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STUDENT NOTES

AGE OF TESTAMENTARY CAPACITY TO MAKE
SOLDIERS' AND SAILORS' WILLS

The unusual contingencies which arise in time of war often serve to focus attention upon legal problems which, during normal times, have remained dormant. A current example is the question of capacity of a minor soldier or sailor to make a will of personalty under existing West Virginia statutes. A bill designed to clarify the issue was introduced into the last legislature,¹ but was not adopted. The problem arises in determining the effect of chapter 41, article 1, section 5 in relation to section 2 of the same chapter and article.² The latter section provides that "no person . . . under the age of twenty-one years, shall be capable of making a will." Section 3, following, provides for the manner of execution and number of witnesses. Section 4 relates to the execution by will of a power of appointment. Section 5 then provides that "notwithstanding the *two* preceding sections, a soldier being in actual military service, or a mariner or seaman being at sea, may dispose of his personal estate as he might *heretofore* have done . . ." It will be observed that the reference to the "two preceding sections" does not extend to section 2, the latter being the third preceding section. It is thus arguable that section 2 is binding upon the soldier's will provided for in section 5, not being within the scope of the exception therein. But the word "heretofore" of section 5 appears to argue for a different result, particularly in view of the fact that all of these sections substantially in their present form, are derived from and have

¹ Committee substitute for House Bill No. 80, 1943 Legislature. The bill would have amended W. VA. CODE (Michie, 1937) c. 41, art. 1, § 2, to read as follows:

"No person of unsound mind or under the age of twenty-one years shall be capable of making a will, except that a soldier, mariner, seaman, or any other person in active service in any of the branches of the armed services of the United States of America, being of sound mind and eighteen years of age or over, shall be capable of making a will."

Chapter 41, art. 1, § 5 would have read: "Notwithstanding the provisions of the two preceding sections, a soldier, mariner, seaman, or any other person in active service in any of the branches of the armed services of the United States of America, being of sound mind and eighteen years of age or over, may dispose of his personal estate as he might heretofore have done; and the will of a person domiciled out of this state at the time of his death shall be valid as to his personal property in this state, if executed according to the law of the state or country in which he was domiciled."

² W. VA. CODE (Michie, 1937).

a simultaneous origin in a single Act of Parliament.³ It is thus arguable on the other hand that the exceptions as to soldiers' and sailors' wills should extend to all parts of the act, including the provision as to age of testamentary capacity. Soldiers' and sailors' wills would then remain subject only to limitations existing prior to the 1837 Statute of Wills.

The granting of a special dispensation to soldiers concerning testamentary disposition of their property is no innovation. Julius Caesar is said to have granted his soldiers the right to make a testamentary disposition untrammelled by the usual legal requirements.⁴ Augustus permitted soldiers yet *filiusfamilias* to dispose by testament of what they had acquired in active service.⁵ And this provision was continued by Justinian.⁶

The common law of England permitted males of sixteen years, and females of fourteen, to make wills of personal estate.⁷ The Statute of Frauds of 1676, containing provisions regarding the execution of wills, specifically excepted soldiers' and sailors' wills from such requirements.⁸ The next development in the Virginia law occurred in 1779, with the passage of an act concerning wills.⁹

As this act appears in Hening's Statutes at Large, section IV designates eighteen years as the age of testamentary capacity as to chattels. But section VIII provides that "any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his chattels as he might heretofore have done." It seems obvious that at this stage, the soldiers' and sailors' will was exempt from the provision as to age. The *Revised Code of Virginia of 1819*, chapter 104, merely incorporated these sections bodily, assigning to them new section numbers. No change in the substantive law is evident. In 1835, an act was adopted "prescribing the manner of making wills and testaments of per-

³ The Statute of Wills, 1837, 1 VICT. c. 26.

⁴ MUIRHEAD, ROMAN LAW (3d ed. 1916) 309.

⁵ *Id.* at page 311.

⁶ See INST. JUST. Lib. 2, tit. XII, and SANDARS' JUSTINIAN (1st Amer. ed. 1876) 248. ". . . *expectis iis quos antea enumeravimus, et praecipue militibus qui in potestate parentum sunt, quibus de eo quod in castris acquisierunt, permissum est ex constitutionibus principum testamentum facere.*"

⁷ 1 BL. COMM. (3d ed. 1768) 463.

⁸ 29 CAR. II, c. 3, XXIII. "Provided always 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."

⁹ See 12 HENING, STATS. c. LXI, at page 140.

sonalty."¹⁰ The testamentary age was again fixed at eighteen years. But the same section provided: "But . . . the will of any soldier in actual military service, or any mariner or seaman being at sea, may be made hereafter in the manner now allowed by law." Again, it appears that the age provision does not affect the soldiers' and sailors' will.

