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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### WILLS—TWO PHASES OF THE LAW OF MILITARY TESTAMENTS

The English Statute of Frauds, as well as the English Wills Act, included an exception in favor of the soldiers and mariners which has been changed very little from the provision of the first statute in 1677 to the present day. That provision reads: "Provided always, That (notwithstanding this Act) any soldier being in

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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."<sup>1</sup>

The original source of this exception is held by all authorities to have been the civil law of Rome<sup>2</sup> and dates from the time of Julius Caesar when he first gave the right to make wills without fulfilling formalities to his soldiers as a temporary measure. It became recognized as part of the Roman law and from Rome spread to nearly all the countries of Europe in the course of several centuries. Its adaptation into the English law came by way of the ecclesiastical courts. Sir Leoline Jenkins, who was responsible for the sections of the Statute of Frauds dealing with bequests of personalty and the exception in favor of soldiers and mariners, claimed that he preserved for the soldiers of the English army the full benefit of the testamentary privileges of the Roman army.<sup>3</sup>

Sir Herbert Jenner Fust, in the case of *Drummond v. Parish*,<sup>4</sup> lays down the principle that since the origin of the exception was the Roman law, then to it must one turn for interpretation of the exception. In this leading case on the point, Sir Herbert applied this theory and held that "actual military service" meant that the soldier must be engaging the enemy, or be "on expedition," as the Roman law required, before the will would be good as a military will.

There is much room for a difference of opinion in regard to this theory. The Statute of Frauds makes no mention of the Roman law as being the basis for the exception, but says that military wills may be made "as before the making of this act."<sup>5</sup> This would only mean the law of England applicable to wills of soldiers and mariners before the act, or the law of the ecclesiastical courts as it was determined and applied to such wills. While the idea behind the English exception came from the Roman law, it does not follow that the ecclesiastical courts adopted the Roman law bodily or entirely. This point was clearly made by Lord Merrivale in 1926 in the case of *Booth v. Booth*.<sup>6</sup> The essential problem is what was the law of military wills as applied in the English ecclesiastical court prior to the Statute of Frauds? Since there are no reported cases of this early period, it is a difficult question. Then too, at least as to form of execution, anyone could then dispose of his personalty by informal writing, or even oral declaration, so that it is difficult to see how a soldier or mariner could have any special testamentary privilege. Since the Statute of Frauds, the reported cases have not been numerous and for the most part deal with the question of just when the soldier or mariner comes within the exception to make an unattested or informal will. This point will not be discussed

1. 29 Car. II, c. 3, § 23 (1676); 7 Wm. IV & I Vict., c. 26 § 11 (1837).

2. *Drummond v. Parish*, 3 Curt. Ecc. 522 (1843); *Ex parte Thompson*, 4 Bradf. 154 (N. Y. 1856); SWINBURNE, TESTAMENTS & LAST WILLS (2d ed. 1635); Summers, *Wills of Soldiers & Seamen* (1918) 2 MINN. L. REV. 261; Atkinson, *Soldiers' and Sailors' Wills* (1942) 28 A. B. A. J. 753.

3. *Drummond v. Parish*, 3 Curt. Ecc. 522 (1843).

4. *Id.*

5. See note 1 *supra*.

6. [1926] P. 118.

in this paper, but attention will be confined to the problem of: (1) for how long after the soldier or mariner has left the service may his informal will, made under the exception, be good; (2) whether a minor soldier or mariner may make a will under the exception.

## I

In *Drummond v. Parish*, by way of dicta, since the point was not in issue, the court says that a soldier's or mariner's will would be good for only one year after it was made. The court is looking to the limitation of the Roman law when it says this. The only square decision on the question of how long a soldier's will is good is the case of *Booth v. Booth*.<sup>7</sup> In this case the will was written but was destroyed by fire at a later date. The only evidence by which the will could be proven was the oral statements of the wife of the deceased as to the contents of the will. The will was written forty-two years before the death of the testator, just as he was about to embark upon a military expedition with the English army. The contention was made that according to *Drummond v. Parish* the privileged will became invalid a year after retirement from service.<sup>8</sup> Lord Merrivale repudiated the theory suggested in the dicta of *Drummond v. Parish* and said that the privilege of the soldier was the same as the privilege of the civilian before the Statute of Frauds. He further stated, "There is no case in our legal history that I am aware of, outside of the judgment referred to; the judgment in *Drummond v. Parish* and the case which is referred to there of *Sherman v. Pyke*, which gives any colour to the supposition that a soldier's will becomes inoperative at the expiration of twelve months from its being made, and neither of these cases is any authority for any such proposition."<sup>9</sup> In neither of the cases mentioned was the point in issue. The judge rejected the earlier dicta and held the will good. He also stated that the fact that Parliament in 1918 had extended the privilege so as to include realty and that, from the wording of this act,<sup>10</sup> Parliament either ignores or negatives the supposition that the soldier's will expired in a limited time, or that a soldier's will was terminated by some mode other than that which is called for in ordinary wills.

