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EXCUSING HARMLESS ERRORS IN THE EXECUTION OF WILLS: A REPORT ON AUSTRALIA'S TRANQUIL REVOLUTION IN PROBATE LAW

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An experiment of historic importance for the future of the Anglo-American law of wills has been in progress over the last decade in Australia. Two states of the federation, Queensland and South Australia, have enacted prototype statutes that abrogate the traditional rule of strict compliance with the requirements of Wills Act formality. The new statutes enable the probate court to validate a will even when the testator has failed to comply fully with the Wills Act.

The Queensland statute uses language for which I bear some responsibility; it authorizes "substantial compliance" with the Wills Act. In the hands of the Queensland courts the measure has been a flop. They have read "substantial" to mean "near perfect" and have continued to invalidate wills in whose execution the testator committed some innocuous error.

In South Australia, by contrast, the legislation employs different words, the so-called "dispensing power," directed to the same end. This statute has produced a triumph of law reform. The South Australian courts have welcomed their new power to excuse harmless errors, and they have used it vigorously. An ample case law, which is the main subject of this Article, provides a vantage point for assessing the reform. The cruelty of the old law has disappeared. The concerns that motivated the former strict compliance rule have been put to the

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Further acknowledgements appear in the footnotes.

test and have shown to be exaggerated or illusory. The reform has been found to embrace the law of revocation as well as execution.

The South Australian legislation and case law have been closely watched in law reform circles in Australia and beyond. The rest of the Australian states seem poised to emulate the South Australian statute: One state has enacted a duplicate measure, and official law reform commissions in the other major states have advanced similar recommendations. The movement has spread to North America. In British Columbia the law reform commission has recommended a version of the South Australian Act, and Manitoba adopted another in 1983. A trend already so extensive is not likely to leave the United States untouched.

Part I of this Article supplies a background discussion of the traditional rule of strict compliance with the Wills Act, and of potential strategies for devising a harmless error rule. In Part II, which is devoted to the South Australian sources, I examine the origins and terms of the statute and canvass the case law (including the published opinions and an equally large body of unreported cases). Part III contrasts the disappointing experience in Queensland. Part IV discusses the spread of the South Australian model to other jurisdictions and mentions the experience under a comparable statute in Israel. Part V collects some conclusions.

I. THE PROBLEM AND THE CURES

A. *The Rule of Strict Compliance*¹

1. *The Formalities.* — Every Anglo-American jurisdiction has a so-called Wills Act that prescribes the formalities for making a valid will. These statutes trace back to English models, in the Wills Act of 1837² and earlier. Our received English tradition recognizes a single mode of testation—the attested will, sometimes called the formal or witnessed will. The essentials are writing, signature, and attestation. The terms of the will must be in writing, the testator must sign it, and two witnesses must attest the testator's signature. A variety of further requirements can be found in the Wills Acts of various jurisdictions: rules governing the acknowledgment of a signature already in place, rules calling for the testator and the witnesses to sign in each other's presence, requirements about the positioning of signature, and many more.³

1. Much of the background material in this subsection derives from Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A. J. 1192 (1979).

2. 7 Will. 4 & 1 Vict., ch. 26 (1837).

3. For an up-to-date compilation see Coughlin, *Will Requirements of Various States*, ACPC Study No. 1, in *ACPC Studies* (American College of Probate Counsel, 1984) [hereinafter *ACPC Study*]. A well-known older compilation is Rees, *American Wills Statutes*, 46 Va. L. Rev. 613, 856 (1960).

An alternative formal system for so-called holographic (handwritten) wills is permitted to testators in half the American states, mostly western jurisdictions where civilian legal regimes have been influential, but also in Pennsylvania, Virginia, and now—through the medium of the Uniform Probate Code—Michigan and New Jersey.⁴ Several Canadian provinces recognize holographs, but England and the Australian states do not. In effect, a holograph statute allows the testator to substitute handwriting for attestation, and thus entails a significant reduction in the level of formality.⁵ The testator may execute his will without witnesses, but it must be “materially” (or in some states “entirely”) in his handwriting.

2. *The Purposes of the Formalities.* — The testator will be dead when the probate court enforces his will. The Wills Act is meant to assure the implementation of his testamentary intent at a time when he can no longer express himself by other means. The requirement of written terms forces the testator to leave permanent evidence of the substance of his wishes. Signature and attestation provide evidence of the genuineness of the instrument, and they caution the testator about the seriousness and finality of his act. The requirement that the will be attested by disinterested witnesses is also supposed to protect the testator from crooks bent on deceiving or coercing him into making a disposition that does not represent his true intentions. The Wills Act thus serves evidentiary, cautionary, and protective policies.⁶

3. *Why Strict Compliance.* — The puzzle about the Wills Act formalities is not why we have them, but why we enforce them so stringently. Consider *Groffman*,⁷ whose facts instance a common execution blunder. Each of the two witnesses, who were attending a social gathering at the testator's home, took his turn signing the will in the dining room while the other witness was in the living room. The will was held invalid for violation of the requirement that the testator sign or acknowledge it in the presence of two witnesses present at the same time, although the

4. The American holograph states, as identified in ACPC Study, *supra* note 3, are Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

5. For discussion of the tension between the two levels of formality, see *infra* note 235.

6. I have also directed attention to a “channeling” policy: standardizing the forms of execution helps routinize probate and lower costs. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 493–94 (1975) [hereinafter Langbein, *Substantial Compliance*].

7. [1969] 1 W.L.R. 733, [1969] 2 All E.R. 108 (Q.B.). Throughout this Article I have departed from the bluebook convention for rendering the titles of case names. Bluebook style retains procedural phrases such as “In re,” “Estate of,” and “Matter of,” probably in order to signal that a case is a probate matter. Since virtually every case cited in this Article is a probate matter, I have deleted these redundant phrases, and I identify case titles by surname.

judge forthrightly declared: "I am perfectly satisfied that that document was intended by the deceased to be executed as his will and that its contents represent his testamentary intentions."⁸ The Wills Act is meant to implement the decedent's intent; the paradox in a case like *Groffman* is that the Wills Act defeats that intent. What makes *Groffman* interesting is not the facts, which are commonplace, but the judge's candor in admitting that his decision frustrated the decedent's intent.

Must it be so? Is the rule of strict compliance the inevitable price for the benefits of Wills Act formality? If legal policymakers were put to the choice between a regime of no Wills Act formalities, on the one hand, versus the Wills Act as traditionally applied on the other hand, there would be a large consensus in favor of the status quo. The greatest blessing of the Wills Act formalities is the safe harbor that they create. Without prescribed formalities, the testator would be left to grope for his own means of persuading the probate court that his intentions were final and volitional. The testator who complies with Wills Act formalities assures his estate of routine probate in all but exceptional circumstances. In order to escape the rule of strict compliance with the Wills Act, therefore, the case must be made that the benefits of Wills Act formality would be retained even if the law were changed to excuse execution blunders.

4. *Excusing Harmless Errors.* — When the testator has made a mistake in complying with the formalities, it does not follow that the purposes of the Wills Act have been disserved. Consider again the *Groffman* case, in which the testator signed out of the witnesses' joint presence. The purposes of requiring the witnesses to be present together are (1) to transform execution into a ceremony, in order that the testator be cautioned properly about the seriousness and finality of signing the will, and (2) to make it harder for crooks to coerce or deceive the testator into signing something he did not want. On the actual facts in *Groffman*, there was abundant evidence that the will was deliberate and volitional, hence that it embodied the decedent's testamentary intent. The testator's conduct showed that the purposes of the presence rule were served even though the testator neglected to comply with the formality.⁹

The central insight that underlies the argument for a harmless error rule is that the law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one. The proponents of a defectively executed will should be allowed to prove what they are now entitled to presume in cases of due execution—that the will expresses the decedent's testamentary in-

8. *Id.* at 735, [1969] 2 All E.R. at 109.

9. For discussion of the importance of the testator's conduct, especially attempted compliance, in deciding whether a formal blunder is harmless, see *infra* text accompanying notes 117–18.

tent. This argument has been resisted on the ground that a harmless error rule would invite excessive and difficult litigation.¹⁰ If any scrap of paper can be alleged to be a defectively executed will revoking the prior will, then the reform could imperil the estates of careful testators who complied fully with the Wills Act. There was always reason to think that this concern was overstated. We shall see that the Australian experience has now put it to rest.

B. *Avenues for Reform*

Broadly speaking, there are two ways to deal with the problem of Wills Act execution blunders. Our initial instinct is to amend the Wills Act to reduce the number and complexity of the formalities, so that the testator will have less to get wrong. However, under the rule of strict compliance, so long as some formalities remain, the least error in complying with any of them still invalidates the will. The other solution is to abridge the rule of strict compliance by fashioning a harmless error rule to excuse blunders that do occur.

1. *Refining the Formalities.* — Much of the case for lowering the levels of Wills Act formality rests on the success of what has come to be called the nonprobate system, meaning life insurance, revocable trusts, joint accounts, pension accounts, and other arrangements for transferring property outside the probate system upon the owner's death.¹¹ These will substitutes serve the function of a will through different procedures. The formalities for a nonprobate transfer originate in the contract that creates the account, rather than in the Wills Act. Nonprobate transfers typically require writing and signature but not attestation. Thus, by comparison both with the nonprobate system and with holographic testation, attestation stands out as the distinguishing trait of conventional Wills Act formality.

To the extent that the Uniform Probate Code (UPC) of 1969 may be said to have addressed the problem of innocuous Wills Act blunders, the drafters' solution was to reduce formality. "[E]xecution must be kept simple," the official comment says. "To this end, . . . formalities for a written and attested will are kept to a minimum . . ." ¹² Section 2-502 of the UPC, which prescribes the formalities for an attested will, requires that the will be in writing, signed by the testator, and attested by two witnesses who saw the testator sign or heard him acknowledge his signature. "There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other . . . [or] that the testator's signature be at the end of the

10. See *infra* text accompanying note 249.

11. On the connection between the will substitutes and the movement for a harmless error rule, see Langbein, *Substantial Compliance*, *supra* note 6, at 503-09.

12. U.P.C., art. 2, pt. 5 general comment.

will"¹³ Further, a witness who benefits under the will does not automatically forfeit his devise, as commonly occurs under traditional Wills Acts.¹⁴

Thus, a case like *Groffman* would not arise under the UPC, because the presence requirement has been abolished. The drafters of the UPC put themselves to the choice and decided that the benefits of the presence requirement were not worth the toll of frustrated estate plans in cases like *Groffman*. There are, however, intrinsic limits to reforming the Wills Act in this way; sooner or later reform must confront irreducible levels of formality. Nobody favors abolishing the requirement that the testator sign his will, yet many would agree that noncompliance with the signature requirement should be excused under extraordinary circumstances, as in the switched-wills cases discussed below¹⁵ where husband and wife mistakenly sign each other's will. The same analysis applies to the attestation requirement. Because attestation serves cautionary and evidentiary policies, there is reason to retain the formality,¹⁶ while excusing innocuous cases of defective compliance.

To eliminate hardship without altering the rule of strict compliance would require abolishing the Wills Act formalities entirely. But a legal system should be able to preserve relatively high levels of formality, in order to enhance the safe harbor that is created for the careful testator who complies fully, without having to invalidate every will in which the testator does not reach the harbor.

2. *Strategies for Excusing Error.* — There are two ways to fashion a harmless error rule—either deem compliance or excuse noncompliance. Under the substantial compliance doctrine, the court deems the defective instrument to be in compliance. Under a statutory dispensing power, the court validates the will even while acknowledging that the will did not comply.

The substantial compliance doctrine is the only avenue open to the courts without legislative intervention. The doctrine reconciles relief with the commands of Wills Act formality by applying the Wills Act purposively. In January 1975, before the Australian legislation had been enacted, I published an article directed to American courts, urging them to develop a substantial compliance doctrine as a matter of judicial interpretation of the Wills Act.¹⁷ As I envisioned the doctrine, the proponents of a defectively executed will would be required to

13. Id. § 2-502 comment.

14. Id. § 2-505 comment.

15. See *infra* text accompanying notes 101–12.

16. In a forthcoming Article, James Lindgren disputes this view, arguing, *inter alia*, that the experience of the nonprobate system (in which attestation is uncommon) shows that the probate system would function well if attestation were eliminated as a mandatory formality. Lindgren, *Abolishing the Attestation Requirement for Wills* (unpublished manuscript on file at the Columbia Law Review). For further discussion of the attestation requirement, see *infra* text accompanying notes 70, 95, and 253–54.

17. Langbein, *Substantial Compliance*, *supra* note 6.

prove that the document expresses the decedent's testamentary intent, and that "its form sufficiently approximate[s] Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act."¹⁸ I pointed for analogy to similar judicially created doctrines: the main purpose and the part performance rules under the functionally similar Statute of Frauds; and in the nonprobate system, the doctrine of substantial compliance with life insurance change-of-beneficiary designation forms.¹⁹

After a decade of observing the Australian experiment under statutes of either sort, I have come to prefer the dispensing power over substantial compliance as a legislative corrective.²⁰ I shall return to that choice after having canvassed the case law that has arisen under the prototype South Australian and Queensland statutes. I must emphasize, however, that the substantial compliance doctrine remains the only device suitable for excusing defects under an unabridged Wills Act.

3. *Nonstatutory Relief.* — Neither in the United States nor elsewhere in the common law world do the law reports teem with converts to the cause of a judicially devised substantial compliance remedy. Lawyers have been trained to regard the strict compliance rule as inescapable; few would think to seek judicial relief against a manifest blunder. Further, the substantial compliance doctrine is difficult to introduce, because the strict compliance rule that it would supplant is so entrenched.

In a recent New Jersey case the proponents of an arguably defective instrument asked the first-instance court to apply the substantial compliance doctrine.²¹ They relied upon the local probate treatise, which had endorsed the doctrine and had predicted that New Jersey would adhere to it. The court was able to find for the proponents on another ground. While obviously sympathetic to the substantial compliance doctrine, the judge said: "were I to rule that the will[] be admitted to probate because of substantial compliance with the Wills Act, I would be breaking new ground, a role more appropriate to appellate courts."²² Because lower court decisions are not widely reported, we

18. *Id.* at 489; see *id.* at 515–26.

19. *Id.* at 498–99, 526–29.

20. When writing on this subject in 1975, *supra* note 6, I gave no consideration to a dispensing power. At that time the ink was only a few years dry on the Uniform Probate Code of 1969, which had neglected to reconsider the rule of strict compliance, and legislative reform did not seem to be in the cards.

21. *Fernandez*, 173 N.J. Super. 240, 413 A.2d 998 (Super. Ct. 1980).

22. *Id.* at 245, 413 A.2d at 1001 (citing 5 N.J. Practice (Clapp, Wills and Administration § 41, n.11) (3d ed. 1962 & Supp. 1979)).

The reasoning in the *Fernandez* case has lately been endorsed by an appellate court. In *Peters*, 210 N.J. Super. 295, 509 A.2d 797 (Super. Ct. 1986), the intermediate court approved the language quoted from *Fernandez* and added: "Even if we were inclined to introduce substantial compliance into this area, ordinarily we should defer such a

have no way of knowing how frequently similar thinking has affected other cases at first instance.

As a practical matter, therefore, the proponent of a will that requires the nonstatutory substantial compliance doctrine for its validation may have to litigate his case through two or three courts. Only in a comparatively large estate would the potential return be worth the expense and risk of loss inherent in having to persuade the final-instance court to abandon long-settled authority.²³ Yet the larger the estate the more likely is the testator to have had competent professional help in drafting and executing his will. Wills Act execution blunders arise mostly in home-executed wills.

I know only one American precedent that has squarely²⁴ validated a concededly defective will on the ground that substantial compliance satisfied the purposes of the Wills Act. In 1981 in *Kajut*,²⁵ a Pennsylvania first-instance court was presented with the will of a blind testator who had signed by making his mark. Pennsylvania's Wills Act has a particular requirement for a will signed by mark; the testator's name must be "subscribed in his presence before or after he makes his mark"²⁶ The attorney who prepared the will in *Kajut* had had the testator's name typed on the will in advance of the execution rather than contemporaneously as the statute required. The court upheld the will, reasoning that the purposes of the particular formality had been achieved despite the formal breach. The holding expressly rested on the doctrine of substantial compliance with the Wills Act. "The intent of the testator was plain," the court said, and "no useful purpose can be served by destroying the will he created by a technical adherence to the Wills Act, the principal purpose of which is to make certain that the intent of a testator is effectuated."²⁷

II. SOUTH AUSTRALIA'S DISPENSING POWER

The snail's pace of progress under a nonstatutory substantial com-

change to the Supreme Court or Legislature." *Id.* at 307-08, 509 A.2d at 804. A dissenter resisted and urged the court to apply the substantial compliance doctrine. *Id.* at 309-12, 509 A.2d at 806-07.

23. Unless the substantial compliance claim arises as a supplementary or alternative ground, as in *Fernandez*.

24. It might also be fair to reckon the decision in *Snide*, 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981), discussed *infra* text accompanying notes 107-11, as a case instancing a judicially developed harmless error or substantial compliance rule, although the court did not speak in those terms.

25. 2 Pa. Fiduc. 2d 197, 22 Pa. D. & C.3d 123 (Orphans' Ct. 1981).

26. 20 Pa. Cons. Stat. Ann. § 2502(2) (Purdon 1975).

