Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN PROBATE AND ADMINISTRATION

SUIT NO. P. 123 of 1975

BETWEEN	DENNIS DUDLEY CALDER ANTONIA CALDER	PLAINTIFFS
AND	MAJORIE SMITH DOROTHY MAHFOOD JEAN LORD ROY CALDER KENNETH CALDER	DEFENDANTS

April 28, 29, 30, 1975;
May 1, 2, 1975;
February 16, 17, 18, 19, 20, 1976;
February 23, 24, 25, 1976;
March 2, 1976; March 31, 1977

Ramon Alberga, Q.C., and H. D. Carberry, for plaintiffs.

H. O. A. Dayes, and Miss Jennifer Rowe, for defendants.

White, J. :

In this action the plaintiffs are claiming as the executors of the last Will and Testament dated 23rd day of May, 1970, of Archibald Lister Calder, deceased, and are seeking to have that will (exhibit 1) established. The first plaintiff is the illegitimate son of the deceased. The second plaintiff is the widow of the deceased, and was his third wife. He met her in Canada in 1967, after the death of his second wife in 1966. They were subsequently married in Jamaica. There were no children of the marriage.

The defendants are all the legitimate children of the deceased by his first wife. This marriage terminated in divorce. These defendants are acknowledged as persons entitled to share in the estate of the deceased, in the event of an intestacy, which would follow on the failure by the executors to prove in solemn form the paper-writing referred to above as the will of the deceased. Effectively, it would result in cancelling of the bequest of £10,000 to the first plaintiff, and the bequests to the Salvation Army, and Margaret Hendricks. More particularly it would dissipate the terms of the testator's expressed intention as deponed to by Mr. K. D. McPherson, Attorney-at-Law, that the second plaintiff should be the beneficiary of the residue of the estate of the deceased.

This probate action has eventuated on the issuing of a caveat by

the defendants, and is based on the allegation that the alleged will of the deceased is not a valid will in accordance with the Wills Act, section 6 of which provides in the following material words that:

> " No Will shall be valid unless it shall be in writing and is 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 subscribe their names in the presence of the testator, but no form of attestation shall be necessary. "

This paper-writing being, admittedly, in the hand-writing of the deceased and bearing his admitted signature, the only ground of challenge to its validity is that when the deceased signed he did not sign in the presence of the two witnesses. Alternatively, the contention is that accepting the identified and unchallenged signature of the deceased, if he did acknowledge his signature, he did not do so in the presence of two witnesses present at the same time. The further allegation that the two witnesses did not attest and subscribe the will in the presence of each other, was not seriously pursued, because it was common ground that it has been laid down that whereas the attesting and signing by the witnesses must be in the presence of the testator, each witness need not sign in the presence of the other, provided that the signing or the acknowledgment, whichever is relied on, occurred in the joint presence of the witnesses. (See e.g. White v. British Museum (1829) 6 Bing 310; 130 E.R. 1299; In the Goods of Webb (1855) Dea. & Sw. I; 164 E.R. 483; Sullivan v. Sullivan (1879) 3 Law Reports (Ireland) 299; O'Meagher v. O'Meagher (1883) 11 Law Reports (Ireland) 117).

Before recounting the evidence regarding the vital fact of the witnessing of the will, I should state the personality and character of the deceased as it was given in evidence. There was accord that he was a well-known farmer and penkeeper in the community of Belmont, which is near to the property of Shafston. This property is comprised of one thousand acres of land with lumber and pimento thereon. There was also a herd of one hundred and fifty head of cattle. The deceased was "Quite an important man in the community," the description given by Mr. Lester Beresford Plinton, who was on good terms with the deceased. Indeed, according to Mr. Plinton, "Whenever Mr. Calder came and asked me to sign documents I would be anxious to oblige him as quickly as possible."

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He described Mr. Calder as "A decent citizen. I would describe him as a forceful person, and as a person who knew what he was doing. He had his own mind. I formed the impression that he intended to dispose of his property by his will. "

This characterisation was amply borne out by the evidence of Mr. K. D. McPherson, who was the friend and attorney-at-law, of the deceased. His assessment of Mr. Calder was of one "very knowledgable in business, very alert, very thorough. A meticulous and astute man. A very determined, and self reliant and independent man, who would not be easily swayed. He was stubborn and would not be easily deflected from his course."

The second plaintiff, the widow, spoke of having lived happily with the deceased, who was a sociable man. He took part in the activities in the area, and was friendly with everyone. He was not a snob. At the same time, she said she had been told by the deceased that the relationship between him and his children, the defendants, had completely broken down. She was told this before they were married. From time to time she endeavoured to get him to repair the breach. The rapprochement between the testator and the defendants, if there was any, has to be tested in the light of the documentary evidence in the case, particularly exhibit 1, dated 23rd May, 1970, and exhibit 2 (unsigned paper-writing by deceased and bearing an unspecified date in July, 1971), which incidentally, was drafted over a year after exhibit 1. Except for appointing Mr. K. D. McPherson and the second defendant as executors, and the omission of any bequest or devise to Dudley Calder, exhibit 2 is in terms similar to exhibit 1. I have taken note also of the letters, exhibits 6 - 9, which were put in as part of the defendants' case.

Bearing the foregoing description of the testator in mind, I now turn to the events of the day on which, it is said, the testator executed his will, exhibit 1. The narrative of these events was given by the two witnesses to that document - Lester Beresford Plinton, and his wife, Gwendolyn. They insisted that the second plaintiff, was not present at the execution of exhibit 1. The second plaintiff, on the other hand, is adamant that she was present, and accordingly gave an account of the proceedings which is in direct conflict with the picture painted by the Plintons.

I first of all, summarize the evidence of the Plintons that the signing and witnessing of the will, exhibit 1, took place in the dining-room behind their shop at Belmont in the parish of Westmoreland on a Saturday, which was a busy day for their business as shopkeepers. Both Mr. and Mrs. Plinton deny, contrary to the evidence of Mrs. Antonia Calder, that at the request of the deceased the doors of the shop were locked for a while - 15 - 20 minutes - so as to obviate any interruptions. They deny too, again contrary to the assertions of Mrs. Antonia Calder, that the will was signed by Mr. Calder in the presence of them both, each of them being present at the same time. Nor did they each sign in the presence of the other and in the presence of the deceased.

According to Mr. Plinton on the 23rd May, 1970, the deceased entered his business place. He had a long envelope in this hand, and said to Mr. Plinton, "I have a document here fof you to witness for me;" to which Mr. Plinton answered, "O.K." As I understood Mr. Plinton, after he had finished attending to a customer, he went to the trapdoor of the counter, opened it and said to Mr. Calder: "Come along, Mr. Calder!" He thereafter took the latter into the dining-room which is behind the shop. The deceased sat at the head of the dining table. The back of the chair on which the deceased sat was turned to the door, which was wide open. According to Mr. Plinton, the distance between the dining-room and the shop was a couple of steps.

After sitting down the deceased released a document from the envelope, and told Mr. Plinton that he wanted two witnesses. With the agreement of the deceased Mr. Plinton said he called his wife, Gwendolyn. There was no evidence where she was at this time. However, he said that he stood at the door and called, "Gwen, come here, Mr. Calder wants you also to sign ..... " This blank space leads to recording the significant fact that after the word "sign," Mr. Plinton in his evidence followed with the words "this will" and then he changed to "this document." For the time being I will only add that he concluded informing his wife about the intentions and wishes of the deceased with the words "for him."

He does not say positively where she was up to this point. It is reasonable to infer, however, that she was in the shop when Mr. Plinton called her; this from Mr. Plinton's statement that the customers she had left in the shop were getting restive. Therefore, Mr. Plinton said

to her, "O.K. then!" you stay with Mr. Calder, I will go and serve those people." There is nothing to show that when he made this remark he was, or was not, in the presence of the testator. When he was finished serving the customers, Mr. Plinton said he returned to the dining-room. He met his wife at the door coming out. In answer to his query, she said, "I have signed already," and continued into the shop.

Mr. Plinton said that when he went into the dining-room, the deceased pointed out where he should sign, and said to him, "This is my will," Mr. Calder then folded the paper which he had shown to him and told Mr. Plinton, "You sign here." Mr. Plinton complied. At this stage the deceased asked him, "You see my signature?" To which there was the reply, "Yes." Thereupon the deceased pointed out, "Here is your wife's signature." After these laconic remarks, the deceased folded the paper, put it in the envelope, got up and walked through the trapdoor, thereby leaving the store.

In this regard, and at this point, it is expedient to refer to what is Mrs. Plinton's evidence regarding the initial event on the 23rd of May, 1970, in so far as that evidence relates to the course of the transaction after Mr. Calder came through the door of her shop at between 1:30 p.m. - 2:00 p.m., and before she was called by her husband. Her evidence is somewhat in agreement with that of her husband. She said she saw when Mr. Calder came into the store. She did not notice where he came from. At the time she was attending to a customer. She saw the deceased and her husband speak at the flap-door of the counter. She did not hear what they said to each other. A careful study of the evidence must of necessity set against the foregoing, the fact that Mrs. Plinton admitted that on the 20th of December, 1972, she had given to Mr. McPherson a statement (exhibit 4). She had then stated that, "He (Calder) came to the counter and said to my husband 'I have a document to sign but I would like another witness.' My husband told him I would be the other witness and that he could come inside." Her explanation for the discrepancy between the statement and what she had stated in court was given in the following note of her evidence. "Maybe, I made a mistake in telling Mr. McPherson what I heard, but what I said a while ago is what I heard. Maybe it is functioning in my mind that I did not hear. Maybe what I said a while ago is exactly what happened. Sometimes this

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"comes up in your mind, you hear a thing and you don't hear." And later to me, "I am saying I made a mistake when I told Mr. McPherson what I heard, but no mistake now when I say what I did not hear."

She adamantly denied that she had deliberately changed from her statement to Mr. McPherson on this point, because she knew that her husband had said otherwise in court. She had not changed from her previous statement to match her husband's evidence.

So, it is clear that this court in looking at the initial stages of the transaction must approach the evidence of this witness with caution. This wariness is increased by her admission that her husband did tell her that he had given a statement (exhibit 5) to Mr. McPherson at his office on December 14, 1972. In addition, as far as she could judge, Mr. McPherson had come to her first on the 20th of December, 1972, before he obtained a second statement from Mr. Plinton on that date (exhibit 5). I note, however, that she said that despite these statements, her husband never told her what was going on.

