

A Critical Appraisal of the Requirements of Due Execution of a Will

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Introduction

The purpose of this work is to examine the different modes of execution, what constitutes execution, the attesting of a Will by witnesses, the presumption of due execution, the consequences of bad execution and finally the responsibility of a lawyer towards his client as far as the due execution of the client's Will is concerned.

The Requirements of Law on Execution

Wherever you are in Nigeria the various Laws insist on the same requirements for the valid execution of a Will. Where a state has not enacted its own Wills Law, the English Laws of general application applicable in England by 1st January 1900 will apply. These laws are mainly the Wills Act 1837 and the Wills Amendment Act 1852.

In Lagos, Oyo, Ogun, Ondo and other Southern States that have enacted their own Wills Laws the applicable law is the Wills Law of the particular State.

States Without Local Wills Law

In these States, Section 9 of the Wills Act stipulates in effect that the Will must be in writing signed at the foot or end thereof by the testator or by some other person in his presence and by his direction or the signature acknowledged by him in the presence of two or more witnesses present at the same time who shall attest and subscribe the Will in the presence of the testator but no form of attestation is necessary. The phrase at the foot or end thereof was strictly construed by the court. So if all the legal requirements were complied with but the signature was not made at the foot or end, the Will became invalid for bad execution. The British parliament had to enact the Wills Amendment Act of 1852 to correct the rigidity of the law in this respect. Henceforth the signature can be placed

anywhere on the Will, so that it is apparent on the face of the Will that the testator had intended to give effect by the signature to the writing signed as his Will. However the Amendment Act does not give validity to Wills improperly executed. For instance, it does not validate a Will signed by the testator after the witnesses had signed; neither does it give validity to disposition which follow the signature or inserted after the signature had been made.

In *Byles v. Cox*¹ the testator's signature appeared after the signature of one of the witnesses. Prior to 1852, the Will would have been bad because of the position of the testator's signature. Counsel for the propounders argued that the 1852 Act had cured such defect. The court pronounced in favour of the Will and it was admitted into probate.

States with Local Wills Laws

These states incorporated the provisions of the English Acts — the Wills Act 1837 and the Wills Amendment Act 1852 in their own provisions. The Wills Law clearly takes care of all the requirements of due execution including the positioning of the signature.

For example the Wills Edict 1990 of Oyo State states as follows:

6(1) No Will shall be valid unless:

- (a) it is in writing;
 - (b) it is signed by the testator or signed in his name by some other person in his presence and his direction in such place on the Will so that it is apparent on the face of the Will that the testator had intended to give effect by the signature to the writing signed as his Will;
 - (c) the testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time;
 - (d) the witnesses attest and subscribe the Will in the presence of the testator but no form of attestation or publication shall be necessary.
- (2) No signature under this section ... shall be operative to give effect to any disposition or direction which is underneath or follows it nor shall it give effect to any disposition or direction inserted after the signature shall be made.

All over the country the following formalities of execution of a Will are common.

- (a) The Will to be signed must be in writing. The law does not specifically prescribe any form of writing. Accordingly the Will can be handwritten or typed.

For durability it should be written or typed on strong paper or parchment and where handwritten the testator should use ink that will not easily fade away.

(b) It must be signed. The Will must be signed by the testator or by another person in his presence and by his direction. Where it was signed by another person such other person may either sign the testator's name or his own. Signature for this purpose may be a cross, an initial, rubber-stamp of a name or signature. A thumb-print has been accepted. In the *Estate of Randle (Deceased)*² a thumb-mark was accepted as good mode of executing a Will. Where an illiterate executes a Will, a special attestation clause should be inserted therein to show that the contents of the Will had first been read over to the illiterate testator who appeared perfectly to understand and approve of same.

A blind person is not precluded from making a Will. However, because of his disability it must be stated in the attestation clause that the contents of the Will had been read over to him and he appeared perfectly to understand and approve of same.³

In the cases of a blind testator or an illiterate one, the law demands that the testator must have knowledge and approval of the contents of the Will. The court will require knowledge and approval in these cases before probate is granted.⁴ Rules of court insist on knowledge and approval as prerequisite of the grant of probate.⁵

(c) The signature may be acknowledged. The law allows the testator to acknowledge his signature. As an alternative to signing his signature, the testator can acknowledge his signature and provided some other conditions are satisfied this mode is as good a form of executing as signing.

(d) The position of the signature. It is now legally accepted that the signature may be placed in such a place in the Will so that it becomes apparent on the face of the Will that the testator had intended to give effect by the signature to the writing signed as his Will. As has been shown, in States where the English Wills Act 1837 applies, the anomaly and problem created by the phrase "at the foot or end thereof" has been cured by the Wills Amendment Act 1852. In any event, effect will not be given to disposition or directives coming after the signature.

