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Formalities and Formalism: A Critical Look at the Execution of Wills

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It has been stated, with force and clarity, that "[o]ne fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power."¹ One cannot, however, read the cases at any length without beginning to sense the struggle which goes on in the courts between the desire to give effect to the manifest intent of the testator and the hesitancy to do so because of formalities requirements imposed by statute.² It is the

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1. Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) [hereinafter cited as Gulliver].

2. An excellent example of this struggle and the tension which it creates may be found in the English case *In Re Graffman*, [1968] 1 W.L.R. 733 (C.A.), in which

tension of that struggle which will be examined along with the methods which are currently proposed to deal with it. Thereafter, a statute will be proposed which will implement the purposive needs of the state for judicial implementation of a testator's wishes while reducing the burden upon both the courts and the testator for literal compliance.

One of Justice Holmes' famous aphorisms was that "upon this point, a page of history is worth a volume of logic."³ Understanding the development and current attitude toward formalities requirements necessitates several pages of history.

I. THE DEVELOPMENT OF FORMALITIES

Pre-1677

The origin of the modern will has commanded the interest of many talented and tenacious writers.⁴ It is generally propounded that the genesis of the modern will is Rome.⁵ However, the formalities attendant to ancient Roman devolution of property, often referred to as the "copper and scales,"⁶ bear little relation to mod-

the judge, after stating "I am perfectly satisfied that the document was intended by the deceased to be executed as his will and that its contents represent his testamentary intentions.", nevertheless went on to hold that there had not been literal compliance with the statute and thus denied probate to the will.

3. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

4. O.W. HOLMES, *THE COMMON LAW* 267-77 (M. Howe ed. 1963) [hereinafter cited as HOLMES]; H.S. MAINE, *ANCIENT LAW* 166-209 (10th ed. 1884) [hereinafter cited as MAINE]; A. REPPY & L. TOMPKINS, *THE LAW OF WILLS* 2-9 (1928) [hereinafter cited as REPPY & TOMPKINS]; W. ROLLISON, *THE LAW OF WILLS* 41 (1939) [hereinafter cited as ROLLISON]; J. WILLIAMS, *WILLS AND INTESTATE SUCCESSION* 2-9 (1891) [hereinafter cited as WILLIAMS]; Bigelow, *Theory of Post-Mortem Disposition: The Rise of the English Will*, 11 HARV. L. REV. 69 (1897) [hereinafter cited as Bigelow]; Gross, *The Medieval Law of Intestacy*, 18 HARV. L. REV. 120 (1904) [hereinafter cited as Gross]; *On the Origin and History of Wills*, 1 LEGAL REP. 223 (1841).

5. Whether the idea of the will existed among any of the Germanic tribes which later invaded England or whether it was adopted from Roman law, by the eighth century, English law was familiar with an instrument which was executed in anticipation of death and which altered the course of descent. W. BOWE & D. PARKER, *PAGE ON WILLS* § 2.7 (1960) [hereinafter BOWE & PARKER]. See also T. ATKINSON, *LAW OF WILLS* 6-10 (1953) [hereinafter cited as ATKINSON]; MAINE, *supra* note 4, at 190-91; REPPY & TOMPKINS, *supra* note 4, at 3; HOLMES, *supra* note 4, at 270; Bigelow, *supra* note 4, at 78-79.

6. Originally the testament 'with the copper and the scales' was in form and in effect a sale by the owner to his intended successor in the presence of five witnesses and a balance holder to weight the price paid by the guarantee to the grantor . . . the transfer took effect immediately and not on the owner's death. In addition, the features of revocability and secrecy were not present . . . about the only feature of the original testament 'with the copper and the scales' which has been preserved is that of the seven witnesses who in latter times were required to sign and seal the instrument. (Footnotes omitted).

ATKINSON, *supra* note 5, at 8-9. See also, BOWE & PARKER, *supra* note 5, at § 2.5; MAINE, *supra* note 4, at 198-202.

ern will formalities. Insight to current will requisites is afforded by a review of the English laws of succession, commencing with the year 1066, when Willy killed Harry.⁷

The Norman Conquest brought both Willy to the throne and feudalism to England.⁸ Prior to that time, both real and personal property had been freely willed.⁹ With few exceptions,¹⁰ land could not be devised under the feudal system.¹¹ This restriction against devising land, coupled with primogeniture,¹² assured the lords of loyal subjects necessary to the military aspect of feudalism.¹³ Additionally, land could only be alienated by livery of seisin, a ritual one was hard put to perform once one was dead.¹⁴

7. "Willy killed Harry—1066" is our method of remembering the Battle of Hastings wherein William the Conqueror of Normandy dethroned Harold with one optically placed arrow, a point of reference well established during eighth grade history and heartily recommended to those with a penchant for forgetting trivia.

8. 1 AMERICAN LAW OF PROPERTY § 1.3 (A. J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROP.].

9. WILLIAMS, *supra* note 4, at 2; REPPY & TOMPKINS, *supra* note 4, at 56; BOWE & PARKER, *supra* note 5, at §§ 2.7, 2.16; ATKINSON, *supra* note 5, at 11-12.

Willed is the verb now commonly employed to indicate succession of both real and personal property. Formerly the term 'willed' related only to real property, 'testament' referencing personalty. Likewise, a distinction was made between the 'devise' of land and the 'bequest' of personalty. See ATKINSON, *supra* note 5, at 36. See also, the preamble to the Statute of Wills of 1837, 7 Will. 4 & 1 Vict, c.26 (1837). [T]he word 'will' shall extend to a testament, . . . "

10. Certain boroughs retained the pre-Conquest custom of devising real property despite the establishment of the feudal system. See Gross, *supra* note 4, at 129-30; WILLIAMS, *supra* note 4, at 10-11, BOWE & PARKER, *supra* note 5, at § 2.11.

11. See *supra*, note 5, ATKINSON at 13-14, and BOWE & PARKER at § 2.9.

12. ATKINSON, *supra* note 5, at 78; Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337, 340 (1940). For a detailed history of primogeniture, see MAINE, *supra* note 4, at 218-36.

13. BOWE & PARKER, *supra* note 5, at § 2.9; MAINE, *supra* note 4, at 225.

14. Analytically, this process [livery of seisin] is twofold. The present possessor vacates possession, indicating to the intending acquirer that he (the purchaser) may take peaceful possession of the land so left vacant. Thereupon, the purchaser enters and takes possession of the land. Usually, however, the process is effected by a single ceremony which disguises the dual character of the transaction ('livery in law'). It is possible, however, that a considerable interval may elapse between the retirement of the transferor and the entry of the transferee. In that case, until the latter event has taken place, the delivery of possession is imperfect ('livery in law'). In any case, it is essential to the transaction that the possession shall be vacant when the transferee enters; otherwise his act is a disseisin, it may be a forcible disseisin, which will subject him to criminal punishment. That is why entry must take place in the lifetime of the feoffor; before the latter's seisin descends to his heir in pursuance of the rule: *le mort saisit le vif*. During the whole of the period under review, no written evidence of the feoffment was required; though for convenience of record, 'charters of feoffment' became common before the end of the fifteenth century. But the form of such documents tells its own tale. It is

Unhappy with the inequitable effects of primogeniture,¹⁵ chicanery was employed to devise one's real property. Under the protection of the Chancery,¹⁶ the *use* became the common vehicle by which one was able to devise his real property despite the prohibition against alienation by will.¹⁷ Albert would convey his property to Bert for the use of Calvin; Calvin would assume physical possession and an equitable interest while Bert would have mere legal title. Should Bert prove to be a bad actor and use the property to the derogation of Calvin's equitable interest, the Chancery would enforce the use against all but a bona fide purchaser.¹⁸

This mode of succession continued from the late eleventh century¹⁹ until the passage of the Statute of Uses in 1535.²⁰ The Statute of Uses was a result of King Henry VIII's realization that his coffers were nearing depletion and the use was effectively depriving him of the incidents of tenure, a previously reliable source of revenue.²¹ The Statute of Uses merged the legal estate held by the feoffee with the equitable estate of the *cestui que use* into one legal estate held by the beneficiary of the use.²² The only arrangements affected were those wherein the equitable estate of enjoyment and possession was separate from the legal estate of title.²³ It did not apply to leaseholds²⁴ and the use was not totally abolished.²⁵

The significance of the Statute of Uses for the formalities of the modern will is that it served as the impetus²⁶ to the creation of the Statute of Wills of 1540.²⁷ The Statute of Uses practically and

recitative only, not operative—'I have given and granted,' not, 'I give and grant.'

