SECTION 11 OF THE WILLS ACT, 1837
(*IN THE GOODS OF NEWLAND, DECD.*)

The decision of Havers J. in *In the Goods of Newland, decd.*[1] extends to sailors the leniency of interpretation the courts have shown soldiers in actual military service[2] as regards the making of privileged wills.

The deceased had joined *S.S. Strathmore* as an apprentice in April 1944 and he continued to serve in that vessel until October of that year. In July 1944, while the ship was in dock at Liverpool, the deceased, with the approval of his employers, was ashore on leave at the house of a friend in Surrey Being at that time between eighteen and nineteen years of age, he executed there the will of which probate was sought. He rejoined his ship on or before August 1, 1944, at which date it sailed.

Havers J. did not question the principle laid down by *In the Goods of Henry Corby, decd.*[3] and *In the Estate of Anderson*[4] that where "a mariner or sea man" makes what purports to be a will before shipping aboard a vessel in which he is about to sail for the first time, then, even though the document is executed in contemplation of sailing in that particular ship on that particular voyage, or though the testator may have signed articles and received orders to join the ship, he cannot be said to be at sea within the meaning of s. 11 of the Wills Act 1837[5] at the time of execution. He stressed, instead, that in *In the Goods of Newland, decd.*[6] the deceased was rejoining his ship and not joining it for the first time. This indeed seems to be the only relevant distinction between the facts of this case and the two above-cited cases, and the question that must arise is whether the distinction is sufficiently vital to justify the decision that Newland was, at the time of executing his will, "a seaman being at sea". There are no English authorities directly on the point, and while the decision of Havers J. is supported by Irish authority, it represents a clear innovation in English law.

In *In the Goods of Patterson, decd.*,[7] and *In the Goods of M'Murdo*[8] the deceased had actually joined his ship and was on board at the time of executing the will, the ship being in one case lying in a river preparatory to sailing and in the other stationed in a harbour, "there being no immediate intention of sending her to sea."[9] In both cases it was held that the voyage had begun for the purpose of making the document the will of a seaman at sea. In *In the Goods of Lay, decd.*,[10] on the other hand, the will upheld was made on shore while the deceased was away from home and in the course of a voyage. These cases establish that the words "at sea" are not to be construed literally. However, there has been a definite tendency to confine the extended meaning. This tendency is exemplified by the cases of *The Earl of Euston v Lord Henry Seymour*[11] and *In the Goods of Austen.*[12]

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492 (inter-State trade and commerce power); and *R. v Burgess, ex parte Henry* (1936), 55 C.L.R. 608 (external affairs power), together with cases cited therein.

[1] (1952) p. 71. This case was applied by Havers J. on the same day in *In the Goods of Alfred John Wilson, decd.*; *Wilson v Coleclough* (1952) P. 92.

[2] See, e.g., *Re Wingham* (1949) P. 187.

[3] (1854) 1 Spinks 292.

[4] (1916) P. 49.

[5] 7 Will. 4 and 1 Vict. c. 26. The equivalent provision in New South Wales is s. 11 of the Wills, Probate and Administration Act (1898-1947) (N.S.W.).

[6] Cited *supra* n. 1 at 75 75 and 78.

[7] (1898) 79 L.T. 123.

[8] (1867) L.R. 1 P. & D. 540.

[9] *ibid.* at 541.

[10] (1840) 2 Curt. 375.

[11] (1802) cited *ibid.* at 376.

[12] (1853) 2 Rob. Eccl. 611.

In the former case the nuncupative will of Lord Henry Seymour, Admiral of the station off Jamaica, was rejected by the court on the grounds that since it had been made at the Admiral's house on shore, he was not "at sea" as required by the Statute. It is difficult to decide from the statement of facts contained in *In the Goods of Hayes, decd.*[13] whether the basis of the decision was that the Admiral had a permanent residence on shore and only occasionally went on board his ship or that at the time of making the will the Admiral was not in the course of a voyage but was between voyages, at what might be called his home while he was admiral of the station. That the latter alternative would, in any case, offer good grounds for the decision appears to be indicated by *In the Goods of Austen.*[14]

In that case Sir James Dodson in his judgment clearly considered that a codicil to a will made by Admiral Austen while he was ashore at Hong Kong for three months between veyoges was not privileged. The facts as set out were that the Admiral had no command on shore at Hong Kong, that he was in constant communication with his ship which was lying in harbour at all times ready to sail and that it might be necessary to sail at any time. The codicil was admitted to probate on the ground that the admitted defect in it was cured by incorporation in a later coricil. Council who moved for probate of the will and all codicils thereto did not, it seems, attempt to argue that the codicil was privileged, but admitted that the codicil was, on its own, defective. In any case, the codicil was admitted to probate on other grounds, so the decision must be regarded as of questionable authority on this point.

