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Recent Statutes

be the same. But as between the surety on the completion bond and the surety on the labor and material bond, which would be preferred as to earned moneys in the hands of the State? *Laski v. State*,[25] carried to its logical conclusion, might warrant a decision in favor of the latter. However, it is unlikely that the courts will give such an extension to that decision even if we assume that the decision retains any vitality since *Arrow Iron Works v. Greene*[26] has been decided. The equity in favor of the lienor, which was held to be superior to the surety's right of subrogation in that case, would probably not be considered of such compelling force when urged by the lienor's subrogee.

RECENT STATUTES

SECURED CREDITORS' DIVIDENDS IN LIQUIDATION PROCEEDINGS.—A unified basis for the computation of dividends to be paid to secured creditors in liquidation proceedings in New York has been enacted by legislative adoption of the Uniform Act on the subject.[1] This new legislation is Article 2-A of the Debtor and Creditor Law.[2] This Uniform Act had been recommended to the New York legislature for passage at its 1941 session[3] but failed of passage. However, there was then enacted an amendment to the Surrogate's Court Act[4] in relation to the payment of secured creditors of insolvent decedents' estates, which adopted the bankruptcy rule of distribution formulated in the Uniform Act.

By the new legislation, the bankruptcy rule of distribution of dividends to secured creditors is now made the governing rule in liquidation proceedings. Liquidation proceedings, by the terms of the statute, include assignments for the benefit of creditors, liquidation of insolvent banks, equity receiverships where the subject under receivership is insolvent, and any other proceedings for distribution of assets of any insolvent debtor.[5] The heart of the enactment is Section 33[6] which provides that "dividends paid to secured creditors shall be computed only upon the balance due after the value of all security not exempt from the claims of unsecured creditors and

25. *Supra*, note 13.

26. *Supra*, note 14. See language of Judge Swan in Maryland Casualty Co. v. Board of Water Commissioners, 66 F. (2d) 730 (C. C. A. 2d, 1933).

1. The UNIFORM ACT has been adopted by four states in addition to New York; see 9 U. L. A. 21 (1942); *infra*, note 5. Chief credit for the drafting of the Act apparently belongs to Judge Fred Hanson, whose scholarly article, *Secured Creditor's Share of an Insolvent Estate*, appears in (1936) 34 MICH. L. REV. 309.

2. N. Y. LAWS 1942, c. 876, effective May 18, 1942.

3. Senate, Int. 1598, p. 2018; Assembly, Int. 1919, p. 2308.

4. N. Y. SURR. CT. ACT § 212, as amended by N. Y. LAWS 1941, c. 425.

5. N. Y. DEBTOR & CREDITOR LAW Art. 2-A, § 30. The UNIFORM ACT makes its provisions also applicable to insolvent decedents' estates, but since New York had already legislated in reference to them, *supra* note 4, the Act as adopted in New York omitted reference to such estates. The New York Act also states that it shall not apply to liquidation of insolvent insurance companies, which is governed by N. Y. INS. LAW Art. 16, § 544 (6), N. Y. LAWS 1932, c. 191, as amended by N. Y. LAWS 1936, c. 397.

6. 9 U. L. A. 23, § 4 (1942).

not released or surrendered to the liquidator, is determined and credited upon the claim secured by it."

There are four principal rules for fixing the amount of the debt on which dividends of secured creditors are computed.[7] They are the bankruptcy, the Maryland, the Illinois, and the equity rules. Under the bankruptcy rule the secured creditor is paid a dividend on the amount of the claim, at the time of insolvency, less the value of the collateral he possesses.[8] The Maryland rule considers as a dividend basis the amount actually due upon the debt at the time of declaring a dividend, without regard to the value of the remaining collateral.[9] The Illinois rule closely resembles the Maryland rule. Under the Maryland rule the time for fixing the amount of the debt which is to serve as a basis for dividends is the dividend date; under the Illinois rule the time for fixing the amount of the debt is the time when the claim is presented.[10] In both cases the value of the remaining security is disregarded in ascertaining the amount of the debt. The equity or chancery rule permits dividends on the full amount of the claim at the time of insolvency, with no reduction on account of security held or liquidated.[11] Thus there exist at two extremes the bankruptcy rule which deducts the value of the security, as evaluated at the time of the filing of the petition in bankruptcy,[12] and the equity rule which disregards the value of the security, leaving the face value of the debt as of the date of insolvency, undiminished. The two intermediate rules, while disregarding the value of the security retained, compute the dividends on the value of the debt actually unpaid at two later stages in the liquidation proceedings.[13] There is another rule which obtains in only one state, Kentucky.[14] It is generally included under the bankruptcy rule, although the two may be widely divergent in their results.[15] In Kentucky the secured creditor does not share with unsecured creditors in dividends until each unsecured creditor has received a percentage in dividends equal to the percentage of the secured creditor's claim protected by collateral. It is important to note that under none of the foregoing rules, not even the equity rule, is a secured creditor entitled to receive from all sources more than the amount of the debt.[16]

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7. Merrill v. National Bank of Jacksonville, 173 U. S. 131 (1899). See also annotations in L. R. A. 1918B, 1024; 94 A. L. R. 468 (1935).

