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Nuncupative Wills

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NUNCUPATIVE WILLS.

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THESIS PRESENTED BY
STUART DIXON JENKS
FOR THE DEGREE OF BACHELOR OF LAWS.

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CORNELL UNIVERSITY.
SCHOOL OF LAW.
1895.

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NUNCUPATIVE WILLS.

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INTRODUCTION.

Testamentary succession, it is now agreed, is an institution of positive law. It grew out of the idea of the universitas juris of the Romans, and wherever it has existed can be traced to Roman influence. (a)

In the earliest times a man's children were considered to be his only rightful heirs, and at first the privilege of willing property was confined to those who had no children to succeed them.

When afterwards legislation provided that a testator might devise property away from his natural heirs it was necessary on account of the importance of the rights involved and the peculiar temptations to fraud surrounding the transaction, that in the execution of wills certain prescribed rules and ceremonies should be observed. Accordingly the later Roman wills were required to be executed with great formality, and written testaments, being obviously the best safeguard against fraud, came in use.

It is enacted by modern statutes, in most States, that (a) Maine's Ancient Law. 172, 176.
except in special cases, testators shall be required to express their wills in writing. The statutes specify the formalities to be observed in the execution of the testamentary instrument and courts are diligent to declare of no effect wills not executed in accordance with these provisions.

But oral or nuncupative wills have a place even in modern English and American law. They are valid if made under the restrictions imposed by the statutes, and in many American States are allowed a very considerable scope and application. (a)

The history of oral testaments, the limitations under which they may now be made, their operation and construction, is the subject of this essay.

(a) e.g. In Ga., all property real and personal may pass by nuncupation. Code Ga. sec. 2482. In Cal. there is no limit to the amount of personalty which may be bequeathed in this way. Mills Annot. Stat. (1889) sec. 4654.
CHAPTER I. ROMAN WILLS.

The disposal of personal property by will was in the earliest times considered to be such an interference with the ancient law of intestate devolution as to require in each particular case the sanction of the legislature. Hence we find that at first Roman wills were legislative enactments made at the comitia calata,(a) the great assembly of the Patricians.(b) There before the assembled order the testator named his heir and stated the legacies with which he charged his property.

After the laws of the Twelve Tables another form of will, the testamentum per aes et libram, came into use. This was in effect a conveyance. At first no writing was used or required. The testator gave oral instructions as to the disposition of his property in the presence of five witnesses. These instructions the grantee (familiae empor) bound himself to carry into effect.(c) They were in fact the conditions of the sale. After a time a writing came to be used in connection with this form of will. But a writing tho' was never necessary.(d)

(a) Gaius II sec. 101.
(b) The power of testamentary disposition was at first confined to the Patrician order.
(c) Gaius Inst. II sec. 102,103,104.
(d) Hadley Roman Law p.300.
The testament per aes et libram continued in use, with modifications, during the time of the empire and indeed during the Middle Ages (a); tho' less formal written wills had become much more common.

In the time of Justinian any Roman citizen might make a valid oral will by declating his wishes before seven competent witnesses (b). This was known as the private nuncupative (c) testament.

ROMAN MILITARY TESTAMENTS: The rules in regard to the formalities of testamentary disposition have always been relaxed in favor of soldiers in active service. At the period when wills during times of peace could only be made by the Patricians in the comitia calata, the soldier, plebian as well as Patrician, was allowed the privilege of appointing an heir on the eve of battle (in procinctu) (d).

The old testament in procinctu had gone out of use before the time of Gaius and was superseded by the Military Will (de testamentis militum). By this legislation the will of the soldier was given effect no matter how made (e).

(a) Maine A.L. 214.
(b) I. 2, 10, 14.
(c) "The word nuncupation was originally used to express the declaration of the testator's intentions whether the testament was written or not, but later usage appropriated the term nuncupata to testaments where there was no written will and where the testator declared his wishes orally". Saundars Justinian 243.
(d) Hadley Rom. Law. p. 293. (e) J. 2, 11, pr: G. 2, 100
It was allowed to be good for one year after retirement, (a) unless the testator was dismissed for misconduct, in which case the privilege was at once extinguished (b). With reference to soldier's wills the Emperor Trajan sent to Statilius Severus a rescript in these words:

