

Simon N. L. Palk\*

## INFORMAL WILLS: FROM SOLDIERS TO CITIZENS

Section 12(2), Wills Act, 1936-1975 (S.A.)

In common law jurisdictions, cases concerned with the formal validity of wills are legion<sup>1</sup>. Time and again the courts have been called upon to decide such questions as whether the signature of the testator is in the right place<sup>2</sup>, whether the signature is indeed a signature at all<sup>3</sup>, whether the will has been duly witnessed<sup>4</sup>, whether the relevant persons were all present at the required times<sup>5</sup>, and so on<sup>6</sup>. Such cases have occurred because, although the statutory requirements on the formal validity of wills and codicils are relatively clear and precise<sup>7</sup>, testators have proved singularly incapable of obeying these simple instructions. Faced with the difficult task of writing out the provisions of their will, signing their name just below the final word of these provisions in the presence of two persons, and then remaining in the room while these same two persons add their own signatures, would-be testators have contrived a myriad of variations. Testators have restlessly wandered their houses while witnesses have signed<sup>8</sup>. Witnesses have come and gone like the ebb and flow of the tide. Attestation clauses have travelled north, south, east and west across the page. Weird and mysterious scratchings have appeared in the place of signatures. Codes have been employed, no doubt for fear the will may fall into enemy hands<sup>9</sup>. Egg-shells have proved almost more popular than paper<sup>10</sup>.

Doubtless not all the errors made can be laid at the door of human folly. People are struck down with sudden illnesses and, with no will made, mistakes occur in the urgency to make one. Pieces of paper have conspired to be just the wrong size for what the testator wanted to say. Moreover the printed will-form has ironically not made life easy for the Do-it-Yourself testator<sup>11</sup>. But whatever the cause, and whether they have had professional legal advice or not<sup>12</sup>, people have made errors or committed irregularities in endeavouring

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\* Lecturer in Law, University of Adelaide. I would like to thank Mr. J. F. Keeler, University of Adelaide, for much help and guidance in the preparation of this article.

1. See *Williams on Wills* (4th ed., 1974), Chs. 9, 10; *Jarman on Wills* (8th ed., 1951), Ch. 7; *Theobald on Wills* (13th ed., 1971), Ch. 6 at para. 113; Mellows, *The Law of Succession* (2nd ed., 1973), Ch. 5; D. H. Parry, *The Law of Succession* (6th ed., 1972), Ch. 2.
2. See, e.g., *Re Hornby* [1946] P.171; *In the Estate of Roberts* [1934] P.102; *Re Stalman* (1931) 145 L.T. 339; *In the Will of William Spence* [1969] 2 N.S.W.R. 195.
3. E.g., *In the Goods of Chalcraft* [1948] P.222; *Re Finn* (1935) 105 L.J.P. 36.
4. E.g., *Re Groffman* [1969] 2 All E.R. 108; *In the Goods of Gunston* (1882) 7 P.D. 102.
5. E.g., *Re Colling* [1972] 2 All E.R. 729; *Re Hancock* [1971] V.L.R. 630; *Brown v. Skirrow* [1902] P.3.
6. Other problems include joining pages of a will that are not otherwise attached; *Lewis v. Lewis* [1908] P.1; *Re Eaglestone* [1950] S.A.S.R. 257; and the effect of words written below the signature: *Royle v. Harris* [1895] P.163; *Cinnamon v. Public Trustee for Tasmania* (1934) 51 C.L.R. 403.
7. For England see the Wills Act, 1837, as amended, s.9. For South Australia, see the Wills Act, 1936-1975, ss.8, 9.
8. *Betts v. Gannell* (1903) 19 T.L.R. 304; *Carter v. Seaton* (1901) 85 L.T. 76 (testator in other rooms).
9. *Kell v. Charmer* (1856) 23 Beav. 195.
10. *In the Goods of Barnes* (1926) 43 T.L.R. 71.
11. Printed will forms available from stationers have produced a rash of litigation: see, e.g., *Royle v. Harris* (*supra*); *In the Will of William Spence* (*supra*); *Re Bucknall* [1965] S.A.S.R. 267.
12. See *Re Robertson* (1972) 2 S.A.S.R. 481; *Casson v. Dade* 48 Digest (Repl.) 1128.

to satisfy the formal requirements for a valid will. The law, fortunately, has taken a very benign view of all this. First, the statutes embodying the formal requirements for a valid will have been drafted to give a would-be testator as much latitude as possible without abandoning the basic requirements altogether<sup>13</sup>. Secondly, where the courts are satisfied the documents in question do in fact embody a genuine attempt by a testator to make his last will, they have often been more than generous in construing both the statute and the facts to hold the purported testamentary document good<sup>14</sup>. On the other hand, even though the would-be testator tried to make a will, where the failure to follow the formal requirements is serious or where the judge feels he must take a narrow view of the law, the courts will do nothing. Where the testator has failed to sign the document<sup>15</sup>, or where there are no witnesses to the will<sup>16</sup> or where the witnesses were both not present when the testator signed or acknowledged his signature<sup>17</sup> then the purported will will be invalid. The formal requirements will not have been satisfied.

In South Australia, the position until 1975 had been no different. South Australian testators have been just as prone to commit errors and irregularities in making their wills as testators elsewhere. Like other courts, the Supreme Court has tried to help them out<sup>18</sup>. Where however this has not been possible, then the will has been declared invalid. In *Re Gramb*<sup>19</sup>, for instance, a testator was lying ill in hospital. A solicitor's clerk drew up the will at the bedside, and both the testator and clerk signed. The matron then came in and she signed. The will was held bad, since it was not signed in the presence of two witnesses as required by s.8, Wills Act, 1936-1940. Nor could the testator be said to have acknowledged his signature before two witnesses, as the clerk had signed before the matron came into the room. Only if the clerk had signed again after the entry would the will have been good. It cannot be said therefore that South Australian testators have fared any better or worse than testators elsewhere. The South Australian Law Reform Committee (hereafter S.A.L.R.C.), however, has become gravely concerned with the plight of the would-be testator who has tried to make a will and failed for

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13. See, e.g., the Wills Act, 1837 (U.K.), s.9, as amended by the Wills Amendment Act, 1852. The original requirement was that the signature of the testator had to be placed "at the foot or end" of the will. The amendment provides that it can be "at, or after, or following, or under, or beside, or opposite to the end of the will". Nor does it matter that the signature appears in an attestation clause, or below that of the witnesses, or that there is a large gap between the provisions of the will and the signature, or even that the signature appears on a page on which there is no writing above the signature.
  14. See, e.g., the attitude to acknowledgements of the testator's signature. The courts will hold it acknowledged where the witnesses can merely see the signature: *Gaze v. Gaze* (1843) 3 Curt 451. Cf. also the cases on signatures themselves; the following have been held good: a thumbprint: *Re Finn* [1935] 105 L.J.P. 36; an assumed name: *Re Redding* (1850) 2 Rob. Eccl. 339; a seal: *Jenkins v. Gainsford* (1863) 35 W. & Tr. 93; initials: *In the Goods of Emerson* (1882) 9 L.R. Ir. 443.
  15. *In the Estate of Bean* [1944] P.83.
  16. *In the Goods of Barnes* (1926) 43 T.L.R. 71.
  17. *Re Colling* [1972] 2 All E.R. 729.
  18. See *Re Eaglestone* [1950] S.A.S.R. 257: signature on back of will held good; *In the Estate of Bucknall* [1965] S.A.S.R. 276: signature before provisions held good by reading last page first and so on; *Re Robertson* [1972] 2 S.A.S.R. 481: signature in middle of will, provisions above signature admitted to probate; *In re Hazlegrove* [1950] S.A.S.R. 99: will on four separate sheets admitted to probate together as clearly written at same time; *In re Sanders* [1944] S.A.S.R. 22: will signed before witnesses came into room—held sufficient acknowledgement though no words or gesture by testator.
  19. [1952] S.A.S.R. 12.

want of satisfying the formal requirements<sup>20</sup>. Their deliberations, and their Report to the Attorney-General, have led to a unique amendment to the Wills Act, 1936-1975<sup>21</sup>, the net effect of which has been to extend to citizens the right formerly allowed to members of the armed forces to make informal wills<sup>22</sup>. It is the purpose of this article to consider the reasons for, and the likely operation of, this amendment, and to consider whether its introduction was, after all, justifiable.