After Mr. Plinton pulled the trapdoor, he and Mr. Calder went into the dining-room. Then Mr. Plinton returned to the open door of the dining-room and spoke to her. He said, "Mr. Calder has a document to sign, but it needs another witness." He said he had asked Mr. Calder if she could be the other witness. Mr. Calder had agreed. She in turn consented to do as she was asked. She did not say in what part of the shop she was while her husband was talking to her. She went into the dining-room leaving a customer in the shop. Mr. Calder was sitting at the long end of the table, not at the head of the table. He had a bit of paper folded i.e., rolled. It was not flatly folded. It was rolled with the bottom part showing. The paper was turned towards her, and the deceased instructed her to "Sign here." She signed where he told her to sign.

According to her, during this time she and the deceased were the only persons in the room, Mr. Plinton having gone out of the room while she was going into the dining room. He had left to attend to the customer whom she had been attending. After she had appended her signature, and was going out to the shop she saw her husband going back into the dining-room. She did not know what happened after that. She saw when both men came from the dining room and saw also when the deceased left the shop.

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In contrast with the foregoing is the evidence of Mrs. Antonia Calder. She said she was present in the shop when the will was signed by the testator and witnessed by the Plintons. She had gone to the Plintons' shop with her husband, and at his request, because he had told her he had made a will which he wished to be witnessed by a couple in Belmont. Mrs. Calder's evidence was that when she and her husband entered, only the Plintons and a young boy were in the shop. Her husband introduced her as his dear wife, Dona, and informed them that he had a will which he was asking them to witness. They agreed to do this. They also complied with his request that the young boy should be sent out of the shop, and the shop be closed. As a matter of fact, it was Mr. Plinton who came from behind the counter to close the folding doors of the shop. They all four were at the counter: the Calders seated on stools on the public side of the counter, the Plintons being then on the serving side of the counter.

It was at that time that Mr. Calder took out, folded, the paper-writing, exhibit 1, from a brown envelope. It was opened by Mr. Calder, who gave it to Mr. and Mrs. Plinton. They both looked at it. After it was read through by both of them, Mr. Calder asked them if they were willing to witness it. Following on this, Mr. Calder took out a fountain pen with which he wrote the date, and his signature. Then the deceased gave the pen to Mrs. Plinton. After she had signed, Mr. Plinton signed. They both used Mr. Calder's pen which he said he wished them to use. At no time, according to Mrs. Calder, did either of the Plintons leave the room before the three signatures were affixed to exhibit 1. She was present there with her husband and the Plintons. After the signing, Mr. Calder put the will back in the envelope, which, as far as Mrs. Calder could remember, he put in the pocket of his trousers.

The differing accounts of the proceedings of the execution of exhibit 1 raise questions, the answers to which will depend on the preponderance of probabilities. On the one hand, if the sharp conflict of fact is resolved in my accepting the evidence of the second plaintiff being the true, or at any rate, the more probable account of the particular circumstances of the case, ipso facto, the court must admit to probate the document which has been produced as the last Will and Testament of Archibald Lister Calder, deceased. However, even if I find that Mrs. Calder's evidence is at the least improbable, I must nevertheless examine the

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evidence of the Plintons very carefully to ascertain whether they are honest and reliable witnesses recounting accurately what took place on the particular occasion. In that event I must perforce discard and disregard the evidence of Mrs. Calder,

That the criterion in these cases is not only the honesty but also the reliability of the attesting witnesses is clearly shown by the observations of the Earl of Selbourne, L.C. in Wright v. Sanderson (1884) 9 P.D. 149 at p. 160, which I now quote:

> " The principle which Dr. Lushington in Burgoyne v. Showler (1844) 1 Rob. Ecc 5; 163 E.R. 945 stated to have been that on which Sir Herbert Jenner Fust always acted in the absence of sufficient recollection on the part of the witnesses was that he would assume the Will to be duly executed; and the same learned judge in Leach v. Bates (1849) 1 Rob. Ecc. 714; 163 E.R. 118, justly and reasonably held that the accurate recollection of the witnesses on some points might properly be tested by the inaccuracy or imperfection of their memory on others. In that case as also in Blake v. Knight (1843) 3 Curt 548; 163 E.R. 821, Cooper v. Bockett (1846) 4 Moo. P.C. 419; 163 E.R., 855, Lloyd v. Roberts (1858) 12 Moo. P.C. 158; 14 E.R. 871 P.C. stronger and more positive evidence then any which exists in this case against the due execution and attestation of the paper was without imputation on the honesty of the witnesses - regarded as untrustworthy in comparison with the inferences reasonably derivable from the evident ae rei, the undisputed facts and the probabilities of the case. "

And Fry, L.J. at p. 163, described the witnesses in that case as "Witnesses about whose honesty the learned President of the Probate Division entertained no doubt, but on whom he, who saw and heard them, felt that he could not rely to rebut the presumption which arises from the admitted facts of the case."

In Wyatt v. Berry /1893/ P.D. 5 Gorrell Barnes, J., reiterated the same thinking in the following words:

> " Wright v. Sanderson (1884) P.D. 149, CA., and Lloyd v. Roberts (1858) 12 Moo. P.C. C. 158; 14 E.R. 871, P.C. (are) cases, which show clearly that where it is obvious that the testator meant the document to be his Will, and thought he was complying with the Act of Parliament, the Court would presume that everything was right and would not tie itself down to accept the evidence of the witnesses to the contrary. The bearing of these two cases appears to be very clear. They really go to this that where there is any doubt about the recollection of the attesting witnesses, where there is anything from which the Court can fairly say that the Will ought to be held to be good, and that the recollection of the attesting witnesses ought not to be relied on as against the Will, the Court, may say that it is satisfied that the Will was duly executed ..... . in this case there has been distinct and positive evidence which the attesting witnesses have given ..... this case is not one in which there is something on the face of the

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> " document which would show that those witnesses cannot be quite accurate in their recollection - for instance, as in the case where a witness says there was no writing on the paper when he signed, whereas, the internal evidence showed that there must have been because the single point to which they speak is that to which their attention must have been drawn, and that was the circumstances in which they affixed their signature. "

In O'Meagher v. O'Meagher (1883) II L.R. (Ireland) 117, to Warren, J., it was clear that:

> " it is not necessary as Lord Penzance said in Wright v. Rogers L.R. 1 P & D 678, to assume that the witness comes here to deceive the Court. The question is whether the Court is able to rely on his memory. "

Of course, in this case the evidence of Mrs. Calder was attacked and dissected by attorney for the defendants, who in his usual forceful style, sought to show that the Court should not accept the report given by her as the true account. Mr. Dayes posited that to ascertain whether a witness in the category of Mrs. Calder is speaking the truth is a task of immense difficulty which is compounded by the absence of any corroborating witness. There are no previous statements by her in the light of which she can be trusted.

In his critical analysis of her evidence, Mr. Dayes submitted that there are improbabilities. The first was the assertion by Mrs. Calder that on a Saturday, which was the big commercial day for the Plintons, the Calders would have been so fortunate as not only not to find any customer in their shop, but also that the deceased would have been able to prevail upon the Plintons to close their shop to facilitate the signing of a document for the deceased. Mr. Dayes contended that the closing of the shop is an improbability when one considers that there was a competitor - the Parkinson's shop next door - which was better stocked than the Plintons'. In this context, Mr. Dayes questions, why close the door of the shop to gain privacy, which could have been obtained by going into the dining-room, especially when it is remembered that the evidence discloses that on every previous occasion, the dining-room was the venue when the Plintons signed as witnesses to a document brought to them by the deceased?

This alludes to an occasion when, according to Mr. Plinton, he and his wife witnessed a will for Mr. Calder. Mr. McPherson also testified that the statement (exhibit 4) which he took from Mrs. Plinton was taken in the dining-room. The argument is, that the evidence to the contrary regarding the transaction on 23rd of May, 1970, is based on the fact that

Mrs. Calder became aware of the necessity to observe the niceties in the execution of a will, this intelligence having been acquired at the time of her visit to Mr. McPherson when he took a statement from her for the purpose of the present case. To my mind, if this is to be accepted, the Court must credit Mrs. Calder with an inventiveness which runs through the whole of her evidence!

Mr. Dayes underlined this censure of the inveracity of Mrs. Calder by pointing out her account of other things which she said happened on the material date. For example, she stated that before the Will was signed and witnessed by the Plintons, they each read it. After the signing, according to her, there was a discussion between her husband and the Plintons and herself. This was primarily concerned with the desire of the Plintons to acquire the premises on which their shop stood. To effect this the Plintons asked the deceased to lend them some money; that the deceased promised to intervene with Mr. Lawson, the land-owner, on their behalf; that he resisted their suggestions that he himself should buy the shop; that there was a suggestion by Mr. Calder that the Plintons should operate a bar along with the shop, which suggestion was not entertained by them. Mrs. Calder added an account of a little girl coming into the shop while this conversation was going on. The little girl was identified by Mrs. Plinton as her grand-daughter.

Of course, all this was denied by the Plintons under cross-examination. Certainly, they said, no such conversation took place on the 23rd of May, 1970, and positively, never in the presence of Mrs. Calder. Mr. Plinton pin-pointed the conversation with the deceased regarding the difficulties he was experiencing in the negotiations for the land, as having taken place after the signing of "the first Calder Will" by himself and his wife as witnesses. He said he acquired the land from Lawson in the latter part of 1974, which was at about some three or more years from the date of the conversation, which itself took place long before the signing of exhibit 1, which occasion he put somewhere in 1972 "far back in 1972." Right at this point it is clear that Mr. Plinton was muddled because exhibit 1 was signed in 1970, and the testator died on the 10th day of October, 1972, and was buried on October 16, 1972.

Mrs. Plinton averred that "Not so that both I and Mrs. Calder were present /on 23rd of May, 1970/. No other occasion on which

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"Mrs. Calder and I present and on which this /the shop-land issue/ was discussed between Mr. Plinton and Mr. Calder."

She also denied that she ever discussed her little grand-daughter with Mr. Calder; not on the 23rd of May, 1970; not ever. Not even when Mrs. Calder visited her home on two occasions - one when there was a discussion about Mrs. Plinton's daughter, whose services as a hair-dresser Mrs. Calder desired to engage. This was before the signing of exhibit 1. The other, when the Calders visited Mr. Plinton, who was ill. This was after the 23rd of May, 1970. In this context, it is well to remember that the exclusion of Mrs. Calder from any conversation between her late husband and the Plintons must extend to the "once or twice" which Mr. Plinton said were the only occasions when she shopped at his shop. It is emphasized by the denial of Mrs. Plinton that the Calders were regular customers of theirs, the Calder shopped only on one occasion at the Plintons'.