The problem is very much the same in America as it was in England before *Booth v. Booth*. Thus, most states have some special statutory provision for the making of a soldier's or mariner's will. Some few states require that the soldier or mariner be in the last sickness. For the most part the states allow the soldier or mariner to make wills of personalty "as before," "without regard to this title," "as at common law" or "notwithstanding this act." Louisiana gets its exception from the French Civil Code.<sup>11</sup> The law in regard to soldiers and mariners is therefore left undefined by these statutes and the common law of the state must be looked to in order to determine just what the privilege is and how it will apply.

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7. *Id.*

8. See note 3 *supra*.

9. See note 6 *supra*.

10. Wills (Soldiers & Sailors) Act, 7 & 8 Geo. V., c. 58, § 3 (1918).

11. Bordwell, *The Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 29-30.

The American courts have for the most part been content with the doctrine as laid down by the English courts in regard to the privilege. There are a few cases on the problem of soldiers and mariners wills in the United States, not over twenty-five that have been reported. Of these, there are few which make any mention of the problem of how long such a will is good and in no case is the point directly in issue. There are two definite viewpoints, however. The court either follows the dicta of the case of *Drummond v. Parish* and says that such a will is good for only a year after the soldier leaves the service, or it follows the theory that the will of the soldier or mariner has the same duration as ordinary wills of personalty, and therefore the will is not revoked at the end of a year or any other period.

The first theory is supported by the Maine case of *Leathers v. Greenacre*.<sup>12</sup> The court declared that the privilege first came from the Roman law and the Roman law permitted such a will to be valid for only a year after dismissal from the army.<sup>13</sup> The court also cited several English cases which have mentioned this idea of one year wills—notably *Drummond v. Parish*. The Maine court is following the theory that the civil law should be looked to when it is necessary to interpret the exception. This case has been cited in several other cases as correctly stating the law in regard to requirements of actual military service.<sup>14</sup> No great reliance, however, should be placed on the dicta as to the duration of the will, because the point was not involved in the case.

The other theory is adhered to in the New York case of *Matter of O'Connor*<sup>15</sup> involving the oral will of a seaman, made at sea, during a sickness from which he recovered, only to die later while on shore. Again the point was not directly in issue as the problem was whether the mariner could make an oral will, although he was not then in *extremis* and recovered. The court held the will within the exception as provided in the New York Statutes and after saying that the will need not be made while in the last sickness, further states: "In submitting to this view it may well be remarked that its dangerous effect is that a mariner's oral will, once made at sea, may remain for his lifetime, and may be proved by mouth by two witnesses, however long after the event and however ample the testator's opportunities for a deliberate statutory will may have been in the meantime."<sup>16</sup> The court is following the common law theory. It says that before the Statute

12. 53 Me. 561 (1866).

13. The point was not in issue in this case as the case turned on whether or not the soldier was in actual "military service." The soldier died while still in service, but the court in a general discussion of problems involved in soldier's and mariner's wills says that the will of a soldier is good for only a year after he leaves the service. The Maine statute made it possible for the soldier or mariner to make a will without complying with the formalities otherwise required and permitted them, either by written or oral wills, to dispose of their personal estate and wages as they might have done at common law.

14. *Pierce v. Pierce*, 46 Ind. 86 (1874).

15. 65 Misc. 403, 121 N. Y. Supp. 903 (Surr. Ct. 1909).

16. *Id.* at 406, 121 N. Y. Supp. at 905.

of Frauds a man could make an informal testamentary disposition which would be good until revoked, and therefore under the exception provided in the state statutes the soldier or mariner had the same privilege as he would have had at the common law. No further mention is made of this problem in the case, but since the court upheld the will, they apparently acquiesce in the result they fear would follow.

