December 1932

The True Function of the Attestation Clause in a Will

Roger L. Severns

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol11/iss1/3
THE TRUE FUNCTION OF THE ATTESTATION CLAUSE IN A WILL

ROGER L. SEVERN’S

A DECISION of the Supreme Court of the State of Illinois in 1926 aroused considerable interest because of the rather unusual circumstances of the case and also because the decision is susceptible of a construction which apparently overturns what has been considered to be the settled law of this state for many years. The case involved a will—one of several spurious wills—claimed to be that of Edward B. Jennings, eccentric millionaire of Chicago. Upon proceedings for probate of the will, one of the attesting witnesses testified that the will was executed in the presence of himself and a stranger whom he did not know. This witness identified his own signature to the attestation clause and also swore that the writing, “J. M. Gordon,” beneath his own, was that placed there by the stranger. No one could be found who was familiar with the handwriting of the stranger and no witness could be produced who knew “J. M. Gordon.”

The case reached the Supreme Court on appeal and the court decided that the will was not entitled to probate. The decision was unquestionably correct, but the reasons given in the opinion were perhaps unfortunate. Apparently the court placed its decision upon the ground that two witnesses were not produced who proved the execution of the will. It has been repeatedly held in this and many other jurisdictions that it is not necessary to produce attesting witnesses if they are dead or absent from the jurisdiction. Perhaps the court might better have placed its decision upon the ground that the will was not proved to have been attested by two witnesses as required by the statute. The name “J. M. Gordon” signed to the will was a mere name. It was not proved that the signature

1 Associate Professor of Law at Chicago-Kent College of Law.
2 Hill v. Chicago Title and Trust Company, 322 Ill. 42.
was that of the stranger, nor that the stranger was "J. M. Gordon."

A consideration of the development of any of the principles of our modern law of evidence is as interesting and instructive as it is essential to an understanding of the application of those principles to the problem of proof. To understand and apply, we must trace an idea or a principle through obscurity to the roots from which it sprung. It is sometimes true that the continuity of development which we endeavor to find is lost—or nearly lost—in the darkness of customary law of which no written records have remained. Yet there is often a discernible trail, however indistinct, which we may follow far enough to ascertain the probable origin of our modern principle.

Presumptions of fact have existed in the common law since very early times. Many of these have withstood the changes in the law, and some have found recognition in our day through statutory enactment. Others, equally vigorous, have become so generally accepted as part of the law that they exist today without declaratory legislation. However, an inquiry into the nature and basis of any presumption necessarily must be conducted in relation to the statutory law which may have limited, modified, or even broadened its modern application.

Decisions in the courts of many states during the last twenty years have enunciated a presumption which has had an interesting development. This presumption has become so firmly established that its existence and correctness perhaps are no longer controversial questions. However, in applying the presumption to certain sets of circumstances, there has been a curious failure on the part of most courts to appreciate the nature of the evidence which gives rise to the presumption.

It has been held in many jurisdictions that where the attesting witnesses to a will are dead or absent from the jurisdiction a presumption arises from proof of their

---

3 For a discussion of this case see comment by John H. Wigmore in 26 Illinois Law Review 572.
handwriting that the will was duly executed. It is our purpose to discuss this presumption and to trace, if possible, its origin and development. It is natural to expect, in the case of a will which includes an attestation clause reciting the facts essential to due execution of the instrument, that the presumption will take on a new aspect, and our inquiry to some extent will be addressed to this feature.

It is obvious at the outset that this presumption did not arise fully developed with the passing of statutes prescribing formalities to be observed in the execution of wills. We expect to find its roots in some older principle of law or procedure which developed as part of our common law. In order to form some conclusion as to the nature of the presumption, it is necessary to consider the function of the attesting witness and the development of the use of documents in our law. It is well to remember that the operation of the presumption is limited to those cases in which the attesting witnesses cannot be produced. True enough, what the courts choose to call a presumption may operate where the witnesses do not remember the facts or where their testimony is conflicting, but this is merely a further extension of the doctrine under consideration.

