Cambridge Law Journal, **71(1)**, March 2012, pp. 147–171
doi:10.1017/S0008197312000232

WILLS AS PUBLIC DOCUMENTS – PRIVACY AND PROPERTY RIGHTS

JOSEPH JACONELLI*

ABSTRACT. *It is a long-established legal rule that the contents of a will, once it is admitted to probate, are available for inspection by any member of the public. This article is the first examination of this remarkable rule, its possible rationales, and its attendant disadvantages. Particular attention is paid to the problems of the ensuing loss of privacy. Legislative attempts to limit open access are considered together with non-legislative devices used for the same purpose: the secret trust; and applications for the sealing of a will (a device especially prevalent in the case of royal wills).*

KEYWORDS: *Wills; publication; privacy; human rights*

I. INTRODUCTION

A long-standing feature of certain national newspapers has been a regular column which gives a brief summary of the wills of recently deceased persons.[1] Those who are selected for inclusion in these columns will have been distinguished in life by fame or wealth (or both). Each entry typically gives the value of the estate together with some details of the main bequests. The affairs of those who were neither famous nor rich also attract the attention of the press, but do so more sporadically on the basis of such factors as strikingly unusual testamentary dispositions. The same range of materials is also to be found in local and provincial newspapers. What these lack in circulation figures by comparison with the national press is more than offset by the greater likelihood that the testator and the beneficiaries under the will are personally known to the readers.[2] Such material, irrespective of its form,[3] has been an aspect of the content of newspapers for so long that

* Law School, University of Manchester. Thanks are due to John Murphy, Geoffrey Shindler and Nigel Taylor for commenting on earlier drafts, and to Robert Brown, Karen Grannum and John Langbein for answering the author's queries. The usual disclaimers apply. Address for correspondence: Professor Joseph Jaconelli, School of Law, The University of Manchester, Manchester M13 9PL. Email: joseph.jaconelli@manchester.ac.uk

[1] Examples are the "Latest wills" and "Recent wills" columns of, respectively, *The Times* and *The Daily Telegraph.*

[2] See I. Jackson, *The Provincial Press and the Community* (Manchester 1971), 218 and the table at pp. 292–293, on the readership for selected items: see the heading "Published Wills".

[3] Sometimes the contents of wills are collected in book form. For an example based on American material see H.E. Nass, *Wills of the Rich and Famous* (London 1991).

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

it scarcely provokes a second thought. Yet, on reflection, its presence calls for some explanation and justification since it involves disclosure to the public of the contents of a document that lays bare the closest emotional ties that the testator will have formed during his or her lifetime. In the legal systems that are based on the common law, characterised as they are by freedom of testamentary disposition, there is the greatest scope for testators to give expression to those emotional ties. This stands in marked contrast to the forced heirship regimes that are characteristic of civil law systems (for instance), where a person may freely dispose by will of only some fraction of his total estate. In these there must necessarily be a correspondingly reduced interest in disclosing the contents of a will.

In reporting the contents of wills the press is merely availing itself of a facility that is open to all. In English law the basis of that entitlement is section 124 of the Supreme Court Act 1981 (as amended):

> All original wills and other documents which are under the control of the High Court in the Principal Registry or in any District Probate Registry shall be deposited and preserved in such places as may be provided for and directions given in accordance with. … the Constitutional Reform Act 2005; and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection.[4]

The general right of access is qualified by the probate rules in question: namely, the Non-Contentious Probate Rules 1987.[5] Rule 58 stipulates that a will or other document referred to in section 124 "shall not be open to inspection if, in the opinion of a district judge or registrar, such inspection would be undesirable or otherwise inappropriate". No criteria, it should be noted, are provided on the basis of which inspection of a will might be deemed neither desirable nor appropriate. In addition, section 125 of the Supreme Court Act provides a facility whereby, subject to the payment of an administrative fee, an applicant is entitled to be supplied with a certified copy of any will that is open to inspection.

The existence of the right of access, in whatever form, is remarkable enough. That the personal information capable of being gleaned from such searches may be freely disseminated to a mass readership calls for particularly compelling justification. Yet in the very substantial literature on privacy it is impossible to find more than a few lines on the subject of the inspection, and publication of the contents, of wills. The

[4] In its original form this provision gave the Lord Chancellor charge over the deposit and preservation of wills. The amendment is due to the changed nature of the office of Lord Chancellor under the Constitutional Reform Act 2005.

[5] S.I. 1987/2024, issued pursuant to the Supreme Court Act 1981, s. 127.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

Younger Committee on Privacy has given it the most attention.[6] The Committee viewed the statutory availability of wills to applicants as falling within the public sector, and hence outside its terms of reference. On the separate issue of disclosure of their contents by the media, it saw no stronger case for restricting such accounts than it did for restricting further dissemination of any other information that was publicly available. In this regard the Committee went against the findings of a survey that it had commissioned on how various institutions and phenomena that impinge on the privacy of individuals (for example, credit rating agencies and closed circuit television) were perceived by the public. Under the heading "Publication of Will", 77 per cent. of those canvassed were of the opinion that this was an invasion of privacy while 71 per cent. believed that it should be prohibited.[7] Clearly, then, opinion is divided on the question of public access to the contents of wills. The purpose of this article is to assess the arguments in favour of publicity and privacy respectively.

II. Preserving and Publicising Wills

An obvious advantage of the traditional position is that publicity might alert interested parties to the existence of an estate from which they would derive some financial entitlement. Seen in this way, the issue of publicity for wills forms one aspect of the problem of ensuring that those on whom property rights have been conferred (whether by way of outright gift or trust) come to be informed of the same so that they can enforce those rights. The entitlement might be immediate and unconditional (as with a gift or a beneficial interest under a fixed trust), or it might consist of a mere right to be considered for some payment (as with beneficiaries under a discretionary trust or the objects of a mere power). Again, it might be conferred by an *inter vivos* disposition, or it might take effect under a testamentary instrument.

With *inter vivos* gifts there is little problem since the formal requirements of an effective gift – principally the requirement of delivery in the case of chattels – will mean that there is little (or no) time gap between the donee learning of his entitlement and his receiving the property in question.[8] In the case of a trust, however, there is nothing in the nature of the arrangement that guarantees that a beneficiary will be informed of his status as such – short, of course, of his actually receiving a payment in that capacity. Yet, as a matter of a general principle, persons who are beneficiaries must be informed of the fact if

[6] *Report of the Committee on Privacy* Chairman: Sir Kenneth Younger (Cmnd. 5012, 1972), paras. 177–180.
[7] Ibid., at p. 238.
[8] However, the use of the alternative to delivery, execution of a deed, does create the possibility of a gap in time between the completion of the gift and the donee's awareness of its existence.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

trustees are to be effectively called to account for the discharge of their duties.[9]

Once the focus moves from *inter vivos* to testamentary dispositions, whether they be in the form of a gift or a trust, problems can arise at several levels. The document that is intended as the expression of the testator's final wishes might be lost between the time of its execution and the death of the testator.[10] Alternatively it might be deliberately suppressed, with the result that an earlier, revoked will is admitted to probate or that the person is believed to have died intestate. Even if what was truly the testator's final will is admitted to probate, the bequests and devises that it contains might not reach their intended destination. Personal representatives might not succeed in tracing intended beneficiaries, who consequently remain in ignorance of their inheritance. Clearly, any publicity that is accorded the will is of particular assistance to hopeful legatees so that it is they who take the initiative in approaching those charged with the duty of administering the estate.