The Plintons agree that the conversation took place. I have to decide how then, if Mrs. Calder was not present, on the occasion when it was discussed, she was able to give the detailed account of it in her sworn evidence? Mr. Dayes put this down to her ingeniousness. She is bent on convincing the Court that what she said happened did in fact happen. The details are added to convince the Court. The details of what she said happened on that Saturday, did not then happen. He discovered an intellectual exchange between the Calders which was in contrast to that between the Plintons, who,for example, did not at any time discuss the matter of their signing the document, exhibit 1, and the obvious problems which had arisen since then. In contrast, Mrs. Calder said the deceased discussed the little pieces of news. Especially if she were not with him when he had gone away from home, he would tell her everything, when he returned home. He discussed business problems, as well as every detail of the day, with her. For instance, if anyone tried to borrow money from him he would tell her. So, according to Mr. Dayes, these are pregnant facts which Mrs. Calder could have known even if they did not happen on the Saturday, as she in fact swore.

It was part of Mr. Dayes' argument, therefore, that the intellectual exchange between the Calders should be compared and contrasted with that between the Plintons. On the one hand, the relationship between the Calders, and the relationship of the deceased with the neighbourh-

would suffice to explain how Mrs. Calder came to know the facts to which she swore. Conversely, if her relationship with him was bad, and if he did not go around and speak his business to others, the question does arise, where then did she get this information?

Looking at the Plintons' evidence, I remind myself that they have been married for many years; on Mr. Plinton's account for 27 years; from 1942, said Mrs. Plinton. He himself had been a Justice of the Peace for nine to ten years. He has been a shopkeeper in Belmont for fourteen to fifteen years, during which time he and his wife have together conducted this business. It is not farfetched, therefore, to expect that, where questions arise concerning joint action and acts by both of them, there would be some discussion between them of any relevant questions which may arise. Such an opportunity arose the day after the funeral of the deceased. On that day, Mr. Plinton told me, a Mr. Ken Mahfood, who was a son-in-law of the deceased, stopped in at the Plintons' shop at Belmont.

Unknown to Mr. Plinton, the will, exhibit 1, had been read at the funeral by Mr. McPherson, who testified that the daughters of the deceased and Kenneth Mahfood were present. Mr. Mahfood was the first person to speak to Mr. Plinton about exhibit 1. On the day after the funeral Kenneth Mahfood had complained to the witness, that the children had been left out of the will. Mr. Plinton thought this was strange. He accepted the invitation by Mr. Mahfood to inform the latter whenever he was in Kingston so that he could take Mr. Plinton to a lawyer. This, I have no doubt, was in keeping with his seeking assurance from Mr. Plinton that he would give evidence in court regarding exhibit 1.

Mrs. Plinton was not in the shop during this conversation. This is borne out by her husband's evidence. As a matter of fact, her evidence was that she did not, and does not know, Kenneth Mahfood, although she knew that her husband worked with the Mahfoods for some time. Although she was at her shop the day after the funeral, she said she could not remember any person by the name of "Kenneth Mahfood" having a conversation with her husband in the shop on that day. She said that before her husband went to Kingston he never told her about any conversation with a Mr. Mahfood in which the latter had complained that the Calder's children had been left out of the will. Her husband supports her in this.

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He went to Kingston, contacted Mr. Mahfood who took him to see Mr. Scholefield, of the legal firm of Lake, Nunes, Scholefield and Company. Mr. Scholefield took a statement, exhibit 3b, from Mr. Plinton. After his return from Kingston he told his wife what Mr. Mahfood had said. Mrs. Plinton's evidence about this is as follows: "My husband when he came back from Kingston, did tell me that a Mr. Mahfood had asked him to call him when my husband was in Kingston, and he would take him to a lawyer. He told me he was asked to give a statement about Mr. Calder's will. He said he had given a statement. He showed me the statement, but I did not read it. I cannot remember if with the statement there was a copy of the will."

One can be permitted to comment that it is reasonable to assume that when he first spoke to Mr. Mahfood, Mr. Plinton must have recalled that his wife had also been a witness to the will (exhibit 1). He did not ask Mr. Mahfood why the latter wanted him to give a statement. There was nothing said by him to Mr. Mahfood about the witnessing of the will, nor did he inform his wife of this. In this regard, she said that even after he came back from Kingston, and he gave her the statement, she asked him what it was about. He did not answer. He only gave her the statement which she did not bother to read it as she was busy. I am being asked to believe that these two persons, husband and wife, who have been joint operators of a business for over a decade, did not for one moment discuss the implications of this new situation which had arisen since they witnessed exhibit 1. The reticence and taciturnity which I am asked to find is faithfully recorded by the words of these two witnesses, do not appear to have been dissipated even when Mr. Plinton expressed, his impressions of, and reactions to, the remarks by Mr. Mahfood. Under cross-examination by Mr. Alberga, Mr. Plinton said, "I thought the children should have a share. I felt disappointed that Mr. Calder had left a will and not mentioned his children, I disapproved of it. Something I would like to see rectified."

It is true that he made it quite clear in evidence that this was his viewpoint which was not communicated either to Mr. Mahfood or to Mrs. Plinton. She said that she did not know her husband's views regarding the statement which he made to Mr. Scholefield. According to her husband, "When I got back to Belmont I showed my wife the copy of the statement.

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"She read at least a part of it. No discussion. She made no comment on it. She read it and gave it back to me. She did not say she agreed or disagreed with it."

An important factor in the circumstances of this case is that Mr. Plinton said that he first learnt that the will, exhibit 1, was being contested on the ground that it was not properly signed, after he gave his statement to Mr.Scholefield. He added: "When I went back to Belmont with the statement, I do not think I told my wife about that." Further he said that when he showed her this statement: "I did not discuss the whole matter with her then. Did not ask her if she agreed with what I said in statement. No point on which she agreed or disagreed."

Mrs. Plinton said that before the 20th of December, 1972, when Mr. McPherson spoke to her, she did not know of the reason why her husband had given a statement regarding the will. She first heard that the Calder children were displeased about the will only when Mr. McPherson came to see her on the 20th of December, 1972. She further gave evidence that when Mr. McPherson took her statement, exhibit 4, he did not refer to the statement of her husband, exhibit 3b, nor to the fact that he had given a statement to Mr. McPherson, exhibit 5. And in fact, after Mr. McPherson left she and her husband did not discuss his visit.

Dealing with that interview, Mr. McPherson, who was the first witness, said that because of a letter, exhibit 3a, which he had received from Messrs. Lake, Nunes, Scholefield and Company, he had gone to see the Plintons. He knew them well. He interviewed Mrs. Plinton before he had spoken with Mr. Plinton. Mr. McPherson stated: "When I saw Mrs. Plinton she said she had read the statement, or at any rate knew the contents of statement, exhibit 3b." I will say here that where there is conflict between the evidence of Mr. McPherson and that of the Plintons, I am prepared to accept the former as recounting more accurately the circumstances to which they both have deponed. So I have to set this against Mrs. Plinton's continued denial that although her husband had given her the statement, exhibit 3B 4, up to the time of her giving evidence she had not read it, even though she had the opportunity of reading it. While this is not the be-all of this matter I will have to consider it in the light of the balance of probabilities, not forgetting, of course, that Mr. McPherson's position as Attorney-at-Law for the estate of th

deceased had been terminated certainly by the 29th of January, 1973, when Mr. McPherson wrote to Messrs. Lake, Nunes, Scholefield and Company intimating that he no longer acted for Mrs. Antonia Calder, although he still continue to act for Dudley Calder. This termination of retainer became a fact on the 9th of May, 1973, when another firm of attorneys, Messrs. Delapenha and Iver, were instructed on behalf of the two executors. Mr. McPherson gave Mrs. Calder's impatience as the reason for this termination of his retainer. Although he had taken a statement from her and a xerox copy of this statement was enclosed in the brief sent to counsel, she thought that he was dragging his feet in seeking counsel's opinion, Counsel's opinion which was sought by letter dated the 21st of December, 1972, was dated the 7th of February, 1973. It comprised 12½ sheets of foolscap. It is clear that Mrs. Calder did not appreciate the problems of a matter such as this.

Incidentally, it could not, and indeed, it was not, suggested, that Mr. McPherson or Mr. Scholefield, in their respective capacities, acted in any way contrary to what is expected of those who have to advice professionally on intricate and complicated matters such as this. At the same time, I certainly make the observation that this whole matter started because of the officiousness of Mr. Kenneth Mahfood, who I am satisfied, was disappointed with the will of the deceased, because no bequests or devise had been made to any of the defendants. It is certainly back-ground evidence to be considered along with the other found facts to assist the Court to the conclusion, one way or the other, whether the provisions of the Wills Act were complied with.

The behaviour of these two witnesses - the Plintons - in their sixtieth year must be germane to their credibility. Admittedly, the incidents to which they testified occurred some five years before the trial. The court has to take this into account in judging their ability as witnesses to recall accurately or reliably, the events about which they gave evidence.

I now address myself to the core of this case which is in what circumstances was exhibit 1 made so that it can or cannot ultimately be regarded as a valid will? In the first place, I take cognisance of the fact that the Plintons, had previously witnessed a will which they said the deceased brought to them.

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Firstly, Mr. Plinton's evidence was that Exhibit 1 was the second will which he was witnessing for the deceased. And in the light of his experience as a Justice of the Peace he said he knew that a will requires two witnesses, a fact which he supported by remarking that he himself had made a will some five years before the time he was giving evidence, and on that occasion he said he signed his will before two witnesses. His will was made after exhibit 1, and the other will which he described "as for Mr. Calder" was witnessed before exhibit 1 was made. In fact, the other will "for Mr. Calder" was made about four to five years before exhibit 1, and before the deceased married the second plaintiff. This previous will was witnessed also by Mrs. Plinton, as has been stated already.

She described this previous document as the will for, "the second wife." She said, "I did sign the first will for the second wife who is dead." Mr. Calder's second wife did not come with him on that occasion. He brought a document, but he did not tell her what sort of document it was. He asked her to witness it, and she did so. In her words, "I understood afterwards that it was the second wife's will. It was after it was signed that he told Mr. Plinton it was his will. I am talking the last time. The first time after document was signed, Mr. Calder told Mr. Plinton it was his second wife's will ..... This will was long before Mr. Calder's second wife died."

She stated that she did not know there was a serious lawsuit over the will of the second Mrs. Calder. Nor did she know that the names of neither herself nor her husband appear as witnesses to the will.

The evidence just recently recited gives a pointer to an aspect of the case which I have already discussed. I refer to Mrs. Calder's denial that she had any discussion with her husband regarding exhibit 1. I have to observe that obviously, referring to the previous situation in which, as far as the Plintons knew no challenge had been made, she has stated that her husband was told afterwards that it was the second wife's will. Presumably, she get this information from her husband or maybe she was present when Mr. Calder informed her husband. More importantly, the foregoing comment is particularly applicable to the circumstances of the execution of exhibit 1. I repeat the evidence that she said, "It was after it was signed that he told Mr. Plinton it was

"his will. I am talking about the last time." This must either come from first hand knowledge or from a discussion with her husband. In either event, it belies her protestations.

