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WILLS - SOLDIERS AND SAILORS - INTENT NECESSARY FOR VALIDITY

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WILLS — SOLDIERS AND SAILORS — INTENT NECESSARY FOR VALIDITY — In December of 1941 decedent was a fireman aboard an oil tanker bound for the Dutch West Indies. While discussing the dangers brought about by the war to merchant shipping, he told a shipmate, "Well, if I get lost or anything—I want Mr. Knight and his people to have what I got, insurance and everything." He repeated this desire to his fellow seaman on several other occasions during the course of the voyage. The vessel reached port safely, but several trips later the decedent was drowned when his ship was torpedoed. Knight claimed the estate, alleging that the statement was sufficient to constitute a valid mariner's will. The dead man's daughter contested it. *Held*, no mariner's will was

created by the decedent's words. It must appear that he intended that his words were to operate as a will, and since the declaration was made in a general conversational manner, the necessary dispositive intent does not arise out of the circumstances. *In re Buehrer's Estate*, (Pa. 1944) 37 A. (2d) 587.

The privilege enjoyed by mariners and soldiers, freeing them of the necessity of conforming to ordinary formal requirements in the execution of wills, has been said to have been borrowed from the civil law.¹ Caesar favored his troops with this concession,² and later it was extended to members of the naval service.³ At early English common law no such special treatment was needed, because the law, recognizing the rarity of literacy, generally allowed nuncupation of personal property.⁴ However, as learning spread, oral wills were frowned upon, and by 1677 the Statute of Frauds severely limited verbal bequests, but excepted the wills of soldiers from the requirement of writing,⁵ as did the English Wills Act of 1837.⁶ Most of the states in this country have statutory provisions relaxing the formal requirements for such persons.⁷ Among these is Pennsylvania, the forum of the instant case, whose statute in this respect⁸ is the virtual image of the old English Statute of Frauds.⁹ Unlike other wills, no particular form is required for the testaments of soldiers and seamen. Statements, oral or written, made by them, which do not meet all the requisites necessary for a truly nuncupative or holographic will, may still be operative to transfer property at death.¹⁰ The reasons usually given for softening the rules for the warrior and seafarer are that, because of the nature of their work, the facilities for receiving legal advice and preparing a deliberate, formal, legal instrument are not readily

¹ *Drummond v. Parish*, 3 Curt. 522, 163 Eng. Rep. 812 (1843).

² *Id.* 2 SHERMAN, ROMAN LAW IN THE MODERN WORLD, § 688, p. 258 (1937); BUCKLAND, A TEXTBOOK OF ROMAN LAW 360 (1932).

³ D. 37. 13. 1; *Ex parte Thompson*, 4 Brad. (N.Y.) 154 (1856).

⁴ *Hubbard v. Hubbard*, 8 N.Y. 196 (1853). See also an excellent article by Atkinson, "Soldiers' and Sailors' Wills," 28 A.B.A.J. 753 (1942).

⁵ "That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman 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." 29 Charles 2, c. 3, § 23 (1676).

⁶ See 10 FORTNIGHTLY L. J. 167 (1941).

⁷ Bordwell, "The Statute Law of Wills," 14 IOWA L. REV. 1 at 29 (1928).

⁸ Pa. Laws, 1917, P. L. 403, § 5; Pa. Stats. (Purdon, 1930) tit. 20, § 194.

⁹ See note 5 *supra*.

¹⁰ A holographic will must be wholly in the testator's handwriting. *Adams' Executrix v. Beaumont*, 226 Ky. 311, 10 S.W. (2d) 1106 (1929); *In re Whitney's Estate*, 103 Cal. App. 577, 284 P. 1067 (1930); and in some jurisdictions must be dated, *Montague v. Street*, 59 N.D. 618, 231 N.W. 728 (1930); see also "Holographic Wills and Their Dating," 28 YALE L. J. 72 (1918).

Nuncupative wills allowing oral disposition have been narrowly restricted and are valid only if testator was in his last sickness, if the will is reduced to writing within a limited time, if he declared the words to be his will, if he asked that it be witnessed, and if he made it at home or in the house in which he died, etc. See 1 PAGE, WILLS, 3d ed., §§ 395-405 (1941).

The statutes relating to the wills of soldiers and sailors do not contain these restrictions.

available, and that, inasmuch as the perils of warfare and of the sea increase the probability of sudden death, a summary means of providing for disposition of property should be granted.¹¹ It is also suggested that commercially alert nations are willing to indulge seamen in the hope of stimulating world trade.¹² In the case at hand the decedent was a fireman working in the boiler room, and his status as a "mariner" was not challenged. The authorities seem to agree that anyone serving aboard a ship, irrespective of his rank, duties, or the nature of his employer is regarded as a mariner or seaman.¹³ This does not include seamen who are traveling merely as passengers.¹⁴ Neither was it disputed that the vessel was "at sea";¹⁵ the case turned upon the absence of testamentary intent. The court said that it must appear that "his words were meant to operate as a will."¹⁶ It has been pointed out that the testator need not realize that his oral remark or writing constitutes a will, for the law is satisfied if a testamentary intent can be found from some of the words used,¹⁷ even though much of the conversation or letter be made up of non-testamentary declara-

¹¹ In re McGarry's Estate, 242 Mich. 287, 218 N.W. 774 (1928); In re Mason's Will, 121 Misc. 142, 200 N.Y.S. 901 (1923).

¹² Atkinson, "Soldiers' and Sailors' Wills," 28 A.B.A.J. 753 at 754 (1942).

