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Why Video Witnessing Is Valid

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There is a broad consensus within the legal profession that section 9 Wills Act 1837 (the 1837 Act) does not permit the execution of wills online and that legislation is required to address this shortcoming. Both views are misconceived because they are based on an assumption that is a *non sequitur*. They both assume (mistakenly) that section 9 requires the testamentary witnesses to be physically present[i] when a will is either signed or acknowledged by the testator; when it clearly does not.

This paper seeks to demonstrate that there are strong legal grounds and sound *a priori* reasons for concluding that a valid will can indeed be executed online in conformity with section 9 of the 1837 Act.

Summary

The 1837 Act prescribes the essential requirements for a valid will (which are set out in the following section of this paper). It has one simple objective: to prevent a testator's intentions from being frustrated by fraud.

The controversy focuses on whether a witness' virtual presence is capable of complying with the 1837 Act's procedural requirements.[ii] No one has argued that a virtual presence is unequal to the task of enabling someone to witness the execution of a will effectively.

Section 9 of the 1837 Act confers a wide discretion as to how its requirements are met. The authorities considered below demonstrate that the common law is a progressive, if cautious, institution that has approved a variety of novel (sometimes bizarre) approaches to conforming to section 9, where they are consistent with the legislative objective.

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The execution of wills using online video technology is undoubtedly a novel way of conforming to section 9. However, the virtual presence of witnesses is a valid practical innovation because it not only fully complies with the wording of section 9 but it also significantly bolsters the statutory safeguards against fraud.

Video wills is also something that should be encouraged for obvious health and safety reasons, in the wake of the coronavirus pandemic. It is also is a more efficient, ecologically sustainable and accessible procedure.

The statutory provisions: ancient and modern

Parliament has regulated will writing for at least 343 years. Section 5 of the Statute of Frauds 1677[iii] (since repealed) stipulated that unless a will was written and the testator signed it (or directed someone else to sign it in their name and 'presence') and unless this act was also witnessed by four or more 'credible' witnesses in the testator's 'presence', the will would be 'utterly void'[iv].

Section 9 of the Wills Act 1837 (the 1837 Act) replaces the 1677 Statute. However, its current provisions are not as antique as the Act itself[v]. The most recent iteration was introduced only 38 years ago and inserted into the 1837 Act by section 17 of the Administration of Justice Act 1982 (the 1982 Act) [vi]. The new provision replaces its namesake. It now provides:

> **17 Relaxation of formal requirements for making wills.**
>
> The following section shall be substituted for section 9 of the Wills Act 1837—
>
> "**Section 9 Signing and attestation of wills**
>
> No will shall be valid unless—
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) it appears that the testator intended by his signature to give effect to the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness either—
>
> (i) attests and signs the will; or
>
> (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),
>
> but no form of attestation shall be necessary." [*Underlining added for emphasis*]

The original 1837 version of section 9 is very similar, it provided:

> 'And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.'
>
> [*Underlining added for emphasis*]

The words used here to prescribe the simultaneous 'presence' of the testator and the witnesses are, in all material respects, identical in both the 1837 and 1982 versions of section 9[vii].

Prevention of fraud

The key decisions are consistent in holding that section 9's formalities are intended as a countermeasure against the ill that section 9 is intended to avert: namely, the possibility of fraud[viii] whether by substitution of the will or otherwise[ix].

The same case authorities are also consistent in holding that to satisfy section 9's formalities, the witnesses' joint 'presence' must enable them to attest first-hand that they saw the testator sign the will or that they heard and / or saw the testator acknowledge his signature.

Section 9 of the 1837 Act insists upon the strict adherence to its formalities as a prerequisite of validity and no deviation is tolerated[x].

Broadly termed but not ambiguous

Section 9 does not specify the means by which the testamentary witnesses should manifest their simultaneous 'presence', any more than it prescribes the nature of the 'writing' or what type of document should be used. This policy enabled the 19th Century version of section 9[xi] to accommodate a wide range of technical innovations over 148 years[xii].

For example, the references to lithographed wills in *Manning v Purcell* (1855)[xiii] and *In the Goods of Wotton* [1874] [xiv] indicates that pre-printed wills were accepted by the courts as valid from the mid-nineteenth century, at least. Furthermore, it is very unlikely that the concept of a typewritten will would have been envisaged by the Parliamentary draftsmen in 1837[xv] but they were in common use long before the 1982 Act. It is within living memory that pre-printed and typewritten wills were in ubiquitous and unchallenged use[xvi] long before

1982. Similarly, no one appears to have questioned the widespread use of word processors for this purpose from the mid to late 1970s onwards[xvii].