(e) Signed by the testator or someone else in his presence at his direction or acknowledge by the testator in the presence of at least two witnesses present at the same time.

Three different types of execution are covered by this requirement which must be religiously complied with.

- (i) where the testator signs the Will himself.
- (ii) where the testator acknowledges his signature.
- (iii) where the Will was signed by someone else in the presence of the testator and at his direction.

In each of these cases there must be at least two witnesses present at the same time to witness what is being done.

The question is what in the eye of the law amounts to "in the presence of two or more witnesses present at the time"? In *Groffman v. Groffman*⁶ the deceased having at some previous time signed his Will, asked two friends to witness it. There being no convenient space in the room in which they were, one of the witnesses took the deceased into an adjacent room, where the deceased took the Will from his pocket unfolded it and asked the witness to sign giving his occupation and address. The witness noticed the deceased's signature on the Will and signed his name. He then returned to the room and asked the other witness to go and sign which he did in the presence of the deceased, the first witness not going with him.

On the question whether the deceased acknowledged his signature in the presence of both witnesses in accordance with s.9 of the Wills Act 1837, it was held that there was no acknowledgement by the deceased in the presence of two or more witnesses present at the same time.

"In the presence of witnesses" must be construed to mean actual visual presence. In *Brown v. Skirrow*⁷ the testator signed her Will in a shop and one of the witnesses who saw her sign, attested it, but the other witness, (being at the time when the testator and the first witness signed) was engaged at the other side of the shop with a customer who stood between him the testator and the first witness. He therefore did not see them sign and did not know nor have the opportunity of knowing what they had been engaged upon until after they had signed and he was asked to be a witness. Held the testator did not sign "in the presence" of the second witness.

Where testator acknowledges his signature, the witness must actually see the signature for the acknowledgement to be valid. *Hudson v. Parker*⁸ two persons subscribed a paper in the presence of the testator and each other, testator having previously in their joint presence acknowledged the said paper to be his Will. The witnesses did not see testator sign his name on the paper nor did they at any time of subscribing their names to it see the signature, the writing upon the paper being purposely concealed from them. Upon the death of the testator, his signature was found at the end of the paper. Held the witnesses did not see the signature which the testator purportedly acknowledged to them therefore the acknowledgement was bad in law. Sir H. Jenner Fust comments thus:

"What is the plain meaning of acknowledging a signature in the presence of witnesses? What do the words import, but this "Here is my name written, I acknowledge that name so written to have been written by me; bear witness" how is it possible that the witnesses should swear that any signature was acknowledged unless they saw?"⁹

His lordship graphically described attestation thus: "To attest" is to bear witness to a fact."¹⁰ Similarly, in *In the Goods of Killick*¹¹ a Codicil was signed by deceased who was ill in bed in one room and attested by two witnesses in an opposite room but who did not see the deceased make or acknowledge her signature or have any conversation with her respecting it. Held bad execution on the ground that deceased did not make or acknowledge her signature in the presence of the witnesses.

It does appear, however, that it might be sufficient if the witness saw the testator writing. In *Smith v. Smith*¹² the attesting witnesses to a Will saw testatrix writing something on the Will before they signed but they did not see what she wrote and they did not know that it was a Will. When they subscribed their names they did not see that the attestation clause contained the testatrix's signature or any of the writing on the Will as testator concealed it from them by holding a piece of blotting paper over it. There was a full attestation clause in testator's handwriting:

Held as the witnesses had seen testator write what the court presumed to be her signature although they did not see the signature and she did not acknowledge it to them the attestation was sufficient.

It is bad execution should the testator sign after his witnesses might have attested. In *Nelson v. Akofiranm*¹³ the testator was alleged to have signed the Will with his mark after the witnesses had signed their names. Bellamy J. refused to countenance the Will for not complying with the formalities of the Wills Act. He says:

"It is clear to my mind that before a document can be admitted to probate it has to be a testamentary document complying with the requirements of the Wills Acts 1837 and 1852. In my judgement the document ... is not entitled to probate because the testator signed it with his mark after the witnesses had signed their names contrary to the provisions of section 9 of the Wills Act."¹⁴

Similarly, in *Apataira v. Apatira*¹⁵ it was found as a fact that the Will was not signed by the two witnesses at the proper time. Accordingly, it was held that the Will was not executed according to law.