"The privilege granted to soldiers on service of having their wills held valid no matter how they are made ought to be understood thus: It ought first to be evident that a will was made: this can be done without writing even by those who are not soldiers. The soldier then about whose goods a question is raised before you, if he called men together for the purpose of declaring his last wishes, and spake so as to make it clear whom he wished to be his heir, and on whom he wished to bestow freedom, may be held, tho' there was no writing, to have made his will in this way, and his wishes must be valid. But if as often happens in the course of talk he said to someone "I leave you my goods", this ought not to be respected as a will. No one has a greater interest in refusing to admit such an example than the very persons to whom the privilege has been granted. For otherwise it would not be hard, after the death of any

(a) D. 29, 1,33. pr.
(b) D. 29, 1,26.
soldier for witnesses to come forward and affirm that they heard the deceased say to antone they thought fit that he left him his goods: and thus the true intentions of the deceased might be overturned" (J. 2,11,1)

The privileges of the military testament were also extended to seamen in the service of the State.(a)

(a) D. 34,13,1.
CHAPTER II. ANGLO SAXON WILLS.

Willmaking was common among the Anglo Saxons, who received it with Christianity. The practice seems not to have pertained to so great an extent in England as on the continent. It is uncertain to what extent family lands could during the Anglo Saxon period be devised away from the family, but no doubt the individual possessor could direct the descent of the real estate within the limits of the family.

Testamentary disposition was much encouraged by the clergy, and most of the wills of this period in England as elsewhere were in favor of the church. It was at this time easy for the ecclesiastic to persuade the dying Ealdorman that it was necessary or would be advisable for the good of his soul to bequeath his property to religious uses.

The formal Anglo Saxon wills were written on three copies each to match like a tally and after being read in the presence of various persons were given to distinct custodians. This practice lasted long after the Conquest. Oral wills were however held valid and as was natural were much favored by the clergy. (a)

(a) There are two instances of nuncupative wills in the chapters. Code Dip. CCLVI: ib. CCCXXVII.
CHAPTER III. FROM THE NORMAN CONQUEST

TO THE STATUTE OF FRAUDS.

At the Norman Conquest or shortly thereafter the disposition of lands by will (except in certain favored localities) ceased. (a) Alienation without the consent of the lord was inconsistent with the principles of the feudal system.

When wills of land were afterwards allowed by Statute Henry 8th such wills were required to be in writing; so that nuncupative wills after the Conquest have in England (b) only to do with personal property.

The sources of information on the subject of oral testaments during this period are few. The probate of wills was a matter of ecclesiastical cognizance and cases in point are rarely found in the reports. During the early period, before the art of writing had become popular, we may infer that nuncupative testaments were in common use and were looked upon with favor. But at a later period they were only considered proper when made in extremis. Perkins who wrote

(a) Coke Litt. 3 Comp. 90.
   Of course after the doctrine of uses grew up the use of land could be disposed of by will.
(b) We shall see that in some of the American States a nuncupative will has been allowed to carry real estate. post n.
during the time of Henry 8th defined nuncupative wills as those made when the testator "lyeth languishing for fear of sudden death dareth not stay the writing of his testament and therefore he prayeth his curate and others, his neighbors to bear witness of his last will, and declareth by word what his will is".(a)

Whether before the Statute of Frauds an oral will was valid if not made in extremis is a matter of some doubt.(b) What is certain is that after the time of Henry 8th these wills were commonly confined to cases where the testator was overtaken by sudden sickness and had not time to execute a written will.(c)

(b) See Prince v Hazelton 20 Johnson (N.Y)503, where the subject is fully discussed the court being divided on this point.
CHAPTER IV. NUNCUPATIVE WILLS UNDER THE
STATUTE OF FRAUDS AND SIMILAR ENACTMENTS.

Before the Statute of Frauds no formalities were pre-
scribed for the execution of oral wills. Swinburne writing
during the reign of James 1st tells us how such wills were
made:–

"In the making of a nuncupative will or testament this
is to be chiefly observed, that the testator do name his ex-
ecutor (a), and declare his mind by words of mouth without
writing before witnesses. As for any precise form of words
none is required neither is it material whether the testator
do speak properly or improperly so that his meaning do ap-
pear". (b)

Temptations to perjury in connection with oral testaments was
so great and frauds became so common (c) that it was felt
necessary to restrict their operation by legislation. Accord-
ingly the Statute of Frauds, 29 Chas. II, provided as follows:

Sec. 19. "And for prevention of fraudulent practices in
setting up nuncupative wills, which have been the occasion of

(a) It does not seem to have been essential to the validity
of a nuncupative will that an executor should have been
appointed thereby.
(b) Swinb. part 4, sec. 26,1.
(c) Cole v Mordant 4.Ves. 196 (n)
much perjury: (2) be it enacted by the authority aforesaid, That from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof: (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness, that such was his will or to that effect: (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home and died before he returned to the place of his or her dwelling.

