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Since this case dealt with an area in which the city did have some interest, by analogy the case should be a strong authority for the unconstitutionality of a state's refusal to license a motion picture on the same basis.

Some statutes have already excluded newsreels from film censorship.⁶⁹ In a recent test case after *Burstyn v. Wilson* an Ohio lower court held that the Ohio censorship statute as applied to newsreels was unconstitutional.⁷⁰ The judge drew attention to the fact that a recent prize fight was "telecasted" throughout the country on movie screens at the time of the event without censorship. If a newsreel were made from the same event, under the Ohio statute, it would have had to have been censored and a license fee would have had to have been paid. The case seems rightly decided for newsreels logically should be classified in the category of newspapers and magazines.

Although not this writer's opinion, it may be that the courts will decide that the dangers from motion pictures are not of such a type that would countenance any degree of censorship. Thus, the regulation of motion pictures and the movie industry would be left to the criminal libel statutes,⁷¹ or statutes which punish the exhibition of obscene films.⁷²

In all probability, however, motion picture censorship is not at an end as a result of the *Burstyn* case, but rather the problems in this new area of civil liberties are just beginning. Future motion picture censorship should be based on the recognition of this medium as one different from other media of communication.⁷³ In recognizing this it would appear that censorship to combat obscenity and indecency has the best chance to be upheld; and that censorship based on well defined standards protecting against films that would incite to crime is at least a possibility. All other censorship of this now constitutionally protected medium would seem to have little chance of survival except in a national emergency.⁷⁴

STANLEY WIENER

The Invisible Signature— Can It Be Acknowledged?

ALTHOUGH all jurisdictions, by statute, require certain formalities in the execution of a will, there is considerable conflict in the statutes as to

⁶⁹ *E.g.*, KAN. GEN. STAT. ANN. § 51-103 (1949).

⁷⁰ *State v. Smith*, 63 Ohio L. Abs. 452 (Toledo Mun. Ct. 1952).

⁷¹ *E.g.*, W. VA. CODE ANN. § 6109 (1949). *Beauharnais v. Illinois*, 343 U.S. 250, 72 Sup. Ct. 725 (1952).

⁷² *E.g.*, OHIO GEN. CODE § 13035.

⁷³ See note 28 *supra*.

⁷⁴ *United States v. Spirit of '76*, 252 Fed. 946 (S.D. Cal. 1917).

what particular formalities are essential. Whether it is necessary for attesting witnesses to a will to see the testator's signature before they can legally attest¹ and subscribe² is a problem as yet unsettled in Ohio. It is the purpose of this note to discuss this problem.

Before a proper analysis can be made it is necessary to examine briefly the historical derivation of the statutory requirements for the execution of a will. At early common law real property passed by descent to heirs, and heirs have since been favored by the law over devisees.³ Since by will a testator is able to defeat the expectancy of his heirs, the primary purpose of wills statutes is to protect the testator's heirs from being fraudulently deprived of their expectancies.⁴ This is indicated by the well settled rule that if the testator has not substantially complied with the statutory requirements, the testator's intent, although clearly manifested, has no legal effect, and his heirs will realize their expectancies through the law of descent and distribution.⁵

Shortly after devises were recognized at common law, the English Statute of Frauds was enacted which set forth the formalities of execution necessary to pass realty by will. The statute provided:

All devises shall be in writing and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses . . .⁶

Many American jurisdictions have patterned the execution requirements in their wills statutes after this provision of the Statute of Frauds.⁷

The English courts interpreted the provision as requiring only a declaration by a testator to his attesting witnesses that the instrument is his will.⁸ Therefore, those jurisdictions which have adopted the language of the Stat-

¹ Attestation means bearing witness that all the statutory requirements were fulfilled. *Nunn v. Ehlert*, 218 Mass. 471, 106 N.E. 163 (1914).

² The subscription of the witnesses is merely the mechanical act of signing as evidence of their prior attestation. *Nunn v. Ehlert*, 218 Mass. 471, 106 N.E. 163 (1914).

