

1918

# Wills of Soldiers and Seamen

W.L. Summers

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Summers, W.L., "Wills of Soldiers and Seamen" (1918). *Minnesota Law Review*. 2470.  
<https://scholarship.law.umn.edu/mlr/2470>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## WILLS OF SOLDIERS AND SEAMEN

THE right of soldiers to make wills, independent of the formalities required of other persons, was first given by Julius Caesar, after he had acquired both civil and military authority at Rome. Caesar gave this privilege as a temporary grant of favor to his soldiers, but it was adopted and confirmed by his successors and extended by them to the naval service, so that by the time of Trajan it had become a well settled principle of Roman law.<sup>1</sup> The privilege when first granted seems to have been very general, but from time to time limitations and restrictions were placed thereon. The extent of the right in the Justinian law is set out in the Institutes as follows:<sup>2</sup>

“The necessity for the observance of these formalities in the construction of testaments, has been dispensed with by the imperial constitutions, in favor of military persons, on account of their excessive unskilfulness in such matters. For, although they neither employ the legal number of witnesses, nor observe any other requisite solemnity, yet their testament is valid, but only if made while they are on actual service, a proviso introduced by our constitution with good reason. Thus in whatever manner the wishes of a military person are expressed, whether in writing or not, the testament prevails by the mere force of his intention. But during the times when they are not on actual service, and live at their own homes, or elsewhere, they are not permitted to claim this privilege.”

This principle of the Roman law of allowing soldiers and seamen to make informal wills has been very generally adopted and has become the law of most civilized nations.<sup>3</sup>

The general policy of the common law of permitting the disposition of personal property by nuncupative will was derived from the civil law at a very early date. By this is not meant that the policy was borrowed from the civil law of military testaments, but from the general principle of that law allowing any person to make a valid oral will in the presence of witnesses.<sup>4</sup> The most

<sup>1</sup> Dig. xxix. 1, 1; xxxvii. 12, 1; Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522.

<sup>2</sup> Inst. lib. 2, tit. 11; Sandars' Institutes, p. 244.

<sup>3</sup> Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522. See also 4 B. R. C. 895 and note.

<sup>4</sup> Prince v. Hazelton, (1822) 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, citing Institutes of Justinian lib. 2, tit. 10, sec. 14.

obvious reason for such in the common law was the widespread illiteracy of the English people. It seems very doubtful if in these early days special privileges were granted to soldiers and seaman as to making wills, for the simple reason that in the existing state of the country, they were unnecessary. Any form of expression, whether made orally to witnesses, in response to questions, by dictation to another, or by an unsigned writing, seemed to have been sufficient so long as the testator's intent was manifest.<sup>5</sup>

With the advance of learning, particularly with the wider diffusion of the art of reading and writing, the reason for this general policy of nuncupation ceased. Oral wills, therefore, gradually fell into disfavor, because of the opportunities for fraud, mistake and consequent injustice attendant upon their publication. The courts, to lessen these evils, attempted to limit the right of making informal wills by requiring proof of necessity. The better opinion indicates that by the time of James I. such wills were invalid unless made in last sickness.<sup>6</sup> It seems very probable that it was while this change was taking place that privileged testaments were allowed to soldiers and seamen, so as to exempt them from the general limitations placed upon nuncupations. How much was borrowed by the ecclesiastical courts at this time, from the civil law of military testaments, is not quite clear. There is good authority, however, for saying that during this period soldiers in actual service were given the privilege of making informal wills independent of any showing of necessity required of other persons.<sup>7</sup> The Statute of Frauds, which came to the assistance of the courts by placing many limitations on the right of nuncupation, bears out this view, in an exception to that act as follows:<sup>8</sup>

"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."

Whether Parliament borrowed this exception to the statute from the common law as they found it stated in Swinbourne, or

---

<sup>5</sup> Hubbard v. Hubbard, (1853) 8 N. Y. 198; Leathers v. Greenacre, (1866) 53 Me. 561; Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154.

