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NOTES

Constitutional Law

THE CONSTITUTIONALITY OF THE FEE SYSTEM IN JUSTICE OF THE PEACE COURTS

Introduction

Perhaps one of the oldest institutions known to the Anglo-American system of jurisprudence is the justice of the peace court.¹ Its origin is traced to the time of Edward III when the conservators of the peace were commissioned by the king to perform local ministerial duties.² Gradually the powers of this office were enlarged, and the appellation "Justice of the Peace" was given to the conservators.³ Paradoxically, the justice of the peace court originated in England as an instrument of centralization, an instrument whereby the king secured a firmer grip over his subjects. In America, however, the colonists, ever fearing the evils of centralization, embodied the justice of the peace into our system of government as a measure of securing the continued existence of local government. Consequently the justices have always been elected by local constituents, free from any central control.⁴

In early America other reasons besides that of decentralization existed which explained the desirability of the justice courts. With poor travel facilities, the local justice of the peace afforded elementary justice to a scattered and thinly populated country. Then too, the court's inexpensive and speedy remedies aided in yielding a court of justice to all.⁵ Lastly, it was felt that since the justice of the peace was a local person, his familiarity with the existing conditions would render him more capable of deciding the cases before him.⁶

In our system today the original reasons for the justice of the peace have long since vanished. Now the once beneficial role of these inferior courts has almost completely degenerated. As yet, our judicial reform has not caught the elusive justice of the peace, and consequently the vestigial organ of the J.P. courts remains to harass our judicial system.

¹ Ewing, *Justice of the Peace — Bedrock of Democracy*, 21 TENN. L. R. 484 (1950).

² 1 Edw. III, c. 16 (1326-7).

³ Keebler, *Our Justice of the Peace Courts — A Problem in Justice*, 9 TENN. L. R. 1, 6 (1930).

⁴ *Id.* at 8.

⁵ Legis., [1939] WIS. L. REV. 414, 419.

⁶ Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 CONN. B. J. 300, 307 (1947).

Many evils are prevalent in the justice of the peace courts. Their corruption and uselessness has frequently been attacked.⁷ The inferior quality of the justices is one of the reasons offered for the system's shortcomings.⁸ No legal or other qualifications — other than the usual age stipulations — are required by any of the states. Louisiana is the only exception to this, and its meager requirement is that a justice must be able to read and write.⁹ One commentator says that the only qualifications for a justice are that, “. . . he has a keen taste for petty politics, that he has little education and no legal training whatever, and that he is a misfit in the world of business and affairs.”¹⁰

Another reason for the corruption and ill functioning of the justice courts is found in the method of compensating the justices. Under the fee system, the justice receives his sole compensation in a criminal case from the fine imposed on the defendant when convicted. In the civil case, the justice likewise receives his compensation from the defendant when a judgment is levied against him. Warren in his book *Traffic Courts* proffers the real issue in the evil of compensating the justices by the fee system. He states:¹¹

Despite these occurrences and notwithstanding isolated cases of huge earnings such as \$2,800 in one month “in season” and \$4,553 in thirteen months from one “traffic light,” justices of the peace in over 90 per cent of the cases do not find fees lucrative. Attempts to swell the normal revenue of this office by either improperly enlarging the costs or expanded business is unquestionably an indictment of the fee system. However, for the purpose of emphasis it is repeated that the real viciousness of the fee system arises not from the possibilities it offers for unscrupulous revenue, but from the psychological attitude it engenders; namely, a conscious or unconscious prejudice where the testimony is at best evenly balanced.

From this, an interesting question is presented. Does this “unconscious prejudice,” this “psychological attitude,” of itself render a judge biased so that the procedural constitutional guarantee of a fair hearing is violated?

The Tumey Case

In 1927, the Supreme Court in *Tumey v. Ohio*,¹² basing its decision primarily on the common law maxim “that a man can not be a judge in his own case”¹³ held that a judge who received his compensation from the fine imposed upon the defendant is a biased judge, unable to render an impartial verdict according to the due process requirement of the

⁷ WARREN, *TRAFFIC COURTS* 211 (1942); Keebler, *supra* note 3, at 14; Sunderland, *supra* note 6, at 305; Legis., [1939] Wis. L. REV. 414.

⁸ WARREN, *op. cit. supra* note 7 at 190.

⁹ *Ibid.*

¹⁰ Keebler, *supra* note 3, at 12.

¹¹ WARREN, *op. cit. supra* note 7, at 214-15.

¹² 273 U.S. 510 (1927).

¹³ *Id.* at 524, 534.

Fourteenth Amendment. The material facts of the case are that the defendant was arrested for violating the state prohibition law. He was taken before the mayor of North College Hill, Ohio, who served as a judge in the "liquor court." Tumey, after objecting to the hearing because of the lack of qualification of the judge, was fined one hundred dollars. From the fine the judge received twelve dollars which was payable only in the event that the defendant was convicted. No trial by jury was provided for in the statutes, nor was a trial de novo on appeal allowed. In concluding that due process had been violated, the Court stated:¹⁴

The Mayor of the Village of North College Hill, Ohio, has a direct, personal, pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional, but was the result of the normal operation of the law and the ordinance.

Although the *Tumey* case was a "liquor court" case of the prohibition era, and not a justice of the peace case, to the casual reader it would seem to have the effect of inflicting the death blow on the existence of the fee system in the inferior courts. However, this is not the result of the case, which itself has several limitations. First, it is limited by its own operation inasmuch as according to the facts and the decision of the *Tumey* case, the ruling of a biased judge under the fee system is contrary to the due process requirement only in *criminal* cases. As stated by the Supreme Court:¹⁵

All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. . . . But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

Secondly, the effect of the *Tumey* case is limited by the state court's narrow and limited application and interpretation of this holding. The state courts have whittled away the operative effect of the decision so that its significance is all but lost. In Indiana, it has been held that the fee system yields a fair trial in accord with the due process clause of the Fourteenth Amendment.¹⁶ The *Tumey* case has been held not applicable in Indiana since the defendant on appeal can acquire a trial de novo, a fact not present in the *Tumey* case. Indiana also avoided the effects of that decision by showing that the defendant can demand a trial by jury,

¹⁴ *Id.* at 523.