There exist several ways by which personal representatives may seek to establish contact with those who have an interest in the proper administration of an estate. One means, that it is firmly established in the annals of fiction, is the reading of the will by the testator's solicitor in front of the assembled relatives.[11] The process is not entirely a product of novelists' imagination since it was a familiar aspect of the rituals of death, in Victorian times at any rate.[12] The modern method is the publication of a notice in the press under section 27 of the Trustee Act 1925 inviting "any person interested" in the estate to file notice of his claim with the personal representatives. Although the aim of the provision is to reach both creditors of the estate and persons beneficially entitled, the difficulty remains that, without access to the contents of the will, an individual has no means of knowing whether he falls within the latter group. That difficulty is compounded by the fact that the executors are not under a legal duty to inform legatees of the existence or terms of a bequest.[13]

[9] There is an exception in the case of discretionary trusts with a very large class of beneficiaries, where the practicalities are such that not every single beneficiary could be informed.

[10] The scale of the problem can be seen from the fact that a retired District Probate Registrar has said that, in his later years in office, he was making about 10 orders a week giving leave to prove a document other than the original will (whether in the form of a copy, a completed draft, or a reconstruction of the will). See K. Biggs, "Losing it" *Journal of the Society of Trust and Estate Practitioners* (STEP) November/December 2005, p. 28.

[11] The procedure is used, for example, in Anthony Trollope's *Can You Forgive Her?*, ch. 55. (I am grateful to Lord Walker of Gestingthorpe for informing me of this reference).

[12] See P. Jalland, *Death in the Victorian Family* (Oxford 1996), 226.

[13] This is explained on the basis that, since wills are in the public domain, there is no need to inform legatees of their entitlements – in contrast to the beneficiaries of a trust (an *inter vivos* trust, at any rate). See J.E. Martin, *Hanbury & Martin*: *Modern Equity* 18th ed. (London 2009), 596. However, neither of the principal authorities cited in support – *re Lewis* [1904] 2 Ch. 656 and *re Mackay* [1906] 1 Ch. 25 – makes the point that a will is a public document. It is therefore only a rationalisation of the case law.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

How did the safeguards for preserving and publicising wills come to assume their present form? It was the Probates and Letters of Administration Act 1857[14] that marked the watershed divide in the modern law of probate. Prior to this measure the power to grant probate of wills was vested in the ecclesiastical courts, which had thereby become depositories of the wills of those who had died within their respective jurisdictions. Charles Dickens, who during his teenage years spent some time as a shorthand copyist at Doctors' Commons (the body of advocates serving the ecclesiastical courts in the London area), has left a memorable picture of the registry of the Prerogative Office of the diocese of Canterbury.[15] On the specific issue of public access, the preface to an edited collection of such wills relates that this was originally permitted only to "men of the highest name in historical or antiquarian literature" and under the authority of a Secretary of State or other such official. In the mid-nineteenth century, as a consequence of the initiative of Sir John Romilly M.R., access was opened up to "historical students" in general.[16] However, there is no suggestion in this that members of the public (or, indeed, the press) could gain sight of the text of a will for reasons of contemporary interest.

Sections 3 and 4 of the 1857 Act, respectively, abolished the testamentary jurisdiction of the ecclesiastical courts and vested it in a newly created Court of Probate. In moving the second reading in the House of Lords of the Probates and Letters of Administration Bill the Lord Chancellor, Lord Cranworth, identified a number of problems that the measure was designed to address.[17] Chief among these was that of the missing will of a deceased. Relatives might be at a loss as to where to find it. It might not be in the testator's private papers, and he could well have changed solicitor several times during his lifetime. The Lord Chancellor proposed a solution to the problem in the form of an office where testators could, if they chose, deposit their wills for easier location after their deaths. In addition he suggested the circulation of lists of wills that had been proved between district probate registries and London (including such particulars as the names of testators and executors, all duly indexed). The result would be to "afford as great facilities for consulting wills as the public could require".[18] The main provisions of the 1857 Act, for the purposes of the present article, were section 66 (which stipulated that there was to be a place of deposit for

[14] 20 & 21 Vict. c. 77: see the historical note on the transition by P.V. Baker at (1974) 90 L.Q.R. 465–466.

[15] Dickens, *David Copperfield*, ch. 33, where he states that the registrars "crammed the public's wills away anyhow and anywhere".

[16] J.G. Nichols and J. Bruce, *Wills from Doctors' Commons – A Selection from the Wills of Eminent Persons proved in the Prerogative Court of Canterbury, 1495–1695* (Camden Society 1863), i–iii.

[17] HL Deb. vol. 145 cols. 384–397 (18 May 1857).

[18] Ibid., at col. 392.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

wills that had been proved under the control of the Court of Probate, where the same could be inspected) and section 69 (which provided that official copies of these wills could be obtained upon payment of a fee). These provisions, notwithstanding the later absorption of the Court of Probate into a unified Supreme Court of Judicature,[19] can be traced in an uninterrupted line, via the Supreme Court of Judicature (Consolidation) Act 1925,[20] to sections 124 and 125 of the Supreme Court Act 1981 which were mentioned at the beginning of this article.

In the post-1857 law the critical step for the purpose of access by members of the public is the proving of a will. Prior to that it is a private document and subject to the standards of confidentiality that attend the lawyer-client relationship.[21] What is it about the procedure of probate, it might be asked, that it should make this important difference? Probate has been defined as a "court-operated system for transferring wealth at death".[22] It should be noted, however, that it is far from being all-encompassing in this regard. Quite apart from the proprietary rights that devolve on death through the right of survivorship (most typically, equitable joint tenancies in the family home), there exists a statutory facility whereby entitlements of small worth may be administered without obtaining a grant of probate.[23]

Three functions have been identified as being served by probate: title clearing; creditor protection; and implementing the testator's donative intent.[24] These need to be considered in the light of the publicity that has long been characteristic of the process.

It is difficult to see how probate serves the cause of title clearing. The passing of a form of property through the probate procedure does not confer immunity against the claims of those who assert a title superior to those who acquire property through the personal representatives of an estate – in the form, for example, of an exception to the rule *nemo dat quod non habet*.[25] The most valuable asset of the estate, so far as most testators in England and Wales are concerned, is the family home, which in the great majority of instances benefits from the state guarantee of registered title. As for the protection of

[19] See the Supreme Court of Judicature Act 1873, especially s. 3 and s. 16(6).
[20] Supreme Court of Judicature (Consolidation) Act 1925, s. 170 and s. 171 respectively.
[21] Under Roman law there were draconian penalties for opening, or disclosing the contents of, the will of a person still living. See S.P. Scott (ed.), *Corpus Juris Civilis* (New York 1973), vol. I, 328 (7): "Anyone who opens, reads publicly, or reseals, the will of a person who is still living, is liable to the penalty imposed by the *Lex Cornelia;* and, in general, persons of inferior station who are guilty of this offence are condemned to the mines, and those of higher rank are deported to an island".
[22] J.H. Langbein, "The Nonprobate Revolution and the Future of the Law of Succession" (1983–84) 97 *Harvard Law Review* 1108.
[23] See the Administration of Estates (Small Payments) Act 1965.
[24] Langbein, op. cit., pp. 1117–1125.
[25] Curiously, only one traditional exception, now abolished, to the *nemo dat* rule – sale in market overt – relied on the element of publicity. It was based on the idea that transactions in such a market were open for all to see, in stark contrast to clandestine dealings.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

the interests of creditors, empirical research conducted in America leads to the conclusion that credit agencies attach little importance to probate as a means of securing the repayment of debts. Most agencies did not even assign personnel to comb through newspaper obituaries and death registers for this purpose.[26] In English law, in any case, the interests of creditors can be adequately protected by provisions such as section 27 of the Trustee Act 1925, which furnish protection for personal representatives only after they have duly advertised for claims against the estate. Such advertisements, routinely to be found in the columns of national and local newspapers, serve their function well enough without the need to disclose the details of the dispositions made by the testator.[27]

Finally, it will be recalled, probate is said to serve the aim of securing the donative intentions of the testator. The procedure can be either contentious or non-contentious. In its contentious form, certainly, it provides a forum in which to decide such matters as whether or not a given document is, in reality, the testator's final will. In the trial of such issues the prevalence of publicity is understandable since the administration of justice presumptively takes place in public. That, however, cannot supply an account of the public accessibility of wills in general since those – the great majority – which go through non-contentious probate are equally subject to public access.

