of a receipt and thus not upon any activity forming an integral part of interstate trade, commerce or intercourse, and not invalid as offending against the provisions of section 92.[19]

Menzies J.[20] agreed with Kitto J.

Windeyer J.[21] found that the legislation could offend section 92 but did not do so because it constituted permissible regulation. He thus constituted the third member of the majority in this case but appears, on the other hand, to align himself with the reasoning of the Chief Justice so far as the meaning of 'direct restraint' is concerned.

Thus the course to be adopted by the High Court in future decisions concerning the amount of interference permitted to the states in the area of interstate trade and commerce seems once again to be facing uncertainty reminiscent of the past. No indication is given as to whether the *Gilpin*[22] formula will remain as a logical method with which to draw the line between what is permissible and what is not permissible interference, excluding consideration of economic and social factors. It may be that such considerations present difficulties in the exercise of judicial power though constitutional law has often faced and resolved such matters. It is to be remembered that in the *Banking* case the Privy Council itself said:

> The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law . . . It is vain to invoke the voice of Parliament.[23]

KATHARINE GORMAN

RE HEMBURROW, DECEASED[1]

Administration and probate—Omission of phrase from will—Jurisdiction to grant probate of will textually different from that signed by testatrix

In March 1966, Alice Hemburrow instructed her son to make certain changes in her will. In retyping the will on a printed will form, there was a mistake in copying the residuary clause. Instead of repeating the words 'I give, devise and bequeath the whole of my real estate and the residue of my personal estate unto my trustee', the phrase 'the residue of my personal estate' was omitted. The will was duly executed in ignorance of the error.

The executor, who was the testatrix's son, sought to have probate granted of the will with the word 'real' omitted from the residuary clause. Gillard J. dismissed the motion and probate was granted of the will as it stood at the death of the testatrix. On the evidence, His Honour was satisfied that the presumption, as to knowledge and approval by the testatrix of the contents of the will, was not rebutted.[2] In any case, the omission sought was unwarranted as the testatrix had meant the word 'real' to be included. Such an omission would be remaking the testatrix's will and altering the sense of her testamentary document.[3]

[19] See also on this point *Grannall v. Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55, where manufacture was held by the High Court to be outside the meaning of interstate trade and commerce, and thus not under the protection of section 92.
[20] *Ibid.* 385.
[21] *Ibid.*
[22] (1935) 52 C.L.R. 189.
[23] (1949) 79 C.L.R. 497, 639.
[1] [1969] V.R. 764. Supreme Court of Victoria; Gillard J.
[2] *Ibid.* 765.
[3] *Ibid.* 766.

In the great majority of cases in this area, the court is asked to omit a word or phrase inserted by mistake, leaving the original words of the will standing. However, in *Re Hemburrow*,[4] the word sought to be omitted was actually intended to be included. It so happened that if 'real' was excluded, the sense of the residuary clause would be what it was before the vital phrase was mistakenly omitted. It was an ingenious attempt by the executor to overcome the error in copying and carry out the apparent wishes of the testatrix.

Faced with this unusual situation, Gillard J., in the course of his judgment, laid down four propositions of law concerning the 'strictly limited jurisdiction in the court of probate to grant probate of a will textually different from the actual document signed by the testatrix'.[5] This note is a discussion of the four propositions.

(i) *There is no jurisdiction in the court to enable it to insert words omitted by inadvertence or mistake, by the testatrix or her draftsman.*[6]

This first statement by Gillard J. is clearly correct.[7] The insertion of words into a testamentary document would infringe the rationale of the Wills Acts, that the whole of every testamentary disposition must be written, signed and attested.[8] However, it was not until *In the Goods of Schott*[9] in 1901 that this was finally accepted.[10]

(ii) *If it can be clearly established that by inadvertence, mistake or deception some word had been written into a will, the court has jurisdiction to grant probate of a will omitting the word so inserted.*[11]

It should be noted that this statement is only concerned with the omission of dispositive material.[12] As a general rule, the statement is true[13] but clearly, it is subject to qualification. For example, the rule only applies when the will was not read over by the testator or when the contents were not brought to his notice in some other way.[14] Otherwise it is presumed by and from the execution of the will that the testator knew and approved of the contents of his will.[15] Another suggested qualification is that contained in the third proposition.