In the English case *In the Goods of G. L. Olding*¹⁶ on the 18th September 1841, the testator read aloud his Will (which had been previously written by his wife) before two attesting witnesses. Thereafter he requested them to attest the same. They thereupon subscribe their names to the Will in the presence of the testator after which he signed his name at the foot or end thereof in their presence.

Held he had not executed his Will in accordance with the law having signed his name after the attestation of the witnesses and it is immaterial that he signed in their presence.

The Witnesses must attest in the presence of the Testator

It is mandatory that both witnesses must attest in the presence of the testator. Where for any reason both or either of the witnesses could not or did not attest in the presence of the testator, the Will fails for ineffective execution/attestation. In *George v. George*¹⁷ one of the witnesses stated on oath that she did not attest the Will in the presence of the testator, the Supreme Court refused to grant Probate thereof.

Whilst it is compulsory that witnesses must attest in the presence of the testator, there is no mandatory legal requirement that the witnesses must attest in the presence of each other. Let us assume, for example, that a testator T signed his Will in the presence of two witnesses, W1 and W2. Just as W1 was attesting in the presence of T, W2 was suddenly called in emergency to see to his young son. He left the scene thirty minutes later he came back and attested in the presence of T although W1 was not around. This situation is perfectly valid in law. The requirement of the law is that both witnesses must attest in the presence of the testator. They are not legally required to attest jointly in the presence of the testator, although in practice it is desirable to do so jointly. Any Will drafted by a lawyer will almost show that attestation was jointly done in the presence of the testator and in the presence of each other.

Who can witness a Will?

Any adult who can see and testify to the fact of execution either by the testator himself or by some other person in his presence and direction or by the acknowledgement of his signature can be a witness. Most people will qualify under this umbrella definition. However, it does seem that a blind person cannot witness a Will.

In *In the Estate of Gibson*¹⁸ a second Codicil was signed in 1943 by the deceased in the presence of Fred James, then Managing Clerk of a firm of Solicitors, and his wife.

Mr. James was totally blind but had known the deceased personally since 1932 and he knew him quite well by his voice.

The question was raised whether the second Codicil had been duly executed in view of the total blindness of one of the witnesses.

Pearce J. said that the normal meaning of attesting is testifying or bearing witness to something, and the normal meaning of witness is one who is a spectator of an incident or one who is present at an incident. He asks:

"Is mere presence without the faculty of sight enough to constitute a witness for the purpose of S.9 of the 1837 Act? Is an act which the witness cannot see done in his presence?"

His Lordship concluded and held that when one of the witnesses is blind the Will has not been signed "in his presence" and he is not able to attest it."¹⁹

Witnessing a Will is not just mere formality. It is one of the strictest requirements of the law. A witness must be able to come out boldly without fear or favour to say I saw the testator perform the act of execution. He must be an independent person who has no interest one way or the other in the Will and any dispositions or directives made therein. To give efficacy to this independence, the law stipulates that neither a beneficiary nor his spouse can take under any Will witnessed by him.²⁰ The benefit is null and void and of no effect, although the attestation is valid and the Will is not thereby rendered invalid. The benefit is lost even though there were two other witnesses thus rendering the witness beneficiary's signature superfluous. One of the leading authorities on this point is the case *Randfield v. Randfield*²¹ But it does appear however that in Lagos and Oyo States such beneficiary's attestation shall be disregarded if the Will could be duly executed without it.²²

The rule applying to the gifts given to attesting beneficiaries and their spouse has no application to the following cases:

- (i) Where no witnesses at all are necessary for the validity of the Will. For example the Will of a soldier in actual military service.²³
- (ii) Where the witness signs the Will not as a witness but merely to show that he agrees with the contents of the Will.
- (iii) A beneficiary who marries a witness after the date of the Will is not precluded from taking his/her gift. The case *Thorpe v. Bestwick*²⁴ is often cited in support.
- (iv) Where gifts are given to trustees as trustees and not as beneficiaries. This is because trustees do not personally benefit from their trusts.
- (v) Where the gift is made or confirmed by another Will or Codicil not attested by the beneficiary.

In *re Trotter, Trotter v. Trotter*²⁵ Charles Trotter by his Will of February 1878 appointed John Trotter, a solicitor, one of his executors and trustees and directed that the said trustee, John Trotter, notwithstanding his acceptance of the trusteeship, should be allowed all professional and other charges for his time and trouble which if employed as solicitor to his trustee, not being himself a trustee, he would be entitled to make. John Trotter was one of the attesting witnesses to the Will.

In May 1881, the testator made a Codicil to his Will referring to it and making an additional bequest to a niece in substitution for a bequest in the Will. The Codicil was not attested by John Trotter.