<sup>6</sup> Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; Prince v. Hazelton, (1822) 20 Johns. (N. Y.) 502, 11 Am. Dec. 307.

<sup>7</sup> Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522, citing Swinbourne on Wills.

<sup>8</sup> Statute 29 Charles II, c. 3, sec. xxiii.

directly from the Institutes of Justinian, is not a question of very great importance, for all the authorities agree that it is no more than a re-enactment of the civil law.<sup>9</sup>

By the Wills Act<sup>10</sup> nuncupative wills were abolished in England, but the exception in favor of soldiers and seamen was preserved in almost the identical words of the Statute of Frauds.<sup>11</sup>

Most of the American states, whether they have followed the Statute of Frauds and allowed nuncupative wills generally, but under certain limitations, or have followed the Wills Act, and abolished them generally, have retained the exception in favor of soldiers and seamen. In most of such states soldiers and seamen are allowed to make wills of personalty, "as before," "without regard to this title," or "as at common law." In a few of such states they must be in extremis before the privilege is allowed. In Louisiana the common law has not been followed, but soldiers and seamen are privileged to make informal wills under an enactment similar to the French Civil Code. In practically all other states, that is those not granting the special privilege, nuncupative wills may be made, under certain restrictions, by any competent person.<sup>12</sup>

Thus it is clear that the law as to wills of soldiers in actual service and seamen at sea, in England and a majority of the United States, is left untouched by statute and is to be determined by the rules of the common law as borrowed from the law of Rome.<sup>13</sup> The underlying reason for the preservation of this privilege is well stated in a New York case:<sup>14</sup>

"The imminent dangers, the diseases, disasters, and sudden death, which constantly beset soldiers and sailors; the utter inability, oftentimes, to find the time or the means to make a deliberate and written testamentary disposition of their effects, seem, at all times, to have made them a proper exception to the operation of a rule, which the wisdom of later times has found it expedient, if not absolutely obligatory, to apply to all others."

In most of the cases where the courts have been called upon to determine the validity of the will of a soldier or seaman, the

<sup>9</sup> Hubbard v. Hubbard, (1853) 8 N. Y. 198; Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522.

<sup>10</sup> Statute 7 Wm. IV & 1 Vict. c. 26, sec. xi.

<sup>11</sup> See note 8, supra.

<sup>12</sup> 1 Stimson, American Statute Law, Art. 270.

<sup>13</sup> Hubbard v. Hubbard, (1853) 8 N. Y. 198; Leathers v. Greenacre, (1866) 53 Me. 561.

<sup>14</sup> Hubbard v. Hubbard, (1851) 12 Barb. (N. Y.) 148 (1855), affirmed in 8 N. Y. 198.

problem has generally been, to decide who, within the meaning of the statute, constitute the privileged classes.

The term "soldier," as used in the statutes, has been held to include any person in military service of any rank from private to general,<sup>15</sup> and the fact that the person is a minor makes no difference.<sup>16</sup>

The term "mariner or seaman" had been held to apply to all persons in the maritime service, from a common seaman to an admiral or captain, and to include not only those in government service, but merchant seamen as well.<sup>17</sup> There is some conflict, however, as to whether or not, one, who although a seaman and at sea, must be in actual service as such, to be entitled to make a seaman's will. In a Rhode Island case, where the testator, although a mariner by profession, was at the time of making his will a passenger, the court said:<sup>18</sup> "The meaning of these words is a seaman employed as such at sea."

On the contrary, in an English case it was held that a naval officer was a seaman within the meaning of the Wills Act, although at the time of making his will he was a passenger on the vessel.<sup>19</sup>

The courts are not entirely agreed as to the meaning of the phrase "actual military service." This question was raised for the first time in the ecclesiastical court, in the case of *Drummond v. Parish*. In this case Sir Herbert Jenner Fust, in an elaborate and exhaustive opinion, shows that the privilege of nuncupation as first given to the Roman soldiers was without any qualifications, but that by the time of Justinian it was limited to soldiers "cum in expeditionibus occupati sunt," which is translated as "while engaged in an expedition." The court then points out that all of the authorities have used the term "in expeditione" translated as "on an expedition" as being synonymous with the phrase "actual military service," and thus he concludes:<sup>20</sup>

"Being of the opinion from the result of the investigation of the authorities, that the principle of the exemption, contained in the 11th section of the [Wills] Act, was adopted from the Roman

<sup>15</sup> Woerner, *American Law of Administration*, Sec. 84 and cases cited.

