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PRIVILEGED WILLS AND TESTAMENTARY FORMALITIES: A TIME TO DIE?

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ALTHOUGH over fifty years have now passed since the ending of the last World War, armed conflict is still commonplace in many parts of the world. Further, though Britain has not itself been involved in a war since the Gulf campaign, developments such as the increasingly frequent deployment of UN peace-keeping forces in other war zones mean that foreign conflicts are nonetheless likely to have a direct impact upon the British armed services. It therefore seems timely to reconsider the doctrine of privileged wills, which gives special protection to the testamentary dispositions of service personnel (among others), and to ask whether, in today's society, the continued existence of such a privilege can really be justified.

WHAT IS A PRIVILEGED WILL?

Section 11 of the Wills Act 1837 states that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act". This provides an exception to the usual testamentary formalities set out in section 9 of the same Act, which require a will to be made in writing, signed by the testator, and attested by two witnesses. The extent of the exception is not directly defined in the Act, which merely preserves the pre-Wills Act position, but the net effect is to permit certain wills to be completely informal. Thus, the provision has been used to validate a broad range of informal testamentary dispositions, from wholly oral wills,[1] to notes of instructions for wills,[2] letters,[3] and written but unattested (or

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[1] *Re Stable* [1919] P. 7; *Re Jones* [1981] Fam. 7.
[2] *Stopford* v. *Stopford* (1903) 19 T.L.R. 185.
[3] *Gattward* v. *Knee* [1902] P. 99.

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otherwise formally invalid) wills.[4] Further, although section 11 only apparently refers to the making of a will, it has also been used to validate the informal revocation of a previous will, including a fully formal will executed when the testator was not in a privileged position.[5] Once made, a privileged will remains valid even though the testator ceases to be entitled to the privilege (for example, if he leaves the armed services).[6] All in all, the privilege is extensive, according privileged testators considerably more flexibility in the making of their testamentary dispositions than the rest of society enjoys.

Who Can Make a Privileged Will?

There are two major limitations on the class of persons entitled to rely on the provision. First, the testator must be a "soldier . . . mariner or seaman". Reported cases have involved military medical staff,[7] a Home Guard officer,[8] a barman serving on an ocean cruise liner,[9] and a typist employed on the *Lusitania*,[10] as well as regular members of the Army, RAF, Royal Navy, and Merchant Navy. Despite the masculine terminology, the privilege applies equally to female personnel.[11]

Secondly, the testator must have been either "in actual military service" or "at sea" (as appropriate). The interpretation of these phrases has altered over time, at least in part because of the changing nature of warfare. For example, in the Second World War, the advent of long-range bombing flights meant that soldiers away from the battlefront itself were the target of enemy attacks, and so sought to claim the privilege.[12] The current test for "actual military service" is one of direct connection with imminent, ongoing or recent military operations,[13] which includes (for example) soldiers mobilised in response to an imminent threat of war,[14] those under orders to proceed to the front during wartime or liable to be ordered to the front without notice,[15] post-war occupation forces,[16] and those

[4] *Re Rippon* [1943] P. 61.
[5] *Re Gossage* [1921] P. 194. Logically, therefore, the privilege should also cover alteration of an existing will.
[6] *Re Booth* [1926] P. 118.
[7] *In bonis Donaldson* (1840) 2 Curt. 386; *Re Stanley* [1916] P. 192.
[8] *Re Anderson* [1944] P. 1.
[9] *Re Knibbs* [1962] 1 W.L.R. 852.
[10] *In bonis Hale* [1915] 2 I.R. 362.
[11] *Re Rowson* [1944] 2 All E.R. 36 (WAAF).
[12] *Re Spark* [1941] P. 115, 117; (but *cf. In bonis Gibson* [1941] 2 All E.R. 91, disapproved by the Court of Appeal in *Re Wingham* [1949] P. 187, but not actually overruled).
[13] *Re Wingham* [1949] P. 187.
[14] *Re Rippon* [1943] P. 61.
[15] *In bonis Hiscock* [1901] P. 78; *Gattward* v. *Knee* [1902] P. 99; *Re Wingham* [1949] P. 187.
[16] *Re Colman* [1958] 1 W.L.R. 457.