The case of *Henninger's Estate*<sup>17</sup> lends strength to the second theory, although the point is not mentioned in the case. The opinion states that the intention of the exception in Pennsylvania Statutes in favor of soldiers and mariners is clearly that all provisions of the wills statute do not apply to the wills of soldiers in actual military service, and, as a matter of purely statutory construction, there is no difficulty in coming to the conclusion that the law applicable to the case of a soldier's will is the law in force prior to the act of 1705, or the common law of the state. The court says that while the exception is like that of the Roman law, the exception in the Pennsylvania Statutes means that the common law of the state, which did not require any formalities in the execution of wills of personalty, will apply. Here, then, the court is looking to the common law of the state, not the Roman law, to interpret and determine the bounds of the exception.

There is another group of cases which lends some support to this second theory. These are the decisions in which the testator died more than one year after leaving the service, but no objection was made on this ground.<sup>18</sup> These cases are not at all convincing upon the proposition but when coupled with the holding in *Booth v. Booth* and dicta supporting it, indicate that it is more generally felt that in the Anglo-American law a military will is good until actually revoked and that it does not lapse one year after the soldier has left the service as was the case in Roman law.

## II

Under the Roman law a soldier could not make a military will until he attained puberty, which was the ordinary testamentary age.<sup>19</sup> Prior to the Statute of Frauds the testamentary age regarding personalty was fourteen and this applied to soldiers and mariners as well as civilians.<sup>20</sup> Even after the Statute of Frauds this rule continued until the English Wills Act of 1837 which fixed the general testamentary

17. 30 Pa. Dist. 413 (1921).

18. In this category is the English case of *Beech v. Public Trustee et al.*, 92 L. J. 33 (C. A. 1922). In America the cases of *In re McGarry's Estate*, 242 Mich. 287, 218 N. W. 774 (1928); *Matter of Dumont*, 170 Misc. 100 (1938); and *Matter of Zaiac*, 162 Misc. 642 (1937), are of this nature. The latter case is especially interesting as the deceased could have made no other will, since he became insane shortly after making the military will. *In re Zaiac's Will* was reversed by the upper court, *Matter of Zaiac*, 279 N. Y. 545, 18 N. E. (2d) 848 (1939), and the implication is that no question would have been raised in regard to the fact that the deceased had been out of the army and unable to make a will for over fifteen years. No great weight may be given these cases but they do have a clear implication in them.

19. Ulpian, tit. 20 § 12.

20. SWINBURNE, TESTAMENTS & LAST WILLS (2d ed. 1635) pt. 2, § 2.

age at twenty-one for personal as well as real property.<sup>21</sup> The same act, however, preserved the testamentary privileges of soldiers and mariners.<sup>22</sup> There is, therefore, an obvious question of statutory construction present as to whether this statutory exception regarding military wills is broad enough to except soldiers and mariners from the general age requirement.

In England the case of *Re Farquar*<sup>23</sup> has been the leading case on this point. Here the deceased was serving in the English army and died on the field of battle, leaving a written will with only one witness. Sir Herbert Jenner Fust held that while under the general statutory provisions in regard to wills, the will of a minor was void, the exception in the Wills Act in favor of soldiers and mariners was broad enough to cover minor soldiers over fourteen, because any male of that age could will his personalty prior to the Wills Act of 1837.

In the case of *Wernher v. Beit*<sup>24</sup> the will of a minor was already probated but the vice chancellor did not believe that the English Wills Act of 1837 permitted the making of a will by a minor soldier or mariner. His contention was that the exception for soldiers' and mariners' wills was not a general exception but a proviso making such wills an exception to sections nine and ten of the Wills Act, which provided for certain formalities in writing of wills. He still upheld the will, saying that it was good, since it was admitted to probate. This case was affirmed on appeal<sup>25</sup> and the court there dismissed the problem raised in the trial court, saying, that the infant soldier had the power to make a will under sections eleven and twenty-seven of the Wills Act of 1837, and that this had been expressly settled in 1918 by the Wills Act of that year. This act provided: "In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that Section 11 of that Act authorized and always authorized any soldier in actual service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of this act, though under 21 years."<sup>26</sup> From these cases and from the unusual wording of the Wills Act of 1918, English soldiers and mariners who are over fourteen years of age have had the privilege of making a will under the exception in favor of soldiers and mariners.

