SUPREME COURT BILL
Notes on Clauses

Clause 122 : Place for Deposit of Original Wills and Other Documents

Clause 122, which re-enacts with minor amendments section 170 of the 1925 Act (as substituted by section 11 of the Administration of Justice Act 1928 and modified by section 8(2) of the Public Records Act 1958), provides for the deposit, preservation and availability for inspection of original wills and other documents under the control of the High Court in the Principal Registry or district probate registries.

2. The "original wills and other documents" referred to in the clause are the wills and documents relating to the estates of deceased persons, in contrast to wills of living persons dealt with in clause 124.

3. The wills and documents referred to in the clause are public records, being "records of or held in any department of the Supreme Court" (Public Records Act 1958, First Schedule, para.4(1)(a)). They are therefore subject to the provisions of the Public Records Acts, notably those relating to the selection of records for permanent preservation and the destruction or disposal of those not selected (1958, s.3). The clause ensures -

(1) that the wills, etc. are deposited, as the Lord Chancellor* may direct (e.g. in the Principal Registry, district probate registries or county record offices) rather than automatically in the Public Record Office;

/(2) that.....

*The power of direction was transferred from the President to the Lord Chancellor by s.8(2) of the Public Records Act 1958, which the clause renders spent and which is repealed in Schedule 7.

(2) that wills, etc. are deposited when received in the Registry, and not after the period of 30 years specified in section 3(4) of the 1958 Act; and

(3) that the wills, etc. are (subject to the control of the High Court and to probate rules - see para.4 below) open to inspection as soon as deposited and not 30 years after their creation or some other period prescribed under section 5(1) of the 1958 Act.

Although the clause makes provision for deposit and preservation, it does not appear to impose an obligation to preserve wills indefinitely:-

"Original wills are no different from other documents which there is a statutory duty to "preserve", see s.170 of the Supreme Court of Judicature Act 1925 as replaced by section 11 of the Administration of Justice Act 1928, and compare s.256 of the Merchant Shipping Act 1894. The duty to "preserve" is subject to the overriding power to destroy those which are not needed for permanent preservation, see s.3(6) of the Public Records Act 1958". (Para.39 of the Report of the Committee on Legal Records, Cmnd.3084).

4. "Subject to the control of the High Court and to probate rules" The availability of wills for inspection has long been subject to the control of the High Court, and although the extent of this control is uncertain, it is thought to justify, for example, the practice of sealing up royal wills (see Tristam & Coote, 25th Edn. at p.141 for the practice and see para.5 below). The reference to probate rules (carried over from s.170) ensures that appropriate restrictions on inspection can be prescribed by rule should the need arise: at present the rules only deal with the taking of copies (r.58, and see note on clause 123).

NOT TO BE READ OUT

5. Note on royal wills. The court has no jurisdiction to make a grant to the estate of a deceased British Sovereign; and the will of the Sovereign's private estate does not need

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NOT TO BE READ OUT

publication (Crown Private Estates Act, 1862, s.5). But it is customary to seal up the wills of other members of the royal family and for the grant to be made without a copy of the will. Sealing up is authorised by order of the President on application, and the will can thereafter be opened only on his direction. For the position regarding copies, see note on clause 123.

Clause 123 : Copies of wills and grants

Clause 123, which re-enacts with minor amendments section 171 of the 1925 Act as amended by AJA 1928 and AJA 1970, enables copies of wills and grants open to inspection under clause 122 to be obtained on payment of a fee.

2. The clause provides that an office copy, or a sealed and certified copy, of any will or part of a will open to inspection or of any grant may, on payment of the prescribed fee, be obtained from the relevant registry (para.(a)) or in certain circumstances from the Principal Registry (paras. (b) and (c)).