¹⁵ *Ibid.*

¹⁶ *Cole v. Wherly*, 206 Ind. 461, 190 N.E. 56 (1934); *State v. Schelton*, 205 Ind. 416, 186 N.E. 772 (1933).

and further, that he can change the venue if he so desires. Thus, the Indiana court distinguished the case before it from the *Tumey* case. In its reluctance to declare the fee system unconstitutional the court stated:¹⁷

The office of justice of the peace has come down to us through the ages and has often been designated as the "poor man's court." It has a place in our system of courts and is of great importance in the smaller towns and villages of our state in the trials of minor civil and criminal actions.

It may be true that in some instances the justice has convicted in order to secure his fees, but because some justice has been too weak to withstand this temptation the whole system should not be condemned and uprooted from our judicial system.

In New Mexico's Supreme Court in 1939¹⁸ the question of determining the constitutional validity of the state's fee system in the justice courts was presented. The court held that even if the sole method of compensating the justice was from the fine imposed upon the convicted defendant, the *Tumey* case did not apply since the defendant, in the case before it, did not reasonably object to the qualification of the judge. Consequently, the defendant was deemed to have waived his right. In the *Tumey* case there was a timely objection, and on this basis the cases were distinguished. Like Indiana, the New Mexico court also stated that the defendant had a right to a trial de novo on appeal. Kentucky,¹⁹ is substantially in accord with the holding and reasoning of both the New Mexico and Indiana courts.

Mississippi, through a series of decisions, has held that the *Tumey* case likewise did not apply to its fee system.²⁰ Here, the *Tumey* case was distinguished on the basis alluded to above, namely, that a trial de novo on appeal could be had. It was further shown that in the event the defendant was acquitted in Mississippi, the justice received the same fee from the county. On this basis due process is said to be satisfied. Arkansas²¹ and Oklahoma²² have similar statutes providing for the state or county payment of the justice's fees in the event of the defendant's acquittal. They follow the reasoning of Mississippi in holding the *Tumey* decision inapplicable.²³ Likewise, Virginia presently has a system where-

¹⁷ State v. Schelton, 205 Ind. 416, 186 N.E. 772, 775 (1933).

¹⁸ State v. Gonzales, 43 N.M. 498, 95 P.2d 673 (1939).

¹⁹ Martin v. Wyatt, 225 Ky. 212, 7 S.W.2d 1048, 1049 (1928); Wagers v. Sizemore, 222 Ky. 306, 300 S.W. 918 (1927); 36 Ky. L. J. 422 (1948). *But cf.* Williams v. Lueke, 265 Ky. 84, 95 S.W.2d 1103 (1936).

²⁰ Arnold v. State, 149 Miss. 738, 115 So. 885 (1928); Hitt v. State, 149 Miss. 718, 115 So. 879 (1928); Brown v. State, 149 Miss. 219, 115 So. 436 (1928); Bryant v. State, 146 Miss. 533, 112 So. 675 (1927).

²¹ ARK. STAT. ANN. § 44-401 (1947).

²² OKLA. STAT. tit. 28, § 53 (1951).

²³ Hill v. State, 174 Ark. 886, 298 S.W. 321 (1927); *Ex parte* Lewis, 47 Okla. Crim. 72, 288 Pac. 354 (1930).

by the county reimburses the justice if the defendant is acquitted.²⁴ Before this system was inaugurated the Virginia court²⁵ had distinguished the case before it and the *Tumey* case on the basis that a trial de novo could be had,²⁶ but laid the foundation for the enactment of the present statute by suggesting in its opinion that the justices should receive the same amount from the state if the defendant was acquitted. In West Virginia, irrespective of the possibility of a trial de novo on appeal, the court held that the fee system was unconstitutional.²⁷ The legislature thereafter enacted legislation which provided for the county payment of justice fees in the event the defendant was not convicted.²⁸

Looking in retrospect upon the effects of the *Tumey* case, keeping in view the state courts' subsequent holdings, that holding has been vindicated in theory but not in fact. With a cursory reading of the Supreme Court decision the ordinary observer would not surmise that all of the state-made exceptions were intended by the court. Nevertheless, the review of the states above gives an indication of the reception and consequent limitation on the decision of the *Tumey* case. Whether or not these limitations were, or were not, intended by the Supreme Court is a matter of speculation. The Supreme Court has not subsequently passed on any of the various state's exceptions to the *Tumey* case.²⁹ However, it appears to this writer that the states have introduced unintended exceptions into the *Tumey* case.

In examining the state's decisions many fallacies appear in the arguments for the constitutionality of the fee system. The argument that a trial by jury will equalize the possibility of an unbiased justice loses its strength when faced with the reality as portrayed by a Texas court. In *Ex parte Kelly*,³⁰ the court stated that even though a jury trial is granted, ". . . it places in the power of the justice of the peace the right to control the introduction of evidence, including the right to rule on the relevancy and materiality of questions propounded by himself."

The argument that due process is satisfied by a provision for a trial de novo on appeal is answered by the West Virginia court. *Williams v. Brannen*, stated that:³¹

²⁴ VA. CODE ANN. § 14-96 (1950).

²⁵ *Brooks v. Town of Potomac*, 149 Va. 427, 141 S.E. 249 (1928).

²⁶ *Id.* at 252.

²⁷ *Williams v. Brannen*, 116 W. Va. 1, 178 S.E. 67 (1935).

²⁸ W. VA. CODE ANN. §§ 388, 5165 (1949).

²⁹ Only one other case involving the constitutionality of the fee compensated justice has reached the highest court, and that case, *Dugan v. Ohio*, 277 U.S. 61 (1928), is not applicable to the question before us. In *Dugan v. Ohio*, the justice received a fixed salary payable out of a fund which was composed of the fines imposed by the justices. The justice was paid his salary regardless of the defendant's conviction or acquittal. The Supreme Court applying the *Tumey* rule held that the judge's interest was too remote to render him biased under the *Tumey* holding.