27. *Kajut*, 2 Pa. Fiduc. 2d at 204, 22 Pa. D. & C.3d at 136; see also *id.* at 201-02, 22 Pa. D. & C.3d at 129-31. The case involved a conflict-of-laws point as well as the substantial compliance question. According to the lawyer who won the case at first instance, the contest was settled before the decision could be subjected to appellate review. Letter from N.J. Nakles to author (Nov. 6, 1986) (on file at Columbia Law Review).

pliance doctrine in the United States contrasts markedly with the extensive development that has occurred under South Australia's statutory dispensing power. The statute has now been applied in forty-one cases.²⁸ By canvassing this case law, I think that the observer can derive a strong feel for how the harmless error principle works.

A. *The Origins of Section 12(2)*

1. *Report and Statute.* — In 1974 the Law Reform Committee of South Australia took up the question of excusing Wills Act execution blunders as an incidental topic in a report dealing mainly with a projected overhaul of the intestacy laws.²⁹ The committee observed that the number of intestate estates could be reduced if the courts were empowered to validate wills that suffered "technical" execution defects. "It would seem to us that in all cases where there is a technical failure to comply with the Wills Act, there should be a power given to the Court or Judge to declare that the will in question is a good and valid testamentary document if he is satisfied that the document does in fact represent the last will and testament of the testator . . ."³⁰

In November 1975 the state parliament translated the recommendation into statute, as section 12(2) of the local Wills Act:

A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court [the court of first instance in probate matters], upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.³¹

There is little reason to think that either the law reform committee or the legislature understood what a fundamental reform this measure entailed. The committee's report devoted only two paragraphs to the subject and invoked dramatically exceptional situations to illustrate the need for the dispensing power. "A person dying of thirst in the desert or a person in the icelands of Australian Antarctica may well scratch out what is without doubt his last will and testament," yet be unable to procure attesting witnesses.³²

28. See *infra* notes 50-51.

29. Twenty-Eighth Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to the Reform of the Law on Intestacy and Wills (1974) [hereinafter South Australia Report].

30. *Id.* at 10-11.

31. Wills Act Amendment Act (No. 2) of 1975, § 9 amending Wills Act of 1936, § 12(2), 8 S. Austl. Stat. 665.

32. South Australia Report, *supra* note 29, at 11. Australia has one of the most urbanized populations in the world. The first commentator on § 12(2) remarked that the law reform committee's emphasis on the isolated testator "embodies a somewhat

No research report of the sort that Australian law reform commissions customarily produce lies behind the recommendation.³³ In South Australian legal circles, section 12(2) is thought to have been the inspiration of the law reform committee's forceful chairman, Justice Howard Zelling of the South Australian Supreme Court. Sitting judicially in 1983 in one of the main cases under section 12(2), Zelling, J. remarked "with some diffidence [that] I wrote the report," but that "I had no idea that what is now s[ection] 12(2), which came from one of the ideas I incorporated in the report, would produce the amount of case law that it has."³⁴

A variety of other indicia reinforce the view that section 12(2) was not a carefully considered product. The measure is not particularly intelligently placed in the Wills Act that it amends; it is tacked on to an earlier section 12 that abrogates the old publication formality. Section 12(2) neglected to provide a transition rule to govern the estates of persons who died after the effective date of the legislation but who left wills afflicted with execution errors that had occurred before the act.³⁵ The section also did not address the intimate connection between errors in execution and errors in revocation, which left the courts to extend the statute to revocation.³⁶ Further, section 12(2) formulated the

romantic view of the modern Australian as a noble savage in constant battle with the forces of nature." Palk, *Informal Wills: From Soldiers to Citizens*, 5 *Adel. L. Rev.* 382, 393 (1976).

The dying testator who "scratch[es] out what is without doubt his last will" can be accommodated in a holograph jurisdiction; see, e.g., 26 *Can. B. Rev.* 1242 (1948), for the case of a farmer, dying pinned beneath his tractor, who scratched his will on its fender. The point is made below, *infra* text accompanying notes 90-91, that several of the cases that require rescue under South Australia's harmless error doctrine would stand as holographs in jurisdictions that, unlike the Australian states, recognize holographs.

33. For discussion of the origins and work of the Australian law reform commissions, see Castles, *The New Principle of Law Reform in Australia*, 4 *Dalhousie L.J.* 3 (1977). See *infra* text accompanying notes 217-30 for discussion of the extensively researched law reform commission reports on the harmless error question from New South Wales and Western Australia, and from the Canadian commissions in British Columbia and Manitoba.

Another lapse in the South Australia committee report, noticed by Palk, *supra* note 32, at 389, is that the report misstates the local requirement for the joint presence of attesting witnesses. Section 8 of the Wills Act requires that the testator sign in the joint presence of the witnesses, not (as the report has it) that the witnesses sign in the presence of each other. Wills Act of 1936, § 8, 8 *S. Austl. Stat.* 665. See *infra* text accompanying notes 58-72 for discussion of the presence requirement under the harmless error rule.

34. Kelly, 34 *S.A. St. R.* 370, 380 (1983). The question whether litigation levels under § 12(2) are worrisome is discussed *infra* text accompanying notes 126-32, 174-89, 248-49.

35. The courts soon held that the section should apply retroactively. Kolodnicky, 27 *S.A. St. R.* 374, 378-83 (1981). This is surely the correct result, since retroactivity in a purely remedial statute disturbs no reliance interests.

36. See discussion *infra* text accompanying note 133.

proponents' burden of proof in an unfelicitous way, appropriating language from the criminal law ("no reasonable doubt") that the courts have had to bend. We shall see that the question of the correct standard of proof for the dispensing power is something of a sore point under section 12(2).³⁷

The full potential of so casual a piece of legislative drafting was not at once perceived. The first decision, *Graham*,³⁸ appeared three years after the legislation was enacted. Subsequent case law under section 12(2) was a trickle until the 1980's. The shortcomings of section 12(2) should not, however, be exaggerated. The basic grant of discretion for excusing harmless errors was forthright enough to permit the courts to work out its implications. Under a better drafted statute the legislation might have controlled more. What actually happened under section 12(2) is that the courts were left to map out much of the dimensions of the reform.

2. *An Echo of Testator's Family Maintenance?* — Although section 12(2) represents a great innovation, there is a sense in which the measure is not without antecedents in Australian probate law. Discretion is the coin of section 12(2): The court is given discretion to vary the ordinary course of probate law for the purpose of preventing injustice. Since the beginning of this century, statutes in each Australian state have conferred upon the court the discretion to vary the disposition of a will in order to correct what the court determines to be inadequate provision for a spouse or dependent.³⁹ This system, still best known under its early label of Testator's Family Maintenance (TFM), has been extended to allow the court a similar discretion to vary the result that would otherwise obtain under the intestacy statute. England adopted TFM in 1938, and in the American literature TFM tends to be known as the English system.⁴⁰

TFM is the Commonwealth alternative to American forced share law. TFM has, therefore, an objective that is quite distinct from section 12(2), and none of the section 12(2) cases has thus far led to TFM proceedings. TFM overrides rather than implements the testator's intent. What TFM shares with section 12(2) is its method, judicial discretion. I happen not to be an admirer of TFM. I prefer the fixed-fractions of American forced share law and of Continental and American community property law.⁴¹ I do not think that adequate standards have been or can be developed to govern judicial discretion when the question is,

37. See *infra* text accompanying notes 88–89, 157–73.

38. 20 S.A. St. R. 198 (1978).

39. The standard reference work is D. Wright, *Testator's Family Maintenance in Australia and New Zealand* (3d ed. 1974).

40. The English statute is extracted and the American literature conveniently collected in E. Clark, L. Lusky, & A. Murphy, *Cases and Materials on Gratuitous Transfers* 194–99 (3d ed. 1985).

41. See generally *id.* at 142–75 (treatment of American forced share law) and 175–81 (community property law).

"How much is fair?"⁴² By contrast, the question under section 12(2), "Did the testator intend this document to be his will despite his formal blunder?", is quite traditional and invites resolution by means of familiar proofs. Nevertheless, the long experience with judicial discretion in probate law under TFM may help explain why in Australia rather than somewhere else the legal system found the confidence to experiment with judicial discretion to excuse Wills Act execution blunders.

B. *Probate Practice*

1. *Procedure.* — The basic architecture of South Australian probate law derives from early nineteenth-century English ecclesiastical practice. The division between common form and solemn form probate, which is still known as such in a few corners of American probate practice,⁴³ and which underlies the UPC's division between informal and formal probate,⁴⁴ is the organizing principle of South Australian procedure. Common form probate is the norm, and it is noncontentious; but when the validity of a will is in dispute probate must be in solemn form.

In common form proceedings, the registrar of probates processes routine estates. He refers questions of difficulty to a judge of the court of general jurisdiction. When such a matter entails fact finding, the court ordinarily does not hear witnesses but is informed by means of witnesses' affidavits gathered by the solicitor for the estate in consultation with the registrar.⁴⁵ Genuinely contested cases are heard in solemn form; ordinary adversary procedure then pertains, with oral examination and cross-examination of witnesses on contested issues of

42. For an illuminating discussion of why discretion under TFM miscarries while discretion under the harmless error rule for Wills Act execution blunders succeeds, see M. Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 Tul. L. Rev. 1165 (1986).

Under TFM, discretion is routine and often unbounded. In 1980, I had occasion to discuss TFM with the Late Justice F.C. Hutley of the New South Wales Supreme Court. He remarked, only partly in jest, that as a result of TFM, "the only thing a testator can be sure of achieving by will is his choice of an executor." TFM therefore impedes predictability and reliance, two of the dominant values of property law. By contrast with the routine discretion of TFM, the harmless error rule for Wills Act execution blunders operates only in highly exceptional circumstances, at the margin of a well-settled legal rule. The harmless error rule is governed by a restrictive standard (well-proven testator's intent) that, experience has shown, actually promotes predictability. See *infra* text accompanying note 247.

43. See generally 3 W. Bowe & D. Parker, *Page on the Law of Wills* § 26.11, at 26-29 (rev. ed. 1961).

44. See U.P.C. art. 3 general comment.

45. "The Registrar examines the application to ensure that the affidavits or papers are not defective or incomplete. When he is satisfied that the application is in order, it is then incumbent upon him to prepare a report for the assistance of the motions Judge." A. Faunce de Laune, South Australia Registrar of Probates, "Re Informal Wills," letter report to Dr. C.E. Croft, Executive Director, Law Reform Commission of Victoria (Dec. 14, 1984) (on file at the Columbia Law Review).

fact. Most of the section 12(2) cases—thirty-six of forty-one—have arisen in common form. The remaining five cases were nominally in solemn form, although only three were seriously contested.⁴⁶

2. *Court.* — Section 12(2) bestows its excusing power upon the Supreme Court, not the registrar of probates, although for tiny estates the court has delegated its discretion to the registrar by means of a published rule.⁴⁷ The Supreme Court is the court of general jurisdiction. No specialized probate division has formed within it. At first instance, judges sit singly. The case law under section 12(2) is, therefore, overwhelmingly the product of single-judge decisions rendered by a nonspecialist bench.⁴⁸

3. *Opinions.* — The deciding judge has complete discretion in a section 12(2) case whether to write an opinion or to dispatch the case by means of a formulaic judgment (“the Court being satisfied that there can be no reasonable doubt that the said deceased intended the said piece of paper to constitute his Will,”⁴⁹ probate is ordered). Twenty-one of the forty-one section 12(2) cases have resulted in opinions, all published or forthcoming in the local reporter, the *South Australian State Reports*.⁵⁰ The remaining 20 cases, decided without opinions,⁵¹ I shall

46. For discussion and criticism of judicial processing of uncontested cases, see *infra* text accompanying notes 174–89. The three contested cases in order of decision were *Baumanis v. Praulin*, 25 S.A. St. R. 423 (1980); *Kelly* (also styled *Duggan v. Hallion*), 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983); *Hodge*, 40 S.A. St. R. 347 (1986). (Mohr, J.). Two further cases originated in solemn form but were not seriously contested, hence were processed more like common form cases. In *Radziszewski* (also styled *Lalic v. State of South Australia*), 29 S.A. St. R. 256 (1982), the testator was wholly without heirs, and there would have been an escheat to the state if the will failed. The state was therefore represented as an adverse party. “Counsel who appeared for the State of South Australia made it clear that whilst putting the plaintiff to proof and not consenting to any orders, she was nevertheless not opposing the order sought. She did not call any evidence.” 29 S.A. St. R. at 257. In *Dale* (also styled *Dale v. Wills*), 32 S.A. St. R. 215 (1983), the disputants settled the case after having commenced it in solemn form. “In effect there is no contest here,” the judge explained. “I am told that the parties have settled the matter of the administration of the estate, subject to the order which I am asked to make today [validating the defectively executed will for probate].” 32 S.A. St. R. at 218.

47. Rules of the Supreme Court (Administration and Probate Act) 1984, Rule 61, discussed *infra* text accompanying notes 188–91.

48. A three-judge appellate panel, called the Full Court, is built from the Supreme Court, and any of the judges (currently there are 14) may draw duty on an appeal. The single judge at first instance has authority to refer a case of exceptional importance to a three-judge first-instance panel; this step was taken in the landmark *Williams* case, 36 S.A. St. R. 423 (1984), discussed *infra* text accompanying notes 113–19, in which the court validated an unsigned will. Of the contested cases under § 12(2), only one has been appealed. *Kelly*, 34 S.A. St. R. 370 (1983), *aff'g* 32 S.A. St. R. 413 (1983).

49. *Gallasch*, No. 89 of 1982, order (S.A. Sup. Ct. July 12, 1982) (Bollen, J.).

50. Following are the 21 cases in which opinions have issued, listed in order of date of decision:

Graham, 20 S.A. St. R. 198 (1978); *Baumanis v. Praulin*, 25 S.A. St. R. 423 (1980); *Kurmis*, 26 S.A. St. R. 449 (1981); *Kolodnick*, 27 S.A. St. R. 374 (1981); *Standley*, 29 S.A. St. R. 490 (1982); *Radziszewski*, 29 S.A. St. R. 256 (1982); *Crocker*, 30 S.A. St. R.

hereafter refer to as the unreported cases; for these cases I have inspected the underlying documents, which are public records, in the registry in Adelaide.

4. *The Registrar's Memoranda.* — The reported section 12(2) cases make occasional reference to various of the unreported cases.⁵² When I began to study section 12(2) cases, I found this somewhat baffling. I wondered how either counsel or court would know to cite such precedents. Indeed, since no opinion has issued in an unreported case, it was something of a puzzle to know what precisely the court was citing when it gave the name and docket number of such a case. Upon inquiry in South Australia, I learned of a practice that explains this use of unreported cases. In probate matters that require judicial decision, the probate registrar prepares a memorandum for the information of the court. (A copy is preserved with the official case file in the probate registry.) The memorandum summarizes the facts as they appear from pleadings and affidavits, reviews the relevant legal authorities, and recommends an outcome. The judges occasionally acknowledge the influence of these memoranda in published opinions.⁵³ When compared

321 (1982); Clayton, 31 S.A. St. R. 153 (1982); Possingham, 32 S.A. St. R. 227 (1983); Dale, 32 S.A. St. R. 215 (1983); Kelly, 32 S.A. St. R. 413, aff'd, 34 S.A. St. R. 370 (1983); Blakely, 32 S.A. St. R. 473 (1983); Williams, 36 S.A. St. R. 423 (1984); Hollis, 37 S.A. St. R. 27 (1984); Eva Smith, 38 S.A. St. R. 30 (1985); Roberts, 38 S.A. St. R. 324 (1985); Lynch, 39 S.A. St. R. 131 (1985); Ryan, 40 S.A. St. R. 305 (1986); Bennet, 40 S.A. St. R. 350 (1986) (Bollen, J.); Kraehe, 40 S.A. St. R. 347 (1986) (Matheson, J.); Hodge, 40 S.A. St. R. 398 (1986) (Mohr, J.).

51. The 20 cases are listed in the order of decision date, a sequence that sometimes differs from filing date. The file number cited after each case name is that assigned in the probate registry, where the pleadings, affidavits, orders, and other litigation papers are kept. Included among these 20 cases is the one thus far decided by the probate registrar pursuant to his authority under Rule 61, on which see *supra* note 47, *infra* text accompanying notes 185–87.

Pavilavskas, No. 494 of 1978 (S.A. Sup. Ct. Aug. 1, 1979) (Zelling, J.); Whibley, No. 159 of 1979 (S.A. Sup. Ct. Aug. 13, 1979) (Mohr, J.); Gallasch, No. 89 of 1982 (S.A. Sup. Ct. July 12, 1982) (Bollen, J.); Middlemiss, No. 145 of 1982 (S.A. Sup. Ct. Sept. 13, 1982) (Mohr, J.); Ball, No. 309 of 1982 (S.A. Sup. Ct. Dec. 13, 1982) (White, J.); Sanderson, No. 237 of 1982 (S.A. Sup. Ct. Dec. 13, 1982) (White, J.); Sierp, No. 173 of 1982 (S.A. Sup. Ct. Dec. 13, 1982) (White, J.); Halliday, No. 329 of 1982 (S.A. Sup. Ct. Apr. 11, 1983) (White, J.); Pointon, No. 105 of 1983 (S.A. Sup. Ct. July 11, 1983) (Sangster, J.); Franks, No. 10 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.); Almya Smith, No. 190 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.); Steel, No. 338 of 1982 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.); Welter, No. 104 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.); Horton, No. 284 of 1983 (S.A. Sup. Ct. Jan. 17, 1984) (Zelling, J.); Phillips, No. 263 of 1983 (S.A. Sup. Ct. Feb. 13, 1984) (White, J.); Brown, No. 45 of 1983 (S.A. Sup. Ct. Apr. 10, 1984) (Milhouse, J.); Robertson, No. 92 of 1984 (S.A. Sup. Ct. Aug. 13, 1984) (Matheson, J.); Rodger, No. 79 of 1985 (S.A. Sup. Ct. May 29, 1985) (order of the registrar, A. Faunce de Laune, pursuant to Rule 61); Pudney, No. 240 of 1984 (S.A. Sup. Ct. June 11, 1985) (Olsson, J.); McFarlane, No. 114 of 1985 (S.A. Sup. Ct. Sept. 9, 1985) (O'Loughlin, J.).