³ 1 PAGE, WILLS 235 (3d ed. 1941).

⁴ *Slemmons v. Toland*, 5 Ohio App. 201 (1916).

⁵ *Soileau v. Ortego*, 189 La. 713, 180 So. 496 (1938); *In re Houghton's Estate*, 310 Mich. 613, 17 N.W.2d 774 (1945); *In re Stever's Will*, 268 App. Div. 559, 52 N.Y.S.2d 348 (1945); *Sears v. Sears*, 77 Ohio St. 104, 82 N.E. 1067 (1907); *In re Bryen's Estate*, 328 Pa. 122, 195 Atl. 17 (1937).

⁶ Statute of Frauds, 1677, 29 CAR. II, c. 3, § 5.

⁷ Illustrative of such statutes are the following: ILL. ANN. STAT. c. 3, § 194 (1941); KY. REV. STAT. ANN. § 394.040 (Baldwin 1943); MASS. ANN. LAWS c. 191, § 1 (Supp. 1951); MINN. STAT. ANN. § 525.18 (Supp. 1952); WISC. STAT. § 238.06 (1951).

⁸ *Johnson v. Johnson*, 1 C. & M. 140, 149 Eng. Rep. 348 (1832); *Wright v. Wright*, 7 Bing. 457, 131 Eng. Rep. 177 (1831); *White v. British Museum*, 6 Bing. 310, 130 Eng. Rep. 1299 (1829).

ute of Frauds and the English interpretation of its requirements recognize a will as validly executed if the testator acknowledges the will before his witnesses even though he did not subscribe in their presence and his signature was not visible to them.⁹

Experience in England under this provision of the Statute of Frauds proved that it was too loosely drawn to accomplish its purpose of preventing fraud and perjury in the execution of wills.¹⁰ By the Wills Act of 1837, Parliament attempted to correct this defect.¹¹ The Act provided:

Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time ¹²

Typical of the English decisions interpreting the meaning of acknowledgment of signature under this statute is the case of *Ilott v. Genge*.¹³ In this case, the testator had requested two persons "to sign a paper for him." The paper was so folded that the witnesses could not see any writing whatever on it. The testator did not state what was the nature of the paper in question. On the testator's death the paper was found to be his intended will but was refused probate. It was recognized that an acknowledgment of signature may be implied as well as express, for the court stated:

The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgement of the signature.¹⁴

It is clear, however, that the court intended to limit this doctrine of "implied acknowledgment" to situations in which the testator's signature was visible to the witnesses, for the court, in refusing probate, went on to explain:

How is it possible that a signature should be acknowledged, unless the signature is exhibited to the witnesses? The statute requires that the signature should be attested, not the will.¹⁵

The court pointed out that Parliament had intended to do away with acknowledgment of a *will*, sufficient under the old Statute of Frauds, and now required acknowledgment of the *signature*.¹⁶

⁹ *Thornton v. Herndon*, 314 Ill. 360, 145 N.E. 603 (1924); *In re Dougherty*, 168 Mich. 281, 134 N.W. 24 (1912); *Lott v. Lott*, 174 Minn. 13, 218 N.W. 447 (1928); *In re Johnston's Will*, 225 Wisc. 140, 273 N.W. 512 (1937)

¹⁰ 1 PAGE, WILLS 326 (3d ed. 1941).

¹¹ This statute also abolished certain distinctions in the Statute of Frauds between the formalities of executing a will of realty and a testament of personalty. Prior to the Wills Act of 1837, certain oral testaments were still permitted.

¹² Wills Act, 1837, 1 VICT., c. 26, § 9.

¹³ 3 Curt. 160, 163 Eng. Rep. 689 (1842).

¹⁴ *Ilott v. Genge*, 3 Curt. 160, 172, 163 Eng. Rep. 689, 693 (1842).

¹⁵ *Id.* at 175, 163 Eng. Rep. at 694.

¹⁶ *Id.* at 183, 163 Eng. Rep. at 696.