Therefore there is nothing intrinsic to probate that would appear to require general access to wills once they have undergone that process. However, the transfer of the probate jurisdiction in 1857 from church courts to state courts led to wills being subjected to legislation enacted in the last 150 years that controls the flow of official information – whether by forbidding disclosure (under the Official Secrets Acts) or by creating rights of access (under the Freedom of Information and Public Records legislation).

For all that wills duly proved are open to public inspection, the fact that those who administer the system are subject to the Official Secrets Acts was powerfully brought home in a prosecution in 1932 of a clerk employed at the Principal Probate Registry. The clerk, Lionel Ballard, was convicted under section 2 of the Official Secrets Act 1911 for releasing, only a few hours ahead of the appointed time, the details of the wills of three famous individuals of the day.[28] It is difficult today to imagine the degree of public interest in the testamentary dispositions of the three that led a journalist on the *Daily Mail*, Frederick Henry Budgen, to bribe the clerk so that his newspaper could gain a marginal lead over its competitors. Scarcely credible, too, is the fact that Budgen

[26] Langbein, op. cit., pp. 1120–1125.
[27] Note that, under subsection (3), s. 27 cannot be ousted by the terms of the will.
[28] The wills were those of Sir John Rutherford, Sir William Pryke and Mr Leo Maxse.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

was himself prosecuted for unlawful receipt of official information under section 2(2) of the 1911 Act, and that when he appealed (unsuccessfully) against a prison sentence of two months the Attorney-General himself appeared for the Crown.[29]

Wills, as public documents, could have been made subject to the system of contemporary access under the Freedom of Information Act 2000. However, it is quite clear that they fall within the category of "exempt information" as information that is reasonably accessible to an applicant otherwise than under the terms of that statute.[30] Eventually wills lose their contemporary significance and their contents become matters of historical interest only. Probate documents rank as public records for the purpose of access under the Public Records Acts 1958–1967, the term even extending to the records of ecclesiastical courts in exercising their testamentary jurisdiction prior to 1857.[31]

A vital condition of an effective system of public access, clearly, is the preservation of the documents that are to be the subject of the access regime. In this context it is necessary to turn to section 20(1) of the Theft Act 1968, the purpose of which has baffled criminal lawyers. The following, while not solving the puzzle, aims to cast further light on the problems associated with the provision. Section 20(1) penalises any person who:

> dishonestly, with a view to gain for himself or another or with intent to cause loss to another, destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court of justice or any government department. …

The central issue, for the purposes of the present article, relates to the phrase: "of or belonging to, or filed or deposited in, any court of justice or any government department". Does this qualify all the items that precede it: in particular, "will or other testamentary document"? Or does it apply only to the last item in the list: "any original document"? One argument in favour of interpreting the phrase so as to include wills and testamentary documents generally is that – as has just been seen – these are routinely placed in both courts of justice and government departments (in the former when proved, and in the latter when removed, some time after probate, to the Public Record Office).

[29] For reports of the two cases see *The Times* 15 July 1932, p. 4, and 13 August 1932, p. 5.

[30] Freedom of Information Act 2000, s. 21(1). Section 21(2)(b) defines "reasonably accessible" information as "information which the public authority … is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment". This definition would appear to accord with s. 125, though not with s. 124, of the Supreme Court Act 1981.

[31] Public Records Act 1958, Sched 1, s. 4(1)(n). The system in both Northern Ireland and the Irish Republic is similar in that wills that have been proved are kept for a number of years in the district probate registry before being removed to the Public Record Office. See S. Grattan, *Succession Law in Northern Ireland* (Belfast 1996), 3, and the Republic's Succession Act 1965, s. 42.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

On the other hand, it does lead to the odd conclusion that section 20(1) affords protection to those wills that, on account of their official custodianship, stand least in need of it. Those that are left, for example, in a solicitor's office or in a drawer in a private residence fall outside its scope.

Section 20(1) had antecedents in the Larceny Acts 1861 and 1916.[32] Section 6 of the 1916 Act encompassed in brief terms the theft of any testamentary instrument, irrespective of whether the testator was alive at the time or not.[33] Section 29 of the 1861 Act was identical in that respect, and also in that it was not qualified by the requirement that the document be filed or deposited in a court of justice or government department. In contrast, its scope extended beyond stealing to include the destruction, cancellation, obliteration or concealment of the instrument in question. It also contained the proviso that it was not necessary in any indictment to allege where title to the instrument (in the sense of the ownership of the paper on which it was written) was vested.

What was the mischief at which all three provisions were aimed? The most direct form of dishonest interference with a testator's final wishes as to the destination of his property is to forge his will. The Wills Act 1837, in requiring that the testator sign the document and that this be attested by at least two witnesses,[34] provides some measure of safeguard.[35] However, there are other ways in which to profit dishonestly from an estate without going as far as committing forgery. Assume, for example, that X is the only relative of T, who has made a will leaving all his property (let us say) to certain charities. On T's death, X is not forthcoming about the location of the will, which in consequence is never found. T is therefore believed to have died intestate, and X inherits his whole estate. Or again, Y is named as a legatee under a will executed by W. Some time later W executes a second will which revokes the earlier instrument and leaves nothing to Y. Y's lack of candour concerning the existence of the second will leads all concerned to the conclusion that the first will remained unrevoked, and it is that document which is admitted to probate.[36]

[32] Earlier still is a statute of 1827, 7 & 8 Geo IV, c. 29. Sections 21 and 22 are concerned with the stealing, destruction, etc of various types of document (testamentary instruments under s. 22, court records under s. 21).

[33] Section 6 ran: "Every person who steals any will, codicil, or other testamentary instrument, either of a dead or of a living person, shall be guilty of felony, and on conviction thereof liable to penal servitude for life".

[34] Wills Act 1837, s. 9.

[35] As the plot of Puccini's opera *Gianni Schicchi* illustrates, the failure to secure the location of a will can have consequences even more serious than its loss. Those who gain access to its contents and are disappointed by its terms are provided with an incentive to replace it with a forgery that contains dispositions more favourable to them.

[36] Under the Fraud Act 2006, s. 3, a person is guilty of an offence if, with the intention of making a gain for himself, he fails to disclose information that he is "under a legal duty to disclose".

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

If these two situations are to be brought within the terms of section 20(1) of the Theft Act 1968, the words "of or belonging to, or filed or deposited in, any court of justice or any government department" must be held not to qualify "any will or other testamentary document". Equally, the term "conceal" (which is used in only two of the three statutory provisions) must be taken to extend beyond moving the location of the will to a hiding place to encompass the giving of evasive answers to the personal representatives, or even to failure to approach them with the required information.