The cases cited above are the main English authorities in this connection, and it is difficult to extract from them any general principle as to when a sailor can be said to be at sea. The only principle which appears to be in complete harmony with all English authorities is tht enunciated by Sir James Wilds in *In the Goods of M'Murdo,*[15] "The cases appear to go to this length, that where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage will be within the exception in the Act, even though such will was in fact made on shore"; and this principle has been judicially recognised as the criterion to be applied.[16] If one were to apply this principle to *In the Goods of Newland, decd.*[17] it seems that there would be no alternative to holding that the deceased was not at sea when he executed his will. Havers J. did not accept this, however, as "a criterion for every set of facts"[18] but stated that he was of the view that Sir James Wilde was "merely laying down a principle applicable to the facts of that particular case".[19] On this view the question raised by *In the Goods of Newland, decd.*[20] must be regarded as open as far as English authorities are concerned.

Accepting the question as open, what then is the justification of Havers J.'s decision? The policy behind the Wills Act 1837, namely, the requirement of compliance with certain formalities in the execution of wills, designed as it is to prevent fraud and protect the interests of both testator and beneficiaries, is a sound one, and the requirement is essential if there is to be any certainty in the law of probate. On social grounds, there seems to be little justification for exempting from its provisions a sailor who is at home between voyages. *In the*

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[13] (1839) 2 Curt. 338.
[14] Cited *supra* n. 12.
[15] Cited *supra* n. 8 at 541.
[16] See *Re Will of L. H. Bickley, decd.* (1949) 49 S.R. (N.S.W.) 94 at 96.
[17] Cited *supra* n. 1.
[18] *Ibid.* at 79.
[19] *Idem.*
[20] Cited *supra* n. 1.

Goods of Newland, decd.[21] admittedly does little more than apply to sailors not in Her Majesty's forces the leniency the Court of Appeal had shown to soldiers, sailors or airmen in the service of the Crown in time of war,[22] but, as Havers J. pointed out,[23] *Re Wingham*[24] is not relevant to the facts of *In the Goods of Newland, decd.*,[25] and the arguments that can be used to justify the former case are not applicable to the latter.

Though this decision represents an innovation in English law, it is supported by two Irish cases, the decision of Madden J. in *In the Goods of Hale*[26] and the dicta of Dodd J. in *Barnard v Birch*.[27] Neither judgment was binding on Havers J. and the *ex parte* judgment of Madden J. did not satisfactorily consider any of the main authorities on sailors' wills but seems to be based largely on *In the Goods of Hiscock*,[28] a case which is concerned with "soldiers in actual military service" and has nothing to do with the privileged wills of sailors. Moreover, as Havers J. emphasised,[29] the dicta of Dodd J. in *Barnard v Birch*[30] were based to no small degree on "a complete misapprehension" by Dodd J. of the judgment in *In the Estate of Ada Stanley*.[31]

Assuming that *In the Goods of Newland, decd.*[32] is right in law, it is clear that there is a great deal of uncertainty and confusion surrounding the question of when a sailor can be said to be at sea, and it is impossible to say exactly how the scope of privilege enjoyed by sailors under the Wills Act 1837 is to be delimited. Havers J., indeed, appears to deny that "any principle of universal application" can be formulated.[33] The only guide provided is that in doubtful cases the sailor should be given the benefit of the privilege.

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[21] *Idem.*
[22] *Re Wingham*. Cited *supra* n. 2.
[23] Cited *supra* n. 1 at 88.
[24] Cited *supra* n. 2.
[25] Cited *supra* n. 1.
[26] (1915) 2 I.R. 362.
[27] (1919) 2 I.R. 404.
[28] (1901) P. 78.
[29] Cited *supra* n. 1 at 85.
[30] Cited *supra* n. 27.
[31] (1916) P. 192.
[32] Cited *supra* n. 1.
[33] *Ibid.* at 75.