E. JENKS, A SHORT HISTORY OF ENGLISH LAW 106-07 (1912) [hereinafter cited as JENKS]. See also, AMERICAN LAW OF PROP., *supra* note 8, at § 1.6; BOWE & PARKER, *supra* note 5, at § 2.9; ATKINSON, *supra* note 5, at 8; ROLLISON, *supra* note 4, at § 43.

15. Primogeniture imposed an inequality upon the distribution of one's possessions among those natural subjects of generosity. Bigelow, *supra* note 4, at 78.

16. For jurisdiction of the Chancery, see Atkinson, *English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943).

17. Sweet, 'A Song of Uses'. *Some Reflections and a Moral*, 35 L.Q. REV. 127 (1919).

18. See, generally, AMERICAN LAW OF PROP. *supra* note 8, at §§ 1.17-1.21; IV W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 421-50 (2d ed. 1973), [hereinafter cited as HOLDSWORTH]; BOWE & PARKER, *supra* note 5, at § 2.12.

19. HOLDSWORTH, *supra* note 18, at 415.

20. Statute of Uses, 1535, 27 Henry 7, c. 10. (1535). For pertinent text, see AMERICAN LAW OF PROP., *supra* note 8, at § 1.25.

21. HOLDSWORTH, *supra* note 18, at 450.

22. *Id.* at 461-63.

23. *Id.* at 463.

24. *Id.* See also, AMERICAN LAW OF PROP., *supra* note 8, at § 1.28.

25. HOLDSWORTH, *supra* note 18, at 463.

26. *Id.* at 464-65.

27. Statute of Wills, 1540, 32 Henry 8 c. 1 (1540).

legally made it impossible to devise real property.²⁸ The Statute of Uses never represented popular desires and its stormy legislative history²⁹ indicates that it was more a means of accumulating revenue than a concerted structuring of the property system. In contrast, the Statute of Wills of 1540 represented the overwhelming desire of the populace to have the freedom to devise their property.³⁰

One of King Henry VIII's concerns prior to the Statute of Uses was the chaotic state of land titles.³¹ Coupled with the use, the absence of recording requirements effectively made it impossible to determine from public records who owned what.³² A companion act to the Statute of Uses, the Statute of Enrolments,³³ was passed to require recordation of land conveyances. This statute was not, however, the best alternative proposed and it too suffered from the stormy politics of the time.³⁴

Under the Statute of Wills of 1540³⁵ one was able to devise real

28. HOLDSWORTH, *supra* note 18, at 464; BOWE & PARKER, *supra* note 5, at § 2.13.

29. See, generally, HOLDSWORTH, *supra* note 18, at 449-61; AMERICAN LAW OF PROP., *supra* note 8, at §§ 1.23, 1.24.

30. BOWE & PARKER, *supra* note 5, at § 2.14; AMERICAN LAW OF PROP., *supra* note 8, at § 1.33.

31. HOLDSWORTH, *supra* note 18, at 450.

32. *Id.* at 444-45.

33. Statute of Uses, (1535), 27 Henry 8 c. 16.

[It] provides that from the last day of July, no bargains and sales of estates of freehold or inheritance shall be valid, unless made in writing and under seal, and enrolled within six months of the date of the deed either in one of the king's courts of Record at Westminster, or in the county where the lands are situate.

HOLDSWORTH, *supra* note 18, at 462.

34. The draft bill concerning the enrolment of covenants, contracts, bargains, or agreements made with reference to the use of lands . . . proposed to enact that the use of lands should not pass nor be created by reason of "any recoveries, fines, feoffments, gifts, grants, covenants, contracts, bargains, agreements, or otherwise, unless declared by writing under seal and enrolled as provided by the Act. Further, it provided that, for the future, all evidences of any kind should be enrolled . . .

This is a remarkably comprehensive scheme for the registration of conveyances; and, if it had been passed and efficiently carried out, we should have today, in working order, a series of country registers, which would have considerably simplified the land law.

Id. at 457-59. The proposed draft provided for a Clerk of Enrolments in each shire authorized to take acknowledgements and enroll evidences; they would also have been required to take an oath to act honestly. The draft additionally provided for a cross reference system between the document and the rolls. For a more specific description of the draft, see *id.*, at 458-59.

35. 32 Henry 8 c. 1 (1540).

property in writing.³⁶ This writing was considered a conveyance of the land and evidenced the transfer of ownership.³⁷ It is for this reason that a will did not pass after-acquired real property; to do so required making a new will.³⁸ It was not uncommon for one to make several wills, one for each new acquisition of real property. This was also the case when property once willed was conveyed and later reacquired; a new will had to be made after the reacquisition.³⁹

The Statute of Wills of 1540 only applied to real property; nuncupative testaments of personal property continued to be effective.⁴⁰ The Statute was so broad it allowed persons lacking in capacity to dispose of real property, a defect soon remedied.⁴¹ The writing requirement was not needed to provide evidence of the testator's intent, but to evidence the conveyance. Consequently, the Statute did not require that the writing be in the hand of the testator nor that it be signed by him.⁴² Thus, it can be seen that the purposes underlying the writing requirement of the Statute of Wills of 1540 had little in common with those allegedly

36. As pertains to all lands except those held of the King by knights' service: "That all and every person shall have full and free liberty, power and authority to give, dispose, will and devise, as well as by his last will and testament in writing, . . . all his said manors . . ." Statute of Wills, 1540, 32 Henry 8, c. 1, §§ I (4) and II (1540). See also, HOLDSWORTH, *supra* note 18, at 465.

As pertains to lands held of the King's highness in chief by Knights service, or of the nature of Knights service in chief . . . shall have full power and authority, by his last will, by writing . . . to give, dispose, will or assign two parts of the same manors . . . to and for the advancement of his wife, preferment of his children and payment of his debts, or otherwise at his will and pleasure; . . .

Statute of Wills, 1540, 32 Henry 8, c. 1 (1540) § IV. Devises of lands held in Knights service were thereby restricted to two-thirds. This distinction was abolished along with military tenures by the Tenures Abolition Act, 1660, 12 Car. 2, c. 24 (1660). See also JENKS, *supra* note 14, at 104-05 and 241-44 and AMERICAN LAW OF PROP., *supra* note 8, at § 1.35.

37. The aim of the Statute of Wills of 1540 was to partially restore that power of testation which the Statute of Uses had taken away; and the width of the clause which conferred the power of testation did, in fact, give to testators all, and more than all, the freedom to mould the disposition of their lands, which they had formerly enjoyed through the machinery of the flexible use. It was only natural, therefore, that the lawyers and landowners alike should have come to the conclusion that the will of lands, made by virtue of the Act, was a transaction of a kind essentially similar to a will of lands made through the machinery of the use. Like it, it did not take effect till death; and, like it, it was essentially a conveyance of the whole or part of the estate belonging to the testator when it was made. (Footnotes omitted).