<sup>16</sup> *Goods of Hiscock*, [1901] P. 78, 84 L. T. N. S. 61, 70 L. J. P. N. S. 22, 17 T. L. R. 110.

<sup>17</sup> *Ex parte Thompson*, (1856) 4 Brad. (N. Y.) 154.

<sup>18</sup> *Warren v. Harding*, (1852) 2 R. I. 133 (138).

<sup>19</sup> *Goods of Saunders*, (1865) L. R. 1 P. & D. 16, 35 L. J. P. N. S. 26, 13 L. T. N. S. 411, 14 W. R. 148, 11 Jur. N. S. 1027.

<sup>20</sup> *Drummond v. Parish*, (1843) 3 Curt. Eccl. Rep. 522 (542).

law: I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words 'actual military service,' the privilege, as respects the British soldier, is confined to those who are 'on an expedition.' "

This decision, even if correct, does not settle the question of interpretation, but merely shifts the burden on the courts to determine in each case, what constitutes "an expedition."

The American courts, where the question has come before them in cases arising out of the Civil War, have adopted this construction of the ecclesiastical courts. In the case of *Gould v. Safford*, decided in 1866, the supreme court of Vermont, in referring to *Drummond v. Parish*, said:<sup>21</sup>

"We are entirely satisfied with this interpretation of the statute, but what shall be considered an expedition is, in some measure a question of fact, depending upon the circumstances of the particular case."

The court in that case held that the testator was on an expedition, and therefore in actual military service, when the body of troops, of which his regiment was a part, was moving to repel an invasion of Maryland, although the testator himself was seriously ill at the time in a field hospital.

The question was before the Vermont court the same year in the case of *Van Deuzer v. Gordon*.<sup>22</sup> In that case the testator had enlisted, been mustered into service and was stationed at a training camp in Massachusetts, expecting to go to the front as soon as his regiment was complete. While at this training camp he made an informal will. Two months later his regiment was ordered to North Carolina where it engaged in actual military operations for some months. While in North Carolina the testator wrote a letter explaining and confirming his informal will. The court was of opinion that while the testator was stationed at the training camp in Massachusetts he was not privileged to make a soldier's will and explained its view, in part, as follows:<sup>23</sup>

"The term service in its restricted sense is the exercise of military functions in the enemy's country in the time of war, or the exercise of military functions in the soldier's own state or country in time of insurrection or invasion, and in this sense the words of the statute, 'actual military service' should be understood."

In explaining its view that the testator was in actual military service while in North Carolina, the court said:<sup>24</sup>

---

<sup>21</sup> *Gould v. Safford*, (1866) 39 Vt. 498 (505).

<sup>22</sup> (1866) 39 Vt. 111.

<sup>23</sup> *Ibid.*, p. 118.

<sup>24</sup> *Ibid.*, p. 119.

"Nor is it essential to the validity of a soldier's will that it should be made or executed in the face of the enemy, or while the army is preparing for an immediate engagement, for, at such a time, from the very nature of the circumstances, the engagement must be delayed to give opportunity for soldiers to make their wills, if they desire to make them, or they must be deprived of the conditions of the statute. When a soldier is in the enemy's country, whether in camp, in campaign or in battle, such service is actual military service within the letter and spirit of the statute."