The beginnings of the rule that such witnesses must be produced lie far back in the realm of the customary law of the Germanic tribes. The attesting witness belongs to that class of transaction or business witnesses found in the law among the early Germans. It is to be remembered that the Germanic law was a law characterized by rigid formality of transaction. If acts were to have legal effect, just the right words had to be said and the exact ceremony observed. Sales were consummated in public according to a prescribed form before witnesses who swore to the fact of the transfer. The right to hold and enjoy land—we cannot speak of titles at this stage—was transferred by the formal act of symbolic delivery of the

land before witnesses. Accompanying this emphasis upon the formal transaction was the strict adherence to the rule that the sale or the transfer of land could be proved only by the transaction witnesses. The reason for this rule was the fact that such witnesses were the only ones who could be compelled to come before a court. By consenting to act as witnesses to transactions, they were considered as assenting in advance to a compulsory summons. No witness, regardless of his knowledge, could be called to prove a transaction except those pre-appointed at the time of the transaction itself. It seems reasonable, therefore, that when such witnesses at a later time allowed their names to be written into documents and thus became attesting witnesses, they did so with the idea of assenting to a summons if it became necessary to prove the document.

We may be sure that when these transaction witnesses were summoned to give testimony, it was the transaction or act that was proved by them and not the document. Documents, using the term in the sense of a formal or solemn instrument, have a significance for us much different from that which they had for the Germanic tribesman in the days of the invasion.  

It seems indisputable that the document when first encountered by the early Germans, who found it in use among the Romans, was regarded with suspicion and distrust. Writing was an art almost unknown to them, and although the document was adopted and used by them, it was early given a different significance from that which was attached to it by the educated Romans.

As has been mentioned before, the law of the Germanic tribes was a law of formal symbolic oral transactions in

---


Much of what is here said in relation to the history of documents and documentary evidence must be credited to Professor Wigmore, who has painstakingly compared the authorities and whose researches form a splendid contribution to the history of the law.
which were used such symbols as the knife, the glove, the wand, the broken twig, and the piece of sod.\textsuperscript{6} Two men would go upon land, and one would formally and with prescribed words cut with the knife a piece of sod which he would deliver to the other. He might deliver the knife also, or he might bend it to distinguish it from all other knives and keep it himself. Later, when documents formed a part of the ceremony, the knife was sometimes attached to the document. This symbolic transfer became livery of seisin. With this emphasis upon delivery and this careful attention to form, it is natural to expect that when the Germanic tribesman made use of the document or "carta", he attached to it a symbolic significance. It meant to him what the knife or the glove meant. Its character as a written instrument was not recognized by those who did not write.

Two facts must have appealed to the early Germanic tribesman after he regarded writing with a little less distrust; and a recognition of these facts would certainly accelerate the adoption of the document. First, the document provided a method by which formal symbolic delivery of the land could be made away from the land itself. Second, the document provided a means of preserving the names of the transaction witnesses. It seems true that at this period the probative value of the document lay only in the witnesses to it,\textsuperscript{7} for if the terms of the document were disputed, they could be proved only by the transaction witnesses.

It is probable that by a slow process, accompanied by the spread of the art of writing in England, the document came to occupy a somewhat different relation to the transaction in which it was used. We have seen that in the early stages its significance was that of a symbol, and its probative force lay in its record of the names of the transaction witnesses. But as men became more familiar


\textsuperscript{7} Wigmore, Vol. V, sec. 2429, p. 293.
with writing, the terms of the document gradually attained some significance, and the document itself became evidence of the transaction. Its terms were still disputable by the testimony of the witnesses. And men were still quoting the amusing couplet mentioned by Professor Wigmore in a quotation from Fickler:

"On parchment scribes may place with ease
Exactly what their own minds please."

It seems safe to say that the seal provided the means of accomplishing a change in the character of the document as evidence. It not only provided the means for authenticating a document but was also the instrumentality which later rendered documents indisputable as to terms. It was long after the seal became common however, that the document as a formal instrument became in terms indisputable.

The tool for shaping the new doctrine had now been supplied; and it remained to develop and extend the doctrine. Here it must be remembered that in Anglo-Norman times people are still, on the whole, unfamiliar with writing, and the chief varieties of transaction—namely, those affecting land—are still practiced with oral forms; the essential, working conception is the livery of seisin, not the charter. Whatever virtue there is in the writing is testimonial only. It furnishes one sort of proof; but it is not a necessary kind of proof, and the main thing is something done apart from the writing. "This indenture" merely "witnesseth"; and the now time-worn phrase was once the actual conception.

