Commentary: 'Seven signatures of witnesses in red ink'

Murray Smith

When Bilbo Baggins left the Shire at the start of *The Lord of the Rings*, he left behind a will with the signatures of seven witnesses, a requirement of Shire law.

Where did this numerical requirement come from? While Tolkien, as he often asserted, based much of the Shire on an English village at the time of Queen Victoria's Diamond Jubilee (1897), in particular Sarehole, where he and his brother Hilary spent a part of their early childhoods in 1896-1900[1] he did not use English law. The Wills Act, 1837, had insisted that the signature of the testator (the person making a will) either had to be made by him or acknowledged by him 'in the Presence of Two or more Witnesses present at the same Time', who shall each sign the will in that testator's presence, a provision that still exists in English law today[2]. Tolkien instead relied on the Roman[3] law of wills, in particular the provisions dealing with the number of witnesses and soldiers' wills.

Here I shall look at the development of the Roman law of wills in these two areas, and will then suggest that Tolkien may have been particularly aware of this law of wills because of his service as a junior officer in the British Army during the First World War. In English law, soldiers' and sailors' wills have been exempt by statute since 1677 from the normal legal requirements for valid wills, something taken directly from the Roman law of soldiers' wills. It will end by suggesting that Tolkien used Roman law in this context to show that the Shire was an 'advanced' society.

The *Institutes* of the jurist Gaius, of around the second century A.D., said that there were two early kinds of will: the *testamentum comitiis calatis* (will before the convocation) and the *testamentum in procinctu* (will in battle-line). The first was made in an assembly of the Roman people which took place twice a year for the purpose of making wills; the second was made when the army was 'drawn up in arms' or in battle order[4].

Another and more important type of will later emerged: the *testamentum per aes et libram* (will by bronze and scales). It was when a person 'facing the prospect of imminent death', who had not made a will of the previous two types, would make a 'pretend' sale of his property to a person, such as a friend, and ask him to 'distribute it according to his instructions after his death'. This will was called one by 'bronze and scales' because it was a pretend version of a property sale called mancipation[4]. According to Gaius, while the person to whom the property was sold, the *familiae emptor* (property-purchaser) was originally the actual heir, to whom the testator gave instructions on distributing his estate after his death, things had changed by his own time. By then, 'one person is appointed heir by the will, and the legacies are charged upon him; another is brought in as the property-purchaser in name only, in imitation of the old law'[4].

The procedure was the same as in the mancipation process, where the testator (instead of the seller) would assemble five adult Roman citizens as witnesses, with another to hold a pair of scales. After writing out his will, he mancipated his property, but sold it in name only. In these proceedings, the property-purchaser was to say:

> I declare that your family and property are in my administration and custody; let them be brought to me with this bronze, and (as some add) the bronze scales, so that you can lawfully make a will according to the public statute.

He was to strike the scales with the bronze and give it to the testator 'as if it were the price'. Then the testator, holding the will, was to say:

> These things, as they have been written on these wax tablets, I thus convey, I thus bequeath, I thus attest; and so you Roman citizens stand witness for me[4].

The reference to 'wax tablets' is to the fact that the text of the will would have been written by a stylus (a pointed instrument) on a wooden tablet partly covered by wax. The use of the scales and bronze was, as explained earlier in the *Institutes*, a legacy of a time when Roman currency only existed in bronze, and was measured in weight not number, so the amount needed to be weighed in any transaction[4].

So we can see that a will needed five witnesses. Also at the transaction was the scales-holder and the property-purchaser, making up seven people, not including the testator.

According to Justinian's *Institutes*, drawn up in the reign of the East Roman Emperor Justinian I (reigned 527-565 A.D.), when Roman law was revised and reached a final form, a fourth type of will emerged, which meant that 'the requirement of a mancipation was dropped; the seals of seven witnesses were enough. State law did not require the witnesses to seal anything'[5]. The requirement of a fictitious sale was abandoned; and the scales-holder and property-purchaser were added to the five witnesses present to produce seven witnesses, who sealed the will with their seals.

It appears that this type of will was a formalization of a tradition that had existed since at least the first century B.C., in the late Republic. The orator Marcus Tullius Cicero, prosecuting a corrupt governor in 70 B.C., quoted from a contemporary praetor's edict, which said:

> If the succession to an estate shall be disputed, and if there shall be produced before me a written will sealed with the full number of seals required by law, I will give possession in accordance with the written will[6].

Gaius later stated that 'if the will is sealed with the seals of seven witnesses the praetor promises estate-possession to the heirs appointed in it'[7]. While the will's validity could be disputed, the heir named in the written will was in the strongest position.