In a Maine case, also decided in 1866, and upon a state of facts very similar to those in the case last cited, the supreme court of that state held that the phrases "engaged in an expedition" and "in actual service" were synonymous. It was said in substance, that if the testator had made his will after being mustered into the service, but while he remained in a training camp in a loyal state not exposed to the incursions of the enemy, and before he had actually crossed over into the enemy's territory and under military orders had begun to move against the foe, that such will would not be entitled to probate as the will of a soldier. But since the testator was actually in the enemy's country, although at the time of making the alleged will was encamped in winter quarters, he was in "actual military service" or "engaged in an expedition," within the meaning of the Maine statute.<sup>25</sup>

In an Indiana case, decided in 1874, the supreme court of that state cited with approval the interpretation of the term "actual military service" as laid down in the Maine and Vermont cases. The testator in that case was denied the privilege of making a soldier's will, although he had responded to a call for volunteers to repel an invasion of the state by Confederate troops and was on the verge of leaving for the front when the alleged will was made, the court holding that since he had not yet been formally mustered into service he was not "a soldier" nor "in actual service" within the meaning of the statute.<sup>26</sup>

Thus it appears that the American courts, when they have been called upon to interpret the phrase, "actual military service," within the meaning of their respective statutes, have accepted the explanation of the ecclesiastical courts that this phrase is synonymous with "engaged in an expedition," and have proceeded to define the meaning of this latter expression, without once reverting to the civil law to determine for themselves the true

---

<sup>25</sup> *Leathers v. Greenacre*, (1866) 53 Me. 561.

<sup>26</sup> *Pierce v. Pierce*, (1874) 46 Ind. 86.

significance in that law of the original Latin phrase, "in expeditione." The result of the decisions in this country have very naturally been to limit the privilege of making soldier's wills to those, who, in time of war out of the country, are actually in the enemy's territory with the fighting forces, or those who, in time of a war of invasion are in the invaded section resisting the incursions of the enemy.

A decidedly more liberal interpretation of the phrase "actual military service" is observable in the later English cases, particularly in those arising out of the Boer War. As early as 1865 it was held that an officer, in command of a detachment about to march from a point in Africa against a native tribe, was entitled to make a soldier's will, even before he left the English settlement.<sup>27</sup>

In the *Goods of Hiscock*,<sup>28</sup> decided in 1901, it was held that where a volunteer had gone into barracks during the Boer War, as a first step towards joining the field forces, he was in actual service. It was there said that the test whether a soldier is "in actual military service" for the purpose of the Wills Act, is whether or not he has, under an order for mobilization, taken some step, however small, towards joining the forces in the field. In explanation of this view the court said:<sup>29</sup>

"The step may be a small one, both as regards place and time. In case of invasion or civil war—both circumstances which were more present to the minds of the persons who framed the laws of this country in the time of Charles II, than they are to the legislators of our own time—the step might be merely that a man was taken from his home to man the walls of defences of his own native town. In the case of invasion, I should imagine, for instance, that a man living at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defense, would have been within the meaning of the term 'in expeditione' or 'actual military service,' although the movement made or step taken by him would be small both in point of time and locality or distance."

The same judge, a year later in the case of *Gattwood v. Knee*, in deciding that a soldier in barracks in India was "in actual mili-

---

<sup>27</sup> *Thorne's Goods*, (1865) 4 Swab. & Tr. 36, 34 L. J. P. N. S. 131, 11 Jur. N. S. 569, 12 L. T. N. S. 639.

<sup>28</sup> *Hiscock's Goods*, [1901] P. 78, 84 L. T. N. S. 61, 70 L. J. N. S. 22, 17 T. L. R. 110.

<sup>29</sup> *Ibid.*, p. 83.

tary service," after the order for mobilization for the Boer War had been given, said:<sup>30</sup>

"Then comes the question, Is it a soldier's will within the meaning of the wills act? Upon the whole, I am of the opinion that it is. In so holding I am perhaps going a step further than in my recent decision,—In the *Goods of Hiscock*,—but I have no doubt myself that mobilization, giving to that word the effect which I understand it to carry, may fairly be taken as a commencement of that which in the Roman law was expressed by the words, in expeditione. These words meant something more than the English words, 'on an expedition,' because it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be in expeditione. I thought, when deciding the case cited, and still think, that it is a fair test to ask whether or not the person whose testamentary dispositions are in question has done anything; but I am of the opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that so alters his position as practically to place him in expeditione. Such an order goes beyond a mere warning. I do not think that a mere warning for active service would be sufficient; but when a force is mobilized I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service."