With the vogue of the seal the transaction witness was no longer essential to the progress of the case. Beginning with the use of the seal by the king on state documents, such documents became indisputable, since no one may give the lie to the king. Over a course of years the

9 The use of the seal had become general by the thirteenth century, according to Professor Wigmore.
use of the seal became general and proof of the terms of the document by the transaction witness waned. Men looked to the seal of their adversary to establish the document. From being merely evidence of the act—"this indenture witnesheth"—the document became the act itself. From the case of Rye v. Humby,\textsuperscript{11} cited by Professor Wigmore, we know that in 1314 the terms of a deed were still disputable where livery of seisin was accompanied by an oral condition. But, the rule that documents relating to realty are indisputable by parol evidence was well established by the sixteen hundreds.\textsuperscript{12}

What effect did this change in the conception of the document have upon the manner and mode of proof? In the procedure followed among the Germanic tribes, the transaction witnesses were once summoned with, and as part of, the jury.\textsuperscript{13} This practice seems to have continued down to as late as the fourteenth century, when it began to disappear.\textsuperscript{14}

We have before noted that when the use of the seal began to render documents indisputable, the necessity for the testimony or oaths of the transaction witnesses was no longer felt, since the terms of the document were established by the document itself. With this change, we might expect to find the names of witnesses no longer attached to documents. However, this was not the case, for the problem of proving the execution of the document still remained. The attesting or transaction witnesses were still retained to attest the fact of execution.

It is at this point, then, that we may expect to find the beginnings of our presumption. Witnesses are now signing their names to documents themselves. Instead of a mere record or memo of the names of the witnesses, so much of the document as relates to the witnesses becomes a record of an act done by them.

\textsuperscript{11} Selden Society (Year Books of 8 Edward II), Vol. XXXVII, pp. 36-51.
\textsuperscript{13} Thayer, p. 97.
\textsuperscript{14} Thayer, pp. 101-2.
It seems logical to assume that at the time when witnesses to documents became attesting witnesses—that is to say, at the time they ceased to be transaction witnesses and became witnesses only to the execution, the rule that such witnesses must be produced continued as an outgrowth of the earlier rule that the transaction witnesses must testify.\textsuperscript{15} At least in modified form, this rule has continued down to the present day. Under modern statutes it is limited in application to those documents required by law to be attested.\textsuperscript{16}

The necessity of producing the transaction witness was absolute, and it is possible that this may have been the rule at first with respect to attesting witnesses where execution was in issue. But we begin to find, in cases decided in the seventeenth and early eighteenth centuries, statements that such witnesses were unavailable.\textsuperscript{17} At this point the presumption of execution is taking form.

Since we are concerned particularly with the operation of the presumption in the law of wills, it is necessary to consider how a presumption of due execution of a will may arise. The Statute of Frauds, passed by Parliament in 1676, set forth certain formalities to be observed in the execution of wills.\textsuperscript{18} By this statute it was provided that all devises of land must be in writing and signed by the person devising, or by some other person in his presence and by his express directions, and must be attested and subscribed in the presence of the testator by three or four credible witnesses.

In order to ascertain the basis of the evidence giving rise to the presumption under consideration, we must consider separately those cases in which there was an attestation clause and those in which there was a lack of such a clause.

\textsuperscript{15} Wigmore, Vol. II, sec. 1287, p. 938.
\textsuperscript{16} Cf. Cahill's Ill. Rev. St. (1931), Ch. 51, sec. 49.
\textsuperscript{17} Henley v. Philips, (1740) 2 Atk. 48; Ludlam on the demise of Hunt, (1774) Lofft 362.
\textsuperscript{18} 29 Car. II, c. 3.
In 1694, Lord Holt decided the statute was satisfied in the case of Dayrell v. Glasscock in spite of the fact that one of but three witnesses—the minimum number required—would not swear he had seen the testator seal and publish the will, where that witness' handwriting and act of signing were proved. It does not appear whether there was an attestation clause to this will. A case decided some two hundred years later gives us a good example of the operation of the presumption in England, and it is enlightening as to what the court considers the basis of the presumption.

In the latter case both attesting witnesses were dead, there was no attestation clause, and the handwriting of only one of the witnesses was proved. A quotation from the opinion seems necessary:

Jeune, P. There is no authority governing this case. Two things may be laid down as general principles. The first is, that the Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes; and, secondly, the Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled. Those are principles which I can act upon, although I am conscious that in this case, where there is no attestation clause at all, I am going to the furthest limit.

