Witnessing an Execution:
What Does s1 of the Law of Property (Miscellaneous Provisions) Act 1989 Require Today?

Oliver Radley-Gardner

Cecily Crampin

1. There have been two recent thought-provoking articles on whether documents which require a signature to be witnessed (that is, wills and deeds) can be witnessed either "virtually" in real-time (with attestation[1] by the witness on a separate counterpart simultaneously, with the execution being observed online) or after the event (with the execution being witnessed online, and the document then being posted to and subsequently attested by the witness).

2. The two pieces are:
    a. Tricia Hemans, "Witnessing Deeds in the Age of Social Distancing",[2] and
    b. Charlotte John, "Will making and Coronavirus – Can Wills Be Remotely Witnessed?"[3]

3. Both pieces thoroughly review the arguments under section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 9 of the Wills Act 1837 respectively, and we suggest going to those two sources first. This piece is intended to provide arguments in addition to those advanced by those authors.

4. We are also extremely grateful to Wayne Clark, who drew to our attention *Wright v Wakeford* [1803-13] All E.R. Rep. 589, 591 and 128 E.R. 310, 315; *Netglory Pty Ltd v Caratti [2013] WASC 364* at [148] to [169]; and *Wood v Commercial First Business Limited (in Liquidation)* [2019] EWHC 2205 (Ch).

5. Section 1 of the 1989 Act says so far as material:

> *(2) An instrument shall not be a deed unless—*

[1] The best place where attestation is discussed in modern literature is M Dray, "Deeds speak louder than words. Attesting time for deeds?" [2013] Conv. 298; see too, for an older source looking at English cases, PH Winston, "Attestation in the Presence of the Testator" (1915) 2 Virginia Law Review 403, which is (incredibly) available online at: https://www.jstor.org/stable/pdf/1063514.pdf.

[2] https://www.falcon-chambers.com/publications/articles/witnessing-deeds-in-the-age-of-social-distancing

[3] http://equitysdarling.co.uk/2020/03/27/will-making-and-coronavirus-can-wills-be-remotely-witnessed/

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and
(b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties.
(3) An instrument is validly executed as a deed by an individual if, and only if—
(a) it is signed—
(i) by him in the presence of a witness who attests the signature; or
(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature;

6. A signature must therefore be "witnessed" and it must also be "attested". In other words, the signature needs to be "seen" by the witness (*quaere* whether seeing is enough, or whether I have to be there to see it) and it must be attested (there has to be a signature confirming it was seen, *quaere* whether that signature must be at the same time and in the same room as the execution). We will discuss whether it is possible to comply with section 1 virtually, below.

"Always Speaking" Statutes[4]

7. At the heart of this conundrum lies a principle of statutory interpretation that we private lawyers do not always have regard to. Some statutes are "always speaking". What does that mean?

8. One view of statutes is that they are a time capsule. They embody the intention of Parliament at the time and in the circumstances that prevailed when they were passed (or, more accurately, the day after they were passed): *The Longford* (1889) 14 PD 34, 36. To put in in non-approved Latin: *contemporanea expositio est optima et fortissima in lege*. The approach is also sometimes referred to as "originalism".

9. There is a different view, which is that some statutes at least must be construed against the background and circumstances of the time at which they are applied, not the time at which they are passed. Constitutional law enthusiasts will be familiar with this process of construction as "the living instrument" or "living tree" approach to interpretation, particularly prevalent (though controversial) in the United States of America and Canada.

10. However it has also been applied in this jurisdiction to statutes in appropriate cases, and is accepted as a conventional canon of construction of long standing:

[4] This approach is much more controversial when applied to contracts, though it has been mooted: see Lord Grabiner, "The iterative process of contractual interpretation" 128 (2012) L.Q.R. 41.