The amendment reads:

“Section 12<sup>23</sup> of the principal Act is repealed and the following section is enacted and inserted in its place—

12(1) A will is valid if executed in accordance with this Act, notwithstanding that the will is not otherwise published.

12(2) 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, 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”<sup>24</sup>.

#### **The view of the South Australian Law Reform Committee**

The main subject of deliberation in the 28th Report of the S.A.L.R.C. to the Attorney-General of South Australia is the reform of the law relating to intestacy<sup>25</sup>. However, intestacy involves a grant of administration, and by and large administration is a much more costly affair than probate. The S.A.L.R.C. obviously felt, therefore, that it would be a reform in the law of intestacy if the number of occasions on which an intestacy occurred could be reduced. Hence intestacies caused by the formal invalidity of wills came under scrutiny.

First of all, the Report<sup>26</sup> considers the position of a would-be testator who is in a position to make a perfectly valid will — as most people are because most people in South Australia are within easy reach of civilisation. The Report points out two areas of difficulty. The first concerns the positioning of the testator's signature. The Report states:

20. See 28th Report of S.A.L.R.C. to Attorney-General, *Reform of the Law of Intestacy and Wills* (1974). One member of the Committee, J. F. Keeler, was absent during the deliberations leading to the Report and so did not sign. It is not clear why the S.A.L.R.C. suddenly became so concerned with formal validity. The S.A. State Reports reveal only one case since the Second World War where a whole will was struck down for this reason, namely, *Re Gramph* [1952] S.A.S.R. 12. Of course, it is very likely that a number of wills were so hopelessly deficient that no attempt at all was made to force them through probate.

22. See s.11, Wills Act, 1936-1975.

21. Wills Act Amendment Act (No. 2), 1975, s.9. There is no parallel provision in the law of formal validity of wills in any of the other Australian States or Territories, England, Canada or any of the common law jurisdictions of the U.S.A. See *American Jurisprudence* Vol. 57, “Wills”, para. 218.

23. Wills Act, 1936-1972, s.12, previously read: “Every will executed in the manner hereinbefore required shall be valid without any other publication thereof”.

24. Ss.8-9, Wills Act, 1936-1975, must now be read “Subject to this Act . . .”, i.e., subject to s.12(2).

25. See Probate and Administration Act Amendment Act (No. 2), 1975. The Act introduces several reforms to the archaic position concerning intestacy in South Australia. Before the 1975 Act, the law on intestacy was governed by the Statute of Distribution (1670).

26. *Report*, 10-11.

"At present the requirement of the Wills Act (with certain minor exceptions<sup>27</sup>) is that the signature of the testator must be placed at the foot or end of the will. There are a number of cases in which a testator does not do so, either because he misunderstands the instructions in the printed form or because he thinks that writing in his name at the beginning is a signature, as indeed it quite often is, or for any one or another reasons based on ignorance or inadvertence".

The second area of difficulty concerns the question of the presence of witnesses. The Report says:

"A similar case is where for some reason or another witnesses do not sign in each other's presence as required by s.8(b) of the Wills Act".

The Report therefore concludes on this point:

"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 a 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 . . ."

While we will return later to consider the effect of s.12(2) of the Wills Act, 1936-1975, on these areas of testator error, it is worthwhile at this point to consider the accuracy of these statements themselves, and the authorities cited for them. After all, they are put forward as reasons why the law needed to be changed.

It must be conceded at the outset that the formal requirements for the validity of wills have in the past frustrated testators' attempts to make a will, and have prevented documents which purport to be wills from being admitted to probate. This may be for either of two reasons. First, the document in question may contain such a clear and fundamental flaw in relation to the formalities, that no one may bother to put the document forward to probate<sup>28</sup>. Secondly it may be that, though there has been such a determined attempt to comply with the formalities that only a minor irregularity has occurred<sup>29</sup>, the court has been unable to interpret the law or the facts to bring the document within the existing parameters of validity<sup>30</sup>. As we will see later<sup>31</sup>, it is not at all clear whether the S.A.L.R.C. remarks are addressed to one or both of these two possibilities. Assuming for the moment however, that they are addressed to the situation where the testator has only made a minor or "technical" error in an otherwise flawless attempt to comply with the formalities it may well be that there is not such a problem at the S.A.L.R.C. imagines. Having said that testators often sign in the wrong place, the S.A.L.R.C. remarks that the would-be testator, however, "has intended to die testate and not intestate and it is not to the law's credit that he ends up as an intestate person when everything points to the fact he intended to die testate"<sup>32</sup>. The inference from this is that the S.A.L.R.C. believes mere technical failures to comply with the formalities cause intestacies. While it has been admitted that they

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27. See s.9, Wills Act, 1936-1975.

28. *E.g.*, no witnesses, or no signature. There are of course no statistics on this as one cannot count documents not put forward to probate.

29. *E.g.*, testator signing in the wrong place on the will.

30. See *Re Gramp* [1952] S.A.S.R. 12.

31. *Infra*, 393-394.

32. *Report*, 10.

33. *Supra*, n.20.

can do so, it is inaccurate to suggest that they always do so, or even that it is a common occurrence<sup>33</sup>.

The S.A.L.R.C. took as their first example of technical failure to comply with the formalities, the misplaced signature. By s.8(a), Wills Act, 1936-1975, a signature must appear "at the foot or end" of the will. Under the guiding hand of generations of testators, it has appeared in any one of three places.<sup>34</sup>

(a) The signature appears at or near the bottom or end of the will. If the signature is juxtaposed to the last words of the will, even though it is not placed directly under them, it is inconceivable that the Supreme Court would invalidate the will. This is so even if the signature happens to be so placed that a few words or lines appear beneath it<sup>35</sup>. Equally it does not matter how great a space appears between the final words and the signature, nor where the signature is placed in relation to that of the witnesses<sup>36</sup>. All this is provided for in s.9, Wills Act, 1936-1975. The section (referred to by the S.A.L.R.C. as a minor exception to the requirement that a signature be placed at the foot or end of the will) is the South Australian equivalent to s.1, Wills Amendment Act 1852 (U.K.), introduced specifically to save wills where the signature did not appear precisely below the last words of the will. Any South Australian would-be testator placing his signature at or near the end of the will, such that it could in spatial terms be defined as being at the end of will, would find he had done enough to satisfy the formal requirements.

(b) The signature appears in the middle of the will. It may happen that a signature is so placed that it cannot spatially be regarded as being placed at the foot or end of the will so as to come within s.9, Wills Act, 1936-1975. It might be thought, therefore, that the signature is misplaced, and the will is invalid<sup>37</sup>. In most cases, however, the courts have not found it difficult to avoid such a conclusion, and have employed two devices to avoid the intestacy.

The first has been to regard the signature as appearing at the end, if not spatially, at least in time or in the intention of the testator. The classic case is *Re Hornby*<sup>38</sup>. There a testator was writing out his will. When he came to about half-way down he drew a neat rectangular box and wrote the word "signed" inside it. He then finished the other half of the will, and signed in the box. The court held the signature good to validate the will. As Wallington J. said:

"There must always be a variety of signatures that will have to be, and will be capable of being, brought within the ambit of the statute because of the many varieties of testator and the many varieties of conduct in relation to testamentary documents that will arise from time to time for consideration, as they have arisen in the past. It is for these reasons that I must regard this signature as being, in the intention of the testator, at the end of the will. I have no doubt that when he

34. Cases from other common law jurisdictions are cited in this discussion, but the South Australian Supreme Court has shown no inclination to depart from the English position on wills.