I further advise myself that she could not remember when the will "for the second Mrs. Calder" was witnessed by her - not the month, nor the year. What she said she did remember was that that will was signed in the dining-room behind the shop during the day. She was unable to say precisely, at what hour. I think that her evidence on this point is really summed up when she said, "I really do not remember what happened on that day. I have no recollection other than what I have said. It was a long time ago. I can't remember if I saw Mr. Calder sign on that occasion. I suppose so that my husband signed on that occasion. I really can't remember if all three of us were together on that occasion. I cannot remember any difference between both occasions of signing wills other than that the first was not a busy day."

This evidence can be put in its proper perspective by the declaration of each of these witnesses relating to this previous will. Mr. Plinton testified, "Today is the first time someone has asked me to recount what happened at the signing of the first will." This matter was raised with Mrs. Plinton by the question, "How many times did Mr. Calder come to your store to have his will witnessed? She answered, "Twice. Once for the second wife and once for this." Later on as if to emphasize the foregoing, she was asked, "Was there any other occasion on which you witnessed another will for Mr. Calder?" Her answer, "No. That's the two I am speaking of. The one for the second Mrs. Calder, and the one for Mr. Calder." Here is the testing of the memory of the witnesses in an endeavour to discover if, having responded to the test of memory, they would each be able to disclose their knowledge, not only of the document which they signed on May 23, 1970, but also the procedure followed. So that, even accepting that Mrs. Plinton did not know anything about how documents like wills should be signed, I will have to enquire whether the full detail of narrative which was given in evidence indicated that she and her husband participated in the making of a valid will.

As to his knowledge of the procedure of making a valid will it is clear from Mr. Plinton's evidence that he knew the requirements. He knew that it must be signed or acknowledged by the testator. His answers

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on this point were, "I did appreciate that both witnesses to a will are required to witness the signature of the deceased. I did appreciate and know that the testator can acknowledge his signature in the presence of both witnesses; also that both witnesses should sign the will in the presence of the testator. Although I rarely sign wills, I know." It seemed to me then, and I am still of that view, that the tense in which the relevant questions were put by Mr. Alberga was accepted by Mr. Plinton in his answer as indicating that he knew the requisites of a valid will before the trial.

When asked by Mr. Dayes if he knew who should sign first, Mr. Plinton answered, "The owner of the will." But he did not know that the testator and the two witnesses should all be together when the testator is signing, although he had earlier stated to Mr. Alberga his knowledge that both witnesses should be present. He told Mr. Dayes that the knowledge of the requisites of a valid will were gathered since he was in court. He said after reading Mr. Calder's will, "I saw that." He was asked this specific question by Mr. Dayes, "Did you, before this case, before reading Calder's will in court yesterday, know in what order they are supposed to sign, and how the signing should go?" His answer, "I have never seen a will with those indications as I observed in Mr. Calder's will yesterday, but I know there should be two witnesses." Mr. Plinton testified that he had "never seen a clause at the bottom of a will as appears on exhibit 1. My will does not contain one." He was there referring to the attestation clause. The question arises, did they know that they were attesting the signature of the deceased to exhibit 1? The court must be satisfied that the names of the witnesses were subscribed on the will for the purpose of attesting the teatator's signature.

According to Mrs. Plinton, "I did not know what it was I witnessed that afternoon." She just wanted to sign and go back to her customers. When exhibit 1 was shown to her at the trial she recognised her signature, as well as those of her husband and Mr. Calder. She does not say how she knew it was Mr. Calder's signature. She did not see him write on the material document, and at the material time, and in fact had never seen Mr. Calder write anything at all. The question naturally arises whether she did see him append his signature to exhibit 1, or whether she recognised his signature, bearing in mind that according to her

she had earlier witnessed another document brought to her by Mr. Calder; although it is worthy of note that there is no evidence from her that on the previous occasion of witnessing the will of the "second Mrs. Calder," she did see the deceased sign a document.

Be that as it may, she was unable to say whether the attestation clause was on exhibit 1, when she signed it. According to her, when she went into the dining room, Mr. Calder was sitting at the table. He had a bit of paper folded. Mrs. Plinton explained that she did not mean by this that it was flatly folded. It was rolled with the bottom part showing.

She explained further what she meant; by first of all saying that the "Paper rolled with the attestation clause only showing when I signed, and that signature 'A.L. Calder' not shown." She was challenged by Mr. Carberry with the suggestion that, "You could not possibly have written your name if paper was so folded as to obscure name 'A.L. Calder'." She said it was on the table, and her demonstration of what she was seeking to convey resulted in her folding the paper so that the name "A. L. Calder" is the first writing shown above the attestation clause.

Under further cross-examination by Mr. Carberry, she said this, "When I first folded exhibit 1 this afternoon I was only showing how it was rolled, but not in such a way as to hide the signature, nor was I trying to say that I could not see it, but I did not see it. What I mean is I don't remember whether I saw it or not on 23rd May, 1970." What is significant is that she had earlier agreed that, "I did see the handwriting on the part exposed, but I did not read it ..... This as per. statement taken by Mr. McPherson. It is right that I saw handwriting but I did not read it. Could have been that handwriting was there but I did not read it. There was handwriting there, but I did not read it because I was hurrying to get outside."

It is important on this point to be reminded of two other matters from her evidence. Firstly, when she said she did not know the difference between folding and rolling I asked her to explain in her own words, how the paper was rolled. She said, "Paper rolled with attestation clause only showing when I signed, and that the signature 'A. L. Calder' not showing." It seems to me that this was an impossibility, bearing in mind the repeated demonstrations by Mrs. Plinton, on the last

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occasion of which the name "A. L. Calder" was plainly visible above the attestation clause. She said she had told Mr. McPherson in her statement (exhibit 4) that the document was folded, she "showed him just how the paper was situated." She then demonstrated this in court, firstly by flattening one end of her statement and then rolling the remainder until a small portion of this statement was left unrolled.

The second significant factor for the proper assessment of whether Mrs. Plinton knew she was signing a will is her recalling that all the recognised signatures on exhibit 1, were written with the same pen - Mr. Calder's. Speaking of that pen, she said this, "I do not remember if it was a ball point pen with a nib. I knew it was his pen. He had it in his hand. I did not see him take it out of his pocket. Do not remember the colour. I only remember it was in his hand. He handed me the pen." She is not sure if when she went in the room the deceased had the pen in his hand. He gave it to her. Following upon which Mr. Calder told her to sign and she did so.

I am satisfied that Mrs. Plinton, the first witness to exhibit 1, attested, having been informed by her husband that she would be witnessing a will for the deceased. I am satisfied that at that time the signature "A. L. Calder" was already on that document. I am able to come to this conclusion despite her saying that she did not see him sign, and notwithstanding her asseveration on her honour that she did not read the attestation clause on exhibit 1. The fact is that the signatures are so juxtaposed as to assist to this conclusion.

Indeed, Mrs. Plinton's evidence strongly supports this. "This signature 'A. L. Calder' is one line above mine. Not immediately above mine. 'Calder' part of the signature above Gwendolyn. Two lines above 'A. L. Calder' is 23rd. Ink of 23rd looks like same shade as ink of all signatures and addresses. That ink is different from the ink in which body of will is written."

Not only is there the formal signature of the deceased on exhibit 1, but the court must also take note of the fact that the attestation clause is in the deceased's handwriting, and he again wrote his name therein. I have it on the authority of Sir Herbert Jenner Fust in In the Goods of Woodington (1839) 2 Curt 324; 163 E.R. 427, that such a writing out by the testator is a signature complying with the Wills

In that case the will of the testator was concluded in the following manner; "Signed and sealed as for the will of me, Catherine Elizabeth Thicknesse Woodington, in the presence of us, Thomas Hughes, Elen Hughes," One of those witnesses swore that he believed that "the names of the deceased as there so written were intended by her as and for her signature to the will," which she acknowledged in the presence of them both. Sir Herbert Jenner Fust's remarks on this situation must be quoted:

> " The deceased by placing her name where it stands seems to have intended that it should answer the purpose of the description as well as of a signature, and such signature being at the foot or end of the will, and the will being written by the deceased, and acknowledged by her to be her will in the presence of the two subscribed witnesses, I think this is a sufficient acknowledgement of the signature of the will to satisfy the provisions of the statute. "

(See further English and Empire Dig. (Repl.) Vol. 48, pp. 113 - 144, Nos. 899 - 909.)

I am satisfied on the authority of In the Goods of Gunstan, Blake v. Blake (1882) L.R. 7 P.D. 102; [1881 - 85] All E.R. Rep. 870, that even if Mrs. Plinton did not see the signature of the deceased, she did have an opportunity of seeing his signature, on exhibit 1. A principle which was reiterated in Re Groffman [1969] 1 W.L.R. 733; [1969] 2 All E.R. 108.

A fortiori, when Mr. Plinton signed. He said that before he signed exhibit 1 he did not read the clause which is opposite to where he signed his name. Certainly, on his evidence when he was returning to the dining-room for the second time he met his wife coming out. She said to him, "I have signed already." This was in answer to his question, "What had happened?" He then went into the dining room, and Mr. Calder told him where to sign identifying the document in these words, "This is my will." He folded the paper and said to Mr. Plinton, "You sign here."

Mr. Plinton did not see the deceased sign his name to exhibit 1, but when he was asked by the deceased, "You see my signature?" he said, "Yes." The deceased then indicated, "Here's your wife's signature." Did he know that these signatures betokened? I dare say he would have had no difficulty in recognising either signature. So, looking at his evidence in a little more detail, it disclosed that Mr. Calder first told Mr. Plinton that it was his will which he wanted to be witnessed when he sat down at the table and when he asked him to sign it. He stated specifically, "When Mr. Calder went into room he sat down at the table.

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"First thing he did. It was then he told me it was his will he wanted witnessed." This witness said he did not form any view about the nature of the document which Mr. Calder asked him to sign, but from his experience he suspected that it may have been a will which the deceased wanted witnessed. His mental attitude was much firmer than a mere suspicion, because he later said, "When I went out of the room and left Mr. Calder and Mrs. Plinton there, I knew that she was going to witness the will." An impression which must have been formed from words used by the deceased at that early stage, and an impression which I am satisfied he conveyed to Mrs. Plinton when he called her. So that when she went in she already knew that she was going to witness the will of the deceased. Yet to Mr. Dayes he said this, "When I said I suspected it could have been a will, I mean I was not sure it was a will."

The later recollection of the witness that up to when he and Mr. Calder went into the dining room, and before the witness called his wife, Mr. Calder had not told him that it was a will which he wanted witnessed, and he did not know this until he went back in the second time, is discordant. The court elicited from him that when he went out he had intended to go back in to witness the document on which he later saw writing at the bottom. He knew that the document was written on one sheet of foolscap paper in handwriting. He added, "As far as I could see it was one sheet. It was rolled." When he went back in to sign and Mr. Calder identified his signature, the witness said the paper "was rolled up where my signature should be. I saw writing nowhere else." Before he signed he said that he was aware, it was a will he was witnessing "because he told me so before I signed."