HOLDSWORTH, *supra* note 18, at 364-65.

38. HOLDSWORTH, *supra* note 18, at 364-66.

39. *Id.* at 366.

40. ATKINSON, *supra* note 5, at 18.

41. 34, 35 Henry 8, c. 5 (1542-1543). HOLDSWORTH, *supra* note 18, at 466; BOWE & PARKER, *supra* note 5, at § 2.11 n.2.

42. HOLDSWORTH, *supra* note 18, at 367-68.

furthered by modern will formalities,⁴³ but the writing requirement did evidence a land transaction, much in the manner of our modern recording system.

*The Statute of Frauds of 1677*⁴⁴

It is helpful to recapitulate the mode of making wills and testaments⁴⁵ prevalent before the enactment of the Statute of Frauds. Only devises of land needed to be written. Such devises were not required to be in the testator's hand nor signed by him; nor need he have read the writing for it to be of effect.⁴⁶ With little exception, personalty passed by nuncupative will, the written form being undesirable due to the widely held superstition that death rapidly followed the making of one's will.⁴⁷

The Statute of Frauds is considered the precursor of modern will formalities.⁴⁸ Sections V, VI, XIX, and XXII of the Statute provided for formalities, many of which are still required in the United States. A review of each section proves helpful before analyzing the history leading to the enactment of the Statute.

Section V applied only to land and required all devises to be in writing and signed⁴⁹ by the devisor or another in his presence and at his express direction. Such devises were also to be attested and subscribed in the devisor's presence by at least three witnesses. Absent compliance with these requirements, a devise would be void.⁵⁰

Section VI also applied only to realty and provided that the rev-

43. See text accompanying note 90 *infra*.

44. Statute of Frauds, 1677, 29 Car. 2, c. 3 (1676-77). For a discussion of the theory that the Statute of Frauds was actually enacted in 1676, see Schouler, *The Authorship of the Statute of Frauds*, 18 AM. L. REV. 442-43 (1884) [hereinafter cited as Schouler].

45. See note 9, *supra*.

46. VII W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 368 (2d ed.).

47. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 539 (5th ed. 2d impression 1973).

48. AMERICAN LAW OF PROP. *supra*, note 8, at § 1.36; BOWE & PARKER, *supra* note 5, at §§ 2.18, 19.2.

49. Statute of Frauds, 1677, 29 Car. 2, c. 3, § V. (1676-1677).

50. All devises and bequests of any *lands or tenements*, deviseable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

Id. at § V.

ocation of a devise was to be in writing or by destruction by the deviser or another in his presence and at his direction.⁵¹

Section XIX related to nuncupative wills of more than thirty pounds. Such wills were only valid when made by a testator *in extremis* at his residence of the previous ten days, excepting the residence requirement for those taken ill by surprise while away from home. Additionally, such wills were to be proved by three witnesses who were present at the making of the will and bore witness thereto at the request of the testator.⁵²

Section XXII provided that a written will⁵³ of personalty could only be revoked by a writing witnessed by three persons.⁵⁴

Sections XIX and XXII must be read conjunctively to assess their full impact. Section XIX, XX and XXI made it practically impossible to make an oral will. Section XXII required essentially the same requirements for revocation of a written will of personalty as for one of realty. The effect of these sections was to require a writing for wills of personalty without the formalities required for wills of realty.

Exactly which single incident provided the impetus for the creation of the Statute of Frauds is hard to ascertain and, likewise, is of dubious existence given the many areas of the law which the Statute affected.⁵⁵ However, at least two authors attribute the

51. No devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent.

Id.

52. No nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and dies before he returned to the place of his or her dwelling;

Id. at § XIX.

53. See note 9, *supra* for distinction between a will and a testament.

54. And be it further enacted, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him and proved to be so done by three witnesses at the least. Statute of Frauds, 1677 29 Car. 2 c. 3, § XXII (1676-1677).

55. VI W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 184-87(2d ed)

Statute's provisions relating to wills to the almost successful fraud revealed in *Cole v. Mordaunt*.⁵⁶ In that case, a young wife almost successfully perpetrated a fraud against the beneficiaries of her elderly husband's written will. Nine witnesses testified to the veracity of her husband's nuncupative will, which supposedly left everything to his wife, and the revocation of his prior written will. Only on appeal to the delegates were the fraud and perjury revealed. In writing the opinion, Chancellor Nottingham expressed hope that Parliament would soon see fit to enact legislation to prevent such evils.⁵⁷ It is significant that Nottingham has been credited as one of the major authors of the Statute of Frauds.⁵⁸

Holdsworth⁵⁹ views the inducement for, and subsequent enactment of, the Statute of Frauds as a more functional result of the transitory state of trial by jury during the latter half of the seventeenth century. Methods of controlling a jury were few or nonexistent, since juries were still prone to deciding cases based upon their own knowledge, "and the modern device of getting an order for a new trial, when the verdict was clearly against the weight of the evidence, was in its infancy."⁶⁰ A new rule of parol evidence, not as yet certain, was emerging. The parties most likely to know the true situation, however, were often considered incompetent to testify.⁶¹ The Statute of Frauds made "certain kinds of evidence necessary for the proof of certain transactions,"⁶² and thereby provided some degree of uniformity in the proving of wills.

While the preamble to the Statute espoused the hope that the Statute would prevent fraud and perjury, in actuality it did little more than avoid blanket assertions of nuncupative wills as exemplified by *Cole v. Mordaunt*.⁶³ And, as early as 1757, Lord Mans-

56. ROLLISON, *supra* note 4, at 88; J. ROOD, WILLS 218 (1926) [hereinafter cited as ROOD].

57. ROOD, *supra* note 56.

58. Schouler, *supra* note 44.

59. See *supra* note 55, 388-89.

60. *Id.* at 388. Holdsworth continues: "Neither the parties to an action, nor their husbands or wives, nor any persons who had any interest in the result of the litigation, were competent witnesses . . . these rules were capable of working grave injustice. (footnote omitted). The attestation of Wills Act, 1752 Geo. 2, c. 6 (1752) provided that witnesses to a will which included a devise or bequest to the witnesses were competent to testify but that the devise or bequest would be null and void. This policy survives in many states. *Id.*

61. See *supra* note 55, at 388-89.

62. *Id.* at 388.

63. The Statute of Frauds "does not preclude the risk of forgery or perjury; it

field in *Windham v. Chetwyn* recognized the capability of the Statute to defeat honest wills for lack of formalities.

I am persuaded many more fair wills have been overturned for want of form, than fraudulent have been prevented by introducing it. I have had a good deal of experience at the delegates; and hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested. It is clear that judges should lean against objections to the formality. They have always done so, in every construction upon the words of the statute . . . And still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled.⁶⁴

Despite the fact that the Statute was not capable of preventing all fraud, it was not without merit. Holdsworth admitted it "did go some way to meet the evil consequences of defective condition both of the system of trial by jury, and of the law of evidence."⁶⁵ It lifted the proof of testaments from the level of mere conjecture by requiring a writing and witnesses, two formalities which continue to survive in all of the states.⁶⁶

*Statute of Wills, 1837*⁶⁷

Since the Statute of Frauds made it practically impossible to make a verbal will, written wills of real and personal property came into general use; nuncupative wills became rare.⁶⁸ The problems next presented to the courts were not fraudulent assertions of oral wills, but cases wherein the formalities of the Statute of Frauds were not met. Then, as now, hard cases made bad law, and the bad law resulting from the judges' reluctance to find true wills void for want of compliance with the requisites of the Statute of Frauds prompted by the Statute of Wills of 1837.⁶⁹

In *White v. Trustees of the British Museum*⁷⁰ the issue was whether or not the witnesses had attested the will of William White as required by the Statute of Frauds.⁷¹ Only one of the witnesses knew the writing to be the will of White and had wit-

does ensure that some evidence of these transactions is submitted to the court; and it thereby renders the prosecution of wholly baseless claims more difficult." See *supra* note 55, at 389.