35. See *In the Goods of Ainsworth* (1870) L.R. 2 P. & D. 151 (last lines of will written in short lines on left side of paper: signature alongside on right).

36. See *In re Eaglestone* [1950] S.A.S.R. 257 (testator signing below witnesses). See also *In the Goods of Mann* [1942] P.146; *In the Will of William Spence* [1969] 2 N.S.W.R. 195.

37. *In the Will of Moroney* (1928) 28 S.R. (N.S.W.) 553; cf. *In the Will of Witts* (1962) 79 W.N. (N.S.W.) 382.

38. [1946] P.171. See also *Re Long* [1936] P.166; *In the Will of Matthews* [1906] V.L.R. 531; *In the Will of Annie Lewis* (1943) 60 W.N. (N.S.W.) 22; *In the Will of Smith* [1965] Qd. R. 177; *Re Bucknall* [1965] S.A.S.R. 276.

made this document he prepared that space because he thought it would be more convenient to have his signature in that position . . . In my opinion, he so signed it with the intention of making it apparent on the face of the will that he intended to give effect by that signature to the writing signed as his will"<sup>39</sup>.

This is a most apt example of the liberal approach of the courts to technical irregularities. The courts have simply expanded the concept of signatures being placed at the end of the will in the notion of space, to the concept that the signature of the testator is placed at the end, either in time or in the intention of the testator<sup>40</sup>. As long as that is proved, the will can be admitted to probate.<sup>41</sup>

The second device has been for the court to regard the signature as the actual end of the will, and to admit to probate the portion of the will above the signature, but not those words below<sup>42</sup>. This device is particularly useful where the major, dispositive, provisions appear above the signature. It has also appealed particularly to the Supreme Court of South Australia. In *Re Robertson*<sup>43</sup>, for instance, the testatrix attended the office of her solicitor where she found her will typed out on two pages. She signed the first page at the bottom, but not the second. The Supreme Court held that the first page would be admitted to probate. A similar decision was arrived at in *Re Smith*<sup>44</sup> and *Re Lawrence*<sup>45</sup>. While it is true this device is of no effect in relation to the provisions appearing below the testator's signature, in all three cases it was clear that the main provision relating to the disposition of the testator's property did appear above the signature. The deceased therefore died largely testate. Such an approach would appear to have ample justification. Section 8(a), Wills Act, 1936-1975, is complied with in that, by ignoring the words below the signature, the signature appears "at the foot or end" of the will<sup>46</sup>.

On the other hand, it is possible to point to cases where a signature appearing in the middle of the will has not availed the would-be testator. In *Re Dilkes*<sup>47</sup>, for instance, a signature placed in the middle of a will, as in *Re Hornby*, was held ineffective. However, it appears from the report that no evidence either as to the time of the signature, or the intention of the testator, was put to the court. Similarly in *In the Will of Moroney*<sup>48</sup>, where a will, written on a printed-will form, was signed at the bottom of the first page although a number of provisions appeared overleaf in the second page, none of the will was admitted to probate. Harvey C.J. distinguished the cases cited where the court would admit the first page to probate, by saying that this practice was permissible where it appeared that only the first page was written at the time of the signature, but not if the whole of the will was in existence when the signature was applied. Be that as it may, there was no

39. [1946] P.177. 179-180.

40. *Mellows, op. cit.*, 56.

41. This approach may involve the court in disregarding part of s.9(3), Wills Act, 1936-1975, which states that nothing in s.9 is to be read as validating words below the signature. Perhaps, however, one could claim the court is not applying s.9 but s.8(a). The signature is at the end in time or in the intention of the testator.

42. *Royle v. Harris* [1895] P.163.

43. (1972) 2 S.A.S.R. 481.

44. [1955] S.A.S.R. 227.

45. [1928] S.A.S.R. 516.

46. Section 9(3) of the Act would also appear to envisage this approach by its reference to a signature not validating words appearing below it.

47. (1874) L.R. 3 P. & D. 164.

48. (1928) 28 S.R. (N.S.W.) 553.

indication in *Re Robertson* that the court believed only the first page was written when the signature was applied. Indeed that was patently not the case.

What can be said therefore is that, though the cases are inconsistent, the courts have from time to time availed themselves of a power to overcome, by one means or another, a signature misplaced in the middle of a will. It is not at all clear in these cases where they do not, why they do not. Whether it is simply that the judge has a technical view of the law<sup>49</sup> or that there are suspicious circumstances surrounding the making of the will, or that the will does not benefit the family, thereby leading the judge to a technical view, is not readily apparent. At any rate it can be said that the courts, and in particular the South Australian Supreme Court, have not balked at avoiding the difficulty caused by a signature appearing in the middle of the will if they wished to avoid it, and that there has always been ample authority to avoid an intestacy on these grounds.

(c) The signature appears at the top of or at the start of the will. In this situation the signature is at its worst spatially in terms of the formal requirement on the placing of the signature. Again, however, there are devices which the courts have employed, with success, to avoid intestacies.

First, the courts are at times able to avoid the consequences of a signature placed at the top of a will by finding some kind of connection between the signature and the bottom of the will. In *Re Roberts*<sup>50</sup>, for instance, a testator wrote out his will on one side of a piece of paper. As there was no room at the bottom of the paper, he turned it on its side and wrote the attestation clause along the margin. The signature at the end of this clause thus appeared at the top of the page. It was held effective. The signature was notionally at the bottom as that was where the attestation clause started. A second device, particularly associated with the printed-will form, has been for the courts either to fold the document so as to make the signature appear at the end<sup>51</sup>, or simply to read the passages of the will in a different order again so the signature appears at the end<sup>52</sup>. Again this approach has been used by the South Australian Supreme Court. In *Re Bucknall*<sup>53</sup>, for instance, a common fault occurred. The testator using a printed-will form wrote out his will on pages 2 and 3. He then turned to the space for signature on page 1 and signed the will. The signature thus appeared before the provisions. Majo J. admitted the document to probate by reading the will from back to front. He said: "It is, I suppose, certain beyond doubt that the signatures were added with the intention for the same to be at the end of the document prepared"<sup>54</sup>.

On the other hand, the courts have not always been in the happy position of being able to employ such devices. In such situations as these, they have been faced with the choice either of holding the will invalid, or of totally ignoring the requirements on the placing of the signature. In *Re Stalman*<sup>55</sup> a will had been written out on one side of paper. There was no room at the bottom to squeeze the signature in, so the testator simply added it at the top. The will was declared invalid. *Re Beadle*<sup>56</sup> was a similar case. Goff J. was

49. This would appear to be Harvey C.J.'s approach in *Moroney's Case*.

50. [1934] P.102.

51. See *Moroney's Case* (1928) 28 S.R. (N.S.W.) 553, 556. It may be doubted if the court can fold the document in any way different from that of the testator.

52. See *In the Goods of Walton* (1874) L.R. 3 P. & D. 159.

53. [1965] S.A.S.R. 276.

54. *Id.*, 278.

55. [1931] W.N. 143. See *Re Harris* [1952] P.319.

56. [1974] 1 All E.R. 493.

impressed by the fact that testators had already been given a considerable flexibility on the placing of their signatures, but the law still basically required the signature be placed at the end of the will. He could not find any sense in which this had been done, and the will was therefore invalid.