8. *Re* Commissioner of Banks, 241 Mass. 346, 136 N. E. 269 (1922); *Re* Isaacs, 246 Fed. 820, (C. C. A. 2d, 1917).

9. Third Nat. Bank v. Lanahan, 66 Md. 461, 7 Atl. 615 (1887); First Nat. Bank v. Green, 221 Ala. 201, 128 So. 394 (1930).

10. Levy v. Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129 (1895); Furness v. Union National Bank, 147 Ill. 570, 35 N. E. 624 (1893).

11. Washington-Alaska Bank v. Dexter Horton Nat. Bank, 263 Fed. 304 (C. C. A. 9th, 1920); United States Fidelity & G. Co. v. Centropolis Bank, 17 F. (2d) 913 (C. C. A. 8th, 1927); McGrath v. Carnegie Trust Co., 221 N. Y. 92, 116 N. E. 787 (1917). This was also the majority rule in the various states until changed by statutory enactments. GLENN, CREDITOR'S RIGHTS AND REMEDIES, (1915) 434, § 544.

12. *Re* O'Gara Coal Co., 12 F. (2d) 426 (C. C. A. 7th, 1926), 8 Am. B. R. (N. S.) 138.

13. Practical illustrations of the various rules are given in Hanson, *Secured Creditor's Share of an Insolvent Estate,* (1936) 34 MICH. L. REV. 309.

14. Bank of Louisville v. Laughbridge, 92 Ky. 472, 18 S. W. 1 (1892).

15. See *supra* note 12.

16. Peter A. Frasse & Co. v. Hartford Automotive Parts Co., 300 Fed. 876 (D. C. 1924). See also L. R. A. 1918B, p. 1042.

Aside from statutory enactments, hereinafter discussed, in New York prior to the new legislation, the prevailing method of determining the amount to which a secured creditor would be entitled was upon the basis of the equity principle. In *People v. Remington*[17] the highest court in the state had before it for the first time the question as to which rule of distribution should be followed in this state. The court adopted the equity rule "as having the weight of authority in its favor" and "the one best according with the principles and established rules of equity jurisprudence, to which department of legal science the question pertains."[18] The court pointed out that the rule prevailing in the administration of bankrupt estates was an express statutory provision which was not controlling on an equity court ruling upon the estate of an insolvent debtor. This view was followed by the Supreme Court of the United States in *Merrill v. National Bank of Jacksonville*[19] where Chief Justice Fuller held that application of the bankruptcy rule in courts of equity constitute an alteration of the contract between the parties. In England the bankruptcy rule first obtained[20] and several of the states in this country followed suit,[21] but the English decisions applying the bankruptcy rule were in effect overruled in *Mason v. Bogg*,[22] and the application of the bankruptcy rule expressly rejected in *Kellock's case*.[23] Later, by statute, the bankruptcy rule was restored and made applicable in all distributive proceedings, whether in chancery or bankruptcy.[24]

The modern trend in legislation is towards the bankruptcy rule. Prior to the adoption of the Uniform Act, New York, in keeping with this trend,[25] had by statute prescribed the bankruptcy rule as the one to be followed in assignments for the benefit of creditors,[26] in the proceedings for the rehabilitation or liquidation of insurance companies[27] and recently, as previously mentioned, in the administration of insolvent decedents' estates.[28] The broad coverage of the 1942 legislation appears to completely abolish the equity or chancery rule in New York.

This legislation, applying as it does to nearly every type of liquidation proceeding, was necessary since it had been held that the prior piece-meal legislation, just referred to on the subject, did not have the effect of indicating the intention of the New York

17. 121 N. Y. 328, 24 N. E. 793 (1890).

18. *Id.* at 332.

19. 173 U. S. 131 (1898).

20. Wright v. Simpson, 6 Ves. Jun. 726, 31 Eng. Rep. R. 1272 (1802); Greenwood v. Taylor, 1 Russ. & M. 185, 39 Eng. Rep. R. 72 (1830).

21. Armory v. Francis, 16 Mass. 308 (1820); Wurtz v. Hart, 13 Iowa 515 (1862); Wheat v. Dingle, 32 S. C. 473, 11 S. E. 394 (1890).

22. 2 Myl & C. 443, 488 (1837), 40 Eng. Rep. R. 709.

23. L. R. 3 Ch. 769 (1868).

24. Judicature Act of 1873, 36 & 37 Vict. c. 66; Judicature Act of 1874, 37 & 38 Vict. c. 83.

25. Bar Ass. City of N. Y., Comm. on State Legislature, Bulletin 238 (1941); Commissioner's prefatory note to Uniform Act, 9 U. L. A. 21.