From a literal perspective, it is arguable that printing, typing and word processing are not 'writing' *per se*, even if they may constitute, collectively, what is sometimes referred to as the written word. However, this did not present any obstacles to validity during the 19th and 20th Centuries because these innovations were compatible with section 9's legislative purpose, if not the ordinary literal meaning of its wording.

The literal meaning of 'presence'

The Oxford dictionary offers several definitions of 'presence'. The most obvious candidate, in this context, has a topographical connotation: 'of being in the place in question'.

The modern 1982 version of section 9, in keeping with its predecessors, does not specify whether a remote or close presence is required.

Admittedly, there was no need in 1677 or 1837 to spell out the obvious. No Parliamentary draftsman from the Restoration or Early Victorian periods is likely to have conceived that a distant presence could possibly fulfil the statutory objective, still less would he have anticipated the virtual presence achieved by computers linked to the internet using online live streaming video technology.

In the circumstances it is easy to see why some might believe that the physical presence of a witnesses is necessary.

A practical emphasis

However, when one considers the way that the courts have construed the term 'presence' in section 9 of the 1837 Act over the centuries, it becomes clear that this term acquired, early on, a purposeful connotation: one that reflects the legislative objective of prevention of fraud.

The early authorities, such *as Right v Price* [1779][xviii] and *Cason v Dade* [1871] [xix]establish that a physical presence is insufficient in itself: it must be a conscious presence that affords a clear line of sight. The full citations for these cases, and others, are provided in an endnote below[xx].

Sir Herbert Jenner-Fust's judgment in *Hudson v Parker* [1844][xxi] provides a clear and comprehensive explanation of what kind of presence is required. An extensive excerpt from this seminal judgment is set out below and so it does not need to be paraphrased here, other

than to confirm that nowhere does it insist on the testator's *physical* presence. Since when, there have been few, if any, significant developments of principle[xxii].

At the risk of labouring the point, it is clear from the authorities mentioned above and featured below (under 'The authorities' heading) that 'presence' has, in this context, a teleological emphasis which carries a subtly different meaning from its every day usage. Consequently, and from a witness' perspective, these authorities indicate that there must be a 'presence' of such a kind that affords the witness a clear line of sight to observe the testator in the act of signing the will (or alternatively, to see or hear the testator's acknowledgment of the signature)[xxiii]. Similarly, the witnesses' 'presence' must be of a kind that enables the testator to have a clear line of sight of them signing[xxiv] (or alternatively, a line of sight and / or ability to hear their acknowledgement of the testator's signature).

Accordingly section 9's use of 'presence' connotes a strictly functional meaning in just the same way that 'writing' has within the same provision.

In the words of Sir Jenner Fust, in *Hudson*: '. What could possibly be the object of the Legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own evidence'[xxv]?

Common usage and common sense

If a valid will can be written on an eggshell[xxvi] or scribbled in bad Ukrainian on a bedroom wall[xxvii], and if an unlettered mark[xxviii] can be accepted as a valid signature, then it is unclear what legal principle or rationale prevent testamentary witnesses from manifesting their virtual 'presence' online using live-streamed video technology – provided, of course, this is undertaken in a manner that is consistent with section 9, the case law and its legislative objective.

Given that video[xxix] evidence can be now be adduced in criminal and civil trials it seems strangely anachronistic for modern practitioners to be trenchantly insisting that the 1982 Act requires nothing less than a close physical attendance in person, especially when the provision itself is silent on the point.

Conclusions

The authorities provide an overwhelming case for concluding that live-streaming video conferencing technology is capable of constituting a valid 'presence' within the meaning of section 9 of the 1837 Act as amended.

There is a strong case to argue that this innovation not only meets the statutory formalities but has the capacity to enhance section 9's legislative objective by providing, for the first time, an unequivocal video recording of the proceedings leading up to the will's execution. A court's *post mortem* fact-finding will no longer be constrained by the vagaries of what a witness might, or might not, be able to recollect, possibly many years after the event. The court will be able to see and hear for itself precisely how the testator and the witnesses interacted with one another. It will be able to observe every nuance and inflection, every word and action - first hand.