Having considered these three possibilities therefore, are the S.A.L.R.C. remarks justified? It is certainly true that at times a misplaced signature has been fatal; at times the judge has been powerless to avoid the defect and avoid the intestacy. What is not true is that this is "not uncommon"<sup>57</sup>. Nor is the inference that an intestacy is the usual result of a misplaced signature. Where the signature is placed at the end or in the middle of will, the courts, and the South Australian Supreme Court in particular, should already have ample power to hold the will, or at least a major part of it, good if they wish to do so. Where the signature is placed at the start of the will, such a power may be exercisable on the facts or it may not. It is only where it is not, in cases like *Re Stalman* and *Re Beadle*, that S.A.L.R.C. remarks really apply. Whether or not it was worth changing the law to accommodate those few cases where such a defect exists remains to be seen<sup>58</sup>.

The second example of failure to comply with the formalities is, the S.A.L.R.C. says<sup>59</sup>, that "witnesses do not sign in each other's presence as required by s.8(b) of the Wills Act". The Report goes on:

"The Australian and English cases are not identical on this point: see *Re Hancock deceased* [1971] V.L.R. 620, *In Re Robertson deceased* [1972] 2 S.A.S.R. 481 and *Re Colling deceased* [1972] 3 All E.R. 729. Certainly the South Australian practice as known to us is the same as the English one and does not follow that set out in the judgment of Mr. Justice McInerney in the Victorian case".

Enquiry into whether or not the fact that witnesses do not sign in each other's presence causes intestacies is a little difficult. This is because a statement more wrong in law than that above is difficult to imagine. There is quite simply nothing in s.8(b) which requires witnesses to sign in each other's presence. The subsection reads:

"The signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time."

A careful reading of this subsection shows that what it requires is that it is the testator who is to sign or acknowledge his signature in the presence of the two witnesses. The subsection says nothing about the two witnesses signing at all; they must simply be present during the testator's signature or acknowledgment. Perhaps however the S.A.L.R.C. really meant s.8(c). This reads:

"The witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Here at least is something requiring the witnesses to sign. However it is clear that it is only the testator who has to be there, when a witness signs. The witnesses must attest "in the presence of the testator," but the subsection says nothing about each other.

57. See *Report*, 10. There is no reported case since 1945 where the Supreme Court has struck down a whole will, or even the dispositive portion of one, by reason of a misplaced signature.

58. *Infra*, 393 *et seq.*

59. *Report*, 10.



The position under sub-ss.(b) and (c), therefore, is this. The testator must sign or acknowledge in the presence of two witnesses. There must be a minimum of three persons present. Then, however, one of the witnesses may go out while the other witness signs—only the testator may not go out, for the witness must attest in his presence. That witness after his attestation may go out, and the first witness come in and sign, again in the presence of the testator. The only thing that is not required at the execution and attestation is the presence of both witnesses while each of them attests. That is the only thing the S.A.L.R.C. mentions as being necessary in regard to the witnesses.

Although there is no statutory justification for the statement that both witnesses be present while they attest the signature of the testator, the S.A.L.R.C. Report does go on to cite a few cases which it regards as being in conflict. One case mentioned is *Re Robertson*<sup>60</sup>. This case can be disposed of straight away as at no point in the case was the question of witnesses in issue. As will be remembered, the point in issue there was the effect of a signature misplaced in the middle of the will. The next case is the Victorian case of *Re Hancock*<sup>64</sup>. The facts here were that a testator signed his will in the presence of two witnesses. One of the witnesses left the room, while the testator saw the other sign. The witness who left the room then returned and signed in the presence of the testator. McInerney J. upheld this will. As he quite rightly observed, there was nothing in the Victorian statute<sup>62</sup> (just as there is nothing in the South Australian Wills Act), which required the witnesses to sign in each other's presence. It must therefore be the third case cited, *Re Colling*,<sup>63</sup> which the S.A.L.R.C. regards as supporting the proposition that witnesses are required to sign in each others presence. The facts of *Re Colling* were as follows. The testator was in hospital and had decided to make a will. When the will was drawn up, he started to sign the will in the presence of two witnesses, one a nurse. Before the signature was finished, the nurse left the room. While she was out the testator finished his signature and the remaining witness signed. The nurse then returned and signed. The will was refused admission to probate.

The reason for this, however, was not that the witnesses did not sign in each other's presence. The reason was that because the nurse left the room before the testator had finished his signature, the testator did not sign in the presence of two witnesses. Nor could he be said to have acknowledged his signature in their presence, as one witness had signed before the nurse came back into the room, which was the only time when an acknowledgment would have been effective. As Ungoed-Thomas J. said:

"Here, clearly, that part of the name Colling, which was subscribed before Sister Newman departed from the scene of the signature—as, indeed, the completion of the signature so clearly establishes—was neither the name itself nor was it some mark which was intended to represent the name. It was not the signature of the testator as it is only part of his name, which did not constitute his signature, as was signed in the presence of both the witnesses"<sup>64</sup>.

It will be seen therefore that none of the cases cited by the S.A.L.R.C. support the proposition that witnesses must sign in each other's presence.

60. *Supra*, n.12.

61. [1971] V.R. 620.

62. Wills Act, 1958, ss.7, 8.

63. [1972] 3 All E.R. 729.

64. *Id.*, 731.

Nor indeed is there any case which supports such a proposition in the English or Australian jurisprudence on the attestation of wills<sup>65</sup>. Nor are the cases cited above in conflict. *Re Colling* involves a completely different point from *Re Hancock*. The English, the Victorian and the South Australian positions are identical in respect of witnessing of wills. No legislation, and no case, requires witnesses to sign in each other's presence. It would be justifiable, therefore, to dismiss the S.A.L.R.C. claim that intestacies are caused by witnesses failing to sign in each other's presence, simply by showing that as nothing requires them so to do, it cannot cause intestacies.

However, since the S.A.L.R.C. was clearly concerned with the possibility of the formal requirements for attestation causing intestacies, it might be germane to consider if the actual law regarding attestation does in fact lead to intestacies. Do intestacies result from the failure of testators to sign or acknowledge their wills in the presence of two witnesses, or from the failure of testators to be present when each of the witnesses is attesting the operative signature? That this is sometimes the case can scarcely be denied. *Re Colling* is a case in point<sup>66</sup>. Moreover, if it is clear from the evidence that there was only one, or perhaps no, witness, or that the witnesses signed before the testator, or that the testator left the will with the witnesses for signature at some later date, one would scarcely imagine any other result than an intestacy. However, to state the law in so harsh a form is to misstate it. In the past documents bearing an obvious and fundamental defect in attestation have not been admitted to probate. Where, however, the document would appear to be properly attested on its face, and the doubt about the attestation arises from extrinsic evidence supplied by those present, after examination by those wishing to challenge the validity of the will, the courts have been prepared to adopt a liberal approach similar to that displayed in dealing with misplaced signatures.

In regard to the presence of persons during attestation and execution, two things could go wrong. First, the witnesses could be absent when the testator signs. Second, the testator could be absent when the witnesses sign. If the first of these contingencies occurs, the courts have shown themselves prepared to save the will by construing the concept of "acknowledgement" of the testator's signature broadly. The formalities require either that testator signs in the presence of two witnesses or acknowledges his signature in the presence of two witnesses<sup>67</sup>. Where he has not done the former, the courts have said it is sufficient acknowledgement if the witnesses are merely able to see the previously appended signature<sup>68</sup>. The testator need not indicate his signature by gesture or spoken word<sup>69</sup>. A witness, it seems, may even acknowledge the testator's signature for him<sup>70</sup>. A typical South Australian example of the approach is *Re Sanders*<sup>71</sup>. Here a testatrix lay ill in bed attended by her two sisters. She signed a will in the presence of the two sisters. Two other persons then came into the room and signed the will as witnesses. The testatrix during this made no move, uttered no word, made no gesture. The Supreme Court admitted the will to probate, as there had been a sufficient acknowledgement. What this in effect means is that as long as there are in fact two witnesses,

65. See *Williams on Wills* (4th ed., 1974), 80.

66. *Supra*, n.63 and text.