26. N. Y. DEBTOR & CREDITOR LAW § 15 (8); *Re* Vietor, 101 Misc. 308, 166 N. Y. Supp. 1012 (1917).

27. N. Y. INS. LAW § 544 (6), N. Y. LAWS 1932, c. 191, and amended by N. Y. LAWS 1936, c. 397.

28. N. Y. SURR. CT. ACT § 212, as amended by N. Y. LAWS 1941, c. 425. Prior to this statute the equity rule governed the administration of insolvent decedents' estates. Matter of Kearns, 139 Misc. 877, 879 (1931); Matter of Cooke, 147 Misc. 528 (1933).

legislature to adopt the bankruptcy rule as a rule of universal application[29] The change in the law of New York also appears to be a wholesome one. It may be said in favor of the equity rule that it preserves for the secured creditor an advantage which by his diligence he had obtained over other creditors and that for his diligence in thus securing himself he should not be penalized by being deprived of his right to payment along with unsecured creditors. However, while the secured creditor possesses only a security title, and legally his possession of the security does not constitute partial payment on the debt, from the practical as well as from the equitable view, the creditor's retention of the security or his realization on it should amount to a *pro tanto* extinguishment on the debt.

The Uniform Act contains specific provisions dealing with the security held by the creditor. It provides that concealment of any collateral he holds, with the intention of evading the provisions of the Act, shall deprive the creditor of his right to receive or retain dividends unless he thereafter releases or surrenders the undisclosed security to the liquidator.[30] The Chandler Act[31] and the recently enacted amendment to the Surrogate's Court Act[32] contain no express provision pertaining to the matter of concealment of security by the creditor. The federal courts have interpreted a failure to disclose the security as a waiver of the security,[33] and the creditor is restricted to the receipt of dividends as a general creditor. The Uniform Act also contains specific provisions for evaluating the security held by a creditor. The primary methods of valuation is by an actual realization in money of the security, either by collection where the security is an obligation for the payment of money, or by creditor's sale where the security is of another kind.[34] Where valuation is not practicable by such methods or where delay would result, the court may order evaluation of the security by compromise, or by litigation in the liquidation proceeding, or by a liquidator's sale of the assets. The latter method when approved by the court passes a good title to the purchaser free of the liens of the secured creditor. If the method is by compromise or litigation, the liquidator may redeem such assets by paying the value so determined if authorized by the court to do so.[35]

By Article 2-A of the Debtor & Creditor Law, New York has adopted a uniform policy applicable in all form of liquidation proceedings. Such unification and simplification of legislative policy are defensible and highly desirable.

SOLDIERS' AND SAILORS' WILLS.—The entry of this country into the war has brought about a change in the law of New York in relation to wills. Section 16 of the Decedent Estate Law and Section 141 of the Surrogate's Court Act have been amended[1] to permit the oral devise of realty by soldiers and sailors, and to validate their

29. Andes Co-Op Dairy Co. v. Baldwin, 238 App. Div. 726, 266 N. Y. Supp. 18 (3d Dep't 1933), *aff'd* 263 N. Y. 578, 189 N. E. 705 (1933); Prudential Ins. Co. of America v. Land Estates Inc., 110 F. (2d) 617, 619 (1940).

30. N. Y. DEBTOR & CREDITOR LAW 2-A, § 32; 9 U. L. A. 23, § 4 (1942).

31. 52 STAT. 866 (1938), 11 U. S. C. A. § 93 (Supp. 1942).

32. *Supra* note 28.

33. Robinson v. Exchange Nat. Bank of Tulsa, Okl., *et al.*, 28 F. Supp. 244 (1939).

34. N. Y. DEBTOR & CREDITOR LAW 2-A, § 34; 9 U. L. A. 23, § 5 (1942).

35. N. Y. DEBTOR & CREDITOR LAW 2-A, § 35; 9 U. L. A. 24, § 6 (1942).

1. N. Y. LAWS 1942, c. 688, effective May 6, 1942.

unattested holographic wills. Such wills hereafter will automatically become invalid upon the expiration of one year after completion of military service. Heretofore, the law of New York contained no provision for automatic invalidation of the informal wills of soldiers and sailors after their discharge from service, and prior to this amendment the nuncupative wills of soldiers and sailors could bequeath only personal property and their unattested holographic wills were without effect.

Soldiers and sailors have been favored in the law of wills since the time when all Gaul was divided into three parts.[2] Caesar, in an endeavor to reward his soldiers for their services, provided that a will made by a soldier should be valid even though the customary formalities of execution were not complied with.[3] Justinian, believing the reason for this privilege to be the ignorance of soldiers as to testamentary matters, restricted the exercise of it to soldiers *in expeditionibus,* when presumably legal advice would not be available.[4] Although the first English commentator on the law of wills states that the testamentary privileges accorded to soldiers by the Roman Law were carried into the common law,[5] it has been pointed out that no special privileges in regard to making wills could have been granted to English soldiers, since at common law even civilians could make informal written or oral testaments bequeathing personalty.[6] However, whether or not at common law the wills of English soldiers were treated differently from those of civilians, the Statute of Frauds expressly excepted the wills of soldiers and sailors from its requirements.[7]

By the Revised Statutes of 1830, New York provided that no nuncupative will should be valid ". . . unless made by a soldier, while in actual military service, or by a mariner while at sea."[8] While this section was held to leave soldiers' and sailors' wills entirely untrammeled, and therefore governed by the principles of the common law,[9] an important distinction was recently pointed out by the New York Court of Appeals. In *Matter of Zaiac,*[10] the Surrogate admitted to probate an unattested letter of a soldier as a valid common law testamentary disposition and also as a nuncupative

2. MUIRHEAD, ROMAN LAW (3rd ed.) 309; Matter of Thompson, 4 Bradford 154, 157 (Surr. N. Y. 1856).

3. Gaius, 6.11, reprinted in 1 SCOTT, CIVIL LAW (1932); Code, 6.21, reprinted in 13 SCOTT, CIVIL LAW (1932); BUCKLAND, ROMAN PRIVATE LAW (1928) 233.