³⁰ 111 Tex. Crim. 54, 10 S.W.2d 728, 729 (1928).

³¹ 116 W. Va. 1, 178 S.E. 67, 69 (1935).

It is ordinarily cheaper to pay a moderate fine than to pay the expenses attendant upon an appeal; for which reason many an innocent man has submitted to an unjust decision in an inferior court. Right of appeal does not meet the situation. The Constitution requires that the accused shall be tried before a fair and impartial tribunal in the first instance where he will not face the alternative of paying an unjust fine or of resorting to the delay, annoyance, and expense of an appeal.

Indiana insists as a part of its argument for sustaining the fee system that a change of venue, a remedy not permitted in the *Tumey* case, will help to satisfy the requirement of due process.³² This contention is readily disposed of by showing that the removal would necessarily be to another fee compensated judge. In the light of the opposing arguments, the remaining contention that a non-objecting defendant waives his right, is merely a weak technical point upon which to hang the validity of the fee system.

Conclusion

Numerous states, as indicated, have a system whereby the constitutionality of the fee system in criminal cases is justified on the basis that the justice receives his fee from the state in the event the defendant is acquitted. This apparently solves the constitutional problem, but hardly does it correct the many other evils existing within the justice courts. The Constitution — up to this date — is silent as to the fee system in civil cases. Here the presiding justice is uninhibited, and his consistent decisions for the plaintiff have earned for his court the title, "J.P. — Judgment for the Plaintiff." Needless to say, the justice in competing for "business" with other justices would never charge the plaintiff in the event of the defendant's non-liability. Likewise, the justices are hesitant in obtaining a reputation for rendering too many verdicts for the defendant. This, naturally, would be bad for "business." Nor does the satisfaction of the due process requirement in criminal cases correct the evils of the unrecorded fines, the overcharged and partially retained fines, and the overzealous enforcement of technical traffic regulations. The corruption on the level of the justice courts is extensive and embracing. The reform of these courts should not stop at constitutional requirements, rather the reform should rid our system completely of these "rotten boroughs."

John A. Pietrykowski

32 *State v. Schelton*, 205 Ind. 416, 186 N.E. 772, 775 (1933).

Evidence

THE EVIDENCE REQUIRED TO PROBATE A MISSING WILL

Introduction

The well-planned disposition of a client's estate after death through careful execution of a last testament may be subjected to rigorous attack for the reason that the original draft of the will cannot be located. Attempting to probate or prove a lost will is not unknown to the law. To the contrary, it seems well-settled by statute and common law; so much so, that the compelling reasons for general doctrines no longer need be set forth but are merely noted in passing as moving principles.

The usual case arises where there is knowledge of a duly executed will in existence and in the possession of the testator, which after a diligent search through the personal effects and other usual places of safekeeping, cannot be found. Thus the alleged devisees or legatees are presented with the problem of propounding a will which they do not have. The burden of proof rests on those beneficiaries under the will and since they cannot receive without it, it will be upon them to show the court the testator did not die intestate.

The fundamental problem is a very practical one in the field of evidence. The proponents of the will of necessity must depend strongly upon circumstantial evidence negating the presumed intent of the testator to revoke the testament by destroying it¹ and that it was the manifest intention of the testator at the time of death to distribute the estate through this missing will. The contestants (those who would take by operation of Law) of the missing will are given the advantage of a presumption that the will has been destroyed with intent to revoke it, stated generally as destruction *animo revocandi*. Where the evidence shows that a lost or missing will was in the possession of the testator and that he was active physically and mentally, the presumption arises that he has destroyed it with the intention of revoking it.²

History of the Presumption

The origin of this presumption is difficult to ascertain. It probably is grounded on the importance that a will was considered to have in the

¹ *E.g.*, the court in *In re Moos' Estate*, 414 Ill. 54, 110 N.E.2d 194 (1953), discusses declarations of the testator and kind and friendly relations toward beneficiaries as factors which are considered to support the conclusion of non-revocation by the testator. *Bowles' Estate v. Bowles' Heirs*, 114 N.E.2d 229 (Ohio 1953). See Heading, "Instances of Admissible Evidence," *infra*.

² In only one state does it appear that the presumption *animo revocandi* is written into the statute. ". . . [I]n every such case [of a lost or destroyed will] the presumption is of revocation by the testator, and that presumption must be rebutted by proof." GA. CODE ANN. tit. 113, c. 113-6, § 113-611 (1935).

affairs of men. A will was given much consideration, and men naturally were presumed to take extraordinary care of such instruments. It seems clear that when a man goes to the trouble of having a will drawn up to distribute his estate that he will also take the trouble to make sure his will is in a safe place in order that his wishes will be carried out when he dies.

Another reason that might explain the presumption stems from the reluctance of the English courts to presume the crime of fraudulent destruction of another's will. The English courts have said that it is better to presume that a man has destroyed his own will than it is to presume that another has suppressed or destroyed it.³ It has also been said that the presumption that the testator destroyed the will *animo revocandi* is often the actual case in human life. It is said that wills are at times destroyed by legal heirs who have been disinherited, but more often the testator destroys the will himself with the intention of revoking it.⁴

The reason for the rule is no longer discussed in the cases, but the presumption is stated as a rule that has long been recognized and used. The problem that has arisen in modern cases is whether sufficient evidence has been brought out by the proponent of the will to sustain his burden of proof⁵ and to rebut the presumption of destruction *animo revocandi*.⁶

Procedure

Historically, a lost or destroyed will could be established in equity.⁷ Today the proper place to prove a will, lost or otherwise, is in a court with probate jurisdiction. The usual proceeding is by nature *ex parte*⁸ and arises upon a petition or application to a court of probate jurisdiction containing allegations that the will cannot be found. In jurisdictions governed by statutes which provide a hearing on the questioned existence of the will, it has been determined that the parties are entitled to a jury trial from the beginning.⁹ In other states, as in the case of a will in

³ *Helyar v. Helyar*, 1 Lee 472, 161 Eng. Rep. 174 (Prerog. Ct. 1774); *Rickards v. Mumford and Freeman*, 2 Phill. Ecc. 23, 161 Eng. Rep. 1066 (Prerog. Ct. 1812).

⁴ 2 PAGE, WILLS 721 (3d ed. 1941).

⁵ *Jordan v. Ringstaff*, 212 Ala. 414, 102 So. 895 (1925).

⁶ *In re Moos' Estate*, 414 Ill. 54, 110 N.E.2d 194 (1953); *In re Jensen's Estate*, 141 N.J. Eq. 222, 56 A.2d 573 (Prerog. Ct. 1947); *In re Lambert's Estate*, 252 Wis. 117, 31 N.W.2d 163 (1948).

⁷ *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646 (1886). By statute Arkansas still allows proof of lost wills in chancery. ARK. STAT. ANN. tit. 60 § 30 (1947).

⁸ *Bowles' Estate v. Bowles' Heirs*, 114 N.E.2d 229, 235 (Ohio 1953). A will contest has been defined as a proceeding *in rem* and an adversary proceeding, while a petition for probate is in a sense *ex parte*, also a proceeding *in rem*, but not necessarily an adversary proceeding; the proponent must prove his allegations whether denied or not. *In re Relph's Estate*, 192 Cal. 451, 221 Pac. 361, 364 (1923).

⁹ Where "answers" were filed controverting the allegations of a petition for probate, the contents of the pleading showing cause for jury trial as accorded by

possession, it is required only that the petition show the purported contents of the will so far as known.¹⁰

The owner of property has the right to devise it according to his desires, as well as the right to revoke a prior testamentary disposition.¹¹ It is not necessary to draft another will in order to revoke an existing will, but the manner of revocation is prescribed by statute in most jurisdictions and revocation by destruction is an usual provision.¹² Statutes on revocation are relevant in a consideration of a lost will since they may furnish requisities or standards of proof in a suit to probate a lost will.¹³ Since the main issue to be resolved is whether or not an alleged will has been destroyed with intent to revoke, such statutes may be the only source of law concerning missing wills.¹⁴

It will be the scope of this note to show the various statutory provisions, their limitations and control of proof and the instances of admissible circumstances which the courts have found to be sufficient to refute the presumption of revocation where the will cannot be found.

Statutory Provisions

Legislation in twenty-six jurisdictions has been directed toward the probate of lost or destroyed wills on the theory that the circumstance of loss makes necessary special requirements of proof.¹⁵ The danger of fraud seems to be the most pressing concern of the court:¹⁶

statute to a will contest, it was held that a jury was necessary at the hearing on the petition, without prejudice to the court's power to determine whether proponent's petition made out a prima facie showing to support the alleged will. *Swift v. Superior Court*, 39 Cal.2d 358, 247 P.2d 6 (1952); but in absence of such circumstances no jury trial would be available on the petition alone. *Wright v. Fultz*, 138 Ind. 594, 38 N.E. 175 (1894).

¹⁰ *E.g.*, IND. ANN. STAT. tit. 7, c. 1, § 7-105 (Burns 1953).

¹¹ "Testaments are revocable at the will of the testator until his decease." LA. CIV. CODE ANN. art. 1690 (1952).

¹² PA. STAT. ANN. tit. 20, § 180.5 (1950): "No will or codicil in writing, or any part thereof, can be revoked or altered otherwise than: . . . (3) Act as to the document. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revocation, by the testator himself or by another person in his presence and by his express direction. If such act is done by any person other than the testator, the direction of the testator must be proved by oaths or affirmations of two competent witnesses."

¹³ 9 WIGMORE, EVIDENCE § 2523 (3d. ed. 1940): "The revocation of a will by destruction may be inferred . . . from the fact that it once existed but cannot be found. . . . Other inferences or rules of presumption, concerning an implied intention to revoke, are closely connected with the substantive law of revocation."; *In re Havel's Estate*, 156 Minn. 253, 194 N.W. 633 (1923).

¹⁴ *E.g.*, ILL. ANN. STAT. c. 148, § 19 (1936); PA. STAT. ANN. tit. 20, § 180.5 (1950).

¹⁵ ARIZ. CODE ANN. c. 38, §§ 222-224 (1939); ARK. STAT. ANN. tit. 60, §§ 301-304 (1947); CAL. PROB. CODE §§ 350-352 (1953); COLO. STAT. ANN. c. 176, § 57 (1935); FLA. STAT. c. 732, § 37 (1951); GA. CODE ANN. tit. 113, c. 113-6, § 113-611 (1935);

The statute should be read as an admonition that the court should proceed with extreme care in the matter of proving a lost will, and should be thoroughly satisfied that no fraud is being attempted, but if the provisions are proved with certainty and the court is satisfied that the weight of the evidence is in favor of the existence of the will at the time of death of the testator, it has a duty to so declare.

While prevention of fraud is the aim of whatever rigid requirements a court may set up, the states which have legislated on the matter of missing wills have established additional conditions which must be met before or during probate. One of the most prevalent requirements found in the statutes is that the will be in existence at the death of the testator. Such a provision is found in the statutes of fourteen, possibly fifteen, states,¹⁷ and is noted as a common law requirement of at least one state.¹⁸

Existence

Existence, as a statutory requisite, has presented a problem to many courts. Actual or physical existence at the time of death is, of course, impossible to show for the very reason that the will cannot be found. Yet it is just such an existence as this which the court must ascertain where the statute so requires. If the provision required proof of actual existence by presentation of the lost will, the proponent would have no standing in court whatsoever. The fact that a diligent search has failed to turn up the will presents a situation where substantial doubts as to actual existence are present, and provides the contestant with the presumption of revocation. Proof of existence of the will at the time of death thus requires great reliance on circumstantial evidence concerning the activities of the testator, his heirs and associates as near as possible to the time of

IDAHO CODE ANN. tit. 15, c. 2, §§ 230-233 (1948); IND. ANN. STAT. tit. 7, c. 1, § 7-105 (Burns 1953); KAN. GEN. STAT. ANN. c. 59, § 2228 (Corrick 1949); ME. REV. STAT. c. 141, § 9 (1944); MICH. STAT. ANN. tit. 27, §§ 27.3178(95)-27.3178(96) (1943); MINN. STAT. §§ 525.260-262 (1949); MONT. REV. CODES ANN. tit. 91, c. 12, §§ 1201-1204 (1947); NEV. COMP. LAWS §§ 9882.34-9882.36 (Supp. 1941); N.Y. DEC. EST. LAW §§ 200-204; N.Y. SURROGATE'S COURT ACT § 143; N.D. REV. CODE tit. 30, c. 30-05 §§ 0517-0518 (1943); OHIO GEN. CODE ANN. §§ 10504-35-10504-40 (1938); OKLA. STAT. tit. 58, §§ 81-84 (1951); S.D. CODE §§ 35.0211-35.0213 (1939); TEX. STAT., REV. CIV. ARTS. 3330, 3335, 3345, 3349 (1948); UTAH CODE ANN. tit. 75, c. 3, §§ 25-27 (1953); WIS. STAT. c. 310, § 10 (1951); WASH. REV. STAT. ANN. §§ 11.20.070-11.20.080 (1951); WYO. COMP. STAT. ANN. c. 6, §§ 601-604 (1945); See also: ORE. COMP. LAWS ANN. tit. 19, c. 2, § 202 (1940); S.C. CODE tit. 19, c. 6, § 19-406 (1952).

¹⁶ *In re Moramarco's Estate*, 86 Cal. App.2d 326, 194 P.2d 740, 747 (1948); *Allnutt v. Wood*, 176 Ark. 537, 3 S.W.2d 298 (1928).

¹⁷ Arizona, Arkansas, California, Colorado, Idaho, Montana, Nevada, New York, North Dakota, Oklahoma, South Dakota, Utah, Washington, Wyoming. The statutes are cited note 15 *supra*. The status of Indiana is not certain since the old statute has been repealed (IND. ANN. STAT. § 7-601 (Burns 1933) with no corresponding provision in the new code.

¹⁸ *In Koester v. Jennings*, 334 Ill. 107, 165 N.E. 650 (1929), without the requirement of a statute, it was held that existence at time of death must be shown.

death. Thus the "existence" required by the court is not strictly an actual existence, but an existence in contemplation of law sufficient to convince the court that the will has not been destroyed, even though it cannot be found.¹⁹

One recent decision from the State of Washington illustrates the danger of overemphasizing the requirement of existence at the time of death. Where the testator believed that he had only a single heir at law, but had provided by will that the proceeds of his estate should go to this heir, he destroyed his will rather than change it or redraft another, with the conviction that his heir would receive his estate in any event. On his death two other persons claimed portions of the estate, and the court held that the statute prevented admission of the will to probate because of the requirement of actual existence at the time of death, which fact could not be substantiated by the evidence.²⁰ If the court requires that proof of physical existence of the will be shown, as the above case implies, the proponent of a lost will would appear to have an insurmountable burden of proof.²¹

The answer to such a strict literal requirement in the statute is found in applying rules of construction in accordance with the purpose of such a statute; namely, to allow probate of lost wills.²² Liberal interpretation of the provision has resulted in the concept of existence in contemplation of law whereby the mere fact that a will cannot be found is not proof that it has been destroyed.²³ In other states the requirement of existence of the will at the time of death either has been stricken from the statute or was never required.²⁴

¹⁹ *In re Moramarco's Estate*, 86 Cal. App.2d 326, 194 P.2d 740, 746 (1948).

²⁰ *In re Kerckhof's Estate*, 13 Wash.2d 469, 125 P.2d 284 (1942). This case also discusses the doctrine of dependent relative revocation, whereby a testator conditionally revokes the will. If the condition is not fulfilled it has been held that the original provisions of the will continue in existence by virtue of this doctrine. See Note, 41 MICH. L. REV. 358 (1942).

²¹ In *In re Sweetman's Estate*, 185 Cal. 27, 195 Pac. 918 (1921), the court relied upon a counter presumption: the law presumes that a thing once shown to be in existence, continues to be in existence. But proof of existence "sometime" prior to death was not sufficient to overcome the presumption of revocation in *In re Ross' Estate*, 199 Cal. 641, 250 Pac. 676 (1926).

²² Minnesota adopted, by construction, the legal existence doctrine, that is, existence in contemplation of law. *In re Havel's Estate*, 156 Minn. 253, 194 N.W. 633 (1923). The statute was changed to conform to this opinion, discarding the concept of physical existence. MINN. STAT. c. 525, § 525.261 (1941).

²³ *In re Moramarco's Estate*, 86 Cal. App.2d 326, 194 P.2d 740, 747 (1948).

²⁴ There is no requirement of existence in Ohio's or Georgia's statutes. GA. CODE ANN. tit. 113, c. 113-6, § 113-611 (1935); OHIO GEN. CODE ANN. § 10504-35 *et seq.* (1938). The Ohio statute retains the provisions concerning fraudulent destruction. *Bowles' Estate v. Bowles' Heirs*, 114 N.E.2d 229 (Ohio 1953). Due execution is a common requirement. *Porter v. Sheffield*, 212 Ark. 1015, 208 S.W.2d 999 (1948), makes execution a matter for proof. See note 16 *supra*.

In applying the doctrine of constructive, rather than physical existence, that requirement loses its otherwise dominant position upon probate; and although the question must be answered to the satisfaction of the court or jury from the evidence adduced, it will not be necessary to prove conclusively that X saw the will after the death of the testator, but only to the satisfaction of the court that the will has merely been lost. The proponent's duty amounts to an accounting of the reasons for non-production of the will.²⁵

Fraudulent Destruction

Accompanying provisions for proof of existence are often found provisions for probate where the will has been fraudulently destroyed. The usual instance encountered is where an interested party who would benefit by intestacy takes the will and partially or completely destroys it. The statute providing for such means of probate is another instance of constructive existence.²⁶ The effectiveness of this provision, however, is qualified by the term "fraud" and as such reaches only specific cases. In Georgia the statute was changed to provide for destruction "without the consent" of the testator, thus avoiding to some degree the limitation of the term "fraudulent" and covering instances where the testator inadvertently destroys the will.²⁷

The statutes which seek to rely only upon the theory of destruction in a fraudulent manner, in order to avoid the limitations of such a rule, should be made more specific. Where the court seeks to establish constructive existence, fraudulent destruction will not meet a substantial number of the situations which have logically arisen. Thus, cases where there is destruction by undue influence, unintentional destruction by mere inadvertence, conditional destruction or destruction failing to meet the requirements of the revocation statutes are other instances which could properly be considered in broadening the statute on missing wills.

Substance of Required Proof

All of the evidence adduced at the trial or hearing on probate of the missing will may be divided into two distinct categories: proof of the constructive existence of the will for purposes of probate and proof of the contents. Considering initially the matter of existence the court may reach several possible conclusions: that X had revoked the will in writing or by destroying it with the intention of revoking it; that it had been

²⁵ *In re Weber's Estate*, 268 Pa. 7, 110 Atl. 785 (1920).

²⁶ For applicable principles concerning fraudulent destruction see *In re Arbuckle's Estate*, 98 Cal. App.2d 562, 220 P.2d 950 (1950) and cases cited therein. That fraudulent destruction is ground for a criminal charge, see DEL. CODE ANN. tit. 12, § 110 (1953).

²⁷ GA. STAT. ANN. tit. 113, c. 113-6, § 113-611 (1935).

destroyed in some manner during his lifetime, either with or without his knowledge; or that neither of the above events occurred, and the missing will was either lost by X or was deposited by X in some out of the way place that cannot be located.

If the proponent has shown constructive existence of the will, the next problem is proof of contents. Statutes in fourteen states have placed a numerical requirement of two or three witnesses in order to prove contents, in the same manner as a statute on revocation.²⁸ The same statutes may require that these witnesses be credible or disinterested.²⁹ These conditions, assumedly to provide or assist the court in prevention of fraud and to induce certainty, are usually met by bringing in the attesting witnesses to the will. If one witness can attest to the contents of the will and be credible, a court could reasonably base its findings on such testimony, especially where there is only one witness available who knows of the contents of the will. Some states have accorded probate to wills where a copy was brought in, the copy being equivalent to one witness.³⁰ Other states have allowed probate where the scrivener and a copy was available, with another witness who identified the copy but did not know the contents.³¹ However, some courts have followed the two-witness provision literally in denying probate.³² In such cases the court imposes an unrealistic standard since a lack of mere numbers of witnesses cannot make truthful allegations of contents any more trustworthy than they are in fact. Numbers of witnesses may only assist the court by adding weight or quantity and appear only to be a holdover from an early emphasis on prevention of fraud in these matters.

The standard of proof noted in the statutes, that the contents of the will be ascertained in a manner "clearly and distinctly proved by at least two credible witnesses,"³³ is typical of the general rigid attitude toward possibly fraudulent assertions of interest in a decedent's estate. The stress

²⁸ Many of the statutes seem to be framed on the provisions of the Field Code: "A lost or destroyed will can be admitted to probate in a surrogate's court, but only in case the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime, and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness. N.Y. SURROGATE'S COURT ACT § 143. These states are Arizona, Arkansas, California, Idaho, Michigan, Montana, Nevada, New York, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming; statutes cited note 11 *supra*."

²⁹ Florida requires disinterested witnesses. FLA. STAT. ANN. c. 732, § 37 (1951).

³⁰ See note 28 *supra*.

³¹ *In re Moramarco's Estate*, 86 Cal. App.2d 326, 194 P.2d 740 (1948).

³² However the proponent was awarded damages in a tort action for malicious destruction. *Creek v. Laski*, 248 Mich. 425, 227 N.W. 817 (1929). In *Hull v. Cartin*, 61 Idaho 578, 105 P.2d 196 (1940), only the attorney and a carbon copy were present.

³³ CAL. PROB. CODE § 350 (1953); *Goodale v. Murry*, 227 Iowa 843, 289 N.W. 450 (1940); *In re Calich's Estate*, 214 Minn. 292, 8 N.W.2d 337 (1943); *Sutherland v. Sutherland*, 192 Va. 764, 66 S.E.2d 537 (1951).

is on credibility and is not limited to proof of contents but to the overall proceedings which, under the statutes, require definite proof of existence as well. The same requirement, a qualitative requirement, of credibility is found in jurisdictions where no statute controls.³⁴

The rule, statutory or otherwise, has led to much discussion in the cases as to the nature of the burden on the proponent of the will, not only as to proof of contents, but as to rebutting the presumption of destruction *animo revocandi*. The presumption of destruction *animo revocandi* in one instance was termed one of law,³⁵ thus requiring more than a mere incident of existence to rebut it. The better view appears to be that requirements concerning proof of contents and the burden of refuting the presumption of revocation by destruction should not, of themselves, make the court more critical of the proponent's evidence.³⁶ The proponent of the will should not be forced to adduce a greater quantity of evidence, but merely to produce credible evidence.³⁷ As the California court stated:³⁸

The statutory requirement of clear and distinct proof is for the guidance of the trial court and has relation entirely to the weight of the evidence . . . [it] means that the trial court ought always to be governed by this rule in weighing the evidence and reaching the conclusion as to the facts. . . . Nor does it mean that absolute certainty is to be required in the trial court, but only that degree of proof which produces conviction in an unprejudiced mind.

Having a copy of a lost will in possession is probably the most practical mode of proving the contents, providing the requisite number of witnesses are available. Proof of contents may have to be ascertained through testimony of family, friends or the writer of the testament, where no copy is available.³⁹ The proof of contents by way of the testator's

³⁴ Where there is no statute to advise the court searching for proof of the contents of the will, the court must concern itself with weighing the evidence brought forward in relation to the weight ascribed to the presumption *animo revocandi*. The relative value of the presumption may override a claim of accidental destruction. *In re Weber's Estate*, 268 Pa. 7, 110 Atl. 785 (1920). *But see In re Drake's Estate*, 150 Neb. 568, 35 N.W.2d 417, 423 (1948) where it is stressed that the presumption ought not be accorded evidentiary weight in the face of credible evidence to rebut it.

³⁵ *In re Calef's Will*, 109 N.J. Eq. 181, 156 Atl. 475 (Prerog. Ct. 1931): The quality of evidence necessary to overcome the presumption has been variously stated as strong, positive, clear, convincing, satisfactory, cogent, full and free from doubt, or in any combination of the terms. Evidence as to the contents receives somewhat the same terminology, e.g., "proved with clearness and certainty." These requirements do not seem to lend more to the quantity, but to the quality and credibility of the evidence; nor should the required burden or weight be increased since this would destroy the traditional burden of proof in a civil action, which is generally described as the burden of proving by a preponderance of the credible evidence.

³⁶ *In re Moramarco's Estate*, 86 Cal. App.2d 326, 194 P.2d 740, 744 (1948).

³⁷ *In re Drake's Estate*, 150 Neb. 568, 35 N.W.2d 417, 423 (1948).

³⁸ *In re Moramarco's Estate*, 86 Cal. App.2d 326, 194 P.2d 740, 744 (1948).

³⁹ *In re Brady's Estate*, 95 Cal. App.2d 511, 213 P.2d 125 (1950).

declarations or conversations is not covered by any known statute, but the courts have generally allowed evidence of this type to enter.⁴⁰

A copy of the will is not necessary unless there is a policy against admitting to probate part of a missing will.⁴¹ The practice of allowing interested parties to give evidence of the contents of the missing will occasionally has ended in hopeless conflict of testimony,⁴² but where the witness has read or heard the contents read, or was an attesting witness familiar with the contents, there should be no objection.⁴³ These witnesses should be permitted to give the substance of a missing will where there is no copy available, the main question being their credibility.

If the court is convinced of the existence of the will, and finds that the evidence adduced toward the proof of contents may be reasonably believed, the will, or such parts as are ascertainable, will be admitted to probate.

Instances of Admissible Evidence

The basic requirement of the presumption of destruction *animo revocandi* is that the will must have been in the possession of the testator in order to bring the presumption into play. Thus when it is shown that X made his will and gave it to W for safekeeping the presumption does not arise. This, of course, is no more than a truism since X could not destroy the will if he did not have access to it.⁴⁴ If, however, any access to the will by X can be shown the courts are quick to put the presumption into effect.⁴⁵ It is generally held that evidence must be adduced to prove that the testator had no opportunity to destroy the will, when the proponent is relying on the possession of a third person.⁴⁶ Courts have gone to some length to hold that the testator might have destroyed his will with the intent to revoke when any possibility of such intent can be found in the case.⁴⁷

⁴⁰ *In re Kennedy's Will*, 167 N.Y. 163, 60 N.E. 442 (1901); *In re Wintjen's Will*, 101 N.Y.S.2d 606 (Surr. Ct. 1950).

⁴¹ The general view towards probate of a partially available testament would appear to be found in OHIO GEN. CODE ANN. § 10504-38 (1938): ". . . such court shall find and establish the contents of such will as near as can be ascertained, and cause them and the testimony taken in the case to be recorded in such court."

⁴² In *In re Brady's Estate*, 95 Cal. App.2d 511, 213 P.2d 125 (1950), because evidence of the contents of the missing will by interested witnesses was in conflict, probate was refused.

⁴³ TEX. STAT., REV. CIV. art. 3349 (1948), requires proof of contents by a credible witness who has read or heard the provisions read to him.

⁴⁴ *In re Bohannon's Will*, 213 Misc. 116, 115 N.Y.S.2d 147 (Surr. Ct. 1951); in general see 57 AM. JUR., WILLS § 568 (1948).

⁴⁵ *In re Bly's Will*, 281 App. Div. 769, 118 N.Y.S.2d 340 (2d Dep't 1953).

⁴⁶ *In re Thompson's Estate*, 44 Cal. App.2d 774, 112 P.2d 937 (1941): The will was deposited by a custodian in a safety deposit box, and testatrix did not thereafter have it in her possession; evidence showed she was not physically capable of getting possession since she was not in the city anytime after she told of the will's existence. *Accord*, *White v. Brennan*, 307 Ky. 776, 212 S.W.2d 299 (1948); *In re Gethins' Will*, 97 Misc. 561, 163 N.Y.S. 398 (Surr. Ct. 1916).

The declarations of the testator have always created a thorny problem for the courts. This problem emanates from the Hearsay Rule. Such evidence falls directly under the rule that a witness must tell what he knows himself, and not what he has heard from others. The majority of courts have made such evidence admissible by making it an exception to the Hearsay Rule.⁴⁸ The New York courts are the one notable holdout to the practice of allowing the testator's declarations to be used as evidence.⁴⁹

There do not seem to be any compelling reasons to exclude this type of evidence. The purpose of probating a will is to carry out the intent of the testator. Such intent can be most accurately shown by allowing the words of the deceased concerning the instrument to be brought out at the trial. However, it is recognized that declarations of the testator will not be enough by themselves to overcome the presumption of revocation.⁵⁰ If the court allows the evidence to come in it should be given full weight, and there should not be any attempt to limit that evidence by saying that it will not be enough by itself to prove the will.

The facts that are generally brought out by the proponent of the will through declarations of the testator revolve around the friendly or unfriendly relations between testator and the parties to the will.⁵¹ Situations arise where the testator, after having made a previous will, decides that he wants to change his will and does so but upon his death the second will cannot be found. When evidence is adduced that the testator has been very friendly toward the devisee under the second will while he has made many statements showing his distrust and dislike of the parties who were to take under the old will, to admit such evidence would help in ascertaining the intention of the testator. When the testator has given reasons for making his will in a certain way, such reasons should be given weight in trying to determine the actual intent of the testator.

When a situation arises where the testatrix has made a valid will but discovers that she has misplaced it, the courts should recognize her expressed intention of keeping a valid will. If, for instance, X has been consistent in her statements that she has a valid will, and this is shown by the evidence, further statements that she had misplaced the will should be admitted and given probative force.⁵²

Evidence that a party with an adverse interest in the alleged will had access to the will either before or after the death of the testator has been

⁴⁷ *Scott v. Maddox*, 113 Ga. 795, 39 S.E. 500 (1901).

⁴⁸ *Goodale v. Murry*, 227 Iowa 843, 289 N.W. 450, 457 (1940).

⁴⁹ *In re Kennedy's Will*, 167 N.Y. 163, 60 N.E. 442 (1901); *In re Wintjen's Will*, 101 N.Y.S.2d 606 (Surr. Ct. 1950).

⁵⁰ *Wood v. Wood*, 241 Ky. 506, 44 S.W.2d 539 (1931); *In re Jensen's Estate*, 141 N.J. Eq. 222, 56 A.2d 573 (Prerog. Ct. 1947).

⁵¹ *In re Morgan's Estate*, 389 Ill. 484, 59 N.E.2d 800 (1945); *Noland v. Turley*, 255 S.W.2d 495 (Ky. 1953); *In re Kanera's Estate*, 334 Mich. 461, 54 N.W.2d 718 (1952).

⁵² *In re Ronayne's Estate*, 103 Cal. App.2d 852, 230 P.2d 423 (1951).

admitted to rebut the presumption.⁵³ Here we have a situation where an heir who has been left out of the will that is being probated has very good reasons to destroy the will.⁵⁴ Such an interest would seem to give very cogent reasons for him to destroy the will and then claim that the testator destroyed it *animo revocandi*. In these situations the courts seem justified in saying that such evidence will be given weight in a case where a lost will is being proved. This particular type of evidence seems to be just what the English courts were trying to avoid when they justified the presumption by saying they would rather presume revocation by the testator than to presume a crime by another party.⁵⁵ It seems that most courts do not reason to the presumption in the same manner as the English courts in this particular situation. Perhaps because we have more people today who are prone to commit such an act the courts feel that they should not presume that such people will not commit such acts.

If the proponent of a lost will can show that the testator was insane or otherwise incompetent at the time that the will was lost or destroyed the presumption will not arise.⁵⁶ This rule stems from the general rules of testamentary capacity, because if proof can be brought out that the testator was incompetent to draw a valid will at the time that the will was lost, he certainly could not have the intent to revoke it.

Conclusion

The courts of the various states are certain to continue hearing disputes concerning lost wills. Variances in pleading and requisites of proof in the cases are largely due to statutory control. That these statutes have made actual probate of a missing will more difficult would appear to be conceded by some authors.⁵⁷ Speaking of statutes which require that existence at the time of death or fraudulent destruction be proved. Wigmore says:⁵⁸

⁵³ *In re Moos' Estate*, 414 Ill. 54, 110 N.E.2d 194 (1953); *In re Ziegenhagen's Will*, 148 Wis. 382, 134 N.W. 905 (1912).

⁵⁴ *Gavitt v. Moulton*, 119 Wis. 35, 96 N.W. 395 (1903).

⁵⁵ See note 3 *supra*.

⁵⁶ *Forbing v. Weber*, 99 Ind. 588 (1884); OHIO GEN. CODE ANN. §§ 10504-35,38 (1938): "The probate court may admit to probate a last will . . . when . . . lost, . . . or after [the testator] became incapable of making a will by reason of insanity. . . ."

⁵⁷ Note that § 65 of the *Model Probate Code* of the American Bar Association (U. of Mich. Press 1946), would appear to have placed the general contents of the subject matter of lost wills solely on case law, for there is no mention of any other requirements other than upon a petition for probate of a lost will, "including a statement of the provisions of the will so far as known." Thus there is no treatment of the problems of existence, fraudulent destruction or number of witnesses. Indiana has adopted this model code so far as lost, destroyed or suppressed wills are concerned. See IND. ANN. STAT. tit. 7, c. 1, § 7-105 (Burns 1953).

⁵⁸ 9 WIGMORE, EVIDENCE § 2523 (3d. ed. 1940); See Note 32 CALIF. L. REV. 221 (1944).

But by [such] statute, if the proponent cannot prove fraudulent destruction (by a third person), he must prove the will's continued existence at the testator's death, yet in the case of a lost will, this is (ordinarily) the very thing he cannot do. Such a misguided statute, literally applied, may amount to the nullification of a lost will.

The desirability of relegating proof of a missing will solely to the methods exemplified by the common law or to a completely integrated statute on the subject is questionable, if only on the grounds that such emphasis could fail to recognize the real problem here, which is a problem of reasonableness or credibility of evidence. A statute emphasizing breadth, that is, including unintentional or conditional destruction among others, may overlook the aspect of credibility and induce the court to decide the case on a technicality, and to leave the proponent without remedy. An amendment to present statutes on the subject more properly should contain requirements which the court can look to in ascribing evidentiary weight to the proponent. It should not increase the burden of proof beyond the usual requirement of a preponderance and should not attach any great impediment to proof of contents. The emphasis ought properly be placed upon the credibility of the entire claim made in good faith. Such a statute could properly caution the court to look for fraud, but only in this way, alert the court to anything more than the duty to probate a claim made in good faith.

Where no statutes control, some courts have been too strict in their requirements of evidence to prove a lost will. While there is a definite danger that there will be fraud practiced in trying to prove a lost will, it is submitted that the desirability of having the intent of the testator carried out would be of sufficient value to the public good that some restrictions be removed. The courts can be trusted to protect legal heirs against any practice of fraud and still be allowed to hear all evidence needed to fully decide the issue. Case law could still be the controlling factor since the variations of credibility of the witness would, of necessity, be the deciding factor in the decisions of these cases, depending upon the judge's discretion.

Since these cases are civil actions there is apparently no good reason why a mere preponderance of the evidence should not be enough to satisfy the judge or jury that the intent to revoke was not present. There is not sufficient danger to warrant the difficult burden of proof on the proponent of a missing will. Statutory change is the only solution to this particular problem. Generally speaking, the presumption of destruction *animo revocandi* is a good rule. The main causes of complaint are the ancillary rules that are interwoven into the presumption by the courts. It might be well for the courts to reexamine their position in this matter and make sure they are giving justice to all.

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