Following the test laid down in the *Goods of Hiscock* and its further extension in *Gattward v. Knee*, the English courts have in cases arising out of the Boer War, held that soldiers were in "actual military service" in the following situations: a sergeant stationed at Woolwich, under orders to report to a regiment about to sail to South Africa in anticipation of the war,<sup>31</sup> in barracks on the day of sailing for South Africa after the war had started,<sup>32</sup> on a vessel sailing for Africa during the war.<sup>33</sup>

Once it is made clear that a testator is actually engaged in an expedition, whether that term is given the meaning fixed by the ecclesiastical and American courts, or the more liberal view of the modern English cases, the privilege exists until the expedition is at an end. In a recent case it was held, that an officer who at the conclusion of a military campaign against a native tribe on the frontier of India, remained as a member of the mili-

<sup>30</sup> *Gattward v. Knee*, [1902] P. 99, 86 L. T. N. S. 119, 18 T. L. R. 163, 71 L. J. P. N. S. 34, 4 B. R. C. 895.

<sup>31</sup> *Gordon's Goods*, (1905) 21 T. L. R. 653.

<sup>32</sup> *Stopford v. Stopford*, (1903) 19 T. L. R. 185. *Contra*, *Bowles v. Jackson*, (1854) 1 Spinks Eccl. & Adm. 294.

<sup>33</sup> *Cory's Goods*, (1901) 84 L. T. N. S. 270; *May v. May*, [1902] p. 99 (103), 86 L. T. N. S. 119, 71 L. J. P. N. S. 34, 18 T. L. R. 184.

tary escort of a party engaged in the delimitation of the frontier, was engaged in actual service and entitled to make a soldier's will.<sup>34</sup> But a soldier home on a furlough is not entitled to the privilege.<sup>35</sup>

The right of a mariner or seaman to make an informal will under the statute is made to depend upon the further condition of being "at sea." The courts have generally construed these words with considerable liberality. In a New York case,<sup>36</sup> however, the court followed the old English rule for determining navigability and held that the commandant of a gunboat operating on the Mississippi river, above the ebb and flow of the tide, was not "at sea" within the meaning of the statute of that state, and consequently not entitled to make a seaman's will. This case has met with justly deserved criticism. In Gardner on Wills, it is said:<sup>37</sup>

"A vessel may certainly be said to be at sea when she is on her way to her destination, regardless of whether or not there is a daily variation in the depth of the waters which she is traversing. If so, a seaman on board can make a valid nuncupative will. To hold to the ancient doctrine is to hold that a sailor on the Great Lakes cannot, when overtaken by sudden danger, make an oral will, although the reasons for sustaining a will thus made are as strong in his case as in that of his fellow on the Atlantic. If this doctrine applies, it follows that a seaman on a vessel bound from Montreal to Liverpool can make a nuncupative will when the ship has reached Three Rivers, where the influence of the tide is felt, but cannot do so between that point and Montreal,—a palpable absurdity."

Most courts would probably agree that a vessel may be considered "at sea" when she has left her wharf and is on her way to her destination, regardless of whether or not she is traversing tidal or non-tidal waters, even though she be detained in a river, harbor, or arm of the sea.<sup>38</sup> Some courts have gone farther and said that a sailor or mariner is "at sea" before his vessel leaves

<sup>34</sup> *In re Limond*, [1915] 2 Ch. 240, 84 L. J. Ch. 833, Ann Cas. 1916A 479.

<sup>35</sup> *In re Smith's Will*, (1865) 6 Phila. 104, 22 Leg. Int. 68.

A nurse, employed under contract by the War Office on hospital ships, after receiving orders to re-embark for duty, and before re-embarking, wrote a letter to her niece disposing of her personal property. It was held valid as a soldier's will. *Estate of Stanley*, [1916] P. 192, 114 L. T. 1182, 32 T. L. R. 643.