In 439 A.D., an enactment of the East Roman Emperor Theodosius II (reigned 408-450 A.D.) said that the seven witnesses shall be offered the will by the testator 'at the same time' for them to seal and subscribe (i.e. sign), as long as the testator has said in their presence that 'the testament which is offered is his own and before the witnesses he himself has subscribed with his own hand on the remaining part of the testament'. When this has been done and the witnesses 'subscribe and seal it on one and the same day at one and the same time' the testament shall be valid. If the testator is illiterate or cannot sign, 'an eighth subscriber shall be employed in his stead'[8].

By Justinian's time, the type of will used was a *testamentum tripertitum* (three-part will). It was so called because it was derived from

> three sources: from the old state law [will by bronze and scales] witnesses and presence at a single will-making occasion; from imperial pronouncements the requirement that testator and witnesses subscribe; from the praetorian edict the seals and the number of the witnesses.

Justinian decided to 'make wills unassailable and to prevent fraud' by requiring that 'the name of the heir must be expressed in the handwriting of the testator or of the witnesses'[9].

There was a category of Romans whose wills were legally valid even if not made in the correct legal form: soldiers. The second century jurist Ulpian, extracts from whose works were preserved in Justinian's *Digest*, gave the history of how this position came about:

> The deified [Dictator] Julius Caesar was in fact the first to concede unrestricted *testamenti factio* [legal capacity to make a valid will] to soldiers; but that concession was temporary. However, later the deified [Emperor] Titus [r. 79-81 A.D.] first gave [it]; after this Domitian [r. 81-96]; thereafter, the deified Nerva [r. 96-98] conferred the fullest indulgence on soldiers; and Trajan [r. 98-117] followed this, and thenceforth such a chapter came to be inserted in [imperial] mandates[10].

So this form of legal exemption was first granted by Julius Caesar in the first century B.C., more probably during his conquest of Gaul, when he used his power as proconsul to ensure that the wishes of a soldier killed in battle while serving under him were carried out. He could have revived or extended the old 'will in battle-line' to do this. This privilege would have presumably been to ensure his men's loyalty[11].

The Emperors Titus and Domitian, more than a century later, gave this privilege to particular soldiers; but Nerva, perhaps to make concessions to the soldiers angered at the assassination of Domitian, his predecessor, made this privilege a formal one ('the fullest indulgence') and extended it to all soldiers, something followed by his successor Trajan.

While this legal privilege might have been a means for emperors to deal with discontent in the army, compensate for the hardships of military life, and maybe help recruitment, there was the realization that it would help to ensure the personal loyalty of soldiers to their emperor, who was the guarantor of this privilege[11].

Things were changed in Justinian's time. While his *Institutes* discusses the privilege of military wills, it says that it applies 'only when they [the soldiers] are on active service'. Also it points out:

> But the military are not to be encouraged to claim this privilege in times when they are on the march or in their barracks but not actually on campaign. They can then make wills under the general law, by applying the rules just described for civilians[12].

This restriction, to soldiers 'on campaign', would have consequences when this concept of privileged military wills was incorporated into English law.

While the legal requirement for a written will was introduced into English law by the Statute of Wills, 1540[13] it only covered those who wanted to bequeath land held by them under a form of tenure called *socage*[14] and did not cover soldiers. In England, the Roman attitude persisted regarding soldiers, that they should be legally privileged due to their lack of education and to compensate them for the hardships they endured[15]. The Statute of Frauds, 1677[16], among other things, dealt in section 23 with the will of a soldier in actual military service or a mariner or seaman at sea:

> Provided always, that notwithstanding this Act, any Soldier being in actual military Service, or any Mariner or Seamen being at Sea, may dispose of his Moveables, Wages and Personal Estate, as he or they might have done before the making of this Act.

The raw material for that section and others was supplied by Sir Leoline Jenkins (1623-85), a Welsh lawyer and diplomat[17]. Among other positions, he also held that of deputy professor of civil (Roman) law of the University of Oxford, and was regarded as one of the greatest civilian lawyers of his day[18]. Section 23 of the 1677 Statute, as we can see from the Roman law previously mentioned, was obviously influenced by Jenkins's knowledge of such law.

The 1677 exemption of soldiers' and sailors' wills was continued by section 11 of the Wills Act, 1837, which exempted the wills of soldiers and sailors disposing of their personal property from its provisions:

> Provided always, and be it further enacted, 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.