67. Section 8(c), Wills Act, 1936-75.

68. *Gaze v. Gaze* (1843) 3 Curt 451; *In the Goods of Gunston* (1882) 7 P.D. 102. Cf. *Re Groffman* [1967] 2 All E.R. 108.

69. *In the Goods of Gunston* (1882) 7 P.D. 102.

70. *In the Goods of Crooke* [1903] Q.W.N. 63.

71. [1944] S.A.S.R. 22. See also *In re Unsworth* (1973) 8 S.A.S.R. 312.

it requires a very particular set of facts for s.8(b), Wills Act, 1936-1975, not to be satisfied: it requires one witness to sign before the other comes into the room thereby preventing an acknowledgment, as only one witness attests the acknowledgment<sup>72</sup>.

If the second contingency occurs and the testator is not present when the witnesses sign, the courts have partially got around this problem by extending the concept of "presence". "Presence" is established if the testator might have seen the witnesses sign if he had cared to look<sup>73</sup>. The testator could therefore be in another room<sup>74</sup>, or watching the witnesses on closed circuit television. A more ludicrous example of this could not be imagined than *Casson v. Dade*<sup>75</sup>. Here a testatrix attended the office of her solicitor to sign her will. Having done so, she was unable to put up with the discomfort of the office and returned to her carriage. She was thus not actually present when the witnesses signed. However, due to some street urchin near the horses, the horses moved back at the vital point, thereby presenting the testatrix with a line of sight into the office window and to the spectacle of witnesses attesting the will. The will was admitted to probate.

Assuming, therefore, that we apply the S.A.L.R.C. remarks on witnesses to the correct law, it is again submitted there may not be such a problem as the S.A.L.R.C. envisages. As long as there has been no fundamental error in attestation, and there has been a substantial attempt to comply with the formalities, the scope given by the courts, and the South Australian Supreme Court in particular, to such concepts as acknowledgment and presence should enable them to save the will if they wish to do so. At times it is true the facts are such that the court can do nothing<sup>76</sup>. At times the court itself may be disinclined to help and insist on taking a strict view of the law. However, in genuine cases like *Re Sanders*<sup>77</sup>, the Supreme Court has shown a particular willingness to help. Moreover, although the S.A.L.R.C. only looked at misplaced signatures and the presence of witnesses, the approach is the same to other errors and irregularity in the making of wills. If the normal signature is not used, the courts are satisfied with other identification marks<sup>78</sup>. If the sheets of a will are not attached, then the court will be satisfied with evidence that they were all written at the same time<sup>79</sup>. In all, it may be said that the S.A.L.R.C. remarks apply only to a very limited range of cases, assuming, as we have, that the S.A.L.R.C. remarks apply only to cases where there has been a substantial and determined attempt to comply with the formalities; in other words, where the defects are just "technical". On the whole, technical defects generate few intestacies<sup>80</sup>.

### Wills made in Extremis

Having dealt with the testator who, due to dwelling in civilisation, is able to obtain witnesses, pen, ink, etc., the Report goes on to consider the testator who is not in a position to use such aids. The Report states:

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72. These were the facts of *Re Colling* [1972] 3 All E.R. 729. See also for South Australia, *Re Gramp* [1952] S.A.S.R. 12.
73. See *Williams on Wills* (4th ed., 1974), 80, and cases cited in footnote (m).
74. *In the Goods of Trimmell* (1865) 11 Jur.N.S. 248.
75. (1781) 1 Bro.C.C. 99. Also *Winchelsea v. Wauchope* (1827) 3 Russ. 441.
76. *Re Gramp* [1952] S.A.S.R. 12. It may be that even in these cases the Supreme Court would not face an intractable problem. A modest perseverance in using the "mischief rule" of statutory interpretation might overcome the difficulty.
77. *Supra*, n.71.
78. See *Williams on Wills* (4th ed., 1974), 74-76.
79. *In re Hazelgrove* [1950] S.A.S.R. 99.
80. The only reported S.A. case since 1945 is *Re Gramp* [1952] S.A.S.R. 12.

“A person dying of thirst in the desert or a person in the icefields of Australian Antarctica may well scratch out what is without doubt his last will and testament but there is no hope at all of his having or obtaining witnesses to that will and yet there is no doubt that what is recorded is in fact his last will. The position becomes of greater importance today as people cease to live in families and elderly people in particular are left to fend for themselves in the cities. They too may have no way of summoning somebody to attest their last will.”

Therefore the Report says there should again be a provision if

“the Court is satisfied that for some good and sufficient reason it was impracticable or impossible to obtain witnesses to the will, then the Court should have power to declare that the will is valid in these circumstances”<sup>81</sup>.

Although this embodies a somewhat romantic view of the modern Australian as a noble savage in constant battle with the forces of nature, little exception to such a narrow reform could be taken. If people genuinely are unable to obtain witnesses, it requires only a limited extension to the notion of privileged wills<sup>82</sup> to help them die testate—and such a limited reform could indeed have been introduced. One might of course expect intelligent persons to make wills before they disappear into arid deserts and frozen wastes. Similarly it is difficult to conceive of older folk, sane enough to have testamentary capacity and being seized of an acute desire to make a will, who in these days of the welfare state are not in touch with somebody. However, the S.A.L.R.C. conceives of a need to make unattested wills, and if such a reform aids one person it will have achieved its aim<sup>83</sup>.

### **The Effect of Section 12(2)**

It has been argued therefore that technical defects in the formal validity of wills are not such a major cause of intestacies as the S.A.L.R.C. infers, and it requires either an unbending set of facts or a strict judicial attitude for an intestacy to result. The S.A.L.R.C. view nevertheless received approval of Parliament, and s.12(2), which was designed to give expression to that view, was enacted. The subsection says simply this. Where the Supreme Court is satisfied that there is no reasonable doubt that the document in question was intended to constitute the will of the deceased, then it may be admitted to probate notwithstanding that the formalities for a valid will have not been complied with. In other words, the subsection gives the Supreme Court a power to look to the substance of what the deceased was trying to achieve, rather than his formal accomplishment of it. We may now turn to discuss the operation and effect of this subsection on the existing law.

#### *(i) Broad or Narrow?*

The first question that needs to be settled is whether the subsection is to be interpreted broadly or narrowly. Either interpretation is possible from the wording. Is the court only to use the subsection in a very narrow sense to validate wills where the testator has made every effort to comply with the requirements of ss.8 and 9, Wills Act, 1936-1975? In other words, where

81. *Report*, 11.

82. See s.11, Wills Act, 1936-1975 (persons in the armed forces or active services can make oral or unwitnessed wills).

83. The reform may generate considerable problems of testamentary capacity. Is a man dying of thirst able to make a will?

the testator has been aware that there are formal requirements for the making of wills, and has accordingly written out his will, signed it in some place and endeavoured to get his signature witnessed by two persons (writing, signature and witnessing might be described as the three basic steps in the formal validation of a will)? Or can the court use the subsection in a much broader sense where the testator, beyond reasonable doubt wanting to make a will, made little or no effort to comply with the formalities; *i.e.*, the testator has obtained no, or only one, witness, or the testator has not signed the will? Can s.12(2) be used to validate the document in these circumstances?

The broad approach is most certainly possible on the wording of the subsection. The only criterion specified, before the Supreme Court can validate the will, is that there should be "no reasonable doubt that the deceased intended the document to constitute his will". It could be argued with some force that there would never be "no reasonable doubt" where the deceased had made no effort at all to comply with ss.8 and 9, Wills Act. If he was unconcerned with these sections, how could he have the relevant operative desire to make a valid will? However, it is perfectly possible to envisage situations where it could be argued, either from the immediate wording of the will itself or from the extrinsic evidence of family and friends, that the testator's intention to make a will was manifest, yet very little attention could have been paid to ss. 8 and 9. The testator might not have known of the correct formalities, for instance. Is the Supreme Court therefore to declare the will valid? If so, s.12(2) will have introduced a new mode of will-making: writing out a document with the "manifest intention" that the document is to constitute one's will.