A consideration of the foregoing remarks by Mr. Plinton indicates an ambiguity which to my mind has not been cleared up. Here is a man who speaks of his experience as a Justice of the Peace, and who certainly gives evidence regarding the known procedure followed on the signing of a previous will at the request of Archibald Lister Calder. This earlier document was witnessed by himself and his wife. On that occasion also Mr. Calder came alone, and "the same identical thing" as on the signing of exhibit 1, happened. And this, except that the first occasion was on a Wednesday."

On that occasion when Mr. Calder said he needed another witness to the document which he then identified as his will, Mr. Plinton called

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his wife. On that occasion, Mr. Plinton said, he did not see Mr. Calder sign. The latter showed his signature and said, "This is my signature." Both Mr. Plinton and his wife were present at this point of time. Mrs. Plinton signed first, and her husband signed next. The three of them were together at the signing. The nagging question is, if this procedure was followed on that occasion, would the deceased have deviated from doing what he must then have known was the correct procedure?

I have some difficulty in reconciling these words of Mr. Plinton, "The same way as I explained for signing of exhibit 1, happened on that occasion. The same identical thing. No difference whatever. Then the deceased sat at the same table, in the same chair as on the occasion of exhibit 1. Indeed, his description that, "In relation to the first will when I called my wife the three of us remained together at the signing," is not accordant with the identical procedure not having been followed in the circumstances of the exhibit with which I have to deal. When I look at the evidence of Mrs.Plinton relative to this first will, I note that she said, "I really can't remember whether the three of us were together on that occasion. I cannot remember any difference between both occasions of signing will, other than that it was not a busy day."

On the other hand, it is the evidence of the Plintons that nothing like that happened on the second occasion, so I am constrained to further examine the evidence of the attesting witnesses to ascertain whether exhibit 1 was or was not signed or acknowledged in the presence of them both present at the same time.

In dealing with the effect of the evidence of the plaintiffs, Mr. Dayes aptly summarised it as a contention asking the court to say that the transaction of executing exhibit 1, was so continuous that the court should say that the acknowledgment or signing were one; that there was no lapse of time, or if so, it was so small as to be insignificant. The argument for the plaintiffs being that, considering the proximity of the dining room and the shop, the fact that the connecting door at the time of the execution was opened, the fact that Calder's signature could be seen, and because he spoke to each of the witnesses, the Wills Act was satisfied even on the evidence of the Plintons.

Mr. Dayes maintained that the legal argument for the plaintiffs on the legal efficacy of the Plintons' evidence cannot stand against fact.

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It was Mr. Dayes' argument that Mr. Calder may have been a man of business, and he may have been careful in one sense, but in this case he was not so meticulous. This was with particular reference to the evidence that the testator had insisted to Mr. McPherson that he would prefer to write a corrected will in his own handwriting rather than have it typed. As already mentioned, the deceased made exhibit 2 in his own handwriting, although it was never executed. The deceased did make the small amendment by referring to dollars instead of pounds which he was advised to do by Mr. McPherson.

It would seem that experience had taught the testator to protect himself against a forged will. Archibald Lister Calder had been previously engaged in a probate action, Suit No. 255/67, brought to contest the will of his deceased second wife, Mrs. Winnifred Frances Calder. He was the executor of that will. A photostat of the probate thereof was put in evidence as exhibit 11 by Mr. Paul Levy, Attorney-at-Law, whose firm acted for the defence in that matter. Mr. Levy it was who settled the defence and counter claim in that case. The Writ of Summons, the statement of claim, together with the defence and counter claim were put in evidence together as exhibit 10. I have had the benefit of examining the photostat of the will of Winnifred Frances Calder, deceased, part of exhibit 11, and the names of the witnesses are not those of the Plintons. This will bears date the 1st day of September, 1966. This is the position also, with regard to exhibit 12, being a photostat of the last Will and Testament of Winnifred Frances Calder, which bears the date the 19th day of December, 1963. Thus, without any counter-vailing evidence, I have reservations that the Plintons were clear about their signing a document for the deceased, previous to the 23rd day of May, 1970.

It is clear to me, that Mr. Calder was a man who would be very cautious about how his own will should be made. I am confident that he recognised the procedure for the making thereof. I do not accept the implications of Mr. Dayes' argument which, if he were right, would mean that although the deceased wrote the attestation clause which declares that the will was "signed, published and declared as his last Will and Testament in the presence of us both being present at the same time who at his request in the presence

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"of each other have hereto subscribed our names as witnesses," he did not follow the course therein set out. From the characterisation of Archibald Lister Calder which I was given I really cannot accept that he did not know the importance of what he was doing. In his own hand-writing he stated the desideratum for a valid will, by which, to all intents and purposes, he wished to express his testamentary dispositions. I find therefore that the incident of the probate action ~~altered~~ alerted the mind of the deceased specifically to the need to meet the provisions of the Wills Act. And although the testator was not a lawyer, but a good man of business, I can relevantly apply the words of Fry L. J, in Wright v. Sanderson (1884) 9 P. D. 149 C.A. at p. 163:

> "The presumption of due execution is strengthened by the conduct of the testator which shows an anxious and intelligent desire to do everything regularly."

It is permissible in this context to repeat also the words of Sir Herbert Jenner Fust in Brenchley v. Still & Rockham & Lynn 2 Rob. Ecc. 162; 163 E.R. 1277 at p. 1279.

> "I think, however, considering the knowledge the deceased must have gained by the execution of 13 or 14 different testamentary papers, the presumption prima facie is, she would follow the example previously set by her professional adviser, and execute this testamentary instrument in the same manner as the other had been executed. It is certainly true that, notwithstanding a previous knowledge of the right mode of proceeding, we do find many instances in which with that knowledge the execution is irregular, and not in compliance with the Act of Parliament, yet it is quite clear that, as in this instance, where the attestation clause records the requisites of the act as complied with, it is to be presumed, unless the contrary be shown, that the execution took place in conformity with the law."

He stressed at page 1282:

> "The presumption is, in all cases when on the face of the instrument the name is signed in the proper place, and is attested by two witnesses, that all has been rightly done. True it is, those circumstances are not conclusive. The onus probandi is upon the person who sets up the instrument; but in a case where the testatrix had previously executed a multitude of testamentary papers with reference to a settlement, and had recourse to a professional gentleman to prepare the paper in question, who gave special directions as to the mode of execution, and we find the testatrix exceedingly careful in pointing out to the witnesses the spot where they must sign their names the presumption is very strong that the instrument was duly executed."

Before I embark upon a more detailed discussion of the evidence bearing on the issue of signing or acknowledgment, it will be profitable to describe the situation of the shop and the dining-room as it was

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given in evidence. This will be of some particular reference to the time when the deceased and the witnesses to Exhibit 1 were in the dining-room.

I have already stated that the dining-room, which measures 12 feet, is behind the shop, on the ground floor of an upstairs building. One goes from the public part of the shop after raising a flap in the counter, and after traversing an area of three or four feet before reaching the door of the dining-room, wherein there is a dining-table. Around this dining-table, there were four chairs, on one of which Mr. Calder sat, after he entered the dining-room with Mr. Plinton, who I repeat, said that the back of this chair was turned to the door, which was wide open at all material times.

According to Mr. Plinton the deceased sat at the head of the table, but Mrs. Plinton said he sat at the long side of the table. Presumably, because the connecting door was open one could stay in the shop and see into the dining-room, depending of course on where the viewer stood. As a matter of fact, Mrs. Plinton told me that, if she was at the counter in the shop, and in front of the doorway, she could look straight into the dining-room. This is borne out by the evidence of Mrs. Calder, Mrs. Plinton also said that the dining-table was not far from the door. This nearness is emphasized by her evidence that when her husband stood at the door and spoke to her "Mr. Calder was sitting near to him. It couldn't be far", - which seems to suggest also that at the time Mr. Plinton spoke to her, she could see clearly into the dining-room, and particularly, that she saw Mr. Calder.

Mrs. Plinton expressed the view that it would not be possible to hear anyone speaking in the dining-room, unless that person spoke loudly. This would be true even if the door were open. This assessment finds practical support in the evidence of Mr. Plinton that his wife could not have heard the testator say to him, "This is my signature", and "Sign here", unless the tone of voice was exceedingly high. "I think it would have been impossible for her to hear because of noise in shop", he said.

It is in this setting that he goes to the door and calls to his wife, thus conveying to her the wishes of the deceased. It is fair to

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assume that he was then between his wife and the deceased. It is not unreasonable to conclude further that when he spoke the deceased could have heard what Mr. Plinton said to his wife. This context of fact has been used variously by each party.

Was there any time at which the testator and the Plintons were together in the dining-room? Mrs. Plinton's answer was, "No period of time, however short". Asked about how long the whole incident lasted on the 23rd May, 1970, Mrs. Plinton was unable to say, but she thought that Mr. Calder left the premises after 10 - 15 minutes. At no time were the three of them all together in the room at one time. She was about three minutes in the same room with him. She estimated that her husband spent about five minutes after his return to the dining-room. Interestingly enough, she said that when she went into the room in response to her husband's call to sign something for Mr. Calder, her husband was in the room.

She saw Mr. Calder with a paper on the table in front of him. She was not able to agree with her husband's statement in Exhibit 3b that he had gone back into the dining room between five and ten minutes after serving the customers, and at that time "Mr. Calder, was then sitting on a chair at the dining table, my wife was standing up and on the table I saw a document written on one sheet of foolscap paper in hand-writing". She said she left at the same time as he was coming in. When she was going out her husband was coming in. There was no dialogue between them. She just said to him "I have just finished signing. He did not ask me anything. We did not have time to talk". Emphatically, she stated her certainty that at no time when she signed was her husband present. Nor was she present when he signed. She was equally certain that Mr. Calder did not sign the will in her presence, nor with both of them being there together. When Mr. Calder said "Sign here", her husband was not in the room.

Her husband said that he returned to the dining room. She went back into the shop while he entered the dining-room. Mr. Calder pointed out where he should sign. He did not see Mr. Calder sign. He was asked these questions by Mr. Alberga: "Q. On the second occasion before you went out was there a period of time when the three of you

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were together in the room? A. About three minutes. Q. There was a period of time on the second occasion when Mr. Calder, your wife and yourself were together before you went out? A. Not even three minutes. Q. And in that time did Mr. Calder sign? A. No Sir, I do not know of that. Q. Did you sign? A. I did not sign before, my wife signed first".