¹³ THEOBALD, WILLS, 9th ed., 51 (1939); 1 PAGE, WILLS, 3d ed., § 408 (1941).

¹⁴ Warren v. Harding, 2 R.I. 133 (1852).

¹⁵ The question of when a person is "at sea" has provoked a great measure of litigation. Clearly a vessel on the high seas is at sea. In England wills made on board a vessel in a river or port are accepted. 1 JARMAN, WILLS, 7th ed., 92 (1930). In America it has been held that a ship in a river above the ebb and flow of the tide is not at sea. In re Gwin's Will, 1 Tucker (N.Y.) 44 (1865). This can be criticized from a practical point of view, and it is interesting to note that the jurisdiction of United States courts in admiralty is no longer limited to tidal waters. The ebb and flow doctrine was probably borrowed from England where almost all streams which are navigable are also tidal. The Hine v. Trevor, 4 Wall. (71 U.S.) 555 (1866).

Problems of whether the mariner is "at sea" before his vessel sails, or while he is on shore have arisen. Ex parte Thompson, 4 Brad. (N.Y.) 154 (1856); In re McDonald's Estate, 37 N.Y.S. (2d) 945 (1942). Page suggests that much of the apparent confusion in this field is due to variant fact situations rather than different rules of law. See 1 PAGE, WILLS, 3d ed., § 408 (1941).

¹⁶ Principal case at 588.

¹⁷ Where a soldier said to his fiancée, "If anything happens to me, and I stop a bullet, everything of mine will be yours," the court upheld the statement as a will saying, "In my view, it is not necessary, in order to establish the validity of a soldier's will, to prove that he knew he was making a will, or had the power to make a will by word of mouth. The statement made by the deceased man must, I think, be meant for a will, only in the sense that he intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death." In re Stable, [1919] P. 7 at 9. Likewise, the Virginia court, in discussing a letter sent by a soldier, stated, "The testator, Freeland, in all probability, did not think he was writing a will, but he was expressing in writing what he desired to be done with his property." Rice v. Freeland, 131 Va. 298 at 303, 109 S.E. 186 (1921).

Even though there was an express reference to the preparation of a future will, a soldier's letter was held to be testamentary. Gattwood v. Knee, [1902] P. 99.

tions.¹⁸ While a decision on the existence of such intent depends upon the peculiar combination of facts in each case, the attitude of the court toward privileged wills may swing the balance. Some courts seem to be very liberal in construing them and finding a dispositive intent,¹⁹ while others, fearing the dangers of ill-remembered speech and the hasty notation, are more strict.²⁰ Pennsylvania seems to follow the latter view, although the court's suggestion that, because the subject was discussed by the deceased and the witness several times, the likelihood of testamentary intent was weakened, is susceptible to doubt. Usually repetition creates emphasis. However, it is true that there was nothing particularly solemn about the declarations and that they were made in the course of ordinary conversation by a man in good health in no immediate fear of death.²¹ The position is in line with that taken by those who seek to discourage the easy, but dangerous, informal, privileged instruments;²² yet never before in the history of modern times has the privilege been extended to so many as it is today.

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¹⁸ Parker's Goods, 2 Sw. & Tr. 375, 164 Eng. Rep. 1041 (1859).

If a soldier's testamentary dispositions are embraced in several documents, all should be admitted to probate. In Estate of Vernon, 33 T.L.R. (P.D.) 11 (1916).

¹⁹ Decedent, a fighting man in France, wrote his wife that he had "fixed the insurance and allotment," and this was recognized as a valid will. The court said, "The case is not free from difficulty if we adhere strictly and rigidly to a literal application of the rule as generally expressed, that a paper to operate as a will must have been intended as such at the time it was written. We are frankly, and we believe properly, relaxing in some measure the ordinary rules of construction in this case, and we are doing so in recognition of the general tendency of the legislatures and the courts to treat soldiers in actual service as belonging to a class of persons entitled to public gratitude and special consideration in respect to their private and property interests." Rice v. Freeland, 131 Va. 298 at 301 (1921). The case is criticized in 16 VA. L. REV. 410 (1929). See also jurisdictions favoring a liberal interpretation of soldiers' and sailors' will statutes. In re Mason's Will, 121 Misc. 142 (1923); Leathers v. Greenacre, 55 Me. 561 (1866); and cases finding necessary intent. Hubbard v. Hubbard, 8 N.Y. 196 (1853); In re Stein's Will, 119 Misc. 9, 194 N.Y.S. 909 (1922). Cases are collected in 137 A.L.R. 1310 (1942).

²⁰ "There is, I apprehend, no difference in substance between the will of a soldier on active service and the will of a civilian." In Estate of Beech, [1923] P. 46 at 57; see also In re Gwin's Will, 1 Tucker (N.Y.) 44 (1865); Selwood v. Selwood, 125 L.T.R. (P.D.) 26 (1920); McNelis' Estate, 22 D.&C. (Pa.) 486 (1935).

²¹ Where a mariner in the throes of a fatal illness asked that his daughter "have everything," the court said, "Sickness may not be necessary to the validity of the transaction; but it affords ground for believing that the act, which might not have had testamentary meaning if done in health, assumed the gravity and significance of a will when done by one who confronted death." In re O'Connor's Will, 65 Misc. 403, 121 N.Y.S. 903 at 907 (1909).

²² Atkinson, "Soldiers' and Sailors' Wills," 28 A.B.A.J. 753 (1942).