In the United States the question of whether the minor soldier or mariner may make a will under the exception will again be answered according to the individual statute and the interpretation put upon it. If the exception is construed as meaning that the will of a soldier or mariner is excluded from all requirements of the various state statutes, then there will be no requirement made as to age, other than the common law requirement that he be fourteen years of

21. 7 Wm. IV & 1 Vict. c. 26, § 7 (1837).

22. *Id.* at c. 26, § 11 (1837).

23. *Re Farquar*, 4 Notes of Cases 651 (1846), discussed in 30 Jurid. Rev. 338 (1918).

24. *In re Wernher* [1918] 1 Ch. 339.

25. *In re Wernher* [1918] 2 Ch. 82.

26. See note 10 *supra*.

age.<sup>27</sup> If the exception is construed as meaning only that the soldier or mariner is excluded from the formalities of writing, or of having witnesses, then the general statutory age requirement is applied.<sup>28</sup> This age is generally twenty-one.

There are few cases on the point in the United States, but there is one good case illustrating each point. The Pennsylvania case of *Henninger's Estate*<sup>29</sup> in which the deceased, while being carried from the battlefield, in a dying condition, told his sergeant, in the hearing of a stretcher bearer, that he gave everything to Mrs. Toomes. The deceased was nineteen at the time of making the will. The Pennsylvania Statute of Wills of 1833 required testators to be twenty-one years old, but the Pennsylvania Statutes also had an exception in favor of soldiers and mariners. The court construed the term "notwithstanding this act" as taking military wills entirely from the operation of the general act and found that the only requirement in regard to age, so far as soldiers and mariners are concerned, was fourteen years of age. This court followed the construction that in excepting the wills of soldiers and mariners, they excepted them from the whole act.

The other construction, that the exception must be narrowly construed, is followed in *Goodell v. Pike*, a Vermont case.<sup>30</sup> An infant soldier, apparently not in actual military service, made a will which was contested by his father. The contention was made that the will was void because it was made by an infant. The defense was that the will had been ratified by the deceased while he was on actual military service in the army and therefore it would come under the exception in the Vermont statute in favor of soldiers and mariners. The court held the will void, saying that the exception in the statute was not to apply to all requirements in regard to a will, but it was to apply only to the formalities of execution. They therefore required the soldier to be of full statutory age, which in Vermont was twenty-one.

The statutory situations under which these two cases were decided were not, of course, absolutely identical, but none of the differences will explain the differences in holding and the cases must be taken as representing opposing conceptions of the statutory exceptions of military wills from the general wills acts. There is only one other case in the United States upon the question of a minor soldier making a will. This is the case of *In re Evans' Will*, an Iowa case.<sup>31</sup> Here the deceased died in France and fourteen days before his death he had executed his will with all formalities. He was nineteen years old at the time of his death. The court construed the Iowa statute to mean that the exception in regard to soldiers and mariners should only permit them to make a nuncupative will. The Iowa statute is worded quite differently from the general exception statute and the court's

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27. *Henninger's Estate*, 30 Pa. Dist. 413 (1921).

28. *Goodell v. Pike*, 40 Vt. 319 (1867).

29. See note 27 *supra*.

30. See note 28 *supra*.

31. 193 Iowa 1240, 188 N. W. 774 (1922).



construction is quite proper.<sup>32</sup> The best that can be determined from these cases is that the court of the state in which the question arises will base its decision upon its statutes and the result favored by the particular court.

In order to make the discussion of the problem of infant soldier's wills complete another problem should be discussed here. In *Werner v. Beit*<sup>33</sup> the trial judge raises the question of how long the will of the infant will be good after he leaves military service. If the infant makes a will while a soldier, then leaves the army, he cannot revoke it, either expressly, or by making a new will, because of his disability as an infant under the regular law. He therefore finds himself saddled with a will which he cannot revoke unless he marries, or destroys the will if it was written. The only other way that he can free himself from the will is by waiting until he comes of age. The court thinks the fact that this situation would arise if the privilege is given to infant soldiers is a good reason why the universal testamentary age under the Wills Act should be twenty-one and that the exception for military wills should not apply to allow infants to make wills. The appellate court overruled this contention. The situation has been somewhat clarified by the Wills Act of 1918 but the disability of infant veterans, to revoke, still continues. The opinion suggests that the power to revoke or alter an infant's military will on his return to civilian life should be given by statute. Another suggestion has been made by J. Muir Watt<sup>34</sup> to the effect that wills of minor soldiers should be so drafted as to be conditional on death in the service. There has been no settlement of this problem at this date and in America the problem has not been discussed in any case. In a recent article<sup>35</sup> it is suggested that in the United States a federal military wills act could be enacted which would give to the soldiers and sailors a uniform law under which to make their wills. The measure would, of course, be temporary, under the war powers, and, as the article claims, would be very desirable.