In November 1881, the testator made a second Codicil to his Will by which he made an alteration in the dispositions made in his Will and then went on to approve and confirm his Will and his first Codicil in every other detail and respect. This second Codicil was attested by John Trotter. It was admitted that, had the Will stood alone, John Trotter would not have been entitled to charge for profit costs as he was one of the attesting witnesses to the Will and the question was, whether the duly attested first Codicil re-established the gift in the Will and whether John Trotter had lost the benefit of this by reason of his having subsequently attested the second Codicil.

Byrne J. the trial judge postulated four legal propositions relating to the effect of subsequent Codicil or other testamentary document on a previous Will:

1. That a Will invalid in itself may operate as a valid instrument when referred to and incorporated in or with a subsequent and validly executed Codicil.
2. That a valid gift by Will to a legatee is not rendered invalid by reason of his subsequently attesting a Codicil although the Codicil has the effect of republishing or incorporating the Will.
3. That although a gift by a valid Will to an attesting witness is utterly null and void such a gift may be rendered effectual if the Will is republished by a Codicil referring to the Will but not attested by the legatee.
4. That the legatee must be able to point to an instrument not attested by him giving him his legacy before he can establish his right to his legacy.

Having laid these propositions of law his Lordship continues:

"Bearing in mind these principles the question appears to be whether or not John Trotter can point to an instrument not attested by himself and giving him the benefit he claims."²⁶

He held that the first Codicil was such instrument through which he could validly claim his benefit.

Presumption of Due Execution

The law presumes that that which is required to be done has indeed been done. This is otherwise known as the presumption of regularity. It is founded on the latin maxim — *Omnia Praesumuntur rita esse acta*.²⁷

The law uses this presumption to support a Will which it would otherwise have been inequitable to deny probate. Such a Will should however appear on the face of it to have *prima facie* complied with the statutory requirements of the law with regards to executing and witnessing. In the absence of anything to the contrary, for instance evidence that indeed and in fact a Will falling within this category was in fact not executed according to law, the court would invariably use the presumption to ensure that the wishes of the testator are carried out and effect given to the contents of the Will.

The reason for the application of the maxim is well spelt out in the dictum of Sir Francis Jeune, the President of the Court in the case *In the Goods of Peverett*²⁸ where he states:

"Two things may be laid down as general principles. The first is that the court is always extremely anxious to give effect to the wishes of testamentary wishes and secondly the court will not allow a matter of form to stand in the way if the elements of execution have been fulfilled."²⁹

The oft-quoted case of *Blake v. Knight*^{29(a)} illustrates aptly when the courts will use the maxim to give validity to a Will. Two witnesses were invited to Mr. Edmund Blake's house to see him sign his Will. The witnesses were introduced to him and the testator was described as the writer of an attorney. It was revealed in evidence that the witnesses found him sitting down in a chair near the fire place. When the wife told him the purpose of the witnesses' visit, he produced a paper from a desk, unfolded same and lay it open on a table before the witnesses so that each might see what the paper was. He expressly told them that the paper was his Will, that the handwriting thereon was his own, that it was a short Will all on one side of a sheet of paper. He told them he made a mistake in the body of the Will and pointed the mistake at the exact place on the Will to them and asked them to draw near to be able to see how he had rectified the mistake. He read the attestation clause to them. Indeed he did everything in the most open manner with regard to the Will and read the commencement to them thus "This is the last Will and Testamentary of me Edmund Blake."

The court observed that the paper appeared signed "Edmund Blake" with a seal thereto. The witnesses deposed that they were sure there never was a seal; they were not so sure whether he did not sign in their presence. Considering all the circumstances of the case the court pronounced in favour of the Will calling in aid it would seem the presumption *omnia rita esse acta*. Sir Herbert Jenner Fust explains as follows:

"The first point to consider is, is it absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the Will was actually signed in their presence, or actually acknowledged in their presence; is it absolutely necessary, under all circumstances, that the witnesses should concur in stating that these facts took place; or is it absolutely necessary where the witnesses will not swear positively that the court should pronounce against the validity of the Will?

I think these are not absolutely requisite to the validity of a Will; I think the court must take into consideration all the circumstances of the case, and judge from them collectively whether there was not at least an acknowledgement of a signature, clearly existing on the face of the Will at the time of attestation; I think under all the circumstances of this case, that the court can have no doubt that that is what has taken place here."^{29(b)}

Sir Herbert concludes that the fact that the matter came to court three years after the transactions took place made it more compelling for the court to look at the whole circumstances of the case rather than what unreliable memory occasioned by lapse of time might dictate. The court had no reservation whatsoever in finding in favour of the Will.