Sec. 20. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.
Sec. 21. And be it further enacted, That no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired: (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kin to the deceased, to the end that they may contest the same, if they please.

Sec. 22. And be it further enacted, That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause devise or bequest therein, be altered or changed by any words, or by will of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

Sec. 23. 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".(a)

It is somewhat remarkable that though these provisions of the Statute of Frauds were in force in England until the Wills Act of Victoria, a period of one hundred and fifty years there is only one case mentioned in the reports where a nuncupative will was established under them. (a) Blackstone mentions that the making of oral wills was hardly heard of in his day. (b) So that the restrictions imposed by the Statute of Frauds seems practically to have had the effect of doing away with the making of oral wills.

These sections of the Statute of Frauds were repealed by the Wills Act 1 & 2 Victoria by which the privilege of nuncupative wills is restricted to soldiers in active service and mariners at sea.

**AMERICAN LEGISLATION.** Legislation founded on the Statute of Frauds and containing substantially the same provisions were enacted in most of the American States and tho' some States have since followed the English legislation of 1 & 2 Victoria nuncupative wills may in more than half of the American States still be made under restrictions substantially similar to those imposed by the Statute of Frauds. (c)

It is accordingly to the decisions of the American courts

(a) Freeman v Freeman, 1 Cas. Temp. Lee 343.
(b) 2 Bl. Com. 501.
(c) See appendix.
that we must look for judicial interpretation of the restrict
enactments contained in the Statute of Frauds in regard to
the making of nuncupative testaments.

Many of the States have copied these provisions from the
English Statute with little or no variation while others have
changed the language to a considerable extent, or omitted
certain parts of the English enactment. In discussing this
statute and the effect of the American decisions in interpre-
tation thereof we shall consider:

1st. The reasons of the statute and the strictness of
its construction.

2nd. The kind of property upon which an oral will may
operate and limitations as to the amount of such property
which may be thus transferred.

3rd. The formalities of execution.

4th. When a nuncupative will may be made.

5th. The other restrictions.

1st. Reason of the statute and its construction: The
purpose of the enactment is stated in the opening words of
the 19th section of the English Statute (29 Charles II). It
is said to be "for the prevention of fraudulent practices in
setting up nuncupative wills which have been the occasion of
much perjury". It has been supposed that it was the grossly fraudulent attempt to set up a nuncupative will in the famous case of Cole v Mordant (a) which led to the incorporation of these provisions in the Statute of Frauds, passed the following year.

Oral wills being obviously so great a temptation to fraud they are no favorites with the courts, and in order to be held valid the statute must be strictly complied with. (b)

Of course all requirements necessary for a valid written will, testamentary capacity, animus testandi, freedom from duress, are equally essential in the case of an oral disposition. It is said that the factum of a nuncupative will must be proved by evidence more strict and stringent than in the case of a written instrument. (c)

But while the evidence by which a nuncupative will is sought to be established should be carefully scrutinized, substantial compliance with the statute is all that is required. (d) It is not necessary that technical words be used, but

(a) Cole v Mordant 4 Ves. 196 (n) Nine witnesses swore to the to the making of this will. They were afterwards shown to have been guilty of perjury.
(b) Lucas v Goff, 33 Miss. 629: Mitchell v Vikers 20 Tex. 377: Brumson v Burnell 2 Pin. (Wis.) 185: Dawson's App. 23 Wis. 69: Owen's App. 37 Wis. 68.
(c) Smith v Thurman 2 Heisk 115.
(d) Ridly v Coleman 1 Sneed 616: Gwin v Wright 8 Humph. 639: Arnett v Arnett 27 Ill. 247: Milligan v Leonard 46 Iowa 694: Weir v Chidoster 63 Ill. 453: Parsons v Parsons 2 Me. 299.
the intention to make a will must appear in the clearest manner. Loose conversations of a sick person or the mere expression of a wish must not be turned into a disposition of property.

