant, be allowed a counsel fee of One hundred and fifty (\$150.) dollars, and their costs to be paid out of the funds

30 of the Estate, and that the question of allowance of counsel fees to the Proctors for the respondent, be reserved.

Respectfully advised,

EUGENE STEVENSON,
V. C.

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MAR. T. 1919

New Jersey Court of Errors and Appeals.

<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;">of</p> <p style="text-align: center;">The Paper Writing Purporting to be the Last Will and Testament of JESSIE GORDON SAGE, <i>Deceased.</i></p>	}	<p>On Appeal from Prerogative Court.</p>	<p>10</p>
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BRIEF FOR APPELLANT.

OPINIONS BELOW—

<p>Judge MARK SULLIVAN, Hudson Orphans' Court. Vice Chancellor STEVENSON, Prerogative Court.</p>	<p>20</p>
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I.

The will of Jessie Gordon Sage, who died in Jersey City in January, 1917, was propounded for probate by the Young Women's Christian Association, Hudson City Branch, on June 30, 1917. The matter was brought on for hearing before the Orphans' Court. Probate was denied October 25, 1917. Judge Sullivan's opinion appears at p. 28 of the Case.

This appeal challenges the correctness of the second and underscored portion of the following statement taken from Judge Sullivan's opinion (at p. 31 of the Case):

“The vital defect under the proof is that it appears that said signature was not made in the presence of the witnesses, *nor was said signature acknowledged by Mrs. Sage in the presence of the witnesses.*”

We contended in the Orphans Court and again in the Prerogative Court, and we now submit to this Court, that Mrs. Sage did acknowledge in the presence of two witnesses, the *making* of the signature, which appears on the will.

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The case went to the Prerogative Court on appeal and the decree of the Hudson Orphans' Court was affirmed on December 16, 1918 (Case, p. 47). From the opinion of Vice-Chancellor Stevenson (which begins on p. 37) it would appear that he based his decision upon the following proposition (which appears at the bottom of p. 42):

20

“A mere declaration by the intended testator that he has signed an instrument which he publishes as his will, is not an acknowledgment of the signature unless the witnesses see or are able to see the signature.”

This appeal challenges the correctness of this proposition as adding to the requirements of the statute the further requirement that the witnesses must see or be able to see the signature of the testator.

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An appeal was taken to this court by notice and petition of appeal, served on December 26, 1918 (Case, pp. 1 and 2).

II.**Specifications of Error.**

We allege error on the following points: The Prerogative Court found

(1) That the paper writing was not executed in accordance with the statute in such case made and provided and therefore cannot be admitted to probate as the last will and testament of Mrs. Sage; **10**

(2) That it was decreed that the judgment of the Hudson County Orphans' Court denying probate should be affirmed;

(3) That it was not decreed that the paper writing was in fact executed in accordance with the statute;

(4) That it was not adjudged that the judgment and decree of the Hudson County Orphans' Court denying probate should be reversed. **20**

These specifications of error appear more at length on p. 3 of the State of the Case.

III.**The New Jersey Statute.**

"That all wills * * * shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses present at the same time, who shall subscribe their names thereto, as witnesses, in the presence of the testator" (4. C. S., p. 5867). **30**

A.

Summary of Argument.

The decision of this case involves, according to our view, merely the ordinary means of familiar words. The question is, did Mrs. Sage acknowledge the making of the signature to her will in the presence of the two witnesses? What she
 10 did was this: She brought a paper to the store, which was kept by the two witnesses, and told them it was her will and asked them to sign it under the word "witnesses".

According to one witness, she said: "Youse two are here anyway and this is my will and you both must sign it" (p. 20). "She told us it was her will we were signing" (p. 21). Both witnesses signed in her presence and in the presence
 20 of each other.

Judge Sullivan's view seems to have been that because these words of the testatrix were so complete a fulfillment of the requirement of the statute that the will shall be published by the testatrix, that they cannot serve as an acknowledgment of the making of the signature as well.

Vice-Chancellor Stevenson's difficulty, as we have already pointed out, seems to have been that the witnesses did not actually see, nor were they able to see, the signature on the will. This,
 30 it seems to us, adds an additional function to the part played by witnesses at the execution of a will. The statute says that two witnesses shall *be present at the same time and shall subscribe their names thereto as witnesses in the presence of each other and of the testator.* The two witnesses in this case were present at the time when the testatrix published her will, and said, that which she did say, in regard to her will,
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and they subscribed their names to the will as witnesses in the presence of each other and of the testatrix. They did not see the signature of the testatrix. Both judges thought this fatal.

If I say to a blind man, "This is my check", it seems to me that I say to him "This is my signed check", not merely that this is a piece of paper belonging to me which I have torn out of my check book. And if my name is in fact written upon the check in my own handwriting, it seems to me that I acknowledge that I wrote it. I take a deed into another lawyer's office and present it to him with the signature covered, I say, "This is my deed". Theoretically, it might be my deed if only my seal were there, but as language is ordinarily used and understood, it seems to me that I say to him, "This is my deed which I have signed", and that I, thereby, acknowledge the signature on the deed to be of my own making.

A paper lies on my desk and I say to those present, "That is my contract". It seems to me that they have a right to assume, as language is ordinarily understood, that I have signed the paper in question, and that I acknowledge that the signature upon it is my signature.

If the words "This is my will, you both can sign it" does not mean in ordinary parlance, "This is my will and the signature upon it is my signature", then, it seems to me, there is nothing in our position; but if the words, "This is my will, you both must sign it", does mean in ordinary parlance "The signature upon this paper is my signature", I think that our appeal is well taken regardless of any cases from other jurisdictions. As a matter of fact, we have examined the cases from other states and find practically nothing to conflict with the position here taken. The very

case from Massachusetts, *Nunn v. Ehlert*, (*Munn v. Elbrett*), 218 Mass., 471, was cited by us to the Vice-Ordinary as supporting one point of our contention. We will refer to the cases below, but we do not think it is a matter of precedent. It is a case of first impression in this State, and it turns on what this very woman meant by what she said and did.

Vice-Chancellor Stevenson said (p. 45):

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“No New Jersey decision dealing with the subject under consideration has been cited by counsel or has in any way come to my knowledge.”

We think that what Mrs. Sage said, and did, came clearly within the rule laid down by this Court in the case of *Ludlow v. Ludlow*, 36 N. J. Eq., 567.

Scudder, J. (p. 601):

20

“It is not necessary that the testator should, by his own words, acknowledge the signature, and declare the writing to be his last will; this in some cases may be impossible through sickness or bodily infirmity.
* * * But he must, by some word or sign, clearly indicate his recognition of the testamentary act in which he is engaged, and of the genuineness of the signature and will which are presented to the witnesses for their attestation.”

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When Mrs. Sage told the De Witts that this paper was her will and asked them to sign it as witnesses, it seems to us that she clearly indicated to them her recognition of the genuineness of the signature and will.

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B.**Elaboration of Argument.****Facts.**

Jessie Gordon Sage, the testatrix, was a sister of James A. Gordon, a lawyer of Jersey City (p. 15). She was educated at the public school and at the State Seminary (p. 17). She was about 62 years old at the time of her death in 1917. She left a personal estate of about \$15,000 (pp. 17 and 24), but no real estate (p. 24). She managed her own affairs, except in the case of one mortgage and some little stock which her brother kept (p. 17). 10

The will to which probate was denied, is entirely in the handwriting of the testatrix, except for the signature of the witnesses (p. 16).