4. Institutes, 2.11, reprinted in 2 SCOTT, CIVIL LAW (1932); BUCKLAND, *op. cit. supra,* note 3 at 224.

5. SWINBURNE, TESTAMENTS AND LAST WILLS (2d ed. 1635) Part 1, § 14. See Drummond v. Parrish, 3 Curt. Eccl. Rep. 522, 183 Eng. Rep. R. 812 (1843).

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

7. Stat. 29 Car. II, cap. 3, § 23 (1676): "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 movables, wages and personal estate, as he or they might have done before the making of this Act."

8. 2 N. Y. REV. STAT. (1830) § 22. This provision was continued in the Consolidated Laws as Section 16 of the Decedent Estate Law. The common law right of nuncupation had been greatly restricted prior to this in New York. N. Y. LAWS 1787, c. 47; N. Y. LAWS 1813, c. 23, § 17. These laws however expressly provided that soldiers' and sailors' were not affected thereby. See Matter of Kennedy, 167 N. Y. 163, 170, 60 N. E. 442, 444 (1901).

9. Hubbard v. Hubbard, 8 N. Y. 196, 199 (1853); Matter of Zaiac, 162 Misc. 642, 295 N. Y. Supp. 286 (Surr. Kings 1937).

10. 162 Misc. 642, 295 N. Y. Supp. 286 (Kings 1937), *rev'd* in 255 App. Div. 709, 5 N. Y. S. (2d) 897 (2d Dep't 1938), and modified in 279 N. Y. 545, 18 N. E. (2d) 848 (1939).

will under the statute. The Court of Appeals reversed the decision of the Surrogate admitting the letter to probate as a holographic will since its execution had not been attested to by two subscribing witnesses as required by former Section 141 of the Surrogate's Court Act.[11] However, since the oral disposition had been witnessed by the required number of witnesses for a nuncupative will[12] the Court directed the probate of this nuncupative will. The court recognized the anomaly of admitting an oral statement "depending on the frail testimony of slippery memory" or "a loose word spoken to a comrade, vaguely understood or badly remembered",[13] and denying probate to a letter clearly dispositive in nature, written entirely in the decedent's own hand and signed by him,[14] but deemed itself bound by the provisions of the Surrogate's Court Act. There seems to be no doubt that this decision played a great part in the enactment of the amendments above referred to, at least in so far as the probate of a holographic will is now permitted ". . . when written entirely in the handwriting of the maker, even though the same be unattested."[15]

The Legislature, however, went further. Apparently in line with the present policy of freeing the members of our armed forces from the necessity of strict compliance with the law where such compliance is rendered difficult by reason of their military service and would very often prove impossible, the Legislature conferred upon soldiers and sailors the privilege of disposing of realty as well as personalty by nuncupative or holographic will. Realty was not devisable at common law[16] until the passage of the Statute of Wills.[17] Today all jurisdictions allow the testamentary disposition of real property, and a few jurisdictions even permit the oral devise of realty.[18] The amendments to the New York statute in this respect find precedent in legislation

11. This section required the testimony of two attesting witnesses for the probate of a written will. As now amended, it provides for the probate of a holographic will upon proof of the handwriting thereof.

12. Two witnesses are necessary for a nuncupative will to have effect. N. Y. SURR. CT. ACT, § 141, and N. Y. DEC. EST. LAW, § 16 as amended.

13. Matter of Smith, 6 Phila. 104, 106, 107 (Pa. 1865), quoted with approval by the Surrogate in Matter of Zaiac, 162 Misc. 642, 654, 295 N. Y. Supp. 286, 300 (Surr. Kings 1937).

14. The fact that the will is holographic gives rise to various favorable inferences as to its validity. There is a strong presumption of testamentary capacity, testamentary intent, and the absence of fraud. Less strictness of proof is required with regard to compliance with the statutory formalities. See Matter of Turrell, 166 N. Y. 330, 59 N. E. 910 (1901); McLaughlin's Will, 2 Redfield 504 (Surr. N. Y. 1877); Carroll v. Norton, 3 Bradford 291 (Surr. N. Y. 1853); Matter of Levengston, 158 App. Div. 69, 142 N. Y. Supp. 829 (3d Dep't 1913).