In the *Virginia Code of 1849* for the first time are found the pertinent sections in form and disposition as they are found in the present *West Virginia Code*.¹¹ For the first time, there appears in the section relating to soldiers' and sailors' wills the questionable phrase, "notwithstanding the two next preceding sections . . ." What was the effect of this phrase of qualification? Its apparent effect has already been adverted to. But the section contains also the qualifying "heretofore," which seems to imply a different effect. The revisors' note to chapter CXXII furnishes an indication of the intended purpose of this chapter. It reads, "The late English statute of wills, (7 Will. IV and 1 Vict. chap. 26,) . . . has, we think, introduced some valuable improvements. In the preparation of this chapter, we have adopted nearly the whole of that statute, for the double reason that we approve its provisions, and that the adoption here of those provisions will give us the benefit of the English decisions upon them—decisions made by courts over which there generally preside men of ability and learning."¹² It is an interesting observation that at the time the revisors' report was made, the leading English authority under the English Statute of Wills, of which the revisors approved, stood for the proposition that the will of a minor soldier was valid, despite the provision of that statute requiring an age of twenty-one years for testamentary capacity.¹³

The statute law remained unchanged from that of 1849, until the adoption of the *West Virginia Code of 1931*. The provision of the 1849 *Code* permitting a minor of the age of eighteen or over to dispose of personalty by will is abolished by the *West Virginia Code of 1931*.¹⁴

¹⁰ Va. Acts 1834-35, c. 60 at page 43.

¹¹ VA. CODE (1849) c. CXXII, § § 2-6, inc.

¹² REPORT OF THE REVISORS OF THE CIVIL CODE OF VIRGINIA (1846) 623.

¹³ *In re Farquhar*, 4 Notes of Cases 651 (1846), as cited in 39 ENG & EMP. DIG. tit. Royal Forces, 335. The will of a minor, written in pencil, after he was mortally wounded on the field of battle . . . admitted to probate under Wills Act, 1837 (c. 26) s. 11."

¹⁴ W. VA. CODE (1931) c. 41, art. 1, § 2, and Revisors' Note thereto.

There appears to be a dearth of American cases on the subject,¹⁵ although many American states have statutes borrowed from the English statute of 1837.¹⁶ In a New York case¹⁷ in 1853, it was stated that "as to the wills of soldiers in actual service, and mariners at sea, they are left entirely untrammelled by our statutes, and are governed by the principles of the common law. The exception in our statute of wills in favor of soldiers and mariners was taken from the 29 Car. II, chap. 3, and is precisely the same, and the same exception is retained in England by their new statute of wills. (Vict., ch. 26, § 11.)" But the leading Vermont case of *Goodell v. Pike*, in 1867, held *contra*.¹⁸ In this case an infant soldier made a will while in active service. The Vermont statute of wills, after prescribing the age of testamentary capacity, and the requisite formalities of execution, provided: "nothing in this chapter shall be construed to prevent any soldier in actual military service . . . from disposing of his . . . personal estate, as he might otherwise have done." The Vermont court held that this provision operates as an exception only to the mode of execution, not exempting the soldier's will from the statutory age requirement. In a Pennsylvania case in 1921,¹⁹ a soldier nineteen years of age made a nuncupative will. It was there stated that the Pennsylvania wills act of 1833, substantially reenacted by the wills act of 1917, provides: "Notwithstanding this act . . . any soldier, being in actual military service, may dispose of his . . . personal estate as he might have done before the making of this act." It was argued that this provision excepts soldiers' and sailors' wills only from the formalities of execution required by the act, and not from the provision as to age of testamentary capacity. This argument, however, was rejected, the court holding that soldiers' and sailors' wills were exempt from all statutory restrictions, including those of age, being governed only by the common law. The court recognized, but repudiated, the opinion expressed in the English case of *Wernher v. Beit*,²⁰ distinguishing upon a minor difference in phraseology. The Iowa case *In re Will of Evans*²¹ held a minor incompetent to execute a valid will, even when in actual military service. The court indicates that under

¹⁵ Annotation (1942) 137 A. L. R. 1312.

¹⁶ Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 29.

¹⁷ *Hubbard v. Hubbard*, 8 N. Y. 196 (1853).

¹⁸ 40 Vt. 319 (1867).

¹⁹ *Henninger's Estate*, 30 Penn. Dist. R. 413 (1921).

²⁰ L. R. (1918) 1 Ch. 339.

²¹ 193 Iowa 1240 (1922).

the territorial statute of Iowa of 1842, the proviso that nothing contained in the statute of wills shall "prevent any soldier in actual military service" from making his will "as he might heretofore have done", excepted such wills from the age provision. It is further indicated, however, that the *Iowa Code of 1851*, arranging the statute into sections, and modifying the wording, places a different construction upon these provisions, which on their face are not ambiguous. The court recognizes that where a revised statute is ambiguous, reference may be had to prior statutes for the purpose of ascertaining the intent of the legislature. It is suggested that the West Virginia statute, upon its face, is ambiguous.

The scarcity of American decisions, and the possibility that they turned upon a statutory content and development peculiar to their respective jurisdictions, serve to focus attention upon the treatment of this point under the English statutes from which those of Virginia and West Virginia are derived. It has been already noted that the first English exception favoring soldiers' and sailors' wills was made in the Statute of Frauds of 1676. But this act established no age of testamentary capacity, leaving the common law untouched.²² The English development of this issue properly begins with the wills act of 1837.²³ Section VII of that act provides that "no will made by any person under the age of twenty-one years shall be valid." Section VII provides that no will of a feme covert shall be valid. Section IX prescribes the manner of execution, and section X governs the exercise by will of a power of appointment. Section XI then states: "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." Does the exception of section XI extend to all sections of the act, or does it properly extend only the formalities of execution, permitting the age provision to apply with equal force to soldiers' and sailors' wills?