Most American jurisdictions,¹⁷ including Ohio,¹⁸ have patterned the language of their execution statutes after the English Wills Act of 1837. The statutes of these jurisdictions therefore expressly require that the testator's signature be acknowledged to the attesting witnesses when the testator does not subscribe in their presence. Thus far, most American jurisdictions having such statutes have construed them in accordance with the English construction in *Hott v. Genge*, and have held that the invisible signature cannot be acknowledged.¹⁹

Massachusetts and some other states which adopted the Statute of Frauds have judicially construed their statutes to require the testator to either subscribe in the presence of the attesting witnesses or acknowledge his signature in their presence.²⁰ Obviously these jurisdictions have the same problem of interpretation of what constitutes a valid acknowledgment of signature as do the jurisdictions which adopted the language of the Wills Act of 1837 by statute. For example, Massachusetts' Supreme Court reached the same conclusion as the English courts, namely, that a signature cannot be validly acknowledged unless it is seen by the attesting witnesses.²¹

The leading case in Ohio pronouncing acceptance of the doctrine of implied acknowledgment of signature is *Raudebaugh v. Shelley*.²² The

Inasmuch as the testator in *Hott v. Genge* did not even acknowledge the instrument as his will, it is probable that the document would have been refused probate under the Statute of Frauds. However, the subsequent case of *Hudson v. Parker*, 1 Rob. Ecc. 14, 163 Eng. Rep. 948 (1844), makes it clear that acknowledgment of the instrument as a will does not constitute an implied acknowledgment of signature if the testator's signature is invisible to the witness.

¹⁷ Illustrative of such statutes are the following: ARK. STAT. ANN. tit. 60, § 60.040 (Supp. 1951); FLA. STAT. ANN. § 731.07 (1944); IDAHO CODE ANN. tit. 14, § 14-303 (1948); N.Y. DECEDENT ESTATE LAW § 21.

¹⁸ "Except nuncupative wills, every last will and testament shall be in writing, but may be handwritten or typewritten. Such will shall be signed at the end by the party making it, or by some other person in his presence and by his express direction, and attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge his signature." OHIO GEN. CODE § 10504-3.

¹⁹ *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447 (1897); *Stewart v. Stewart*, 56 N.J. Eq. 761, 40 Atl. 438 (1898); *In re Laudy's Will*, 148 N.Y. 403, 42 N.E. 1061 (1896); *Lewis v. Lewis*, 11 N.Y. 220 (1854); *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925 (1901).

²⁰ *Reynolds v. Massey*, 219 Ala. 265, 122 So. 29 (1929); *Wood v. Davis*, 161 Ga. 690, 131 S.E. 885 (1926); *In re Harter's Estate*, 229 Iowa 238, 294 N.W. 357 (1940); *Nunn v. Ehlert*, 218 Mass. 471, 106 N.E. 163 (1914); *Maxwell v. Lake*, 127 Miss. 107, 88 So. 326 (1921).

²¹ Acknowledgment of signature takes the place of subscribing in the presence of the attesting witnesses, but acknowledgment of the document as a will does not. *Nunn v. Ehlert*, 218 Mass. 471, 106 N.E. 163 (1914).

²² 6 Ohio St. 307 (1856).

statute then in effect required of attesting witnesses that they "saw the testator subscribe, or heard him acknowledge the same."²³ The testator had not subscribed in the presence of the witnesses, but had expressly acknowledged his signature before one witness who then signed. The other witness was requested by the testator to witness a paper, and he signed. The signatures of the testator and the prior witness were plainly visible to the second witness.

The court construed the statutory language "acknowledge the same" as meaning acknowledgment by the testator of his physical act of putting his signature on the paper as his will.²⁴ The court then stated:

If by signs, motions, conduct, or attending circumstances, the attesting witness was given to understand that the testator had already subscribed the paper as his will, it was a sufficient acknowledgement.²⁵

The court affirmed admission of the will to probate because there had been an implied acknowledgment to the second witness.