64. *Id.* at 394-95. The contrary opinions of Lords Kenyon and Mansfield are also set forth therein.

65. *Id.* at 390.

66. See text accompanying note 95 *infra*.

67. Statute of Wills, 1837, 7 Will. 4 & 1 Vict., c. 26 (1837). "It is an 'Act for the Amendment of the Laws with respect to Wills,' not an original Act, but to amend the law, and was intended to remove all doubt and latitude of interpretation." (Footnote omitted). E. EDWARDS, *THE NEW STATUTE OF WILLS*, 1 VICTORIA, C. 26, 2 (1846). [hereinafter cited as EDWARDS].

68. H. SUGDEN, *AN ESSAY ON THE LAW OF WILLS AS ALTERED BY THE 1 VICTORIA*, c. 26, 181 (1837) [hereinafter cited as SUGDEN].

69. EDWARDS, *supra* note 67.

70. 130 Eng. Rep. 1299, 6 Bing 310 (1829).

71. "[T]he identity of the instrument is beyond dispute." *Id.* at 319.

nessed the acknowledgment of the testator's signature as we now know it to be, that is, a verbal acknowledgment that the signed name was the testator's own and in his hand or the hand of another at his direction. The remaining two witnesses did not know the character of the writing nor did White verbally acknowledge his signature. The jury had found by special verdict that the will was the true will of William White and it is most likely this fact which most influenced the court in its decision. The court held that the testator had impliedly acknowledged the will merely by requesting that the witnesses sign the writing, and that this was within the Statute of Frauds.⁷²

Cases such as *White*⁷³ effectively abrogated the formalities required by the Statute of Frauds which purportedly were designed to prevent fraud and perjury.⁷⁴ Under the holding in *White*, whenever a testator requested a person to witness a paper, an implied acknowledgement could be inferred. However, the paper may have been blank, or any number of irregularities could have been present, and the witness would be incapable of testifying on these matters. Were the procedure in *White* to become customary, a witness could only offer testimony as to whether or not the signature on the document was his own. No certainty as to the witness' ability to testify upon the circumstances surrounding the execution of the will by the testator would exist. Presented with the fact that the formalities required by the Statute of Frauds had become meaningless at the pens of the judges, a commission was formed to study the law of wills as they then existed and to make recommendations thereon.⁷⁵

72. [W]e think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his . . . yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgement of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgement conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgement of signature has been made, and we do therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the statute.

Id. at 320.

73. SUGDEN, *supra* note 68, at 183.

74. "Here there was an acknowledgement to one of the witnesses; but to hold that sufficient would be to repeal the statute. . . ." 130 Eng. Rep. 1299, 1302, 6 Bing 310, 316 (1829) (Adams Serjt., *contra.*).

75. See text accompanying note 69 *supra*.

The Commission,⁷⁶ after expounding upon the desirability of witnesses to wills,⁷⁷ recommended that only two witnesses to a will be required⁷⁸ instead of the three required by the Statute of Frauds. It further recommended that the witnesses attest the will in the presence of each other,⁷⁹ that no form be required for attestation,⁸⁰ and that witnesses be considered competent to attest a will if they were competent at the time of the execution and not

76. For extracts of the report of the Fourth Real Property Commission, 1833, see SUGDEN, *supra* note 68, at 177.

77. [A] will does not appear until after death of the only person who is necessarily aware of its existence; it may by possibility have been executed at any time during the life of the testator that a fabricator may think it most safe to fix upon, and it usually disposes of the whole property of the testator. Forgery is not the only, nor by much the most usual, question affecting the validity of a will. The incapacity of the testator, or the circumstances of fraud or coercion under which a false will may have been obtained, and which may be attempted to be disproved by perjury, render the validity of a will one of the most complicated and perplexing subjects of litigation, and make it particularly necessary to require the protection of attesting witnesses.

SUGDEN, *supra* note 68, at 179.

78. These considerations induce us to recommend that every will shall be attested, and we think it expedient and sufficient to require two witnesses. . . . The protection against forgery is greatly increased by requiring a second witness, on account of the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information, or not being able to elude a discovery of the fraud by a searching cross-examination. We think it expedient not to require more than two witnesses but of course the number should not be restricted.

Id. at 180.

79. We therefore propose that every will should be signed by the testator in the presence of, or the signature acknowledged to, two witnesses present at one time and that they should subscribe their names in the presence of each other, or that one, having signed first, should acknowledge his signature, and be present when the attestation is signed by the other. We do not think it necessary to continue the provision of the Statute of Frauds, which requires that the witnesses should subscribe in the presence of the testator. This, as we have stated, has been disregarded so far that the courts have not required that the testator should actually see the witnesses sign, but have considered it sufficient if he might see them; . . . But if it be required that both witnesses shall be present at the time when the will is signed or acknowledged, and shall attest it, in the presence of each other, the signature of the witnesses will usually be made either in the presence of the testator, or before they lose sight of the wills . . . It does not appear to us that the additional security which may be obtained by requiring the witnesses to sign in the testator's presence, is of so much importance as the burthen and danger of imposing such a restriction.

Id. at 183-84. Note, the last sentence quoted above demonstrates a concern of the Commission that wills truly representing a testator's wishes may be defeated for want of formalities, a result contrary to the underlying purposes of the freedom of testamentary disposition. The recommendation of the Commission that the requirement of the Statute of Frauds that the witnesses sign in the presence of the testator be repealed was not accepted and the Statute of Wills of 1837 maintained the requirement. See note 84, *infra*.

80. "We think the present law, which renders it unnecessary to state in the attestation that the forms required by the Statute were complied with, should not be altered. . . ." SUGDEN, *supra* note 68, at 185.

rendered otherwise subsequently.⁸¹

After rejecting both holographic and nuncupative wills as exceptions to the "general rule which would preponderate over the benefits,"⁸² the Commission recommended the repeal of the provisions of the Statute of Frauds pertaining to nuncupative wills.⁸³

All of these recommendations were incorporated in the Statute of Wills of 1837. Section IX incorporated the recommendations of two witnesses, that witnesses sign in the presence of each other and that there be no form required for attestation.⁸⁴ The provisions of the Statute of Frauds dealing with nuncupative wills were repealed by Section II.⁸⁵ Section XIV provided that the competency of witnesses would be determined at the time of execution.⁸⁶

81. It appears to us to be expedient that wills should be required to be attested by such witnesses as would be admitted, unless they subsequently become incompetent, to give evidence respecting the execution of them. We do not feel ourselves at liberty to suggest alterations in the general rules of evidence, and see no sufficient reason for making the case of wills an exception to those rules. These reasons induce us to propose, in conformity with the Statute of Frauds, that the witnesses should be required to be credible persons, and that gifts to them should be void, according to the provisions of the Statute. 25 Geo. 1, c.6.

Id. at 187.

82. *Id.* at 181.

83. We admit that in many of these cases the impossibility of making a will must be attended with injury to the family of the testator; but in establishing any general rule it is impossible to prevent all cases of individual hardship, and if nuncupative or irregular wills were allowed in such cases, the property of every person who died away from his family would be liable to be fraudulently taken from them by the perjury of persons who were, or might pretend to have been, near him at the time of his death.

Id. at 182.

84. And it be further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Statute of Wills, 1837, 7 Will. 4 § 1 Vict., c. 26 § IX (1837).