The case *In re Farquhar* in 1846 admitted to probate the will of a minor soldier under the English Wills Act of 1837.²⁴

²² *Hyde v. Hyde*, 24 Eng. Rep. 149 (1711), held that an infant male of fourteen years, and female of twelve years, may make a valid will of personal estate.

²³ 1 VICT. c. 26.

²⁴ 4 Notes of Cases 651 (1846), as cited in 39 ENG. & EMP. DIG. tit. Royal Forces, 335.

The case *In re D'Angibau*,²⁵ 1880, stated that no will can be made by an infant . . .” But this case did not involve a soldiers’ or sailors’ will. In 1900 the case *In the Goods of Hiscock*²⁶ held that a minor soldier may make a valid nuncupative will under the Wills Act of 1837. It was stated in an Irish case²⁷ that all that the eleventh section does is to release persons so situated from certain obligations as to execution and verification which were imposed for the first time . . . by the Wills Act; and the difficulties that have arisen and the cases that have been decided on this branch of the law show how unreasonable it would have been to exact obligations from persons in the position of soldiers and seamen when in service.” But this case did not involve a soldiers’ or sailors’ will, and must be considered dictum as to such. *In re Stable*²⁸ held valid the will of a minor soldier. In 1918 was decided the leading case *In re Wernher*²⁹ in which was advanced the argument that section 11 of the Wills Act of 1837 is a proviso exempting soldiers’ and sailors’ wills from the formalities required by the preceding sections 9 and 10, but not from the age requirement of section 7. But this argument is dictum, since the case turned upon another point. In a case prior to the *Wernher case*,³⁰ in commenting upon the effect of section 11 of the Statute of Wills as to section 15, dealing with attestation by an interested party, Sargant, J. said “The governing consideration to my mind is that s. 15 on the true general view of the statute deals with the execution and attestation of wills under the provisions of the statute itself and is not dealing with the subject-matter of soldiers’ and sailors’ wills, which in my opinion are left entirely unaffected in respect of execution and attestation by the provisions of the Act.” This tends to refute the argument that section 11 is a proviso directed only to the preceding sections 9 and 10, arguing that it extends also to section 15. If this is so, may not section 11 extend as well to section 7, providing for the age of testamentary capacity?

In any case, the matter now seems at rest since the passage of the Wills Act of 1918.³¹ Younger, J., who delivered the opinion

²⁵ 15 Ch. 228, 241 (1880).

²⁶ (1901) Prob. 78.

²⁷ *In the Goods of Hale*, (1915) 2 I. R. 362; 369.

²⁸ (1919) Prob. 7.

²⁹ (1918) 1 Ch. 339, 352-362.

³⁰ *In re Limond*, (1915) 2 Ch. 240, 257.

³¹ 7 & 8 GEO. V. c. 58, § 1: “In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that section eleven of that Act authorizes and always has authorized any soldier being

in the *Wernher* case, later confirmed this as the effect of the 1918 act.³² In English jurisdictions, prior to the 1918 act, the point was of greater exigency than in the Virginias, since section 7 of the act of 1837 set the age of testamentary capacity at twenty-one years. But the Virginias act of 1779³³ set the age of testamentary capacity as to chattels at eighteen years. This provision was continued until adoption of the *West Virginia Code of 1931*,³⁴ at which time the age was raised in all cases to twenty-one years. Before 1931, the comparatively small number of soldiers and sailors under age eighteen tended to alleviate the difficulty as to testamentary disposition of chattels. But at present, with thousands of minors in the service of their country, the issue may be regarded as of paramount importance.

The English decisions have indicated that the proposition is arguable, and it is to be observed that a legislative solution was found advisable.

It is suggested that a strong case might be made in West Virginia that section 5, of chapter 41, article 1, excepts soldiers' and sailors' wills from the age requirement set forth in section 2 especially in view of the expression intention of the revisors of the *1849 Code* and the state of English authority at that time.

But perhaps the best solution has been suggested by Younger, J., in the *Wernher case*.³⁵ "It is for others to consider whether, at such a time as the present, with our manhood in arms, this uncertainty as to a young soldier's testamentary powers should be allowed to continue. It may be that the age of fourteen for any boy to make a will is too young. But, if a soldier lad can be called upon to fight at eighteen . . . it will now seem to many to be irrational, whatever may have been thought by the legislators of 1837, that he should not be able, until he is twenty-one, be bequeath his property to whom he pleases."

K. J. V.

in actual military service, or any mariner or seaman being at sea to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years."

³² In the Estate of Gossage (1921) Prob. 194, 203.

³³ 12 HENING, STATS. c. LXI, § IV.

³⁴ W. VA. CODE (1931) c. 41, art. 1, §2.

³⁵ *In re Wernher*, (1918) 1 Ch. 339, 361.