### III

In Missouri there have been no reported cases on soldier's and mariner's wills, but such wills have been admitted to probate.<sup>36</sup> Under the Missouri Statute a soldier or mariner is permitted to make his will as he might have done by the

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32. This statute does not state that the soldier or mariner may make a will "as before" but merely permits the soldier or mariner to make a nuncupative will. An earlier statute had permitted military wills, "as he might heretofore have done," but this was not in force at this date. See § 3273, 3273 Iowa Code (1837), also *In re Evans' Will*, 193 Iowa 1240, 188 N. W. 774 (1922).

33. See note 24 *supra*.

34. Watt, *Wills in Wartime*, 4 *Convey.* (N. S.) 150 (1939).

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

36. The records of the local probate courts no doubt contain many such wills. One recent case was found in the files of the Probate Court at Boonville, Missouri. In this case the deceased was on the Navy submarine S-4 when it was sunk in a collision. Before the deceased died, he wrote on ordinary, plain paper the following: "In case of my death please send entire contents of box to my mother, Mrs. M. G. Short, 804 E. Spring Street, Boonville, Missouri.

By Roger L. Short USN"

Final settlement in this case was made on the 17th of May, 1929. The will was

common law.<sup>37</sup> The question immediately arises, what is the common law of Missouri?

Going back to the Laws of the Territory of Louisiana<sup>38</sup> we find that the exception included therein for soldiers and mariners was lifted almost word for word from the English Statute of Frauds.<sup>39</sup> The exception permitted the making of military wills "as before this act" and as we have pointed out, this has been held in England to mean that the military will should be governed by the law of the ecclesiastical courts before the Statute of Frauds. Therefore the common law of the Territory of Louisiana would seem to be the common law of England.

In 1816 the Territorial Assembly of Missouri provided that the common law of Missouri Territory should be the same as the common law of England.<sup>40</sup> In 1821, under the first Missouri State Statutes, the old exception which was worded "as before this act" was changed to read "at common law" and later "by common law."<sup>41</sup> It would seem to follow that since Missouri had adopted the common law of England in 1816, the Legislature in 1821, desiring to make the Missouri statutes comply with the provision of 1816, had changed the Missouri exception so that the military will would follow the common law of England in regard to the formalities required for such wills.

Applying this reasoning to the two points discussed in this paper: In Missouri the will of a soldier or mariner would look to the common law of England for its requirements, and such will would be good, when made, unless revoked in some proper way. There would be no termination of the will one year after the soldier left the army.

In regard to the wills of minor soldiers or mariners the question is more difficult. For ordinary wills of personalty the statutory testamentary age for males has always been eighteen years.<sup>42</sup> Whether this provision also applies to soldier's and mariner's wills, or whether the age requirement for these instruments is fourteen as under the ecclesiastical court rule, is a matter of statutory construction—to some extent a particular local problem and to some extent a matter of general policy upon which courts in other jurisdictions have differed.<sup>43</sup>

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not witnessed and was held good under the Missouri exception. There was a case in Callaway County during the Civil War in which a letter was probated as a last will. The letter had been written by a soldier before a battle in Callaway County in which he lost his life. Full details are not available on this will, however, but it was probated.

37. MO. REV. STAT. (1939) § 543. Any mariner at sea or soldier in the military service, may dispose of his wages or other personal property, as he might have done at common law, or by reducing the same to writing.

38. Laws of Territory of Louisiana, c. 39, p. 125 (1807).

39. 29 Car. II, c. 3, § 23 (1676).

40. *Lindell v. McNair*, 4 Mo. 380 (1836), MO. REV. STAT. (1939) § 645.

41. Laws of Territory of Louisiana, c. 39, p. 125 (1807); Mo. Stat. (1821) c. 334, § 5; MO. REV. STAT. (1939) § 543.

42. MO. REV. STAT. (1939) § 518.

43. See notes 23, 24, 25, 27, 28, 31 *supra*.