a. In *Attorney General v Edison Telephone Co of London* (1880) 6 QBD 244, the Court had to consider the Telegraph Act 1869. Under this Act, the Postmaster-General enjoyed the exclusive right of “transmitting telegrams”, defined as messages transmitted by telegraph. A telegraph was defined as "*any apparatus for transmitting messages or other communications by means of electric signals*". In 1869, only morse code messaging was known as a transmitting technology. When the Act was passed, Parliament was blissfully unaware of the labours of Alexander Graham Bell. When the telephone caught on, it was argued that this was outside the scope of the 1869 Act, as the telephone communicated by transmitting voices, not clicks. This was given short shrift: "[…] absurd consequences would follow if the nature and extent of those powers and duties [under the Act] were made dependent upon the means employed for the purpose of giving the information": p 255. Statutory purposes are not frustrated by human inventiveness.

b. The second illustration is *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, the House of Lords was required to consider how the implied promises in the Sale of Goods Act 1893, devised at a time when contracts were simpler, could be applied to more complex modern sale of goods arrangements. Lord Diplock did not think modern contracts ought to be held to Victorian standards stating at p 501 E-H:

> "Unless the Sale of Goods Act 1893 is to be allowed to fossilise the law and to restrict the freedom of choice of parties to contracts for the sale of goods to make agreements which take account of advances in technology and changes in the way in which business is carried on today, the provisions set out in the various sections and subsections of the code ought not to be construed so narrowly as to force upon parties to contracts for the sale of goods promises and consequences different from what they must reasonably have intended. They should be treated rather as illustrations of the application to simple types of contract of general principles for ascertaining the common intention of the parties as to their mutual promises and their consequences, which ought to be applied by analogy in cases arising out of contracts which do not appear to have been within the immediate contemplation of the draftsman of the Act in 1893."

c. A third pool of cases relates to the Offences Against the Person Act 1861. The Victorian law maker conceived of harm in terms of physical harm. However developments in psychiatry meant that it became possible scientifically to identify psychiatric injury as well, and the Courts have (perhaps most significantly, meaning that it involved an expansion of the scope of a criminal offence) repeatedly held that the 1861 Act can extend to such harm, undreamt of by Parliament when passing the Act: *R v Chan-Fook* [1994] 1 WLR 689; *R v Burstow* [1997] 1 Cr App R 144, *R v Burstow* sub nom *R v Ireland* [1998] AC 147.

d. The same approach was taken in a fourth illustration, *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 292 and 295-6 (was a press conference a "public meeting" in the law of defamation, that phrase deriving from a statute from 1888).

e. In *Victor Chandler International Ltd v Customs and Excise Commissioners* [2000] 1 WLR 1296, the Court of Appeal was concerned with the prohibition on advertisements by off-shore bookmakers. Under section 9 of the Betting and Gaming Duties Act 1981 prevented advertisements, by which (at the time, under what was then a relatively recent statute) was meant documentary (paper) advertisement. However by the time of this case, it was possible to advertise on Teletext,[5] which became operative on commercial channels allowing advertising in 1993. The appellant was an off-shore bookmaker that wanted to advertise via Teletext and sought a declaration that this was acceptable. The Court of Appeal said it was not – this form of advertising was functionally the same as paper advertising and fell foul of the prohibition, even if the lawmaker in 1981 could not dream of the futuristic world of Teletext advertising (though for completeness it is to be noted that the BBC Ceefax service was in existence from 1974).

f. Closer to home for the authors, we know from *Fitzpatrick v Sterling Housing Association* [1999] 3 W.L.R. 1113 that the term "family" in the Rent Act 1977 (with the term first used in 1920) is not to be confined to heterosexual families, and reflects modern understanding of what comprises a family unit. Lord Nicholls explained:

> *"A statute must necessarily be interpreted having regard to the state of affairs existing when it was enacted. It is a fair presumption that Parliament's intention was directed at that state of affairs. When circumstances change, a court has to consider whether they fall within the parliamentary intention. They may do so if there can be detected a clear purpose in the legislation which can only be fulfilled if an extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it was expressed."*

11. So, when is it permissible to apply a statute enacted when the internet was unheard of to the brave new world of Zoom, FaceTime and Skype?

12. In *Burstow* (one of the criminal law cases referred to above), the House of Lords held (at page 158) that:

> "*In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply*

[5] Younger readers are invited to google this term.

the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the 'always speaking' variety: see Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800 for an example of an 'always speaking' construction in the House of Lords."