3. The reference in section 171 to the issue of official certificates of grants of administration is not reproduced, because in practice only office copies or sealed and certified copies of grants are provided; and "office copy" is substituted for "official copy" to accord with modern usage. In practice office copies are sealed photographic copies (NCPR, r.58(1)), which are receivable in evidence without further proof (1925, s.174(2), and see now clause 130). Sealed and certified copies (which are similarly receivable) are obtainable where a photographic copy would be inadequate, and are issued after examination against the original (NCPR, r.58(2)).

4. "Open to inspection" These words which are new, fill an apparent gap in section 171 which appears to give an unrestricted

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right to office copies, etc. It is thought that such a right cannot exist in respect of documents not open to inspection (such as the wills of living persons deposited under clause 124, which are sealed up during the testator's lifetime). The clause therefore restricts the right to cases where the document is open to inspection under clause 122.

[Not to be read out. This point is of particular significance in relation to Royal wills which in practice are frequently sealed up on the order of the President (see notes on clause 122), insofar as the purpose of obtaining such an order is to prevent disclosure of the contents rather than to protect them against theft or damage.(The question whether the "control of the High Court" (see clause 122) may in law be exercised to render a will unavailable for inspection remains unanswered and neither this clause nor clause 122 seeks to answer it)].

LCO 65/262
Extract 1

Mr Legge to see

I informed Mr President accordingly.
DNS
23/6.

Sir Denis

Lord Tryon rang to say that there is no need to seal Lord Milford Haven's Will. The Buckingham Palace lawyers consider that except in special circumstances (for example a will containing something which should not be made public) "fringe"members of the Royal Family need not have their wills sealed. This should only be for H.R.H.s.

NAH.

23rd June 1970.

In general I agree. Draft on the basis of Pres[t]'s alternative (2) only. If (3) were adopted in any form, Ministerial resp[y] wd be constitutionally requisite. Therefore it sh[d] be avoided. Moreover the paramount point is that sealing sh[d] not be automatic but sh[d] depend on application being made. Best of all, it wd be preferable to leave the present practice unaltered and take alternative (2) only as a way to be ready quite. Please dft.

H

LORD CHANCELLOR

10 OCT 1970

Wills of members of the Royal Family

I attach a letter from the President (the receipt of which has been acknowledged) about the practice of sealing up wills of members of the Royal Family so that they are not open to inspection by the public under section 170 of the Judicature Act. In the memorandum attached to his letter the President makes recommendations -

(a) as to where to draw the line in deciding to which members of the Royal Family the rule should apply; and

(b) that Ministers should take constitutional responsibility for the decision.

I will deal with these recommendations in turn.

2. At flag X on the attached file you will find a useful paper on Royal Wills which was sent last June by Mr. Registrar Bayne-Powell to Dobson at a time when there was a question of application being made to seal up the will of the late Marquis of Milford Haven. In the end Lady Milford Haven decided to apply for an ordinary grant of probate in common form and not for her husband's will to be sealed up. The relevant part of the paper dealing

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with the sealing-up of Royal wills begins on page 3 and on the following pages you will find the law, in so far as there is any, and the practice explained.

3. In his memorandum the President suggests, but rejects, the idea of having a rule which would require the sealing-up of the wills of persons to whom the Royal Marriages Act 1772 applies, i.e. the legitimate descendants of George II, who died in 1760. What is said about this proposal on pages 5 and 6 of the paper at flag X shows that the President is quite right in rejecting the idea of applying the rule to persons to whom the Act of 1772 applies.

4. Although I do not consider it in the least necessary to formulate any rule and, as I shall show, I should be against the proposal that Ministers should take any responsibility in the matter, I personally think the President's proposal that the rule should apply automatically to members of the Royal Family who bore the title of H.R.H. (or the Consort of a Sovereign who did not bear that title) would provide a convenient rough-and-ready rule for the President to follow. It has apparently been the practice (since this modern practice was invented) to seal up the wills of members of the Royal Family bearing the title H.R.H.