Judge Sullivan found as a fact in the case that when Mrs. Sage wrote her name upon the will she intended such writing to be her signature, and that this was done before she presented it to the witnesses to sign the same. 20

We quote his words as follows (p. 30):

“There is a strong inference, and indeed this court will take it for a fact, that the name ‘Jessie Gordon Sage’ as it appears in the two places shown above, was written after the rest of the will had been completed. 30

“When the document was drawn it undoubtedly read as follows:

“Will of

“In the Name of God, Amen:

“I,

“Being of sound mind, memory and understanding.

“And these blanks were filled up at some subsequent time. This conclusion is the more forceful when another paper writing which was put in evidence is considered. 40

"This other paper appears to have been the original draft of the alleged will offered here for probate, and the beginning of it is identical with the paper offered for probate except for the fact that there are no dates thereon and there are blanks where the name 'Jessie Gordon Sage' appears in the paper offered for probate.

10 "It is argued that from these circumstances it must be apparent that when Mrs. Sage wrote her name in said blank spaces she intended such writing to be her signature to the document, and did not think that anything further would be necessary except to publish the will in the presence of witnesses and have them attest the same.

20 "And the court feels, in view of the other testimony adduced at the hearing as to Mrs. Sage's secretiveness and her personality, that probably this is true, and the court believes that it should go still further and say that while there is no direct proof or evidence as to when Mrs. Sage wrote her name in these blank spaces, yet if she intended it for her signature, to the document, which the court finds she did, the reasonable presumption is that she wrote in her name in these blank spaces before she called upon the witnesses to sign the same."

30 With her will actually signed, she took it to the grocery store at the corner of Summit Avenue and Zabriskie Street, Jersey City, about three doors from her home, where she had traded for about four years (p. 23). This store was also a branch post office. She came to the store where she found Charles De Witt and his sister-in-law, Mrs. L. C. De Witt. She asked them if they would sign her will, and they signed as witnesses (p. 21). Charles De Witt signed first (p. 22). He testified "She said this is her will and wished me to sign it" (p. 19), and again "She says, 'Youse two are here any way and this is my will, and you must both sign it'" (p. 20). Mrs. L. C. De Witt testified "She came with the paper folded

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and asked us if we would sign her will and she had it folded up except just where she wanted us to sign as witnesses" (p. 21). They both signed under the word "witnesses," and above their common address "Summit and Zabriskie Street" (p. 20).

The will was found by the caveator in a little tin box in a wash stand "in the ground—on the floor you know, back," in her bedroom. In this box also were two savings bank books (p. 24).

The endorsement upon the will is also in the handwriting of the testatrix (p. 16). 10

The draft of the proposed will (Exhibit P—2), found at p. 2, was found in a traveling bag (p. 25). Judge Sullivan spoke of this paper as "the original draft of the alleged will". Perhaps he is right. But we had supposed, not that it was a draft of the will offered for probate, but the draft of a proposed new will. Although the matter is of little, if any, importance, we think that a careful comparison of the two papers (pp. 10-12) supports the latter theory. 20

In reference to Exhibit P—2, attention should be called to one fact. It reads "Will of

In the name of God, Amen:

I, J , being of sound mind etc."

As if she had started to write her name after the word "I" and had stopped herself lest by writing her name she should sign her will. Can any one doubt what would have been Mrs. Sage's answer if one had asked her if this paper P—2 was her will. Would she not have said, "No, can't you see I have not signed it?" On the other hand, in respect to the will Exhibit P—3, if she were asked if that were her will, she no doubt would have replied "Yes, can't you see that I have signed it?" So when she told the De Witts that this paper was her will, she told them, and 40

they so understood her, that it was a paper which she had signed as a will, and that the signature upon it was her signature, and that they should subscribe their names to the paper as witnesses to her will.

In the ordinary meaning of these words, she certainly acknowledged the facts that the signature upon the will was made by her.

10 I think that both of the judges below felt that this was so, but they thought that something more explicit and formal was necessary. Judge Sullivan said (p. 28) "Mr. De Witt and Mrs. De Witt testify that they attested said document at the request of Mrs. Sage * * *." The Vice Ordinary said (p. 42):—

20 "Even if Mrs. Sage had said: 'This is my signed will,' that would not present legal proof of her signature if the witnesses did not and could not see any signature."

The Vice Ordinary relied upon the opinion of Judge Loring in *Nunn v. Ehlert*, 218 Mass. 471; 106 N. E. 163 (mis-named in the opinion as *Munn v. Elbrett*). The Massachusetts Statute requires the witnesses to *attest* the signature. Under our statute, witnesses "*subscribe their names thereto as witnesses in the presence of the testator.*"

30 We shall quote somewhat at length from Judge Loring's opinion to make clear that it was the defect in *attestation* that controlled the case, not the failure to *acknowledge* the making of the signature. The Vice Ordinary, in his opinion, cites three other cases, two from New York, one from England. The same distinction runs through them all. Under these statutes the witnesses are required, not only to subscribe their names, but they must attest the signature of the testator as well.

40 In the earlier Massachusetts cases, it was held that it was a sufficient acknowledgment if the tes-

tator told the witnesses that the will was his will, or if he asked the witnesses to witness his will. When, however, it was pointed out to the court, in the *Nunn* case, that the witnesses must attest the signature, under the Massachusetts Statute, and not merely subscribe as witnesses, the court adopted the view to which the Vice Ordinary refers.

Nunn v. Ehlert, 218 Mass. 471.

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Loring J. (p. 472) :

"This case, therefore, presents the question whether a will is *duly attested* when the signature of the deceased is hidden from the witnesses when they attest and subscribe the will.

"Our statute of wills (in substance a reenactment of the statute of frauds, St. 29 Car. II, c. 3, §5,*) is in these words: 'Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal,' with some additions not necessary to be stated. R. L. c. 135, §1.

20

"In *Chase v. Kittredge*, 11 Allen, 49, 63, a statement was made of the meaning of the word 'attested' in what is now R. L. c. 135, §1 * * *. Chief Justice Robertson gave a similar definition of the word 'attest' in *Swift v. Wiley*, 1 B. Mon. 114, 117. He said: 'To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental the other mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication: but to subscribe a paper published as a will, is only to write on the

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same paper the names of the witnesses, for the sole purpose of identification.' See in this connection *Reed v. Watson*, 27 Ind. 443, 447; *Gerrish v. Nason*, 22 Maine, 438, 441; *Brooks v. Barrett*, 7 Pick. 94, 98."

10 Our New Jersey Statute uses somewhat unusual phraseology. The testator is not required to acknowledge his signature. The signature "shall be made by the testator or the making thereof acknowledged by him." He merely acknowledges the fact that he has made the signature on the paper.

Judge Loring, in this same Nunn case, (p. 476) says:

"Apart from authority it is manifest that a person does not acknowledge a signature to be his where no signature can be seen. All that he does in such a case is to acknowledge the fact that he has signed."

20 Is not that exactly what Mrs. Sage did in this case? And is not that exactly what our statute says the testator in this state must do.

In reference to the New York cases, the Vice Ordinary says: "The New York statute of wills construed in this case is to the matter now under consideration, the same as our own" (p. 45). This is clearly incorrect.

30 That there may be no misunderstanding on this point, we quote the section of the New York Statute. It is printed in *Birdseye, Cumming & Gilbert's Consolidated Laws of New York, Vol. 4, p. 952, Sec. 21*, as follows:

"Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

"1. It shall be subscribed by the testator at the end of the will.

40 "2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged

by him, to have been so made, to each of the *attesting* witnesses.

"3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.

"4 There shall be at least two *attesting* witnesses, each of whom shall sign his name as a witness, *at the end of the will*, at the request of the testator."

10

In the case of *Lewis v. Lewis*, 11 N. Y., 220, which the Vice-Ordinary cites as an authority upon the question here involved, the court not only used the language quoted, but it went on to hold that there was no publication of the will.

"It must be declared to be his last will and testament by some assertion or some clear assent in words or signs and the declaration must be unequivocal."