13. In his dissent in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 Lord Wilberforce states as follows at p 822:

> "*In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot be asking the question 'What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?' attempt themselves to supply the answer, if the answer is not be found in the terms of the Act itself.*"

14. That dissent was approved subsequently in *Fitzpatrick* and, again in *Regina v. Secretary of State for Health (Respondent) ex parte Quintavalle (on behalf of Prof-Life Alliance)* [2003] 2 A.C. 687 (whether a new genetic testing technique pre-embryo implantation was capable of being authorised by the Human Fertilisation and Embryology Act 1990). The House of Lords also expressed approval of the dictum from *Burstow*, above, that modern drafting techniques mean that statutes will generally always be "always speaking". In *Quintavalle*, the House of Lords went on to say that:

> *"[i]n order to give effect to a plain parliamentary purpose a statute may sometimes be held to cover a scientific development not known when the statute was passed. Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation, this is a benign principle designed to achieve the wishes of Parliament."*

Back to Section 1

15. As was pointed out by Tricia Hemans (in relation to section 1 of the 1989 Act) and Charlotte John (in relation to section 7 of the 1837 Act), the effectiveness of virtual witnessing is doubtful on the cases as they stand. Those doubts are shared by the Law Commission. In their Report on Electronic Execution[6] (Law Com 386) at paragraphs 5.21 and following, endorsing the view of the law expressed in the underlying Consultation Paper (Law Com CP 237),[7] that the current law is that: "the signature of the witness must also be affixed at the time of execution" (CP 237, at para.4.53) with a footnote (70) citing *Wright v Wakeford* [1803-13] All E.R. Rep. 589, 591 and 128 E.R. 310, 315; see also *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [148] to [169] (attestation must be at the same time as witnessing).

16. However, matters may not be as simple as that. First, we are not aware of the Courts considering, in this specific context, the line of cases concerning an "always speaking" approach to section 1 (enacted before the technologies we now have). Secondly, in *Wood v Commercial First Business Limited (in Liquidation)* [2019] EWHC 2205 (Ch) a Deputy Judge of the High Court approached section 1(3) of the 1989 Act as follows (at paras 41, 45 and 47-48):

> "*[t]he proper interpretation is that while there is a requirement for the person executing the deed to sign in the presence of a witness, it is not a requirement for the witness to sign in the presence of the person executing the deed (or indeed of anybody else).*"

17. The correctness of this decision is however doubted by Emmet on Title (20.015), pointing out that the authorities considered above to the contrary were not considered by the Court, and secondly indicating that what the witness must do is "attest" and not merely "sign". Attestation is not defined in the 1989 Act, but the Law Commission said in its report underlying section 1 that:[8]

> *"'Attestation' involves more than simply witnessing the execution of the deed; it also includes the subscription of the witness' signature following a statement (attestation clause) that the document was signed or executed in his presence.*"

18. The case cited for that proposition is *Re Selby-Bigge* [1950] 1 All E.R. 1009, though as Martin Dray has convincingly demonstrated in his article in the Conveyancer (Fn 1 above), things are

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[6] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/09/Electronic-Execution-Report.pdf

[7] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/08/Electronic-execution-of-documents-consultation-paper.pdf

[8] *Law Commission, Deeds and Escrows (HMSO, 1987), Law Com. No.163.*

not as simple as that and the older cases do not speak in one voice as to what is required, so that the law may be rather less clear-cut than is set out in Emmet.

19. There is an interesting decision of the Court of Appeal, *Shah v Shah* [2002] Q.B. 35[9], which suggests some arguments for virtual witnessing.

20. In that case a deed was signed by the principal party but then delivered to his accountant in another room who attested it later. Was the deed binding or not? All parties were held to have intended the deed to have effect; its delivery as a deed showed that intention. Thus the argument for invalidity on formality grounds was a wholly unmeritorious attempt to wriggle off the hook. The delivery of the deed was a representation of fact that it was a deed, and the basis for an estoppel preventing the invalidity point being taken.