Very little light is cast on section 20(1) by the report of the Criminal Law Revision Committee which foreshadowed the Theft Act 1968.[37] Its commentary on Clause 16 of the draft Theft Bill that was appended to the report noted that in recent years there had been a dearth of prosecutions under the earlier provisions. The Committee therefore wondered whether it was necessary to retain the offence that went on to find renewed expression in section 20(1) of the 1968 Act.[38] In the event it was retained on the ground that the actions covered by section 20(1) were often the first steps taken towards committing a fraud without necessarily qualifying as an attempt in law. Smith pronounces this to be "not a particularly convincing explanation" for the retention of the offence,[39] noting that criminal damage will "almost certainly" be committed by a person who falls within the terms of the section.[40] Several points should be made about this observation. It is true only of those actions listed in section 20(1) that amount to some physical damage to the paper on which the will is written. It would not encompass mere concealment of the will. Even if criminal damage is committed, this is a crime the gravity of which cannot be gauged by the mere physical act of destruction. The true measure of harm is the loss (whether actual or potential) of an individual's inheritance. It should be noted in this connection that the destruction or concealment of a will does not necessarily lead to loss to an intended beneficiary under the missing instrument. It is possible to admit to probate the contents of a will that has been lost or destroyed.[41] It is probably for this reason that section 20(1) is drafted merely in terms of the relevant acts being done *with a view to* bringing about the gain or loss in question.[42]

However, it is doubtful whether, in the situations outlined in the text, X and Y are subject to the requisite "legal duty".

[37] Criminal Law Revision Committee, Eighth Report: *Theft and Related Offences* Cmnd. 2977 (1966).

[38] Ibid., at para. 106.

[39] A.T.H. Smith, *Property Offences* (London 1994), 780.

[40] Ibid.

[41] See note 10 above.

[42] Section 20(1), it is submitted, is a further instance of a type of criminal offence identified by Andrew Ashworth: namely, "offences that are defined in the inchoate mode". See "Defining Criminal Offences without Harm" in P. Smith (ed.), *Criminal Law: Essays in Honour of J.C. Smith* (London 1987), 7–8.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

III. The Adverse Effects of Testamentary Publicity

While the publishing of wills is useful in securing certain ends, it does carry with it the risk of harming the interests of a range of persons, especially their interests in reputation and privacy.

A will might contain a passage that is defamatory of – or, at least, offensive to – a person still living. This would not be unusual in situations where the testator has sought to justify the exclusion from the will of a person who might have been expected to receive a bequest. The problem can be tackled, at one level, by omitting the words in question so that anyone who applied for access to the will would receive a copy without the offending passage. The court so ordered in *In the Estate of White*,[43] where the testator had inserted some "scandalous and defamatory" words about his wife (to whom he had left nothing). As is to be expected, applications to excise words have made the observation that scandalous extracts are more likely to be reproduced in the press than routine testamentary dispositions. In *In the Goods of Bowker*[44] the affidavit in support of the successful motion to omit certain words from the probate of the testator's will emphasised the point that, unless the passage was omitted, it "would be broadcast in the Press and particularly in the locality where the deceased was well known and where the deponent and other members of the family lived".[45] Clearly, if (as is very likely) the words in question do not effect a disposition of property, the omission of them will not jeopardise the basic purposes of probate.[46]

What is the legal position if a defamatory passage remains in the will as admitted to probate, whether because there was no application to exclude it or because the application was unsuccessful? The question has not arisen in English law,[47] though there is a small body of case law in the USA which is of some assistance in illuminating some of the problems in this area. The background that is shared by both legal systems is the common law rule, *actio personalis moritur cum persona.* This means that actions in tort are terminated by the death of either the injured party or the person who inflicted the injury. The rule has been subjected to statutory amendment here, as it has in many US jurisdictions. It is necessary to pay close attention to the English provision. Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 states in general terms that "all causes of action subsisting against or vested in [a deceased person] shall survive against, or, as the case may

[43] [1914] P. 153.
[44] [1932] P. 93.
[45] Ibid.
[46] In *Re N.* [1950] V.L.R. 139 the Supreme Court of Victoria, Australia, gave an overview of the situations in which offensive words may be omitted from probate.
[47] See Gatley on *Libel and Slander* 11th ed. (London 2008), 236.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

be, for the benefit of, his estate". This amounts to the abolition of the *actio personalis* rule – an abolition that is made subject to a number of exceptions, including the action for defamation. In short, therefore, the position in regard to defamation remains unchanged from that prevailing at common law. However, it should be asked whether, at the time of the testator's death, there is an action for defamation "subsisting against" him by virtue of a defamatory extract in his will. An act of publication, it will be recalled, is an essential element of the tort of defamation. It could be that the testator did publish the material in circumstances that would not be covered by legal privilege, but died before an action could be brought against him. This situation falls squarely within the terms of the *actio personalis* rule as expressed in the 1934 Act. Alternatively, the will might have been written by the testator either without publication or with only privileged publication during his lifetime. Here no action would have vested at the time of his death. There is, it should be noted, no necessary element of publication in the required attestation of the testator's signature by two witnesses. It is not required that they should have sight of the contents of the document, still less that they should know its nature. And if curiosity should lead them to read the defamatory passage, this in itself would not constitute publication to them.[48] It could be argued, in this alternative situation, that the tort set in motion by the testator writing the words is completed only when his personal representatives communicate the contents of the will in a non-privileged context. In that event the testator and the personal representatives could be regarded as joint tortfeasors.

A will, to repeat the theme of this article, is ultimately a public document. This point was taken up in the American case, *Harris v Nashville Trust Co.*,[49] where it was stressed that, however many people had previously seen the defamation, the essence of the harm to the plaintiff's reputation lay in making the remarks in question a matter of public record. There is, on the other hand, a difficulty in identifying the crucial act of publication as being that which follows from the granting of probate. Since that is a judicial proceeding – even if only in an attenuated sense[50] – it should be protected by privilege.[51]

The possibility that a will might contain defamatory material is quite low when compared with the routine disclosure of individuals' financial affairs that forms an integral part of the process of probate. The issue of loss of privacy, therefore, is central to the concerns of this part of the article. In the USA, indeed, there is a body of publications

[48] See *Huth v Huth* [1915] 3 K.B. 40.
[49] 128 Tenn 573.
[50] That is to say, there is no hearing which involves the decision of a dispute between parties.
[51] *Nagle v Nagle* 316 Pa 507.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

aimed at the layman instructing him on how to avoid the process of probate with, amongst its other disadvantages, the ensuing loss of confidentiality for his financial affairs.[52] The probate court, as has been seen, can safeguard a person's interest in reputation by omitting any words that are defamatory of him from the probated copy – a decision that is the easier to take since the libellous words are very unlikely to have any dispositive effect. This expedient is not available to protect privacy interests since the disclosure of the existence (or absence) of a testamentary gift and its size are the very essence of a will. In view of the (as yet) undeveloped state of the law of privacy in English law it is only possible to speculate on some of the central issues, both theoretical and practical, that might be posed by access to wills and the publication of their contents.

That legatees have a privacy interest was acknowledged by the Younger Report in noting: "widespread knowledge of a large inheritance often leads to begging letters".[53] There is a slight analogy to be drawn here with the protection afforded to lottery winners who wish to remain anonymous – slight, since legacies usually lack the enormous size and arbitrary nature that are characteristic of lottery wins.[54] As for the testator himself, there is a substantial body of theoretical opinion that rights, including the right to privacy, cannot be said to be possessed by those who are dead.[55] On the question of legal enforcement, there would be considerable obstacles to any attempt, through the Human Rights Act 1998, to deploy in this area the right to privacy contained in Article 8 of the European Convention on Human Rights. At the very outset proceedings may be brought under the Human Rights Act only by those who are (or would be) a "victim" of the unlawful act.[56] Even if this barrier could be overcome, it is a central feature of the Act that proceedings may not be brought to challenge actions that are required to be performed by statute.[57] The existence of sections 124 and 125 of the Supreme Court Act 1981 would immediately dispose of the possibility of any proceedings being brought against the Probate Registry,[58] though the press, in choosing to report the contents of any will, would not be protected in the same

[52] The most famous work is N.F. Dacey, *How to Avoid Probate* (New York 1990). See especially ch. 3 ("Probate – the ugly side") which lists amongst the disadvantages of probate that of undesirable publicity. Examples include the disclosure of the inheritance gained by those recently widowed and the extent of the debts owed by the estate.

[53] See note 6 above, at para. 178.

[54] For judicial recognition of the importance of protecting those lottery winners who wish to preserve their anonymity, see *Camelot Group v Centaur Ltd.* [1998] 1 All E.R. 251, 255e, quoting from the unreported judgment at first instance of Maurice Kay J.

[55] See especially H. Steiner, *An Essay on Rights* (Oxford 1994), 249–258, and C. Wellman, *Real Rights* (New York 1995), 146–157.

[56] Human Rights Act 1998, s. 7(1) and s. 7(7).

[57] Human Rights Act 1998, s. 6(2)(a).

[58] Undoubtedly a "public authority" under the Human Rights Act, s. 6(1).

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

way. In any event, to judge by the developed case law on privacy of the USA, suits will be rejected that are based on nothing more than the defendant's dissemination of information gleaned from documents (for instance, birth certificates) that are matters of public record.[59]

Remarkably, open access to wills has been used as a benchmark standard from which to justify increased loss of privacy in another area of property law: public access to the land register. The starting point was the secrecy of the register under the Land Registration Act 1925.[60] Apart from some exceptions in favour of government bodies, no one other than the registered proprietor or a person authorised by him was allowed to inspect the register. From this there has been a complete reversal to an open land register effected by the Land Registration Acts 1988 and 2002.[61] In making the case for this transition reference has been made to analogous registers relating to property and personal information. The argument was that, if the contents of wills (for example) are publicly available, so *a fortiori* should the contents of the land register with its less intimate content. This was the submission advanced, both by the Law Commission in making the case for an open register,[62] and by the Land Registry in setting out the arguments for and against the further step of including on the register (and consequently making available for all to see) the price paid for the land on the most recent sale. As the Land Registry document puts it, "matters which might be regarded as more private are open to public inspection", citing the example of wills that have been admitted to probate.[63]

At two stages, therefore, the case for disclosure has been made, in part, by reference to the questionable assumption that wills are quite properly open to public inspection. Even so, provision has been made for retaining the secrecy of the land register in certain respects. Although the Land Registration Act 1988 conceded access, not only

[59] A case in point is *Meetze v Associated Press* 95 S. E. 2d 606. The plaintiffs brought an action for invasion of privacy in regard to the defendant newspaper's report of the birth of their child. The newsworthy aspect of the article, and the gist of the plaintiffs' complaint, was that the mother was only 12 years old. In dismissing their case, the court emphasised that the birth was obliged by law to be recorded as a matter of public record, and moreover that the birth certificate was required to state the ages of the mother and father. It is worth noting, in this connection, the contents of the Draft Right of Privacy Bill that was appended to the report by JUSTICE, *Privacy and the Law* (1970). Put forward as the basis of a new privacy right in English law, it included several defences among which was that conferred by Clause 3 (f): that the defendant "acted under authority conferred upon him by statute or by any other rule of law".

[60] Land Registration Act 1925, s. 112. See generally S.R. Simpson, *Land Law and Registration* (Cambridge 1976), 49–51 ("Secrecy of the English system").

[61] The Land Registration Act 1988, which first effected the change, was repealed by the 2002 Act.

[62] Law Commission, *Second Report on Land Registration: Inspection of the Register* (Law Com. No. 148) HC 551 (1985), p. 15.

[63] Land Registry Consultation Paper, *Proposal to Restore Price Paid to the Land Register* (October 1997), para. 3.8.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

to the register itself, but also to documents in the custody of the registrar relating to any land or charge, it envisaged a distinction between those documents access to which would be as of right and those where it was to be at the discretion of the registrar.[64] The current provision, section 66 of the Land Registration Act 2002, provided the basis for the making of rules that would contain exceptions to the general right of access. These, as subsequently promulgated, allow for the making of applications to the registrar to deny access on the ground that the document in question contains "prejudicial information".[65]

Land registry entries and probated wills are alike in that the general right to inspect them makes available a fund of useful information for academic research and the formulation of public policy. In the former case it facilitates the monitoring of movements in land prices and indeed of changing patterns in the ownership of land itself.[66] In the latter it makes possible the investigation of the holding and transmission at death of property in general. Probate records have been extensively used in research of this nature by economists such as Josiah Wedgwood,[67] C.D. Harbury,[68] and A.B. Atkinson.[69] They have also been used for wider purposes, such as the investigation of patterns of employment among women.[70]

The importance of access to wills for the conducting of social research was emphasised by the Press Council in stating its opposition to any departure from the established position.[71] For some investigative purposes it suffices to have access to the total value of the estate. Where, by contrast, it is patterns of bequeathing that are the subject of inquiry, it becomes necessary to see the particulars of how individual estates have been distributed.[72] Whatever the level of investigation, it is

[64] According to the new s. 112 of the Land Registration Act 1925, subsections (1)(1)(b) and (2), as substituted by the Land Registration Act 1988.

[65] Land Registration Rules 2003, S.I. 2003/1417, rules 136–137. Rule 136(1) states:

> "A person may apply for the registrar to designate a relevant document an exempt information document if he claims that the document contains prejudicial information".

Under rule 136(3) the registrar must so designate the document provided that he is satisfied that "the applicant's claim is not groundless".

[66] Nevertheless, some substantial landowners enjoy a considerable degree of secrecy as to the extent of their holdings because, among other reasons, there has been no transaction requiring first registration of title. See K. Cahill, *Who Owns Britain* (Edinburgh 2001), 3–5.

[67] J. Wedgwood, *The Economics of Inheritance* (Harmondsworth 1939).

[68] C.D. Harbury, "Inheritance and the Distribution of Personal Wealth in Britain" (1962) 72 *Economic Journal* 845.

[69] A.B. Atkinson, *Unequal Shares: Wealth in Britain* (Harmondsworth 1974).

[70] See J. Whittle, "Housewives and Servants in Rural England, 1440–1650: Evidence of Women's Work from Probate Documents" (2005) 15 *Transactions of the Royal Historical Society* 51.

[71] See H.P. Levy, *The Press Council: History, Procedure and Cases* (London 1967), 425.

[72] As, for example, to conduct the research that was published in J. Finch, J. Mason, J. Masson, L. Wallis and L. Hayes, *Wills, Inheritance, and Families* (Oxford 1996). See ibid., at p. 11, where it is stated that the data was drawn from the examination of 800 probated wills.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

apparent that probate records are used as an informal census of wealth (or other data). The "census rationale" – as we may term it – has emerged as a purported justification, rather than a historical explanation, of the phenomenon of probate publicity. It is not surprising, therefore, that probate records are quite deficient as a method of compiling reliable information about wealth holding. Some brief indication can be given as to why this is so. Under inheritance tax, as formerly with estate duty, there is a strong incentive for the wealthy to reduce the size of their estate by making significant *inter vivos* transfers.[73] Furthermore some items that pass on death may not be valued for the purposes of probate. An instance very much in point is property – most usually the family home – which accrues to another joint owner through the right of survivorship. Of course, researchers are fully aware of these limitations and adjust their calculations accordingly. More significant, however, is the fact that the data that is gathered from households in the regular censuses is protected from disclosure by the criminal law. While aggregated data is publishable (indeed the whole purpose of conducting such censuses would be stultified if it could not), it is an offence to disclose any "personal census information" – defined as "any census information which relates to an *identifiable* person or household".[74]

IV. Mitigating the Loss of Privacy

Given the fact of open access to the contents of wills that have been proved, what attempts have been made to secure a measure of confidentiality? In this part of the article two devices in actual (if sporadic) use will be considered. This will be followed by some account of the various attempts that have been made to effect changes in the law.

It is trite learning that the subject of secret trusts came into being largely on account of the wish of testators to maintain posthumous secrecy over aspects of their lives of which they were not entirely proud (keeping a mistress or fathering a child out of wedlock). For this purpose they can choose between the total secrecy of a fully secret trust (where, on the face of the will, the secret trustee appears to take beneficially) and the semi-confidentiality of a half-secret trust

[73] Especially noteworthy in this regard was the treatment of the financial affairs of the leading film director, Stanley Kubrick, in the "Latest wills" column of *The Times*, 18 December 2000, p. 14. Spurred, perhaps, by having entered as "nil" the net value of the estate of an outstanding practitioner of a lucrative profession, the compiler of the column added that Kubrick had already created a trust for the benefit of his family.

[74] Census (Confidentiality) Act 1991, s. 1, taking effect as the Census Act 1920, s. 8 (emphasis added). See, in particular, subsections (3) and (7). On census confidentiality see M. Bulmer, *Censuses, Surveys, and Privacy* (London 1979), Part III.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

(a teasing arrangement where the existence of the trust and the property subject to it are exposed to view, but not the identity of any beneficiary).

Some general points about secret trusts should first be made. In one sense, all trusts are secret. No outsider has access as of right to their terms.[75] The problem arises in regard to testamentary trusts since, unlike their *inter vivos* counterparts, they happen to fall within the ambit of public probate. Nevertheless, it is not the fact that wills may be accessed by anyone that is wholly responsible for creating the situation where publicity is sought to be avoided by means of creating secret trusts. Even if their contents were not made available for inspection by all, the testator's immediate family would come to learn (directly or through hearsay) of their dispositions. Furthermore, the institution of the secret trust cannot remedy one aspect of probate publicity: the disclosure of the value of the estate.

One point that is central to the theme of this article is that secret trusts depend for their effective functioning on one category of person – the beneficiaries – being brought into the secret. Otherwise all hinges on the integrity of the secret trustee(s) and the assurance that he or they would not be tempted to divert the trust property into their own pockets.[76] For, if secret trusts avoid the disadvantages of will publicity, they also lack its advantages. There is no effective means whereby a person who believes that he might be the beneficiary of such a trust can ascertain the true position. It was perhaps by way of response to this problem that Professor Sheridan advanced a proposal for the compulsory registration of secret trusts, and indeed of wills in general.[77] As regards wills, a similar suggestion had been made by Jeremy Bentham on the ground that they are "the kind of deeds most liable to be fabricated".[78] Sheridan does not say what the sanction would be for failure to register, unlike Bentham who categorically stated that in the absence of registration under his scheme the will would be a nullity. More relevant to the theme of this article is Sheridan's proposal that the register be open to inspection, but "only to persons having business with the will".[79] But who is such a person, and judged by what criteria?

[75] See *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 A.C. 709 for a discussion of the issues. The Judicial Committee of the Privy Council characterised the right of a person to be informed about any possible entitlement under a trust as forming an aspect of the inherent jurisdiction of the court to ensure that trustees be effectively monitored in the performance of their duties. However, it stressed at para. [67] that "an applicant [for information] with no more than a theoretical possibility of benefit ought not to be granted any relief".

[76] This is a less serious problem in half-secret trusts since the existence of the trust is apparent on the face of the will.

[77] L.A. Sheridan, "English and Irish Secret Trusts" (1951) 67 L.Q.R. 314.

[78] Bentham, *Principles of Penal Law*, in J. Bowring (ed.), *The Works of Jeremy Bentham* (Edinburgh 1843 – reprinted by Thoemmes Press, Bristol, 1995), vol. I, p. 552.

[79] Sheridan, op. cit., 329.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

The system of undifferentiated access to wills possesses at least the advantage that such persons do not need to be defined. As regards secret trusts, the proposal has the merit of furnishing a source of information for those who believe that they might be the beneficiaries of such arrangements – though, unless applications were closely scrutinised, it might also turn into a source for those from whom the testator would prefer to withhold the information. In any case, if secret trusts are effectively enforced by their beneficiaries under the present arrangements despite the absence of systems of registration and publicity – a matter on which there is no reliable evidence – it would indicate that a regime of less than complete openness is consistent with the implementation of the testator's wishes.

The second device that is used to secure confidentiality is the sealing of the will. Since the early twentieth century it has been the standard, if (until of late) little noticed, practice in regard to royal wills.[80] In this context some light has been cast on the device by the recent application of Robert Brown, an accountant based in Jersey, to gain access to the wills of Princess Margaret and the Queen Mother which were both sealed shortly after their deaths in 2002.[81] It has also emerged that application may be made for the sealing of the wills of non-royals though, in marked contrast to those of the royal family, these are rarely successful.[82] A recent parliamentary question addressed to the Department for Constitutional Affairs elicited the response that no statistics on the subject were available nor would any be compiled.[83]

The procedural steps in the sealing of a royal will, at any rate, have been revealed. Application is made to the High Court by the executors of the will. A summons is then served on the Treasury Solicitor, who proceeds to instruct the Attorney – General. The matter is heard before the President of the Family Division, the hearing taking place in chambers (it could scarcely be in open court without jeopardising the very point of secrecy). This is followed by a press report that the

[80] As regard the pre-modern period see *A Collection of All the Wills now Known to be Extant, of the Kings and Queens of England, Princes and Princesses of Wales, and every branch of the Blood Royal from the reign of William the Conqueror to that of Henry the Seventh Exclusive* (London 1780).

[81] *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother and Executors of HRH Princess Margaret and HM Attorney-General* [2007] EWHC 1607 (Fam), [2007] W.T.L.R.1129.

[82] These two points emerged from a programme transmitted on Radio 4 on 29 August 2005 at 8.00 pm in its *Document* series.
There is some indication that in the USA, where (of course) royal status does not exist, it is possible to have testamentary records sealed. The matter came into prominence in 2004 when two newspapers, the *Pittsburgh Tribune-Review* and the *Pittsburgh Post-Gazette*, unsuccessfully applied to unseal the will of Senator John Heinz III. The will had been sealed the day after the Senator's death in 1991. The contents were of particular interest in 2004 since his widow had subsequently married Senator John Kerry, the Democratic Party's candidate for the Presidency in that year. The will and financial records of the estate were made public in 2005 on a renewed application to the court by the two newspapers: see S. Tolliver, "Senator Heinz's financial records open" *Pittsburgh-Tribune Review* 2 April 2005.