15. N. Y. LAWS 1942, c. 688, § 1.

16. There is some doubt as to whether prior to the Norman Conquest there was any generally recognized right to devise. In any event the Conquest and the resulting growth of the feudal system put an end to any such right that might have existed. See 4 KENT, COMM. *504, and 1 PAGE, WILLS (1926) § 11, 23 *et seq.*

17. 32 Hen. VIII, c. 1 (1540). See also 35 Hen. VIII, c. 5. The effect of these two acts was to permit of the devise by written will of two-thirds of all land held by knights' service and all lands held by socage tenure.

18. See, for instance, GEORGIA CODE (1933) § 113-504. The substance of the dispositions must be reduced to writing within 30 days. See also Bordwell, *Statute Law of Wills,* (1928) 14 IOWA L. REV. 1, 30.

passed in England in 1918.[19] Whatever historical reasons may have prompted the requirement of greater formality in the case of devises, as distinguished from bequests, personal property is more often today of greater value than holdings of realty and no reason appears why the disposition of the latter should be attended by more protective limitations.

In granting a soldier or sailor the right to dispose of realty, no mention is made whether he must have reached his majority to exercise this privilege. Section 10 of the Decedent Estate Law provides that "All persons, except . . . infants, may devise their real estate. . . ." The amendment under consideration merely states that "No nuncupative or unwritten or holographic will, bequeathing or devising personal or real estate, shall be valid unless made by a soldier or sailor in actual military or naval service. . . ."[20] The question is therefore presented whether it was intended to confer upon all soldiers and sailors, regardless of age, the power to make an informal will. The English act of 1918 expressly grants this right to devise to all soldiers and sailors regardless of their age.[21] Remembering that the reason for the privilege of nuncupation is the difficulty in complying with the statutory formalities,[22] it may be reasoned that where the soldier is prevented from making a formal will, not by his wartime duties, but by his youth, the purpose of the statute is not frustrated by holding the oral or holographic devise by an agent invalid. Furthermore, as the right granted is in derogation of the common law, it may be correct to construe it strictly. However, the fact that minors over eighteen years of age are today considered mature enough to be conscripted into the armed services may be an important consideration in construing the legislative intent with which the amendment was passed. Since young men under eighteen may today volunteer for the armed services, a similar question is involved in trying to ascertain whether, while in actual service, such a person may orally bequeath his personalty. At common law the age requirements for a valid testament of personal property were fourteen for males and twelve for females.[23] The decisions of the English courts[24] holding valid a bequest

19. Wills (Soldiers and Sailors) Act (1918) 7 & 8 Geo. V, c. 58, § 3 permits real property to pass by an informal military will.

20. N. Y. LAWS 1942, c. 688, § 1.

21. Wills (Soldiers and Sailors) Act (1918) 7 & 8 Geo. V, c. 58, § 3. "However, the recent English property acts prevent all minors from devising real property. See Watt, *Wills in War Time,* 4 CONVEY. (N. S.) 150 (1939)." Atkinson, *Soldiers' and Sailors' Wills* (1942) 28 A. B. A. J. 753, 757, note 83.

22. Hubbard v. Hubbard, 12 Barbour 148, 155 (N. Y. 1851); *In re* Gibson [1941] P. 118; *In re* Hiscock [1901] P. 78, 80 (1900).

23. Van Weit v. Benedict, 1 Bradford 114 (N. Y. 1849); BL., COMM. *497. The Civil Law rule was the same. See Gaius, 2.113, Ulpian, 20.13, reprinted in 1 SCOTT, CIVIL LAW (1932).

24. *In re* Hiscock [1901] P. 78; *In re* Stable [1919] P. 7; *In re* Vernon [1915] Vict. L. R. 699; *In re* Farquhar, 4 Notes on Cases 651 (1846). *Contra: In re* Wernher, [1918] 1 Ch. 339, *aff'd* [1918] 2 Ch. 82-CA. *Cf. In re* Limond [1915] 2 Ch. 240 to the effect that soldiers' and sailors' wills were left unaffected by the Statute of Frauds only in so far as execution and attestation are concerned. See also Comment (1918) 31 HARV. L. REV. 1022, 1024. 1 PAGE, WILLS (2d ed. 1926) 619, states that if the Wills Act of a state excepts soldiers and sailors from its terms and leaves them the power which they had at common law, a person under the statutory age may make a will, but if the Act only provides for a different and less formal method in which they can make their wills, they must be of age

by a minor soldier under the statutory age have been codified in the English Act of 1918.[25] The point does not appear to have been litigated much in the United States. The leading American case in point holds that a soldier under the statutory age for a formal will cannot nuncupate, bottoming its decision on the theory that the statute requiring testators to be of a certain age did not permit of any exceptions.[26] Bearing in mind that Section 16 of the Decedent Estate Law, prior to its amendment in 1942, in no way changed the common law as to soldiers' and sailors' wills,[27] perhaps New York would reach a different conclusion, particularly in view of the wording of Section 15 of the Decedent Estate Law which provides that "Every person of the age of eighteen years or upwards, . . . and no others, may give and bequeath his or her personal estate, by will *in writing*" (italics added). However, by taking such a view New York would be prohibiting a holographic bequest of a person under eighteen years of age, while upholding his nuncupative bequest.[28]