85. "*An act for prevention of frauds and perjuries*, as relates . . . to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein . . . are hereby repealed . . ." *Id.* at § II.

86. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

The Statute of Wills of 1837 constituted an enactment of the practical effects of the Statute of Frauds; its provisions applied equally to wills of both personalty and realty.⁸⁷ Section XXIV also brought the law in step with accepted custom by abrogating the outmoded concept of a will as a conveyance, prevalent when the first Statute of Wills was enacted, by providing that a will would speak as of the time of the testator's death and would thereby serve to pass all property acquired after its making.⁸⁸ Other provisions of the Statute dealt with the competency of interested witnesses,⁸⁹ a concept which survives in many states.

The reasons set forth for the Commission's recommendations indicate that the Commission's primary concern was to create practical formalities to assure adequate evidence would be available at the testator's death,⁹⁰ while at the same time not unduly burdening the courts with formalities which would only serve to defeat true wills.⁹¹ With the enactment of this statute, a shift in emphasis from restrictions upon testation to formalities which are designed to implement and facilitate testamentary intent becomes evident. The only mention of the prevention of fraud and

Id. at § XIV.

87. See note 67 *supra*.

88. And be it further enacted, that every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Statute of Wills, 1837, 7 Will. 4 § 1 Vict., c. 26 § XXIV (1837).

89. And be it further enacted that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than the except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such persons attesting the will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will.

Id. at XV.

And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, or any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Id. at XVI.

And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Id. at XVII.

90. See text following note 121 *infra*.

91. See note 79 *supra*.

perjury as a realistic goal of the Statute was made when the Commission discussed its reasons for recommending the nonrecognition of holographic and nuncupative wills.⁹² Many states today have statutes requiring formalities very close to, if not exactly the same as, those required by the Statute of Wills of 1827. Like the Commissioners, courts and legislators generally recognize that the purpose of these formalities is to serve an evidentiary function.

A General Survey of American Statutes

Today every state in the union and the District of Columbia have statutes⁹³ requiring essentially the same formalities as the Statute of Wills of 1837:

- (1) A writing;
- (2) Subscription by testator;
- (3) Subscription by witnesses;
- (4) Two witnesses;
- (5) That the testator sign or acknowledge his signature in the presence of both witnesses at the same time.⁹⁴

92. SUGDEN, *supra* note 68, at 181-82.

93. ALA. CODE tit. 43, § 1-30 (1977); ALASKA STAT. § 13.11.155 (1972); ARIZ. REV. STAT. § 14-2502 (1975); ARK. STAT. ANN. § 60-403 (1971); CAL. PROB. CODE § 50 (West 1956); COLO. REV. STAT. § 15-11-502 (1974); CONN. GEN. STAT. § 45-161 (Supp. 1978); DEL. CODE tit. 12, § 202 (Supp. 1977); D.C. CODE § 18-103 (1967); FLA. STAT. § 732.502 (Supp. 1978); GA. CODE § 113-301 (1975); HAW. REV. STAT. § 536-3 (1968); IDAHO CODE § 15-2-502 (Supp. 1978); ILL. REV. STAT. Ch. 3, § 43 (1961); IND. CODE § 29-1-5-3 (Supp. 1977); IOWA CODE § 633.279 (Supp. 1978); KAN. STAT. § 59-606 (1964); KY. REV. STAT. § 394.040 (Supp. 1978); LA. CIV. CODE ANN. art. 1584 (West 1952); ME. REV. STAT. tit. 18, § 1 (1965); MD. ANN. CODE art. 4, § 102 (1974); MASS. GEN. LAWS ANN. Ch. 191 § 1 (West Supp. 1978); MICH. COMP. LAWS § 27.3178 (Supp. 1978); MINN. STAT. ANN. § 524.2-502 (West 1975); MISS. CODE ANN. § 91-5-1 (1973); MO. REV. STAT. § 474.320 (1956); NEB. REV. STAT. § 30-2327 (1975); NEV. REV. STAT. § 133.040 (1973); N.C. GEN. STAT. § 31-3.3 (1976); N.D. CENT. CODE § 30. 1-80-02 (Special Supp. 1975); N.H. REV. STAT. ANN. § 551.2 (1974); N.J. STAT. ANN. § 3A:2A-4 (West Supp. 1978); N.M. STAT. ANN. § 30-1-4 (1954); N.Y. EST., POWERS & TRUST LAW § 3-2.1 (McKinney Supp. 1977); OHIO REV. CODE ANN. § 2107.03 (Page 1976); OKLA. STAT. ANN. tit. 84, § 55 (West 1970); OR. REV. STAT. § 112.235 (1977); 20 PA. CONS. STAT. ANN. § 2502 (Purdon 1975); R.I. GEN. LAWS § 33-5-5 (1970); S.C. CODE § 21-7-50 (1977); S.D. UNIFORM PROB. CODE § 29-2-6 (1976); TENN. CODE ANN. § 32-104 (1977); TEX. PROB. CODE ANN. § 59 (Vernon 1956); UTAH CODE ANN. § 75-2-502 (1977); VT. STAT. ANN. tit. 14, § 5 (1974); VA. CODE § 64.1-49 (1973); WASH. REV. CODE ANN. § 11.12.020 (1967); W. VA. CODE § 41-1-3 (1966); WISC. STAT. § 853.03 (1971); WYO. STAT. § 2-4-104 (1971).

94. Whether these state statutes have been fashioned after the Statute of Frauds or the Statute of Wills of 1837 is of little significance in view of the fact that the Statute of Wills of 1837, at the time of its enactment, was considered an amendment to the then existing law governing wills, which was, essentially, the Statute of Frauds. See note 67 *supra*. Although Louisiana's law is fashioned after the Civil Law, its will formalities are closely aligned with those states following

All states require a writing, signed by the testator and either two or three⁹⁵ witnesses.

Variations upon the Statute of Wills relate to the remaining requirements. Only eleven states require that the testator subscribe the will⁹⁶ and only twenty-three states require subscribing witnesses.⁹⁷ Twenty-eight states require the witnesses to sign in the presence of the testator,⁹⁸ and thirteen of those additionally require the witnesses to sign in the presence of each other.⁹⁹ Six states require a declaration by the testator that the writing is his will.¹⁰⁰

These last two variations, unlike the others, add to the original requirements of the Statute of Frauds. The requirement that the witnesses sign in the presence of each other serves essentially the same function as the Statute of Wills requirement that the testator sign in the presence of both witnesses at the same time, to avoid the ease of forgery and fraud possible when only one other person is required to be present.¹⁰¹ It should be noted that

the common law. Louisiana, however, requires superscription on a sealed will as opposed to subscription. LA. CIV. CODE ANN. art. 1584 (West 1952). *See also* BOWE & PARKER, *supra* note 5, at § 19.2.

95. Louisiana, New Hampshire, South Carolina and Vermont require three witnesses. *See* note 93 *supra*.

96. California, Connecticut, Delaware, Florida, Kansas, Kentucky, New York, Ohio, Oklahoma, Pennsylvania, and South Dakota require the testator to subscribe the will. *Id.*

97. Alaska, Arkansas, California, Delaware, District of Columbia, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Mississippi, Nevada, New Hampshire, New York, Oklahoma, South Carolina, South Dakota, Virginia, Washington, West Virginia, Texas, Rhode Island and Vermont require subscribing witnesses. *Id.*

98. California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin require the witnesses to sign in the presence of the testator. *Id.*

99. California, District of Columbia, Florida, Indiana, Iowa, Louisiana, New Mexico, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wisconsin require witnesses to sign in both the presence of the testator and each other. *Id.*

100. Indiana, Iowa, Louisiana, New York, Oklahoma, and South Dakota require the testator to declare the writing to be his will. *Id.*

101. We have seen that, for the due execution of a will according to the Statute of Frauds, it is not requisite that the witnesses should attest in the presence of each other, or that one should be seen by another. It is sufficient if the testator acknowledge his signature, or his will, at three several times to different witnesses. It is evident that this construction, which has been regretted by several eminent judges, militates against the object of the Statute, and that great additional security against forgery and fraud is obtained by requiring that the witnesses should be present at one time. In case of forgery, it is easier to get two accomplices at different times, than both together. It is important that the competency of the testator at the time of the execution of his will should be satisfactorily established; and if the transaction must be witnessed by both witnesses at one time, they must then agree in the same story, and perjury will be more easily detected by cross-examination.

the Real Property Committee recommended that the witnesses sign in the presence of each other.¹⁰² This recommendation was not incorporated in the Statute of Wills of 1837.¹⁰³ No statutes expressly require both witnesses to be present at the same time when the testator signs or acknowledges the will. The requirement of a declaration bears no relation to the Statute of Wills of 1837.