I find that the document before me was signed by the testatrix, and that there are upon it the signatures of two persons who are both dead, and one of whom, at any rate, was a person who was not unlikely to be a witness to a document for the deceased, and the signature of the other of whom is proved. With these facts found, I look at the document, and, irregular and informal as it is, I am justified in holding that the testatrix did intend it for her will. It was signed by her and by two other persons, and, although there is nothing on the face of the will to shew it, I hold, on the principle Omnia praesum-

19 Skinner 413.

20 In the Goods of Frances Peverett, L. R. [1902], P. 205.
untur rite esse acta, that it was signed first by the testatrix and then by the two other persons as witnesses, all three being present at the same time.

Taking this case as an example, we may say three things concerning the presumption are established. First, the basis of the presumption is one of necessity. It is applied in order that the will shall not fail. Second, the presumption arises upon proof of the handwriting of the witnesses. Third, the presumption is applied because the court will presume that where an act is proved to have been done, in the absence of proof to the contrary, it was rightly done. The doctrine may then be stated this way: Where the signatures of the witnesses to a will are proved, and the witnesses are unavailable, it will be presumed that the statutory requirements as to due execution were complied with. This principle is subject to the limitation that the will itself must appear regular on its face.21

It now becomes material to consider the effect of an attestation clause upon the principle just set forth. It is well to remember at the outset that an attestation clause to a will was early decided not to be a formal requisite.22 The case of Hands v. James,23 decided in 1735, is interesting to consider in the light of the cases that follow. In this case the attestation clause did not contain a recital that the witnesses signed in the presence of the testator. But the very fact that three witnesses signed the will was held to be a circumstance which the jury might consider as tending to prove that the witnesses acted in compliance with the statute. In other words, the will may not have been properly executed, but the probabilities are that it was; and bearing that in mind, the jury is entitled to presume due execution from the fact that the witnesses did sign.

21 Burgoyne v. Showler, 1 Rob. Ece. 5.
23 2 Comyns 531.
In the cases thus far considered the attesting witnesses were dead or absent from the jurisdiction. Two other classes of cases should be discussed before summing up the rules applied in the English decisions. In the first class, the presumption of due execution is applied where the witnesses are unable to recollect the circumstances attending the execution and attestation. The rule generally applied in these cases seems to be that where there is a full and complete attestation clause reciting the facts essential to execution and attestation, mere failure of memory will not defeat the will; but due execution will be presumed. Where the attestation clause is defective or incomplete, the presumption is less strong, but the court will look to all the circumstances, and probate will be granted if the will appears regular on its face.

A statement of the manner in which the presumption is applied in this class of cases is found in *Vinnicombe v. Butler*, where the court says:

When there is a regular attestation clause, with the names of two witnesses appended thereto, leading to the conclusion that the will was executed by a person who knew the requirements of the Wills Act, the principle applies directly, and it may be presumed that the will was duly executed, and the mere failure of memory of the witnesses will go for nothing. But where there is an informal attestation clause, such as in the present case, which leads to the conclusion that the testatrix did not know the requirements of the Wills Act, the presumption will not apply with the same force. In every case of this kind the court should be influenced by a strong desire that the intention of the testator be not frustrated by the lapse of time and failure of the memory of the witnesses.

The second class of cases to be discussed is that in which the testimony of the witnesses is contradictory. Here, as in the cases just discussed, we find the courts applying the presumption, *omnia praesumuntur rite esse*

25 In the Goods of Rees, 29 J. P. 296.
26 3 Sw. & Tr. 580.
Where the testimony of the witnesses is conflicting, hesitant, or uncertain, the court may look to all the facts and circumstances, and may in the exercise of its discretion apply the presumption.\(^2\)

Through all of these cases there appears an undercurrent of desire on the part of the courts not to permit a will to fail merely because the witnesses cannot be produced or because their memories are not infallible. But the statute is mandatory and its requirements must be met. Therefore, the presumption of fact is resorted to, where the instrument itself appears regular on its face. This presumption is indulged in whether or not there is an attestation clause. Indeed, courts have not recognized the evidentiary value of the attestation clause itself. Their decisions have merely noted that a full and complete attestation clause strengthens this presumption of due execution. True, such a clause is not a formal requisite, but it does not follow that it is without evidentiary value.