Interesting questions relating to witnesses are raised by the amendments. It is provided therein that a nuncupative will must be ". . . made within the hearing of two persons. . . ." In construing the section of the Surrogate's Court Act already referred to, which requires for the probate of a nuncupative will that ". . . its execution and the tenor thereof must be proved by at least two witnesses," it has been uniformly held that the two witnesses need not be present simultaneously.[29] The question is thus presented whether the law in relation to nuncupative wills has been changed in this respect. Under the amendment must the witnesses to a nuncupative will be present simultaneously? The keyword would seem to be *within*. If it was not intended to require the witnesses to be present at the same time, would it not have been more natural to use the word *in*? While such a line of argument is by no means convincing it may be significant that the original bill before the Legislature used the word *in*,[30] whereas the bill, as approved, had this word changed

to make an ordinary formal will. The New York law would appear to be in the first classification, *supra*, note 8.

25. Wills (Soldiers and Sailors) Act (1918) 7 & 8 Geo. V, c. 58, § 1.

26. Matter of Evans, 193 Iowa 1240, 188 N. W. 774 (1922). See also Goodell v. Pike, 40 Vt. 319 (1867), coming to the same result on the theory that the privilege of nuncupation is only as to the manner of execution. *Contra*: Henninger's Estate, 30 Pa. Dist. R. 413 (1920), holding that a soldier otherwise qualified can nuncupate personalty although under age.

27. *Supra*, note 9.

28. Professor Atkinson in discussing the desirability of allowing minors to make military wills points out that in the reported cases, minor soldiers have always made sensible wills, which is more than can be said of their superior officers. Atkinson, *Soldiers' and Sailors' Wills* (1942) 28 A. B. A. J. 753, 755.

It is of interest to note that where a will attempts to dispose of both realty and personalty, and for some reason the realty cannot pass, the American courts hold that the personalty will pass, unless it appears on the face of the will that the gifts were intended to be inseparable. Mulligan v. Leonard, 46 Iowa 692 (1877); *In re* Davis, 103 Wis. 455, 79 N. W. 761 (1899). The English Courts seem to hold that there is a presumption of the invalidity of the entire will in such a case. Godman v. Godman [1920] P. 261.

29. Matter of Mason, 121 Misc. 142, 200 N. Y. Supp. 901 (1923); Matter of Mallery, 127 Misc. 784, 217 N. Y. Supp. 489 (1926), *aff'd* 247 N. Y. 580, 161 N. E. 190 (1928); Matter of Zaiac, 162 Misc. 642, 295 N. Y. Supp. 286 (1937), reversed on another ground 279 N. Y. 545, 18 N. E. (2d) 848 (1939).

30. Ass'n. Bar of the City of New York, BULL. No. 8 (1942) p. 543.

to *within*.[31] On the other hand, the term *within* might well refer to the orbit of hearing, *i.e.*, that the nuncupation be made in such a manner that it be heard by two witnesses, although not necessarily at the same time. Certain it is that the emergencies of war might disclose many situations wherein such repetition is necessary. A question also arises whether a witness to a nuncupative will who is also a beneficiary thereof can take under it. A recent amendment to Section 27 of the Decedent Estate Law provides that a subscribing witness cannot take under a will.[32] Since in no sense may it be said that a witness to a nuncupative will subscribes thereto, the section would seem to be inapplicable. Nevertheless it is a matter of prime importance in the avoidance of fraud that an interested witness be incompetent to establish an oral will.[33]

The 1942 amendments do not expressly require that a holographic will be subscribed or signed by the testator. Undoubtedly the widest use of this privilege of holographic testamentary disposition will be in the form of letters. It is thus not difficult to conceive that dispositive provisions might be contained in a post script arranged after the signature. Will such provisions be given effect? The answer to this question must be found in the statute. Does it create a new kind of will or does it merely dispense with the necessity for witnesses where the instrument is in the handwriting of the testator? If the latter, it would seem that the holograph would have to be subscribed at the end,[34] while if the former, mere signing would seem to be enough and post script should be given effect. The fact that the new legislation contains the only mention of a holographic will in the entire Decedent Estate Law is some evidence that a new form of will has been set up. On the other hand the language of the amendment, "A holographic will when written entirely in the handwriting of the maker *even though the same be unattested* (italics added)", would seem to correlate a holograph with a formal will, the manner of execution of which is prescribed in Section twenty-one of the Decedent Estate Law. How the point will be handled by the courts should it come before them is difficult to say.[35]

31. Ass'n. Bar of the City of New York, BULL. No. 8 (1942) p. 561.

32. But the amendment does not apply if there are two other subscribing witnesses who are not beneficiaries. N. Y. LAWS 1942, c. 622. This amendment was intended to remedy the situation involved in Matter of Walters, 285 N. Y. 158, 33 N. E. (2d) 72 (1941). In that case it was held that the former provision that a subscribing witness to a will could not take thereunder where such will could not be proved without his testimony, did not operate to defeat his bequest where the will had been probated upon the testimony of one witness in accordance with Section 142 of the Surrogate's Court Act, the subscribing witness having absented himself from the state solely in order to avoid testifying and thereby save his legacy. See (1942) 17 ST. JOHN'S L. REV. 50.