Let us now examine how the courts have used the presumption to give effect to certain Wills.

(i) *In David v. Mayhew*³⁰

The Will was made in 1890 by the testator who died in 1905. The executrix took no steps to prove the Will and died in 1924. Plaintiff found the document in 1925 in a desk which had been in the possession of the executrix up to the time of her death. Both the attesting witnesses were dead. All the signatures were proved to be those of the respective persons alleged to have executed and witnessed the Will.

Held by the court of Appeal (English) reversing the judgement of Hill J. that the maxim *omnia praesumuntur rite esse acta* applies and accordingly the court would without further evidence presume the document duly executed and that the testator knew and approved of the contents.

(ii) *Re Denning, Harnett v. Elliot*³¹

A holograph Will, the only testamentary document found after the testator's death consisted of a small single sheet of writing paper. On one side appeared the date and the words "I give all I possess to my cousins Mary Jane and John Harnett" followed by the signature of the testator. On the other side and upside down two names of people were written in different handwriting. There was no attestation clause and no indication why those two names were on the back of the document. The sole surviving cousin now sought to propound the Will. There was no evidence as to the identity of the two persons who signed at the back of the document.

Held applying the maxim, probate would be granted since the only practical reasons why the names of two persons were on the back of the document must be that they were for the purpose of attesting the Will.

(iii) *In the Estate of Randle (Deceased)*³²

Randle, a Bishop of the African Church made a Will dated 17th June 1955. He died on 11th January 1957. At the time of the making of the Will he was paralysed on the right hand and foot. He signed the Will by affixing his right thumb impression. His executors under the Will were his cousin, Mr. Nelson and Madam Alake, his wife of about 28 years by native law and custom.

The defendant was his daughter by an earlier marriage. She filed a caveat when the executors took steps to prove the Will. The present action was therefore commenced and seek to fault the Will on the ground *inter alia* that the Will was not duly executed in conformity with the Act.

The 84 years old testator summoned a Mr. Cole to his bedside and dictated to him his Will. Mr. Cole had the Will typed and arranged with the testator to bring it back to his bedside for execution.

The testator had arranged for the defendant, her daughter and other relatives to be present at the time appointed for executing the Will. At the testator's request, Mr. Cole read the Will aloud after which he translated it into the Yoruba language for the benefit of all present. Among those present were the defendant, a Mrs. Okuyiga, Mr. Reffel and Mr. Cole who prepared and read the Will. After signing, the Will was allegedly witnessed by three witnesses to wit the defendant, Mrs. Okuyiga, Mr. Reffel and Mr. Cole who prepared and read the Will. After signing, the Will was allegedly

witnessed by three witnesses to wit the defendant, Mrs. Okuyiga and Mr. Reffel and the testator asked Mr. Cole to destroy the draft and retained the typed executed copy. The Will contained an effective attestation clause.

Evidence was contradictory as to whether or not the testator signed before or after the witnesses had signed. The defendant denied her signature. Mr. Reffel, one of the witnesses was not available at the trial. The third witness, Mrs. Okuyiga testified that the testator signed the Will first, then asked the defendant to sign it, showing her where to sign; after this, he asked her (Mrs Okuyiga) and Mr. Reffel to sign showing each where to sign. But Mr. Cole who had signed the Will as writer, interpreter and witness to the testator's thumb impression testified that was after the three witnesses had attested that the deceased put his thumb impression on it.

The trial judge seemed to believe the evidence of Mr. Cole and held the Will invalid and thereby not entitled to Probate. The plaintiff/appellants appealed to the Supreme Court which reversed the trial judge's finding.

Ademola CJF observed:

"Having taken into consideration all the particular formalities observed by the testator, his conduct and the calling together of his witnesses, the reading of the Will and interpreting it to them, his act in pointing out where each witness should sign after signing himself at the bottom and end of the paper, the formal and correct attestation clause which was read out, and all other circumstances to which I have earlier referred, the presumption *omnia rita esse acta* is not rebutted and should apply."

The witnesses signed above the testator's thumb print. On the evidence available and because there was a proper attestation clause in the Will, the court held that the Will be admitted to probate on the presumption *omnia rita esse acta*.

In the first case there was nobody available to depose to the fact that the testator executed his Will according to law. The Will was found three decades after the demise of the testator and the two witnesses had therefore since died. Evidence was before the court that the three signatures on the Will were indeed those of the persons they purported to be. In the absence of evidence to the contrary the court relying on the presumption pronounced in favour of the Will. The other two cases presented peculiar but common problems.