52. E.g., Roberts, 38 S.A. St. R. 324, 325, 326 (1985); Kolodnick, 27 S.A. St. R. 374, 379 (1981); Kurmis, 26 S.A. St. R. 449, 454 (1981).

53. See, e.g., Eva Smith, 38 S.A. St. R. 30, 31 (1985) (Bollen, J.) ("I begin by ac-

with the resulting judgment, a memorandum will sometimes be found to have served as the draft judgment.

The registrar's memoranda have made possible the precedential life of the unreported section 12(2) cases. The registrar understood the potential importance of section 12(2) from its inception, and he kept track of the cases, including the unreported ones.⁵⁴ His memoranda consistently cite both the reported and the unreported cases. Although an unreported case may lack an explicit rationale, the implicit rationale in the typical section 12(2) matter is easily discernible from the facts and the outcome.

C. *The Patterns of Case Law*

The forty-one cases applying section 12(2) sort themselves into five categories,⁵⁵ which I shall follow in discussing the law that has developed. Two of the categories involve the attestation requirements. Fully one-third of all section 12(2) cases arise from situations in which

knowledging the great assistance which I have had from a memorandum prepared for me by the Registrar of Probates."); Roberts, 38 S.A. St. R. 324, 326 (1985); Kolodnicky, 27 S.A. St. R. 374, 385 (1985). See also the reference to the registrar's memorandum at the end of the passage quoted supra note 45.

54. The 20 unreported cases that are cited in this Article have been identified for me by the registrar as the total cohort of such cases that had been decided as of the time I concluded my research for this Article, in June of 1986. A few more cases were pending at that time.

Facts that I narrate when discussing an unreported case come from the witnesses' affidavits or from the summary of those affidavits in the registrar's memorandum. A laconic one-or-two page judicial decree will have reported the result; see the example quoted supra text accompanying note 49.

55. The following table counts 46 applications of § 12(2) in the 41 cases. The discrepancy arises because a few cases contain more than one sort of defect.

<i>Section 12(2) Cases</i>		
<i>Category of Defect</i>		<i>Instances</i>
Attestation:	Presence	14
Attestation:	Number	9
Signature:	Unsigned Will	4
Signature:	Misplaced	7
Alteration		12
	Total	46

The cases as categorized in the table follow. Within each category, cases are listed in the sequence that they were decided. Citations for all cases appear supra notes 50-51.

Presence: *Graham, Whibley, Kolodnicky, Standley, Ball, Sanderson, Dale, Pointon, Almyra Smith, Steel, Horton, Phillips, Rodger, McFarlane.*

Number: *Radziszewski, Crocker, Clayton, Halliday, Kelly, Franks, Phillips, Eva Smith, Hodge.*

Unsigned will: *Baumanis v. Prauln, Blakely, Williams, Pudney.*

Misplaced signature: *Pavilavskas, Welter, Brown, Phillips, Hollis, Roberts, Kraehe.*

Alteration: *Kurmis, Standley, Gallasch, Middlemiss, Sterp, Possingham, Steel, Horton, Robertson, Lynch, Ryan, Bennet.*

The cases that are multiple-counted are *Standley, Steel,* and *Horton* (double-counted); and *Phillips* (triple-counted).

the testator failed to comply with the requirement that he sign in the presence of at least two witnesses present at the same time (hereinafter, "presence" cases). In the other set of attestation cases, one or both of the required witnesses were missing (hereinafter, "number" cases). Two further groups of section 12(2) cases arise from the requirement that the testator sign his will. In a small set of these cases there is no signature at all (hereinafter, "unsigned will" cases). A larger group involves wills in which the testator signed on the first page or pages, but not at the end (hereinafter, "misplaced signature" cases). Finally, there is a sizeable and intriguing category, in which the testator attempted without adequate Wills Act formality to revise or to add provisions to a previously executed will (hereinafter, "alteration" cases).

In the exposition that follows, I shall review the five categories of case law. I shall then direct attention to two large issues of policy that emerge from the experience to date. First, I discuss why the standard of proof needs some tinkering.⁵⁶ Second, I explain why the litigation levels, which may look high, have been bloated as a result of a foible of local probate procedure that is not integral to the harmless error rule and that need not be repeated elsewhere should other jurisdictions choose to emulate the South Australian dispensing power. Under South Australian probate procedure, section 12(2) requires judicial validation of a defective will. The parties cannot handle the matter consensually. Most of the section 12(2) cases, although they evince judicial applications of the dispensing power, are not genuinely contested.⁵⁷

D. *Attestation*

1. *Presence*. — The first case, *Graham*,⁵⁸ was decided in November 1978, almost three years to the day after the enactment of section 12(2). The facts are typical enough of the presence genre. An ailing testatrix signed her will in private and sent her nephew, the principal beneficiary, to "get it witnessed" by a pair of neighbors.⁵⁹ The attestation thus violated the requirement of section 8 of the South Australian Wills Act that the testator sign "in the presence of two or more witnesses present at the same time."⁶⁰ The will had been drafted by an officer of a trust company in accordance with the testatrix' instructions and without involvement by the nephew, so there was no ground to suspect imposition. The testatrix' signature was independently verified. The judge, Jacobs, J., concluded: "Upon these facts, I have not the slightest doubt that the deceased intended the document which is

56. See *infra* text accompanying notes 157-73.

57. See *infra* text accompanying notes 174-89.

58. 20 S.A. St. R. 198 (1978).

59. *Id.* at 201.

60. Wills Act Amendment Act (No. 2) of 1975, § 5, amending Wills Act of 1936, § 8(b), 8 S. Austl. Stat. 665, 668.

before me to constitute her will."⁶¹

Virtually every subsequent reported section 12(2) opinion has cited *Graham*, and many have glossed its key passage, in which the judge discusses how to apply the statute's tersely worded standard. Section 12(2) requires the court to be "satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."⁶² But since an execution defect might signal irresolution or worse, how can a judge satisfy himself as the statute requires that the decedent did in fact mean the document to be his will? Jacobs, J. reasoned that

in most cases, the greater the departure from the requirements of formal validity dictated by [the Wills Act], that is to say, to the extent that those requirements have not been . . . observed, the harder will it be for the Court to reach the required state of satisfaction. For example, I do not think I could have reached that state of satisfaction in the present case if the deceased had done no more than sign the will⁶³

The main insight in this passage has been endorsed incessantly,⁶⁴ although later case law declined to follow the particular dictum that section 12(2) could not cure a wholly unattested will.⁶⁵ What matters in excusing a Wills Act defect is "the extent" of the departure from Wills Act formality; hence "the greater the departure . . . the harder" the case. This is a profoundly purposive interpretation of section 12(2). The court must distinguish between a formal breach that impairs the purposes of the Wills Act and one that does not. Presence defects are almost always innocuous, because the presence requirement is so peripheral to the main evidentiary, cautionary, and protective policies of the Wills Act. A larger departure—for example, failure of the testator to sign the will—is far more likely to have impaired the Wills Act policies, and is correspondingly more difficult to excuse under section 12(2).

Graham was the first of fourteen presence cases.⁶⁶ In all fourteen

61. 20 S.A. St. R. at 201.

62. Wills Act Amendment Act (No. 2) of 1975, § 9, Amending Wills Act of 1936, § 12(2), 8 S. Austl. Stat. 665, 669 reprinted supra text accompanying note 31.

63. 20 S.A. St. R. at 205.

64. See, e.g., *Eva Smith*, 38 S.A. St. R. 30, 33 (1985); *Williams*, 36 S.A. St. R. 423, 428 (1984); *Clayton*, 31 S.A. St. R. 153, 156 (1982).

65. See infra text accompanying notes 71–87. A similar dictum two paragraphs earlier, 20 S.A. St. R. at 205, concluding that "unsigned documents . . . would not come within the ambit of s[ection] 12(2)" has also been disaffirmed, see infra text accompanying notes 101–16.

66. See supra note 55. Presence defects occur far more often than come to light. Ordinarily, the presumption of due execution that arises from a seemingly regular attestation clause forecloses inquiry into the actual circumstances of execution. When, however, a will lacks an attestation clause or exhibits indicia of irregularity such as alteration or interpolation, proofs are taken on the circumstances of execution, and presence defects may then be discovered.

the defective instruments have been validated. The detail is not worth recounting. Most of the cases are unreported, and all involve uninteresting variations on the facts in *Graham*. It does not much matter why people botch the presence requirement, so long as there is no evidence to suggest imposition.⁶⁷ What Americans are likely to find peculiar about these cases is that they get litigated at all, since the outcome is mostly foregone. I shall return to that subject below, when discussing litigation levels under section 12(2).⁶⁸

2. *Number*. — There have been seven cases in which the will appeared totally unattested⁶⁹ and two more in which the will was attested by only one witness.⁷⁰ In contrast to the innocuous presence cases, cases that instance total failure of attestation have presented some difficult tests of section 12(2). Presence is peripheral to the Wills Act policies, but attestation is not. The attestation process sets will making apart from daily routine, warning the testator of the seriousness of what he is signing. Attestation evidences deliberation and finality; attesting witnesses may, if needed, give evidence of the circumstances of execution, and they provide some protection against imposition.

a. *Unattested Wills*. — The first important⁷¹ case to raise total failure of attestation involved especially compelling facts. In *Crocker*,⁷² the court validated a will executed in 1941 on a Royal Australian Air Force form. The form had wrongly declared that a serviceman on active duty could make an unwitnessed will. Inferring that the decedent had relied

67. It should be remarked that the ability to remedy presence defects under the dispensing power has the incidental effect of foreclosing liability for professional malpractice in the case in which the presence defect arises in a professionally drafted will. Presence defects seldom occur when a professional draftsman supervises execution, but they do arise in the situation in which the lawyer or other draftsman releases the will for the testator to execute without supervision. It would not be surprising to see malpractice liability develop in American law for failure to supervise execution. See Johnston, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 Iowa L. Rev. 629, 650–52 (1982). For recent authority, see *Persche v. Jones*, 387 N.W.2d 32 (S.D. 1986) (will attested out of testator's presence held void, and banker who negligently supervised execution held liable for damages for unauthorized practice of law).

68. See *infra* text accompanying notes 181–89.

69. *Hodge*, No. 2349 of 1984 (S.A. Sup. Ct. Mar. 13, 1986) (Mohr, J.); *Eva Smith*, 38 S.A. St. R. 30 (1985); *Franks*, No. 10 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.); *Kelly*, 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983); *Clayton*, 31 S.A. St. R. 153 (1982); *Crocker*, 30 S.A. St. R. 321 (1982); *Radziszewski*, 29 S.A. St. R. 256 (1982).

70. *Halliday*, No. 329 of 1982 (S.A. Sup. Ct. Apr. 11, 1983) (White, J.); *Phillips*, No. 263 of 1983 (S.A. Sup. Ct. Feb. 13, 1984) (White, J.).

71. An earlier case, *Radziszewski*, 29 S.A. St. R. 256 (1982), dealt with the less interesting situation of attesting witnesses who had been present but had not subscribed when the testator signed. The weakened testator signed by mark, and the opinion is devoted to the conventional issue of whether a mark constitutes a signature (it does). The attestation defect is dismissed with a passing remark that “compliance with [the relevant sections of the Wills Act] is no longer essential (see [section] 12(2)).” *Id.* at 259.

72. 30 S.A. St. R. 321 (1982).

upon this mistaken notice, the court enforced the will under section 12(2). What makes this such an intuitively correct result, despite the testator's total noncompliance with the attestation requirement, is that the cause of his noncompliance was explained and shown to be harmless. The court protected his quite reasonable reliance upon official misinformation.

The testator in *Crocker* was essentially blameless, but section 12(2) has been applied in later unattested will cases in which the testator was more responsible for the defect. The morose testator in *Franks*,⁷³ for example, committed suicide by rifleshot in his kitchen. On the kitchen table he left two envelopes, one containing his unwitnessed will, the other a signed letter addressed to the principal beneficiary. The letter recited: "It may not be a true will in the legal sense but under the circumstances I think it will be legal and binding."⁷⁴ Virtually nowhere else in the world (apart from holograph jurisdictions) would this brave and untutored prediction have proved correct, but under section 12(2) the judge concluded that the document expressed the testator's intent and ordered it probated.

The testator who pulled the trigger appreciated the finality of his unwitnessed will. In other unattested-will cases the evidence has been less clear. In *Eva Smith*,⁷⁵ the unattested will of an elderly testatrix was found after her death among other valuable papers in an envelope at her hospital bedside. The will was a printed form with inked fill-ins. Instructions on the back of the will form emphasized the need for attestation. The judge, Bollen, J., posed the right question when considering whether to probate the will under section 12(2). "Is it possible that she had written it out but delayed complying with necessary formalities whilst deliberating about what she had 'provided' in the document?"⁷⁶ Attestation evidences finality. When the formality is lacking, the court must satisfy itself that the want of attestation does not indicate irresolution. The judge did so:

The established facts are that the deceased was very old, that she told her grand-niece that she had written out a will, that no later will exists, that she took the document with other valuable papers with her to the hospital, and . . . that she provided for those to whom one would have expected her to leave her

73. No. 10 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.).

74. Document headed "Letter to Hilary Ignatious Keane," in the probate file in *Franks*, No. 10 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.).

75. 38 S.A. St. R. 30 (1985).

76. *Id.* at 33. Another peculiarity of the document that could indicate irresolution was that the words "Lindy 8 (Ward)" are jotted in the margin of the will, at right angle to the text. The judge thought it "likely that [the notation] refer[red] to someone, perhaps a nurse, in Ward 8 of the Royal Adelaide Hospital when the deceased was there." *Id.* at 34. He continued, "I can see no relevant significance in this writing." *Id.* But if she thought the document was her will, why was she using it as a notepad? Answer: Somebody confined in a hospital bed may not always have a lot of options.

estate Despite her mental acuity in old age I am satisfied beyond reasonable doubt that age must have caused her to overlook the need for witnesses.⁷⁷

On behalf of the testator in *Hodge*,⁷⁸ the latest of the unattested will cases, not even frailty can be pleaded in defense of his failure to obtain attestation. He was simply stubborn. He took a booklet supplied by a firm of funeral directors for the purpose of aiding prospective survivors in making funeral arrangements, and he turned it into a will. Where the booklet had a section to be filled in beginning "My will is lodged with . . .," the testator wrote: "This is my Will and whatever I leave behind is the property of my daughter Mrs. V. Thoreson."⁷⁹ He showed this invention to the daughter, who told him that a will needed two witnesses. "The deceased said to her that, in effect, he did not want to be bothered with that, it was perfectly plain," since he had signed the document and dated it.⁸⁰ The court found no evidence of fraud or imposition and validated the will under section 12(2).

What makes *Hodge* a hard case is that the testator had been warned that his instrument might be defective. It is hard to say of a testator who deliberately sets out to breach the governing formalities that he nevertheless intended the instrument to be effective as his will. But *Hodge* is not quite that case, because the warning that the testator refused to heed came only from a family member and not from an authoritative figure such as his lawyer.⁸¹

The most difficult of the unwitnessed will cases is *Kelly*.⁸² Dr. Kelly, the testator, was a physician who, late in life, had studied law and qualified at the bar. A few weeks before his death in February 1981, Dr. Kelly handed his housekeeper a notebook, saying to her, "Use these for your notes." The notebook was discovered to contain a page in Dr. Kelly's hand, headed "My last will and testament." The document bore his signature, was dated October 17, 1980, and concluded: "Written as I have considerable cardiac pain and irregularity at time." The evidence showed that Dr. Kelly had been investigating making certain charitable devises, for which this document did provide.⁸³

The trial judge probated the document under section 12(2) despite the want of attestation. "If the document were meant merely as instructions or an *aide-memoire*," the judge reasoned, "there would be no point in his signing it, dating it, and writing an explanation for his lack of proper formality."⁸⁴ Although there was evidence that on the day of

77. *Id.* at 33-34.

78. 40 S.A. St. R. 398 (1986).

79. *Id.*, at 399.

80. *Id.*

81. For further discussion of the significance of attempted compliance, see *infra* text accompanying notes 117-18.

82. 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983).

83. *Id.* at 414-16.