<sup>36</sup> *Gwin's Will*, (1865) 1 Tucker (N. Y.) 44.

<sup>37</sup> Gardner, Wills 63.

<sup>38</sup> *Warren v. Harding*, (1852) 2 R. I. 133; *Patterson's Goods*, (1898) 79 L. T. N. S. 123; *Milligan's Goods*, (1849) 2 Rob. Eccl. Rep. 108; *Hubbard v. Hubbard*, (1853) 8 N. Y. 198; *Austen's Goods*, (1853) 2 Rob. Eccl. Rep. 611.

the wharf.<sup>39</sup> And in one instance a mariner on board a naval vessel was held to be within the statute, although his vessel was at the time lying in port with no immediate intention of sailing.<sup>40</sup>

In one case it was said: "A mariner on shore has no rights in making a will of his personalty superior to those of any other person."<sup>41</sup> In the light of other decisions this statement needs some qualification. It is very apparent that the legislators did not intend to grant the privilege of nuncupation to all seamen under all conditions or circumstances, but only while "at sea," and it has accordingly been held that the privilege cannot be exercised on shore, although the testator may be contemplating an immediate voyage,<sup>42</sup> but it has been held that a voyage once begun, a seaman in continuous service, may make an oral will while ashore at an intermediate port.<sup>43</sup>

In those jurisdictions where soldiers and seamen are, by express reservation in the statutes, allowed the privilege of nuncupation, it has generally been held that the members of the privileged class do not have to be in extremis to make a valid oral will.<sup>44</sup> In a recent case it was said:<sup>45</sup>

"The fear of death which was supplied by sickness in case of those who made oral wills at home was sufficiently furnished, in the case of sailors or soldiers, by the perils of the sea or the presence of the enemy."

The statutes of Montana, North Dakota, and Oklahoma,<sup>46</sup> however, provide that:

<sup>39</sup> *Ex parte Thompson*, (1856) 4 Brad. (N. Y.) 154; *Rae's Goods*, (1891) Ir. L. R. 27 Eq. 116.

<sup>40</sup> *M'Murdo's Goods*, (1868) L. R. 1 P. & D. 540, 37 L. J. P. N. S. 14, 17 L. T. N. S. 393, 16 W. R. 283.

<sup>41</sup> *Gwin's Will*, (1865) 1 Tucker (N. Y.) 44.

<sup>42</sup> *Goods of Henry Corby*, (1854) 1 Spinks Eccl. & Adm. Rep. 292.

A woman for several years employed by the Cunard Company as a typist on one or other of its steamships, who made her nuncupative will while at her lodgings in Liverpool, in contemplation of sailing on the *Lusitania* on the voyage during which the ship was sunk, was held to be a "mariner or seaman;" she was also held to have been "at sea" within the meaning of the Wills Act, at the time of making her will. *Goods of Sarah Hale*, [1915] 2 I. R. 362.

<sup>43</sup> *Parker's Goods*, (1859) 2 Swab. & Tr. 375, 28 L. J. P. N. S. 91, 5 Jur. N. S. 553; *Lay's Goods*, (1840) 2 Curt. Eccl. Rep. 375.

<sup>44</sup> *Leathers v. Greenacre*, (1866) 53 Me. 561; *Van Deuzer v. Gordon*, (1866) 39 Vt. 111; *Ex parte Thompson*, (1856) 4 Brad. (N. Y.) 154; *In re O'Connor's Will*, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903; *Botsford v. Krake*, (1866) 1 Abb. Pr. N. S. (N. Y.) 112.

<sup>45</sup> *In re O'Connor's Will*, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903.  
<sup>46</sup> N. D. Compiled Laws 1913 Sec. 5645; Okla. Rev. Laws 1910 Sec. 8343; Ray v. Wiley, (1902) 11 Okla. 720, 69 Pac. 809; Mont. Rev. Codes 1907 Sec. 4738.