The position of the testator's signature in each case was such as to raise doubt whether they signed before their witnesses. And yet in all the cases

effect was given to the Wills purely on the presumption that the Wills must have been executed and witnessed as prescribed by law.

When may the presumption be called in support

Following the reasons given by Sir Francis Jeune in the *Peeverett's case* and the illustration given on the application of the presumption in the three cases mentioned above, it would seem that the presumption can be called in aid where:

- (i) the Will appears signed by the testator and the name of at least two other persons are in place. But there is no evidence before the court to show that in fact and indeed execution was strictly done as prescribed by the law.
- (ii) there is attestation clause in a Will which appears to have being executed by the testator in the presence of at least two witnesses, although there is no evidence available to confirm that the Will was executed according to law.
- (iii) where there are no witnesses alive to confirm acts of execution.

Of course the force of the presumption in each case varies with the circumstances. So if the Will is entirely regular in form as in the *David v. Mayhew's case*, the presumption that it has been executed according to law is very strong. If however the Will is irregular and unusual, the maxim may not apply with the same force. Within these two perimeters each case must be looked at depending on its individual circumstances. It does seem that the presumption will apply if there is a proper attestation clause even though witnesses have no recollection of having witnessed a Will.³³ It will seem that where the Will was drawn up by a lawyer in which case a proper attestation clause would have been inserted, the presumption would be readily called in and relied upon. Whatever the case, it should be remembered that like every other legal presumption, this one can be rebutted. The question now is what sort of evidence can rebut the presumption of due execution.

1. *Evidence of attesting witnesses directly negatives due execution and rebuts the presumption of due execution.* In *Croft v. Croft*³⁴ the two attesting witnesses stated that the Will (which had an attestation clause) was not executed according to law. Their evidence was not rebutted either by direct or circumstantial evidence and the veracity of the witnesses was not impeached. It was held that the court cannot by reason of a formal attestation clause and on the presumption of the maxim pronounce for the Will in the face of the positive and uncontradicted evidence of the attesting witnesses. Similarly, in *Glover v. Smith*³⁵ the Will appeared on the face of it to have been duly

executed as prescribed by the Wills Act 1837 and the attestation clause was in full accordance with the law. Attesting witnesses gave parol evidence varying the terms of the attestation clause they had subscribed to. Held the presumption of law was rebutted by their evidence and the Will had not therefore been duly executed and should not be admitted to probate.

2. *Positive evidence of one of the witnesses may rebut.* In *Noding v. Allison*³⁶ the positive evidence of one of the attesting witnesses negated the fact of signing or acknowledging of the signature by the testator in the presence of the witnesses. Held that in the absence of circumstances raising any presumption of his being mistaken the court was compelled to pronounce against the execution of the Will.

This case should be contrasted with *In the Goods of Thomas*³⁷ Here, A made her Will in 1842. At her death, there appeared the names of three subscribed witnesses on her Will. There was no attestation clause. The only surviving witness, whose name stood first of the three suggested that the testatrix signed the Will in his presence only; that he suggested the necessity of two witnesses but could remember no more particular circumstances. Held the presumption of due execution was not rebutted by the affidavit of the surviving witness. Perhaps the justification for the decision lies in the fact that the surviving witness was not positive enough. He himself raised the question of two witnesses but he could not remember whether this advice was taken or not and what happened thereafter. Even if it was assumed that the testator signed the Will in the presence of the surviving witness alone, it was just possible that the testator could have acknowledged his signature to the two other witnesses jointly present.

It seems therefore that the doubt created by this witness was not in the eyes of the court sufficient to displace the presumption of due execution.

The presumption holds and is not rebutted where there is a proper attestation clause although the witnesses have no recollection of having witnessed the Will. In other words the Will is not rebutted merely because the witnesses are entirely ignorant of the details of execution. In *Wright v. Sanderson*³⁸ Testator, a good businessman (though not a lawyer) wrote in 1878 a holograph Codicil on the same paper as his Will made in 1861. He wrote an attestation clause at the end of the Codicil. He called a nurse and a nursery governess into the school room and asked them to "sign this paper." Evidence showed that he took his own pen into the room. Both witnesses signed. Both attesting witnesses were examined some five years later when the question of due execution was before the court.

The governess deposed that she had deliberately abstained from looking at any of the writing on the paper and the nurse had been very nervous. Neither of them could say anything as to what writing was on the paper nor as to whether the testator's signature was there when they signed. Both said they did not see him sign. The President of the Court pronounced for the validity of the Codicil.

On appeal it was held by Earl of Selbourne L. C. that the reasonable conclusion was that the Codicil was signed by the testator in the presence of the witnesses. Cotton C. J. held that on the evidence he should have come to the contrary conclusion but that the finding of the President who had seen and heard the witnesses ought not to be reversed.

Fry C. J. held that as the Codicil *ex facie* appeared to be properly executed and the presumption was strengthened by the conduct of the testator which showed an anxious and intelligent desire to do everything regularly that that presumption was not rebutted by the evidence of the witnesses who appeared to have been nervous and confused on the occasion of the attestation and whose recollection of what took place was evidently imperfect.

The rebutting evidence must be positive and reliable otherwise the presumption is called in operation to support the validity of the Will.³⁹ This must be so otherwise it would not be fair to rely on inconclusive evidence of witnesses many years after the execution had taken place. Where there is doubt in the evidence given the matter must be resolved in favour of the Will. A wise guiding principle was postulated by Sir Herbert Fust in *Brenchley v. Still*⁴⁰ where he states:

"Difficulties must arise in many cases where witnesses are deposing after a considerable period of time from the transaction in question. Where both attesting witnesses positively declare that they did not sign their names till after the testator had signed, the case is conclusive unless there be evidence to contradict them. Where the witnesses differ the court must judge which is the more likely to be correct in the account given. Where the witnesses depose with doubt and hesitation the court must look at all the circumstances and see on which side the preponderance of possibility rests..."⁴¹

In some of the cases described below the court held that the evidence of the witnesses was not sufficient to rebut the presumption of due execution because of their unreliability and the inherent weakness in their testimonies.

- (i) In *Bailey v. Frowan*⁴² in a suit concerning the validity of a Will the surrounding circumstances and the appearance of the Will were in favour of its having been duly attested. The adverse evidence of the two witnesses who denied having attested in the presence of the testator appeared to be of a doubtful character. The court acted on the presumption and found in favour of the Will.
- (ii) In *Neal v. Denston*⁴³ undue execution was alleged. Declaration made by the attestation witnesses that testator did not sign or acknowledge in their presence. To back this up they said it would have been a physical impossibility for testator and attesting witnesses to have been present together in the confined space in which the execution of the Will took place. Court found the evidence of the attesting wholly unsatisfactory and unreliable. Held the maxim applies and probate should issue.
- (iii) *Dayman v. Dayman*⁴⁴ Here probate sought to be revoked on the ground of undue execution. Both attesting witnesses swore that the Will was not signed by them in the presence of the testator. However, their evidence did not coincide upon other equally important matters. Held the presumption by law must prevail.

The three cases must be contrasted with *Pennant v. Kingscote*⁴⁵ In this case the two attesting witnesses were examined. One deposed that he had a strong impression that the papers was signed in his presence although signed after he and his co-witness had subscribed. The other had no doubt and indeed was certain that the testator did not sign at all in their presence. Held the evidence was sufficient to displace the presumption.

Burden to prove Due Execution

The burden of proving due execution whether by presumption or by positive evidence rests on the propounder of the Will.⁴⁶

Practice Points

- (i) The Calibre of Witnesses.

The validity or otherwise of a Will or other testamentary documents may depend on whether or not it was duly executed and attested. An uncontradicted positive evidence of one or the other of the witnesses or both that the Will was not executed and witnessed according to law may spell doom for the Will and Probate may not be given it.

It is therefore of the utmost practical importance to choose witnesses of high moral standards and standing who may not perjure themselves in consequence of gratification given by parties who stand to lose should the Will be admitted to Probate.

Lawyers should carefully screen potential witnesses more so if they are nominating them for the testator. Where the testator selects his own witnesses lawyers should advise about the importance the court attaches to witnessing according to law and that those selected must be of impeccable character who are not likely to turn around after the death of the testator to say untrue things about the act of execution.

The practice in some Chambers whereby junior lawyers are nominated as witnesses is commendable and this is recommended. By training and dispositions it can be safely presumed that lawyers will not yield to inducements which may dazzle a man of straw chosen to witness the Will of a wealthy man.

(ii) Since an affidavit of Attesting Witness has to be sworn by each witness deposing to the fact that the testator executed the Will either by signing or acknowledging or getting the Will signed by another person in his presence and on his behalf in the presence of himself and the other subscribed witness thereto both of them present at the same time, the lawyer should ensure that whatever mode of execution adopted was within the visual presence of the two witnesses. Accordingly, when attesting such witness can boldly assert "I saw him sign/acknowledge in our joint presence." The place where the act was performed must be such as to accommodate principal actors and the lawyers so that the need to move some parties to another location for the convenience of space will not arise. The problem that arose in *Groffman v. Groffman*; *Brown v. Skirrow*; *Hudson v. Parker* discussed above, should be avoided by the lawyer.