20

The Court in that case found that there was no such declaration.

No one in the present case contends that Mrs. Sage did not make known to the witnesses in most explicit language that the paper was of testamentary character, and declare the paper to be her last will and testament.

It does not seem sound logic to say that the *testatrix* did not acknowledge the making of the signature because the *witnesses* did not see it.

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It was upon the failure of the witnesses to perform their statutory function, that the cases of *Nunn v. Ehlert*, and *Matter of Mackey* turned (both cited by the Vice-Ordinary). In this latter case, Judge Earle held:

"Subscribing witnesses to a will are required by law (the New York Statute) for the purpose of *attesting and identifying the signature* of the testator, and that *they* cannot do, unless at the time of the *attestation*,

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they see it" (*Matter of Mackey*, 110 N. Y., 611, at 614.

It is to be noted that, under the New York Statute, both the testator and the witnesses are required to subscribe their names at the same place, *i. e.*, "at the end of the will".

10 Where the statute requires the witnesses to attest the signature, we can see a good deal of force in Judge Earle's logic, but under a statute by which the witnesses are merely called upon to subscribe their names as witnesses in the presence of the testator, and they do so, the fact that they do not see the signature, it seems to us, can have little bearing on the question of whether or not the testator acknowledged the making of it. In the present case, the witnesses did all that which the statute in terms required of them. They attended the publication: They signed the paper
20 in the presence of the testatrix and at her request; They come into court and testify to the identity of the instrument and the acknowledgment and publication by the testatrix.

If this case had arisen in New York, it is obvious that the will could not have been supported. It was not subscribed by the testatrix at the end of the will, and the witnesses have not properly qualified to attest the signature under the decisions cited by the Vice-Ordinary, but these
30 cases are both cases very sharply distinguishable, both on account of the differences in the statutes and because the facts of those cases are different from the facts of the case in point.

The English case, *Blake v. Blake*, cited by the Vice Ordinary, was decided under the English Statute of Wills, which requires attestation as well as subscription.

40 *Williams on Executors*, (Star, p. 63, 1 Randolph & Talcott, p. 95):

“Sect. 9. ‘No Will (or codicil, or other testamentary disposition shall be valid, unless it shall be in writing, and executed in manner hereafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall *attest* and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.’” 10

Not only was the statute different but the facts were quite different in the Blake case from those in this case. The testatrix did not tell the witnesses that the paper was her will.

“According to Ann Harradine (one of the witnesses), the testatrix said, ‘This is a little whim of mine’. According to Susan Harradine she said ‘We have all our little wishes, and this is one of mine.’” 20

The witnesses did not understand that it was a will they were witnessing. Ann testified that if the testatrix had said it was her will, she would have taken more notice.

Sir J. Hannen, President, said (L. R., 7 P. D., 102):

“Without entering into the question whether a mere statement to that effect (that the paper was her will) would be sufficient, at any rate, when there is an absence of acknowledgment that the instrument is the will of the testatrix, and an absence of acknowledgment of the handwriting, the statute is not complied with.” 30

That was the point upon which the case turned in the Probate Court, and that was the final point made in the case in the Court of Appeals.

In the case of *Beckett v. Howe*, Law Reports, 40
2 Probate and Divorce, 1 Lord Penzance said:

10 “The doctrine in *Gwillim v. Gwillim*, (3 Sw. & Tr., 200) is this, that if the testator produces a paper and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature was on the will at the time. * * * In that case, Sir C. Cresswell said: ‘If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it by asking them to witness his will, the proof of the execution would fail, but that certainly is not necessary. * * * I am, therefore, at liberty to judge from the circumstances of this case whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not know that he must sign it before they did, and either sign it or acknowledge it in their presence.’”

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These cases were distinguished in the *Blake* case. But so, too, in later cases, the *Blake* case itself has been explained and modified. We believe that when the whole line of English cases is considered together, it will appear, notwithstanding some expressions used in the *Blake* case, that the question is one of fact to be determined by the circumstances of each particular case.

30 While we are upon the subject of the English cases, the following case may have some bearing upon one phase of this case. Before the Prerogative Court, we suggested that Mrs. Sage first wrote the body of her will, leaving blank spaces at its commencement which she later filled in with her name, intending thereby to sign her will.

40 This suggestion seemed to us simple and devoid of difficulty. But the Vice-Ordinary took a different view of the matter. The English

Probate Court carried a similar line of reasoning further than we pressed ours.

In *The Goods of Huckvale*, Law Reports, 1 Prob. & Div., 375, Sir J. P. Wilde said:

“The signature, it is true, is in the attestation clause, but it is plain that it was not written at the same time as the attestation clause, but subsequently. The difference in the colour of the ink in which it is written, and its position, being squeezed with difficulty into the blank space left for it, make this evident. It is also proved that she asked the attesting witnesses to witness her will. The probability is therefore very strong that her signature was on the paper when the witnesses signed it. I have no hesitation in pronouncing that the will was duly executed.”

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The distinction between attesting witnesses and subscribing witnesses, pointed out in a case, which the Vice-Ordinary chose to disregard, seems to us both sound and to be conducive of good common-sense results in cases such as the one under discussion. For can any good purpose be served in the prevention of fraud or otherwise in holding that a testator must do more than this testatrix did in the present case? Every precaution of the statute was complied with, both literally and in spirit. The views, both of Judge Sullivan and of Vice-Chancellor Stevenson involve, it seems to us, an enlargement by construction, of the formalities required by the statute surrounding the execution of a will without affording any increased protection against fraud or mistake.

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In *re Dougherty's Estate*, 168 Mich., 281, Ann. Case, 1913, B. 1300, 1302:

“Statutes which relate to the duty of subscribing wills couple usually the words ‘attest’ and ‘subscribe’; and these words should be distinguished. ‘To attest the publication

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of a paper as a last will,' observed Robertson, C. J., of Kentucky, in 1840, 'and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends.' Attestation is the act of the senses; subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses for the sole purpose of identification."

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How closely that case resembles this, the following excerpt will show. While there was an attestation clause, the witnesses did not see or read it. In that case the will was admitted to probate.

20 (p. 1304):

"In aid of the presumption that the will was signed when presented to the witnesses, are the following facts: It was signed when found. It was found in the drawer of testator's desk, in an envelope bearing directions in the handwriting of testator. The entire will is in his handwriting. * * * His own declaration that he had made his will. He had drawn it himself. He wanted the witnesses to witness it. He was in his right mind. He produced it from his own custody. He would not be presumed to perform an idle act. He was unattended and competent and rational. He was at the time giving his business matters attention. The paper was folded. The space he pointed out where he asked the witnesses to sign was small. The manner of folding the paper was such that one sheet covered the other, except the space where the witnesses signed, so that no signature of testator was seen upon the paper. The witnesses could not swear that the signature was

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not upon the paper. There was no fraud claimed in the transaction.

“Will the facts that the witnesses did not see the testator sign his name, and did not see his name on the paper, and that he did not expressly say to them that he had signed it, as a matter of law, overcome the presumption that it was signed when presented to the witnesses, under the circumstances? We think not.”