The Minnesota statute (Minn. G. S. 1913) provides:

"The decedent must at the time have been in actual military service in the field, doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death, or the decedent must have been at the time in expectation of immediate death from an injury received the same day."

In other states where soldiers are not specially privileged, but where nuncupative wills are allowed, it is held by the weight of authority that the testator must be in extremis to make a valid oral will.<sup>47</sup>

By the words of the statutes only personal property may be bequeathed by the will of a soldier or sailor, and this is the rule generally prevailing as to all nuncupative wills.<sup>48</sup>

It was provided by the Justinian law that if a soldier made a will while in actual service such a will would hold good for one year after he left the service.<sup>49</sup> This rule seems not to have been enforced in England and the United States. It was recently held in a New York case that a will of a seaman remained effective, although the testator recovered from the illness prompting making of the will and died on shore.<sup>50</sup> In England it has been held that a will made by the testator in actual military service remained effective although the testator had returned to England and lived there for several years before his death.<sup>51</sup>

The form of expression of the testamentary disposition of a soldier or sailor has never been considered very material. Justinian said:<sup>52</sup>

Sec. 7252. "Nuncupative wills shall not be valid unless made by a soldier in actual service or by a mariner at sea, and then only as to personal estate."

Sec. 7282. "Nuncupative wills, at any time within six months after the testamentary words are spoken by the decedent, may be admitted to probate on petition and notice, as provided for in case of other wills. The petition shall allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing shall accompany the petition. No such will shall be admitted to probate except upon the evidence of at least two credible and disinterested witnesses."

The Wisconsin Statute 1915 Secs. 2292 and 2293 regarding nuncupative wills contain the following proviso:

"Nothing herein contained shall prevent any soldier being in actual service nor any mariner being on shipboard from disposing of his wages and other personal estate by a nuncupative will."

<sup>47</sup> *Prince v. Hazelton*, (1822) 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; see also 40 Cyc. 1134.

<sup>48</sup> *Pierce v. Pierce*, (1874) 46 Ind. 86; see also L. R. A. 1916E 1132 note.

<sup>49</sup> *Institutes*, lib. 2, tit. 11, sec. 3.

<sup>50</sup> *In re O'Connor's Will*, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

<sup>51</sup> *In Goods of Leese*, (1852) 17 Jur. 216.

<sup>52</sup> *Institutes*, lib. 2, tit. 11.

"Thus in whatever manner the wishes of a military person are expressed, whether in writing or not, the testament prevails by the mere force of his intention."

Blackstone is authority for the statement that under the civil law if a soldier wrote anything in blood on his shield or in the dust of the battle field with his sword, it was a good military testament, but he adds that the common law is not so liberal.<sup>53</sup> Swinbourne says, however, that:<sup>54</sup>

"As for any precise form of words, none is required, neither is it material whether the testator speak properly or improperly, so that his meaning appears."

This statement, though made three hundred years ago, seems to be the law today. All that the courts require, is that there be proof of the testator's wishes, however they may have been expressed, and proof of testamentary intent at the time of the declaration. It has accordingly been held that a seaman's will is good though made orally,<sup>55</sup> and in response to interrogatories.<sup>56</sup> And that an expression of testamentary desire and intent of a soldier or seaman contained in a written statement,<sup>57</sup> or letter,<sup>58</sup> may constitute a valid will, even though a large portion of such letter is not testamentary,<sup>59</sup> or the writer therein expresses an intention of making a formal will.<sup>60</sup> In one case, on the authority of the civil law, it was held that a document not effective as a soldier's will because not made in actual service, became such where it was recognized and confirmed by the testator in a letter written by him while in actual service.<sup>61</sup> In a recent English case, a declaration made by a soldier in actual service at the instance of the military authorities, to the effect that, "in the event of my death in South Africa, I desire all of my effects to be credited to my sister," naming her, was held entitled to probate as a will.<sup>62</sup>

In the construction of the wills of soldiers and sailors, although a few cases have arisen, most of which concern expressions of the

<sup>53</sup> 1 Blackstone, Commentaries 417.