He however, admitted that before he signed he had seen .. Mr. Calder's signature. What is clearly remembered also is that before he signed he saw his wife's signature on exhibit 1. When he entered the room the deceased did not speak to him in the presence of Mrs. Plinton, who was standing up in the room by the table at which Mr. Calder was sitting with the document. "I saw the document while she was standing up by the table". When I attempted to go in to do the signing my wife was standing beside the table. Eventually, she passed me while I was going in." This evidence to my mind does indicate that at some time the three principals were in the dining-room together.

On the evidence of the Plintons the court has therefore to determine whether there was a signing or acknowledgment. Mr. Carberry submitted that on the balance of probabilities, and looking at the unsatisfactory state of the evidence given by the Plintons, and ignoring for this purpose the evidence of Mrs. Calder, there is sufficient evidence to find that Exhibit 1, was signed before the Plintons, on the afternoon of the 23rd of May, 1970. It was not signed after the witnesses signed, nor between their signing. The first of these negatives is borne out by the fact that when his turn came to sign, Mr. Plinton saw the signature already there, the testator immediately put back the document into the envelope.

Mr. Carberry further submitted that the second assumption of when the signature was made is unsubstantiated considering that Mr. Calder was never left alone at any time, being continuously with one or the other. This means that one or the other must have seen him sign, or was singularly unobservant. Either, says Mr. Carberry, they are lying, or they have had so serious a failure of recollection as to make them unreliable. The submission developed to the point of saying that all the evidence suggests that on the Plintons story, it was signed before them, probably as Mr. and Mrs. Plinton were in the room, with Mr. Plinton just having called his wife, and his wife just entering.

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But it must be recalled that in so far as Mrs. Plinton was concerned, although she saw Mr. Calder with a pen in his hand when she entered the dining-room, and she also saw paper on the dining table in front of him, she said it was not possible for him to have been writing his name as she entered the room. This, although she would not put it higher than maybe so or maybe not.

So that as far as I can deduce from the evidence I am not in a position to say that the testator signed exhibit 1 in the presence of the witnesses, they being present at the same time. I repeat my earlier conclusion that it is highly probable from the evidence that the signature "A.L. Calder" was already on that document before the Plintons signed.

I now enquire whether there was an acknowledgment by the testator in the presence of both witnesses present at the same time. On the facts of this case, and bearing in mind the authorities, Mr. Carberry submitted that the production of the document by Mr. Calder, with the request to Mr. Plinton to witness it, and to produce another witness, was an acknowledgment by conduct made to Mr. Plinton and that when the latter relayed this request to his wife in the adjoining room, and she entered in response to it, there had been at that stage, an acknowledgment of the signature made by the testator to both of them before either signed. The fact that there might have been subsequent acknowledgments to either does not matter.

There was an elaborate citation of cases apropos the point of whether there was an acknowledgment in the presence of both witnesses present at the same time. I was treated to an interestingly detailed and informative analysis and critique of the several cases cited. I was put in mind of cases on both sides of the line, the one where the signing or acknowledgment was not "in the presence of," the other where it was "in the presence of," the witnesses. Mr. Carberry pointed out that the phrase "in the presence of" has been interpreted more often than not on the facts where the question was whether the witnesses had attested in the presence of the testator, but he pointed out also that there are cases about "in the presence of" so far as the testator is concerned. However, these usually have the additional factor of the order in which the matter proceeded. But, he submitted, the phrase "in the presence of" in the Wills Act s. 6 (corresponding to s. 9 of the Wills Act 1837 (England has one consistent interpretation although it is used twice with

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reference to (a) the signing or acknowledgment of the testator in the presence of the witnesses both present at the same time and (b) the signing and attesting by the witnesses in the presence of the testator, Mr. Carberry therefore depended heavily on those cases which he compendiously labelled the "Open door cases," where the execution or signing of the will by the testator took place in one room, at the testator's death bed and out of motives of consideration or just convenience, the attestation was done in another room. The principle, he said, has been worked out that it does not have to be proved that the testator did see the attestation, but so long as he could have seen had he wished, and was generally aware of what was going on in the adjoining room, then there has been attestation in his presence.

According to the argument for the plaintiffs, so long as the testator has acknowledged his signature in a continuous transaction in which the witnesses have attested as his, a signature that was clearly there before they so attested, then it matters not whether they were told it was his will before, during, or immediately after they had attested. This means that even if the court accepted, without analysis, the effect which the defendants have sought to attach to the Plintons' evidence, then the court could find that one has here a will, in the handwriting of the testator, bearing his signature, and that that signature was put there before either party signed the will, and that, putting aside Mrs. Calder's evidence and accepting that they did not see him sign, there was an acknowledgment with attestation to satisfy the Wills Act.

I was further asked, that even if I should accept the Plintons' evidence at face value, I should nevertheless apply the res gestae principle: the principle that the events sworn to by the Plintons are part of one continuous transaction, and that it is unnecessarily pedantic to attempt by minute examination of a series of events (of which the witnesses themselves may have no very clear recollection, and no real reason for remembering one way or the other), to find an acknowledgment to both instantaneously before either had attested by signing.

The res gestae principle was applied by Sir Herbert Jenner Fust in Cooper v. Bockett (1843) 3 Curt 648; 163 E.R. 855, and was raised on evidence of the attesting witnesses who stated their belief that, at the time of their signing, there was a blank space where the signature of the deceased was seen at the rtial. The issue therefore was, was the will signed

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by the deceased after they had witnessed it? That learned judge, opined at page 859, that:

> " If it appears from the evidence of the witnesses and from the res gestae of the case, clear that the will was signed by the testator, after the witnesses attested, it is not a good execution of the will. "

But, at page 860, he said:

> " Now, where the res gestae do not confirm the impression of the witnesses the court must look at the circumstances of the case, as it is always at liberty to do. "

In Blake v. Knight (1843) 3 Curt, 547; 163 E.R. 821, at page 825, the same learned judge asked the following questions:

> " Is it absolutely necessary to have 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? "

His answer was:

> " I think these are not absolute requisites to the validity of a will; I think the court must take into its consideration all the circumstances of the case, and judge from them collectively whether there was not at least an acknowledgment 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 this is what has taken place here. "

He went on to explain what would constitute an acknowledgment, saying that the court:

> " must attend to the facts of the case ..... The deceased saying that the will was all in his handwriting, if the court is then satisfied that his signature was then written, would be sufficient as an acknowledgment of his signature; it is not necessary that a testator should actually have pointed out to the witness his name, and say 'that is my name or handwriting' if the court is satisfied that the signature of the testator was there at the time. "

It should further be noted that Sir Herbert Jenner Fust considered "the appearance of the paper as a material factor when put against a bare recollection of the two witnesses."

From the whole circumstances of the case he upheld the validity of the questioned document based on the finding that the witnesses were mistaken. In that case the witnesses were examined three or four years after the transaction. In Cooper v. Bockett they were examined within a few months after the particular attestation. In this case, the court notes that the attesting witnesses, were first asked questions about the will two years after the making of exhibit 1. But the evidence was taken nearly

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six years after the event. And I may add that Mr. Plinton said in evidence "I do not keep in mind all the documents which I have signed. I just forget about it." The first time that he thought about the execution of the will was when he went to Mr. Scholefield's office in December, 1972. But he did not quite remember when it was that he went there, and indeed, he said, "I think it was in the seventies I went to Mr. Scholefield's office." He explained the phrase, ""In the seventies" to mean "in the year 1970," which is patently wrong, and leads me to question further the reliability of this witness.

The case of Re Groffman (deceased). Groffman and Block v. Groffman, /1969/ 2 A.E.R. 108 was brought to my attention. There, Sir Jocelyn Simon, P., accepted the evidence of the two attesting witnesses regarding the execution. He accepted that the deceased, having previously signed his will, asked two friends to witness it on the occasion of a social visit to the house of one of them. After supper, the testator and one friend went to an adjoining room because of lack of space in the room where they previously were. The testator acknowledged his signature and the witness subscribed. This witness then having left the room, informed the other that he should go in to sign the will, encouraging him to be quick about it as the room wherein the signing was done was cold. When this second witness went in, the testator repeated the process as with the first witness who was then absent. Sir Jocelyn Simon, P., held that the presumption of due execution was rebutted, and the execution was defective. He followed certain previous decisions.

I do not agree with the complaint of Mr. Carberry that this is a disappointing case, because I think the facts in that case warranted the decision. The learned President rejected the argument of counsel for the executors that as the interval of time between the two witnesses was so small the matter should be regarded as one continuous transaction, and therefore, the principle of res gestae be applied. The rejection of this submission was made after a minute analysis of the evidence dealing with the process of execution. The court found that the acknowledgment had not been made to both witnesses at the same time although the testator had earlier mentioned his will in the dining-room. This could not be depended on because the testator had not then produced it. Let me quote from his judgment to show his reasoning. Firstly, at page 113 after dealing with the authorities, he said:

> " Daintree v. Butcher & Fasudo (1888) 13 P.D. 102; bears out what I have described from In the Goods of Gunston, (1882) 7 P.D. 102, namely, that, if there were to be an acknowledgment within the Act, the attesting witnesses must either see or be capable of seeing the signature of the testator. In the present case, neither of those conditions was satisfied at any time when the witnesses were together. "

Sir Jocelyn Simon, P., went on to deal with the argument of counsel for the executors that:

> " Originally there was a sufficient acknowledgment to satisfy the Act in what happened in the lounge, when admittedly both attesting witnesses were present ..... that what happened was all part of the res gestae - there was no break in the continuity of the transaction. Both attesting witnesses had an opportunity of seeing the signature at the time they signed the will, which was within a couple of seconds of each other and within a matter of seconds of being asked to witness it. On that argument the acknowledgment started in the lounge but ended in the dining-room. "

The learned judge described the limitations of the argument:

> " It seems to me that there is one total flaw in that argument, namely, that if the acknowledgment was not completed until the dining-room, then there was no complete acknowledgment in the presence of both attesting witnesses being present at the same time."

In my view, Re Groffman should not be applied to the instant case. For one thing, in this case there is a strong connecting link between the wishes of the deceased and the reactions of the witnesses. They were in very close proximity to each other, and it seems to me that the time frame within which the wishes of the deceased were conveyed to Mrs. Plinton by Mr. Plinton was not such as can be said to have existed in Re Groffman. To my mind, the res gestae were of such a nature and in such a time span that it can be said that there was an acknowledgment by the testator of his signature in the presence of both witnesses present at the same time.

Mr. Dayes submitted that it does not really follow from the finding of proximity, and, once there is in one sense continuity, that then there must be due execution and attestation. But, whereas the evidence in Re Groffman strongly indicates that the two attesting witnesses were not together with the testator, in the present case the result of the cross-examination is that I am not in a position to rely on the evidence of the Plintons who, inconsistently, at one time say that they were never together with the testator, and yet go on to state to the contrary. This is with regard to not only when Mrs. Plinton was called by Mr. Plinton, but also as regards after she had signed. Satisfied as I am from the evidence that she knew the nature of the document which she was signing, I have no doubt that in fact the circumstances were such as to lead me to the

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conclusion that there was an acknowledgment before them, both present at the same time.

Mr. Dayes argued that there cannot be two acknowledgments. Broken down, he disagreed with the plaintiff's argument that what took place between the deceased and Mr. Plinton before the latter called his wife was an acknowledgment to him. Mr. Dayes submitted that that acknowledgment would be invalid because it was not then made in the presence of both. So too, when Mr. Plinton said to Mrs. Plinton that there was a document for her to sign, that did not amount to a valid acknowledgment, for or by Mr. Calder. That is the only time at which it can be said that, according to the authorities, the Plintons were in the presence of each other and the testator. Whilst an acknowledgment can be made by someone on behalf of the testator, it cannot be made by an attesting witness who is saying something to a person who is not even in the same room. None of the cases cited, he said, suggest that you can acknowledge through an attesting witness, who does not even have the document in hand or is pointing to it, but someone who merely refers to a document to be signed.

Two cases may be cited as bearing on this point. They are Inglesant v. Inglesant (1872-1875) 3 P & D 172, and Daintree and Butcher v. Fasudo (1888) 13 P.D. 102. In the first, the court had to deal with the following facts: The deceased signed her will in the presence of one witness. She had sent for two witnesses. On the entry of the second witness, a person present directed him to sign his name under the testatrix's signature. He did so, and the second witness also subscribed the will. The deceased was in the room but said no word during the proceeding. The will was lying on the table open, and headed in large characters with the words "This is the last Will and Testament etc." It also had a full and formal attestation clause. It was held, that the deceased acknowledged her signature in the presence of the witnesses.

Sir J. Hannen at p. 175 said:

> " The authorities abound which shew that if the words used by Mrs. Lee had been spoken by testatrix, namely, an invitation to the witnesses to put their names under the signatures of the testatrix, that would have been an acknowledgment sufficient to render the execution valid. Therefore, the question is, whether the invitation given by Mrs. Lee in the presence of the testatrix was equivalent to an invitation by, and therefore an act of, Mrs. Inglesant herself. All the cases mentioned, with one exception, are subject to this observation - in each some word or act of the testator himself was used. But this does not apply to Faulds v. Jackson, "

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which case the learned judge held was, "as nearly as can be parallel with the present."

Continuing at pp. 176 - 177, Sir J. Hannen said:

> " As the evidence stands, I must adopt the view that the words were heard by the testatrix. Mrs. Greaves had just before been conversing with her and no question has been put to any witness to raise a doubt that the testatrix did hear the words used by Mrs. Lee. Moreover, the execution was undoubtedly in furtherance of the wishes expressed by the testatrix when she sent for the witnesses. "

The facts of Faulds v. Jackson (1845) 6 Notes of Cases Suppl. 12, P.C.: E. and E. Dig. Vol. 48 (Repl.) pp. 120, 977, referred to by Sir J. Hannen, were as follows: Testator having written his will, produced it, with his signature attached to A.B., who subscribed it, and then, by desire of the testator, called into the room C.D. from whom the testator wished to conceal the fact that it was his will, and said to him, Mr. J., testator, "wants you to sign this paper," whereupon C.D. subscribed it, testator, who said nothing whilst C.D. was in the room, placing his arm at the time lengthwise over the paper. It was held that both witnesses having seen the testator's signature, there had been by act, a sufficient acknowledgment.

In Daintree v. Butcher and Fasudo the testatrix exhibited a codicil to her last will which was entirely in her own handwriting, to one of the witnesses, telling her she had something which required two witnesses. Subsequently, the second attesting witness, having come into the room, was asked, either by the testatrix or by the other attesting witness in her presence, to sign it. They both signed, but the testatrix did not tell them it was a testamentary paper, nor did they know what sort of paper it was that they attested. They did not recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed.

The judgment of Cotton, L.J., at pp. 102-103 in part reads thus:

> " In this case it is not disputed that the signature of the testatrix is upon the codicil in question, and it is not disputed that it was written there before the witness came into the room. The two witnesses in the presence of the testatrix, signed their names below her signature, which was so placed that they could have seen it. The evidence of the attesting witness, Miss Whymper, shows that she was asked to sign as a witness. It is said that she was only asked to sign before she came into the room, and this was not a request by the testatrix amounting to acknowledgment of some signature ..... Cross-examination ought to have been directed to it ..... and as the evidence stands, though it is not as clear as it might have been wished, I think it must be taken that the other

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> " attesting witness, Miss Hepburn, after Miss Whymper had come in, and in the presence of the testatrix, asked her to sign as a witness. Now it is admitted that it is not necessary for the testator to say 'this is my signature,' but if it is placed so that the witnesses can see it, and what takes place involves an acknowledgment by the testator that the signature is his, that is enough. In my opinion, when the paper bearing the signature of the testatrix was put before two persons who were asked by her or in her presence to sign as witnesses, that was an acknowledgment of the signature by her. The signature being so placed, that they could see it, whether they actually did see it or not, she was in fact asking them to attest that signature, as hers ..... No doubt if they cannot see the signature, the mere calling on them to sign as witnesses is not enough. But here there was a signature on the paper which they could have seen and which the testatrix would suppose they did see. "

Cotton, L.J., was thereby echoing the views of the Court of Appeal in In the Goods of Gunston, Blake v. Blake which thereby standardised the criterion for acknowledgment, requiring something more than what was stated by Tindal, C.J., in the case of White v. The Trustees of the British Museum (1829) 6 Bing 310; 130 E.R. 1299, at page 1303 to constitute an acknowledgment:

> " When, therefore, we find the testator knew this instrument to be his will, that he produced it to the three witnesses and asked them to sign the same, that he intended them to sign as witnesses; that they subscribed their names in his presence; and returned the same identical instrument to him; we think the testator did acknowledge in fact though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute (of frauds) if the case were res integra, yet as the law is now fully settled that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his hand-writing is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever or means of knowledge, either of the nature of the instrument, or the object of the signing we think that the facts of the present case place the testator and witnesses in the same situation as they stood where such oral acknowledgment of signature has been made. "

It will be observed that these comments were made in the light of facts that of the three witnesses who signed the holograph will, one was told what the document was. The other two were not so informed. They did not see the testator's signature. The learned Chief Justice essayed the query that although there was no acknowledgment by words, yet if there was an acknowledgment in fact the court must find whether, from what the devisor had done, "he must in common understanding, and reasonable construction, be taken to have acknowledged the instrument to be his will." If so the attestation of the will must be considered complete.

The fact of "acknowledgment" is a concomitant to the factor of

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"in the presence of." The case of Brown v. Skirrow [1902] P. 3 was much canvassed to show what is meant when the Wills Act speaks of the testator's signing or acknowledgment in the presence of both witnesses present at the same time. The facts were that the testatrix went to a shop to have her will witnessed. In that shop was the shopkeeper and her assistant. The testatrix had her will attested by one witness, who saw her sign. It was in evidence that while the testatrix was standing at the counter with that witness she had her back to the other witness, who was then engaged in doing business with a commercial traveller. Presumably, nothing was said to him, or in the presence, before the testatrix went up to him after the first witness had signed. The second witness then signed the will.

I quote from the comments of Gorrell Barnes, J., on those facts.

> " It is urged that even if he was conscious that the testatrix was there he had not seen anything of the transaction at the other counter; he says so himself. In fact he did not know, and had no opportunity of knowing, what was going on there. The witness, Miss Jeffry, having completed her signature marched around the shop and asked Mr. Reid to come from his counter and go to where the testatrix still was, the first witness taking up the position which Mr. Reid had vacated. Mr. Reid accordingly went around, and the testatrix said to him 'This is my will' Mr. Reid then signed his name to the document. The question for me to decide is whether that was a good execution and attestation. It is not suggested that it was a good acknowledgment in the presence of the two witnesses, because at the moment when she said to Mr. Reid 'this is my will' the first witness, Miss Jeffry, had already signed her name; and according to the decided cases, the acknowledgment must be made in the presence of the two witnesses, who must afterwards attest it; see especially Wyatt v. Berry [1893] P. 5. Mr. Priestly contends that it was a good execution, but I fail to see how the testatrix's signature can be said to have been affixed to the document in the presence of Mr. Reid, when although he was in the shop, he had no idea and saw nothing of what was going on at the time and, moreover, had no opportunity of seeing, there being as I have said, another person in the shop between him and testatrix. "

I have made this lengthy quotation, in deference to Mr. Dayes's submission that it is not possible to distinguish the facts of Brown v. Skirrow from those of this case. He said the fact that Mr. and Mrs. Plinton would know does not distinguish this case. Mrs. Plinton did not know that she was signing a will. I have already said that from the evidence given by the Plintons I can reasonably infer that she had an opportunity of seeing the deceased's signature on exhibit 1, even if she did not actually see it. Furthermore, I am satisfied that on the balance of probabilities, Mrs. Plinton knew the nature of that document when she signed.

Mr. Dayes strongly urged that it cannot be said that Mr. Plinton was making an acknowledgment for Mr. Calder. And it was argued by him that

when Gorrell Barnes, J., said that the witness to the will "had no opportunity of knowing" he did not mean that if you are near enough so that you could see. Gorrell Barnes, J., must not be interpreted as saying that if by chance the witness had moved he could have seen. With respect, it seems to me that, put as badly as that Mr. Dayes would be correct. But surely one would have to take into account when the witness became aware of the testator's signature viz-a-viz the signing or acknowledgment.

He went on to say that when one looks at the authorities one does not find a constructive acknowledgment heaped upon a constructive presence. In all cases of acknowledgment, at the time of acknowledgment the document was plainly visible, and identified to all material parties, namely, the testator and the relevant number of attesting witnesses according to the year of judgment. He did not see from the cases cited that the acknowledgment which plaintiffs are asking the court to find had been established. There was no acknowledgment in the presence of the attesting witnesses in this case. The fact that Mr. Plinton spoke to Mrs. Plinton in the doorway leading to the dining-room, and while Mr. Calder was there is not enough. He contended that there was no certainty of evidence that Mr. Calder could have heard, no evidence which shows that at the time of acknowledgment there was a document visible to Mrs. Plinton to whom the constructive acknowledgment had been made. No evidence of the visibility of the testator had he chosen to look, and he emphasized that "in the presence of" does not mean "in the hearing of."

My comment on the foregoing arguments is that there was no cross-examination to those points. In addition, I emphasize, "in the sequence of facts," Mr. Plinton said that his calling to Mrs. Plinton came after the deceased had gone into the dining-room, and as he sat at the dining table he released the document from the envelope. I am confident that it can reasonably be inferred also that at that time, from her vantage point in the shop she could have seen this document on the table, at the same place where she said she saw the testator seated. Taken together these two pieces of evidence considerably weaken the substance of Mr. Dayes's argument.

Here, let me emphasize the striking feature of the facts of Brown v. Skirrow using the words of Langton, J., in Neal v. Denston, 147 LT. 460. He said, the witnesses:

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> " were there certainly in the same building at the same time, but there was definite evidence that neither was addressing his mind at all to the question of the signing of the will at the time when the other was signing ..... That case is frequently cited, and rightly so, as authority for saying that the two witnesses must be in each other's visual presence at the time when the will is signed, and more than that must have their minds addressed, to the matter together. Hence the form in which the attestation clause reads: 'In the presence of each other we have subscribed our names as witnesses.' "

Mr. Carberry, I note, submitted that one of the interesting things about this case, unlike Brown v. Skirrow, is that here the attesting witnesses both signed after acknowledgments had been made to each of them. He adverted to the sequence of facts which I have just recalled. There is, he said, a clear point of distinction between this case and Brown v. Skirrow. In that case witness No. 1 had attested before witness No. 2 knew at all what was happening. In the present case, witness No. 2. knew from the start what was happening. If he continued, the testatrix in Brown v. Skirrow had gone to witness No. 2 and if he had said to her "Yes I will do it for you, but not now. Let witness No. 1 start first," there would have been a situation in which both witnesses would have been aware of what was happening, because there would have been an acknowledgment in the presence of both/either before had subscribed his name. In my view, however, this must be subject to the observation that the validity of the acknowledgment would depend on whether, in the supposition above, witness No. 1 could have heard what witness No. 2 said to the testator.

Mr. Carberry went on to argue that there can never be an instantaneous perception by both witnesses. In the nature of things, one witness will always hear first or see first, and what counts is that both must have seen and heard before either signs. This must be interpreted reasonably. So long as both witnesses have had the opportunity of seeing and hearing, the attestation must be done in a reasonable time frame and viewed in a reasonable way. These arguments as propounded show that legally the acknowledgment was "in the presence of."

I take cognizance of two Irish cases which Mr. Carberry suggested for my consideration. The first is O'Meagher v. O'Meagher (1883) II L.R. (Ireland) 117. The head note reads:

> " The legal presumption is in favour of a will with a perfect attestation clause, and to rebut it, the court requires the strongest evidence. Therefore, where a solicitor drew his will himself with a perfect attestation clause, which appeared attested by two persons of humble rank, and on the will being propounded after the lapse of seven years, and a-half from its date, one of the attesting witnesses swore,

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> " but not very positively, that the testator signed his name to the will before the witnesses, while the other witness swore that at the time he signed the will the testator's name was not signed to it, the court, not relying on the memory of the latter, acted on the presumption in favour of due execution of the will, and declared it will proved."

The learned judge made the finding that the witnesses signed the paper knowing that it was the will of the deceased from the statements of the deceased, and the learned judge, Warren, J., went on to hold that, on his view of the facts there was at least a good acknowledgment, within the rule in Blake v. Blake. He said:

> " The case then resolves itself into the narrow point - and the onus lies on the defendant - is there sufficient evidence to establish that this solicitor, the testator, did not sign before Rafter signed, but that on the contrary against what was right, against what he knew to be right, against the terms of the attestation clause - he reserved the signature which the witnesses were called on to attest until one of them at least had gone through the mockery of attesting a signature which at the time of attestation did not exist? "

After closer examination of the evidence, seeking to show not only that the deceased did not sign in the presence of the witnesses, but that his signature was not on the paper at all when the witness signed, Warren, J., at p. 121, said:

> " If this evidence is true, it is necessarily fatal to the validity of the will. But observe, this is the alleged recollection after an interval of nearly eight years of a negative fact relating to a matter in which the witness had no personal interest, the importance of which was wholly unknown to him, and the witness professes to think the will might have been the will of some client - in a hurried interval - he said he was in a hurry - during which his task of sowing peas in the garden of the deceased was interrupted. There are very few men in any class of life who would or could recollect such a negative fact under such circumstances. I disclaim the notion of imputing to Rafter intentional misrepresentation. But many men do not accurately observe facts, forget facts and then by imagination supply defects of observation and memory, and confound their fancies with their recollections. "

To this, I will add the apposite words of Sir. J. P. Wilde in Vinnecumbe v. Butler 3 Sw and Tr. 580; 164 E.R. 1401 at page 1402:

> " The requirements of the statute are very precise and when the court has to deal with witnesses who are not lawyers and men of business or persons who from their position in life have acquired the habit of jotting down in their minds the precise order of events, it should be very cautious indeed in pronouncing against a will where the signature of the testator is amply proved, and it is also proved that the persons who put their names as witnesses went for the express purpose of signing the paper as a will. "

The testator in Mulhall and Another v. Mulhall and others (1936) The Irish Reports page 712, desiring to execute a will which he had already written out in his own hand, brought one of the witnesses into a room in

testator's dwelling house and there executed the will in that witness's presence. The second witness was then sitting in a position in an adjoining room from which he could have seen the will being signed by the testator through the doorway between the two rooms, the door being open at the time. After the testator had executed the will it was signed by the first witness in the presence of the testator in the room in which the witness and the testator were. The will was then brought by the testator into the adjoining room and was there signed by the second witness in the presence of the testator and the first witness. Held, that the will was duly executed.

It should be mentioned that the witness who was in the kitchen was at a distance of not more than three or four feet from the deceased. The other witness told McQuire, J., that he was "unable to state whether the first mentioned witness was actually looking at the deceased and witness signing the will, as witness was paying attention to what deceased was doing, but stated that, if Patrick Mulhall was looking at witness and deceased, he could have seen everything that was going on."

It was Willmer, J., in Re Chalcraft, v. Giles (1948) 1 A.E.R. 700 who adverted to the view of Sir J. P. Wilde in In the Goods of Killick (1964) 3 Sw and Tr 578, 164 E.R. 1399, that great latitude ought to be given to the meaning of the word "presence" used in section 9 of the Wills Act, 1837. Willmer, J., himself was disposed to show "some latitude in the interpretation of what is meant by in the presence of witnesses." The court said, Willmer, J., should allow this latitude with regard to the attestation of witnesses when it has been satisfied that the document was properly signed by the deceased and was intended to be of a testamentary character.

I will quote what I regard as the following pertinent remarks made by Sir J. P. Wilde in In the Goods of Killick:

> " Great latitude ought to be given to the meaning of the word 'presence' used in the 9th section of the Wills Act, and I am not disposed to draw a fine distinction between one room and two rooms opening into one another; but I think such an act as this cannot be said to be done by one person in the presence of another, unless at the time each is aware of the other's presence. That was not the case here. Apparently, the deceased knew nothing about the witnesses being in the other room. "

The facts in In the Goods of Killick were that a codicil was signed by the deceased, who was ill in bed in one room, and attested by two witnesses in an opposite room, but who did not see deceased make or acknowledge her signature, or have any conversation with her regarding it. Deceased, the

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doors of both rooms being open, might by raising herself in bed have seen the witnesses sign; but there was no evidence that she did so. It was held that the execution was bad, on the ground that deceased did not make or acknowledge her signature in the presence of the witnesses, and that they did not attest in her presence. Interestingly, In the Goods of Jane Piercy (1845) 1 Rob. Ecc. 778, 163 E.R. 1038, Sir Herbert Jenner Fust granted probate on the positive evidence by two witnesses that the testatrix could, had she had her sight have seen from her bed. The witnesses subscribe she was totally blind and very ill in bed, but was in full possession of her faculties. The will had been prepared under her directions, and was read over to her. In the presence of the attesting witnesses, she signed her name in bed, one of the witnesses having placed her hand on that part of the paper where it was necessary for her to sign. Thereafter, the witnesses went to an immediately adjoining room on the same floor, across a landing or passage, and there within view of the bed-room the doors of both rooms being open, signed their names.

But while it is possible for a blind testator to have executed a valid will, no will can be said to have been signed "in the presence of" a blind person within the meaning of the Wills Act (1837). Pearce, J. in Re Gibson (deceased) [1949] 2 A.E.R. 90, held further that such a blind person cannot be a witness for the purposes of that section.

The cases which were brought to my attention, and which were each considered by me, show variations of facts. Notwithstanding, the guiding principles which I have culled by the extracts from the several quoted judgments, indicate the outcome of my consideration of the evidence in this case. In so far as the evidence of the attesting witnesses is concerned, I must repeat that I find them to be witnesses upon whose account I could not place any reliance.

The evidence in this case shows that the Plintons were purportedly busy on the occasion when they each attested exhibit 1 in the presence of the testator. They were particularly anxious, on their account, not to let the business of the day pass by. This is a factor which has to be given, and I have given it, much consideration in evaluating their evidence. Satisfied as I am that exhibit 1 being in the handwriting of the deceased, expresses the wishes of the deceased, and that it bears a proper attestation clause, the genuine signatures of the deceased, and the witnesses, I conclude from their evidence that it has not been proven to me that the

execution of exhibit 1 was defective. I am satisfied from that evidence that the presumption of due execution can be applied, despite the attempt to show that the statutory requirements of the Wills Act have not been complied with.

The decision on the requisite formalities for the execution of a will have mostly been concerned with the role of the attesting witnesses. The courts have concentrated on their account of what happened then. The attesting witnesses' evidence is neither exclusive nor conclusive. The courts have from time to time applied the doctrine of the presumption of due execution and as in this case, have from time to time found the will duly executed despite the evidence of the attesting witnesses. Because the evidence of the attesting witnesses is not conclusive, it has been held that evidence may be called to show that they were in error: Vere-Wardle deceased Vere-Wardle v. Johnson and others [1949] P. 395. It is noteworthy that in Young v. Richards (1839) 2 Curt 371; 163 E.R. 443 Sir Herbert Jenner allowed such a witness to be called; a step which was taken in an undefended probate action; McKay v. Rawlinson [1919] 35 T.L.R. ~~357 L.R.~~ 233. There the court allowed the execution of the will to be proved by a person who was present thereat but who was not a witness.

As I stated earlier in this judgment the second plaintiff was called to rebut the evidence of the attesting witnesses. In my view the unreliability of their evidence is such that I need not give any great consideration to her evidence, setting it in argumentative contrast to the other evidence in the case. Suffice it to say that her account is a straightforward one, which, in my view, was not successfully shaken by cross-examination so far as the essentials of her story are concerned.

Therefore, in all the circumstances, I pronounce for the validity of the will, dated the 23rd day of May, 1970, of Archibald Lister Calder, deceased.

Costs of the parties are to be paid out of the estate.