As we have already said, the Mass. cases which turned upon the acknowledgment by the testator as distinguished from the attestation by the witnesses, were generally in favor of the position here maintained. 10

Nickerson v. Buck, 12 Cush, 332, at 342:

“If the witness be requested by the testator to sign his name to an instrument as an attesting witness, and the testator declares to the witness that the signature to the will is his, that is abundantly sufficient. But the adjudicated cases go further, and hold that the actual signature by the testator may be made known to the witness in other modes than an express declaration to the witness that the will is his. Any act or declaration that carries by implication an averment of such fact is equally effectual. Hence it has been repeatedly held that a declaration by the testator to the witness, that the instrument is his will, or even a request by him to the witness to attest his will, or other varied form of expression implying that the same had been signed by the testator, are either of them quite sufficient.” 20

Dewey v. Dewey, 1 Metcalf, 349 at 354 (1840).
Dewey, J.:— 30

“Certainly the presumption, arising from all the facts that appear in the case, is very strong that the will was subscribed by the testator before it was attested by the witnesses. The signature of the testator is admitted to be a genuine signature * * * 40

The purpose of procuring the attestation of the witnesses was to give effect to the instrument as a valid will. It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz. the signature by himself.

10 "It seems to us, upon the whole evidence, that the will was duly signed by the testator, and being thus signed, he by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of it to authorize the three witnesses to attest and subscribe the same as witnesses thereto, in accordance with the provisions of the statute."

Ela v. Edwards, 16 Gray, 91, and *Hogan v. Grosvenor*, 10 Metcalf, 54, contain more to the same effect.

20 The cases of *Gould v. Chicago Theological Seminary*, 59 Northeastern, 536; 189 Illinois, 282, is more or less in point. In that case, while there was an attestation clause, the paper was so folded that the witnesses could not see what they were signing. In that case, as in this, the witnesses did not see either the testator sign, nor did they see the testator's signature on the paper. In that case, the testator said "Will you please witness this?" or "Will you please witness this paper" to one witness, and to the other—"Sign your name there Manchee".

30 The Illinois Statute provides "All wills * * * shall be reduced to writing and signed by the testator or testatrix or by some person in his or her presence and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom declaring on oath or affirmation before the County Court of the proper County, that they were present and saw the testator or testatrix sign said

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will, testament or codicil in their presence, or acknowledged the same to be his or her act and deed."

The case is a very carefully considered one. The authorities from England and Massachusetts and elsewhere are referred to and reviewed. In summing up the testimony, the Court held:

"The will and attestation clause are in the handwriting of the testator. The testator knew the requisite formalities necessary to the proper execution of the will. The signature to the will is the genuine signature of Leonard Gould. The testator procured the authentication of the document by the necessary witnesses. The attesting witnesses both signed their names to the paper in the presence of the testator and at his request, and understood they were attesting a paper which they believed to have been signed by him. The will had written thereon, in the handwriting of the testator, an attestation clause reciting all facts necessary to a proper execution of the will. The testator knew that he was making a testamentary disposition of his property, as his will was holographic. He supposed that he had made a testamentary disposition of his property, as he stated after the execution of the instrument that he had made a will, and the will was found among his private papers after his death. These facts, and the presumptions arising therefrom, show nothing here lacking which the law deems essential to a full and complete acknowledgment of the will. We are of the opinion that the evidence was sufficient to authorize the circuit court to admit the will to probate."

In *Hobart v. Hobart*, 39 Northeastern, 581, at 584, the Court said:

"An instrument not in writing, and not signed, is not a will. When the testator called the paper his will, it will be presumed, in the absence of any evidence to the contrary, that he had signed it, inasmuch as a

signature was necessary to justify him calling it a will. Included in the declaration of the testator to the witnesses that the paper was his will, was the further declaration that he had signed it. Where the testator declares to the witnesses that the instrument is his will, or requests them to attest his will, such declaration or request implies that the same has been signed by him."

In *Harp v. Parr*, 48 Northeastern, 113 at 117,
 10 it was said:—

"Where a testator requests the witness to attest his will, this is sufficient to authorize the inference that he had executed the paper as a will and is equivalent to an acknowledgment that he had signed the paper as a will."

We repeat, that we think the present case turns upon the question whether or not Mrs. Sage acknowledged the signature upon the will to be her signature, when she told the witnesses that the
 20 paper was her will and asked them to sign it as witnesses. It seems to us, that neither the cases cited by the Vice Chancellor nor the cases cited by us are on all fours with the present case. But when we view the facts in the light of our statute, note its differences from the New York and Massachusetts statutes, note carefully the points upon which those cases, cited by the Vice Ordinary actually turned, we find nothing in them or in any
 30 of the other cases which the Vice Ordinary did not cite, contrary to the position which we take here. On the other hand, we feel that every requirement of the New Jersey statute was complied with by Mrs. Sage. We feel that she did all that was required of her to do, and we feel that the witnesses did all that was required of them to do. To hold differently, would extend by construction the requirement of the Statute and accomplish no beneficial result.

40 This testatrix wrote her will with her own hand

showing thereby that she fully understood what she was doing, then finding two witnesses together and commenting on the fact that they were together, said to them distinctly, "This is my will, you must both sign it," pointing to the place where they must sign under the word witnesses, and above their admitted joint address, and they signed as requested. Can there be any advantage in holding that such conduct on her part is not a compliance with the provision of the statute? In fact, is it not more consonant with the policy of our law to hold, as can be done without doing any violence to reason or to the statute, that there was a complete compliance with the statute. 10

The only thing Mrs. Sage did not do was something that the express words of the statute did not require her to do. She did not exhibit her signature to the witnesses. Shall her actual testamentary intent be defeated because she did not do something that the statute did not say she must do, but which the courts below thought she ought to have done? Will this court of last resort extend the statute by construction to defeat this woman's will? We think it will not. 20

In the Runkle case, 86 N. J. Eq., 226, this court said:—

"There is no mistaking the actual intent of the testator. In that situation the courts will lay hold of slight circumstances carrying into legal effect the will of the testator." 30

The will should be admitted to probate.

Respectfully submitted,

CONDICT, CONDICT & BOARDMAN,
Proctors for and of Counsel with Appellant.

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MAY 1, 1919

New Jersey Court of Errors and Appeals.

In the Matter of The Estate of JESSIE GORDON SAGE, deceased.	}	On Appeal from Preroga- tive Court.
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BRIEF FOR RESPONDENT.

Statement.

This appeal is taken from the decree of the Prerogative Court affirming the decree of the Hudson County Orphans' Court, denying probate to a paper writing purporting to be the last will and testament of the deceased.

Probate of the paper writing was denied because it was not executed in compliance with the provisions of the statute.

I will refer to the paper writing in this brief as the "will."

ARGUMENT.

Facts.

The respondent, John Sage, is the husband of the deceased. The will was filed with the Surrogate of Hudson County on May 11th, 1917, by the respondent, who at the same time filed a caveat with the Surrogate. The petition of the Young Women's Christian Association, the appellant, for the probate of the will was filed in the office of the Surrogate, on June 30th, 1917. The appel-

lant was a legatee under the will, to the extent of five hundred dollars. Citations were issued to all persons interested and the matter was tried before the Hudson County Orphans' Court.

The testimony taken before the Court was very brief.

The will is not signed by the deceased. The will is written in the handwriting of the deceased. There is no attestation clause.

*the original will
is produced before
the Vice Chancellor* Copy of the will (Exhibit P3) is printed in the record on page 11. There is an error in the printing. The legacy to Mrs. A. C. Hart is "\$500" not "\$5,000."

The names of two persons are signed to the will as witnesses. They were both produced on the stand, and their testimony taken.

They both agreed as to what happened at the time they signed their names on the will. Their testimony is very brief and is printed on pages 19-23 of the record. They are Charles DeWitt and Elsie DeWitt. Mrs. DeWitt is the wife of Charles DeWitt's brother. They kept a grocery store, in which was the branch post office, at which the deceased was accustomed to deal.

Charles DeWitt, a witness on the part of proponent, on direct examination (p. 20, lines 11-34), testified as follows:

"Q. Can you now tell us just what happened that morning when you signed that paper?