84. *Id.* at 417.

his death Dr. Kelly had spoken as though a devise omitted from this document but contained in an earlier will were still in effect, the judge thought that "there can be no reasonable doubt that Dr. Kelly at the time of the making of the 1980 document . . . intended that document to constitute his will. Whether having done so remained in his memory or not . . . [is] in my opinion not to the point."⁸⁵ The decision was sustained on appeal.⁸⁶

Granting that the document was written under conditions of apprehended peril such that, had Dr. Kelly then died, the court ought to have exercised its power under section 12(2) to excuse noncompliance with the attestation requirement, it is much harder to excuse his failing to get the document attested after he recovered. When a legally-trained testator recites in the defectively executed instrument that he is making it on account of a medical emergency, his subsequent failure to procure attestation once events allowed is consistent with the view that it was intended at the time of its making to be provisional. Dr. Kelly's instrument is therefore open to interpretation as a conditional will, intended to take effect if he had died of the immediate peril, but allowed to lapse when not re-executed with Wills Act formality after the passing of the peril.⁸⁷

I find *Kelly* particularly difficult to reconcile with the high standard of proof that section 12(2) imposes. Recall that the judge's duty is not only to ascertain that "the deceased intended the document to constitute his will," but also to be "satisfied that there can be no reasonable doubt" about it.⁸⁸ To say that *Kelly* is at best a close case is to call into question whether it could be correctly decided on so high a standard of proof. I shall return to the subject of whether the South Australian courts are meeting this standard; and whether, as a matter of statutory design, it is wise to impose that standard.⁸⁹

Notice that in a holograph jurisdiction the document in *Kelly* would have qualified as a complying instrument, since the testator wrote it by hand and signed it. The gist of holographic formality is to dispense with attestation when the testator handwrites the will.⁹⁰ Some of the

85. *Id.* at 418.

86. 34 S.A. St. R. 370 (1983).

87. This point was raised on appeal and dismissed lightly, see 34 S.A. St. R. at 383: "There is nothing in the document . . . which makes the will conditional in that respect. The addendum at the end simply provides the reason why the testator found it urgently necessary to make a will as he did." This passage is question-begging. Precisely the issue that arises in a case in which the testator has made a recital of inducement is whether the recital is a condition or a mere explanation. The court asserts the latter without rationale. I have indicated in text why the contrary is the better view.

88. Wills Act Amendment Act (No. 2), of 1975, § 9 amending Wills Act of 1936, § 12(2), 8 S. Austl. Stat. 665 reprinted *supra* text accompanying note 31.

89. See *infra* text accompanying notes 157-73.

90. The holograph requirements are discussed *supra* text accompanying note 4. The question of construction in *Kelly* (whether the language of the addendum rendered

need for section 12(2) in South Australia arises because in that state (as in all Australian jurisdictions) the Wills Act does not authorize holographs. In Manitoba, which enacted a variant of the South Australian dispensing power in 1983, the courts have been content to handle under the local holograph statute some cases that in South Australia would have been dealt with under section 12(2).⁹¹

b. *Partial Attestation.* — From the willingness of the South Australian courts to validate wholly unattested wills under section 12(2), it followed that they would not hesitate to enforce partially attested wills. There have been two cases, both unreported, in which the testator thought that one witness would suffice. The courts have held the error harmless both times.⁹² The key facts in *Phillips*⁹³ are worth recounting, because the same blunder occurs in one of the few cases arising under the Queensland statute discussed below.⁹⁴ The will was witnessed by a justice of the peace (JP), who is a lay officer armed with a rubber stamp in the fashion of an American notary. It seems that the misimpression is current among some of these JPs that attestation by a single JP satisfies the Wills Act. In South Australia under section 12(2) the court protected the testator's mistaken reliance.

3. *Overview on Attestation.* — Half the section 12(2) cases to date have involved defective compliance with the attestation rules (presence and number). The courts have excused the error every time. By contrast, we shall see that the first unsigned will case failed under section 12(2), and that no oral will case has even been brought. Practice under the purposive standard of section 12(2) has rightly discerned that writing and signature are more purposive than attestation. Because writing and signature have greater evidentiary and cautionary value, they are much harder to dispense with under section 12(2).

Having spent time on legislative drafting committees in recent years, I have become newly sensitive to the multiplicity of purposes that statutes may intend, and to the paucity of means available for drafters to signal whether a particular requirement serves a major value or a trivial one. Drafters feel that they must speak in one voice: command. The choice is felt to be between commanding and omitting, even when what is wanted is more in the way of recommendation, instruction, or

the document conditional) would remain in issue in a holograph jurisdiction, although the testator's failure to procure attestation after recovering from the apprehended peril would no longer bear on the issue. See also *infra* note 235 (discussing tension between two levels of formality in holographic jurisdictions).

91. See *infra* note 234 and accompanying text.

92. The second case, *Phillips*, No. 263 of 1983 (S.A. Sup. Ct. Feb. 13, 1984) (White, J.), is discussed next in text. In the other, *Halliday*, No. 329 of 1982 (S.A. Sup. Ct. Apr. 11, 1983) (White, J.), an elderly testatrix took the counsel of a lay companion that a will needed one attesting witness.

93. No. 263 of 1983 (S.A. Sup. Ct. Feb. 13, 1984) (White, J.).

94. *Henderson*, No. 860 of 1985 (Queensl. Sup. Ct. Sept. 27, 1985) (Macrossan, J.), discussed *infra* text accompanying notes 209-14.

exhortation. Thus, the Wills Act insists upon the marginal presence requirement of the attestation ceremony in the same terms that it calls for the fundamentals of writing and signature.

South Australia's section 12(2) provides an indirect cure. It leaves the Wills Act formalities unaltered but allows the courts to excuse instances of harmless noncompliance. Yet one way to describe the effect of section 12(2) as seen in the attestation cases is to say that section 12(2) has reduced attestation from a requirement to an option.⁹⁵ Non-compliance is hardly an enticing option, even for the stubborn, since (if detected⁹⁶) it throws one's estate into litigation. Hence, few testators have elected this option—to be precise, twenty-three testators of whom we know, mostly blunderers, have done it, out of tens of thousands of testators during the decade that section 12(2) has been in force.

E. Signature

1. *Unsigned Will*. — The second reported section 12(2) case, *Baumanis v. Praulin*,⁹⁷ reached the courts in 1980. Validation was refused to a will that the testator had not signed. A clergyman drafted the will at the testator's request. When the will was typed up and brought to the testator's hospital bedside for signing, he expressed his approval but insisted that the document be retyped to include a couple of small changes. He died before the clergyman could return with the revision. The court refused to probate either draft under section 12(2). The judge admitted that there could be "no doubt that the [first draft] . . . represents what the deceased intended his will to contain and that he intended to sign as his last will and testament a document in similar form but with the minor variations . . ." ⁹⁸ Nevertheless, the court refused to validate it.⁹⁹

Baumanis is an illuminating and fortunate precedent for limiting the application of the dispensing power. Many a testator decides not to execute a will that has been prepared to his instructions. One of the things you can do with a draft will is decide you do not want to use it. Signature is the formality that permits us to distinguish between drafts and wills. Decide such a case the other way¹⁰⁰ and the risk arises that

95. See *supra* text accompanying note 15.

96. Because the witnesses' signatures must appear on the face of the will, partial or total failure of attestation cannot escape detection. A presence defect, by contrast, must be proved by means of extrinsic evidence from the attesting witnesses or from others, and proofs will be taken on this question only if something irregular (such as the want of an attestation clause) puts the matter in issue. See *supra* note 66.

97. 25 S.A. St. R. 423 (1980).

98. *Id.* at 425.

99. *Id.* at 426.

100. A New Jersey court has just managed to blur the distinction between draft and will, applying that state's ungovernable "probable intent" doctrine in order to construe as a holographic will a signed letter of instructions for the drafting of a will that the testatrix delivered to her lawyer. *Smith*, 209 N.J. Super. 356, 507 A.2d 748 (Super Ct.),

any unsigned draft, any scrap of paper, can be argued to be an intended but unexecuted will.

By contrast, in *Blakely*,¹⁰¹ the court validated an unsigned will in circumstances where it was highly appropriate to do so. *Blakely* was what American academics in the trusts and estates field tend to call a *Pavlinko* case, after the wretched Pennsylvania precedent of that name.¹⁰² All these cases have identical facts. Wills are prepared for husband and wife. At the execution ceremony the wills become switched: the husband mistakenly signs the will prepared for his wife and the wife signs the will prepared for her husband. When presented with the will that the husband signed in *Pavlinko*, the Pennsylvania Supreme Court, tracking language from a nineteenth-century precedent, declared that "he had executed no will and there was nothing to be reformed. There was a mistake, it is true, but that mistake was *the same as if he had signed a blank sheet of paper.*"¹⁰³ Of course, there is a world of difference between the conduct of the testator who signs a blank sheet of paper; and the testator who mistakenly executes the wrong document with full Wills Act attestation intending that the right document should constitute his will. White, J., sitting in *Blakely* had no trouble applying the section 12(2) dispensing power to the will that the husband signed, because "[t]he circumstances of intention to constitute this document his will are here so convincing . . ."¹⁰⁴ And he persuasively distinguished *Baumanis*, "because the document there submitted for probate was only a draft. The deceased never intended to sign that draft at all."¹⁰⁵

Blakely necessarily became the definitive precedent for how this recurrent situation would be handled under section 12(2). The next time a switched-wills case arose, the South Australian court viewed it as routine and validated the will without opinion.¹⁰⁶

It is interesting to notice that the New York Court of Appeals recently departed from common law tradition without the aid of statute in another of these switched-wills cases, *Snide*.¹⁰⁷ The court ordered the mistakenly signed will admitted to probate. The court was concerned

certif. granted, 104 N.J. 461, 517 A.2d 446 (1986). For contrary cases that correctly distinguish between ordering a draft and signing a will, see, e.g., Moore, 443 Pa. 477, 277 A.2d 825 (1971); *Price v. Huntsman*, 430 S.W.2d 831 (Tex. Civ. App. 1968).

101. 32 S.A. St. R. 473 (1983).

102. *Pavlinko*, 394 Pa. 564, 148 A.2d 528 (1959).

103. *Id.* at 567-68, 148 A.2d at 529-30 (quoting *Alter's Appeal*, 67 Pa. 341 (1871) (emphasis added)).

104. 32 S.A. St. R. at 476.

105. *Id.* at 480.

106. *Pudney*, No. 240 of 1984 (S.A. Sup. Ct. June 11, 1985) (Olsson, J.).

107. 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981). For a more detailed discussion of *Snide*, see Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 562-66 (1982).

to limit its holding to this "very unusual case,"¹⁰⁸ but the factors it mentions are those that would be important under a general harmless error rule—the high quality of the evidence of harmless ness ("what has occurred is so obvious, and what was intended so clear");¹⁰⁹ and fidelity to the purposes of the Wills Act: "The instrument in question was undoubtedly genuine" and was "executed with statutory formality There is absolutely no danger of fraud."¹¹⁰

The switched-wills cases cause our subject of Wills Act execution blunders to overlap with an otherwise distinct doctrine, the rule forbidding reformation of wills afflicted with mistaken terms. The testator in *Blakely* can be thought to have left his will unsigned (an execution error), or—when signing the will prepared for his wife—to have executed a will containing mistaken terms. As *Snide* and other cases evince, there has been some willingness in American law in recent years to relax the no-reformation rule.¹¹¹ There are signs in Australian law reform circles that the development of a harmless error rule for execution mistakes is encouraging a rethinking of the no-reformation rule.¹¹² These developments raise the prospect that Anglo-American law will move to a unitary mistake doctrine for errors of both types—mistake in the execution and mistake in the terms.

In the most challenging of all the section 12(2) cases, *Williams*,¹¹³ the South Australian court validated an unsigned will that was more problematic than the switched-wills cases. Husband and wife, a farm couple about to leave on a journey, decided to write new wills, which they did in longhand and without professional help. Neighbors were summoned to attest both wills at a kitchen-table execution ceremony the next morning. The husband signed his will, and the neighbors attested both wills, but only two years later upon the wife's death it was noticed that she had not signed her will. Probate was sought under section 12(2). The attesting witnesses testified that they had not noticed at the time of the execution ceremony that the wife had not signed. They explained that the wife "was busily engaged preparing for the annual Jamestown Agricultural & Horticultural Show," which was to take place the day before the couple's departure.¹¹⁴ One of the testatrix' sons testified to a conversation with both parents two days after the bungled execution, in which "he was informed by his parents that they had prepared their wills in their own handwriting in the event that something should happen to them on their tour."¹¹⁵ The court

108. 52 N.Y.2d at 196, 418 N.E.2d at 658, 437 N.Y.S.2d at 65.

109. *Id.* at 196, 418 N.E.2d at 657, 437 N.Y.S.2d at 64.

110. *Id.* at 197, 418 N.E.2d at 657–58, 437 N.Y.S.2d at 64–65.

111. See Langbein & Waggoner, *supra* note 107, at 521–22, 555–66.

112. See *infra* text accompanying notes 224–25.

113. 36 S.A. St. R. 423 (1984).

114. *Id.* at 427.

115. *Id.*

validated the will. Legoe, J., relied on *Blakely*, the South Australian *Pavlinko* case, as authority for the proposition that an unsigned will could be validated under section 12(2). He then reasoned that this

testatrix had carried out unequivocal acts which satisfy the criteria of the section. Sbe had done everything consistent with the formal and conclusive act of making (in this case writing it out in her own hand) and completing her last will except that she did not sign it. She set the stage for such a complete act. Her actions in writing out the document, contacting the witnesses, being present at the time of attestation of the wills, and writing the word 'Wills' on the envelope in which the two documents were placed were in my opinion final and conclusive evidence of her clear intentions in relation to that document. Furthermore she was present and silently confirming the existence and the probative effect of the document which she believed to be her will when her son . . . was shown the will by her husband [two days later].¹¹⁶

Thus, the court concluded that the testatrix, in an addled moment, omitted to sign a will that she meant to sign, in circumstances in which her conduct was deliberate enough to satisfy the purposes of the formality.

Although I accept the court's premises, I have reservations about the decision to validate the unsigned will in this case. I agree that, in emphasizing the testatrix' attempt at compliance, the court was directing attention to a factor of fundamental importance. Under the functionally similar Statute of Frauds, when the question is whether to allow a party to prove that an instrument lacks an intended term or contains a misrendered one, the courts have been willing to excuse the want of writing when there is strong evidence that the parties were attempting to have the instrument contain the term.¹¹⁷ As under the Statute of Frauds, so under the Wills Act: Attempt is purposive. Defective compliance is not as good as perfect compliance, but it is much better than (and much different from) noncompliance. This point was well put in one of the misplaced signature cases discussed below, *Roberts*, in which White, J. directed attention to "the efforts of the deceased to go through those formalities of execution which are required by law. The steps taken toward ensuring due execution are as capable as actual signature of demonstrating the deceased's intention . . ."¹¹⁸

Nevertheless, the question in *Williams* is whether the testatrix' conduct was purposive enough, whether she really was attempting to sign the will (as the testators in the switched-wills cases so clearly were). An explanation other than inadvertence can be suggested for the testatrix'

116. *Id.* at 434.

117. See the discussion in Palmer, *Reformation and the Statute of Frauds*, 65 Mich. L. Rev. 421, 423 (1967).

118. *Roberts*, 38 S.A. St. R. 324, 325-26 (1985), discussed *infra* text accompanying note 132.

failure to sign the will. She might, for example, have had reservations about the will, and she may craftily have left it unsigned in order to disarm it without upsetting her husband. Under the beyond-reasonable-doubt standard of proof, the burden of excluding such a possibility rests on the proponents and is very hard to discharge. On the other hand, this will replaced a prior will, and if the changes were modest,¹¹⁹ the court's finding would be more plausible. In any event, regardless of whether the extraordinarily difficult *Williams* case is correctly decided, there is little reason to fear that future courts could confuse such a situation with an unsigned draft in a case like *Baumanis*.

2. *Misplaced Signature*. — There is a convention of testation in England and Australia that gives rise to a class of execution errors scarcely known in the United States. Professionally drafted wills, including those prepared by trustee companies as well as by lawyers, commonly provide lines for the testator and the attesting witnesses to sign at the foot of each page when a will extends over more than one page.¹²⁰ Seven of the section 12(2) cases¹²¹ raise the question of what to do when the testator signs the first page or pages, but omits to sign at the end where his signature is required.¹²²

I have a particular reason for wanting an American readership to pause over these cases, even though the genre falls outside our familiar set of recurrent Wills Act execution blunders.¹²³ I think these cases illustrate one of the great advantages of a harmless error rule: its tendency to displace sleight-of-hand and to promote candor. When I first wrote in 1975 about the likely consequences of a harmless error rule, I pointed out that the traditional strict compliance rule tended to drive sympathetic courts into strained interpretations of what constituted

119. The testatrix had made a previous will with a trustee company in 1969, and a prime objective in making the new will was to eliminate the trustee company as executor in order to save the fees. 36 S.A. St. R. at 426. The opinions in the case do not disclose how closely the new will conformed to the substance of the former will.

120. The phenomenon is described as "excessive execution" in W.A. Lee, *Manual of Queensland Succession Law* 52 (2d ed. 1985). The purpose "is to guard against an unauthorised interpolation." *Id.*

121. See cases listed supra note 55.

122. The South Australian Wills Act requires that the testator sign the will "at the foot or end thereof." Wills Act, 1936, § 8(a), 8 S. Austl. Stat. 665, 668 (1975). This provision derives from the English Wills Act of 1837, 7 Will. 4 & 1 Vict., ch. 26, § 9. Some American jurisdictions, most prominently New York, have been troubled with the "at-the-end" requirement, which the Uniform Probate Code does not retain. See T. Atkinson, *Handbook of the Law of Wills* § 64, at 303-07 (2d ed. 1953).