The narrow approach would seem to be the one envisaged by the S.A.L.R.C. In the passage quoted which discusses the problem of those making a will while cut off from civilisation, the Report speaks of the need to convince the court that it was "impossible or impracticable to obtain witnesses"<sup>84</sup>. It can scarcely be imagined therefore that the S.A.L.R.C. would look with equanimity on a person who in civilisation does not try to obtain such witnesses, as required by sub-ss.(b) and (c) of s.8. In speaking of "technical failure to comply with the Wills Act"<sup>85</sup>, the S.A.L.R.C. seems to imply something different from a total failure to comply with the Wills Act, and there is no suggestion in the Report that they were seeking to promote any new modes of will-making. The idea was to stop technical arguments in these cases reaching the court, and the only cases to reach the court are those where there has been a substantial performance of the formalities, so that a grant of probate could be possible.

On the other hand, the Report, in discussing misplaced signatures, says that testators who put their signatures in the wrong place would do so "... for any one of a number of reasons based on ignorance or inadvertence". Is it possible therefore that the S.A.L.R.C. envisages a document being valid where, through ignorance, a person has not attempted to comply with the formalities at all? Where, for instance, a German immigrant makes a holograph will, valid in Germany, but without the witnesses required by the South Australian law? Considered in the abstract, a will would be defined, not in terms of formalities, but in terms of purpose: a will is an ambulatory document which expresses the intent of a person in relation to matters, chiefly the

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84. *Report*, 11.

85. *Id.*, 10.

distribution of his property, which are to take effect on death. The courts have echoed this approach when, on being called to decide if a document really is a will, they have examined all the surrounding circumstances to discover if the document is or is not testamentary<sup>86</sup>. While the fulfilment of the requisite formalities will go a very long way to proving a document is a will, there are nevertheless cases where the courts have found there to be no will even though the formalities are observed<sup>87</sup>. Similarly, in cases where the formalities are not observed, the courts have found the document in question to be an attempted will and consequently not valid, even though it would have been good as a deed<sup>88</sup>. As a will therefore is ultimately to be defined in terms of testamentary intent, and not in terms of ss.8 and 9, Wills Act, this makes a narrow approach to s.12(2) a little hard to justify. Why should an attempt to comply with the formalities of the Wills Act be the trigger that activates s.12(2) if the document can be defined as an attempted will without these formalities? Why read s.12(2) as saying that there can never be "no reasonable doubt" that the document was intended to be a will if there has not been a determined and substantial attempt to comply with ss. 8 and 9 of the Act, if s.12(2) simply does not say that?

(ii) *The Effect of the Narrow Approach*<sup>89</sup>

Assuming for the moment that the Supreme Court does adopt a narrow approach to s.12(2) and requires substantial compliance with the three basic steps in the formal validation of a will, what will be the effect of this on the existing law? In part this question has already been answered in our discussion of the S.A.L.R.C. Report. S.12(2) will only be of use in one of those cases where the purported will could not be saved by the court, because the facts would not yield to a sympathetic treatment<sup>90</sup>, or would not be saved by the court because the judge took a strict view of the law<sup>91</sup>.

Viewed as such, s.12(2) may not be an unwelcome addition to the law. It has been clear for a long time that judges have been unhappy with their lot in striking down wills on mere technical grounds. In *Re Colling* Ungoed-Thomas J. pointed out<sup>92</sup>:

"It is, perhaps, unfortunate, particularly in circumstances where the section itself contemplates oral evidence as necessary, that the section<sup>93</sup> has manifestly on occasions defeated the intention of the testator, and, in some cases, of which this is one, glaringly so. The requirements of the section however are established as strict and technical."

86. *In the Goods of Slinn* (1890) 15 P.D. 156; *Re Sheppard* (1893) Q.L.J. 116; *Bartholomew v. Henley* (1820) 3 Phillim. 317; *In the Goods of Morgan* (1866) L.R. 1 P. & D. 214; *Re Cowin* [1968] Q.W.N. 3.

87. *Dillon v. Coppin* (1839) 4 My. & Cr. 647 (document struck down, though attested and signed, because it was expressed to take effect "immediately").

88. *Bird v. Perpetual Trustee* (1946) 73 C.L.R. 140 (document not witnessed).

89. Whichever approach is adopted, it is assumed that s.12(2) will still be available to help those who make their wills *in extremis*. If the narrow approach is used, s.12(2) could simply be interpreted to include the *in extremis* cases as well. If the broad approach is used, s.12(2) will be wide enough to cover the *in extremis* cases anyway.

90. *E.g.*, *Re Colling* [1972] 3 All E.R. 729; *Re Gramp* [1952] S.A.S.R. 12; *Re Stalman* [1931] W.N. 143.

91. *In the Will of Moroney* (1928) 28 S.R. (N.S.W.) 553.

92. [1972] 3 All E.R. 729, 730.

93. S.9, Wills Act, 1837 (U.K.), which is the same as s.8, Wills Act 1936-1975 (S.A.).

After deciding the will was invalid, he concluded<sup>94</sup>:

"I come to this conclusion with regret, and only because I feel compelled to do so despite its so patently defeating the intention of the testator and involving no advantage, as far as I can see, in the avoidance of any fraud."

Such sentiments have been echoed in South Australia. In *Re Roberts*<sup>95</sup> Murray C.J., having decided a misplaced signature prevented a document from being admitted to probate, said:

"I regret exceedingly having to come to this decision, but it is only another instance of the danger of using printed forms of will without sufficient knowledge . . . of the statutory requirements".

It appears s.12(2) will help the Supreme Court out of its dilemma. Assuming there is no reasonable doubt the document was meant to be a will, the Supreme Court may now uphold the document no matter where the signature of the testator appears on its face, no matter that this signature appeared on an envelope<sup>96</sup>, no matter that the testator signed before one witness and acknowledged before another, and no matter that the testator was seized by a peripatetic passion just as the witnesses were signing. It is ironic that in one sense s.12(2) may even work a reversal of judicial attitude. We have seen already that the Supreme Court is quite prepared to save the portion of a will above the signature where the signature appears in the middle of a will<sup>97</sup>. The court adopts a liberal view, and regards the signature as being the end of the will. Section 12(2) may enable them to save the portion below the signature as well. To do so, however, involves putting a strained construction on that section. The subsection speaks of saving a document that is invalid for want of fulfilling the correct formalities. Where the signature appears in the middle of the will and the court holds the portion above the will valid, one might not be able to use s.12(2) as the document is not invalid—only a part of it is invalid. Section 12(2) can only be used if it be taken to read: "a document or part of a document purporting . . ." The court may well not feel justified in reading it in this way. If that is so, the only way they can then hold the portion below the signature of the testator good is to abandon their liberal attitude and declare the whole will invalid as the signature is misplaced. They can then use s.12(2) to validate the whole will. It would be ironic if a subsection designed to save wills causes the judiciary to abandon the liberal attitude under which they formerly saved wills<sup>98</sup>.

(iii) *The effect of a Broad Approach*

If, however, consistent with its wording, the Supreme Court adopts a broad approach to s.12(2) and uses it to validate documents where there has been a

94. [1972] 3 All E.R. 729, 731.

95. [1928] S.A.S.R. 175, 178.

96. The Supreme Court would, it is submitted, still have to be satisfied the signature was intended to be the operative signature of the will: see *In the Goods of Mann* [1943] P.146. If it was not, the will would not be signed. There would, therefore, not be substantial compliance with the formalities and the document would fall outside the narrow approach.