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engaged in anti-terrorism operations during peacetime.[17] The last two examples, in particular, would apparently cover peace-keeping forces such as those which have recently been in action in Bosnia. Under section 2 of the Wills (Soldiers and Sailors) Act 1918, the phrase "at sea" must be interpreted consistently with the phrase "actual military service" as far as military naval personnel are concerned, so that (for example) a sailor in the Royal Navy on shore leave who is under orders to rejoin his ship now counts as being "at sea";[18] and recent case law has achieved the same extension of the privilege for merchant seamen.[19] One difference remains, however: a sailor can make an informal will when "at sea" during peacetime, a privilege which has no counterpart for soldiers.

Why Do We Have Testamentary Formalities at All?

Before we can assess whether the existence of the privilege is justified, it seems most sensible to take one step back, and consider why section 9 might impose testamentary formality requirements in the first place. An unjustifiable exception to an unjustifiable rule is problematic in its own way, but it should cause us far less concern than an unjustifiable exception to a useful and reasonable requirement.

There are various reasons why we might decide to impose a formality requirement, but an obvious one is that to do so will produce (on balance) more beneficial effects than detrimental ones.[20] Borrowing Fuller's classification,[21] the benefits of formality rules fall into three main groups: (a) *evidentiary* (securing good evidence for parties, third parties and the courts); (b) *cautionary* (for example, warning the parties that their actions have legal effects); and (c) *channelling* (providing a "tool" to permit the parties to give legal effect to their intentions). We could also add to this a fourth category, of *governmental* benefits: that is, the benefit of formalities to the executive government. A good illustration is the fiscal role of formalities in triggering liability to taxation (as with stamp duty, which is essentially a tax upon documents).[22]

In the context of testamentary dispositions, securing each of these

[17] *Re Jones* [1981] Fam. 7.
[18] *Re Yates* [1919] P. 93.
[19] *In bonis Newland* [1952] P. 71; *In bonis Wilson* [1952] P. 92; *Re Rapley* [1983] 1 W.L.R. 1069.
[20] For a fuller consideration of benefit and detriment analysis of formalities, see P.R.F. Critchley, "Taking Formalities Seriously" in S. Bright and J.K. Dewar (eds.), *Land Law: Themes and Perspectives* (Oxford, 1998), ch. 20.
[21] L.L. Fuller, "Consideration and Form" (1941) 41 Columbia L. Rev. 799.
[22] J.M. Perillo, "The Statute of Frauds in the Light of the Functions and Dysfunctions of Form" (1974) 43 Fordham L. Rev. 39, 62–64.

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types of benefit seems desirable.[23] For example, since a will only takes effect (and is therefore usually only challenged) after the death of the principal party concerned (the testator), ensuring that there is good evidence of his intention seems vital. Similarly, it seems important that he should be protected against external pressure from greedy would-be beneficiaries (a cautionary benefit); and for his own peace of mind, the channelling effect of testamentary formalities is significant, since it permits him to feel reasonably confident that his wishes will be carried out. The role of fiscal considerations hardly needs mentioning: the collection of death duties is clearly facilitated by formalities such as those imposed by section 9, which make it difficult to hide or obscure testamentary dispositions.

The down-side of formalities—their detrimental effects—can also be placed into different categories. Here the main groupings are two-fold: (a) the costs of complying with the formality (often involving actual financial cost, such as legal fees, but also including time and effort);[24] and (b) the problem of failure of informal transactions.[25] The latter may be detrimental not only to the parties concerned, but also to the legal system as a whole, since the failure of the informal transaction may hinder the achievement of some other legal policy aim. Again, it is possible to identify both types of detrimental effect in relation to the testamentary formalities imposed by section 9. For example, it is very common for those who make wills to take professional advice regarding (inter alia) the necessary formal steps, which will almost inevitably involve financial cost. Similarly, a number of wills every year fail for non-compliance with the formality requirements: perhaps one witness alone is used, or the relevant persons are not all present at the same time.[26] This failure is hard on the parties concerned (the testator and beneficiaries), and also conflicts with a discernible legal policy, which actively encourages people to make wills so that their individual wishes, rather than the generalised intestacy rules, can be put into effect.

[23] A.G. Gulliver and C.J. Tilson, "Classification of Gratuitous Transfers" (1941) 51 Yale L.J. 1, 1–12; *Fourth Report made to His Majesty by the Commissioners Appointed to Inquire into the Law of England Respecting Real Property (On Wills)* (London, 1833) (hereinafter "Real Property Commissioners"), pp. 16–19.