Another important Ohio case involving the implied acknowledgment problem is *Keyl v. Feuchter*.²⁶ The statutory requirements for due execution were the same as in the *Raudebaugh* case. At the time of the probate proceeding one attesting witness was deceased. The testimony of the other witness was that he did not see the testator's signature, that he did not know that the paper he signed was a will, and that he was told merely to witness a paper. It was not clear from the evidence whether the testator's signature was visible to the witness. The court affirmed a refusal to probate the proffered will because the testator had neither acknowledged the will nor his signature.

It is clear from the *Keyl* case that a testator's conduct in requesting a witness to sign a paper does not constitute an implied acknowledgment of signature when such witness does not know that the paper is a will and does not see the testator's signature. But the *Keyl* case did not decide the question of whether there could be an implied acknowledgment of signature in Ohio when the witness knows the document is a will but does not see the testator's signature.

This question was answered in part by the court of appeals in *Blagg v. Blagg*,²⁷ which involved the construction of the current Ohio Statute.²⁸ In that case both witnesses knew the document was a will. One witness testified that she saw the testator's signature when subscribing. The other wit-

²³ R.S. [Ohio] § 5914.

²⁴ 6 Ohio St. 307, 316 (1856).

²⁵ *Ibid.*

²⁶ 56 Ohio St. 424, 47 N.E. 140 (1897).

²⁷ 57 Ohio App. 518, 9 N.E.2d 991 (1936).

²⁸ See note 18 *supra*.

ness was not certain whether the testator's signature was on the will when he subscribed. Both witnesses signed at approximately the same time. The court reasoned that the fact that one witness could not recall whether the testator's signature was on the document, although he could have seen it if he had looked, was an insufficient reason to refuse probate, and held that the testator's signature had been impliedly acknowledged to both witnesses.

It is to be noted that the *Blagg* case still left undecided in Ohio the question of whether an attesting witness who knows the document is a will, but who testifies *positively* that he did not see the testator's signature even though such signature was plainly visible, can be said to have had the testator's signature impliedly acknowledged to him.²⁹ Also, the *Blagg* case was not concerned with the problem of whether there could be a valid acknowledgment when the witness testifies that the paper was so folded that he could not see the testator's signature although he knew the document was a will.

In *Borgman v. Dillow*,³⁰ a recent court of appeals case, the direct question of whether an invisible signature can be impliedly acknowledged was raised. In that case, both of the attesting witnesses survived the testator and testified at the probate proceeding that the testator presented the document to them for witnessing so folded that they could not ascertain whether the testator had himself subscribed. However, both witnesses also testified that they knew the document was intended by the testator to be his last will and testament. The probate court refused to admit the will for probate.

The court of appeals discussed the elements of an implied acknowledgment of signature under such circumstances in the following statement:

We are of the opinion that since the witnesses signed at the request of the testatrix who produced the instrument for the purpose of acknowledgment, all of the requirements of the statute were met, *providing the testatrix had previously signed the same.* [Italics added]³¹

However, the court in the *Borgman* case went on to explain that although there is ordinarily a presumption that the testator signed the will before witnesses subscribed their names thereto,³² this presumption does not prevail in the face of uncontroverted evidence that the testator's signature was invisible to the witnesses at the time of their attestation.³³ The

²⁹ At least one case has held that there can be an implied acknowledgment of signature under such circumstances. See *In re Bragg*, 106 Mont. 132, 76 P.2d 57 (1938), which reversed a probate court judgment refusing probate under a statute requiring acknowledgment of signature; one witness said positively he did not see the testator's signature and the other witness was not sure. Cf. *Anthony v. College of the Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944).

³⁰ 61 Ohio L. Abs. 429, 105 N.E.2d 69 (1951).

³¹ *Borgman v. Dillow*, 61 Ohio L. Abs. 429, 431, 105 N.E.2d 69, 70 (1951).

³² *Anthony v. College of the Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944); *In re Bragg*, 106 Mont. 132, 76 P.2d 57 (1938).

³³ *Accord*, *Tobin v. Haack*, 79 Minn. 101, 81 N.W. 758 (1900).