[83] HC Deb. vol. 435 col. 182W (13 June 2005) question no. 3106.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

application was successful. As for applications to seal the wills of non-royals, one can only speculate as to whether these too would be heard by the President or would involve the Attorney-General (who is joined in the application to represent the public interest). If more is now known of the procedure, the same cannot be said of the substance of the grounds upon which applications are decided. The orders to seal the wills of the Queen Mother and Princess Margaret precluded their being opened without the consent of the President of the Family Division for the time being. In disposing of Robert Brown's request for permission to see the two documents, Sir Mark Potter P. confessed to being in the dark as to the matters that had been placed before his predecessor in making the orders.[84] He decided the matter on the basis that Rule 58 of the Non-Contentious Probate Rules 1987[85] governed his decision (though the Rule refers to the opinion of a district judge or registrar, not that of the President), and that the power to seal a will was "concerned with considerations of privacy".[86]

The background to that case is Brown's long-standing belief that he is the illegitimate son of Princess Margaret.[87] Consequently, he claims, the couple (both since deceased) who raised him were incorrectly described on his birth certificate as his parents. Almost as striking as the strange nature of the claim has been the way in which Brown has sought to pursue it in the courts. It is difficult to understand why an action to establish what he regarded as his true parenthood should be brought in the form of an application to see the wills of the persons he believed to be his mother and grandmother. There are family law proceedings that, arguably, he could have invoked that would have raised the issue directly.[88] Equally, as the President's judgment points out, gaining access to the wills would scarcely be of assistance to him in his quest. Furthermore, it could be added, if Brown hoped to be vindicated by finding some financial provision for him in either will, the traditional way of making a testamentary provision in favour of illegitimate offspring is (as already noted) through a secret trust. Sight of the will, in that event, would reveal little (if anything). Finally, as a method

[84] See note 81 above, at para. [43].
[85] See note 5 above, and accompanying text.
[86] See note 81 above, at para. [41].
[87] Some accounts of the case in the media have said that Mr Brown claims as his father Peter Townsend, the man with whom Princess Margaret had a relationship in the early 1950s but whom she felt unable to marry on account of his divorced status. Mr Brown has, however, told the author that he has never made a claim as to the identity of his father.
[88] See Family Law Act 1986, s. 56, as amended by the Family Law Reform Act 1987, s. 22. There could have been several obstacles to Mr Brown's use of this provision. First, the applicant must be domiciled in England and Wales at the time of the application or have been habitually resident there throughout one year before the lodging of the application – a condition that he might not have been able to satisfy in view of his residency in Jersey. Secondly, the drafting of s. 56(1) – that such a person may apply for a declaration "that he is the legitimate child of his parents" – does not appear suited to Mr Brown's cause since the essence of his case is that he is illegitimate.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

of establishing a place in the line of succession to the throne it would encounter the obstacle that illegitimate offspring are excluded from any place in that line.

In the event, Brown's failure to adduce even a minimal amount of supporting evidence led to his application being dismissed as an abuse of process. The Court of Appeal, however, has subsequently ruled him to be entitled to a substantive hearing of his claim, particularly in view of the lack of transparency of process at the time when the two wills were originally sealed.[89] His counsel's arguments touched on the traditional justifications of access to wills that have undergone probate. In the case of royal wills, he submitted, the justifications applied with even greater force than usual in view of the unique position of the royal family. Yet, as was entirely clear from its wording, Rule 58 of the Non-Contentious Probate Rules did not distinguish between their wills and those of the rest of the population. This leads us to enquire whether alternative bases for the distinction can be found. It is necessary for this purpose to consider separately the will of the late Monarch and the wills of members of the royal family in general.

The modern history of the law relating to the will of the reigning sovereign starts with a statute of 1800, which allowed George III and (in turn) his successors to make a will in their private capacities.[90] The difficulty had been that of differentiating between the private wealth of the Monarch and the assets that he held in order to finance government expenditure. The leading work on the finances of the Monarchy, Phillip Hall's *Royal Fortune*, describes the aim of the statute (to which he refers as the Crown Private Estate Act 1800) as being "to allow the King to become a private person in the sphere of ownership, as well as a public person who was head of the government".[91]

Such a will, however, could not be admitted to probate. The point is made in several authoritative texts, which cite two cases in support: *In the Goods of His Late Majesty King George the Third*,[92] and *In the Goods of His Late Majesty King George III*.[93] The earlier case is quite clear on the point:

> Now the history of the wills of Sovereigns from Saxon times – from Alfred the Great down to the present day, has been diligently searched and examined; but no instance has been produced of probate having been taken of the will of any deceased Sovereign in

[89] [2008] EWCA Civ 56, [2008] 1 W.L.R. 2327. At the time of writing there appears to be little prospect of an early rehearing of the substantive issues before the President of the Family Division.
[90] 39 & 40 Geo 3, c. 88, s. 10.
[91] P. Hall, *Royal Fortune: Tax, Money & the Monarchy* (London 1992), 9.
[92] (1822) 1 Add. 255: 162 E.R. 89.
[93] (1862) 3 Sw. & Tr. 199: 164 E.R. 1250.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

> these Courts; much less of its having been contested here against the reigning Sovereign.[94]

If the granting of probate is the precondition of public access to a will, it is not surprising that the will of the Monarch, at any rate, is exempt from disclosure. Phillip Hall, however, advances an entirely different basis for the exemption: the Crown Private Estates Act 1862. His claim that it was this statute which laid down the rule that "the monarch's will need not be published"[95] appears to be based on section 5: "… that a will or other testamentary disposition by Her Majesty, her heirs or successors, of or concerning any such private estates as aforesaid, shall not require publication; … " It is submitted that the word "publication" is used here, not in its ordinary meaning of making generally accessible, but rather as a technical term in the law of succession. A testator, in this sense of the word, published his will when he stated in the presence of witnesses that the document that he was executing was his will.[96] Clearly, on this interpretation section 5 provides no basis for maintaining the secrecy of the Monarch's will.

Even if Hall's view is correct it could not furnish a legal basis for the practice, established over the past hundred years, of the sealing of wills of members of the royal family other than that of the Monarch. In this context the precedent – setting case is that of Prince Francis of Teck, brother to Queen Mary, the wife of King George V. Born in 1871, Prince Frank spent much of his short life teetering on the edge of scandal. On his death in 1910 Queen Mary successfully applied for the sealing of his will to Sir Samuel Evans, freshly appointed head of the Probate, Divorce and Admiralty division of the High Court.[97] Since then four cases (albeit unreported) involving applications to seal the wills of the wider royal family – *The Princess Royal* (1931),[98] *Prince Arthur of Connaught* (1939),[99] *Duke of Kent* (1943),[100] and *Princess Beatrice* (1945)[101] – have been noted by a leading practitioners' work.[102]

[94] (1822) 1 Add. 255, 262: 162 E.R. 89, 92.
[95] Hall, op. cit., p. 14.
[96] *Doe v Burdett* (1839) 9 Ad. & E. 936, 950: 112 E.R. 1469, 1474, per Gurney B.: "If it means anything, I should suppose that it must mean that the testator, at the time of making the will, stated that that which he was so executing was his will". This would also appear to be the sense in which the term is used in the Wills Act 1837, s. 13: "Every will executed in manner herein-before required shall be valid without any other publication thereof".
[97] It was that case that formed the focus of the radio programme referred to in note 82 above. The reason for the application, as given in the programme, is that Queen Mary feared the scandal if it emerged that Frank had bequeathed to the Countess of Kilmorey, a married woman and former mistress of Edward VII, some extremely valuable items of jewellery known as the "Cambridge emeralds" that had been in the family since 1818.
[98] The subject of this case would appear to be Princess Louise, Duchess of Fife, the eldest daughter of Edward VII, who died in 1931.
[99] Prince Arthur of Connaught (1883–1938) was a grandchild of Queen Victoria and Prince Albert, being the son of their seventh child, Prince Arthur Duke of Connaught.
[100] George, Duke of Kent (1902–1942), was the fifth child of George V.
[101] Princess Beatrice (1857–1944) was the youngest child of Queen Victoria.
[102] Tristram & Coote, *Probate Practice* 19th ed. (London 1946), 9.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

These, however, form only part of the picture. A list filed in the National Archives identifies 27 royal wills in Somerset House that have been sealed by order, from the will of Francis of Teck to that of Prince Henry, Duke of Gloucester, in 1974.[103] Several aspects of the list merit attention. No mention is made of the wills of the two reigning sovereigns who died during the period: George V and George VI, in 1936 and 1952 respectively. This omission is entirely consistent with the legal rule that such wills do not have to undergo probate.[104] Against each person there is attached a valuation of the estate, with the sole exception of Queen Mary in 1953. Finally, and unusually, "all records as normal" is the entry recorded in the case of Princess Helena Victoria (in 1948).[105]