It is advisable to turn our attention now to a consideration of cases decided in the courts of the United States. Since the statutes which prescribe the formalities to be observed in the execution of wills differ in their details in each of the states, it is impossible to consider them individually. Consequently, the state of Illinois has been selected as an example. The principles discussed are of general application, although the formal requisites may vary.

The section of the Illinois statute setting forth the formalities to be observed in the execution of wills is as follows:

All wills, testaments and codicils, by which any lands, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses, two

\(^2\) Gove v. Gawen, 3 Curt. 151.
of whom, declaring on oath or affirmation, before the County Court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same to record. . . . 28

In construing this section, the Supreme Court of Illinois has held that four things must concur to entitle a will to probate. First, it must be in writing, signed by the testator or in his presence by someone under his direction; second, it must be attested by two or more credible witnesses; third, two witnesses must prove that they saw the testator sign the will or that he acknowledged the same to be his act and deed; and, fourth, the witnesses must swear that they believed the testator was of sound mind and memory at the time of signing or acknowledging the will. 29

In view of the construction thus placed upon the statute, it becomes material to consider what proof is necessary to entitle a will to probate where one or both of the attesting witnesses are dead or absent from the jurisdiction, so that their testimony cannot be had.

Section six of the Wills Act provides:

In all cases where any one or more of the witnesses of any will, testament or codicil, as aforesaid, shall die, be insane, be blind or remove to parts unknown to the parties concerned, so that his or her testimony can not be procured, it shall be lawful for the County Court, or other court having jurisdiction of the subject matter to admit proof of the handwriting of any such deceased, insane, blind, or absent witness, as aforesaid, and such other secondary evidence as is admissible in courts of justice, to establish written contracts generally

28 Cahill's Ill. Rev. St. (1931), Ch. 148, sec. 2.
29 Glos v. Schildbach, 344 Ill. 23; Hill v. Chicago Title and Trust Company, 322 Ill. 42; In re Estate of Kohley, 200 Ill. 189; Canatsey et al. v. Canatsey et al., 130 Ill. 397; Dickie et al. v. Carter, 42 Ill. 376.
in similar cases; and may thereupon proceed to record the same, as though such will, testament or codicil had been proved by such subscribing witnesses, in his, her, or their proper persons.\textsuperscript{30}

This section of the statute was considered by the court in the case of \textit{Robinson et al. v. Brewster et al.}\textsuperscript{31} In that case one of the attesting witnesses pre-deceased the testator. A bill in equity was filed to set aside the probate of the will. Upon trial the surviving witness testified that he and the deceased witness were present and saw the testator sign the will; that he signed it in the presence of, and at the request of, the testator; that he saw the deceased witness sign; and that he believed the testator to be of sound mind and memory at the time of signing. The handwriting of the deceased witness was then proved. The court held that the proof required by section two of the Wills Act was furnished and that there was a concurrence of the four requisites entitling the will to probate. There was no attestation clause to this will.

The evidentiary effect of an attestation clause to a will was discussed by the same court in the case of \textit{Hobart v. Hobart}.\textsuperscript{32} There a will and codicil containing an attestation clause were offered for probate in the County Court of McLean County. The attestation clause read, "Written, signed, and sealed in the presence of," followed by the signatures of the two witnesses. An appeal was taken to the circuit court from an order admitting the will to probate. It was proved in the circuit court that one of the attesting witnesses was dead. The surviving witness testified that she signed in the presence of the testator and at his request. She also testified, together with two other witnesses, to the handwriting of the deceased witness. The circuit court held that the will was entitled to probate and this decision was affirmed by the Appellate Court. Upon appeal to the

\textsuperscript{30} Cahill, Ill. Rev. St. (1931) Ch. 143, Sec. 6.
\textsuperscript{31} 140 Ill. 649.
\textsuperscript{32} 154 Ill. 610.
Supreme Court it was objected that the record did not show the testimony of the two subscribing witnesses. The court held that, under section six of the Wills Act, the will was properly proved, and said:

Proof of the handwriting of the deceased witness is prima facie sufficient, especially where the signatures of the witnesses are attached to an attesting clause that the will or codicil was written, signed, and sealed in their presence. The death of the witness merely changes the form of the proof. It permits secondary evidence to be introduced of the due attestation and execution of the will. The attestation is then to be shown, as it would in the case of deeds, by proof of the handwriting of the witness. As to him, it is to be presumed that he duly attested the will in the presence of the testator.