A. That I was in that post office and I was attending to my duties there, and Mrs. Sage came into the store and she bought a few articles of groceries, and she came to my brother's wife and she says, 'Youse two are here anyway, and this is my will, and you must both sign it,' and she had it wrapped up, and we could only see the part where our signatures are, and we signed it.

"Q. How do you mean it was wrapped up?

A. Folded up, doubled a couple of times.

"Q. Could you see the word witnesses on it? A. No, sir.

"Q. Tell us and show us where and how it was signed; how it was folded at the time (witness folds paper). A. She had it doubled up like that and like that.

"The Court: He indicates everything covered except the words 'after all expenses are paid,' 'Witnesses: Charles DeWitt, L. C. DeWitt, Summit and Zabriskie St.'"

Mrs. Rose DeWitt, a witness on the part of proponent, on direct examination (p. 21, lines 22-40) testified as follows:

"Q. Will you tell us the circumstances under which this paper was executed? A. Well, she used to come in the store to deal with us, and she came with the paper folded and asked us if we would sign her will, and she had it folded up except just where she wanted us to sign as witnesses.

"Q. And you signed it as witnesses? A. Yes.

"Q. What did you think you were doing? A. She told us it was her will we were signing.

"Q. Will you show us as near as you can how the paper you call the will looked and how you saw it when she handed it to you and when you signed it? (Witness folds it up.)

"The Court: Witness indicates that it was folded in the same manner as the last witness, except she leaves out the words 'after all expenses are paid.'"

On cross examination, she testified as follows (p. 23, lines 23-41):

"Q. What did she say? A. She came in and asked me whether we would sign her will, which she had folded up, and we saw nothing at all except where we could sign it.

"Q. And then what? A. We said yes we would.

"Q. And then what? A. Then we signed it, and she seemed to be happy and put it back in her bag.

"Q. After you had signed it? A. Yes.

"Q. Did she say anything else at all to you about it? A. No, sir.

"Q. Or to Mr. DeWitt in your hearing about the paper? A. No, sir.

"Q. Have you stated everything that she said about the paper which you heard at that time? A. Yes.

"Q. You can't recollect anything else about that? A. No, sir."

As appears on pages 20-21 of the record, they both folded it in the same manner with the exception that Mr. DeWitt folded it so that a part of the last line was visible. According to Mrs. DeWitt they could see nothing except the word "witnesses" and where they signed their names. According to Mr. DeWitt they could see in addition, the following words of the last line" after all expenses are paid" (pp. 20-21).

Both witnesses were positive that they saw no other portion of the will; that the deceased did not sign anything in their presence, and that she did not show them her name written in any part of the will; that she did not show them any signature and indicate to them that that was her signature to the will; that she did not show them the contents of the paper, or read it over to them, or permit them to read it, or convey its contents to them. That she did not even say that she had signed the will.

The testimony of Mr. Gordon (pp. 15-18) was to the effect that the will was in the handwriting of the deceased. That she was a very secretive woman, was shown by his testimony and also the testimony of the respondent (pp. 24-26). Mr. Gordon is a lawyer and transacted business for the de-

ceased, and his office was about a mile and a half from the home of the deceased (p. 18). She did not have him draw the will and he did not know of the existence of any will.

In addition to the fact that there was no contradiction of the testimony of the two witnesses, and that there is no question but that the occurrence, at the time they signed their names to the will, occurred just as they testified, the testimony of Mr. Gordon and the respondent is corroborative in that it shows that this was just what the deceased was likely to do (pp. 15-18, 26-27).

There is no proof that at the time the witnesses signed the will, the name of the deceased was written in any place in the will.

Counsel for appellant conceded that the name of the deceased was written in the blanks in the will at some subsequent time to the writing of the body of the will, and, in fact, bases his argument on this fact.

Judge Sullivan in the Orphans' Court held that "these blanks were filled up at some subsequent time" (Opinion, p. 30). Judge Sullivan further says that "while there is no direct proof or evidence as to when Mrs. Sage wrote her name on these blank spaces, yet if she intended it for her signature to the document, which the Court finds she did, the reasonable presumption is that she wrote in her name in these blank spaces before she called upon the witnesses to sign the same" (pp. 30-31)

If this presumption can prevail, then the provision of the statute for the signature or the acknowledgment of the making of the signature before witnesses, is entirely done away with.

The endorsement on the back of the will is in the handwriting of deceased (p. 18). Can it be

presumed that this endorsement was written before the witnesses signed?

I think that Vice Ordinary Stevenson takes the better view. On page 41, he says:

“Conceding that Mrs. Sage regarded the writing of her name with her own pen in these spaces or one of them, as her signature to the will, the significant fact remains that this so-called holographic will remained unsigned by Mrs. Sage for a long time, and there is absolutely no evidence when it was signed. We may surmise or think it probable that Mrs. Sage, presuming that she could sign her will by filling in the blanks, would not have left those blanks unfilled when she declared that the document was her will and caused the witnesses to subsequently sign their names, but there is no evidence that Mrs. Sage did not procure the attestation of the witnesses first, and subsequently at her own convenience, insert her name in the space which she had left for that purpose. The case would bear a different aspect if the paper signed by the witnesses, showed on its face that it had been written *currento calamo* by Mrs. Sage. In such case, there would be no evidence that the body of the instrument had been written first and the signature or signatures inserted subsequently. I see no ground for the affirmative conviction that Mrs. Sage’s signature or signatures had been inserted in the will before she brought it to the witnesses, which is not merely surmise—a presumption of a fact which the law required to be proved. Even if Mrs. Sage had said: ‘This is my signed will’ that would not present legal proof of her signature if the witnesses did not and could not see any signature.”

The decisions of both Courts were rendered on the assumption that even though it be assumed that the name of the deceased was written in the will at the time it was signed by the witnesses, but

that the will could not be admitted to probate because the provision of the statute required the signing or the acknowledging of the making of the signature in the presence of two witnesses, etc.

Vice Ordinary Stevenson concurred with the Judge of the Orphans' Court "in his opinion, that the instrument propounded as Mrs. Sage's will was neither signed by her in the presence of the witnesses, nor was the making of the signature acknowledged by her in the presence of the witnesses" (p. 38).

On page 39 the Vice Ordinary says:

"The important circumstances pertaining to the attempted execution of this alleged will, is that Mrs. Sage brought the paper to the witnesses, so folded that they did not and in fact could not, see her alleged signature. The witnesses subscribed their names and Mrs. Sage placed the paper in her bag and took it away with her without the witnesses being able at any time, to see her signature."

Further down he says:

"That there is no sufficient acknowledgment unless the witnesses either see or are able to see the signature.' 30 Am. & Eng. Ency. of Law, page 589. The great weight of authority sustains the proposition that where the testator purposely prevents the witnesses from seeing his signature, even the positive declaration by the testator, that he has in fact, signed the instrument, will be of no avail; much less, can the acknowledgment in such case be inferred from the testator's declaration that the instrument is his will" (pp. 39-40).

Further, on page 40:

"Where, as in this case, the instrument is so folded that the witnesses cannot see the signature, the most solemn declaration by the

testator that in fact the will bears his signature is merely a statement on his part, and all that the witnesses can attest to is that statement. They are not witnesses to whom the testator has acknowledged a certain specific signature as his own signature. They can merely attest that the testatrix informed them that the will was signed by him. As a matter of fact in such case the will may have been left unsigned by mistake or it may have been purposely left unsigned so that the testator at any time in the future, in fraud of the statute, could affix his signature or elect to die intestate."

There is no question but that neither of the witnesses saw any signature or could see any, and that the deceased did not acknowledge or indicate any signature. There is no proof that the name of the deceased was written in any blank on the paper when the witnesses signed it.

The statute expressly provides that the will "shall be signed by the testator which signature shall be made by the testator or the making thereof acknowledged by him." *Not only is there no evidence that this provision of the statute was not complied with, but there is direct evidence that it was not complied with.*

The will therefore cannot be admitted to probate.