The Wills (Soldiers and Sailors) Act, 1918, extended the privileges in the 1837 Act. A member of the Royal Navy or the Royal Marines had section 11 of the 1837 Act extended to them not just when at sea but also 'when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section'.

Soldiers and sailors who died after this Act was passed were also entitled to make dispositions of real property (land) in a will under section 11 of the 1837 Act, even if under age. They also had the power to appoint in their will guardians of their minor children. The expression 'soldier' in section 11 of the 1837 Act was extended to a member of the Royal Air Force[19].

In terms of the interpretation of section 11 of the 1837 Act, and in particular the definition of what was 'actual military service', the English courts until the mid-twentieth century looked for inspiration to Roman law[20]. In particular, they looked at the Latin term *in expeditione*, which a translation of Justinian's *Institutes* quoted earlier in this lecture gives as meaning 'on campaign'.

J. R. R.Tolkien's First World War service as a second lieutenant, later lieutenant, in the British Army in 1915-9, has been well documented[21]. With the distinct prospect of being killed, it is reasonable to presume that Tolkien would have concerned himself with making a will. Before his marriage, he is said to have set 'his affairs in order' to provide for his wife if the worst occurred, during the period *c*. 26 January – 22 March, 1916[22].

It is reasonable to assume that someone of his learning would have been aware that the soldiers' and sailors' wills provision in English law was borrowed from Roman law, which may have made him aware, either then or later, of the Roman law of wills, including the requirement of the signatures of seven witnesses for ordinary wills. But why did Tolkien insist in *The Lord of the Rings* on the Roman requirement of the signatures of seven witnesses, where the law of England – on which the Shire was modelled – only required two?

My opinion is that he did this to show how 'advanced' yet peaceful a country the Shire was. In his discussion of that country in his prologue to *The Lord of the Rings*, in particular in 'Of the Ordering of the Shire', he pointed out that the hobbits began as subjects of the King of Arthedain, and persisted in regarding themselves as such, even after those kings lost their lordship. They attributed to him 'all their essential laws; and usually they kept the laws of free will….' The office of Thain, the royal deputy, became

'a nominal dignity'. The only real Shire official, the Mayor, elected every seven years, had the main duty of presiding at banquets. The only governmental services the Mayor had to bother about were the police and

the post office, the latter being the 'busier' of the two. The police only numbered twelve Shirriffs, with a larger body of Bounders to 'beat the bounds'.

The Shire is, therefore, an idealized society where there is the rule of law, but no need for a lot of written law and institutions of law enforcement such as a courts system; because the hobbits are freely law-abiding. The requirement that seven signatures are necessary for a valid will fits in well with this, the large number indicating that hobbits are willing to ensure of free will that the laws are obeyed, doubtless with a certain ceremony being followed in their execution.

Tolkien's use of Roman law in the manner I have suggested shows another possible influence of his First World War service on his works. Also, it is interesting to see the influence of Roman law still continuing centuries after its revision under Justinian I, in an imaginary country in a work of literature. That emperor, and those who revised the law under him, hoped that their work would survive long after their deaths. I feel that the reference to 'seven signatures of witnesses in red ink' shows that it has; a fragment of Imperial Rome possibly exists in the Shire.

Murray Smith was born and raised in Dublin, Ireland. He was called to the Irish Bar in 1999, has written a number of articles on historical and legal topics, and has given lectures on Tolkien at conferences in the UK.