This author has not unearthed a single case authority that supports the current consensus that section 9 of the 1837 Act, insists on a witness' close or proximate corporeal presence. The most that can be said on that account, is that in a previous (pre internet) age, the physical presence of witnesses was a practical necessity (as distinct from a statutory requirement) that enabled them to see and hear the events that they were required to attest to. The implicit need for a physical presence was attributable to the technical limitations of the time. As those limitations no longer prevail, neither does the implication. *Ergo*, remotely witnessed video wills that enable the testator and the witnesses to simultaneously observe and hear the proceedings are a valid and lawful means of complying with section 9 of the 1837 Act.

It is of course probable that some video wills will be mismanaged in their execution and later held to be invalid for failing to conform to the 1837 Act's formalities; just as numerous personally attended wills have. However, in the author's opinion, that is no good reason to discourage this innovation, particularly when it is capable of improving the effectiveness of the statutory safeguards against fraud whilst, at the same time, providing the public with a coronavirus-free, convenient and ecologically friendly means by which to access this important legal service.

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The authorities

The following cases either consider what is meant by 'presence' or they illustrate the court's approach to applying it:

In ***Right v Price*** [1779] 1 Doug KB 241 it was held that the physical presence of a testator, who was rendered insensible after signing his will, was insufficient to satisfy the formalities prescribed by the 1677 Statute which required that his signature '...shall be attested and subscribed in the presence of the said Devisor by three or fower credible Witnesses..'.. It was held that the will was not validly executed because the testator had to be cognisant of what was occurring.

In ***Casson v Dade*** [1781] 1 Bro.C.C. 99, a testator had retired to her carriage outside the office where she had just signed her will in the presence of the witnesses (three then being required by the 1677 Statute). The witnesses were deemed to have signed her will in her presence, on the basis that the testator's carriage had at some stage moved into alignment with the office window in such a manner as would have allowed her to see through both windows and observe the witnesses sign her will, had she chosen to do so. There was no evidence that she had actually seen them sign but the doctrine of constructive presence was applied, so that in the absence of evidence to the contrary this was presumed to have occurred.

In ***Wright v Manifold*** [1813] M&S 294 the testator was bedridden and was unable to observe his witnesses attest his signature in an adjoining room. The court held that the will was not valid. Lord Ellenbourough CJ explained:

> 'But I am afraid that if we get beyond the rule which requires that the witnesses should actually be within the organs of sight, we shall be giving effect to an attestation out of the devisor's presence ; as to which the rule is , that where the devisor cannot possibly see the act of doing, that is out of his presence.'

Re Colman's Goods [1842] 3 Curt 118 features another bedridden testator who signed his will in the witnesses' presence but they then retired to an adjoining room to sign and attest his will. That room had a connecting doorway with a set of folding door leading to the testator's chamber. Unfortunately as this provided no line of sight by which the testator could observe them the will was held to be invalid.

Arguably the most detailed consideration of what is meant by 'presence' is provided by Sir Herbert Jenner-Fust in *Hudson v Parker* [1844]. This was one of the first times that section 9 of the 1837 fell to be construed.

In ***Hudson v Parker*** [1844] 1 Rob Eccl 14, the testator acknowledged the document in his possession as his will, in the physical presence of two witnesses but without allowing them to see his signature. The witnesses signed the will but all of its writing was deliberately concealed from them.

Sir Jenner-Fust held that the will did not conform with section 9 of the Act, because, in his words: 'how is it possible that the witnesses should swear that any signature was acknowledged unless they saw it?'

The following excerpt merits quoting verbatim with the exception of one redaction of a passage that refers to a formality removed in the current version of section 9 (introduced by section 17 of the Administration of Justice Act1982):

> 'The words of which we now wish to understand the meaning are the following:—• "Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." I..[redacted text]...
>
> ..."and such witnesses shall attest, and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. First, then, as to the plain meaning of these words, "that the signature of the testator shall be made in the presence of two witnesses;" will the statute be satisfied if the signature be made in their presence, if they are in ignorance of the fact? I am of opinion, under such circumstances, that the statute is not complied with. **It is obvious that the solution of this question must mainly depend on the meaning which the Legislature intended to convey by the use of the word " presence "** in this and in the other clauses of the statute. **What could possibly be the object of the Legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own evidence**: if the witnesses are not to be mentally, as well as bodily, present, they might be asleep, or intoxicated, or of unsound mind. Again, how is the signature so made to be proved, except by parol evidence? to exclude which was one great object of the statute.
>
> In support of this view of the question, let us call to mind how the word " presence" is received in its common acceptation : *Loquendum est ut vulgus*, says Lord Coke (4 Eep. 47). If in the course of common conversation a person wishes to support the truth of a statement, does he not say—" Such a one was present, and he will vouch for the truth**?" if a statement be questioned, does not a person say, "I was present and can attest its correctness," and does not the whole world understand by this, mental, not bodily, presence? Would not a contrary construction lead to absurdity, and defeat the plain intention of the statute?**'
>
> [emphasis added]