123. There is an echo of the misplaced signature problem in American law in what has become known as the "*Boren* problem," after the unfortunate Texas case, *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966). In these cases, the testator signs the self-proving affidavit on a self-proving will, but not the earlier testimonium clause of the will itself. The courts have voided the wills. For a collection of the cases and a withering critique, see Mann, *Self Proving Affidavits and Formalism in Wills Adjudication*, 63 Wash. U.L.Q. 39 (1985).

compliance with the relevant formality.¹²⁴ In a presence case like *Groffman*,¹²⁵ for example, where each witness was in the next room while the other attested, most courts invalidate the will. But not all. Some courts have squirmed and used the fiction of "conscious presence" to conclude that since the two witnesses were close enough for each other and for the testator to be conscious of their presence, their conduct satisfied the strict compliance standard.¹²⁶ The trouble with such tricks is that it is so hard to predict whether the equities in a particular case will prove sufficiently appealing to inspire the court to indulge in the pretense. Thus, at least for execution defects of the near-miss type, the rule of strict compliance may actually promote litigation, by inciting courts to bend the ostensible rules in ways that make the outcomes hard to predict.

In the South Australian misplaced execution cases, the candid standard of section 12(2)—that is, well-proven testator's intent—has displaced another of the devices that grew up to bend the strict compliance rule. Before the enactment of section 12(2), the South Australian courts had been able to rescue the wills in some of the misplaced execution cases by the expedient of disregarding the unsigned last page and enforcing only the signed first page(s). Two difficulties beset this stratagem. First, it cannot be used when the unsigned last page contains substantive provisions whose omission would distort the dispositive plan of the instrument. Further, the reason that professionals want the testator and attesting witnesses to sign the first page(s) is to identify all the pages as genuine and integrated,¹²⁷ whereas execution with attestation at the end shows that the testator utters the document with finality. Signature on the first page(s) may not be commensurate in purpose with signature at the end.

In *Pavilavskas*,¹²⁸ the first of the misplaced signature cases to arise after section 12(2), Zelling, J. validated the will under the old stratagem rather than under the dispensing power. That is, he ordered the signed first page probated without the unsigned second page that contained only boilerplate. However, as the courts became more comfortable with section 12(2), all the later misplaced signature cases¹²⁹ were decided under the dispensing power, and it is now hard to imagine the South Australian courts returning to the older stratagem. In *Hollis*,¹³⁰ the judge said that he would have used the stratagem¹³¹ had section

124. Langbein, *Substantial Compliance*, supra note 6, at 525–26.

125. [1969] 1 W.L.R. 733 (Q.B.), discussed supra text accompanying notes 7–8.

126. See 2 W. Bowe & D. Parker, supra note 43, § 19.125, at 240–41.

127. Regarding the integration doctrine, see T. Atkinson, supra note 122, § 79, at 380.

128. No. 494 of 1978 (S.A. Sup. Ct. Aug. 1, 1979) (Zelling, J.).

129. See cases listed supra note 55.

130. 37 S.A. St. R. 27 (1984).

131. In South Australia the stratagem is known as the rule in *Robertson*, 2 S.A. St. R. 481 (1972). In the penultimate paragraph of his opinion in *Hollis*, Matheson, J. says

12(2) not been available to him. More recently, in *Roberts*,¹³² the judge refused a litigant's motion to employ the strategem and insisted on applying section 12(2). The harmless error rule has, therefore, substituted candor for sleight-of-hand in this class of case.

F. *Alteration*

In our concluding category of section 12(2) cases, the testator starts with a validly executed will, which he then amends without adequate formality. Sometimes the testator simply adds a clause, that is, he tries to interpolate a defectively executed codicil. More frequently, the amendment has the character of a revision: The testator crosses out former text and inserts replacement terms.

These revision cases entail an overlap with revocation formality, since the testator is attempting to set aside the old terms as well as to substitute the new. Revocation formality is much the same throughout the Anglo-American world. The statutes authorize revocation either by physical act or by written instrument. Revocation by writing requires full Wills Act formality.¹³³ Because the formal requirements for revocation by writing and for execution are essentially the same, the South

that, absent § 12(2), "the proper decision would be . . . to admit to probate only the first three pages" of the four-page will. 37 S.A. St. R. at 30.

132. 38 S.A. St. R. 324 (1985). The case involved a two-page will that had been signed on the first page only. "Initially, the widow applied for probate of the first page only as that page clearly complied with the formalities required by s[ection] 8 of the [Wills] Act," said White, J. "However, I could see no reason why probate should not also be granted with respect to the second page. In this case the contents of the second page are not important but in another case they might be." *Id.* at 325.

Contrast the predicament of American courts, which are still left to choose between total and partial invalidity in equivalent circumstances. For a recent instance of the latter, in which a law-office stapling error caused the testatrix to sign one page before the residuary clause, see *Mergenthaler*, 123 Misc. 2d 809, 474 N.Y.S.2d 253 (Nassau County Sur. Ct. 1984). The residue was made to pass by intestacy. (I owe this reference to John A. Wallace).

133. See, e.g., U.P.C. § 2-507(1). The point requires more demonstration than the present Article allows, but I believe that the requirement of Wills Act formality for revocation by writing is unwise. The gist of my view is contained in my statement to the British Columbia Law Reform Commission:

The rationale seems to be since it takes Wills Act formality to make a will, it should take Wills Act formality to unmake a will. But we are not consistent about that, since we allow revocation by physical act, yet when the testator attempts to revoke by writing, we insist on Wills Act formality. In truth, virtually all the permitted modes of revocation by physical act are intrinsically more ambiguous than revocation by writing, even when the writing lacks Wills Act formality. Physical act without more must be ambiguous on the questions whether the act was (a) done by the testator, and (b) done with *animus revocandi*. An unwitnessed writing is always clearer on this point.

Law Reform Commission of British Columbia, Report on the Making and Revocation of Wills 67-68 (1981) [hereinafter *British Columbia Report*]. The New South Wales commission has recently endorsed such a change in the law, to allow a will to be revoked "by any writing on the will or dealing with it, which is done by the testator" or at his direc-

Australian courts have not had to distinguish them in most of the revision cases. The courts typically discuss the new language being inserted rather than the old language being struck.

In the first of the alteration cases, *Kurmis*,¹³⁴ the court erred in refusing to apply section 12(2), but later cases have effectively overruled *Kurmis*.¹³⁵ The testator in *Kurmis* had a properly executed will containing two handwritten devises filled in on a printed will form. Sometime later he interpolated a third devise, but he did not reexecute the will. The court found that the testator added the third devise "with the intention that the addition should form part of his will,"¹³⁶ but the court refused to enforce the addition because it was "unexecuted," that is, it had not been undertaken with fresh signature and attestation.

The court, relying on *Baumanis v. Praulin*,¹³⁷ treated the situation in *Kurmis* as though it were an unsigned will case. But there is a material difference between a case like *Baumanis*, where the testator never signs the will, and *Kurmis*, where he attempts to amend an instrument that he has previously executed properly. The testator in *Baumanis* had never taken the step of executing his will. He had not crossed the line from draft to will. In *Kurmis*, by contrast, the testator had long since taken that step; indeed, it so impressed him that he sought to take advantage of its effect by adding a further term to the document that he had already executed. The addition was in the testator's own hand, so there could be no doubt about its genuineness. Because the court found that the testator could only have intended "that that addition should form part of his will," the court was wrong to refuse to enforce the term under section 12(2).

A year later, in the second alteration case, *Standley*,¹³⁸ the court applied section 12(2) to validate the will. That precedent has captured the field, and all subsequent alteration cases have been decided in favor of validation (except for one case in which the court was apparently not satisfied that the alteration was the work of the testator).¹³⁹ The testa-

tion in his presence. New South Wales Law Reform Commission, *Wills: Execution and Revocation* § 5.12, at 62 (1986) [hereinafter *New South Wales Report*].

134. 26 S.A. St. R. 449 (1981).

135. The process of overruling *Kurmis* began with *Standley*, 29 S.A. St. R. 490 (1982), discussed *infra* text accompanying notes 138-41. For a later, although still circumspect disavowal, see the remarks of Legoe, J., in *Williams*, 36 S.A. St. R. 423, 434 (1984).

136. 26 S.A. St. R. at 450.

137. 25 S.A. St. R. 423 (1980).

138. 29 S.A. St. R. 490 (1982).

139. *Horton*, No. 284 of 1983 (S.A. Sup. Ct. Jan. 16, 1984) (Zelling, J.). The judge applied § 12(2) to cure a presence defect but refused to validate a provision designating a trustee for fear that it had been subsequently interpolated. A transcript shows that Neil Lowrie, counsel for the proponents, attempted to assure the court that although the provision "seems to be in a little different hand," the testator was suffering from an ailment that could have produced such variances. Zelling, J. replied that "[o]n the balance of probabilities I would have very little difficulty in saying yes that is a perfectly

trix in *Standley* took pen and ink to her previously executed will and crossed out the name of the executor. She interlined the name of somebody else, initialed, and had a witness initial. The court enforced the amendment under section 12(2), saying that "the only satisfactory explanation for an act of alteration" otherwise untainted was intent to alter.¹⁴⁰

The court in *Standley* distinguished *Kurmis* on the ground that the testator in *Kurmis* had not initialed his interpolation, as had the testatrix and a witness in *Standley*. This is not a persuasive ground of distinction. If the underlying will in *Standley* to which the amendment had been fastened had not been properly signed and attested, it seems unlikely that the court would have enforced the initialed document with or without the modification. Initialing is helpful but hardly conclusive in showing deliberateness and genuineness. What makes the result in *Standley* intuitively correct is that the testatrix worked her modification on a will that was already properly executed; but so did the testator in *Kurmis*.

I believe that the correct analysis in all the alteration cases that have thus far arisen under section 12(2) is that the testator meant the modification to *relate back to the prior will* not only in substance, but also in form. The testator's error was in thinking that *the prior execution had continuing effect*. When the circumstances establish that the alteration was untainted by fraud or imposition, the error is harmless. By way of analogy, note that American law follows a similar rule for subsequent modifications to holographs. Fresh execution (that is, new signature) is not required.¹⁴¹ The only plausible rationale for such a rule is that the modification relates back to the original signature, or put differently, that the original signature has continuing effect when the testator alters the will.

There have been ten further alteration cases since *Standley*.¹⁴² A few of them are worth recounting in order to suggest the range of the genre. *Middlemiss*¹⁴³ instances an unattested codicil. Beneath the signatures on her properly attested will the testatrix subsequently typed in a paragraph making specific devises of heirlooms to each of her three children. She signed the addition but did not procure attesting witnesses. The court validated the addition under section 12(2). The result in *Middlemiss* is surely a fortiori to cases like *Franks*¹⁴⁴ and *Hodge*¹⁴⁵ that allow wholly unattested wills; an unattested codicil is a less serious

reasonable argument. Unfortunately the section requires me to be satisfied beyond reasonable doubt." Transcript of Proceedings at 2 (Jan. 16, 1984).

140. 29 S.A. St. R. at 495.

141. See *Cuneo*, 60 Cal. 2d 196, 384 P.2d 1, 32 Cal. Rptr. 409 (1963); *Stanley v. Henderson*, 139 Tex. 160, 162 S.W.2d 95 (1942).

142. See the full list tabulated supra note 55.

143. No. 145 of 1982 (S.A. Sup. Ct. Sept. 13, 1982) (Mohr, J.).

144. No. 10 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.), discussed supra text accompanying note 73.

145. 40 S.A. St. R. 398 (1986) discussed supra note 78 and accompanying text.

departure from Wills Act formality, because the underlying instrument has been attested.

In *Bennet*¹⁴⁶ the court applied section 12(2) to a pure revocation case. The testatrix drew two lines across a clause of her will, deleting a devise to a boyfriend with whom her relationship had cooled. She wrote the date and her signature in the margin. The court enforced the deletion. American specialists will recognize that we would reach the same result by a different means under the UPC¹⁴⁷ or in a non-UPC jurisdiction that allows partial revocation by physical act. We would treat the testatrix' markings as cancellation under the physical-act revocation statute. Thus, section 12(2) has now been used in South Australia to make up for the want of a partial revocation statute.¹⁴⁸

Perhaps the most difficult of the alteration cases is an unreported one, *Sierp*.¹⁴⁹ The testator's professionally drafted will created several shares in a remainder interest in his residence. By cross out and interlineation he altered these shares, carefully signing each alteration. These are by now routine facts for this class of case. What sets *Sierp* apart is that the testator subsequently took the altered will to a solicitor for safekeeping. The solicitor perused it, noticed the modification, warned the testator that it did not comply with the Wills Act, and recommended that a new will be drafted. The testator had the solicitor draft a new will, which the testator later fetched and took away unexecuted. The solicitor met the testator socially on several subsequent occasions and reminded him to have the will executed, but the testator apparently never did, and this later document was not found after his death.

When the testator's blunder is a knowing one, our inclination is to say that the error is not harmless. If the testator knew that he was not complying with the Wills Act, the likely inference is that he did not want

146. 40 S.A. St. R. 350 (1986) (Bollen, J.).

147. See U.P.C. § 2-507(2).

148. In *Lynch*, 39 S.A. St. R. 131 (1985), § 12(2) had the effect of avoiding another archaic rule of transplanted English law. The testatrix executed her will in 1977 when her name was Eileen Ramsey. In 1979, she married her companion of long standing, Lynch. Her adult son by a former marriage advised her that she would need to change her name in her will. This she subsequently did in a variety of ways. At the heading of the will she struck out "Ramsey" and substituted the words "Lynch nee," obviously, as the judge remarked, "under the misapprehension that the word 'nee' means 'formerly,' not 'born.'" At the foot of the first page of the will, she wrote "Mrs. E.J. Lynch"; and alongside her original signature at the end of the will she wrote "now Mrs. E.J. Lynch." She later showed the altered will to her son, who advised her to initial where she had altered the heading of the will, which she did in his presence. South Australia has the old English rule that when a testator marries, his will is entirely revoked, but he may revive the revoked will by reexecuting it. Wills Act of 1936, §§ 20(1), 25(1), 11 S. Austl. Stat. 570. The court in *Lynch* applied § 12(2) to hold that the testatrix' conduct in renaming herself in the will constituted adequate compliance with the reexecution requirement.

149. No. 173 of 1982 (S.A. Sup. Ct. Dec. 13, 1982) (White, J.).

to comply. Intentional noncompliance belies testamentary intent. But closer analysis shows that intentional noncompliance is not a fair description of what happened in *Sierp*. *Sierp* began as a conventional innocent blunder case. Only well after the testator had altered the will was he put on notice the alteration required further formality. Since the will as altered would have been routinely enforced under section 12(2) *when altered*, the question is whether subsequent notice somehow vitiates the section 12(2) remedy, perhaps by estoppel: Those claiming through the testator's amendment are estopped from pleading the amendment because he had knowledge of its formal insufficiency. Against that notion, however, is the conventional time-of-execution standard that so dominates the law of wills: what determines testamentary intent is the testator's state of mind at the time he executes, or here, modifies, the will. If the testator intended the modification to be valid when he made it, what he subsequently learned and wanted does not matter unless he acts again to conform the will to the subsequent state of mind.

Sierp thus resembles that difficult unattested will case, *Kelly*,¹⁵⁰ where the testator, fearing imminent death, hastily penned and signed a will in a household notebook. The trial judge emphasized the time-of-execution standard, saying that at the time of the making of the emergency will the testator "intended the document to constitute his will. Whether having done so remained in his memory or not . . . [is] not to the point."¹⁵¹ It is difficult to gainsay this argument on its own terms. I have criticized the result in *Kelly* on the ground that the particular language that the testator used suggested that he meant the will to be provisional. In that connection it seemed relevant that the testator was legally trained and thus likely to have known of the attestation requirement for wills. But the underlying time-of-execution standard that the court was applying seems right in that case, and it seems likely to have been the factor that disposed the court to validate the will in *Sierp*. The issue is what the testator knew when he executed the will, or in an alteration case, when he made the modification.

G. *Reforming the Reform*

I have reviewed at some length the case law that has arisen under section 12(2) in order to supply readers with a basis for evaluating the reform. I suspect that most readers will share my admiration for what the South Australian courts have done with the dispensing power.¹⁵² The courts could have sabotaged so laconic a piece of legislation. In-

150. 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983).

151. *Id.* at 418, discussed *supra* text accompanying note 85.

152. I know only one dissenting Australian voice, an apprehensive article by a practitioner published before the South Australian case law had taken shape. Ormiston, *Formalities and Wills: A Plea for Caution*, 54 *Austl. L.J.* 451 (1980).

stead, they have taken its message to heart. *Graham*,¹⁵³ the first section 12(2) case, sounded the theme that has echoed through the later case law. The purpose of section 12(2), Jacobs, J. said, "is to avoid the hardship and injustice which has so often arisen from a strict application of the formal requirements of a valid will."¹⁵⁴ In the difficult *Kelly* case, Bollen, J. pointed to the "liberal and pragmatic" character of the case law. "Section 12(2) is meant to have a very significant practical effect," he said.¹⁵⁵ It has.

When presented with a defectively executed will, South Australian courts are now allowed to ask the right question, which is whether the document embodies the unequivocal testamentary intent of the decedent. As so often happens in the law, if you get the question right, it is much easier to get the answer right. One can quibble here or there with an outcome among the corpus of section 12(2) cases, as I have with the result in *Kelly*, but when looked at in its entirety, the case law appears overwhelmingly successful. Justice is being done where it previously was not.

The natural course of events in matters of fundamental law reform is that experience suggests avenues of refinement. I conclude this discussion of the South Australian developments by directing attention to a pair of shortcomings¹⁵⁶ in the current practice. The standard of proof in section 12(2) needs modest repair. So does the procedure for processing harmless error cases that the parties are prepared to settle but that present law requires to be adjudicated.