(iii) *The court in granting probate is not entitled to omit a word or words from the will, the result of which would be to alter the sense of those which remained.*[16]

[4] [1969] V.R. 764.
[5] *Ibid.*
[6] *Ibid.* 764.
[7] *Jarman on Wills* (8th ed. 1951) i, 29, n.k. *Williams on Executors and Administrators* (14th ed. 1960) i, 96; *Phillips' Probate Practice* (6th ed. 1963) 77; *In Re Tait* [1957] V.R. 405, 410, 414.
[8] Williams, *loc. cit.*; Lee, 'Correcting Testators' Mistakes: The Probate Jurisdiction' (1969) 33 *The Conveyancer and Property Lawyer* 322.
[9] [1901] P. 190.
[10] In *In the Goods of Bushell* (1887) 13 P.D. 7 and in *In the Goods of Huddleston* (1890) 63 L.T. 255, Sir Charles Butt had allowed the substitution of one word for another in a probate. However, these decisions were regarded as 'heretical' by his colleagues. See *In the Goods of Schott* [1901] P. 190, 192.
[11] [1969] V.R. 764.
[12] Other types of omission are (i) where a testator intends merely to make a codicil to a will, and a clause revoking the will itself creeps into that codicil by accident; (ii) where a codicil by mistake describes itself as appertaining to an earlier revoked will, when it is clear that it belongs to a later extant testament; (iii) words or passages which are offensive, libellous or scandalous of the testator's family. Lee, *op. cit.* 323; Phillips, *op. cit.* 77.
[13] Jarman, *op. cit.* i, 29; Williams, *op. cit.* i, 96; Phillips, *op. cit.* 77.
[14] *Harter v. Harter* (1873) L.R. 3 P. & D. 11.
[15] *Guardhouse v. Blackburn* (1866) L.R. 1 P. & D. 109.
[16] [1969] V.R. 764, 765.

This principle is first based upon an *obiter dictum* of Lord Blackburn in *Rhodes v. Rhodes*.[17] In that case, His Lordship agreed that distinct and severable parts inserted in a will by mistake could be omitted, but he continued:

> A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the Court is convinced that the words were improperly introduced, so that if the instrument were inter vivos they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within [the Wills Act].[18]

After many years these doubts were adopted by the Court of Appeal in *Re Horrocks; Taylor v. Kershaw*.[19] Here, it was argued that a residuary trust for 'charitable and benevolent' objects had been converted, by a typist's error, into one reading 'charitable or benevolent'. The Court of Appeal rejected this evidence, although it had been accepted in the court below. But in any case, said the Court, the alteration sought was not one which it had jurisdiction to make.

> The omission of the word 'or' alters the effect of the word 'charitable' which was approved by the testatrix and which she must be taken to have intended should have its full signification . . . It appears to us that so to alter a will as under the guise of omission, to affect the sense of the words deliberately chosen by the testator or his draftsman is equivalent to making a new will for the testator, and on principle we do not consider that this is permissible . . . The suggestion made by the Privy Council [in *Rhodes v. Rhodes*[20]] as to the possible reason why the Court might be unable to reject words when to do so would alter the sense of what remained is one which commends itself to us.[21]

In the High Court case of *Osborne v. Smith*,[22] the judge at first instance had refused to admit a will to probate for a number of reasons indicating lack of knowledge and approval. There was particular doubt about the meaning of one specific legacy, but on appeal, the Court said it could not be struck out altogether for that would increase the gift to the residuary legatee.[23] The leading judgment was delivered by Kitto J. who found that the proposition laid down by *Re Horrocks*[24] was 'fully borne out by the authorities'.[25]

Is the position as clear as the High Court thought? It should be pointed out, first, that the rule, as stated by Gillard J., is contrary to some earlier authority. In *Re Horrocks*, it was said that

> The cases in which the court has decreed probate with the omission of words, phrases, or clauses have all been cases where the matter omitted was, so to speak, self-contained and its omission did not alter the sense of what remained.[26]

It is submitted that this is putting the matter rather too strongly.

[17] (1882) 7 App. Cas. 192.
[18] *Ibid.* 198.
[19] [1939] P. 198. Greene M.R., Finlay and Luxmoore L.JJ. The judgment of the Court was read by Greene M.R.
[20] (1882) 7 App. Cas. 192.
[21] [1939] P. 198, 217.
[22] (1960) 105 C.L.R. 153. Kitto, Menzies and Windeyer JJ.
[23] *Ibid.* 162.
[24] [1939] P. 198.
[25] (1960) 105 C.L.R. 153, 161.
[26] *Ibid.* 217.

In *Morrell v. Morrell*[27] a testator directed all his shares in a certain company (of which he had four hundred) to be given to his nephews, but by mistake, the word 'forty' was inserted before the word 'shares' in several places in the will. A jury agreed that the word 'forty' had been inserted in error, and the court ordered it to be struck out of the will. The actual phrase used by the conveyancing counsel was 'in equal shares, the forty fully paid-up or deferred shares, of the value of £100 each, in John Morrell & Co. Ltd.'[28] The effect of the omission was to increase the gift to the nephews by 360 shares or £36,000, and to reduce the residuary legacy by an equal amount. In this regard, the facts in *Morrell v. Morrell* are similar to those in *Osborne v. Smith*. Kitto J. commented that in the former case 'a single word was omitted, but again every remaining word had precisely the sense it had before the omission'.[29] It is submitted that this view is, with respect, rather unconvincing. With the word 'forty' omitted, the phrase 'the shares in M. Co.' is construed as covering all such shares owned by the testator at the time of his death.[30] The sense of the words was indeed altered by the omission of 'forty'.

Space does not permit a similar examination of the other authorities. However, the cases show that, in situations similar to *Morrell v. Morrell,* the word 'real' has been omitted from the phrase 'all my real estate' thus allowing 'estate' to embrace both real and personal property as intended;[31] the phrase 'undivided moiety of and in' has been omitted thus giving a devisee an entire interest in property owned absolutely by the testatrix;[32] and the word 'revenue' has been struck out of a will when it was clear that the testator had meant to say 'residue'.[33] The sense of the words remaining has been clearly effected by the orders of the courts.

None of the decisions cited is of binding authority, especially in the High Court of Australia. But if that Court and the Court of Appeal proposed to reverse a clear trend of authority, should not they have overruled the cases rather than ignoring their effect? That there is this line of authority established by the early cases, is recognized by both English[34] and American[35] texts.

The approach adopted in *Osborne v. Smith*[36] may also be criticized on the ground that, in certain fact situations, it involves an apparent misunderstanding of the nature of a residuary clause in a will. This is shown by the actual decision in the case as well as by Kitto J.'s analysis of an authority cited to him—*In the Goods of Boehm.*[37] In that case, the testator directed that a bequest of £10,000 should be settled on each of his unmarried daughters,

[27] (1882) 7 P.D. 68.
[28] *Ibid.* 69.
[29] (1960) 105 C.L.R. 153, 161.
[30] *Thornhill v. Hall* (1834) 2 Cl. & Fin. 22 H.L.
[31] *Tartakover v. Pipe* [1922] N.Z.L.R. 853 following *Vaughan v. Clerk* (1902) 87 L.T. 144.
[32] *Brisco v. Baillie Hamilton* [1902] P. 234.
[33] *In the Goods of Schott* [1901] P. 190. See also *In the Goods of Duane* (1862) 2 Sw. & Tr. 590; *In the Goods of Boehm* [1891] P. 247; and *In the Goods of Swords* [1952] P. 368.
[34] *Jarman on Wills* (8th ed. 1951) i, 29. *Williams on Executors and Administrators* (14th ed. 1960) i, 96. *Phillips' Probate Practice* (6th ed. 1963) 77.
[35] 'The English practice goes beyond this. There, words are sometimes omitted from probate on the ground that they were included through mistake, when the effect of this omission is to alter the effect of the words of the provision remaining.' *Atkinson on Wills* (2nd ed. 1953) 276, 277. See also *Page on Wills* (4th ed. 1960) i, 675 where there is a good analysis of the historical development in regard to wills of realty and personalty.
[36] (1960) 105 C.L.R. 153.
[37] [1891] P. 247.

Georgiana and Florence. Inadvertently the name of Georgiana was inserted in both gifts, and Florence's name omitted altogether. The draft was not read over to the testator and the error was not brought to his notice. Jeune J. omitted Georgiana's name from the second clause because it was clearly 'inserted in mistake'.[38]

Kitto J. concluded that the decision in *In the Goods of Boehm*[39] could be 'correct if, but only if, the will contained no residuary clause.'[40] Presumably, His Honour meant that if there was no residuary clause, the now meaningless gift of £10,000 would pass as on an intestacy. However, if there was a residuary clause, the £10,000 would follow its directions, thus altering the sense of the remaining words of the will. But is the fact that the residue will be increased a reason for failing to reject a legacy inserted by mistake? The meaning of a residuary gift is not changed by the revocation of a legacy for a residuary clause carries, not any particular property, but whatever property may, for any cause (including lapse, uncertainty or ademption) be undisposed of at the testator's death.[41]

Applying this view to the facts in *Osborne v. Smith*, the legacy to the Home of Peace could rightly be omitted because of the doubt surrounding its approval by the testatrix. It was not to the point that this omission would increase the benefit to the residuary legatee. Thus, it was not necessary for Kitto J. to adopt the principle laid down in *Re Horrocks*.[42]

Finally, it may be argued that the third proposition appears to confuse the limited role of a Court of Probate. That Court derived from the old ecclesiastical court and its jurisdiction was limited to deciding what words constituted the will of the deceased, and who is entitled to be his personal representative.[43] The interpretation of the testator's words was vested exclusively in the Chancery Court—now a court of construction. The Court of Probate has no duty to construe a will except in so far as it may be necessary for its limited purposes, yet the rule in question requires the Court to concern itself with the effect of striking out words from a will.[44]

(iv) *The Court cannot omit a word that it was clearly intended by the testatrix should be inserted in the will.*[45]

This fourth principle set out by Gillard J. is stated to apply even if the omission would carry out the intention and actual instructions of the testatrix. This is, of course, the very principle on which *Re Hemburrow*[46] was decided, and given the restrictions on a court of probate, suggested above, it is clear that the rule is correct. If the word was meant to be in the will, a court of

[38] *Ibid.* 251. For a discussion of this case see Warren, 'Interpretation of Wills' (1936) 49 *Harvard Law Review* 689, 712-4.
[39] [1891] P. 247.
[40] (1960) 105 C.L.R. 153, 162. None of the reports contain this information.
[41] Gray, 'Striking Words out of a Will' (1913) 26 *Harvard Law Review* 212, 229. Lee, 'Correcting Testators' Mistakes: The Probate Jurisdiction' (1969) 33 *The Conveyancer and Property Lawyer* 322, 332.
[42] [1939] P. 198.
[43] *Halsbury's Laws of England* (3rd ed. 1956) xvi, 150.
[44] Gray, 'Striking Words out of a Will' (1913) 26 *Harvard Law Review* 212, 229. *Williams on Executors and Administrators* (14th ed. 1960) i, 54. Lee, 'Correcting Testators' Mistakes: The Probate Jurisdiction' (1969) 33 *The Conveyancer and Property Lawyer* 322.
[45] [1969] V.R. 764, 765.
[46] [1969] V.R. 764.

probate must leave it there. Conjecture as to whether the omission of the word would carry out the testator's intention is not within the sphere of such a court.[47]

However, it is worth noting that at the same time as Gillard J. was deciding *Re Hemburrow*, a possibly contrary result was reached by Latey J. in *In Re Morris*.[48] Here, the testatrix wanted to revoke clauses 3 and 7 (iv) of her will, both of which referred to a certain employee. However, the codicil which she actually executed read 'I revoke clauses 3 and 7 of my said will' and the testatrix signed without properly reading the codicil. The executors sought probate of the codicil with the omission of the figure '7'. Latey J. held that he could best approach the testatrix's dispositive intentions by excluding '7' from the codicil, saying that the resulting blank could be construed from the context as referring to clause 7 (iv).[49] It should be pointed out that as clause 7 of the will contained twenty separate legacies, nineteen of which now stood, the effect of the decision was to deprive the residuary beneficiaries of quite a sizeable sum. The decision excluded the figure '7' which, on a *Re Hemburrow* analysis, should have been left in, because the testatrix had intended to include it.

This discussion has tried to show that the authority on which Gillard J. based his third principle is by no means beyond question. It has been persuasively argued, elsewhere, that both *Re Horrocks*[50] and *Osborne v. Smith*[51] could have been, and in fact were, decided on other sounder grounds.[52] It is to be regretted, therefore, that His Honour laid down such a rigid rule. A rationalization of the apparently conflicting decisions or a summary of just when these omissions can be made would have been more useful. If the court is never entitled to make omissions altering the sense of the remaining words, then what is the point of applications seeking such omissions? Surely proceedings to have words omitted from probate are generally made by persons who stand to gain from the omission.[53]

The whole subject of mistaken words in wills underlines the need for conspicuous care in guarding against inadvertent errors. In the present state of the law, such errors may well have unfortunate results for the intended beneficiaries of the testator's bounty.

DAVID HABERSBERGER

BENNING v. WONG[1]

Statutory authority—Escape of gas—Personal injuries—Rylands v. Fletcher

The Australian Gas Light Company was authorized by a series of statutes[2] to lay gas mains and keep them charged with gas at a certain pressure. The plaintiff, Mrs Wong, occupied a house abutting a highway beneath which the

[47] *Cf.* the contrary result on identical facts in *Re Cogan, deceased* (1912) 31 N.Z.L.R. 1204.
[48] (1969) 113 *Solicitors Journal* 923.
[49] *Ibid.* 924.
[50] [1939] P. 198.
[51] (1960) 105 C.L.R. 153.
[52] Lee, *op. cit.* 332.
[53] *Ibid.* 331.
[1] (1969) 43 A.L.J.R. 467. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer and Owen JJ.
[2] Australian Gas Light Company Acts 1837-1935 (N.S.W.), Gas and Electricity Act 1935-1965 (N.S.W.).