33. It has been held that a statute which makes a subscribing witness competent by destroying his legacy does not apply to nuncupative wills unless by its very terms it fairly includes them. Vrooman v. Powers, 47 Ohio St. 191, 24 N. E. 267 (1890). Note that *In re* Limond, [1915] 2 Ch. 240 holds that as witnesses are not required to a military holograph, they may take under it.

34. N. Y. DEC. EST. LAW, § 21 provides: "Every last will and testament . . . shall be subscribed by the testator at the end of the will."

35. It is questionable whether a paper originally intended as a formal will, though not perfected as such because of failure to observe all the statutory requirements, may be established as a holographic will. The majority view is in the negative: Porter's Appeal, 10 Pa. 254 (1849); Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216 (1909). *Contra*: Offutt v. Offutt, 42 Ky. (3 B. Mon.) 162 (1842).

The one year limitation on the validity of an informal military will after discharge from military service is a restriction on the right of nuncupation as it existed at common law, under which the will was valid until revoked,[36] as well as under the prior wording of the New York statute.[37] The new legislation provides that every informal will shall become invalid upon the expiration of one year following discharge from military or naval service, or, should the testator lack testamentary capacity at such time, then one year after testamentary capacity has been regained. The amendment does not provide an answer to the question whether an informal will may be revoked informally before the expiration of the statutory period of one year. Section thirty-four of the Decedent Estate Law provides that "no will in writing" can be revoked save by another will in writing, a formal instrument of revocation, or physical destruction thereof. While this provision by its very terms is inapplicable to nuncupative wills it would seem, as a matter of first impression, to apply to holographic wills. However, at common law a will, whether holographic or otherwise, could be revoked without any particular formality,[38] and if we presume that the Legislature intended to reinstate the holographic will effective at common law, which the Court of Appeals in *Matter of Zaiac*[39] had been forced to find invalid, there may exist a basis for further presuming that the Legislature did not intend the formal requirements for revocation of formal wills to apply to this informal type of will. However, even assuming that the underlying purpose of the amendments is to dispense with as much formality as possible, it should be a simple matter for a soldier or sailor to revoke a holographic will by physical destruction or by another holographic will, and no practical reason appears why the Legislature should have intended the statutory provision as to revocation to be inapplicable.[40]

For convenience in treatment this note has refrained from considering separately the provisions of the amendment as they apply to mariners. Before 1942 Section 16 of the Decedent Estate Law permitted nuncupative wills to be made ". . . by a soldier while in actual military service, or by a mariner while at sea." The amendment extends the privilege of informal testamentary disposition to ". . . a soldier *or sailor* while in actual military *or naval* service, or by a mariner while at sea . . ." (italicized matter added by amendments). The amendment makes a distinction between a sailor on the one hand, and a mariner on the other, in the provision dealing with automatic revocation. In the case of the mariner his informal will is not automatically revoked. While formerly the term "mariner" was interpreted to include a member of the

36. Matter of Conner, 65 Misc. 403, 121 N. Y. Supp. 903 (1909); *In re* Booth, [1926] P. 118. The amendment returns to the view of the Roman Law. See Justinian, II, § 3, reprinted in 2 SCOTT, CIVIL LAW (1932); Ulpian, 23.10, reprinted in 1 SCOTT, CIVIL LAW (1932). England has not adopted this rule.

37. N. Y. DEC. EST. LAW, § 16.

38. Card v. Grinman, 5 Conn. 164 (1823); *In re* Pierce's Estate, 63 Wash. 437, 115 Pac. 835 (1911).

39. 279 N. Y. 545, 18 N. E. (2d) 848 (1939).

40. As a holographic will is a "will in writing" it would seem that a prior formal will would be revoked thereby. To this effect see: Ennis v. Smith, 14 How. 400 (1852); Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342 (1896); Estate of Gossage [1921] P. 194. *Contra: In re* Soher, 78 Cal. 477, 21 Pac. 8 (1889). *Cf.: In re* Booth [1926] P. 118. However, as mere words cannot revoke a formal written will, a subsequent nuncupative will cannot revoke a prior written will. See: Limbach v. Limbach, 290 Ill. 94, 124 N. E. 859 (1919); McCune v. House, 8 Ohio 144 (1837).