In ***Re Killick's Goods*** [1864] 3 Sw & Tr 578) A codicil was signed by the testator, who was ill in bed in one room, and attested by two witnesses in an opposite room across a landing, but who did not see the deceased make or acknowledge, her signature, or have any conversation with her respecting it. The doors of both the rooms being open, the bedridden testator might by raising herself in bed have seen the witnesses sign ; but there was no that the deceased did not make or acknowledge her signature in the presence of the witnesses, and (2) that they did not attest in her presence.

Sir J. P. Wild offers the following observations on what was meant by 'presence':

> '**Great latitude ought to be given to the meaning of the word " presence" used in the 9th section of the Wills Act**, and I am not disposed to draw a fine distinction between one room and two rooms opening into one another; **but I think such an act as this cannot be said to be done by one person in the presence of another, unless at the time each is aware of the other's presence**.'
>
> [Emphasis added]

In ***Brown v Skirrow*** [1902] P.3. 1901 Nov. 12, 13, a testator signed her will in her busy shop in the immediate presence of one witness who saw her do so, the other witness was at the other end of the crowed shop and not only was her view of the testator obstructed by various customers but she was unaware that the testator was signing he will at that moment. Applying *Re Killick's Goods*, the court held that the statute's use of the word 'presence' must mean a visual presence and so held the will to be invalid.

During the course of the trial, the defendant had argued that the statute only required a presence. Gorell Barnes J responded to this with these words

> 'You cannot be a witness to an act that you are unconscious of; otherwise the thing might be done in a ball-room 100 feet long and with a number of people in the intervening space. In my view, at the end of the transaction, the witness should be able to say with truth, "I know that this testator or testatrix has signed this document.'

The author

Nicholas Bevan, is a practicing solicitor, an academic and a law reform activist. He was senior counsel at what is now Womble Bond Dickinson, before setting up his own legal consultancy service specialising in regulatory compliance, European law and motor insurance law. He returned to private practice where he is currently engaged on a project for Solicitors Title LLP that aims to modernise private client services. He was awarded a doctorate in law at the University of Exeter in 2017 for his ground breaking research into the UK's systemic breaches of EU Motor Insurance Directives and for identifying an important new EU law remedy based on the principle of direct effect. He has received several national (and international) awards in his career for outstanding achievement and was a finalist in the prestigious Halsbury Rule of Law Award in 2018.

Nicholas is an extensively published author, editor and lecturer and he enjoys a national reputation for his stridently critical analysis and for accurately predicting and influencing law reform.

Three examples are given:

- In 2018, his two-part New Law Journal feature, '*Driverless Vehicles: a future perfect*?", offered the first critical analysis of the Automated & Electric Vehicles Act 2018. This exposed a serious flaw in the Act's 'no fault' liability scheme which was predicated on a valid motor insurance policy being in place. However, at that time section 152 Road Traffic Act 1988 enabled insurers to obtain a court declaration that a policy was void *ab initio,* after the event giving rise to a claim, if a policyholder had made a material misrepresentation at the policy's inception. This infringed EU law as well as undermining the effectiveness of the new scheme. This defect was promptly addressed by regulation 6 of the Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019.

- In 2016 his two-part serialised feature in the New Law Journal feature, '*Putting Wrongs To Rights*', prepared the ground for the landmark ruling in *Motor Insurers' Bureau v Lewis* [2019] EWCA Civ 909 which overturned Mr Justice Flaux's (now Lord Justice Flaux) decision in *Byrne v MIB* [2007] EWHC 1268 (QB). In *Lewis* the Court of Appeal ruled, unanimously: (i) that the MIB is an emanation of the state and (ii) the EU law principle of direct effect imposed a direct liability on the MIB to compensate third party motor accident victims wrongly denied their entitlement to a compensatory guarantee vouchsafed under EU law, due to the Government's failure to implement that law. Nicholas had been a lone voice in contending that *Byrne* was wrongly decided that the MIB was liable on this basis..