1. Humphrey Carpenter, *J.R.R.Tolkien: A biography*, (London: George Allen and Unwin Ltd., 1977), pp. 20-4; *The Letters of J.R.R.Tolkien*, (London: Harper Collins Publishers, 1995), *Letters* 178, 181, 213, pp. 230, 235, 288 ; Joseph Pearce, *Tolkien: Man and Myth*, (London: Harper Collins Publishers, 1999), pp. 14-7.
2. 1 Victoria, c. 26, section 9. Section 17 of the Administration of Justice Act, 1982 (c. 53), substituted a new section 9 for the existing one in the 1837 Act, dealing with the wills of those who died after 1st January 1983, which included the additional permission for a witness to acknowledge his own signature in the testator's presence after the testator signs or acknowledges his own.
3. For overviews of Roman law, see Alan Watson, *The Law of the Ancient Romans*, (Dallas: Southern Methodist University Press, 1970); and J.M.Kelly, *A Short History of Western Legal Theory*, (Oxford: Oxford University Press, 1992), Chapter 2.
4. Gaius, *Institutes*, (London: Gerald Duckworth and Co. Ltd., 1988), I, 122; II, 101-4.
5. Justinian, *Institutes*, (London: Gerald Duckworth & Co. Ltd, 1987), II, 10.2.
6. Cicero, *Against Verres*, II, I, 45, §§ 117, from *The Verrine Orations*, I, (Harvard University Press: Cambridge, Massachusetts, and London, 1989), p. 247.
7. Gaius, *Institutes*, II, 119.
8. The Theodosian Code and Novels and the Sirmondian Consitutions, (Princeton, New Jersey: Princeton University Press, 1952), N.Th. 16.2-3.
9. Justinian, *Institutes*, II, 10.3-4.
10. Justinian, *Digest*, (Philadelphia, Pennsylvania: University of Pennsylvania Press, 1985), II, 29.1.1
11. J.B.Campbell, *The Emperor and the Roman Army 31 BC – AD 235*, (Oxford: Oxford University Press, 1984), pp. 210, 228.
12. Justinian, *Institutes*, II, 11, Preface.
13. 32 Henry VIII, c. 1.
14. In the *Statute of Tenures*, 1660 (12 Charles II, c. 24), all freehold tenure became socage tenure.
15. This was influenced by the textbook written by ecclesiastical lawyer Henry Swinburne (c. 1551 – 1624), *A Briefe Treatiese of Testaments and Last Willes*, (London: John Windet, 1590), in particular Part I, Chapter XIV.
16. 29 Charles II, c. 3.
17. Sir William Holdsworth, *A History of English Law*, Second Edition, (London: Methuen and Co. Ltd. and Sweet and Maxwell Ltd., 1966), VI, pp. 382, 384; XII, p. 658.
18. For general biographies of Jenkins, see *Dictionary of National Biography*, (London: Smith, Elder, & Co., 1908), X, pp. 739-42; *Oxford Dictionary of National Biography*, (Oxford: OUP, 2004), 29, pp. 960-4. For a legal biography, see Holdsworth, *A History of English Law*, XII, pp. 647-61.
19. 7 & 8 George V, c. 58, sections 2-5.

20. See the cases of: Drummond v. Parish (1843) 3 Curt., 522; Gattward v. Knee [1902] P., 99; In the Estate of Gossage, Wood v Gossage [1921] P., 194; In re Booth [1926] P., 118; and Re Wingham, Andrews and Another v. Wingham [1948] 2 All ER, 908.
21. John Garth, *Tolkien and the Great War: The Threshold of Middle-earth*, (London: Harper Collins Publishers, 2003), passim, but in particular the postscript (pp. 287-313).
22. Christina Scull and Wayne G. Hammond, *The J.R.R.Tolkien Companion and Guide, I*, (London: Harper Collins Publishers, 2006), p. 77.

Commentary: Teaching and Studying Tolkien

Dimitra Fimi

In *J.R.R. Tolkien: Author of the Century*, Tom Shippey makes a strong case for the inclusion of Tolkien within the established literary canon by means of three main arguments: the 'democratic', the 'generic' and the 'qualitative' (2000: xvii-xxvii; 305-328). The first argument refers to the continuous popularity of Tolkien's work with readers, backed by book polls; the second has to do with Tolkien's role in the establishment of fantasy as a literary genre; and the third one argues for Tolkien's relevance as a twentieth-century writer. That Tolkien is gradually entering the literary canon – following decades of academic snobbery – is demonstrated by an abundance of new academic publications on his work. This short piece aims to look at related academic activity which also marks clearly an author as belonging to the canon: his/her inclusion in academic programs and syllabi. To what extent is Tolkien taught in English Departments in the UK and abroad? Is his work equally included in courses and modules as is the work of Woolf, Joyce, Eliot and others of his contemporaries?

At Cardiff University, where I have been teaching for the past four years, I have introduced a course on Tolkien, entitled *Myth, Language and Ideology in J. R. R. Tolkien's Fiction*, which is offered as a free-standing module. This means that undergraduates from across different departments of the University can take this module as part of their degree programs. Naturally, most of my undergraduate students come from English or the Humanities in general, but I occasionally also have students from the Sciences or Social Studies attending. In autumn 2005 I also started teaching an online course on Tolkien (*Exploring Tolkien: There and Back Again*) open to undergraduate students and adult learners from all over the world. This course affords an excellent opportunity to undergraduates at Universities where Tolkien is not taught, to study and carry out research on their favourite author; and also a chance for adult learners to attend a course without necessarily having to follow an academic scheme. At Cardiff University, apart from myself, my colleague Dr Carl Phelpstead has also been teaching a course on Tolkien, this time at a postgraduate