The legal basis of the exemption in favour of the will of the Monarch, it is submitted, rests on nothing more complex than the well-established principle of construction: that the Crown is not bound by an Act of Parliament "which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication".[106] Since there is nothing in the operative provisions – sections 124 and 125 of the Supreme Court Act 1981 – to bind the Crown in either of these ways, it follows that the Monarch is exempt from their scope. There is, however, a paradox at the core of this explanation. The question as to the disclosure of a Monarch's will must necessarily arise when his or her successor is on the throne. Exemption from disclosure, therefore, cannot be a privilege that is capable of being claimed by the reigning Monarch for his own benefit. Alternatively, it may be that the royal prerogative in general forms the basis for the secrecy of royal wills. If so, it is an aspect of that subject that has not been noted by any of the writers on the constitution.[107] It would be a strange prerogative power, exercisable over the wills of the wider royal family, but beyond the traditional controls of ministerial advice and judicial review.[108]

To summarise thus far, neither the secret trust nor the sealing of wills is entirely satisfactory as a means of checking the uncontrolled dissemination of the contents of testamentary documents. The latter is

[103] J. Cox, *Wills, Inventories and Death Duties: A Provisional Guide* (Public Record Office 1988), 59–63.

[104] See notes 92 and 93 above. There is, however, an entry for the Duke of Windsor (1972) who had abdicated the throne as Edward VIII.

[105] An (initially) surprising entry is that for Maud Charlotte, Queen of Norway (1939). She was in fact British. A daughter of Edward VII, she had married Haakon VII, King of Norway.

[106] *British Broadcasting Corporation v Johns* [1965] Ch. 32, 79, per Diplock L.J.

[107] The only reference to royal wills in the classic work by Joseph Chitty, *Prerogatives of the Crown* (London 1820), 242–243, merely recites the contents of section 10 of the statute 39 & 40 Geo., c. 88 (as to which see note 90 above and accompanying text).

[108] Matters of the royal prerogative that do not touch on high policy are now subject to judicial review. If the exemption from will disclosure does form part of the royal prerogative, it surely falls into this category.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

little known, its legal basis is obscure, and it is seldom invoked successfully outside the royal circle. Any success enjoyed by the former is likely to be at the cost of jeopardising the inheritance rights of the trust beneficiaries. Attempts have therefore been made to correct the root problem of intrusive press reporting. From time to time private member's bills have been introduced in Parliament which, if they had been passed, would have made unlawful the publication in the media of more than the barest details of probated wills. For example, three bills drafted in broadly similar terms were introduced in the House of Commons in 1954, 1955 and 1958 respectively by Charles Mott-Radclyffe, Nigel Fisher and Marcus Kimball.[109] Each would have made it illegal to publish in any newspaper the particulars of the will of a deceased person other than the date of the will and the name of any executor or administrator of the estate.

The detailed provisions merit some attention. In each of the three measures an element of choice was provided as to whether the publication ban was to apply in a particular instance. The Mott-Radclyffe and Fisher bills stipulated that it was not to be brought into force if consent to publication were given either by the testator (whether in the will "or otherwise") or by the personal representatives. The starting point of Marcus Kimball's bill was the opposite: the prohibition on publication was to apply only if the deceased had expressed, in any "testamentary instrument" executed by him, his preference for confidentiality. Under all three measures bequests in favour of a charity or the Government or any public or local authority could be freely reported. Equally, in the interests of historical research, all prohibitions on reporting were to cease to apply if thirty years (or, in the case of one bill, twenty-five years) had elapsed since the death of the testator.

Mr Kimball's Wills, &c. (Publication) Bill progressed as far as the Committee stage in the House of Commons and consequently underwent some changes. Especially noteworthy are those relating to permissible disclosures. The measure was not to apply to any bequest to a solicitor, registered medical practitioner or nurse who had had any professional contact with the testator within five years of his death.[110] The explanation was, presumably, to facilitate the exposure of testamentary gifts that might have been secured by undue influence.[111] Indeed, fresh in people's memories at the time will have been a notorious case of a doctor who had benefited on a huge scale from the

[109] Each was named the Wills, &c. (Publication) Bill. Other such measures have been introduced unsuccessfully from time to time. See, for example, the Publication of Wills Bill 1975.

[110] Wills, &c. (Publication) Bill 1958, as amended by Standing Committee C, clause 1(1)(c).

[111] The Younger Report, see note 6 above, at para. 178, lists solicitors together with legatees and executors as the groups whose potentially unscrupulous conduct might be held in check by testamentary publicity.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

wills of his patients.[112] A further amendment embodied one of the traditional bases upon which open access to wills is defended. It stipulated that, notwithstanding any restriction, a personal representative remained free to publish such details of the will or the amount of the estate "as appear to him to be necessary for the purpose of tracing the whereabouts of any beneficiary" of the estate.[113]

In the end all three measures failed to pass into law. In this respect they shared the usual fate of private member's bills which lack support from the Government. Added to their difficulties was the opposition of a newspaper industry, channelled through the Press Council,[114] that was fearful of the creation of legally enforceable privacy rights.

V. Conclusion

It would seem that the law which permits general access to probated wills, together with its concomitant scope for widespread publicity, is disproportionately wide when it is judged against the legitimate ends served by disclosure. In this regard note should be taken of developments in respect of other documents of a personal nature which have traditionally been accessible by anyone without restriction: birth, marriage and death certificates.[115] Restrictions on unfettered access have here taken two possible forms. An edited version of the full text may be all that is made available to the public. There has long been, on account of the historical stigma attaching to illegitimacy, the facility of making available a shortened version of the birth certificate which omits details of parentage and adoption.[116] Alternatively, access might be confined to a restricted class of applicant. In this vein a recent White Paper[117] has proposed that sensitive items of information on the three certificates be made available only to the individuals themselves and their families, those authorised either by the individual or family, and those agencies that are granted legally prescribed access.[118]

The subject of wills must be approached in a different way. To make available only a shortened or edited form of the complete document

[112] The case of Dr John Bodkin Adams had been tried in 1957, the year prior to the introduction of the bill. A medical practitioner in Eastbourne, he was suspected of having killed a large number of his elderly patients by administering lethal levels of drugs in return for being left property in their wills. In the event he was acquitted of the single charge of murder brought against him.

[113] Wills, &c. (Publication) Bill 1958, as amended by Standing Committee C, clause 1(3).

[114] See note 71 above and accompanying text for an account of the opposition by the Press Council to a private member's bill (of unspecified date) that would have curbed newspaper reporting of the contents of wills.

[115] The marriage certificate stands somewhat apart from the other two in documenting an event to which there is a required degree of public access.

[116] See *Cretney's Principles of Family Law* 8th ed. by J.M. Masson, R. Bailey-Harris and R.J. Probert (London 2008), 537.

[117] *Civil Registration: Vital Change – Birth, Marriage and Death Registration in the 21st Century* (Cm. 5355: 2002).

[118] Ibid., at para. 6.3.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press

risks omitting the one piece of information that is being sought by a hopeful legatee. Ideally, access should be confined to those who genuinely hope for some testamentary gift, in contrast to those wishing to intrude without justification in the affairs of others. The difficulty, however, of differentiating the former group from the latter may well mean that there exists no realistic alternative to the present position of undifferentiated access.

https://doi.org/10.1017/S0008197312000232 Published online by Cambridge University Press