5. Mentioned in the list at Annexure A (flag Y) are a number of members of the Royal Family who were not H.R.H., but whose wills were sealed. They were -

(a) the Duke of Fife, who married Princess Louise, daughter of Edward VII;

(b) Prince Maurice of Battenburg and Lord Leopold Mountbatten. They were sons of H.R.H. Princess Beatrice and were entitled to

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use the title H.H., though Lord Leopold relinquished the title on assuming the surname of Mountbatten;

(c) Princess Maud, first wife of the Earl of Southesk. She was H.H. and not H.R.H. She was a daughter of H.R.H. Princess Louise, Duchess of Fife and a granddaughter of Edward VII.

6. There are at present a number of members of the Royal Family who are as closely related to The Queen as were those whom I have just mentioned to her predecessors whose wills would not automatically be sealed up under the H.R.H. rule, e.g. the Earl of Harewood and Mr. Gerald Lascelles and some of the younger members of the Royal Family. Of course, if the President's third proposal were adopted that the practice should apply to the wills of any of Her Majesty's kin whose wills She wished to be sealed, that would cater for any of the cases to which the H.R.H. rule would not apply. However, in these days when the sealing-up of a Royal will is likely to attract far more publicity than it formerly did and possibly lead to embarrassing questions in Parliament, I imagine that The Queen would be advised to use very sparingly Her power to ask that any Royal will not covered by the H.R.H. rule should be sealed up. Indeed, it may well be that it would not in future be necessary to extend the practice beyond the H.R.H. category.

7. The Duchess of Windsor might provide a rather awkward problem if she died leaving an English will. The fact that she is not H.R.H. has been a bone of contention and this might be revived; but I dare say that there would be

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no trouble unless she died before the Duke and left an English will which he requested should be sealed.

8. I have been able to find no authority whatever for the sealing-up of Royal wills, apart from the rather slender authority in section 170 of the Judicature Act which, as amended by ~~section 11 of~~ the Public Records Act 1958, reads as follows:

> "All original wills and other documents which are under the control of the High Court either in the principal probate registry, or in any district probate registry, shall be deposited and preserved in such places as the President of the Probate Division, with the consent of the Lord Chancellor, may direct, and any wills or other documents so deposited shall, subject to the control of the High Court and the provisions of probate rules and orders, be open to inspection."

I have discovered nothing in the text-books apart from what the President has quoted in his memorandum from Tristram and Coote's Probate Practice and I believe that the authority for the practice really depends on the words in section 170 of the Judicature Act which I have underlined. This is the view of those in the Probate Registry who have expressed a view on the subject.

9. The President has recommended that Ministers should take constitutional responsibility for the decision about whose wills should be sealed up; but section 170 requires that wills "shall, subject to the control of the High Court, and the provisions of the probate rules and orders, be open to inspection." This obviously means open to

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public inspection and the sole possible justification (failing other authority) for denying public inspection is that they are subject to the control of the High Court and that the High Court has in particular instances ordered that a will shall not be open to inspection.

10. It seems to me that if Ministers were, as the President suggests, to take responsibility for any decision to seal up a will or, indeed, for any general rule to be applied, they would not have a leg to stand on and that this would be more likely to cause The Queen embarrassment than to save Her from embarrassment.

11. So far as we are aware the present practice has not caused the President any great trouble. It is true that in modern conditions and with more and more publicity (and less and less privacy) it is liable to cause trouble; but trouble cannot be avoided and is more likely to be aggravated by Ministers purporting to accept responsibility and it would be far better to do nothing. Having said that, I would add that I think the H.R.H. rule proposed by the President (coupled with the Sovereign's freedom to ask for sealing-up of wills in exceptional cases) would be a convenient and sensible rough-and-ready rule for the President to follow.

12. If the Lord Chancellor agrees with this, I will, if he wishes, draft as tactful a reply as I can.

H. B-R.

13th October 1970

I agree with Boggis-Rolfe. These cases do not arise very often; when they do, they are, like the elephant, more readily recognised than defined; and I think that to attempt to lay down rules would do more harm than good. I agree that it would be wrong to bring Ministers into this.

DHS 14/10/70.