2nd. What may pass by an oral will. We have seen that in England since the Conquest oral wills could pass only personalty; and the provisions of the Statute of Frauds in reference to verbal wills applied only to that class of property; so also in most of those American Statutes where the language of the English enactment has been substantially copied it has been interpreted to apply only to personal property, even though the words of the statutes used in their general sense are broad enough to include land. (a)

It was however held in Ohio, under the Act of 1824, which used the term "estate" (the same term as that used in Stat. 29 Chas. II) that the interest of a testator in lands might pass. (b) This holding is however contrary to the great weight of authority and the statute in that State was so changed in 1831 as to expressly restrict verbal wills to personal property.

The statute of Georgia expressly provides that "all prop-

(a) Smithdale v Smith 64 N.C.52: Palmer v Palmer 2 Dana 390: Pierce v Pierce 46 Ind. 36.
(b) Gillis v Weller 10 Ohio 463: Ashworth v Carleton 12 Ohio State 381.
erty, real and personal may pass by nuncupative wills properly made and proved". (a) The formalities of execution and proof are similar to those prescribed by the Statute of Frauds (29 Chas. II)

In the other States, where oral dispositions can only affect personal property, the amount which may be thus bequeathed varies from $50 in South Carolina to an unlimited sum in Colorado. (b)

A nuncupative testament may dispose of any property not affected by a written will (c) and personalty bequeathed orally is not taken subject to the payment of debts, if there be realty undivised sufficient to discharge them. (d)

3rd. Formalities of execution. It is very generally held that a testament in order to be valid as a nuncupation must be oral. The testator must intend to make a verbal will and not a written one. (e)

There is however a conflict of authority as to whether and under what circumstances informal writings or instructions for drawing up written wills may be proved as nuncupations.

(a) Code Ga. sec. 2482.
(c) McCullom v. Chidester 63 Ill. 477.
(d) Robinsons Cas. Rym. 344.
The subject will be discussed hereafter. (a)

Witnesses: The number of witnesses required for proof of an oral disposition is, by the Statute 29 Chas.II, three; but in many States two are sufficient. The requirements of the local statute in this respect must be strictly complied with. Any person who would be a legal witness for the purpose of proving any will may be heard as a witness in proof of a nuncupation. In Georgia a legatee is a legal witness. (b)

Rogatio Testium: It is required by the Statute (29 Chas.II) that the testator at the time of declaring his will shall "bid the persons present to bear witness, that such was his will or to that effect". This provision is intended to guard against the casual disposition of a sick person not meant to go into effect as a will, being proved as such. It is found in the statutes of most of the States. (c)

What is a sufficient rogatio testium? The statute requires explicitly that the testator shall call upon those present to bear witness that such is his will. (d) It is a

(a) Post Page 26
(b) Brown v Carroll 36 Ga.568.
(c) The rogatio testium is necessary in Fla., N.J., Neb., Ga., Ind., Kan., Ohio, Okl., Tenn., S.C., Pa., Tex., Utah, Wis., N.H., Mo., Miss., Del., Ark., Me., Ala., see appendix. It is not necessary in Iowa. See Mulligan v Leonard 46 Iowa 692.
different act from pronouncing it to be his will. It is distinguished by the words of the statute. It is not necessary however to invoke the attention of the witnesses by any set form of words, nor is it required that the testator call upon the persons present by name. Any form of expression however imperfectly uttered so that it conveys to the minds of those present the idea that he wishes them or some of them to bear witness to the disposition will be a sufficient compliance with the statute. (a)

"The statute does not require the testator, if he may be so styled, to call upon the two witnesses to take notice that such is his will, or to call them to witness that he calls upon some person present to take notice that such is his will. They must testify to the fact, that the testator called upon some person present to take notice, bear testimony, or otherwise be informed and understand that such is his will". (b)

In Tennessee it is held, contrary to the weight of authority elsewhere, that the rogatio testium may be implied. The leading case is Baker v Dodson (c), in which it appeared

(a) Bennett v Jackson 2 Phillin. 190; Dockrum v Robinson 26 N.H 372; Bundrick v Haygood 106 N.C. 468; Arnett v Arnett 37 Ill. 247; Winn v Bab 3 Leigh 151; Sampson v Browning 22 Ga. 293; Dawson's Appeal 23 Wis. 69.
(b) Biddel v Biddel 36 Md. 644. But see Gwin v Wright 4 or 3 Humph. 639;
(c) Baker v Dodson 4 Humph. 342.
that Dodson was taken sick at his own house and on Monday night the 23rd of August exclaimed: "I am gone, I am lost". He then remained silent some fifteen minutes, when Boyd and Hayes came in. He addressed himself to them without calling them by name, saying, "I wish to make a disposition of my effects". He then proceeded to dispose of his property. This decision seems in effect to do away with the necessity of the rogatio testium altogether and to allow the animus testandi to be proved in any way. (a)