United States Navy,[41] it would clearly appear that by using the term "sailor", today popularly ascribed only to members of the armed forces, the Legislature intended to distinguish between members of the United States Navy and members of the merchant marine who are not bound to any period of definite service. In this connection the English Act[42] is more specific. It provides that the nuncupative (or holographic) will of a sailor will be given effect if it is made ". . . when he is so circumstanced that if he were a soldier he would be in actual military service."[43] The bill as originally proposed to the New York Legislature provided for the right of nuncupation to all persons in the military, naval or air forces of the United States during a state of war, whether or not they were in actual military service.[44] The idea behind this proposal was that the requirement of "actual military service" was vague and the source of much expensive litigation although the admitted dispositive wish of the decedent was not in doubt.[45] It was pointed out, however, that the expression "actual military service" had been definitely defined as being equivalent to "on an expedition",[46] and that the proposed extension lost sight of the reason for the exception to the usual formalities prescribed for wills.[47] Thus the only change made as to the persons covered was the insertion of ". . . sailors in actual . . . naval service. . . ." There would seem to be little doubt that the purpose of this extension was the same as that expressly avowed in the English Act.[48]

One last inquiry remains. Is the privilege of making an informal military will available to those women, such as the Waacs[49] and the Waves,[50] who are engaged in noncombatant service with our armed forces? The answer to this query lies in the nature of the duties of the particular unit concerned. As Waves are restricted

41. *In re* Gwin's Will, 1 Tuck. 44 (N. Y. 1865) (A commandant on a gunboat is a mariner); *Ex parte* Thompson, 4 Bradford 154, 158 (1856) (Every person in the naval or mercantile service, from the common seaman to the captain or admiral, is a mariner).

42. Wills (Soldiers and Sailors) Act (1918) 7 & 8 Geo. V, c. 58.

43. *Supra* note 2.

44. S., Pr. 1956, Int. 1595; A., Pr. 2341, Int. 1907.

45. Butler, *The Wills of Soldiers and Sailors under New York Law,* N. Y. L. J. Editorial, March 17, 18 and 19, 1942.

46. Matter of Dumont, 170 Misc. 100, 9 N. Y. S. (2d) 606 (1938) *aff'd* 257 App. Div. 952, and authorities cited therein. It must be admitted, however, that the question of "actual military service" has been productive of more litigation than any other phase of informal military wills. See Atkinson, *Soldiers' and Sailors' Wills* (1942) 28 A. B. A. J. 753, 755.

47. *Supra,* note 22. See also: Assn. Bar of the City of N. Y. Bull. No. 8, p. 543 (March 27, 1942).

48. *Supra,* note 43. There is reason to believe that the amendment will be given retroactive effect. See Estate of Yates, [1919] P. 93. Thus the will of a sailor in actual naval service, who died subsequent to the amendment, would most probably be probated, even though the will was not made while at sea.

49. The Women's Army Auxiliary Corps was established by Presidential order pursuant to authority granted by Public Law 554, 77th Congress, Chapter 312, 2nd Session, approved May 14, 1942.

50. The Women's Naval Reserve was established by the addition of Title V to the Naval Reserve Act of 1918 by Public Law 689, 77th Congress, Chapter 538, 2d Session (H. R. 6807), approved July 30, 1942.

to the performance of short duty within the continental United States,[51] and as this country is not a theater of war, it is difficult to visualize a situation in which a Wave could be said to be on or about to set out on an expedition[52] as required for the validity of a nuncupative or holographic will. However, should the United States become an actual battlefield, these women, living in navy barracks[53] and therefore a mark for enemy action, might well be said to be on an expedition,[54] and hence entitled to the privilege of nuncupation. A different situation is presented by the Waacs. While they are authorized to serve with the Army throughout the world, they are not members of the Army,[55] and therefore would seem not to be soldiers in the strict sense of that word. Nevertheless they are certainly in military service[56] and the considerations motivating the extension of the right to make informal wills to a member of the United States Army apply with equal vigor to them. It would therefore appear unquestionable that the courts, availing themselves of at least a modicum of liberality in the field of statutory construction, will uphold the informal wills of Waacs. The broad policy of affording all those actively engaged in the military service of their country the maximum protection in the decedent disposition of their property[57] would be best effectuated thereby.

51. Naval Reserve Act of 1918, § 504. Thus there is no possibility of the informal will of a Wave being upheld as being made by a mariner while at sea. In *In re Stanley* [1916] P. 192 the informal will of a nurse on a hospital ship was admitted to probate as a mariner's will.

52. *Supra,* note 46.

53. In *In re* Gibson, [1941] P. 118, the informal will of a member of the Army Dental Corps who slept at home was refused probate. The court said: "The foundation of the permitting of nuncupative wills was that a man was uprooted from civil surroundings." It would thus seem that if the Wave were residing in civilian quarters she could not validly make an informal will.

54. In *In re* Spark, [1941] P. 115, the nuncupative will of a soldier in camp in England was probated, the court pointed out that in the present war the scope of military operations have been very much enlarged and due to the changed circumstances a more modern interpretation than the one afforded by the older cases must be imparted to "in military service".

55. Public Law 689, 77th Congress, Chapter 554, 2d Session, § 12. Members of the Army Nurses Corps, a constituent part of the United States Army, and the only other women's organization authorized to serve with the Army, clearly have the right of informal testamentary disposition.

56. *Ibid.* § 19 provides for the inclusion of a Waac in the definition of a person in military service used in the Soldiers' and Sailors' Civil Relief Act of 1940, 54 STAT. 1178 (1940), 50 U. S. C. A. § 501 (Supp. 1942).

57. Muzzicato, N. Y. L. J., (1942) p. 1382, col. 3, April 2, 1942.