Nine states have enacted the Uniform Probate Code (U.P.C.).¹⁰⁴ The U.P.C. does not require attestation, although it does require witnessing of either the testator's signature or acknowledgment thereof.¹⁰⁵ Given the meaning of attestation,¹⁰⁶ the absence of this requirement in the U.P.C. is of little significance.

Nine states have statutes providing for self-proved wills.¹⁰⁷ Self-proved wills may be admitted to probate without the testimony of subscribing witnesses. Such statutes, in addition to the usual formalities, require affidavits of the witnesses be attached to the will before a designated official and evidenced by his seal.

II. FORMALITIES CONSIDERED FROM A FUNCTIONAL STANDPOINT

Having reviewed the history of formalities requirements and, thus, the progression of law to the present tension in the courts, the following query seems appropriate: what are the goals to be achieved by formalities requirements and how will they facilitate the accomplishment of those goals? To the extent that it is believed that something must be measureable or that the testator

SUGDEN, *supra* note 68, at 184.

102. See note 79 *supra*.

103. See note 84 *supra*.

104. Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, and Utah. The Uniform Probate Code was enacted by South Dakota, but later repealed; it is no longer effective there. See note 93 *supra*.

105. Except as provided for holographic wills, writings within Section 2-513, and wills within Section 2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing of the testator's acknowledgment of the signature or of the will.

UNIFORM PROBATE CODE § 2-502.

106. BLACK'S LAW DICTIONARY 163 (4th ed. 1968).

107. ARIZ. REV. STAT. § 14-2504 (1975); COLO. REV. STAT. § 15-11-504 (Supp. 1978); IDAHO CODE § 15-2-504 (Supp. 1978); IND. CODE § 29-1-5-2 (1972); IOWA CODE § 633.279 (Supp. 1978); MINN. STAT. ANN. § 524.2-504 (West 1975); NEV. REV. STAT. § 133.050 (1973); N.M. STATE. ANN. § 30-2-8.2 (Supp. 1978); OKLA. STAT. ANN. tit. 84, § 55 (West 1970).

can be forced to take some desired action by imposing a requirement, there is ample justification for a relevant formality. On the other hand, to the extent that an action cannot be forced upon a testator or measured by a presently existing or proposed formality, the implementation of such a formality or its retention would be a formalism adding to the tension between courts and testators.

There are several goals that can be stated, although the list may not be exclusive:

- (1) That the testator has thought seriously about the nature and value of his property, those who have natural claims upon the testator for support, and how those claims can be satisfied;
- (2) That the testator reached a final decision on the disposition of the assets. Although it is not necessary that the testator make complete disposition, it is desirable that the testator's state of mind be final on the disposition made in the will;
- (3) That the testator's decision, when made, be free of excessive influence by others. Although it is recognized that testators are inherently influenced by all that surrounds them, the testator should weigh those influences against his or her own values and come to an independent decision;
- (4) That there be a record of the scheme of disposition which is free from alteration or substitution by others;
- (5) That the testator's choices be expressed in language and form which enables the implementation of those choices on a routine basis.

Gulliver and Tilson have suggested that these goals can be expressed as functional purposes of the Statute of Wills, serving a ritual function, an evidentiary function and a protective function.¹⁰⁸ Professor Langbein has added a fourth function which he calls the channeling function.¹⁰⁹ Accepting the classifications for purposes of discussion, an examination can be made to determine the extent to which current formalities serve the function of achieving the above mentioned goals.

The Ritual Function

"Compliance with the total combination of requirements for the execution of formal attested wills has a marked ritual value, since the general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion."¹¹⁰ It is perhaps true that facing the reality of death and its attendant consequences is one of the most difficult responsibilities in life.¹¹¹ While the con-

108. Gulliver, *supra* note 1.

109. Langbein, *Substantial Compliance With The Wills Act*, 88 Harv. L. Rev. 489, 493 (1975) [hereinafter cited as Langbein].

110. Gulliver, *supra* note 1, at 5.

111. For an excellent discussion of the psychology of confronting death as part of the estate planning process, see Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME L. REV. 345 (1969) and Shaffer,

sequences of death are inherently the focus of the execution of a will, a will is normally executed at a time when death is not imminent. Coupled with the fact that normally the testator does not part with the least incident of ownership upon execution of the will, such execution may not achieve the goal of careful consideration of property and obligations. The process of ritual or ceremony is thought to assure that the testator is aware of the solemnity of the act and its attendant consequences. It is, of course, true that ritual or ceremony cannot guarantee such awareness. A testator whose mind is set to accomplish some deviant purpose may nevertheless choose testamentary ritual for that purpose without intending its normal consequences.¹¹²

There are perhaps three principal formalities that provide ritual. The first is the requirement that wills be in writing. Writing has always been regarded as the most solemn form of expression and is far less susceptible to a claim that it was tentative instead of final.¹¹³ The requirement of writing cannot, of course, assure the desired degree of solemnity. Holographic wills, though required to be in writing, are often cast in very conversational tones which have the reader wondering whether the expression was nothing more than a segment of the writer's "stream of consciousness" instead of a finalized act.¹¹⁴

The second formality which purports to promote solemnity is that of a signature. A signature is, of course, a sign of authenticity and, when placed at the end of the writing as required by most wills' acts, also imparts a sense of completeness.¹¹⁵ It says, in es-

The "Estate Planning" Counselor and Values Destroyed by Death, 55 IOWA L. REV. 376 (1969).

112. The requirement is that there be actual, as opposed to stated, testamentary intent. *BOWE & PARKER*, *supra* note 5, at § 5.10. The most obvious example of deviant purpose is the so-called "sham will" cases. The leading case is *Lister v. Smith*, 3 Sw. & Tr. 280, 164 Eng. Rep. 1282 (1864), wherein a testator was shown to have executed a codicil to induce a member of his family to surrender a house which she then occupied. Evidence of the absence of testamentary intent caused the untimely demise of the codicil. *Accord*: *In re Estate of Siemers*, 202 Cal. 424, 266 P.298 (1927).

113. This is, of course, the principal thrust of the Statute of Frauds. See text accompanying note 44, *supra*.

114. One of the great examples of such conversational "stream of consciousness" appears in *Kimmel's Estate*, 278 Pa. 435, 123 A. 405 (1924), where the sequence of presentation was advice on how to pickle pork, ruminations of the cold winter and a short statement of disposition of property "if ennything [sic] happens". See also *Estate of Devlin*, 198 Cal. 721, 247 P. 577 (1926).