1. *Standard of Proof*. — Under section 12(2) the court can validate a defectively executed will only if persuaded that there is "no reasonable doubt" that the decedent intended it to be his will.¹⁵⁷ This beyond-reasonable-doubt standard (hereafter, BRD) originates in the criminal law, where it serves the special purpose of tilting the scales in favor of liberty for an accused who is threatened with penal sanctions. The BRD standard is virtually never transposed to private law.¹⁵⁸ "Proof beyond reasonable doubt is . . . the highest standard of proof known to the law,"¹⁵⁹ said Zelling, J. in *Kelly*.

In some section 12(2) cases, adherence to the BRD standard would have required the courts to frustrate well-proven testator's intent under a remedial statute that was designed to achieve the opposite. The courts have not been willing to allow that to happen. Instead, they have

153. 20 S.A. St. R. 198 (1978).

154. *Id.* at 202.

155. *Kelly*, 34 S.A. St. R. at 389.

156. Other minor defects in the statutory drafting are mentioned *supra* text accompanying notes 35–36.

157. Wills Act Amendment Act (No. 2) of 1975, § 9 amending Wills Act of 1936, § 12(2), 8 S. Austl. Stat. 665, reprinted *supra* text accompanying note 31.

158. 9 J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2498, at 421–31 (Chadbourn rev. 1981).

159. *Kelly*, 34 S.A. St. R. at 384.

weakened the BRD standard while purporting to apply it. *Kelly* is the obvious example. Whether the will was provisional, as I think, or unconditional, as the court held,¹⁶⁰ the evidence for the court's view is too equivocal to satisfy the criminal law standard of proof. Or recall *Williams*,¹⁶¹ the case of the seemingly addled testatrix who neglected to sign her will at the farmhouse kitchen table execution ceremony that she and her husband convened. I have suggested how something other than inadvertence might account for her failure to sign her will—that she might have wanted to sabotage it without upsetting her husband. Under a BRD standard, it is not enough that the proponent's theory be the more persuasive; the proponent's case must exclude plausible contrary accounts. The courts would not have imposed serious criminal sanctions on evidence of the quality seen in *Kelly* or *Williams*. Doubts of similar force could be marshalled in other section 12(2) cases¹⁶² that may seem correctly decided as a matter of testator's intent, but not on a BRD standard.

It is possible to interpret the holdings of the South Australian courts as fashioning an unconventional meaning for the BRD standard. Since the standard is novel outside the criminal law, the courts have been free to devise a civil BRD standard in place of the criminal one. A civil BRD standard would require proof higher than the mere-preponderance standard in ordinary civil matters, but short of the conventional criminal BRD standard. Reworked in that way, the BRD standard would approximate the standard of clear and convincing (hereafter, C&C) evidence that has become familiar in American law for civil matters of special seriousness.

The C&C standard is prominent in several spheres of the American law of gratuitous transfers. In the law of wills it is applied in suits to prove the existence or contents of a lost will¹⁶³ and where a contract to make a will (or not to revoke one) is asserted.¹⁶⁴ In the law of nonprobate transfers, the C&C standard governs actions to reform deeds, trusts, insurance contracts, and the like, when the claim is that the

160. See *supra* text accompanying note 87.

161. 36 S.A. St. R. 423 (1984).

162. See, e.g., *Eva Smith*, 38 S.A. St. R. 30 (1985), discussed *supra* text accompanying notes 75–76; *Clayton*, 31 S.A. St. R. 153 (1982). In *Clayton*, the decedent's cohabitant testified that she found his will on a household chest. It was signed but not attested. It named her the primary beneficiary. The court relied upon her self-serving testimony about purported lifetime statements of the decedent indicating that the document reflected his testamentary intent, even though the printed-form will plainly called for attestation. I suspect that the decisive fact that allowed the court to find for the beneficiary in *Clayton* was that the testator's next of kin (who would have taken on intestacy had the will failed) consented to the application for probate. See *id.* at 154. On the relationship between the courts' handling of the BRD standard and the uncontested character of much of the South Australian litigation, see *infra* text accompanying note 189.

163. See 3 W. Bowe & D. Parker, *supra* note 43, § 29.156, at 726–28.

164. B. Sparks, *Contracts to Make Wills: Legal Relations Arising Out of Contracts to Devise or Bequeath* 24–27 (1956).

draftsman or the typist misrendered the contents.¹⁶⁵ Because these doctrines deal with problems of mistake in the terms, they resemble closely our subject of mistake in the execution and thus constitute an especially cogent analogy.

As a matter of policy, the justification for imposing an afforded standard of proof in a particular field of doctrine is, in the words of Justice Harlan, "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness" of his fact-finding in that class of case.¹⁶⁶ We understand why the drafters of the South Australian statute sought a higher-than-ordinary standard of proof for dispensing with Wills Act formality. They were inviting litigation about an issue of great importance, an issue that due compliance with the Wills Act forecloses, namely, whether to treat an imperfect instrument as a will. The standard should not, however, have been expressed as BRD. As I shall discuss in greater detail in Part IV of this Article, several Commonwealth law reform commissions have examined the South Australian dispensing power and recommended similar legislation for their jurisdictions, but they have had qualms about the BRD standard of proof. British Columbia, Manitoba, and New South Wales have rejected the BRD standard.¹⁶⁷ The Western Australia report recommends keeping it, partly in order to achieve consistency with South Australia and thus to avoid creating "uncertainty as to the relevance in Western Australia of the South Australian precedents."¹⁶⁸

The Commonwealth law reform commission reports show discomfort at having to choose between the criminal BRD standard, which they sense to be excessive, and the ordinary civil standard of proof, which does not seem adequate to the seriousness of the issue involved in deciding whether to enforce a defectively executed will. Curiously, the C&C standard, which seems so apt for these circumstances, has not crystallized in the Commonwealth legal systems as a distinct standard of proof, although English and Commonwealth cases sometimes speak of the need for especially "convincing" or "cogent and conclusive" evidence in circumstances in which American law uses the C&C standard.¹⁶⁹ The New South Wales commission seems to want the C&C standard, but not quite to know how to ask for it. Its report recom-

165. See discussion in Langbein & Waggoner, *supra* note 107, at 524-26.

166. Winship, 397 U.S. 358, 370 (1970).

167. British Columbia Report, *supra* note 133, at 53-54; Manitoba Law Reform Commission, Report on "The Wills Act" and the Doctrine of Substantial Compliance 27-29 (1980) [hereinafter Manitoba Report]; New South Wales Report, *supra* note 133, §§ 6.33-6.34, at 73.

168. Law Reform Commission of Western Australia, Report on Wills: Substantial Compliance 52 (1985) [hereinafter Western Australia Report].

169. For discussion of the requirement of "convincing proof" for rectification of *inter vivos* instruments of transfer, see New South Wales Report, *supra* note 133, § 7.26, at 88. The "cogent and conclusive" formulation appears in the classic sham will case, *Lister v. Smith*, 3 Sw. & Tr. 282, 289, 164 Eng. Rep. 1282, 1285 (1863).

mends the ordinary civil standard, but explains: "We assume that the courts would in fact require a standard of proof approximating that for rectification,"¹⁷⁰ that is, for reformation of deeds, where the local standard is "convincing proof."¹⁷¹

The widespread longing for an afforded standard of proof in these cases, coupled with the equally widespread sense that the criminal standard is misapplied in civil litigation, leads me to believe that the C&C standard strikes the appropriate balance. Even granting, as some allege,¹⁷² that the C&C standard is hard to define and to enforce, its hortatory effect, cautioning the trier that the issue is one of special seriousness, is worth preserving.

I have elsewhere suggested that under a substantial compliance doctrine, the proponent's burden of proof should be the ordinary preponderance-of-the-evidence standard.¹⁷³ The requirement that the testator must have complied substantially with the Wills Act is without counterpart under the dispensing-power type of harmless error rule, and it serves much the function of an afforded standard of proof. Complying substantially necessarily involves conduct that evinces unmistakable testamentary intent. On the other hand, for precisely that reason, little harm would be done if an explicit C&C standard were superimposed upon the substantial compliance doctrine.

2. *Uncontested Cases and Litigation Levels.* — Perhaps the most recurrent concern in discussions about the merits of a harmless error rule for Wills Act execution blunders is the fear of a litigation imbroglio. A harmless error rule opens for litigation an issue of potential difficulty that the traditional strict compliance rule forecloses, namely, whether to enforce a defectively executed will. At first glance, the South Australian data looks worrisome. Over the space of half a dozen years in a smallish jurisdiction,¹⁷⁴ some forty-one lawsuits about harmless error have had to go to judgment, and the observer may well wonder what larger iceberg looms beneath that tip.

Astonishingly, this seeming litigation boomlet turns out to be

170. New South Wales Report, *supra* note 133, § 6.34, at 74.

171. *Id.* § 7.26, at 88.

172. See McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 251-54 (1944).

173. Langbein, *supra* note 1, at 1194. A functionally equivalent substantial compliance doctrine governs defective compliance with life insurance change-of-beneficiary designations; no standard of proof beyond the ordinary civil preponderance-of-the-evidence standard has emerged. See, e.g., *National Life & Accident Ins. Co. v. Neuhoff*, 140 Ind. App. 603, 224 N.E.2d 690 (Ct. App. 1967).

174. In the 1980's, the population of South Australia has hovered around 1,300,000. Australian Bureau of Statistics, *Australian Demographic Statistics: September and December Quarters 1984*, at 8 (Table 5) (1985). Grants of representation, mostly of testate estates, numbered 5368 for 1980, 5565 for 1981, 5537 for 1982, 5334 for 1983, and 5103 for 1984. "Record of Grants Issued," unpublished document supplied by the Registrar of Probates, Dec. 1985 (on file at the Columbia Law Review).

largely illusory. Of the forty-one cases, only three have been genuinely contested.¹⁷⁵ Virtually none of the others would have resulted in adjudication, or even in litigation, had they arisen in a typical American jurisdiction that had adopted a comparable harmless error rule.

Section 12(2) magnifies a weakness in the underlying probate procedure of South Australia. The jurisdiction does not have a moderate rule facilitating consensual suppression of a purported will. As a result, most of the section 12(2) cases are being litigated by people who would rather waive their rights or settle out of court. Consider, for example, *Kurmis*,¹⁷⁶ in which the question was whether or not to enforce the testator's unattested interpolation of a \$5,000 devise to a grandchild born after the execution of the will. The court noted that the residuary devisee whose share would have borne the loss of the \$5,000 was the testator's son, the grandson's father, "who has already taken steps to see that the testator's grandson . . . will indeed receive his \$5,000 whatever the Court may decide."¹⁷⁷ The costs of the litigation were charged to the estate, where they were also borne by the father. He was, therefore, required to conduct and to pay for a lawsuit that he wanted to concede.

Almyna Smith,¹⁷⁸ one of the unreported presence-defect cases, supplies a scandalous example. The decedent's son was the sole beneficiary under her defectively attested will; he was also her sole heir in intestacy. Under no outcome would he have taken less than the whole of her estate. Nevertheless, proofs had to be gathered and adjudication conducted at his expense in order to determine that, pursuant to section 12(2), he took under the will rather than by descent.

Try as they might, the parties cannot waive their rights. In *Gallasch*,¹⁷⁹ where the testator's unattested alteration increased his widow's share at the expense of their children, the registrar's memorandum advised the court: "The children have all consented to the alteration not being admitted to proof," that is, the children waived their right to complain that the alteration had not been executed with proper formality; "however in view of section 12(2) I did not consider that it was optional for the applicants to elect whether or not the alteration should be admitted."¹⁸⁰ Consequently, the widow had to pay her solicitor to obtain proofs and procure judicial validation on the issue that her children wanted to concede.

The passage just quoted from the registrar's memorandum in *Gallasch* seems to say that section 12(2) requires this pointless litigation, but the memorandum speaks in shorthand. The problem lies not in section 12(2), but in the way section 12(2) interacts with the underlying

175. See cases listed *supra* note 46.

176. 26 S.A. St. R. 449 (1981).

177. *Id.* at 454.

178. No. 190 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.).

179. No. 89 of 1982 (S.A. Sup. Ct. July 12, 1982) (Bollen, J.).

180. *Gallasch*, registrar's memorandum, at 5.

probate procedure of the jurisdiction. When the personal representative applies for probate (of a testate estate) or for administration (of an intestate estate), he must file an oath—either that the proffered document is the decedent's last will, or that the decedent died intestate.¹⁸¹ Before the enactment of section 12(2), a defectively executed will or alteration could not have been enforced, and the personal representative could tender his oath without hesitation even when such a document existed. Now, however, because section 12(2) allows imperfect instruments to be validated, the personal representative is thought to be obliged to bring forward a plausible one for proofs. He cannot suppress what may be the will.

Under American law, by contrast, there is ample authority for allowing the beneficiaries under a purported will to waive their rights, so that the estate may pass under a prior will or through intestacy.¹⁸² If South Australia had this pro-waiver rule, section 12(2) would work far more smoothly. The reform would then operate for the most part in private channels rather than in the courts. Obviously, if waiver were permitted, litigation would never arise in a case like *Almyrna Smith*, where the outcome could not have varied regardless of whether section 12(2) saved the will; nor in cases like *Kurmis* and *Gallasch*, where the family circumstances were tranquil and the persons entitled to complain preferred to disregard the execution defect. Likewise, cases that arise in well-settled categories of section 12(2) doctrine would not be litigated under the American pro-waiver rule, for all the reasons that people do not in general bring hopeless lawsuits. For example, if waiver were permitted in South Australia, it is hard to imagine a presence defect being litigated under section 12(2) in the absence of suspicious circumstances, since the dispensing power so routinely leads to validation of the wills in such cases.¹⁸³

There has been a little discomfort in South Australia, although not as much as one would expect, about this phenomenon of pointless litigation under section 12(2).¹⁸⁴ In 1984, the South Australian Supreme Court took a slight step toward ameliorating the problem. It adopted a rule of court, Rule 61, that authorizes the probate registrar to process section 12(2) matters on simplified proofs and without judicial ratifica-

181. Court rules prescribe the forms of oath. Form 12 has the executor swear his belief that the paper he is producing contains the last will of the decedent. Form 21 has the administrator swear that the deceased died intestate. Rules of the Supreme Court (Administration and Probate Act) 1984, at 43, 48.

182. See Annotation, Family Settlement of Testator's Estate, 29 A.L.R.3d 8, 102-10 (1970); Annotation, Family Settlement of Intestate Estate, 29 A.L.R.3d 174, 190, 228-29 (1970).

183. See *supra* text accompanying notes 58-68.

184. It appears from the report in Kolodnicky, 27 S.A. St. R. 374, 385 (1981), that the probate registrar sought the court's guidance on whether the parties might be allowed to waive their rights under § 12(2), but he was rebuffed.

tion when the estate in question has a gross value of \$10,000 or less.¹⁸⁵ Rule 61 stops well short of what is needed. The limitation to tiny estates has so hobbled Rule 61 that only a single case has thus far been processed under it.¹⁸⁶ The recent New South Wales Law Reform Commission report that endorses the South Australian dispensing power also favors a procedure like Rule 61, but without limitation of amount. "[T]he requirement of consents to the application is a sufficient protection to justify vesting in the Registrar a jurisdiction with no monetary limitation,"¹⁸⁷ the report says. Actually, the commission's rationale has a much broader reach: The consents of all affected parties should be "sufficient protection" for dispensing with litigation altogether.

The stark truth is that as a result of the no-waiver rule, section 12(2) has left many of the people it has touched worse off than if the reform had never been enacted, since it has forced them to pay for lawsuits that nobody wanted and that would not have been required before section 12(2) came into effect. I reiterate, however, that the flaw is not with section 12(2), but with the no-waiver rule of the probate procedure. In effect, the no-waiver rule turns section 12(2) into a litigation tax on the beneficiaries of blundering testators. South Australia and the other Commonwealth jurisdictions that are adopting the dispensing power solution for Wills Act execution blunders should abrogate the no-waiver rule, either by rule of court or by legislation.

The essentially uncontested character of most of the South Australian case law has inevitably impaired its quality. Legoe, J., complained in a candid passage in one of the early cases about his predicament in having to "decide this 'first-time up' question of interpretation after hearing one counsel, putting one argument, and then rely[ing] upon the muscular strength that I could gain from arguing with myself on the point."¹⁸⁸ In particular, it seems unlikely that the South Australian courts could have been so lenient in applying the BRD standard of proof had opposing counsel been regularly engaged.¹⁸⁹

185. Rules of the Supreme Court (Administration and Probate Act) 1984, Rule 61.

186. Rodger, No. 79 of 1985 (S.A. Sup. Ct. May 29, 1985) (order of the registrar, A. Faunce de Laune). Quite apart from the larger critique of the no-waiver rule being voiced in text, there is a technical flaw in Rule 61. The rule limits the registrar's jurisdiction to estates of \$10,000 or less. The ceiling should have been expressed not on the estate but on the amount in issue. As it now stands, Rule 61 cannot apply to a codicil of trivial value if the estate exceeds the \$10,000 ceiling. See, e.g., Middlemiss, No. 145 of 1982 (S.A. Sup. Ct. Sept. 13, 1982) (Mohr, J.), discussed *supra* text accompanying note 143, where § 12(2) was needed to validate a noncomplying codicil to an otherwise valid will.

187. New South Wales Report, *supra* note 133, § 6.38 n.65, at 79. The Western Australia commission also endorses Rule 61. Western Australia Report, *supra* note 168, at 56-57.