97. See *Re Robertson* (1972) 2 S.A.S.R. 481.

98. It is likely, and to be hoped, that counsel will continue to argue cases in the same way as before. If they try to prove the will is valid anyway under ss.8 and 9, then the court is unlikely to doubt the document was intended to be a will. If they concede invalidity, they then have the difficult job of proving intent. To this extent, s.12(2) may well not stop, as the S.A.L.R.C. suggests, technical arguments as to the validity of wills.

minimal attempt to fulfil the requirements of ss.8 and 9, Wills Act, 1936-1975, the effect on the existing law will be considerably greater. Testators who formerly died intestate as their documents were not signed<sup>99</sup>, or had only one, or even no, witness<sup>100</sup>, now would stand every chance of having their wills admitted to probate<sup>101</sup>. It is the question of proof that is the interesting one under the broad approach. The applicant for admission of the will to probate has to prove that there is no reasonable doubt that the testator intended the document<sup>102</sup> in question to be his will. Where the narrow approach is adopted, this is not difficult to establish. The mere fact that the testator has made a determined effort to comply with ss.8 and 9 itself goes a long way to proving the document was intended to be his last will<sup>103</sup>. Where the broad approach is adopted, however, no such evidence is available, and other proof will be required that the document was intended to constitute the will of the testator, or part of his will. Such evidence could come from two sources.

#### (A) THE DOCUMENT ITSELF

It is perfectly possible to imagine circumstances in which the document itself contained evidence that it was to be an operative will. The document might look particularly formal, being, say, on a printed form and marked "Last Will and Testament". Or the document might contain an expression that the will is being made in the face of imminent danger or fear of death. Or the document might contain an admission that the correct formalities had not been fulfilled. The problem however in using the document itself as evidence of the fact it was intended to function as the last will, or as a codicil, is that it does contain evidence of its own denial. One could never be wholly sure the testator had simply not changed his mind, and therefore had not gone through with the formalities. Moreover this point is enhanced where there is in existence a previous will made in accordance with the correct formalities. Seeing the testator knew the formalities, why did he not follow them in the later document? At any rate, it is submitted the Supreme Court could scarcely admit a document to probate on the evidence of the document alone.

#### (B) EXTRINSIC EVIDENCE

This means that the main source of evidence available to the court would be the extrinsic evidence of what third parties heard the testator say, or saw him do. It is certainly true that before the introduction of s.12(2), the Supreme Court would take the extrinsic evidence of the witnesses to the will<sup>104</sup>, or of others present at the scene of the will-making, in order to determine if the presumption of due execution had been displaced. In these cases, however, the will would be one where the formalities were substantially satisfied and there would be no doubt as to the intention of the testator<sup>105</sup>. It is only what happened that needs to be established, and that can be done by

99. *In the Estate of Bean* [1944] P.83; *Re Borger* [1966] Q.W.N. 8.

100. *In the Goods of Barnes* 136 L.T. 380; *Re Williams* [1917] 1 Ch. 1.

101. It is unlikely a testator will adopt the "manifest intention" approach as a deliberate method of making his will. This method is expensive as it requires the approval of the Supreme Court. It is the indolent, the negligent, the ignorant and the testamentary crank who will be helped by s.12(2).

102. S.12(2) speaks of a document, so presumably an oral will will be no good even under s.12(2). Oral wills can still only be made by the armed forces on active service under s.11, Wills Act, 1936-1975. If a broad approach to s.12(2) is adopted, it is only the ability of members of the armed forces to make oral wills that prevents s.12(2) rendering s.11 otiose.

103. See *Dillon v. Coppin* (1839) 4 My. & Cr. 647. The opposite can sometimes be established.

104. See *Re Gramp* [1952] S.A.S.R. 12, (both witnesses examined).

105. There might be some doubt as to whether the testator meant the signature to be operative or not: cf. *In the Estate of Bean* [1944] P.83.



the direct evidence of those present. Now, however, the Supreme Court will have to alter its approach to elucidating not merely what the testator said or did, but his intention about the document as disclosed by what the testator said or did. The courts' distaste for this sort of exercise is disclosed by refusal, in construing a will, to look at any evidence other than the words of the will itself<sup>106</sup>.

The point about formalities in the making of wills is not so much what formalities are required, but that some formalities are required. As A. R. Mellows<sup>107</sup> points out, the original notions behind this were the prevention of forgery, fraud and coercion. Forgery, fraud and coercion, however, are today just as likely where the formalities have been fulfilled, as where they have not. The presumption of due execution will carry a will to probate where there is no witness available to swear in affidavit what happened. Moreover, the Supreme Court should have every chance of discerning a forgery, fraud or coercion where they have to apply the criterion of "no reasonable doubt the deceased intended the document to constitute his will"<sup>108</sup>. The reason for requiring formalities in the making of a will is that one can at least be sure the testator has thought about what he is doing and intends the particular document to be his will. In obtaining witnesses and signing in their presence, we know the "testator" is not about the task of preparing a practice draft, or listing the extent of his property, or preparing a bogus document to frighten his relatives, or displaying a sham generosity which he knows cannot constitute his will for want of formality.

Without, therefore, the certainty of formalities, the Supreme Court has to gather other evidence of intention, and, as suggested, they will have to look to what witnesses heard the testator say or do. Chiefly they will look to expressions of testamentary intent. The Supreme Court however can only be satisfied that there was "no reasonable doubt" the document was meant to be a will on the admissible evidence. Neither the S.A.L.R.C. Report nor s.12(2) itself, however, contains any discussion of rules of evidence, and so, presumably, the normal rules of evidence will apply. The problem is that the question of providing evidence as to the intention of a dead man, who is not able, of course, to give direct evidence of his own intention, is one of the difficult areas of the law of evidence<sup>109</sup>. However, although it is a novel one, the nature of the problem facing the Supreme Court under s.12(2) does permit us to hazard the opinion that most of the evidence required to prove the intention of the would-be testator will be admissible.

Using a broad approach to s.12(2), the Supreme Court is likely to be faced with two problems. First, is the document before the court the document of the testator? In many cases there will be most satisfactory evidence of this. The document may be in the testator's own hand writing, or be signed by him. Alternatively witnesses may be able to show that they saw the testator writing or typing it out. If the document is professionally prepared, the solicitor will

106. See *Williams on Wills* (4th ed., 1974), 383; *Re James W. T.* [1962] Ch. 226. They must find *quod voluit* from *quod dixit*.

107. *Mellows, op. cit.*, 51-53.

108. The door to forgery will be opened slightly wider, as one could present a document that is entirely typewritten. The forger, however, will know his document is to be scrutinized by the Supreme Court. Also there will be the problem of proving authorship: see *infra*, 399.

109. *Cross, Law of Evidence* (Aust. ed., 1970, J. A. Gubbo), Ch. 19; *Wigmore on Evidence* (3rd ed., 1940), I, para. 112; VI, paras. 1734-1740; *Garrow and Willis, Principles of Law of Evidence* (6th ed., 1973), 136.

be able to show he prepared it on the testator's behalf. In other cases, however, where such evidence is not available, the Supreme Court will be faced with a difficulty. The only other evidence that is likely to be forthcoming is the testator's own statements heard by witnesses—statements like "My will is on four sheets of blue paper in my desk", or "I've typed my wishes on the paper inside this envelope". Such statements are of course hearsay as to the truth that the testator did type his wishes on the paper, or that the four sheets of blue paper do represent the testator's will. As such, the Supreme Court should not admit them as evidence that the document before the court is the testator's, unless they can be admitted under the rules relating to *res gestae*<sup>110</sup>. While this is no place to discuss the *res gestae* rules, it will be recalled that they are limited in scope, requiring contemporaneity with the events in issue and being of limited use in regard to self-benefiting recollections of things said.

Once, however, as in most cases, it is clear that the document in question is the deceased's, the next question concerns the deceased's intention in regard to the document. Here the deceased's statements before, at or after his making of the document may be introduced as evidence. Such statements are not hearsay but are original or presumptive evidence of his state of mind. Witnesses to the statements may deliver them in court, and the court can draw conclusions from them. In *Sugden v. St. Leonards (Lord)*<sup>111</sup> Mellish L.J. said:

"Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were."

In the case of a dead man, that is most certainly true<sup>112</sup>, and statements of intention have been used in the past to impeach a will on the ground of fraud<sup>113</sup>, to identify whether a particular paper formed part of a will<sup>114</sup> and in one case<sup>115</sup> to prove actual *animus testandi*. The only problem that the court will be left with is attaching a statement of intent to the particular document in court if the connection is not made plain from the statement. This will be particularly problematical if the deceased leaves several documents that could be interpreted as wills. Still, if the deceased does not make his intention plain with respect to any particular document, he must expect to die intestate.

The rules of evidence then would appear to give the court plenty of scope to hold that a particular document constitutes a will. The broad approach is not hamstrung by evidential inadmissability. However, the process of eliciting intention is likely to prove a harrowing process. This is not so because the document may have been prepared years before the testator's death. The Supreme Court has often examined witnesses about events long ago. The problem is that there is a very real possibility, especially where the distribution of "family wealth" is concerned, either that those examined will deliberately commit perjury<sup>116</sup>, or that they will innocently confuse what the testator

110. *I.e.*, statements accompanying relevant acts, statements contemporaneous with an event in issue: see *Adelaide Chemical Co. v. Carlyle* (1940) 64 C.L.R. 515.

111. (1876) 1 P.D. 154, 251.

112. It is difficult to imagine conduct that would display intention.

113. *Doe v. Hardy* (1836) 1 M. & R. 525.

114. *Gould v. Lakes* (1880) 6 P.D. 1.

115. *In the Goods of Slinn* (1890) 15 P.D. 156 ("Give X £10 after my death" treated as evidence of testamentary intent).

116. Perjury was a reason why a witness to a will could take no benefit under it. See, however, s.17, Wills Act, 1936-1975: since 1972 a witness to a will in South Australia can benefit under the will.

wanted to achieve with what they feel he ought to have achieved. They may also confuse the testator's general testamentary intention with his intention in relation to any particular document.

Without the certainty of formalities, the Supreme Court, if it adopts a broad approach to s.12(2), must keep a very tight rein indeed on those wills it admits to probate. Because of the nature of the problem, evidence will be forthcoming either from those benefitting from a document being a will, or those seeking to denounce the document in order to take under an intestacy, or a previous will. There is likely to be a mass of litigation pursuant to s.12(2)<sup>117</sup>. All sorts of friends and relatives and business associates will be coming forward with letters, and notes, and copies of wills either as new wills or codicils to an original will<sup>118</sup>. Once the Supreme Court admits these to probate, it may well unleash a process it cannot control. The irony is that s.12(2) was introduced to give effect to what a would-be testator actually intended. Yet the tighter the rein the Supreme Court keeps on documents that do not fulfil the requirements of the Wills Act, the more it may defeat that intention. One letter distributing the estate, or granting a legacy, may well be admitted to probate on the basis of evidence of a witness to the testator's intention. Another letter for want of such corroboration may not. Yet in actual fact it may be the second letter that the testator wanted to override the first, or grant an additional legacy. There will thus be increasing pressure on the Supreme Court to admit more and more documents to probate for fear of doing an injustice, and the criterion of "no reasonable doubt" will be lost. Either way, whether many or few documents are admitted, s.12(2) may well have the net effect not of upholding the testator's intention, but of abusing it.

Before leaving this discussion, one particular point could be looked at—the question of alterations to an existing will. The previous rule was that alterations had to be executed and attested in exactly the same way as the original will<sup>119</sup>. Only if they fulfilled the correct formalities would they be valid. After the introduction of s.12(2), can they now be admitted to probate, where no such formalities have been fulfilled<sup>120</sup>? To do so will of course involve reading s.12(2) as again applying, not only to a whole document, but to "part of a document" that is not valid for want of valid execution and

117. It is interesting to note that s.12(2) was introduced to cut down the cost of intestacies. The effect of the section will be to extend the normal time of execution under probate while the true will is established. If it does so, the expense of execution will be increased and the reason for reform nullified. Also worth noting is that the section will put executors and administrators in difficulty. What happens if they distribute and then a new will is discovered? While this problem could arise before s.12(2) was introduced, it was not so likely. With s.12(2), advertising claims takes on a new significance. Expense dictates that the grant of probate or administration is got right first time.

118. Another type of document that may appear is the letter or note promising the deceased's housekeeper "everything" if she will look after the deceased for the rest of his life: see *O'Sullivan v. National Trustees Executors Agency Co. of A'Asia* [1913] V.L.R. 173; *Horton v. Jones* (1935) 53 C.L.R. 475; *Stunchcombe v. Thomas* [1957] V.R. 509. These cases on contracts to make a will could now become probate cases under s.12(2).

119. See Wills Act, 1936-1975, s.24; *Williams, op. cit.*, 106; *Mellows, op. cit.*, 105.

120. A broad interpretation to s.12(2) would tend to render s.24 otiose. Alterations properly executed and attested will be admitted to probate anyway under s.8. S.24 will only apply to those invalid alterations that fail to reach probate because there was reasonable doubt they represented part of the deceased's last will and thus fail to fall within s.12(2). A narrow approach would continue to give s.24 a considerable effect.

attestation<sup>121</sup>. If the courts are prepared to do that, then what alterations are admitted will depend on the approach adopted. If the narrow approach is used, only those alterations where there has been a substantial attempt to comply with the formalities will be admitted. If the broad approach is adopted, all alterations should be accepted. There would not normally be any doubt that in making alterations, the testator intended those alterations to constitute part of his last will<sup>122</sup>. It is this possibility of being able to justice to the testator's intention in relation to alterations that may well influence the Supreme Court in favour of a broad approach.

### Conclusion

Whether or not the enactment of s.12(2) is justified may depend more on the operation of the subsection after enactment than upon the reasons for its original introduction. We have seen that while the S.A.L.R.C. overstressed the problem of technical defects, nevertheless such defects could cause an intestacy. If s.12(2) is construed narrowly to combat this problem, and therefore is only used where there has been a substantial attempt to comply with the formalities, then the subsection may be of some use. It will allow those judges who feel conscience bound to uphold the technical nature of the law, to do so and yet to reach a satisfactory result. It will enable those judges who previously took a liberal view of the requirements, to uphold wills where even their ingenuity was being strained. If, on the other hand, a broad approach is adopted in order to do justice to the testator's intention, then the subsection may well do more harm than good. Unless the courts tread carefully, the result could be an invitation to perjury, the occurrence of delays in distributing the estate, and a failure to identify that intention correctly. In that case, it would have been well if the S.A.L.R.C. had confined itself to the fate of the man scratching out his will on a rock by the side of the Birdsville track<sup>123</sup>.

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121. *Supra*. If s.12(2) is not read in this way, it will have the anomalous effect that what is clearly part of the testator's intention and meant to be part of the last will is not admitted merely because it is part of a document — yet it may be a considerable part of the disposition of the will, and may be of more importance than any codicils admitted despite invalidity because they are whole documents.
  122. Note, however, that, on a typewritten will, alterations unsigned and unwitnessed would be easy to forge. See n.108.
  123. Section 12(2) came into effect on January 29th, 1976. The subsection does not state to what deaths or documents it applies. General principles of statutory interpretation would suggest that it should not be applied retrospectively — but to what? (1) Testators who died before January 29th, 1975 or (2) documents in existence before that date? It is submitted it should not apply to persons who die before 29th January, 1976 — otherwise it will disrupt executors who have distributions in progress. There seems no reason it should not apply to documents in existence before that date. At any rate, many documents will not be dated.