IN THE ESTATE OF NEWLAND (1952) 1.A.E.R. 841.

Will – Seaman at sea – Document made in Contemplation of voyage

Under English testamentary legislation (1) a soldier being in actual military service, and a mariner or seaman being at sea, may make a testamentary disposition of his real and personal estate, either orally or by a writing, although not complying with the Wills Act. These persons may also make a testamentary disposition of real and personal estate at the age of fourteen.

In **In The Estate of Newland,** Ian Frederick Charles Newland, a seaman, though under twenty-one, had made a will, otherwise validly executed. In view of Newland's age, the will could be admitted to probate only if it was the will of "a seaman being at sea". That he was a "mariner or seaman" was not in dispute. These words in an earlier Irish case(2) were held to mean "any person employed in any branch of the Royal Navy or the Merchant Navy from the highest to the lowest". The problem here was whether Newland was a seaman "being at sea" when he made the disputed instrument.

Newland joined the S.S. Strathmore as an apprentice in April 1944 and continued to serve in that vessel until October 1944. During the war the Strathmore was engaged as a troopship between England and India. On July 4, 1944 she was in dock at Liverpool. On July 25, 1944 the deceased while on leave in England with the approval of his employers, the owners of the ship, executed a will in compliance with the formalities required by the Wills Act, 1837. At the time the will was made no sailing date had been set for the ship. Newland rejoined his ship on or before August 4, 1944 on which date the ship sailed on a new voyage. He died on August 8, 1951 at Madras, India.

Mr. Justice Havers was unable to find a principle of universal application by which to interpret the term "seaman being at sea". In fact the courts have interpreted the words liberally. The privilege extends to a person in maritime service serving on board a vessel permanently stationed in a harbour (3), or on service in a river (4); and a will made in the course of a voyage may in fact be made on shore (5). Mr. Justice Havers applied In **The Goods of Hale** in deciding that the deceased Newland was a "seaman being at sea" when he made his will between voyages in England. Newland was declared to be a "seaman being at sea" because he was in the employment of the steamship company when he made the will and was then in contemplation of sailing on a fresh voyage.

(1) The Wills Act, 1837, 1 Vict. c. 26, s. 11 (Imp.;) Wills (Soldiers and Sailors) Act, 1918, 7 and 8 Geo. 5, c. 58, ss. 1 and 3 (Imp;) the N.B. Wills Act, 14 Geo. 6, c. 172, s. 4 subs. (1) provides that "the will of any mariner or seaman when at sea or in the course of a voyage, may be made by writing signed by him or by some other person in his presence and by his direction without any further formality or any requirement as to the presence of or attestation or signature by any witness"
(2) In The Goods of Hale (1915) 2 I. R. 362.
(3) In The Goods of McMurdo (1868), 17 L. T. 393.
(4) In The Goods of Austen (1853), 163 E. R. 1431.
(5) In The Goods of Lay (1840), 163 E. R. 444.

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Mr. Justice Havers seemed to base his decision on the fact that, though the will was made on shore and not during a leave in the course of a voyage, the testator had in contemplation a future voyage to take place within a reasonable time. This was the decisive factor in **In The Goods of Hale.** There the deceased lady was engaged by the Cunard Steamship Company as permanent typist of the Lusitania, and when she was not actually sailing on board the Lusitania she worked in the office at Liverpool. She had been notified that she would have to sail in the vessel. The ship was to sail on January 16th, and on January 14th and 15th she made the three documents which were set up as a seaman's will. The Irish Courts held that she was a "seaman" and that she was at sea, because she was definitely engaged to commence her voyage, although she had not actually commenced it. It was evident from the documents of January 14th and 15th that she intended to sail on January 16th. The reasoning of the judgment was based on analogy to the cases involving soldiers wills; in those cases if a man has definitely taken the first step to go on a military expedition he is said to be in actual military service; by parity of reasoning, the lady having taken the first step to go on board the Lusitania was said to be at sea.

The facts in the Hale case appear to be distinguishable from those in **In the Estate of Newland;** the will in the latter was made between voyages with the date of the oncoming voyage indefinite; in the former the will was made on the eve of a definite sailing.

The decision of Mr. Justice Horridge in **In the Estate of Bowly** (6) was not referred to in the Newland case but the facts are similar. The facts in **In the Estate of Bowly** are sketchy; there, a gentleman who was employed as a lieutenant on the Mediterranean Squadron came up to London for five days to be married. Then he went back and joined his ship. In those circumstances, was he a seaman being at sea when he made a will during his leave? In deciding that this man was not a seaman being at sea when he made the will while in London Mr. Justice Horridge said: "It was no portion of his duty as a seaman, and it was not in the course of a voyage. It was a distinct and separate occasion, on which he left his ship and went to London and got married and went back".

Both Newland and the gentleman from the Mediterranean were on leave with the consent of their employers. Neither was on shore in the course of a voyage. Newland was waiting on a voyage to start; his ship had been in dock in Liverpool from July 4th till around August 1st when it sailed, five or six days after Newland had made the will on July 25th. The gentleman from the Mediterranean was on leave for five days at the most, the time granted by his employers, and then he went back to his ship, and in that five day period he made his

(6) In the Estate of Bowly, 1918, 34 T. L. R., 626.

will; he was declared not to be a seaman being at sea. The decisions do not seem reconcilable.

The Court however applied **In The Goods of Hale**; the result of the application it seems, widens the scope of the already liberal interpretation given by the Courts to the term "mariner or seaman being at sea".

Terence V. Kelly, Law III U.N.B.

Re ELLIOTT (deceased). LLOYDS BANK, LTD. v. BURTON – ON–TRENT HOSPITAL MANAGEMENT COMMITTEE AND OTHERS

Will – Condition Precedent – Illegal Condition – Gift of Personality Subject Thereto – Malum Prohibitum and not Malum In Se – Validity of Gift

The recent case of **Re Elliott (deceased) Lloyd's Bank Ltd. v. Burton-On-Trent Hospital Management Committee et Al** (1952) 1 A.E.R. 145, is of interest. It provides an example of the adoption by courts of equity of a civil law doctrine involving the distinction of **malum in se** and **malum prohibitum** in reference to conditions precedent and personal property.

The facts of the case are that the testator, Arthur Elliott, by his will appointed the plaintiff bank to be executor and trustee and directed the bank to convert the whole of his estate, both real and personal, into money. After payment of his debts and funeral and testamentary expenses, he gave the sum of £100 to the Burton-On-Trent Infirmary to be invested as the trustee should direct "for the purpose of maintaining and renovating my grave and headstone, subject to the Burton-On-Trent Infirmary accepting the above £100 and the terms as above attaching thereto then I give to the said Burton-On-Trent Infirmary the rest, residue and remainder of my estate to be applied to the general purposes of the said infirmary."

From the facts it will be apparent that this was not an absolute gift but rather a gift subject to a condition precedent under which the infirmary was to take the residue only if it accepted the legacy of £100 and also the terms, which were to maintain and renovate the testator's grave and headstone.

The Court held that on construction of the will, the legacy of £100 was intended to be set apart in perpetuity for maintaining the testator's grave, and, therefore, it was void as transgressing the rule against perpetuities and thus the condition precedent attached to the gift of residue was an illegal one which the residuary legatee could not lawfully carry into effect.