188. Kolodnicky, 27 S.A. St. R. 374, 376 (1981).

189. See, e.g., Eva Smith, 38 S.A. St. R. 30 (1985), discussed *supra* text accompanying notes 75-76; Clayton, 31 S.A. St. R. 153 (1982), discussed *supra* text accompanying note 162. The question is whether, at least unconsciously, the judge thinks, "If the peo-

South Australia's litigation boomlet does have its silver lining, at least for students of the harmless error rule. Because the jurisdiction has insisted on litigating a mass of cases that should have been ignored or settled, it has generated a stock of precedents that have sketched the contours of the harmless error rule. In an odd sense, therefore, the South Australian experience with the dispensing power provides the best of both worlds. It supplies a detailed case law that illumines the working of the harmless error rule, yet it gives no cause to fear that the reform would produce significant litigation levels in a jurisdiction that allowed noncourt processing of uncontested estates.

III. QUEENSLAND'S STATUTORY SUBSTANTIAL COMPLIANCE RULES

The state of Queensland adopted a substantial compliance doctrine in 1981.¹⁹⁰ Three recent cases have interpreted the measure so narrowly as to render it nearly useless. The sad experience under the substantial compliance doctrine in Queensland contrasts strongly with the principled development of the dispensing power in South Australia. For jurisdictions that have yet to choose a harmless error rule, the Queensland courts have probably sealed the fate of the substantial compliance doctrine as a statutory solution to the problem of harmless execution errors. The dispensing power will command future legislation.

The Queensland legislation resulted from a large-scale review of Queensland probate and succession law that the Queensland Law Reform Commission commenced in 1973.¹⁹¹ The commission reported in 1978 and its recommendations were largely implemented in the Succession Act of 1981.¹⁹² The distinguished scholar of trust and succession law, W.A. Lee, had a strong hand in framing the report and in drafting the legislation, and he took a particular interest in the harmless error problem. Working before the South Australian dispensing-power legislation of 1975 had attracted any attention or case law, Lee decided to draft a statute that would essentially codify the substantial compliance doctrine as I had developed it in my 1975 article.¹⁹³ The draft language proposed in the 1978 commission report¹⁹⁴ became section 9(a) of the 1981 act: "the Court may admit to probate a testamentary

ple entitled to contest this application do not want to avail themselves of their rights, then I will not strain to put the applicant to the rigors of the BRD standard." In *Posingham*, 32 S.A. St. R. 227 (1983), an alteration case, *Jacobs, J.*, concludes the paragraph in which he explains why the evidence satisfies the BRD standard by referring to the consent of the intestate heirs, the next takers, "against their own interest." *Id.* at 229.

190. Queensland Succession Act of 1981, § 9(a), 1981 Queensl. Stat. No. 69.

191. Queensland Law Reform Commission, Report of the Law Reform Commission on the Law Relating to Succession (1978) [hereinafter *Queensland Report*].

192. Queensland Succession Act of 1981, § 9(a), 1981 Queensl. Stat. No. 69.

193. *Queensland Report*, supra note 191, at 7.

194. The draft legislation appears as an appendix to the *Queensland Report*.

instrument executed in substantial compliance with the [Wills Act] formalities . . . if the Court is satisfied that the instrument expresses the testamentary intention of the testator."¹⁹⁵

As in South Australia, it took a while in Queensland for case law to emerge from the probate pipeline. The Queensland measure came into effect on January 1, 1982. In 1983, after the South Australian cases had begun to flow but before any Queensland decisions had appeared, Lee expressed optimism in a scholarly journal that, "despite the differences of wording, the sorts of defects of execution which have been [remedied under the South Australian statute] . . . will be seen as coming within the scope of the Queensland jurisdiction."¹⁹⁶

It was not to be. Four Queensland cases have been decided.¹⁹⁷ The first, *McIlroy*,¹⁹⁸ which applied the substantial compliance section to excuse a presence defect, was decided in late 1984 without opinion and was wholly overlooked in the three subsequent cases, all decided in 1985, that appear to have buried the reform. Those three, *Grosert*,¹⁹⁹ *Johnston*,²⁰⁰ and *Henderson*,²⁰¹ refused to apply the section to wills instancing trivial execution errors in which testamentary intent was manifest.

McIlroy was decided by McPherson, J., who had served as a member of the Queensland Law Reform Commission when it recommended the substantial compliance measure. The facts of the case disclosed a difference of recollection between the two attesting witnesses about whether the testatrix signed the will in their joint presence. "McPherson J held that it was unnecessary to resolve this dispute, since even assuming that only one witness had been present at the time of signature, the formal requirements of the Wills Act had been substan-

195. Queensland Succession Act of 1981, § 9(a).

196. Lee, *Queensland Succession Act 1981*, 3 *Oxford J. Leg. Stud.* 442, 442 (1983).

197. I wish to acknowledge the help of Paul Burns of the Brisbane probate registry, who supplied me with the documentation on these cases; and registrars R.J. Keane in Townsville and G.D. Roberts in Rockhampton, who checked to establish that further § 9(a) cases had not been filed there.

In addition to the four decided cases identified, *infra* notes 198–201, at least one other is pending. In *Skinner*, No. 190 of 1984 (Queensl. Sup. Ct.), an elderly testatrix took her will to the reception desk of her nursing home and had the duty officer witness her signature. She did not procure a second attesting witness. She told the one attesting witness, "Thank you very much, that has got my will fixed up." Interview with O.G. Eckhardt, solicitor for the proponent (Brisbane, Dec. 18, 1985). In South Australia, this one-witness case would be regarded as a *fortiori* to the seven no-witness wills that have been validated. See *supra* text accompanying notes 71–91. In Queensland, however, *Skinner* seems doomed by the outcome in *Henderson*, No. 860 of 1985 (Queensl. Sup. Ct. Sept. 27, 1985) (Macrossan, J.), discussed *infra* text accompanying notes 209–13.

198. No. 375 of 1984 (Queensl. Sup. Ct. Nov. 2, 1984) (McPherson, J.).

199. [1985] 1 Q.R. 513.

200. [1985] 1 Q.R. 516.

201. No. 860 of 1985 (Queensl. Sup. Ct. Sept. 27, 1985) (Macrossan, J.), *aff'd* full court (May 13, 1986) (Kelly, Derrington, Moynihan, J.J.), appeal denied, [1986] 17 *Leg. Rep. S.L.* 4.

tially complied with.”²⁰²

When *Grosert* arose, the unreported *McIlroy* was unknown to Vasta, J., who decided *Grosert* unaware that he was acting in irreconcilable conflict with precedent. Like *McIlroy*, *Grosert* was a presence case, although there was no dispute that the blunder had indeed occurred.²⁰³ The testator had his daughter-in-law attest his will when the two of them were alone, hence not in the joint presence of the second witness. In the key passage of the opinion, the judge announced that in these circumstances “there has been a lack of compliance with what I would regard as a most important provision”²⁰⁴ of the Wills Act. But why is the presence requirement “most important”? The opinion supplies no rationale. The conclusion rests upon assertion: Since presence is “most important . . . , [i]t is difficult therefore to say that . . . there has been substantial compliance with the formalities.”²⁰⁵

The court in *Grosert* neglected to apply the purposive analysis that the substantial compliance doctrine presupposes. The right question under the doctrine is whether the testator’s conduct served the purposes of the Wills Act formality. The particular idea is that when the purposes are served, noncompliance with the letter may be excused.²⁰⁶ The purposes of the presence requirement are to protect the testator against imposition; and to enhance the solemnity of the execution ceremony, in order to assure that the instrument represents the considered intent of the testator. The judge effectively conceded that those purposes had been satisfied when he said that “there can be no doubt that the instrument expresses the testamentary intention of the testator”; yet in the same sentence he concluded that “unless there is substantial compliance,” this finding of testamentary intent is “irrelevant.”²⁰⁷ What could “substantial compliance” mean if the testator’s conduct can evince unmistakable testamentary intent and still be insubstantial?²⁰⁸

202. The Western Australia Law Reform Commission investigated the facts in *McIlroy* and gave this account in Western Australia Report, supra note 168, at 35. I have confirmed with the judge that this account conforms to his recollection. Interview with Hon. Bruce McPherson, (Brisbane, Dec. 17, 1985).

203. [1985] 1 Q.R. at 514-15.

204. Id. at 515.

205. Id.

206. Substantial compliance “enables courts to excuse formal defects when the purposes of the legislation have been satisfied in particular situations notwithstanding some deficiencies in complying literally with all the specified formalities.” New South Wales Report, supra note 133, § 6.13, at 69.

207. [1985] 1 Q.R. at 515.

208. In *Johnston*, [1985] 1 Q.R. 516, there was also a presence defect, but the circumstances were murkier. There was some evidence that a term may also have been interpolated after the execution. Further, the testatrix had been furtive when obtaining the attesting signatures; in one instance she had folded the paper over, and the witness could not subsequently identify it. Although the judge endorsed the taking of “a liberal approach,” id. at 518, toward applying the substantial compliance doctrine, and con-

In the quite recent *Henderson*²⁰⁹ case, the Queensland court refused to cure an execution blunder in which the grounds for validation were very strong. On its key facts, *Henderson* is a precise replay of the South Australian *Phillips*²¹⁰ case: Only a single witness attested the testator's will, but that witness was a JP who had misrepresented to the testator that a single JP's attestation sufficed. In South Australia, the testator who had relied upon official misinformation was excused from his error. In Queensland he was not. Although the judge declared himself "satisfied . . . that the instrument does express the testamentary intention of the testator," the judge would not apply the substantial compliance doctrine "since the will was executed with only one witness present" and substantial compliance is "cumulative"²¹¹ to the requirement of testamentary intent.

In the hands of the Queensland bench, substantial compliance is no longer a means of discerning testamentary intent, it is a *new formal requirement* that must be established independently of testamentary intent. And the standard for this formality is essentially quantitative: compliance cannot be substantial unless the defect is minimal. Said the judge in *Henderson*:

there is an essential difficulty in saying that substantial compliance with the requirements of the [Wills Act] has occurred if the two witnesses . . . have not been involved in some way or other in the testator's execution or acknowledgment.

In the present case there are no such two witnesses involved but one only, and in the case of such a basic deficiency I am not prepared to regard substantial compliance as having occurred²¹²

No matter that the court understands precisely why the testator was misled into thinking himself justified in using only one witness, and no matter that this explanation wholly excludes the dangers of imposition and irresolution against which the attestation requirement is meant to safeguard, since one is less than two, compliance cannot be substantial.

The first-instance judgment in *Henderson* was appealed to a three-judge appellate panel of the Queensland court, which summarily dismissed the appeal and, in a rare departure from the contrary norm in estate practice, charged the costs of the appeal to the petitioning execu-

ceded that "[i]t is probable that the eventual document . . . represents the final wishes of the testatrix," *id.* at 519, he refused to find substantial compliance on these facts.

209. No. 860 of 1985 (Queensl. Sup. Ct. Sept. 27, 1985), *aff'd* full court (May 13, 1986), appeal denied [1986] 17 Leg. Rep. S.L. 4.

210. No. 263 of 1983 (S.A. Sup. Ct. Feb. 13, 1984) (White, J.), discussed *supra* text accompanying note 93. *Henderson* is also reminiscent of *Crocker*, 30 S.A. St. R. 321 (1982), discussed *supra* text accompanying note 72, in which the testator's reliance upon official misinformation contained in a Royal Australian Air Force will form explained and excused his failure to obtain attesting witnesses.

211. No. 860 of 1985, slip op. at 3.

212. *Id.* at 5.

tor rather than the estate²¹³—a clear warning to future victims of defectively executed wills not to try any further purposive applications of the Queensland substantial compliance doctrine. The High Court of Australia, the federal supreme court, put the final nails in the coffin when it refused the plaintiff's application for leave to appeal, saying that there was "no reason to doubt that the attestation by two witnesses is a substantial requirement . . . and that if the will is attested by one witness only there has been a failure of substantial compliance. The South Australian legislation is quite distinguishable."²¹⁴

It is now hard to imagine in what circumstances the Queensland courts might find an execution defect insubstantial, since they have (1) declared the most innocuous of the recurrent execution blunders, presence defects, as "most important"; and (2) refused to rescue the will of a testator whose failure to procure a second attesting witness was induced through official misrepresentation.

Whether this unfortunate jurisprudence was a fluke that could have been avoided in the hands of a more sensitive bench (as the decision of McPherson, J. in *McIlroy* strongly implies) is a subject that may beget speculation, but future legislative drafters are scarcely likely to test the waters again. The capsule lesson that will be taken from Queensland is that statutory substantial compliance was tried and found wanting, despite the evidence from South Australia that there was nothing to fear from relaxing the traditional rule of strict compliance with the Wills Act. Although the substantial compliance doctrine will continue to be the only means of remedy available in jurisdictions where legislative reform has not yet taken place,²¹⁵ future legislation will take the guise of the dispensing power.

IV. THE SPREAD OF THE HARMLESS ERROR RULE

A. *Australia*

South Australia's dispensing-power statute is achieving pan-Australian influence. The immense but barely populated Northern Territory enacted a precise copy of South Australia's section 12(2) in 1984,²¹⁶ following a 1979 recommendation of its law reform committee.²¹⁷ In recent months the law reform commissions in New South Wales (Sydney) and Western Australia (Perth) have published extensive reports examining the harmless error problem and recommending ver-

213. No. 860 of 1985, slip op. at 3.

214. *White v. Public Trustee & Blundell*, [1986] 17 Leg. Rep. S.L. 4, denying appeal sub nom. *Henderson*, No. 860 of 1985 (Queensl. Sup. Ct. Sept. 27, 1985), aff'd full court, (May 13, 1986).

215. See *supra* text accompanying notes 18-19.

216. Northern Territory Wills Amendment Act of 1984, § 12(2).

217. Northern Territory Law Reform Committee, *Relating to the Attestation of Wills by Interested Witnesses and Due Execution of Wills* 10-11 (1979).

sions of the South Australian statute.²¹⁸ In Victoria (Melbourne), the other populous Australian state, a review committee appointed by the attorney general has recommended the dispensing-power solution, and the project has been referred to the law reform commission for a report.²¹⁹ Legislation is likely to result in some or all of these jurisdictions.

In Tasmania, whose law reform commission reported in 1983, before the disappointing Queensland case law appeared, the recommendation was in favor of the substantial compliance solution.²²⁰

The New South Wales and Western Australia commission reports are carefully researched documents. Having learned from the South Australian case law, both commissions urge that the dispensing power should extend to errors in complying with the revocation formalities as well as the execution formalities.²²¹ The New South Wales report is particularly wide ranging and detailed. It criticizes the South Australian BRD standard of proof and recommends a civil standard "approximating that for rectification,"²²² which should translate in American parlance to the C&C standard.²²³

The New South Wales report would extend the harmless error doctrine to include not only execution errors but also mistakes in content (as when a lawyer or a typist misrenders or omits a term).²²⁴ The commission recommends extending to wills the existing judicial authority to rectify mistaken instruments of inter vivos transfer such as trusts.²²⁵ As has been mentioned above²²⁶ in connection with the switched-wills cases that straddle the line between execution errors and errors in contents, the development of a harmless error rule for execution errors and of a reformation or rectification rule for errors of con-

218. New South Wales Report, *supra* note 133; Western Australia Report, *supra* note 168. A research report in aid of the New South Wales Report has been separately published as an article. Lang, *Formality v. Intention: Wills in an Australian Supermarket*, 15 Melbourne U.L. Rev. 82 (1985).

219. Wills Working Party, Initial Report (n.d., early 1986); letter from Dr. C.E. Croft, Executive Director, Law Reform Commission of Victoria, to author (Feb. 26, 1986) (on file at the Columbia Law Review).

220. Law Reform Commission of Tasmania, Report on Reform in the Law of Wills 10 (1983).

221. New South Wales Report, *supra* note 133, § 6.31, at 73; Western Australia Report, *supra* note 168, § 8.11, at 53-55. These recommendations were foreshadowed in British Columbia Report, *supra* note 133, at 69; and Manitoba Report, *supra* note 167, at 29.

222. New South Wales Report, *supra* note 133, § 6.34, at 74.

223. See *supra* text accompanying notes 163-71.

224. See discussion *supra* text accompanying notes 111-12.

225. This is a reform for which Lawrence Waggoner and I have argued in the American setting. See Langbein & Waggoner, *supra* note 107, at 524-28. The present Article presents no occasion for reviewing the merits of that proposal, but I think it important to notice that the parallels between the two problems have led the New South Wales commission to want to deal simultaneously with both.

226. See *supra* text accompanying notes 111-12.

tents would (if a common standard of proof such as the American C&C evidence were employed) achieve doctrinal unification in the treatment of both types of mistakes; and across both spheres of the law of gratuitous transfers, that is, both probate and nonprobate transfers.

B. *Canada*

The legislation in Australia in the 1970's prompted law reform commissions in two Canadian jurisdictions to consider the harmless error problem.

In 1981 the British Columbia commission produced an extensively researched report with a timid recommendation.²²⁷ The report calls for a dispensing power permitting the court to enforce a defectively executed will if satisfied that the will reflects the testator's intention, but only on condition that the will be in writing and that the testator have signed it.²²⁸ Thus, the proposed reform would in practice be limited mainly to attestation defects. As of yet there has been no legislative response.