115. *BOWE & PARKER*, *supra* note 5 at §19.57. See also *Estate of Manchester*, 174 Cal. 417, 163 P.358 (1917).

sence, "this is my act and I have completed it." Holographic will statutes do not generally require that the signature be placed at the end of the will.¹¹⁶ Although a signature, wherever placed, may declare the authenticity of the document,¹¹⁷ authenticity will probably already have been guaranteed in the holograph by the requirement that it be completely in the handwriting of the testator. The failure to require that the signature be at the end of the will raises two significant problems. The first is whether it was, in fact, placed elsewhere on the document as an authentication. The second is whether the document is complete or whether it has been left open-ended or incomplete.¹¹⁸ Courts have been called upon to use a fiction of adoption of a prior signature where later provisions were added to a holographic will.¹¹⁹ The litigation which has occurred over the failure to require that the signature be at the end is indicative of its function as a formality.

It may, of course, be true that the solemnity of a writing and a signature do not forever fix the testator's intent. Intent is fluid as a part of ongoing thought processes; however, it is presumed that if the testator's intent does not change to the point where he is motivated to revise the written instrument, the change is tentative and does not deserve solemn recognition.

The third formality which promotes solemnity is that of declaration or publication of the instrument as the testator's will or testament and the attendant witnessing of that act. It is interesting to

116. In those states where holographic wills are authorized by the general statute on execution of wills, the usual requirement is that the signature must be placed in the same position as that required for all other wills. *BOWE & PARKER, supra* note 5, at § 20.8. This appears to be limited to Arkansas, Kentucky, Mississippi, North Carolina, Texas, Virginia and West Virginia. Of these states, the Arkansas, Kentucky and Mississippi statutes require subscription. *ARK. STAT. ANN.* §60-403 (1971) and *KY. REV. STAT.* §394.040 (1972). *But see* *Smith v. MacDonald*, 252 Ark. 931, 401 S.W.2d 741 (1972). *MISS. CODE ANN.* 391-5-1 (1973). The North Carolina, Virginia and West Virginia statutes require that the will be signed in a manner which makes it manifest that it was intended as an executing signature. *N.C. GEN. STAT.* § 3.1-3.4 (1976); *VA. CODE* § 64.1-49 (1973); *W. VA. CODE* § 41-1-3 (1966). The Texas Probate Code simply requires a signature. *Vernon's TEX. PROB. CODE ANN.* § 59 (Vernon 1956).

117. The approach of the courts is amply stated in *Estate of Manchester supra* note 115, at 421, where the court, in discussing a holographic will, said:

The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears.

118. An excellent example of the apparent incompleteness of a probate will may be found in *Estate of Devlin, supra* note 114.

119. *BOWE & PARKER, supra* note 5 at §20.9. *See also* *In re Glass*, 165 Cal. App. 2d 380, 331 P.2d 1045 (1958); *Campbell v. Henley*, 172 Tenn. 135, 110 S.W.2d 329 (1937).

note, however, that few states still require publication,¹²⁰ preferring instead to rely upon authentication by signature or acknowledgement of signature. If the signature is required to be at the end of the instrument it would seem that publication is a formalism that is unnecessary. The completion of the act in the presence of witnesses definitely adds formality to the ceremony and prevents the testator from regarding the act as whimsical or capricious. It is believed that the sum and substance of these formalities is that few persons could realistically avoid the conclusion that this is a solemn act which will have significant consequences.

The Evidentiary Function

In the Statute of Frauds of 1677, the act is entitled "An Act for Prevention of Frauds and Perjuries."¹²¹ All wills' acts have as a primary function the providing of evidence from which the court can, with certainty, ascertain the testator's wishes. Writing assures a more permanent form. The signature authenticates the document as being that of the testator. The requirement that the signature be at the end with subsequent attestation assures completeness, prevents interpolation, and infers finality. The requirement of witnesses provides testimony as to the act of testation, and the requirement that the witnesses be disinterested is meant to eliminate self-serving testimony. It cannot be said with certainty that these goals will be achieved by the requirements of such formalities. Interpolation of a signed and witnessed will is not impossible since there is no requirement that the testator sign every page and there is certainly no requirement that the witnesses know what is in the instrument. The fact that they promote achievement of the goals is, however, sufficient to warrant their inclusion in the statute.

Holographic instruments are perhaps the best form of evidence since they are required to be wholly in the handwriting of the testator. Indeed, Gulliver and Tilson believe they are justifiable only from an evidentiary standpoint.¹²² However, the premise that genuineness of handwriting is justification for the holographic form is highly suspect. The holographic will is exempted from

120. See note 100 *supra*.

121. See note 113 *supra*.

122. Gulliver, *supra* note 1, at 13.

most of the formalities which are designed to achieve the desirable goals. The Uniform Probate Code, however, has not only perpetuated the holograph as a desirable form of expressing intent but has facilitated its use by lowering the evidentiary requirements by providing that only the "material provisions" of the will need be in the handwriting of the testator.¹²³

The Protective Function

The requirements that the testator publish and declare the will to disinterested witnesses and that they attest in the testator's presence and in the presence of each other are meant to protect the testator from imposition at the time of execution.¹²⁴ Functionally, the presence of multiple parties acts as a check against imposition by third parties and by parties present at the signing of the will. It is here, however, that the formalities requirements may have failed to live up to their purposes. While fraud may be practiced at the time of execution of the will,¹²⁵ undue influence usually occurs over a much longer period of time.¹²⁶ Inherently, therefore, the fact that witnesses are disinterested or that they attest in the presence of each other is little safeguard against imposition. On the other hand, failure to adhere to the formality can result in the will being disallowed probate even where the court is satisfied that no fraud or undue influence has occurred.¹²⁷

The courts have recognized that these formalities are overly harsh. The requirement that witnesses attest in the presence of the testator and in the presence of each other has often been interpreted as meaning "in the conscious presence." "Conscious presence" generally means that though the witness may be out of the testator's senses of hearing or sight, they are where the testator could see or hear them if he wished to make the effort to do so.¹²⁸

The requirement that witnesses be disinterested has been softened in some jurisdictions by saying that a witness must be disinterested at the time of his testimony by giving up his gift under

123. UNIFORM PROBATE CODE § 2-503.

124. Gulliver, *supra* note 1, at 9.

125. See Pope v. Garrett, 147 Tex. 18, 211 S.W. 2d 559 (1948) where the testatrix was forcibly prevented from executing her will.

126. See *In re Kaufmann's Will*, 20 App. Div. 2d 464, 247 N.Y.S.2d 664 (1964) *aff'd* 15 N.Y.2d 825, 257 N.Y.S.2d 941, 205 N.E.2d 864 (1965); Hutton, *Undue Influence and Fraud in Wills*, 37 DICK. L. REV. 16 (1932); Green, *Fraud, Undue Influence and Mental Incompetency*, 43 COLUM. L. REV. 176 (1943).

127. *In re Groffman*, 1 W.L.R. 733 (1968); Gulliver, *supra* note 1, at 9-13.

128. BOWE & PARKER, *supra* note 5 § 19.125; Glenn v. Mann, 234 Ga. 194, 214 S.E.2d 911 (1975); Estate of Tracy, 80 Cal. App. 2d 782, 182 P.2d 336 (1947).

the will.¹²⁹ It would seem that such lack of interest at the time the will is probated will have little prophylactic value on imposition at the time of making the will.

Since fraud and undue influence have usually been brought to bear upon the testator prior to the execution of the will, it seems that the continuation of the requirements that the witnesses attest in the presence of each other and that the witnesses be disinterested are unnecessarily formalistic and should not be continued. Fraud and undue influence are usually the results of objective acts which may be proven at probate and which do not usually require the testator's presence.