[24] Scottish Law Commission, Consultative Memorandum No. 66, *Constitution and Proof of Voluntary Obligations and the Authentication of Writings* (1985), paras. 3.2, 3.8.

[25] P.J. Muukkonen, "Formal Provisions and the Elimination of their Detrimental Consequences" (1961) 5 *Scandinavian Studies in Law* 79, 83–84.

[26] See Law Reform Committee, Twenty-Second Report (*The Making and Revocation of Wills*) (London, 1980) (hereinafter "Law Reform Committee"), Annex 2 (results of a 1978 study carried out by the Family Division Registry).

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Is the Privilege Justified?

Despite the negative effects of section 9 just mentioned, it is at least arguable that its benefits outweigh its detriments: hence the retention of (essentially) the same formality rule ever since the Statute of Frauds 1677. Therefore, if we have a prima facie justifiable rule imposing a requirement of form, logically there must be something different about the situations covered by section 11—either some greater detriment, or some diminished benefit—which explains why we are exempting these particular wills from the formality rules which would otherwise apply to them.

First, is it the case that the benefits of section 9 (as outlined above) are not needed in these cases? This seems doubtful. Taking the evidentiary benefits as an illustration, there are numerous examples of privileged wills in the law reports which are very poorly evidenced indeed. For instance, in *Re Jones*,[27] the entirety of the oral will was: "If I don't make it, make sure Anne gets all my stuff". Apart from anything else, this is ambiguous: thus, does it refer only to the deceased's personal effects which he had with him in barracks, or to the whole of the deceased's personal (and real?) estate? Such ambiguity also makes one wish that the cautionary benefits of formality had been present, since it suggests that the testamentary disposition is ill-thought-out. What if the deceased had had elderly parents whom he might, on reflection, have wished to assist with a gift of part of his estate? Nor can it be said that a legal formality rule is unnecessary here because this particular group of testators would all act in a sufficiently formal manner regardless of the legal requirements. Although several of the cases indicate some attempt at formality, such as writing,[28] or attestation by one witness,[29] there is no consistent pattern of formality, and some wills are wholly informal.

Is it, then, the case that the detriments of the formality requirement are greater for privileged testators than for the common-or-garden variety? Looking first at the costs of complying with section 9, there is no immediately obvious reason why observing testamentary formalities should be any more troublesome or expensive in these cases. However, this assertion may be criticised for ignoring the effect of the especially high risk of death which is associated with the occupations of soldier or sailor. Although in the abstract making a will seems no more costly for a soldier or sailor than for a normal citizen, the difficulty and delay caused by formality may be, for them, a greater burden, given that they run a much higher risk of early and

[27] [1981] Fam. 7.
[28] *Re Anderson* [1916] P. 49.
[29] *Re MacGillivray* [1946] 2 All E.R. 301.

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sudden death than the majority of the population.[30] Since they are more likely to die without warning, they are also more likely to die without the opportunity of revising and formalising the arrangements which they have made concerning the disposition of their property on death. The case law seems to recognise this increased burden: hence the extension of the privilege to those who are under orders to proceed to the battlefront in the immediate future, or to those who may be sent to the battlefront with little or no notice. The counter-argument—that people facing considerable risks should make their will before entering the risk-area[31]—seems unrealistic. Must the soldier ensure, before each tour of duty, that his will is exactly right? Individuals' circumstances change (they marry; acquire particular property; have children; develop new interests—say, in a particular charitable cause), and they cannot always provide for such future changes in an earlier (formal) will.

Turning now to the detriment caused by the failure of informal transactions under section 9, might this be significantly greater in cases of privileged wills? One possible argument of this sort (which builds upon that just made) is that it would be unjust to require compliance with formality for this particular group of testators, because such compliance would be impossible, or at least immensely difficult, for them to achieve. In particular, the case law suggests that privileged testators may not have *access* to the necessary legal advice (regardless of whether they can afford to pay for it): thus, it is frequently stated that the Roman law rationale for the privilege (that such persons are *inops consilii*) is also the foundation for the English rule.[32] This explanation seems historically accurate, at least: at the date of the enactment of section 23 of the Statute of Frauds 1677, which was the forerunner of section 11, the occupations of soldier (on actual military service) and sailor (at sea) would involve long separation from English society and therefore from legal advice.[33] Further, there are also more recent cases where legal advice could not have been sought, and where the privileged will could not have been completed formally for lack of time and materials: for example, *Re Jones*,[34] (soldier fatally wounded by a terrorist attack dying in ambulance) or *Gattward* v. *Knee*[35] (situation of siege).