LAW.

The will cannot be admitted to probate because it was not executed in accordance with the provisions of the statute.

The argument of counsel for appellant proceeds on the theory that none of the cases from other States referred to by the Vice Ordinary in his opinion, apply because of the fact that the stat-

utes of those States, use the words "attest" or "attesting witnesses." He draws the distinction between these statutes and our statute in that the words "attest" or "attesting witnesses" does not appear.

His argument carried to its logical and only conclusion would result in the doing away of most of the solemnities and safe-guards required by our statute and all that would be necessary would be for the paper to be signed and the names of the witnesses subscribed *for identification*. This can not be the law and would result in the upsetting of the long line of cases in this State, holding that each provision of the statute must be strictly complied with.

Counsel, on page 11 of his brief, quotes the decision of Loring, J., in *Nun v. Ehlert*, 218 Mass., 471, as setting forth the distinction between attest and subscribe and as holding that "to attest a will is to know that it was published as such, and to certify the facts required," etc. That "to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification."

Under our statute, the only use which the word "subscribe" has, is that even though any number of witnesses could certify or attest that the foregoing provision of the statute had been complied with, the will could not be admitted to probate unless it had been "subscribed" by the witnesses as provided by the statute. The provision that the witnesses "shall subscribe their names" etc. is only another requirement necessary for the proper execution of a will. If we strike out the provision of the statute providing for the subscribing of their names by the witnesses, nevertheless a will could not be admitted to probate unless two witnesses could certify or attest that

all of the other provisions of the statute had been complied with.

If the statute had read simply "that all wills * * * shall be in writing and shall be signed by the testator which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses present at the same time," and stop there, the will in this case could not be admitted to probate.

The decisions referred to by the Vice Ordinary would be just as much in point. It could not possibly be contended that it was not necessary for the will to be signed, or the making of the signature acknowledged by the testator, *and* such writing declared to be his last will and testament, in the presence of two witnesses.

The Century Dictionary defines an "attesting witness" to be a person who signs his name to an instrument to prove it, and for the purpose of identifying the maker or makers.

The Standard Dictionary defines "attestation" to be the subscribing by a person of his name to a written instrument to certify that the same was executed in his presence, or that it is correct.

However, this question was aptly dealt with by this Court in the case of *Lacey v. Dobbs*, 63 N. J. Eq., 325, where the Court dealt with the decisions of foreign Courts on the question of attestation and subscription being separate acts.

On page 331 this Court says in considering a Kentucky case: "a distinction was drawn between attest and subscribe. The Judge said that subscription was required 'for the sole purpose of identification.' This was a misconception for attestation of a will involves subscription, and there is a better argument in favor of the decision which I will later suggest."

The Court on page 341 holds that the true interpretation of our statute is that the witnesses are to attest by their subscription, the testator's signature or acknowledgement of signature, and that an instant of precedence on their part will render that impossible.

It was held in that case, that it is essential to validity that everything required to be done by the testator, shall precede in point of time, the subscription of the witnesses.

On page 326, the Court quotes the present statute passed in 1851. On page 332, the Court quotes the statute providing for the manner of executing wills, passed in 1850, and says—"a year later, the statute first above quoted, and still standing, was substituted. The main purpose of the change was to more clearly express the requirement that the *signature* of a testator must be made or acknowledged by him in the presence of the witnesses, and to declare in terms that the provisions of the Act should extend to personal as well as real estate."

On page 333, the Court comments on the English statutes, as follows:

"Ours is the more stringent, if there be any difference in the forms of expression."

Further down the Court says:

"It should not be lost sight of that since 1714 our law had required wills devising lands to be *signed* as well as published in the presence of 'subscribing witnesses.' In that respect the new statute was an enlargement, in its permitting a signature previously made to be acknowledged by the testator."

The Court also says at page 333:

"it was suggested by the learned Ordinary in the court below in this case that there may

be a difference in the effect of the two Amendatory statutes in that the English one does, while ours does not, require the witnesses to *attest* as well as *subscribe* the will. *It being expressly provided in the English Act that no form of attestation shall be necessary, it is evident that what is meant is that the witnesses shall subscribe 'as witnesses' which is a concise direction of our act, accordant with the usual definition of the lexicographer, of the words 'attest' and 'subscribe' the writing.*" (Italics mine.)

The facts in the case of *Lacey v. Dobbs* were much stronger in favor of the proper execution of the will than in the case at bar. In that case, the will was proved to have been signed by the deceased after the subscription of the testamentary witnesses, *although on the same occasion and while they were still present*. This Court reversed the decision of the New Jersey Prerogative Court, affirming the decree of the Orphans' Court affirming the decree of the Surrogate admitting the will to probate.

Counsel for the appellant, on page 12 of his brief, quoted from Judge Loring's decision, in the case of *Nun v. Ehlert*, *supra*, as follows

"Apart from authority it is manifest that a person does not acknowledge a will to be his where no signature can be seen. All that he does in such a case is to acknowledge the fact that he has signed."

Under the decision of this Court in *Lacey v. Dobbs*, *supra*, the mere acknowledgment that he had signed is not sufficient because the witnesses could not certify that he had actually signed without seeing the signature.

But in this case the proof is positive that Mrs. Sage did not acknowledge that she had signed or say that she had signed.

Vice Ordinary Stevenson in his opinion, referring to the Nun case, on page 47 says:

“I agree with the Massachusetts Court in disregarding the Michigan case in *In re Doherty* estate, in which it appears an ‘opposite conclusion’ was reached.”

Counsel for appellant, on page 18 of his brief, lays great stress on this case and quotes from the opinion to show how closely that case resembles the case at bar.

The case is found in 168 Mich., 281, 38 L. R. A. (N. S. 161).

The quotation found on page 18 of appellant’s brief starts in the middle of a paragraph. Immediately preceding the portion quoted there appears in the opinion of the Court:

“We think that the fact that this was a holographic will is of some importance. The presumption that it was signed when written is, we think, greater than would have been the case had the will been prepared by another person, as a mere general paper. The jury saw the paper. It is claimed by proponent that it bears intrinsic evidence of *having been written and signed with the same pen and ink and at the same time*. These were matters for the jury” (italics mine)

and then follows the quotation which appears on page 18 of appellant’s brief. The phrase which is left out of the quotation as indicated, is as follows: “Including the attestation clause,” so that the sentence reads: “The entire will is in his handwriting, including the attestation clause.”

So while it might be contended that this decision is directly in conflict with the decision in the case of *Nun v. Ehlert*, nevertheless it is found that the Court gave weight to the fact that the entire paper, including the attestation clause and the

signature, was all written in the same handwriting with the same pen and ink, and at the same time.

The facts in the case at bar are absolutely dissimilar to the facts in that case.

There is no question in this case but that the name of the deceased was not written with the same pen and ink and at the same time that the body of the will was.

The Vice Ordinary in his opinion, on page 45, refers to the case of *Lewis v. Lewis*, 11 N. Y., 220, as being on all fours with the case at bar and very aptly quotes the following from the opinion of the New York Court of Appeals:

“If the party does not subscribe in their presence [the presence of the witnesses], then the signature must be shown to them and identified and recognized by the party and in some apt and proper manner acknowledged by him as his signature.”

The New York Court of Appeals construed the New York statute which the Vice Ordinary held and I contend is as to the matter in question in the case at bar, the same as our own, and denied probate to the will. Of course under our statute the will need only be *signed*, not *subscribed*.

In recognizing the necessity of strictly complying with the statute, the Court in the *Lewis* case says:

“The statute prescribes the signature or the acknowledgment thereof, in the presence of the witnesses, and a publication of the instrument as a will as two distinct acts, and both are necessary to its full execution; and being explicit and clear in terms, courts are not authorized to vary it by construction or to make the one act stand for both. Upon this branch of the statute, it is the subscription, not the will, which is to be acknowledged.”

In that case, the deceased requested two persons to "sign a paper for him," which they did in his presence, but the paper was so folded that they did not see any writing whatever on it.

The Court in that case in reference to the policy of the courts say:

"It is not probable that any wrong will be done in this case to the parties, or to the intention of the deceased to give effect to this document as a will, and although we may regret that the provisions which he designed to make for his family and doubtless supposed he had made, must fail for the want of the 'prescribed formalities,' the statute is quite too explicit to authorize a departure from its terms; and although it may operate with apparent harshness in this case, it is a beneficent and wise statute and the public interests will be best subserved by a strict adherence to its provisions."

The same conclusion was arrived at by the New York Court of Appeals *In re Mackay*, 110 N. Y., 611 (referred to by the Vice Ordinary in his opinion on page 46), where he says:

"In this case, Judge Earle delivered the unanimous opinion of the New York Court of Appeals, directly holding that where the testator so folded the instrument that the witnesses could not and did not see his signature, or any part thereof, the will was not properly executed however distinctly it was published. The Court held (p. 614) that: 'There would undoubtedly have been a formal execution of the will in compliance with the statute if the witnesses had at the time seen the signature of the testator to the will.' This decision is directly in point."

In approving and following the case of Mitchell

v. Mitchell, the N. Y. Court of Appeals in the Mackay case said:

“In the case of *Mitchell v. Mitchell*, 16 Hun, 97, affirmed by the Court of Appeals of New York, 77 N. Y., 596, the deceased came into a store where two persons were and produced a paper and said: ‘I have a paper which I want you to sign.’ One of the persons took the paper and saw what it was and the signature of the deceased. The testator then said: ‘This is my will, I want you to witness it.’ Both of the persons thereupon signed the paper as witnesses under the attestation clause. The deceased took the paper and said: ‘I declare this to be my last will and testament’ and delivered it to one of the witnesses for safe-keeping. At the time when this took place the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed for the reason that one of the witnesses did not see the testator’s signature and as to that witness there was not a sufficient acknowledgment of the signature or a proper attestation.”

Counsel for appellant on page 19 of his brief refers to the case of *Dewey v. Dewey*, 1 Metcalf, Mass., 349, and quotes from page 354.

That case was considered in the elaborate opinion of Loring, J., in the case of *Nun v. Ehlert*, 218 Mass., 471, L. R. A. (U. S.), 1915, B., 87; 106 N. E., 163 at page 166. He clearly distinguished it from the case before him and the case at bar. The reference is lengthy and I will not quote in full from it. However, he says that in the *Dewey* case, there was some question as to the sufficiency of the attestation on the part of one of the witnesses. *That the only question raised in that case was as to whether the will was duly attested.* That there was no suggestion that

the signature of the deceased was hidden from the two witnesses. He then says,

“the case at bar, therefore, is not concluded by the decision made in *Dewey v. Dewey*. Not only is that true, but there is nothing in the opinion which is decisive of this case. When Mr. Justus Dewey says that the deceased ‘by his acts, if not by his declarations sufficiently recognized and acknowledged his own execution of the will, he may be taken to have meant that the deceased by his acts, if not by his declarations sufficiently recognized and acknowledged the previous signature made by him,”

and further down he says,

“Whether such a declaration would be sufficient if the signature were hidden from the witnesses was not before the court in *Dewey v. Dewey*; and what was said there cannot be taken to have been said with reference to such a case.”

The Court then goes on to show that the Court in *Dewey v. Dewey* could have found from the evidence before it, that two witnesses saw the signature of the deceased but did not recollect that fact when they testified. Also on the fact that one of the witnesses did not testify that he did not see the signature of the deceased but that what he did testify to was that he “did not recollect seeing a word of the writing on the paper” *and that the distinction is plain.*

A careful reading of the comments of Loring, J., on the case of *Dewey v. Dewey*, on page 166, clearly shows that the decision in the *Dewey* case was not only not accepted by the Supreme Judicial Court of Massachusetts in 1914, *but can have little if any weight in the determination of the case at bar.*

Counsel for appellant on page 21 of his brief quotes from the case *Hobart v. Hobart*, 39 N. E., 581 (Ill.).

This case was considered by this Court in the case of *Lacey v. Dobbs*, *supra*. This Court, on page 336, holds that the Illinois statute is unique and that plainly it is the will, not the signature or its acknowledgment that is to be attested.

The same reasoning applies to the case of *Gould v. Chicago Theological Seminary*, 59 N. E., 536 (Ill.) referred to on page 20 of appellant's brief, and *Harp v. Parr*, 48 N. E., 113 (Ill.), referred to on page 22 of appellant's brief.

New Jersey Cases.

I feel that it is not necessary to go outside of the decisions of our own courts for authority that the will was not executed in accordance with the provisions of the statute and therefore cannot be admitted to probate.

The New Jersey statute (4 C. S., p. 5867) is quoted on page 3 of appellant's brief.

There are four distinct things required to be done in the execution of a will. In the *Matter of Gertrude Rice McElvaine*, 18 N. J. Eq., 499, Chancellor Zabriskie, on page 501 says:

"Four things are required: First, that the will shall be in writing; secondly, that it shall be signed by the testator; thirdly, that such signature shall be made by the testator, or the making thereof acknowledged by him in the presence of two witnesses; fourthly, that it shall be declared to be his last will in the presence of these witnesses. Each and every one of these requisites must exist. They are not in the alternative."

And a fifth is that it must be subscribed by the witnesses.

The cases in this State are all unanimous in holding that the provisions of the statute respecting the execution of wills must be strictly complied with.

I have referred at length in this brief, to the case of *Lacey v. Dobbs*, 63 N. J. Eq., 325.

In that case, this Court held:

“That it is essential to validity that everything required to be done by the testator shall precede in point of time, the subscription of the witnesses.”

This Court denied probate to the will because the signature of the deceased was proved to have been made after the subscription of the testamentary witnesses, although on the same occasion and while they were still present.

In the case of *In re Phelan's estate*, referred to by the Vice Ordinary, on page 39, the opinion of the Prerogative Court, Walker, Ordinary, is found in 82 Eq., 316. That case was taken to the Court of Errors and Appeals and was affirmed on the opinion below. See 91 Atl., 1070. In the Court of Errors and Appeals, Chief Justice Gummere and Justices Swayze and Parker and Judges Bogert and Vredenburgh, dissented.

In that case the Court held that:

“A last will need not be expressed in any particular formula. It must be signed, but the signature may be at the beginning, middle or end or on the side. If the testator writes his name in, on or under the testament, with the intention thereby to make that name his signature, even if expressed in the third person, *and the witnesses see him write it*, and it is duly executed in other respects, the testament is valid.” (Italics mine.)

That case was a much stronger case than is the case at bar.

The deceased in the presence of the witnesses told the witnesses that the paper was his last will and requested them to sign it as witnesses. He also read it over to them. He then, in their presence, wrote in his own handwriting an attestation clause as follows: "Signed, sealed, published and declared by the said Cornelius or Corneil Phelan to be his last will and testament in the presence of as witnesses." Even though the testator read the will over to the witnesses, the Court did not hold that the signature of the testator at the commencement of the will was properly acknowledged by the reading of the will to the witnesses.

The case turned upon the fact that the name of the testator in the attestation clause was written by him in the presence of the witnesses, the Court saying:

"Rejecting, as I do, the assertions that either name in the instrument in question was acknowledged by the testator to be his signature, I nevertheless find, as the facts show that the name of the testator in the attestation clause was written by him in the presence of the witnesses. As already remarked, the deceased was an intelligent man, and intended the paper writing which was offered for probate to be his last will and testament. He commenced the writing of the attestation clause immediately under the testimonium clause without leaving the usual place for signing, thereby, to my mind, believing that the writing of his name in the presence of the witnesses in the clause mentioned would constitute the signing required by law. I ought to say that only two words of the testimonium clause appear on the last line of that clause, and that the attestation clause was commenced immediately below them, and while there was sufficient room for the testator to have written his name after the last word of the date in the testimonium clause, had he done so, it

would have filled the line up solid, making a very awkward appearing execution of the paper. He must have intended his name as written in the attestation clause to be his signature for the purpose of giving efficacy to his will."

The syllabus in the Phelan case is as follows:

"Under the statute declaring that the testament must be signed, but not expressly requiring it to be subscribed, the name of the testator by himself written in, or on any part of the testament, in the presence of witnesses, even if expressed in the third person, with intention to thereby make that name his signature, satisfies the statute."

The Prerogative Court *in re* Berdan's Will, 65 Eq., 681, refused probate to a will even though there was a proper attestation clause in the will.

In that case a paper writing was produced and offered as a will; it was written and signed by the testator. It had a complete attestation clause appended, also in the handwriting of the testator, and beneath that clause the signature of two competent witnesses. The signatures were acknowledged by the witnesses as their signatures.

The evidence showed that the testator asked one witness to witness his will. That the witness did not see the contents of the will or the signature of the testator. Testator asked the other witness, not in the presence of the first-named witness, to witness his will. The will was folded so that the two witnesses could not see the contents of the will or the signature of the testator.

In that case, the Court, Magie, Ordinary, denied probate of the will, saying:

"Unless I can find in the proved facts in the cause, or in this evidence itself, ground for rejecting it as incredible, I must give it

effect. I can find no ground for rejecting it. The only fact which raised any doubt in my mind is the singular resemblance in the signature of this witness and of Bogert, which gives the impression that they were written with the same pen and the same ink. But this circumstance will not in my judgment justify me in finding that Blauvelt does not recollect what he professes to recollect respecting his part in the transaction. As I deem his evidence credible, I am compelled to conclude that this instrument was not executed in the manner required by law, because it was not signed, or the signature acknowledged by testator in the presence of two witnesses present at the same time. Any presumption arising from the attestation clause has been overcome by Blauvelt's testimony that he did not see the attestation clause, or knowingly certify to the facts therein stated, and that the facts in the respects above stated are not true."

That case was much stronger than the case at bar, as there was a perfect attestation clause. The syllabus is as follows:

"A paper writing, produced and offered for probate as a will, is shown to have been written and signed by the testator. It has a complete attestation clause appended, also, in the handwriting of testator, and beneath that clause are the admitted signatures of two competent witnesses. *Held*, that a presumption of due execution is thereby raised, which will require the admission of the paper to probate, unless overcome by strong and convincing evidence.

"Both of the subscribing witnesses, when called, while admitting the genuineness of their signatures, testified that the paper was not signed by testator, nor the signature thereto acknowledged by him, in their presence, and that their signatures were not made at the same time or in the presence of each

other. Although the evidence of one witness was open to serious question affecting his recollection of the transaction, the evidence of the other witness being found credible, and to establish that he did not see the attestation clause or know its contents, and that the statements therein certified were not in fact true. *Held*, that the presumption arising from the attestation clause was overcome, and that the probate should be denied."

The case of Berdan's Will was followed in *Gunn, et al. v. Eliza Early*, 71 Eq., 719.

In the Matter of *Eliza v. Manners*, 72 Eq., 854, the Prerogative Court denied probate to a will having a perfect attestation clause.

The opinion is by Magie, Ordinary, and Berdan's case is cited.

The facts in that case show that there were four persons in the room; the testatrix, the scrivener, and the two witnesses. The scrivener said that the testatrix had made her will and wanted them to sign it. The witnesses both declared that she made no sign of assent and both agreed that she did not sign the paper in their presence.

The Court held, on page 856:

"As the paper writing was not signed in the presence of witnesses, it is, by our statute, invalid, unless the testatrix acknowledged the making thereof," *i. e.*, the making of the will in their presence. "On this subject the evidence shows that the scrivener said, apparently, with reference to the paperwriting which was in the room, on the table, 'This is her name.' Testatrix remained silent and no act or sign was made by her to that statement.

"But if she had signified her assent to the statement of the scrivener, in my judgment, the act, which the statute required, would not be made out. An acknowledgment that the signature was her name is not an acknowledg-

ment that it was made by her, and I think nothing less than an acknowledgment satisfies the statutory requirements."

There Is No Attestation Clause to the Will.

In all of the New Jersey cases that I have referred to above, there were perfect attestation clauses.

As was said by Chancellor McGill in the case of *Hildreth v. Marshall*, 51 N. J. Eq., 241, a perfect attestation clause is a most important element of proof.

Yet in several of the foregoing cases, our Courts have denied probate to wills where there were perfect attestation clauses and much stronger proof as to due execution than in the case at bar.

In the case at bar the proof is positive and uncontradicted that the will was not signed or the making of the signature acknowledged by the deceased, in the presence of two witnesses, and that therefore, one of the requirements of the statute was not complied with.

Intention.

Counsel for appellant concludes his brief with a citation from the Runkel case, apparently in support of his argument that this Court will do away with one of the provisions of the statute in order to affect what he contends to be the intention of the deceased.

This point is fully covered by the cases heretofore referred to in this brief and particularly in the quotation from the opinion of the N. Y. Court of Appeals in the Lewis case.

However, this Court in the Runkel case, was construing the designation of an executor in a will, about the probate of which there was no question. That this is so, is shown by the fact that

immediately following the portion of the opinion quoted by counsel, there appears the following sentence:

“This thought runs through the entire literature applicable to the construction of wills.”

Conclusion.

The decision of Judge Sullivan announcing his reasons for denying probate to the will, is very brief and convincing. He strikes at the meat of the situation and holds that:

“The vital defect under the proof is that it appears that said signature was not made in the presence of the witnesses, nor was said signature acknowledged by Mrs. Sage in the presence of the witnesses” (p. 31):

Judge Sullivan comments on the argument of counsel for the proponent submitted before him and which is contained in his brief in this court, and aptly refers to it as follows:

“But such reasoning is making a matter of substance out of a shadow and the Court is not willing to come to any such conclusion” (p. 32).

Vice Ordinary Stevenson held that the will can not be admitted to probate as it was not signed or the making of the signature acknowledged by the deceased in the presence of two witnesses; that in fact the will was folded so as to conceal any signature of the deceased from the witnesses, and that there was no sufficient declaration by words or conduct that the deceased had signed the paper, or that her signature was affixed to it in any way. Further that the evidence showed that the name of the deceased had been written in the will after the body of the will had been written by the deceased, and that there was no evi-

dence to show that her name had been so written in the will before or at the time the witnesses signed their names to it.

It ^{is} respectfully submitted that the will was not executed in accordance with the provisions of the statute, and, therefore, that it cannot be admitted to probate. That the decree of the Prerogative Court affirming the decree of the Orphans' Court denying probate to the paper writing, should be affirmed with costs.

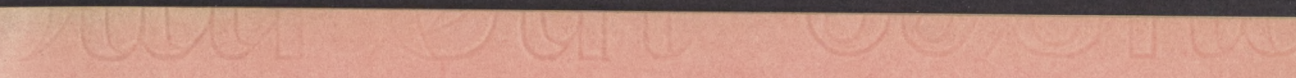
Respectfully submitted,

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March Term, 1919.



Southern Bond

John R. Smith