- In 2013 his four-part New Law Journal feature, '*On The Right Road*', exposed for the first time the numerous and systemic breaches of EU law within the UK's transposition of the Motor Insurance Directives. The Law Commission consulted him that year. He later devised a heuristic approach to aid busy practitioners identify actionable breaches. He also developed new EU law remedies to redress these shortcomings. When the Department for Transport blocked the Law Commission's involvement, he began a reform campaign, culminating in a long running judicial review in *RoadPeace v Secretary of State for Transport* [2017] EWHC 2725 in which he secured judicial declarations that the Road Traffic Act 1988 does not conform to EU law before Brexit intervened. His activism and research has influenced decisions, such as *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172 and *Lewis*, and they resulted in significant reform: including the replacement of two compensation schemes (affecting approximately 25,000 claimants every year).

Endnotes

[i] That belief appears to have originated in the Law Commission's 2017 consultation report, *Making a will*, in what appears to be a casual observation at paragraph 5.26: '*A witness must be mentally as well as physically present and therefore cannot be asleep, intoxicated or of unsound mind.*' The statement is supported by a footnote that cites *Hudson v Parker* [1844] 1 Rob Eccl 1. However, the excerpts quoted from *Hudson's* ratio, at page 9 above, show that its ratio is not concerned with the physical presence or otherwise of a witness but with what they can perceive with their senses. To the writer's knowledge, no one is contending that live-streaming video conferencing is an inherently misleading visual or auditory medium. The Commission's unsubstantiated opinion has since acquired a weight that has influenced a number of organisations and individuals who seem to have accepted it at face value without further enquiry. The following examples suffice:

(a) the Law Society, in its online practice guidance states: '*Under the Wills Act 1837, it is not permitted to witness a will via video messaging as a witness must be physically present, however it is possible to supervise the signing of a will using electronic means where you are not acting as a witness to the will.*' See: https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-covid-19-information-for-members/#practice. This view is reiterated by Ian Bond, chair of the Law Society's Wills and Equity Committee at: https://www.lawgazette.co.uk/practice-points/coronavirus-qanda-executing-wills/5103688.article;

(b) Lexis Nexis, '....*The witnesses must sign or acknowledge their signature in the presence of the testator: both physical and mental presence is required.....*' at: https://www.lexisnexis.com/uk/lexispsl/willsandprobate/document/393767/55KG-P271-F18C-512S-00000-00/Validity_of_Wills_overview,

(c) Hardwick Chambers, see: https://hardwicke.co.uk/will-making-and-coronavirus-can-wills-be-remotely-witnessed/. '*It has also been held that the testator must be both physically and mentally present when the witnesses sign (Right v Price (1779) 1 Doug KB 241; Re Killick's Goods (1864) 3 Sw & Tr 578).*' Neither of these cases, whose ratios are summarised here under 'The authorities' heading, decide the point contended. *Right* does not hold that the Statute of Frauds 1677 requires a physical 'presence', nor does *Re Killick's Goods* conclude that section 9 of the Wills Act 1837 does either.

(d) Others have either been more equivocal on the issue: see Radcliffe Chambers' bulletin https://radcliffechambers.com/wp-content/uploads/2020/03/The-effect-of-the-coronavirus-crisis-on-the-preparation-of-wills-Paper-by-Edward-Hicks-and-Thomas-Middlehurst.pdf and Selborne Chambers bulletin at: https://selbornechambers.co.uk/6041-2/ or

(e) Yet others have skirted the issue entirely: See the National Wills Register webcast from early May 2020: https://vimeo.com/407520436

[ii] The topicality of this issue is reflected in the written question by Lloyd Russell-Moyle MP to David Chalk MP on 23 March 2020. This was answered on 21 April 2020

[iii] The Author does not have his usual access to a law library during the present pandemic and as section 5 of the Statute of Frauds is not available on the Parliamentary website or in Lexis Nexis online he has relied Sir H Jenner-Fust In *Hudson v Parker* (1844) 1 Rob Eccl 14, for terms and effect and on the following academic source that he has not been able to verify, see: https://www.british-history.ac.uk/statutes-realm/vol5/pp839-842

[iv] Section 5 of the Statute of Frauds is quoted by Sir Jenner-Fust in *Hudson*, thus: 'All devises shall be in writing, and signed by the party so devising or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the devisor by three or more credible witnesses'.

[v] Whilst the Wills Act 1837 undoubtedly dates from the Victorian era, section 9 was introduced by way of substitution in 1982

[vi] Section 17 of the Administration of Justice Act 1982 (http://www.legislation.gov.uk/ukpga/1982/53/section/17) implements the recommendations of the Law Reform Committee report (Command 7902) 'The making and revocation of wills: consultative document', first published in 1977. As Lord Hailsham explained in the second reading of the Bill in

the House, these were minor 'house-keeping' revisions: intended to remove various anomalies resulting from changed social circumstances. See: https://api.parliament.uk/historic-hansard/lords/1982/mar/08/administration-of-justice-bill-hl. Section 17 introduced two important innovations. The first was to remove the overly prescriptive requirement that the testator should sign at the end of the will (replacing this with a new requirement that 'it appears that the testator intended by his signature to give effect to the will'). The second was to provide that an acknowledgement (parole or otherwise) by a witness of the testator's signature should have the same effect as his actual signature

[vii] In *Couser v Couser* [1996] 3 All ER 256 HHJ Colyer QC, sitting as a High Court Judge points out the similarities of the new section 9 Wills Act 1837 to its predecessor:

> 'As now slightly redrawn by the substitution of the 1982 section, the section is clearly directed in the first place to creating the safeguard that there shall be two witnesses, and the further safeguard—and it is a significant safeguard—that the two witnesses must both at the same time see the testator either sign or acknowledge his signature on the will. There must be a point in time, therefore, when all parties to the transaction, the two witnesses and (most importantly) the testator, are concerned in it together simultaneously, but the evidencing of their joint activity can be made subsequently and separately.
>
> The section seeks, therefore, to avoid formalities and technicalities, but nevertheless to preserve the essential safeguard against fraud of two witnesses and of the two witnesses having to function together with the testator, albeit that they may subsequently evidence what they have done by each witness acknowledging his or her respective signature.'

[viii] The legislative intention is made particularly explicit in the Statute of Frauds 1677. It opens with this preparatory declaration: 'For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury...' In *Re Vere-Wardale; Vere-Wardale v Johnson and Others* [1949] 2 All ER 250 Willmer J provides a similar explanation of the legislative purpose of section 9 of the 1837 Act: 'It appears to me that the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, s 9, was the prevention of fraud, and, therefore, that my duty here is to do all that I can to see that no fraud is perpetrated, and, if I am to exclude further evidence, it seems to me that such a ruling can only in-crease the possibility of the perpetration of fraud. In all the circumstances it appears to me that it would be wrong and not in accordance with authority to exclude such further evidence with regard to the attestation of this will as may be available. I, therefore, decline to rule that it is not competent for the propounders of this will to adduce further evidence, and they are at liberty to do so.' In *Re Fuld deceased (No 3)* [1968] P 675 Scarman J observes, at 719, that: 'The legal requirement upon the Defendant to establish these facts [*viz – conformity with section 9*] is a safeguard in will cases against fraud upon the dead'. More recently, Scarman J's analysis in *Re Fuld*, quoted above, was cited *verbatim* and applied by Lightman J in *Sherrington and others v Sherrington* [2004] EWHC 1613 (Ch) when considering the 1982 version of section 9

[ix] The Law Commission's 2017 report, *Making a Will*, (Consultation Paper 231) at para 5.6 on pp 73 states that section 9's formalities have four main functions, namely: evidentiary, instilling a degree of caution as to its legal effect, due process and finally, the protective function. This may be true but these attributes are not to be conflated with the legislative objective that informs the construction of a statute. We have seen from the previous endnote, the statutory purpose is restricted to the last of these: namely the prevention of fraud

[x] There is no doctrine of substantial compliance, see Williams on Wills (10th Edition), Part D, [10.1]. Every valid will must be in writing, signed by or on behalf of the testator and the signature (or acknowledgement thereof) must be witnessed in the joint presence of the testator and the witnesses. See also Willmer J's comments, in *Re Vere-Wardale* [1949] 2 All ER 250

[xi] It will be recalled from the above that the present version of section 9 was introduced, by way of substitution, under section 17 Administration of Justice Act 1982