4th. When may an oral will be made? The Statute of 29 Chas. II requires that, in order to be good, it be made "in the time of the last sickness of the deceased", and this language has been followed in most of the American Statutes. (b)

As to the interpretation of the term "last sickness" we have two distinct lines of cases. By the weight of authority

(a) Gwin v Wright 8 Humph. 647: Smith v Thurman 2 Heisk 110
But see Ridley v Poleman 1 Sneed 616. The provisions of the statute in Tennessee are in effect the same as those of the Statute of Frauds (29 Chas. II)

(b) The term "last sickness" is used in the statute of the following States: Ga., Ind., Kan., Ohio, Tenn., S.C., Pa., Tex., Wis., Cal., Ill., Nev., Fla., N.J., Neb., N.H., Mo., Miss., Ark., Me., Ala., The statute in Delaware provides that a nuncupative will is good if made during the last illness and reduced to writing within three days, if the testator die before the expiration of the said three days or be not afterwards capable of making a will. Laws of Delaware (1833) P 636.
it is held that "last sickness" is equivalent to *in extremis*.
The opinion of Chancellor Kent in the great case of Prince v Hazelton (a) decided in 1822 contains the first clear announcement of this proposition. The decision proceeds upon the ground that before the Statute of Frauds a nuncupative will was not good unless made in extremis or in fear of present death when the testator had not time or ability to make a written one. It is said that the words "last sickness" must, in view of this fact, be intended as a statement of the common law, and should be understood to apply only to the last extremity mentioned in the books.

The decision in Prince v Hazelton that oral wills may be made only under stress of necessity has been approved and followed in many of the States. (b) It was first followed in Pennsylvania in the case of Yarnalls Will, decided in 1833 (c) where it appeared that the alleged testatrix had been afflicted with pulmonary consumption for about six months

(a) Prince v Hazelton 20 John. 522.
(b) This great case (Prince v Hazelton 20 John.) is always referred to in this connection and has been said to contain the substance of all the learning on the subject of nuncupative wills from the earliest day to the time of its decision.

Redfield on Wills I,185. see Rees v Hawthorn 10 Gratt.
Jones v Norton: 10 Tex. 120: Haus v Palmer 21 Pa, St. 300.
Werkheiser v Werkheiser 6 W & S 357: Yaralla Will 4 Rawle 46: Stricker v Groves 5 Wh. 385: Carroll v Boham 42 N.J.E. 625;
Sacaife v Emmons 34 Ga. 619: Ellington v Dillard 42 Ga. 361:
In Re Askius Estate 20 D.C.12.
before her death; that she made testamentary declarations nine days before her death, during which period tho' physically weak, she retained possession of all her faculties. It was held that the declarations were not entitled to probate as an oral testament because not made in extremis.

The provisions allowing nuncupative wills have always in Pennsylvania, been very strictly construed. (a) It was held in Werkheiser v Werkheiser (6 W & S) that a decedent who was able to come down stairs and receive and converse with visitors and to walk in the street, was not in such extremity that he could make a valid nuncupative will, tho' he died the next day.

But we have seen (b) that it is uncertain whether at law common law before the Statute of Frauds it was essential to the validity of a verbal testament that it be made when in extremis. If such a will was valid, tho' not made under necessity, before the statute there is no reason why such a strict interpretation should be given to the words "last sickness". These words should then "be construed according to their obvious import which is the sickness immediately preceding the death of the testator, without reference to any

(b) Supra Pageq.
precise period of the disease or any particular apprehensions the testator may be under as to his approaching dissolution".

Accordingly there is a line of cases which adopt this more liberal interpretation of the words, and hold a nuncupative testament good if made during the sickness which resulted in the death of the testator notwithstanding there may have been ample time and opportunity to make a written will.

5th. The remaining provisions of the statute: The restrictions of the Statute of Chas. II in reference to the place where a nuncupative will is allowed to be made and as to its reduction to writing within a certain limited time have been adopted in most States which have followed this legislation. So also the provision that process shall issue to call in the next of kin and that a written will shall not be revoked by nuncupation are usual, and do not require elucidation. But few cases have arisen under these sections of the statute.