<sup>54</sup> 2 Swinbourne, Wills 643.

<sup>55</sup> *Ex parte Thompson*, (1856) 4 Brad. (N. Y.) 154; *In re O'Connor's Will*, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

<sup>56</sup> *Hubbard v. Hubbard*, (1853) 8 N. Y. 198.

<sup>57</sup> *In re Limond*, [1915] 2 Ch. 240, 84 L. J. Ch. 833, Ann. Cas. 1916A 479.

<sup>58</sup> *Leathers v. Greenacre*, (1866) 53 Me. 561; *Gould v. Safford*, (1866) 39 Vt. 498; *Gattward v. Knee*, [1902] p. 99, 86 L. T. N. S. 119, 18 T. L. R. 163, 71 L. J. P. N. S. 34, 4 B. R. C. 895; *Anderson v. Pryor*, (1848) 10 Sm. & M. (Miss.) 620.

<sup>59</sup> *Parker's Goods*, (1859) 2 Swab. & Tr. 375, 28 L. J. P. N. S. 91, 5 Jur. N. S. 553; *Rea's Goods*, (1891) Ir. L. R. 27 Eq. 116.

<sup>60</sup> *May v. May*, [1902] P. 99 (103), 86 L. T. N. S. 119, 71 L. J. P. N. S. 34, 18 T. L. R. 184; *Herbert v. Herbert*, (1855) Deane & Sw. Eccl. Rep. 10.

<sup>61</sup> *Van Deuzer v. Gordon*, (1866) 39 Vt. 111.

<sup>62</sup> *Scott's Goods*, [1903] P. 243, 73 L. J. P. N. S. 17, 89 L. T. N. S. 588.

testator relating to approaching death, yet there appears to be no principle that is not pertinent to the construction of ordinary wills.<sup>63</sup>

Although the policy of permitting soldiers to make informal wills originated in the civil law nearly two thousand years ago and has by direct or indirect influence of that law become a fixed principle in most civilized countries, there has never been a time in the world's history when so many men were entitled to the privilege as now. In the United States very few cases upon this subject have reached the higher courts. But with a proposed army for the present war to be numbered by millions, it seems very likely that many soldiers will exercise their privilege of nuncupation and that some litigation will follow.

As the law now stands there is really but one question on this subject about which the courts are not agreed. That question can be generally put as follows: At what stage in the career of an American soldier, from the time he is called from private life until he stands in the front line trenches on the battlefields of Europe can it be said that he is in actual military service, within the meaning of the English and American statutes? By the rule of the American decisions it is not till he is "in the enemy's country, performing military service, whether in camp, campaign or battle." If our courts attempt to follow this rule in the future they are sure to meet with much difficulty in applying it to the conditions of modern warfare, and to a war like the present. Many questions suggest themselves, for example, what is the "enemy's country?" If the battlefields of Europe, then what of the American soldier who crosses a sea infested with enemy submarines? If the sea is the "enemy's country" where on the sea can a soldier make a valid oral will? The rule laid down by the recent English cases that actual military service is begun when the order for mobilization has been given, that is, when the soldier is "placed under military orders with a view to some step being taken forthwith for active service," is one which seems founded on best reason, easiest of application, and most likely under all circumstances to do justice.

W. L. SUMMERS.

UNIVERSITY OF FLORIDA.

---

<sup>63</sup> *Gattward v. Knee*, [1902] P. 99, 71 L. J. P. N. S. 34, 86 L. T. N. S. 119, 18 T. L. R. 163, 4 B. R. C. 895; In *Goods of Spratt*, [1897] P. 28, 66 L. J. P. N. S. 25, 75 L. T. N. S. 518, 45 W. R. 159; *Goods of Robinson*, (1870) L. R. 2 P. & D. 171, 40 L. J. P. N. S. 16, 23 L. T. N. S. 397, 19 W. R. 135; *Scott's Goods*, [1903] P. 243, 73 L. J. P. N. S. 17, 89 L. T. N. S. 588.