In 1983 Manitoba became the first (and thus far the only) North American jurisdiction to enact a harmless error rule. The provincial law reform commission published a report in 1980 preferring the South Australian type of statute to the Queensland variety.²²⁹ The commission recommended that South Australia's BRD standard of proof be deleted in favor of the ordinary civil standard, and that the legislation "be very clearly worded to encompass revocation and alteration defects as well as those of execution."²³⁰ Section 23 of the Wills Act of 1983 enacted the measure as recommended.²³¹

In 1984 the Manitoba Queen's Bench decided *Pouliot*,²³² the first case under the measure. The testator had taken pen and ink to his validly executed will, crossed out the institutional executor named there, substituted two individuals, and signed his name immediately below these modifications. The court ordered the will as amended admitted to probate. "I am satisfied that the alterations to the will represent the testamentary intentions of Mr. Pouliot," the judge said.²³³

Manitoba is the first holograph jurisdiction in the common law world to adopt a harmless error rule. The early indications²³⁴ are, as

227. British Columbia Report, *supra* note 133.

228. *Id.* at 54.

229. See Manitoba Report, *supra* note 167, at 26-27.

230. *Id.* at 29.

231. The Wills Act, 1982-83-84 Man. Rev. Stat. 387, ch. 31, § 23, Cap. W150 (1983).

232. 30 Man. R.2d 178 (Q.B. 1984), noted in Harvey, Casenote, 7 Est. & Tr. Q. 109 (1985).

233. 30 Man. R.2d at 180.

234. Cameron Harvey of the University of Manitoba Faculty of Law kindly investigated and wrote me about the unreported practice. In Briggs, Q.B. No. 85.02.424 (Oct. 23, 1985) (Oliphant, J.), the holograph was not signed "at the end" as the Wills Act of

one would expect, that some homedrawn wills that would require the harmless error rule for rescue in a nonholograph jurisdiction will be handwritten and thus can be treated as having complied with the holograph rules.²³⁵

C. *Israel*

Discussion of the harmless error problem in the common law world proceeded until 1979 in ignorance of the fact that Israel had enacted in 1965 a statute that has the main attributes of the South Australian dispensing power. Section 25 of the Israeli Succession Law of 1965 provides: "Where the Court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, . . . or the capacity of the witnesses."²³⁶

1983 requires. But because the will had been executed before 1983, when, pursuant to the decision in *Tachibana*, 63 W.W.R. 99 (Man. Ct. App. 1968), that requirement did not govern holographs, the court held that the will complied with the formalities and there was no need to use § 23. By contrast, in *Public Trustee v. Hedstrom*, Q.B. No. 15378 (1985) (St. Bon, J.), Ct. App. No. 95/85, § 23 was used to validate a holograph suffering from the same defect. Since the will in question also predated the 1983 change in the holograph statute, Harvey observes that "it was not necessary for the courts to have referred to s[ection] 23; this case could have been decided in the same way *Briggs* . . . [was] decided." Letter from C. Harvey to author, June 11, 1986, at 1 (on file at the Columbia Law Review). Section 23 was also pleaded in a third case, *Cumming*, Probate 85-01-02817 (1985), in which the requirements of holograph formality were arguably met. The case was settled. *Id.* Harvey notes that Manitoba has also seen some attempts to use the harmless error statute to simplify the proofs in lost will cases. *Id.* at 2. Where an original will has been validly executed but has gone astray, conventional law allows the fact of execution and the contents to be proved from copies and extrinsic evidence according to a high standard of proof, see *supra* text accompanying note 163. Accordingly, there should be no occasion to use the dispensing power in such cases.

235. I have long been puzzled that the rule of strict compliance with Wills Act formality has not come under more pressure in leading American holograph jurisdictions, especially California, on account of the tension between the two levels of formality.

The legislatures in these states have authorized in the holograph a type of testamentation that completely dispenses with the protective policy that is the dominant concern of so many of the formalities for attested wills. When, therefore, a testator attempts to make an attested will but blunders, he will still have achieved a level of formality that compares favorably with that permitted for a holographic will in the same state.

Langbein, *supra* note 1, at 1195.

236. Succession Law, 5725-1965, in Ministry of Justice, 19 Laws of the State of Israel 62, ch. 1, § 25 (1965) (authorized translation).

After the British Columbia Law Reform Commission discovered the Israeli statute and brought it to my attention, I engaged a Hebrew-speaking research assistant, David Landes, to work with the cases, and I reported on them in a paper prepared for the 1980 meeting of the American Bar Association that was held in Sydney. Langbein, *Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine*, in *American/Australian/New Zealand Law: Parallels and Contrasts* 59 (1980).

The main Israeli unsigned will case, *Gitah*,²³⁷ dates from 1971. It was subsequently endorsed in two of the South Australian precedents discussed above, *Baumanis*²³⁸ and *Williams*.²³⁹ The court in *Gitah* refused to apply the harmless error rule to an unsigned and undated writing found among the decedent's papers after his death. The instrument said: "In the case of death my brother inherits from me—I want to be buried in Moshav Yanov or in Jerusalem."²⁴⁰ The obvious rationale for refusing to validate such an instrument (as in *Baumanis*) is that the proponents have not carried their burden of proving that the paper was a will as opposed to a mere draft. But the Israeli court spoke as though total noncompliance with the requirements of dating and signature could never be remedied under the dispensing power, on the conceptualistic ground that, whereas section 25 authorizes remedy for a "defect," an omission is somehow more fundamental than a mere defect.

In 1981 the Israeli Supreme Court endorsed this logic in a shocking case that ultimately provoked the legislature to amend the statute.²⁴¹ The decedent in *Koenig v. Cohen*²⁴² was a young woman who lived estranged from her husband. She became distressed when, under the restrictive Israeli divorce law, she found herself unable to terminate her marriage. Accompanied by her three-year-old daughter she checked into a room on the twentieth floor of the Tel Aviv Sheraton. An hour later the two plunged to their deaths in what was determined to have been a suicide and infanticide. In the hotel room the decedent left several handwritten slips of paper. None were dated or signed as required under local law for a holographic will.²⁴³ In one of these notes she gave an account of her motivations; another asked certain relatives to keep the husband away from her funeral; and in yet another, which she labelled "Will," she asked that her estate be divided among her four brothers. When one of her brothers sought to enforce the instrument under the dispensing power, the husband resisted. The first-instance court refused probate, and the Supreme Court affirmed in two judgments (the second a rehearing). The Supreme Court followed *Gitah*, concluding that omitted formalities are more serious than mere defects and hence fall outside the scope of the statutory dispensing power.

Koenig v. Cohen is wrong. The only plausible object that the legislature could have had in authorizing the courts under section 25 to rem-

237. Estate 39/70, 76 P.M. 156 (Dist. Ct. 1971).

238. 25 S.A. St. R. 423, 426 (1980).

239. 36 S.A. St. R. 423, 429 (1984).

240. Estate 39/70, 76 P.M. 156 (Dist. Ct. 1971).

241. I am grateful to Judge I.S. Shiloh of Tel Aviv, who has kept me abreast of the developments recounted in the next paragraphs; and to Irwin Keller, who translated the sources.

242. C.A. 86/79, 35 P.D. 176 (1981); F.H. 40/80, 36 P.D. 708 (1982).

243. Succession Law, § 19.

edy a "defect" in the signature of a will is to dispense with the signature in exceptional cases of well proven intent. No dispensing power is needed for other types of "defect" in complying with the signature requirement—for example, signing by mark or by nickname. Such problems are commonly dealt with as matters of construction under existing law.²⁴⁴ The court's strict reading of the word "defect" made the statute superfluous. On its facts, *Koenig v. Cohen* is easily distinguishable from *Gitah*. *Koenig v. Cohen* resembles the South Australian case, *Franks*, in which the court validated an unattested instrument that the decedent left at the scene of his suicide.²⁴⁵ *Franks* is an easier case than *Koenig v. Cohen* because only attestation was missing, not signature. Nevertheless, what distinguishes both cases from the "mere draft" cases like *Baumanis* and *Gitah* is the evidence of finality of intent that arises from the conduct of a testator who creates an ostensibly testamentary instrument in circumstances of certain death. We understand why somebody busy committing suicide may not have Wills Act formalities on his mind.

Reacting to the ugly result in *Koenig v. Cohen*, the Israeli legislature amended section 25 in 1985 to sweep away the conceptual ground on which the case rested. A new subsection dealing with holographs was added to section 25. It provides that when "the court has no doubt as to the authenticity of the holograph and the finality of purpose of the testator," the court is empowered to validate the will "despite the omission of a signature or date as required" in the holograph statute.²⁴⁶

Although this liberalizing amendment was found necessary to extend the dispensing power to an unsigned holograph, the Israeli harmless error rule has otherwise been regarded as a success. In 1979, Judge I.S. Shiloh, an authority on Israeli probate law, advised the British Columbia Law Reform Commission about Israel's then fourteen-year experience with its dispensing power statute. He made a telling observation about litigation levels under the measure:

[I]t has been my experience that Advocates are gradually attaching less and less importance to defects of form in a will since they are aware of the Court's approach, and will not oppose probate merely on grounds of such defects. I am, therefore, of the opinion that s[ection] 25 actually prevents a great deal of unnecessary litigation and saves time and expense in cases before the Court. Its effect is to limit the battleground to issues which should be the foremost if not the only ones, i.e., to the question: Is the will a true expression of the testator's intent?²⁴⁷

244. See, e.g., for the American black letter, T. Atkinson, *supra* note 122, at 297-99.

245. No. 10 of 1983 (S.A. Sup. Ct. Aug. 9, 1983) (Cox, J.), discussed *supra* text accompanying notes 73-74.

246. Succession Law (Amendment No. 7) 1985, [1985] Knesset Laws 80.

247. Letter from Judge I.S. Shiloh, Tel Aviv, to Law Reform Commission of British

A properly conceived harmless error rule actually decreases litigation about Wills Act formalities, although hard cases that require judicial resolution must inevitably arise. A harmless error rule suppresses litigation about technicalities of compliance, since the court will excuse errors anyhow; and the rule subjects whatever litigation still arises to a purposive standard more predictable than the intrinsically arbitrary formalism of the rule of strict compliance.²⁴⁸

D. *England*

Every law reform authority that has studied the strict compliance problem has recommended some sort of harmless error rule, except in England. In a brief section of a 1980 report devoted mainly to changes in certain of the Wills Act formalities, the Law Reform Committee disapproved the South Australian example. The report said "that by making it less certain whether or not an informally executed will is capable of being admitted to probate, [a dispensing power] could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong."²⁴⁹ This is, of course, the familiar concern that a harmless error rule would beckon schemers to throw estates into litigation. The South Australian cases (all but one decided after the English report) have now put that argument to the test and refuted it.

V. CONCLUSION

The abiding lesson that emerges from the decade's experience with the harmless error rule in South Australia is that the rule works. Among the aspects of the story that deserve emphasis are these:

(1) Excusing execution blunders does not undermine the Wills Act. Properly understood,²⁵⁰ the litigation levels have been astonishingly low. The reform has not engendered trumped-up claims. Nor

Columbia (Oct. 18, 1979), quoted with permission of the author, reprinted in part in British Columbia Report, *supra* note 133, at 46.

248. See Langbein, *Substantial Compliance*, *supra* note 6, at 525-26.

249. Law Reform Committee, *The Making and Revocation of Wills*, 1980, 22d Report, Commd. No. 7904, at 4.

In a forthcoming article scheduled to appear in the *International and Comparative Law Quarterly*, J. Gareth Miller, a leading writer on English succession law, concludes a discussion of the Australian case law with the observation that the English will have to rethink the matter. Miller, *Substantial Compliance and the Execution of Wills* 29 (manuscript on file with Columbia Law Review).

The Scottish Law Commission is expected to make a recommendation on the subject in 1987. In September 1986 it issued a preliminary report soliciting views "on the questions whether a dispensing power should be introduced and, if so, what form it should take." Scottish Law Commission, *The Making and Revocation of Wills* 20 (Consultative Memorandum No. 70) (1986).

250. By which I mean, adjusted for the litigation-breeding no-waiver rule of the local probate practice that I have criticized, *supra* text accompanying notes 174-89.

has it inspired testators to become sloppy about executing their wills—people do not set out to embroil their estates in litigation. Thus, the reform has left unaffected the estates of testators who have complied fully with the Wills Act formalities. Nevertheless, the South Australian case law shows us that the estates of those who have committed innocuous execution errors are now being distributed in accordance with their wishes. The intent-serving goal of the Wills Act is achieved better without than with the rule of strict compliance.

(2) From the first decision to the most recent, the South Australian courts have given the dispensing power a purposive interpretation. The larger the departure from the purposes of Wills Act formality, the harder it is to excuse a defective instrument. Breach of the peripheral presence rule, indeed of any attestation requirement, has been relatively lightly excused. By contrast, the courts have excused the testator's failure to sign his will only in extraordinary circumstances.

(3) Implicitly, this case law has produced a ranking of the Wills Act formalities. Of the three main formalities—writing, signature, and attestation—writing turns out to be indispensable. Because section 12(2) requires a “document,” nobody has tried to use the dispensing power to enforce an oral will. Failure to give permanence to the terms of your will is not harmless. Signature ranks next in importance. If you leave your will unsigned, you raise a grievous doubt about the finality and genuineness of the instrument. An unsigned will is presumptively only a draft, as the landmark decision in *Baumanis v. Praulin*²⁵¹ insisted, but that presumption is rightly overcome in compelling circumstances such as in the switched-wills cases.²⁵² By contrast, attestation makes a more modest contribution, primarily of a protective character, to the Wills Act policies. But the truth is that most people do not need protecting,²⁵³ and there is usually strong evidence that want of attestation did not result in imposition. The South Australian courts have been quick to find such evidence and to excuse attestation defects under the dispensing power.

(4) In devaluing attestation while insisting on signature and writing, the South Australian legislation and case law has brought the South Australian law of wills into a kind of alignment with the American law of will substitutes, that is, with our nonprobate system, where business practice has settled the forms for transfer.²⁵⁴ In life insurance beneficiary designations; in bank transfer arrangements such as pay-on-death accounts, joint accounts, and Totten trusts; in pension accounts;

251. 25 S.A. St. R. 423 (1980), discussed *supra* text accompanying notes 97–99.

252. See *supra* text accompanying notes 101–10.

253. This is a theme of the celebrated article, Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 *Yale L.J.* 1, 9–13 (1941).

254. See *supra* text accompanying note 11; see also Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 *Harv. L. Rev.* 1108 (1984).

and in revocable inter vivos trusts, writing is the indispensable formality of modern practice, and signature is nearly as universal. Attestation, however, is increasingly uncommon.

(5) Although in theory there should have been little reason to choose between the purposive South Australian dispensing power and the purposive substantial compliance doctrine,²⁵⁵ the practice in Queensland proved otherwise. The courts read into their substantial compliance doctrine a near-miss standard, ignoring the central issue of whether the testator's conduct evidenced testamentary intent. I am not alone in thinking that the work of the Queensland courts in sabotaging their substantial compliance statute was a self-inflicted wound.²⁵⁶ Nevertheless, the contest between statutory substantial compliance and statutory dispensing power is resolved. Future legislation will take the form of the dispensing power. The substantial compliance doctrine will, however, remain available to do the work for which it was devised; it is the one means by which a court may relieve an execution error when legislation has not yet intervened to supply a statutory harmless error rule.

(6) Future legislation patterned on South Australia's dispensing power should contain two refinements that have been suggested by the decade's experience. The legislation should explicitly reach errors in compliance with revocation formality, although the South Australian experience shows that the courts must of necessity extend the reform to revocation formality. And the standard of proof should be pitched below that of the criminal law but above that of ordinary civil litigation—in American parlance, clear and convincing evidence.

(7) The development of a statutory remedy to cure mistakes in complying with execution formalities invites consideration of the parallel (and in one area overlapping²⁵⁷) problem of mistakes in content. When a typist drops a paragraph, or a lawyer misdescribes a devisee, the law should be prepared to correct the error if the error can be proved according to the same clear and convincing standard of proof that applies when such mistakes arise in the law of will substitutes. In the law of wills, both the traditional refusal to excuse innocuous execution errors and the traditional refusal to correct obvious mistakes in content, result from the same theoretical excess—overvaluing the requirements of Wills Act formality.²⁵⁸ That is why our law contains a long-standing reformation doctrine for will substitutes like trusts and life insurance contracts, but none for wills. The success of the harmless

255. See *supra* text accompanying note 206. This point is developed in Harvey, *supra* note 232, at 110.

256. *New South Wales Report*, *supra* note 133, §§ 6.15–16, at 69–71.

257. In the switched-wills cases, see discussion of the overlap, *supra* text accompanying notes 111–12.

258. For discussion of the Wills Act as the source of the no-reformation rule for mistakes of content, see Langbein & Waggoner, *supra* note 107, at 524–54.

error rule for execution errors casts a shadow over the traditional no-reformation rule for mistakes in content. The New South Wales Law Reform Commission has grasped this point and recommended that legislation in that state embrace both a dispensing power for execution errors and a reformation power for mistaken content.²⁵⁹ Both would operate under a standard of proof that, in American terms, would be described as clear and convincing evidence. Accordingly, the opportunity has now arisen for legislation to create a unitary mistake doctrine for curing errors both of form and of content in the execution and revocation of wills. If that opportunity is pursued, we may witness the elimination of some of the harshest and most senseless rules that remain in Anglo-American private law.

(8) Americans should be grateful indeed to the Australians (and Canadians and Israelis) who turned their legal systems into laboratories for testing and perfecting the harmless error rule. We should understand the force of these comparative examples, we should shudder that we still inflict upon our citizens the injustice of the traditional law, and we should join in this movement to rid private law of relics so embarrassing.

259. Discussed *supra* text accompanying note 224.