In the Hobart case the surviving witness could not remember whether the signature of the testatrix was on the paper when she signed as a witness. The court held that mere lack of memory could not overcome the presumption of due execution arising from the fact of attestation and said there is a presumption that he has signed when the testator requests the witnesses to attest his will.

In both of the cases just mentioned, the testimony of one witness was available. No discussion of the presumption of due execution is complete without mentioning the case of *Elston v. Montgomery*. This case originated with a bill in equity filed, according to the provisions of the statute, to contest the will of Blanche S. Clarke. Proper execution of the will was denied by the bill. Both of the attesting witnesses had pre-deceased the testator by many years. Evidence was introduced to show that the signature to the will was not in the handwriting of the testatrix. The defendants proved the handwriting of the two witnesses but offered no further proof. The court held that it was not necessary to prove the handwriting of the testatrix, since the statute provides that a will may be signed by someone other than the testator.

33 242 Ill. 348.
or testatrix in his presence. Proof of the handwriting of the deceased witnesses coupled with the attestation clause which recited the fact of acknowledgment was sufficient to make a prima facie case.

These Illinois cases appear to be in full accord with the English decisions mentioned. Where the attesting witnesses are dead or absent from the jurisdiction, a presumption of due execution arises from proof of the witnesses' handwriting. This presumption is also applied where the witnesses do not recollect the facts. And to make the comparison complete, we find that the court in Illinois holds that this presumption is strengthened where there is a full and complete attestation clause.

The case of Hayhurst et al. v. Jones is an apt illustration of the lengths to which the presumption may be carried. Here, both attesting witnesses appeared in the probate court and denied their signatures. Probate was denied and an appeal was taken to the circuit court where proponents called both attesting witnesses and had each identify specimens of his signature and handwriting. Handwriting experts were then called who identified the signatures on the will by comparison with the specimens. The attesting witnesses were recalled and again denied their signatures, but were confused and mistaken as to events occurring about the same time. The circuit court decided that the will was entitled to probate and this decision was upheld by the appellate court. An excerpt from the opinion is as follows:

... while our courts heretofore have not dealt with a case precisely like this where the attesting witnesses deny their signatures, still they have repeatedly, in the cases before cited, indorsed holdings of other courts that the probate of a will does not depend on the recollection or even the veracity of a subscribing witness.

34 Hobart v. Hobart, supra; Gould v. Chicago Theological Seminary, 189 Ill. 282.
35 Kuehne v. Malach, 286 Ill. 120; O'Brien v. Estate of Rhembe, 269 Ill. 592.
36 215 Ill. App. 315.
The provisions of the Wills Act in Illinois are peculiar. Section two, before quoted, requires that two witnesses declare upon oath or affirmation before the county court that they believed the testator to be of sound mind and memory at the time they signed as witnesses. This provision is not found in the Statute of Frauds nor is a similar provision contained in the statutes of most states. The significance of this fact is that proof of the handwriting of a deceased witness must be held to be proof that such witness believed the testator to be of sufficient mental capacity. In other words, the presumption of due execution includes also a belief of the witness as to the mental condition of the testator.

The case of *More v. More* 37 decided the question of a presumption of testamentary capacity. The contestants objected to the probate of the will on the ground that there was not sufficient proof of testamentary capacity as required by the statute since the attesting witnesses were dead. The supreme court in considering this question said:

The act of attestation of a will is not merely to witness the mere fact that the testator signed the will or acknowledged that he had signed the same, but the attention of the witnesses is called, by the act of attestation, to the mental condition of the testator and as to whether he is possessed of a sound, disposing mind, and, therefore, if the will appears on the face thereof to have been duly executed and it is proven that the signatures thereto are in the genuine writing of the maker and the witnesses, if the attesting witnesses be dead an inference arises, from the mere fact of attestation, that the witnesses believed that the testator possessed testamentary capacity at the time of the execution of the will, though there be no formal recital to that effect.

At one time it was necessary to produce the witnesses themselves, and nothing would excuse their non-appearance. The discussion thus far seems to lead to the conclusion that the court will presume a will to have been

37 211 Ill. 268.
duly executed if the handwriting of the witnesses is proved, where the witnesses are unavailable or their testimony is conflicting. As we have seen, this presumption arises out of necessity, in order that the will not fail.