[xii] I.e. between 1837 and 1982

[xiii] *Manning v Purcell* (1855) 7 De G M & G 55

[xiv] *In the Goods of Wotton* [1874] LR 3 P & D 159; [1874-80] All ER Rep 240

[xv] The typewriter was not commercially available, *a fortiori* in common use, until several decades following the 1837 Act. The first commercially available machine resembling a typewriter that was capable of typing was faster than handwriting was produced by the Remington Company (the famous guns smiths) in 1868. They were not in widespread use until the 1880's at the earliest. See: (i) http://www.smithsonianeducation.org/scitech/carbons/typewriters.html and (ii) https://www.britannica.com/technology/typewriter; [xv]. In 1837, Charles Dickens' debut novel, the Pickwick Papers, had only just been published. Only nine years earlier, he had worked as a copy clerk in Gray's Inn; presumably scratching out legal texts with a quill and pen.

[xvi] The accommodation of typewriting has not been entirely without incident in Scotland. In *M'Beath's Trustees v M'Beath* [1935] SC 471, a Court of Session of seven judges was convened to determine the validity of a testamentary document produced by a 'typewriting machine' that declared itself to be a holograph will (which under the Scots law were exempted from the requirement of attestation by witnesses). The Lord President found it 'impossible to regard handwriting and typewriting as equivalents'. The document was signed by the testator only. The judgment debates whether a typewritten document is capable of possessing a probative value in these circumstances due to the risk of fraud. Their Lordships concluded that the document was indeed a holographic will, on the basis that the testator had typed it. The Wills Act 1837 did not apply to Scotland.

[xvii] See: https://www.britannica.com/technology/word-processing, https://web.stanford.edu/~bkunde/fb-press/articles/wdprhist.html

[xviii] *Right v Price* [1779] 1 Doug KB 241, refers to section 9 of the Wills Act 1837's predecessor, in section 5 of the Statute of Frauds 1677

[xix] *Casson v. Dade* [1781] 1 Bro.C.C. 99

[xx] I list the most relevant authorities in date order here: *Shires v Glascock* (1698) 91 ER 584;; *Right v Price* [1779] 1 Doug KB 241; *Casson v. Dade* [1781] 1 Bro.C.C. 99; *Re Colman's Goods* [1842] 3 Curt 118; *Wright v Manifold* 1813 I M&S 294; *Hudson v Parker* [1844] 1 Rob Eccl 14; *Re Killick's Goods* [1864] 3 Sw & Tr 578); *Beckett v Howe* [1869] LR 2 P & D 1; *Gwillim v Gwillim* [1859] 3 Sw & Tr 200; *In the Goods of Swinford* [1869] LR 1 P & D 630; *In the Goods of Gunston Blake v Blake* [1881-85] All ER Rep 870; *Carter v Seaton* [1901] 85 LT 76; *Brown v Skirrow* [1902] P. 3; *Groffman, Re, Groffman and Block v Groffman* [1969] 2 All ER 108, [1969] 1 WLR 733, 113 Sol Jo 58; *Couser v Couser* - [1996] 3 All ER 256; *Re Clarke* (2011) COP 19/9/11 (strictly speaking this is not a s9 Wills Act 18347 case but it is instructive none the less for its consideration of 'presence' within regulation 9 of The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007) ; *Channon v Perkins* [2005] EWCA Civ 1808; *Ahluwalia v Singh & anor* [2012] EWCA Civ 1635; *Burgess v Penny & Anr.* [2019] EWHC 2034 (Ch)

[xxi] *Hudson v Parker* [1844] 1 Rob Eccl 14

[xxii] However, the facts and the decision in *Brown v Skirrow* [1902] P. 3 provide a useful illustration and restatement of the basic principles

[xxiii] See *Hudson v Parker* [1844] 1 Rob Eccl 14

[xxiv] See *Casson v Dade* [1871] 1 Bro.C.C. 99

[xxv] See *Hudson v Parker* [1844] 1 Rob Eccl 14. For a more extensively quoted excerpt, see under 'The authorities' heading

[xxvi] See *Re Barnes Goods, Hodson v Barnes* (1926) 43 TLR 71

[xxvii] *Re Slavinskyj's Estate* (1989) 53 SASR 221

[xxviii] *Re Kieran* [1933] IR 222

[xxix] References to 'video' in this paper are used to describe the combination of audio and visual technology