One final argument is that, quite apart from the injustice caused

[30] R.E. Megarry, "'Actual Military Service' and Soldiers' Privileged Wills" (1941) 57 L.Q.R. 481 (hereinafter "Megarry"), 485–487.
[31] S.N.L. Palk, "Informal Wills: From Soldiers to Citizens" (1976) 5 Adel. L. Rev. 382, 393; A.G. Lang, "Privileged Will—A Dangerous Anachronism?" (1985) 8 U. Tasm. L. Rev. 166 (hereinafter "Lang"), 178.
[32] *In bonis Hiscock* [1901] P. 78, 80; *Re Spark* [1941] P. 115, 116–117; *Re Anderson* [1944] P. 1, 3–4.
[33] Lang, at pp. 176–177.
[34] [1981] Fam. 7.
[35] [1902] P. 99.

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thereby, the failure of privileged wills for informality might be detrimental to other policy aims. It could be argued that it is important for morale to allow members of the armed forces, who are acutely aware of the risk of their death, to make provision for that event in whatever manner best suits them.[36] Since the imposition of strict formality requirements as in section 9 would thwart this aim of maintaining morale, the exception in section 11 is necessary. This explanation would fit neatly with a number of judicial statements, which seem to favour upholding the testamentary dispositions of military personnel wherever possible.[37]

So, we have three possible arguments which tend to suggest that testamentary formalities would cause greater detriment in relation to this group of testators: first, that the increased risk of death makes testamentary formality requirements in practice more burdensome and costly for these testators; secondly, that it is impossible or impracticable for them to comply with formality requirements; and thirdly, that the policy aim of maintaining morale is inimical to strict formality requirements. These three arguments are closely interrelated: thus, the high risk of sudden death makes situations of impossibility more likely to occur,[38] and explains *why* morale needs to be maintained by the relaxation of testamentary formalities.

Unfortunately, however, there are problems with all of these arguments. For a start, the statutory exception in its modern form is not restricted to cases of impossibility of compliance. The judiciary have expressly rejected the notion that the privilege is limited to those who are in fact *inops consilii*,[39] and, as far as service personnel are concerned, the efforts of the military authorities mean that the average soldier is probably better advised as to the legal formalities required for a will than the majority of the population (*and* he obtains this advice free of charge).[40] In any case, a modern soldier in barracks in England or a sailor on extended shore leave—both of whom qualify for the privilege—arguably have no significantly greater difficulty in obtaining the advice, materials and assistance needed to make a formal will than does an ordinary civilian. Weiss argues, contrary to this, that despite the apparent opportunity to make a formal will, the lack of psychological energy and attention when a soldier is in rigorous preparatory training means that it is unreasonable to expect completion of testamentary formalities.[41]

[36] T. Weiss, "The Formalities of Testamentary Execution by Service Personnel" (1947) 33 Iowa L. Rev. 48 (hereinafter "Weiss"), 48, 53.
[37] *e.g., Re Wingham* [1949] P. 187, 196.
[38] As in *Re Jones* [1981] Fam. 7 (fatally wounded soldier making oral will in ambulance).
[39] See case references cited at note 32 above.
[40] A.L.G. Goodhart (1949) 65 L.Q.R. 6, 7; G. Cole, "How Active is Actual Military Service?" [1982] Conv. 185 (hereinafter "Cole"), 189; though note Weiss, at pp. 82–83.
[41] Weiss, at pp. 83–84.

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However, this argument will not cover all cases currently included within the privilege, and in particular has no application to non-military personnel (such as merchant seamen).