Where there is a full and complete attestation clause, containing a recital of the very facts in issue, we might expect that the recital would be considered as evidence by the courts. Yet it is here that the decisions lead us astray. The courts repeatedly say that the effect of such a recital is to strengthen the presumption.

It seems logical enough to say that where there is no attestation clause or where the attestation clause does not contain a recital of the fact or facts in dispute, compliance with statutory requirements will be presumed, if the signatures of the witnesses are proved. In other words, where it is proved that a man set his name to a will and is not the maker of the will it may be taken for granted that he signed as a witness. It is probable that, having signed as a witness, he did what he intended to do; namely, attest the execution of the instrument in such a manner as to satisfy the statutory requirements. Such a supposition is entitled to weight as evidence in the absence of proof to the contrary.

The basis of our presumption may be stated thus, following the doctrine laid down by the United States Supreme Court in *Mutual Life Insurance Company v. Hillmon.*

Where there is evidence of an intention to do a particular act, an inference arises that such an act was in fact done, in the absence of proof to the contrary. Therefore, when it is established that a person signs his name to a document as a witness, intending thereby to satisfy certain statutory requirements as to attestation, it is to be presumed that he did in fact satisfy those requirements. Considered in this way, what we have is a presumption of fact entitled to weight as such. This presumption is the basis of the decisions before referred to.

*38 145 U. S. 285.*
ATTESTATION CLAUSE IN A WILL

Something besides mere evidence of an intention exists where there is a full and complete attestation clause. If the question in issue is whether or not certain acts have been done, a recital of those acts in an attestation clause signed by the witnesses thereto is an express declaration that those acts have been done. Courts have given effect to such recitals, although the true doctrine has been disguised under statements that the presumption is strengthened thereby.

We have referred at considerable length to the transaction witness who was required to be produced to prove the acts of which a document was evidence. At a later time, when such documents became indisputable or in effect became in themselves the acts, the need for witnesses continued in order to prove the execution. When, in the law of wills, statutes were passed requiring execution in a particular manner, a mode of proof of such execution was provided.

In other words, these statutes require an act of the witnesses themselves—the act of attesting. This act provides the basis of proof where the attestation clause contains a recital of the facts in issue. Since attestation itself is an act done, such recitals in the attestation clause are declarations by the witnesses at the time of doing an act. Being declarations made contemporaneously with an act required by the statute, they are admissible in evidence as an exception to the hearsay rule. This has been the principle that has been constantly overlooked by the courts in considering this class of cases.

Instead of merely strengthening the presumption of due execution, these recitals are evidence of the facts contained therein. Thus, in Illinois, where an attestation clause contains a statement that the witnesses believed the testator to be of sound mind and memory, such a statement is equivalent to a positive assertion of the witnesses made at the time they signed their names. If the witnesses are dead, absent from the jurisdiction, or

insane, no distinction appears between these and other declarations admitted in like cases as exceptions to the hearsay rule. Indeed, the principle of the *res gestae* is broad enough to admit such declarations where the witnesses do not remember the facts or where their testimony is conflicting.

It is said by some authorities that when the witness signs as witness he impliedly testifies at the time of signing to all of the facts required by the statute. In other words, in the absence of an attestation clause, declarations of the witnesses are to be implied; and such implied declarations are admissible upon the same basis as if they had been expressly made in an attestation clause. It is believed that this is unsound, and when some fact, of which there is no recital, is in issue, the presumption must be relied upon. Some difficulty might be experienced with this presumption in Illinois where the statute requires that two witnesses state that they believed the testator to be of sound mind and memory at the time of attestation. However, it is to be remembered that the statute does not require the witness so to state at the time of attesting. Therefore, it seems an unnecessary extension of the doctrine to say that the witnesses impliedly made such a statement. It seems sounder to rely upon a presumption that the witnesses so believed at the time they signed, coupled with the presumption that all men are sane.

In conclusion, the attestation clause in a will has had a definite influence on decisions of courts of many states. It has quite generally been revealed as an influence on the presumption of due execution. Perhaps because an attestation clause has not been required by statute, courts have been disposed to disregard its evidentiary features and have been satisfied to say that the presumption of due execution is strengthened by its recitals. Nevertheless, an attestation clause may be considered as evidence which is admissible as an exception to the hearsay rule.

40 Wigmore, Vol. IV, sec. 1511: