A. R. RAILEY and **C. A. MONTGOMERY**, Purported Executors of the Estate of the Late C. A. SMITH, Appellants, v. **JOHN W. CLARKE**, Adopted Son of the Late C. A. SMITH, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, SINOE COUNTY.

Argued March 13, 23, 28, 1950. Decided June 8, 1950.

1. The provisions of our statutes governing the commencement of actions are not intended to be applied to proceeding for the probate and/or contest of wills, since proceedings of this nature are not civil actions as such but are judicial inquiries to ascertain whether the instrument before the court is genuine.

2. Attesting witnesses to a will may testify at the proving of a will as to the mental capacity of the testator at the time of the execution of the will.

3. A deed is the best evidence to settle a dispute over the title to real estate. Therefore, it was proper to reject the assessment list from the internal revenue office offered as evidence to prove title to real property.

4. The date is not a material part of a will. Therefore a will with no date or an incorrect date may be held valid.

5. Testator's signature cannot precede the final clause appointing the executors in a will.

6. Where testator did not declare to attesting witnesses that the document was his will, where said witnesses did not sign in testator's presence, where one witness' name was signed by someone else, and where the said witnesses were not permitted to scan the document they signed, said will was not properly executed and should not be admitted into probate.

7. If one or all of the witnesses sign before the testator affixes his signature, the will is void.

Appellants offered a will for probate. Appellee objected to the probate of said will. After a trial, the will was rejected. On appeal to this Court, *judgment affirmed.*

T. G. Collins for appellants. *R. A. Henries* for appellee.

MR. JUSTICE DAVIS delivered the opinion of the Court.

In the settlement of Lexington, Sinoe County, Republic of Liberia, there lived a gentleman by name of Charles A. Smith, who, during the evening tide of his natural life, is alleged to have executed a last will and testament, which document after his demise was offered for probate. An adopted son of his, namely John W. Clarke, the abovenamed appellee, interposed objections to the probate of said instrument, which gave birth to these proceedings. The pleadings in the case progressed as far as the surrejoinder of the objector; and, in harmony with the provisions of our statutes controlling contested wills, the case was transferred from the Probate Division of the Third Judicial Circuit to that of the law division of said court to be tried by a jury. Accordingly, trial was had and a verdict returned by a petit jury in favor of objector, and, of course, rejecting the will.

Respondents in the court below, now appellants, dissatisfied with the said verdict and the final judgment rendered thereon, have fled hither for a review and possible reversal of said judgment, submitting as a basis of their appeal a bill of exceptions embodying nine counts, four of which we deem it necessary to pass upon in this decision, namely, counts one, two, seven, and eight. Inasmuch as we are in full accord with the ruling of the trial judge in respect to counts four, five, and six, we shall not, in commenting on said ruling later in this opinion, refer to and pass upon same. We now quote hereunder count one of appellants' bill of exceptions:

"Because at the call of the case respondents offered a plea of jurisdiction consisting of (6) six counts, see sheet 1 of 13th day session of court."

Recourse to the minutes of the trial court discloses the following as the plea of jurisdiction just referred to:

(1) "That all legal proceedings according to the Liberian Statutes are termed actions, and their method of commencing is mandatorily set out in said statutes; a departure from which must occasion a discharge of any defendant or respondent in the case."

(2) "And also because the method by which actions are commenced and defendants brought into court is by means of a Writ or writs [of] summons, which can only be issued upon the written directions of the party or his agent."

(3) "And also because the only document the clerk of this court issued, and which according to law is an act done ultra vires, is a notice, which is an instrument foreign to our Liberian Statutes in bringing defendants or respondents into court."

(4) "And also because since said notice is an illegal document, the return of the Sheriff who made same is also illegal."

(5) "And also because in Liberia there are only two actions which are not ordinarily commenced by writ of summons, namely INJUNCTION AND REPLEVIN."

(6) "And also because jurisdiction over parties is defined by law, and since our law has definitely described the method by which only defendants or respondents as in this case can be legally brought before court, which has not been done, respondents pray that they be discharged, the Will remain undisturbed as though no objections had been filed, and thereby order it probated according to law."

Although the determination of the foregoing issues by this appellate court does not in our opinion extend as far as the actual merits or final determination of the case, as will be seen later in this opinion, yet, since it is the inescapable duty of this Court of *dernier ressort* to settle the practice in the courts below and also to interpret the provisions of our statutes when necessary, we shall now once and for all consider and settle these issues.

The said issues are in substance as follows :

(1) That the trial court had no jurisdiction over respondent because in the filing of his objections objector did not follow the provisions of our statutes with respect to the commencement of actions, which provisions require the plaintiff to file a written direction and cause a writ of summons to be issued against the defendant by means of which he is brought before court; and

(2) That under our statutes injunction and replevin are the only actions in which the ordinary mode of filing a written direction and obtaining a writ of summons against defendant upon said written direction is not followed.

In passing upon said issues, we have to state that this contention of respondents, now appellants, would seem plausible at first blush; but when the law controlling the probate of wills is referred to, read, and carefully digested, the fallacy of this proposition becomes apparent, and the contention untenable and void of legal merit.

In our opinion jurisdiction is acquired by the trial court over the executors of a will as soon as the will is presented to court by either them or their agents, with or without a formal petition asking for the probate of said will; and where objections are filed contesting the validity of said will and protesting against its admission to probate, said objections assume the character and nature of an answer to the petition or request already submitted by the executors, either directly or through their agents, and who by said act have already submitted to the jurisdiction of the court. Hence no written direction or writ of summons is necessary in such a case. Moreover, in the opinion of this Court, the provisions of our statutes governing the commencement of actions are not intended to be applied to proceedings for the probate and/or contest of a will, since proceedings of this nature are not civil actions as such, but are judicial inquiries to ascertain whether the instrument before the court offered for probate is the last will and testament of the deceased.

We are in perfect agreement, therefore, with the trial judge when he denied respondents', now appellants', request to dismiss the objections on this ground, and he committed no error in so doing. Furthermore, our Revised Statutes in sections 1268 and 1272 fully conferred jurisdiction upon the court below to try and determine said cause, and the moment the said respondents, executors of the said will, caused same to be submitted to court for probate, they then and there submitted themselves to the jurisdiction of the court and therefore could not thereafter legally attack the court's jurisdiction over their person. We do not hesitate in pronouncing their contention void and of no legal efficacy.

Count seven of appellants' bill is an exception taken to the trial judge's charge to the empanelled jury on the ground that the judge in his said charge expatiated on the mental abnormality of the testator at the time of the execution of the will as brought out in evidence by some of the attesting witnesses, which respondents felt was improper since insanity on the part of testator had neither been proved nor testified to by expert witnesses.

A careful study of this exception and the applicable law brings us to the conclusion that the law not only requires the attesting witness to a will to sign his name and witness the signing by the testator, but also imposes an additional and greater responsibility on said attesting witness; for, by law, attesting witnesses are expected and required in addition to signing the will also to observe the mental capacity of the testator when called upon by him to attest his will, and said witnesses should be satisfied that testator is mentally capable of executing the document they are being called upon to sign as attesting witnesses. Said witnesses may therefore testify at the

proving of the will, when called upon, to the mental capacity of the testator at the time of the execution and signing of the will. In support of this view we have the following rule laid down in *Corpus Juris:*

"It is a rule of very general application that witnesses attest not only the due execution of the will by the testator but also his mental capacity to make a valid will at the time of the execution thereof." 68 C.J. 673 (1934).

" 'The legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed around the testator to ascertain and judge of his capacity.' Chase v. Lincoln, 3 Mass. 236, 237." *Id.,* n. 23.

In view of the foregoing rule of law, we are of the opinion that the trial judge did not err in reviewing or commenting upon the testimony of the attesting witnesses in his charge to the jury with respect to testator's mental capacity.

With reference to the trial judge's ruling on the question of the evidence offered by respondents to prove title in C. A. Smith, the testator, to the parcel of land willed by said testator to J. W. Clarke, appellee, namely, the assessment list from the office of internal revenue, we are in full accord with the ruling of the judge rejecting said document. We uphold and emphasize his ruling in effect, that where a dispute arises over title to real estate, a deed is the best evidence to settle said dispute or to prove in whom title to said property is legally vested. Moreover, hoary with age is the principle that in contests of this nature a party recovers, or, as in this case, succeeds, upon the strength of his own title, and not upon the weakness of his adversary's. Therefore it appears to us that the only proper course for appellants to have taken was to have produced the deed for the property which they contend was testator's property, and if the original had been lost or destroyed a copy should have been obtained from either the registrar's office or from the archives at the Department of State. Failing to do this, the trial judge was correct in rejecting the assessment list offered by them to prove title, for the court could not be expected to do for them that which they had neglected and failed to do for themselves.

Having thus considered and passed upon the several exceptions contained in appellants' bill and brought hither for review, we shall now consider the points presented in the briefs by both parties. Upon such points submitted by appellants they seek a reversal of the judgment of the court below, and appellee, an affirmation of said judgment.

In an effort to secure from this Court a ruling affirming the judgment of the court of origin which rejected the will, appellee has submitted in his brief the following points for our consideration :

(1) That the signature of attesting witness M. C. Cooper was forged to the will. Therefore the signature on said will is not genuine. Moreover, that witnesses Thomas Birch said he signed "some sort of paper," but did not know whether it was Mr. Smith's will or not. That Governor Birch signed the document without knowing what it was. That such procedure, being contrary to law, makes the will invalid.

(2) That the testator's signature precedes the final clause of the will nominating the executors. Therefore, the will should not be admitted to probate.

(3) That from the evidence adduced at the trial, the attesting witnesses did not sign the will in the presence of the testator, and vice versa. Appellee contends this is necessary to make a will valid ; and

(4) That the way in which the will was written indicates that testator could not at the time of the execution of the will have been of sound mind and disposing memory which is an indispensable factor in the making of a valid will. Therefore appellee contends the will should not be admitted to probate. For example : (1) devising one-fifth of an acre of land to Allen Walter without stating where the land is. (2) After bequeathing plates to his wife, to Jean Scott one pitcher and four tumblers, in the same will he declares, "that all of the pots, dishes, tumblers etc" shall remain in the house. (3) At the top of the will appears the date April 8, 1947, and at the bottom appears June 5, 1947. (4) Devising property not belonging to him to his adopted son.

Before passing upon and deciding these points, we shall recite those urged by appellants in their brief and seek to disclose their respective merits and demerits, and thereby decide whether the judgment should be affirmed or reversed.

"1. That as to legal requisite and validity, a Will is held to be valid without date, or even with a wrong date; and that it is immaterial where the testator's name is placed, it being sufficient if written in the Will."

This count obviously is intended to answer or controvert count two and a portion of count four of appellee's contention above.

Regarding the question of whether a will is invalid because of two different dates appearing upon the face thereof, we are of the opinion that this is not sufficient to invalidate a will because, according to the weight of modern legal authority, the date is not an essential part or requisite of a will, and, unless expressly required by a statute of the particular locality, it may be omitted without rendering the will invalid. This view finds full support in *Cyclopedia of Law and Procedure:* "The date not being a material part of a will, a will may therefore be held to be valid, although it has no date or a wrong one, unless a statute provides otherwise." 40 *Id.* 1098 (1912). The foregoing rule is also sanctioned by *American Jurisprudence:*

"A will is presumed to have been executed on the day of its date. A date, however, is not an essential of a valid will, except, in some jurisdictions, in the case of holographic wills, and an erroneous date will not vitiate the instrument. If it is necessary to ascertain the date of an ordinary will in order to determine which of two or more instruments is the last will of the testator, the date may be established by extrinsic evidence." 57 *Id.* 188 (1948) Annot. 1916E L.R.A. 501.

The next issue is whether the testator's signature appearing on the will before the clause nominating and appointing the executors renders said will invalid. Recourse to the law controlling the execution of wills discloses the following as the prevailing rule, and by application of this rule we intend to settle and decide the said issue.

In *American Jurisprudence* we have the following:

"According to one line of authorities, a will signed at the end of the dispositive portion thereof is signed at the end within the meaning of the statute, notwithstanding that following the signature there is a clause appointing an executor, or relieving the executor of the necessity of furnishing a bond. The theory of such view is that the appointment of the executor is not essential to the validity of a will, and accordingly should not be deemed to affect or determine the end of the instrument. According to other cases, a will is not signed at the end within the meaning of the statute where a clause appointing executors follows the signature. The theory of such authorities is that while the appointment of an executor is not absolutely essential to the validity of a will, it is nevertheless a part of the will where it is included in the instrument." *Id.* at 215.

In *Corpus Juris* we have the following rule on the point

"In some jurisdictions it is held that a will is signed at the end within the statutory

requirement although such signature is followed by a clause appointing an executor, and the ground assigned for this rule is that, under the applicable statutes, the appointment of an executor by the will is not essential to its validity, and that in these circumstances the portion of the paper preceding the signature constitutes a complete will. But this doctrine has been denied in other jurisdictions, where it is held that when a will is written with a final clause appointing an executor and the signature precedes such clause, the will is not signed at the end thereof, especially where the subscribing witnesses signed at the actual end of the will. The reason assigned is that the appointment of an executor is a material and integral part of the will. . . ." 68 C. J. 665 (1934), section 300.

In *Ruling Case Law* we find the rule stated in more definite language :

"A will is not invalidated by the fact that it contains words written by the testator after his signature, where the words do not dispose of any part of the estate and are not testamentary in character. But it has been held that there must not be any words placed below the signature at the time of execution and intended as a part of the will. Thus the testator's signature cannot precede a final clause appointing executors, and a will so signed is not properly executed, and should not be admitted to probate. . . ." 28 R.C.L. 121 (1921).

By virtue of the foregoing citation one easily concludes that testator's signature preceding the final clause appointing the executors in the said will is neither favored nor sanctioned by law. There are cases in which a material part of the intention of the testator centers in the selection of persons to execute his testamentary purpose where important trusts are created on behalf of natural persons or where important charitable institutions are founded, or other large and far-reaching designs are shaped, and the administration and execution of them committed to the executors of the will who are not named until the concluding clause of the will. This clause, which is a material and integral part of the will, must precede the signature of the testator. Appellee's position, therefore, in this respect is well taken and entitled to favorable consideration.

Coming now to the four contentions of appellee in his brief, we deem it necessary first to turn to the records and review the evidence given by these attesting witnesses before applying the law in the premises.

In the minutes certified to this Court by the court of origin is recorded the following statement of attesting witness Margaret C. Cooper :

"Q. Miss Witness, what is your name and where do you live?

"A. My name is Margaret C. Cooper, and I live in the Settlement of Lexington, Sinoe County.

"Q. Miss Wittness, the court observes from the face of this document the name of one M. C. Cooper, as a witness to this document, which is styled, 'The Last Will & Testament of the late C. A. Smith, Testator.' Please tell this court whether or not you are the M. C. Cooper.

"A. I am the M. C. Cooper.

"Q. As a witness to this document, please give the court to know whether or not you signed this document now in my hand.

"A. I did not sign the document.

"Q. Your name appearing upon its face makes the court . . . [believe] that you signed it as an attesting witness. Since you say that you did not sign it, please explain to the court the reason why you say you did not sign it.

"A. The reason why I say I did not sign it is this : The late C. A. Smith called one Governor Birch, but the manner in which he called the said Governor Birch caused me to think that there was some dispute. The testator then called me while he was on his piazza and I was at my home. He said, 'Margaret Mayson, come and sign my will.' When I got to his home, he told me that was his will but as I saw the person who was writing it, my courage fell. Governor Birch was then holding a pen and he, Governor Birch, then said to one Alexander Railey who was then writing the will, to read the same in order that they may know what they were signing, and Mr. Railey replied : 'No.' At this time, Governor Birch took the pen and signed, after which C. A. Smith, the testator, asked him to sign for me, and I walked down the stairs, and Mr. Governor Birch signed my name on said will. This is what I know.

"Q. Since you say that you did not sign the will yourself, but that C. A. Smith, deceased, asked Governor Birch to sign for you, was the signing of the will by Governor Birch for himself and for you done in the presence of the testator?

"A. At this time the Testator was on the other side of the piazza.

"Q. Did he, the testator, on requesting you to sign the document, explain to you that it was his last will and testament and exhibit same to you so that you might be enabled to identify it when presented in court?

"A. The testator did not, for if he had done that, I would have signed it.

"Q. Then, Miss Witness, can you now upon your oath identify this document as being the last will and testament of the late C. A. Smith, which Governor Birch signed for you?

"A. No, I cannot, for nobody can say that I ever saw the paper that Governor Birch signed for me.

"Q. Miss Witness, can you write?

"A. I can sign my name.

"Q. Being able to sign your name for yourself, why did Governor Birch then sign for you?

"A. As soon as the late C. A. Smith came on the other side of the piazza and asked Governor Birch whether he had signed, and he replied that he had, he then said that he should sign for me, without making any further reference to me.

"Q. So then, Miss Witness, did Governor Birch sign that document in your presence or before you arrived?

"A. He signed before I got there, and he was trying to read the paper, but Mr. Alexander Railey, who was then writing the will, refused. After Governor Birch returned home, I asked him what was the contents of the Will and he replied that he tried to read it for himself and me. Alexander Railey refused, as such, he was not able to know the contents."

Attesting witness Thomas Birch testified as follows :

"Q. Mr. Witness, what is your name and where do you live?

"A. My name is Thomas Birch. I live at Kaetu-sohn, Juarzohn District, Sinoe County.

"Q. The court observes upon the face of this document purporting to be the last will and testament of the late C. A. Smith of Lexington, Sinoe County, deceased, the name of one Thomas Birch as an attesting witness to same. Please say, if you are the Thomas Birch.

"A. I am the Thomas Birch.

"Q. Were you ever called by the late C. A. Smith, to attest his will as a witness and did you do such, attest it?

"A. Yes, he called me at one time to sign some sort of paper, and I signed it, but I did not know what sort of paper it was.

"Q. You said . . . C. A. Smith, deceased, did at some time call you to sign some sort of paper, but you did not know what sort of a paper it was. Did he or did he not tell you what sort of a paper it was?

"A. He did not tell me what sort of paper he wanted me to sign.

"Q. The court observes here the name of Thomas Birch with his cross mark. As such, please say whether you are or not.

"A. I cannot write.

"Q. Then, Mr. Witness, please tell the court who attached your signature [name] on this document?

"A. It was B. A. Railey, Jr.

"Q. Did not this B. A. Railey, Jr., who attached your name to this document, tell you what sort of paper he required you to attach your name to?

"A. He did not tell me what sort of paper it was.

"Q. Mr. Witness, you not being able to write and read, did the said B. A. Railey, Jr., open it to your view that you might be enabled to know it when seen again by you?

"A. The paper was lying on the table and the said Mr. B. A. Railey, Jr., asked me to

sign, when I told him to sign for me.

"Q. Was the testator himself there at the table with him where he called you to sign the document which you signed?

"A. He was at one end or corner of his piazza.

"Q. Did he himself, the testator, sign the paper, which B. A. Railey asked you to sign, in your presence?

"A. He did not sign same in my presence.

"Q. Mr. Witness, he, the testator, not signing the paper

in your presence, did he the testator tell you or explain to you that the paper which you were asked to sign as an attesting witness was his will?

"A. He did not.

"Q. As an attesting witness, then, can you say whether this document held in my hand on which your name appears as attesting witness is the will of the late C. A. Smith?

"A. I don't know. Attesting witness Governor Birch testified as follows :

"Q. Mr. Witness, what is your name and where do you live?

"A. My name is Governor Birch. I live in the Settlement of Lexington, Sinoe County.

"Q. Mr. Witness, the name of one Governor B. Birch appears upon the face of this document purporting itself to be the last will and testament of the late C. A. Smith, of Lexington, Sinoe County. Will you please tell the court whether or not you are the G. B. Birch?

"A. Yes. I am.

"Q. As an attesting witness to this document, the testator of same being now interred, you are called upon by the court to prove this document as being the last will and testament of the late C. A. Smith, which it purports itself to be. You will please, then, give to the court all information within your knowledge concerning the document

and how it was signed by the Testator and the attesting witnesses.

"A. I was called one day by the late C. A. Smith to sign a paper. When I went upstairs in his house, he was on his front piazza upstairs. Mr. B. A. Railey, Absolom Railey were on the side piazza at the table. I then walked to the table. Mr. B. A. Railey handed me a pen, and I asked him to allow me to see what I was about to sign, and he replied, 'No.' At that time the late C. A. Smith was still on the front part of the piazza. Mr. B. A. Railey then started turning over the document until he got to the last sheet where he required me to sign. When I looked at that part of the document which he gave me to sign, I saw nothing to sign, for the said C. A. Smith who had called me to sign the said document had not attached his signature to the same. I then inquired of Mr. B. A. Railey whether I should still sign the paper and he replied, 'Yes.' I then took up the pen and signed. I then asked him again whether he had refused allowing me to see the paper, neither did he agree to read the paper to me. Then I held the pen in my hand, at which time the said late Honorable C. A. Smith came around that end of the piazza where we were, and said to me that I should sign for Margaret Cooper, and I signed her name to said document. He did not ask as to whether the said Margaret
Cooper could sign or not, or as to whether I should not put her cross mark to her name. After this we walked downstairs.

"Q. You have said, Mr. Witness, that on being called by the late Honorable C. A. Smith, testator, to sign a paper, you went and met him on the front piazza and met B. A. Railey and A. A. Railey, Sr., on the side piazza at the table where the document which you were called over to sign was. The paper on being presented to you by Mr. B. A. Railey for your signature, you say, was rolled back, that you saw no part of it but the concluding part where you were requested to attach your signature. Not seeing, as you said, the name of the testator thereto, you desired to be given the privilege of reading the paper or of having it explained to you before attaching your signature thereto. Did Mr. B. A. Railey explain to you what sort of a paper it was before attaching your signature thereto?

"A. No.

"Q. You said further that after you had attached your signature to the document, the testator walked around to the side piazza where the document was and requested you to attach the name of Margaret Mayson-Cooper thereto, which you did. Did he [the testator], on requiring you to attach the name of Margaret Mayson-Cooper to the document, explain to you what sort of paper it was he was requiring you to attach her

name to?

"A. No.

"Q. You being one who can read and write, can you then upon your oath say to this court and jury that this is the document you attached your name to?

"A. If I should see the document, I would be able to tell better.

"Q. Please then, Mr. Witness, take this document which I now hold in my hand and say upon your oath to the court and jury whether it is the document you signed on that day or not. [Document handed to witness for scrutiny.]

"A. I have signed so many documents for the said C. A. Smith, until I cannot say that this is the correct document or not."

From the foregoing testimony of attesting witnesses Margaret Cooper, Thomas Birch, and Governor Birch, it is evident that the will in question was not properly and regularly executed. According to their evidence, the document was never declared to them by the testator as his last will. Further, the testimony of some of these attesting witnesses discloses that when they signed the purported will or, in the case of Margaret C. Cooper, when her name was placed on the will by Governor Birch, it was not done in testator's presence and testator had not signed the document at the time. Moreover, Thomas Birch stated that although he signed a certain paper, he did not know what the character or nature of the paper was. To use his own language, "I did not know what sort of paper it was." Obviously this was because of the testator's failure to declare or publish to the said witness that the said document he was being called upon to sign was his, the testator's, last will and testament, as well as because of Mr. Railey's refusal to permit either to read or even scan the paper he was being required to sign. All of these irregular circumstances tend, in the opinion of this Court, to indicate something unusual and something sinister, and in a great measure demonstrate that the testator either was mentally unbalanced or that some undue influence was being wielded over him which caused him to be tossed from the regular orderly course authorized by law for the execution of wills.

Throughout the judicial history of all countries, from ancient times and up to the present, because of the sacred aspect and character of wills which are the last wishes and intentions declared by mortal man for the execution by his fellows after his flight is taken from time into eternity, a time when he can neither explain nor speak upon

what is said to have been written as his desire, the law has guardedly placed around the execution of said documents certain safety walls, to penetrate or enter which certain definite requirements must of necessity be met. For instance, on the question of whether or not the testator should sign the will before the attesting witnesses, we have the following rule in *Corpus Juris:*

"In England the rule is settled by a long line of decisions, among which is a decision of the house of lords, that to give validity to the will the signing by the testator must precede in point of time the signing by the witnesses, and that, if one or all of the witnesses sign before the testator affixes his signature, the will is void. This rule admits of no exceptions or qualifications whatever, and has been followed in Canada, and also in many American states, the view being taken that the attestation of witnesses is 'of a past transaction,' and that, until the signature of the testatator has been affixed to the will, there is nothing to attest, and that, for some period, longer or shorter, as the case may be, those signatures certify what is not true." 68 C.J. 659 (1934).

On the question of publication of the will and the testator declaring same in the presence of the attesting witnesses to be his last will and testament, we have the following from *Corpus Juris:*

"There is a sufficient publication where the testator declares in the presence of the witnesses that the instrument is his will, where he declares the instrument is his will in the presence of witnesses and asks them to sign it as witnesses, where he states to the witnesses that he has written out a paper so that his matters could be attended to in case of anything happening to him, where he replies in the affirmative to a question asked him as to whether the instrument is his will, where he requests persons present to witness his will, where he replies in the affirmative to a question as to whether he wants persons present to witness his will, where he acquiesces in the statements or request of another acting in his behalf, where he makes a scroll or seal after his signature to the will in the presence of the witnesses, where he requests witnesses to sign the will and takes steps to have the will deposited with the county judge, or where a testator unable to speak at all, or only with difficulty, communicates by signs or by words, to some unintelligible, that the paper being executed is a will. So, where the witness was requested to sign the instrument at the testator's instance, and the instrument bore on its face evidences of a testamentary intent and was read to the testator in the presence of the witnesses, there was a sufficient publication. The writing of the will by a witness at the request of the testator, and embodying therein the disposition the testator desired to make of his property and the signing of the

will by the testator, was a sufficient publication. But there is no publication where there is no word or act by the testator recognizing the instrument as a last will, or where the testator purposely withholds from the witnesses the fact that the document signed was a will." 68 C.J. 692 (1934)

In view, therefore, of the testimony given by the at-testing witnesses and expatiated upon, *supra,* and of the law cited in this opinion, we are of the considered opinion that the trial judge was correct and acted in harmony with the law in upholding the verdict of the petit jury in this case; and we therefore affirm the judgment rendered by him in the court below rejecting the said will with costs against the appellants; and it is hereby so ordered.

Affirmed.