Similarly, the argument based on the policy of maintaining morale does not sit comfortably with two key facts: first, that marine military personnel have the benefit of the privilege during peacetime, when maintenance of morale does not seem especially crucial; and, secondly, that not all military personnel have the benefit of the privilege even during wartime. In addition, an argument which focuses on the need to bolster the *esprit de corps* of troops actively engaged in warfare does not explain the particular extension of the privilege to sailors in the Merchant Navy, who are not directly involved in military manoeuvres. From a historical perspective, the socially beneficial activities of the Merchant Navy in the 17th century, when they played a significant part in expanding trade and bringing vital supplies into the country (and its colonies), might explain why they were classed alongside the army and Royal Navy in this way.[42] However, air transport of supplies is at least as important as carriage by sea in today's society, so that it is difficult to argue that there is an especial need to boost the morale of merchant sailors in order to ensure the continuance of their socially beneficial activities.

The Problem of Inconsistency with Modern Social Conditions

A further problem is that all three arguments raise serious problems of inconsistency. In the 1670s, the occupations of soldier and sailor may well have been the two most risky professions one could enter (professional police and fire fighters did not exist, for example, and deep mining was not technologically possible). However, today other persons engaged in high-risk occupations, such as fire fighters or police, face a sufficiently increased risk of death to put them on a par with soldiers and sailors.[43] Similarly, such persons may equally need to make a will in a situation where compliance with section 9 is impossible or impracticable; and it seems equally important to maintain the morale of such persons, since they undertake these high-risk occupations to the benefit of society as a whole.

Indeed, there is an even more fundamental difficulty of consistency as regards the "risk of sudden death" argument. If the comparison is made with the norm of civilians during a state of peace, it could be argued that, given the characteristics of modern warfare (as demonstrated in all wars from the Second World War onwards), *all*

[42] Lang, at p. 176.
[43] *Ibid.*, at p. 178.

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inhabitants of a belligerent state suffering enemy attacks during wartime face this risk and so should be entitled to the privilege.[44] Against this may be raised the argument that the norm of risk must be determined by what is normal for the majority of the population in any given situation.[45] However, this is arguably unfair to civilians during wartime, who are at much greater risk of sudden and unexpected death than during peacetime, yet must ensure that they meet peacetime standards when they seek to make testamentary dispositions.

Conclusion: Abolition, Retention or Reform?

These difficulties of consistency mean that, if we were to conclude that the balance of the arguments canvassed above was, in fact, in favour of informality, a redrafting of the privilege would be required such as might produce a substantial increase in the number of persons able to claim the privilege. If this is thought unacceptable,[46] then the call made by many writers for the abolition of the privilege as an unjustifiable anachronism may become more attractive.[47] This may not be a great loss: it appears that the privilege is now rarely invoked,[48] which fact suggests that privileged testators are having no significant problems with the ordinary section 9 formalities (though it may partly reflect the extended period of peace enjoyed in mainland Britain since 1945, which removes the privilege from many military testators).

However, it is interesting to note that the various law reform bodies which have considered the question of abolition thus far have favoured retention without any reform or redrafting.[49] Why is this? The argument given by the most recent report (that of the Law Reform Committee) was that the authorities most closely concerned are still able to envisage extreme cases in which it would be desirable to retain some sort of exemption. Since the evidence presented by the said authorities is not published alongside the recommendation for retention, we can only conjecture what these "extreme cases" might be, but, in any case, this argument is unconvincing. It seems quite possible to envisage similarly extreme cases involving civilians—

[44] *Re Spark* [1941] P. 115, 117; M. Davey, "The Making and Revocation of Wills" [1980] Conv. 64 (hereinafter "Davey"), 71.
[45] Megarry, at p. 487.
[46] See *In bonis Gibson* [1941] 2 All E.R. 91, 92; Megarry, at p. 488; D.C. Potter, "Soldiers' Wills" (1948) 12 M.L.R. 183, 187.
[47] See, *e.g.,* Davey, at p. 72; Lang, at pp. 179–180; Cole, at p. 190; P. Bailey, "A Soldier's Privileged Will in Northern Ireland" (1982) 33 N.I.L.Q. 53, 58–59.
[48] See Law Reform Committee, Annex 2, section 5.
[49] Real Property Commissioners, at p. 22; Law Reform Committee, at para. 2.21.

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particularly those in high-risk occupations, as noted above—where we might be glad of an exception to the rigours of section 9, but the legislation does not provide one. Of course, it must be acknowledged that section 11 does not at present appear to cause any significant practical problems, and that therefore there is little impetus for rationalisation. Nonetheless, it seems undeniable that in its present form, the privilege creates theoretically unacceptable inconsistencies, and that, consequently, mere retention does not appear to be a desirable or even viable option.

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