Even though an attestation clause is in the Will, to be doubly sure it will not be asking for much if both witnesses are made to affirm either at the bottom of the Will or in separate document to be put in safe custody as follows:

"We A B C of and X Y Z hereby affirm and certify that the testator signed/acknowledged his Will/Codicil within our physical presence both of us present at the same time and we in his presence thereafter sign our names as witnesses."

This could then be witnessed by the lawyer who drafted the Will. The advantage is that it would be difficult for either or both witnesses to come round later to say that the testator had not signed by the time they signed or that they did not see him sign or acknowledge his signature.

(iii) Ordinarily, a competent lawyer would ensure that no beneficiary or the spouse witnesses a Will. This is because in law the witnessing is valid but the beneficiary will not be able to take his gift. But in some cases this may not be avoided. For instance, where the testator is ill and in the process of being operated upon, the surgeon and the testator's valet are the only two people around to witness. But the valet is a beneficiary. The testator had acknowledged his loyalty and services by giving him a bequest. The lawyer has to quickly balance the factors involved and decide whether the overall good that would ensue if the valet witnesses the Will far outweigh the problem in the way of several gifts and the manner in which the testator had arranged his affairs? The lawyer should advise the testator on the legal points involved if he is conscious. The possibility of a subsequent Codicil to accommodate the valet's bequest should if the testator survives the operation be discussed so as to bring the matter within the principle laid down in the Trotter's case.

NOTES

1. (1896) 74 L.T. 222.
2. (1962) 1 All NLR 130.
3. *Institutes v. Christian* (1951) 3 WACA 345.
4. *Ibid.*
5. See order 48 Rule 24 Rules of High Court of Lagos.
6. (1902) 2 ALL E.R. 108; (1959) 11 B.R. N.L.R. 1. See also *Onwudinjo v. Onwudinjo*
7. (1902) p. 83; 83 L.T. 645; 18 T.L.R. 59.
8. (1844) 1 Rob. Eccl. 14; Vol. 163 E.R. 948.
9. *Ibid.*
10. *Ibid.*
11. 10 Jur. N.S. 1083; Vol. 163 E.R. 1399.
12. (1866) L.R. 1 P & D 143.
13. (1959) L.I.R. 143.
14. *Ibid* at p. 145.
15. (1944) 17 NLR 149.
16. 2 Curt 863; Vol. 163 E.R. 611.
17. FSC 264/1963 reported in February — August 1964 SC 66.
18. (1949) p. 434; (1949) p. 434 (1949) 2 All E.R. 90.
19. See the dictum — "To attest is to bear witness to a fact" — of Sir H. Jenner Fust in *Hudson v. Parker* (1844) 1 Rob Eccl 14; Vol. 164 E.R. 948.
20. See for example S. 10 Wills Edict 1990 of Oyo State.
21. (1863) 32 L.J. Ch. 668.

22. See the proviso to S. 8 Wills Edict 1990 Lagos State and proviso to S. 10 Wills Edict 1990 Oyo State.
23. *Re Lamond* (1915) 2 Ch. 240.
24. (1881) 6 Q.B.D. 311.
25. (1899) 1 Ch. 764.
26. *Ibid* p. 768.
27. See S. 150 Evidence Act Cap 112 LFN, 1990.
28. (1902) p. 205.
29. *Ibid* at p.206.
- 29a. Vol. 163 E.R. 821.
30. *Ibid* at p. 825.
31. (1958) 2 ALL E.R. 1.
32. (1962) 1 ALL NLR 130.
- 32a. *Ibid* at p. 139.
33. See *In the Estate of Randle* (1962) 1 ALL NLR 130 and *Lawal Osula v. Lawal Osula* (1993) 2 NWLR 158 at p. 172-173.
34. 11 L.T. 781.
35. (1886) 57 L.T. 60.
36. (1850) Jur. 904.
37. 7 W.R. 270.
38. (1884) 9 & D 149.
39. *Wyatt v. Berry* (1893) p. 5
40. Vol. 163 English Reports 1277.
41. *Ibid* at p. 1282
42. (1871) 19 W.R. 511 Reported in Vol. 48 English Empire Digest 142.
43. (1932) 147 L.T. 460.
44. (1894) 71 L.T. 699.
45. (1843) 3 Curt 642 Reported in Vol. 163 English Report 853.
46. See *Bremchley v. Still* 1850 2 Rob. Eccl. 162.