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WILLS-PROBATE OF LOST WILL-MEANING OF "LOST" IN STATUTES OF LIMITATIONS

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WILLS—PROBATE OF LOST WILL—MEANING OF "LOST" IN STATUTES OF LIMITATIONS—More than twenty years had elapsed between testatrix' death and the date of filing of petition for probate of her will. Testatrix' son, a sole beneficiary, had searched for the will without success and it could not be found by the register of probate on his initial search. However, the register eventually discovered the will in his inactive files. Two other brothers had seen the will in the probate office but had said nothing. *Held,* the will was "lost" within the meaning of a statute which provided that the twenty year statute of limitations should not run during the time a will was lost. *In re Smith,* (Maine 1949) 67 A. (2d) 529.

The statutes providing that probate of a will must be within a certain period of time are for the purpose of quieting estates and preventing protracted litiga-

tion.[1] They seek to prevent concealment until all persons who have knowledge of the facts of execution are dead or unavailable.[2] The general statutes of limitations are usually not held to apply because the probate process is a "proceeding" as distinguished from an "action."[3] It is usually said that these special statues of limitations, which apply only to wills, are not subject to exceptions unless such exceptions are stated and that they are inflexible and to be construed strictly.[4] In the principal case, the right to probate was based on the fact that this will came within the express exception regarding "lost" wills. It appears that the word "lost," as applied to wills and other instruments, means that the instrument cannot be produced after a due and diligent search in the usual places.[5] Another court requires a thorough, careful, and vigilant search.[6] Still another court has said that the word "lost," when applied to wills, partakes of the nature of "spoilated."[7] If it can be said that a diligent search in the usual places failed to produce the will in the principal case, it seems that it might be described as "lost" even if it was in the probate office. There is abundant authority for this position in cases dealing with other instruments. Thus, it has been held that a deed was lost in the office of the register of deeds,[8] a contract was lost after filing in the office of a justice of the peace,[9] and that wills and other documents were lost after being stolen,[10] burned,[11] destroyed,[12] and abandoned.[13] It would seem that the term "lost will" is broad enough to cover the principal case,[14] and that the spirit and intent of the statute would not be violated by this inclusion.[15] The only question with regard to the decision in the principal case appears to be the ques-

[1] Bier v. Bigger, 352 Mo. 502, 178 S.W. (2d) 347 (1944); 90 UNIV. PA. L. REV. 373 (1942).

[2] 2 PAGE, WILLS §584 (1941).

[3] Ricks v. Wilson, 154 N.C. 282, 70 S.E. 476 (1911); ATKINSON, WILLS §178 (1937).

[4] Gilbert v. Partain, 222 Ala. 459, 133 S. 2 (1931); In re Colyer's Will, 157 Kan. 347, 139 P. (2d) 411 (1943).

[5] Bryan v. Walton, 14 Ga. 185 (1853); In re Granacher's Will, 74 App. Div. 567, 77 N.Y.S. 748 (1902); Gfroerer v. Gfroerer, 173 Ind. 424, 90 N.E. 757 (1910); Dan v. Brown, 4 Cow. (N.Y.) 483 (1825); James v. Hayden's Admr., 10 Ky. L. R. 534 (1888). See also ATKINSON, WILLS §186 (1937); 2 PAGE, WILLS §707 (1941).

[6] Rogers v. Miller, 5 Ill. 333 (1843).

[7] Gibson v. Gibson, 25 Ohio C. C. 698 (1903); 2 PAGE, WILLS §707 (1941).

[8] Wittenberg v. Lehman, 213 Wis. 7, 250 N.W. 756 (1933).

[9] Stanley v. Anderson, 107 Mich. 384, 65 N.W. 247 (1895).

[10] First Nat. Bank v. Brown, 117 Kan. 339, 230 P. 1038 (1924); Murray v. Ready, 85 Col. 544, 277 P. 298 (1929).

[11] Craig v. Chicot County, 40 Ark. 233 (1882); McGregory v. McGregory, 107 Mass. 543 (1871).

[12] The destruction was not under circumstances that amounted to revocation. In re Patterson, 155 Cal. 626, 102 P. 941 (1909).

[13] The will was left with other personal effects when testator was forced to flee from a rebellion in India. In re Gardner, 1 Sw. & Tr. 109, 164 Eng. Rep. 651 (1851).

[14] 2 PAGE, WILLS §707 (1941).

[15] Craig v. Chicot County, supra, note 11.

tion of fact as to whether the search was due and diligent when the length of time and the knowledge of the two brothers are considered.[16]

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[16] Search was held not to be diligent enough because all sources of information had not been exhausted in Bryan v. Walton, supra, note 5.