21. In relation to a submission that estoppel could not get around the statutory formalities, Pill LJ analysed the Law Commission documents and came to the following view:

> "*[30] I bear in mind the clarity of the language of section 1(2) and (3) and also that the requirement for attestation is integral to the requirement for signature in that the validity of the signature is stipulated to depend on the presence of the attesting witness. I also accept that attestation has a purpose in that it limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed. The beneficial effect of the requirement for attestation of the signature in the manner specified in the statute is not in question. It gives some, but not complete, protection to other parties to the deed who can have more confidence in the genuineness of the signature by reason of the attestation. It gives some, but not complete, protection to a potential signatory who may be under a disability, either permanent or temporary. A person may aver in opposition to his own deed that he was induced to execute it by fraud, misrepresentation or (as was unsuccessfully alleged in the present case) duress and the attestation requirement is a safeguard.*
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> *[31] I have however come to the conclusion that there was no statutory intention to exclude the operation of an estoppel in all circumstances or in circumstances such as the present. The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature. I can detect no social policy which requires the person attesting the signature to be present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature. Failure to comply with the additional formality of attestation should not in itself prevent a party into whose possession an apparently valid deed has come from alleging that the signatory should not be permitted to rely*

[9] *Shah* was distinguished in *Bank of Scotland Plc v Waugh* [2014] EWHC 2117 (Ch) and Re *Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch). In both those cases, unlike in *Shah*, it was obvious that s1 had not been complied with. In *Waugh* there was no witness signature, in *Gleeds*, no signature to witness. Both emphasise that what saved the deed in *Shah* was the appearance of compliance in line with the Act. A third case, *Actionstrength Limited v International Glass Engineering* [2003] UKHL 17, is about an attempt to grant a guarantee without signed writing contrary to the Statute of Frauds 1677.

on the absence of attestation in his presence. It should not permit a person to escape the consequences of an apparently valid deed he has signed, representing that he has done so in the presence of an attesting witness, merely by claiming that in fact the attesting witness was not present at the time of signature. The fact that the requirements are partly for the protection of the signatory makes it less likely that Parliament intended that the need for them could in all circumstances be used to defeat the claim of another party.

[32] Having regard to the purposes for which deeds are used and indeed in some cases required, and the long term obligations which deeds will often create, there are policy reasons for not permitting a party to escape his obligations under the deed by reason of a defect, however minor, in the way his signature was attested. The possible adverse consequences if a signatory could, months or years later, disclaim liability upon a purported deed, which he had signed and delivered, on the mere ground that his signature had not been attested in his presence, are obvious. The lack of proper attestation will be peculiarly within the knowledge of the signatory and, as Sir Christopher Slade observed in the course of argument, will often not be within the knowledge of the other parties.

[31] In this case the document was described as a deed and was signed. A witness, to whom the third and fourth defendants were well known, provided a form of attestation shortly afterwards and the only failure was that he did so without being in the presence of the third and fourth defendants when they signed."

22. We are of the view that the above passage provides two answers to the question of virtual witnessing and virtual attestation. First, it appears to us that the executor of a deed who has used virtual witnessing and attestation may find themselves at the wrong end of an estoppel argument just as much as the Appellant Mr Shah did. But secondly, it appears to us that the lack of policy detected in *Shah* so as to prohibit later or remote attestation also affords an opening to argue that section 1(3) is an "always speaking" statute. It is now possible to be "present" via a screen, and to execute a document and witness and attest its execution in real time from the other end of a fibre optic cable. If all attestation requires is signing without presence – which Martin Dray has shown has some support in the older cases – then surely virtual witnessing and attestation is acceptable.

23. However it must surely be arguable that even if the requirements of witnessing and attestation are taken at their highest – that is, as requiring both presence *and* simultaneous signing – then this can be replicated by the use of virtual witnessing and remote attestation. If, as the Court of Appeal noted, there is no discoverable policy prohibiting later attestation *in absentia*, and (as Martin Dray has observed) no clear statutory definition ousting the general "always speaking" approach, then there must be a good chance that the Court will consider that this is an acceptable form of compliance, given that it is functionally equivalent to being in the room, pen in hand and eyes locked on the executing party. To that extent, the cases identified by Charlotte John

under section 9 of the 1837 Act that hold that witnessing through a window is enough (e.g. *Casson v Dade* (1781) Bro C.C. 99, 28 E.R. 1010) also provide support and comfort.

24. If I can witness and attest in real time through a carriage window, why not via Microsoft Windows?