The Channeling Function

Professor Langbein had added this additional function to the three originally described by Gulliver and Tilson.¹³⁰ Essentially it says that it is important to put wills into recognizable forms in order to minimize the time and effort required to ascertain their purpose. Presumably, the more an instrument looks like a will and speaks like a will, the less likely it is that litigation will result with consequent depletion of the estate and prolonged or delayed distribution. To the extent that formalities force a will into a set form, they have served a function of effecting a routine transmission of wealth. However, the critical factor is not whether the testator created something which looked like a will, but whether the language of the transmission was adequate to express the testator's intent. Formalities, as they are presently structured, do not prescribe language of transmission, but only the requirements surrounding execution.

Although they may add to the burden of family wealth transmission,¹³¹ the formalities requirements of the Statute of Wills, with the exceptions previously noted, are important to the integrity of the will and to its implementation. In the past few years, however, there has been increasing concern over the fact that the

129. State of Frauds, 1752, 25 Geo. 2, c. 6 § 1 (1752); BOWE & PARKER, *supra* note 5 at § 19.102; *In re Lee*, 225 Cal. App. 2d 578, 37 Cal. Rptr. 572 (1964). See also Comment, *The Prohibition Against Interested Witnesses Taking Under the Will*, 9 HOUS. L. REV. 1078 (1972).

130. Langbein *supra* note 109, at 493-94.

131. While burdens upon the process are not to be taken lightly, we do not believe that the process can be unburdened by minimizing formalities as has been done in the Uniform Probate Code. See Comment to UNIFORM PROBATE CODE § 2-503.

failure to follow formalities requirements will normally result in the will failing in its entirety.¹³² Several attempts to ameliorate such harshness have been suggested.

III. REDUCING THE TENSION OF FORMALITIES

The two most significant attempts to reduce the tension created by formalities requirements are the Uniform Probate Code¹³³ and the proposal to implement the substantial compliance doctrine.¹³⁴

The U.P.C., in Section 2-502, states the requirements for execution of a non-holographic will to be as follows:

[e]very will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgement of the signature or of the will.

The general comment to Part 5 of the U.P.C. makes clear that the overriding purpose of the statute was to minimize requirements for execution in order to validate wills wherever possible.¹³⁵ While simplicity of execution is important, it seems that the process of minimizing formalities has significantly reduced the functional ability in at least two significant respects. There is no requirement that the signature be at the end of the document.¹³⁶ This is important to prevent the type of litigation produced by holographic wills in states such as California.¹³⁷ It is also important as a demonstration of completeness and finality of intent.

Section 2-503 of the U.P.C. should not have reduced the requirement that holographic wills be entirely in the handwriting of the testator.¹³⁸ The result is that the principal justification for holographic wills, *i.e.*, their evidentiary value, has been seriously impaired. Holographic wills, since they are often cast in informal language which leaves in doubt their completeness and finality,

132. The justifications used by the courts for such harsh treatment are amply discussed by Professor Langbein, *supra* note 109, at 499-503.

133. See UNIFORM PROBATE CODE §§ 2-501, 2-506.

134. Langbein, *supra* note 109.

135. Uniform Probate Code, Part 5, General Comment: Part 5 of Article II deals with capacity and formalities for execution and revocation of wills. "If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum . . ."

136. UNIFORM PROBATE CODE § 2-502.

137. Estate of Manchester, *supra* note 115, Estate of Leonard, 1 Cal. 2d 8, 32 P.2d 603 (1934); Estate of Devlin, *supra* note 114; Estate of Kinney, 16 Cal. 2d 50, 104 P.2d 782 (1940); Estate of Bloch, 39 Cal. 2d 570, 248 P.2d 21 (1952).

138. UNIFORM PROBATE CODE § 2-503.

should likewise be required to have an executing signature at the end of the document.

The value of the U.P.C. approach is that its statutory language gives predictability to a testamentary act. The ability to predict the outcome of one's actions is, of course, a paramount function of the law. Its difficulty lies in the fact that it leaves in doubt a principal question of the state of the testator's mind with regard to disposition. That completeness and finality of intent can be judicially determined from an inspection of the language at probate is not sufficient since one of the goals is routine processing of testamentary instruments. Since most written wills are drawn by attorneys, the burden on the testator is not onerous.

The argument in favor of the implementation of the substantial compliance doctrine is that, while it lacks the predictability of the U.P.C., it does insist upon a higher degree of formality yet with the understanding that where the failure to comply with any formality is shown, proof may be received to demonstrate that the function of the formality has still been met.¹³⁹ There is something inherently fair about an approach which says that formalities are important but they are a tool and not a sword. If the result has been achieved without the tool, then the tool becomes unimportant. The problem is that wills are unlike the world of contracts where the demands of business often necessitate informality which does not rise to the level contemplated by the Statute of Frauds. Wills are more often made without such demands of time pressure. The testator has every opportunity to comply with formality requirements. And it is inherently true that the will's implementation will preclude testimony by the already deceased testator.

A second problem is the ambiguity of "substantial compliance." Does it mean that whenever the previously set forth goals have been met, we then have substantial compliance?¹⁴⁰ Does it mean that some formalities are more important than others and that substantial compliance involves completion of only the important formalities?¹⁴¹ If the former, then the statute governing execution

139. Langbein, *supra* note 109, at 513.

140. There is some indication that this is the purposive inquiry of the doctrine. Langbein says "The substantial compliance doctrine would permit the proponents in cases of defective execution to prove what they are now entitled to presume from due execution . . . the existence of testamentary intent and the fulfillment of the Wills Act purposes." *Id.*

141. That some formalities could not be excused is apparent. "The substantial

of wills ought to be framed in such a way as to inform the potential testator of the objective to be achieved and how to best go about it. If the latter, then would there not be a reversion back to the more parochial situation where judicial decision-making leaves a wide discrepancy between courts as to what is important and what is less important? With an increasingly mobile society such discrepancy would seem to be something to be discouraged.

On the whole, therefore, while implementation of the substantial compliance doctrine is favored it is believed that the interests of testators will generally be better served by a statute which requires those formalities which are important to achievement of the stated goals. Such a statute gives predictability to the consequences of a testator's proposed cause of action. When coupled with an interpretive approach designed to validate the will wherever possible, the statute will significantly reduce the tension created by formalities requirements which are viewed in a strict sense. Therefore, the following statute is proposed:

Execution of Wills. Every will shall be in writing and shall be executed as follows:

- (1) It must be signed at the end thereof by the testator or in the testator's name by some other person in the testator's presence and by his direction. A person who signs the testator's name, by his direction, should sign his own name to the will but a failure to do so will not, of itself, invalidate the will.
- (2) It must be signed by at least two persons, each of whom witnessed either the signing of the will or the testator's acknowledgement of the signature or declaration that the instrument is his will.

General Comment

The formalities requirements set forth in the statute are intended to facilitate a determination that the testator has reached a final decision concerning disposition of part or all of his or her estate, to preserve as accurate a record of that decision as possible, and to provide testimony to the implementation of that decision wherever possible. The statutory requirements are to be interpreted in such a way as to implement those goals and the court may, in the situation where it is satisfied that those goals have been met, admit a will to probate even though literal compliance with the requirements may be lacking.

IV. SUMMARY

Although the history of formalities requirements has been a struggle to free ourselves from the restraints upon alienation imposed by feudal policy, there are positive goals to be achieved by utilization of such formalities in the wealth transmission process. It is our attitude toward those formalities which, in the end, creates the burdensome tension between private ownership and re-

compliance doctrine would virtually always follow present law in holding that an unsigned will is no will; a will with the testator's signature omitted does not comply substantially with the Wills Act because it leaves in doubt all the issues on which the proponents bear the burden of proof . . . *Id.* at 518.

strictions upon disposition. To the extent that formalities can be perceived or approached from a perspective of achieving the testator's goals or assisting the implementation of the testator's choices, the tension will have been significantly reduced.