The last section of the enactment having to do with the subject, preserves the right of soldiers and mariners to make

(a) Dissenting opinion of Woodworth J. in Prince v Hazelton 20 Johnson at p. 517.
(b) Johnson v Glascock 20 Ala. 242 (overruling Sy Rest Sykes 2 Stewart)
Harrington v Stees 82 Ill. 50; Nolan v Gardner 7 Heisk 215
The statute in Iowa provides that personal property to the value of $300. may pass by nuncupation. Nothing is said about "last sickness". Rev. Code sec. 2324.
informal wills under certain circumstances. Before proceeding to a discussion of these privileged testaments we shall dispose of the other matters connected with our subject.

Informal writings as nuncupative wills: It has been held in some States that an uncompleted or defective written will or instructions for drawing up a will may be admitted to probate as a nuncupation if the failure to complete resulted from what is called the act of God, and not from an intention to abandon its execution. (a)

The decisions cite as authority the cases found in the English ecclesiastical reports, where many instances are recorded of such informal writings having been held good and admitted to probate. But these decisions are not at all in point. They do not sustain the position that defective written wills may be admitted to probate as nuncupations. No English case is to be found where they were so admitted. The defective documents were in the cases reported uniformly treated as written wills and proved as such. Dispositions of personal property were not required to be signed or attested in England until 1838 (Stat. 1 & 2 Vict.) and holographs and writings of all kinds were freely admitted and held good.

(a) Affutt v Offutt 3 B. Mon. 162; Phoebe v Boggess 1 Gratt. 129; Boofer v Rogers 9 Gill 44.
The Statute of Frauds had no effect to prevent the admission to probate of testaments committed to writing but left unsigned by accident or by reason of the act of God. (a)

Certainly upon principle a nuncupative will should be made by oral declaration, the testator intending at the time **such declaration** to be his will. The words of the statute require this construction. They are ".....at the same time pronouncing the same"..... This position is sustained by the weight of authority in the American States. (b)

Nuncupative wills in Louisiana: In this State all wills not made with the formalities necessary for the execution of a mystic will are classed as nuncupative testaments, even tho' in writing. This use of the term should be born in mind in reading the decisions of that State. Special favors are allowed to soldiers and sailors in accordance with the rules of the civil law.

(b) Supra P.47 and cases cited under(e). See also Stamper v Hooks 22 Ga.603: Dockrum v Robinson 26 N.H.372: Males Case 49 N.J.Eq.266: Perkin's definition P..w supra Swinb. Pt.1 sec.12.
CHAPTER V. MILITARY TESTAMENTS

IN ENGLISH AND AMERICAN LAW.

The special privileges of soldiers and sailors in being allowed to disregard the formalities prescribed for the execution of testaments originated in the Roman law, and has been continued in all modern enactments. In England and those States which have followed the latest English legislation soldiers in active service and mariners at sea are the only persons who are favored in this respect.

We shall now briefly discuss these military testaments, as to their construction and the extent of the privilege.

The English Statute of Frauds, as well as the Wills Act of Victoria, provides that "any soldier being in actual military service or 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".

Who is a "soldier in actual service"? The first case requiring an interpretation of these words was that of Drummond v Parish. The facts were as follows: Major-General

(a) Supra P. 4. Drummond v Parish 2 Curt. 531.
(b) Mass., N.Y., Va., R.I., W.Va., Minn., Mont., Or., Ky., Md., and N. Dakota have followed the English Statute of Wills by which nuncupative and other informal wills are entirely abolished except in the case of soldiers and sailors.
(c) Supra P.
(d) Drummond v Parish 818.
Drummond died at Woolwich on the first of January 1843. At the time of his decease he was an officer in the army holding the position of Director-General of the Royal Artillery and was on full pay. A testamentary paper was found locked up in a private repository of the deceased. It was signed by him and had a seal opposite the signature, but was not attested by witnesses. This paper was propounded as the last will and testament of the deceased it being sought to establish it as a military will under the exception allowed in the Act 1 & 2 Victoria. It was held in an elaborate opinion that "actual military service" went on an expedition against the enemy (in expeditione). This decision is as we have seen in accordance with the civil law. (a) The rule established in this case has been uniformly followed both in England and America. (b)

The cases firmly establish the doctrine that the soldier must be engaged in actual warfare; tho' the term expedition is not confined to the movement of troops which actually precedes a conflict. (c)

(a) Supra Pµ .  
Who is a mariner at sea? The term "mariner" has been held to apply in this connection to anyone who has duties in connection with the ship. It includes the whole profession, and applies as well to sailors in the Merchant Marine (a) as to those in the Navy. It includes the purser of a man of war (b), a cook on board a steamship (c), even a surgeon in the Navy returning from a foreign station as a passenger. (d)

"At sea" has been held to include any place where the tide ebbs and flows. (e) A sailor who made a nuncupative will on the Mississippi river was not "at sea". (f) The first reported case involving the construction of the words "at sea" is that of The Earle of Euston v Seymour. (g) The testator was commander in chief of the naval force at Jamaica but lived on shore at his official residence. It was held that he did not come within the excepting clause of the statute.

But it was however decided by the Prerogative Court of Canterbury in 1840 (h) where a sailor of a man of war obtained leave to go on shore while the ship was in the harbor of

(a) Morell v Morell 1 Hagg. 51.
(b) In the Goods of Hayes 2 Curt. 333.
(c) Ex Parte Thompson 4 Bradf. 155.
(d) Goods of Saunders L.R. 1 P & D.
(e) Bouv. L.D: In Re Jefferson 10 Wheaton 428.
(f) Will of Gevin 1 Tuck 44.: see also Warren v Harding 2 R.I. 133.
(g) Earle of Euston v Seymour 2 Curt. 339.
(h) Curt. 375. see also Hubbard v Hubbard 8 N.Y. 196: In Goods of McMurdo L.R. 1 P. & D. 540.
Bonos Ayres and there met with an accident and died on shore shortly thereafter, that an informal paper written immediately after the accident was a good will. The court distinguished the case from that of Seymour and referred to above.

What may be disposed of: The Statute of Frauds expressly says "personal estate", and this language has been adopted in most States. It is provided in England that sailors and marines, even at sea, cannot dispose of prize money except in writing. (a)

How may the soldier or sailor make the disposition? "In the same manner as he might have done before the making of this act" (Wills Act Vict. sec. 11) Before the act the military testament could be made in any the most informal manner, any writing or nuncupation by which a testamentary intent could be established was sufficient. (b) The Roman law required that the testament be established by two witnesses but by the rule of the common law the nuncupation of a sailor may be established by one witness only. (c) It is required by statute in some of the States (d) that the nun-

(a) 28 & 29 Vict. c. 72.
(b) Ex Parte Thompson 4 Bradf.160; Hubbard v Hubbard 8 N.Y.
(c) Leathers v Greenacre 53 Me.561: Ex Parte Thompson 4 Bradf.160.
(d) 4 Watts & Ler 357; 3 B. Mon.162; 4 Rawle 46; 6 W. & S. 184; 3 Leigh 140; 2 Greenl.298; 4 Humph. 342.
cupative will of a mariner be made in extremis, but such is not the rule at common law. (a)

Present tendency of legislation. We have now stated the principal points involved in our subject with as much particularity as is possible in a discussion covering the general American law. We have seen that tho' the statutes in those States following the English Statute of Frauds (29 C II) are substantially the same, the interpretation of the enactments varies to some extent in the different jurisdictions.

The present tendency of legislation is in the direction of the entire abolition of nuncupative testaments except in the case of soldiers and sailors. The majority of the States lately formed have enacted statutes similar in this respect to the English Wills Act and a number of the older States have followed that enactment.

(a) 4 Watts & Ler 357; 4 Humph. 342; 3 B. Mon 162; 4 Rawle 46; 6 W. & S. 134; 3 Leigh 140; 2 Greenl. 293.
APPENDIX.

The following States have provisions with regard to nuncupative wills substantially like those of the Statute of Frauds. (29 Chas. II)

Del. Laws as Am. 1893 p. 636.
Fla. R. S. 1892. secs. 1799-1801.
Ill. R. S. 1889. c. 149 secs. 15-16.
Mo. R. S. (1889) ss. 8892-5.
Md. Rev. 1894 sec 2747.
N. J. Rev. 1877 p. 1245.
In the following jurisdictions the further provision that the decedent must have been at the time in expectation of death from injuries received the same day is added:


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Badons Abridgement.
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Coke on Littleton.
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Maines Ancient Law.
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