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WILLS - INTERPRETATION OF "EXISTENCE" AS USED IN STATUTES PROVIDING FOR PROBATE OF LOST OR DESTROYED WILLS

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WILLS — INTERPRETATION OF "EXISTENCE" AS USED IN STATUTES PROVIDING FOR PROBATE OF LOST OR DESTROYED WILLS — Testator, about to undergo a serious operation, executed a will leaving $5,000 to his fiancee and the balance of his estate to his brother Louis. Three days later, after the operation had been performed and when testator was apparently on the road to recovery, he informed a lawyer that he desired to give his fiancee a check for $5,000 at once in lieu of the bequest to her in the will, and desired the rest of his estate to go to Louis. Testator mistakenly told the lawyer he had no other relatives. The lawyer then advised him to have the will destroyed, since the property would all go to Louis by intestacy, and thus avoid the risk of the fiancee claiming an additional $5,000 under the will. Testator directed the lawyer to destroy the will and he did so. Upon testator's death three days later, it was disclosed that he had several brothers and sisters in Belgium. Louis petitioned to have the destroyed will admitted to probate, alleging that testator had destroyed it only on the condition that Louis take all by intestacy, and invoking the doctrine of dependent relative revocation. *Held*, under the Washington statute [1] the will was inadmissible as a lost or destroyed will since it was not

744, 1 S. E. (2d) 756 (1939); Zuvich v. Ballay, (La. App. 1933) 149 So. 281; Bracy v. Lund, 197 Wash. 188, 84 P. (2d) 670 (1938). Other cases are referred to in 27 MICH. L. REV. 116 (1928).

[8] Hale v. Pacific Tel. & Tel. Co., 42 Cal. App. 55 at 58, 183 P. 280 (1919). "The rule, as we understand it, applicable to such cases, is that where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury."

[1] Wash. Rev. Stat. Ann. (Remington, 1932), § 1390: "No will shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions shall be clearly and distinctly proved by at least two witnesses. . . ."

"in existence at the time of the death of the testator" or "shown to have been fraudulently destroyed" in his lifetime. The court interpreted "existence" to mean physical existence at the time of the testator's death. *In re Kerckhof's Estate,* (Wash. 1942) 125 P. (2d) 284.

At common law, the ecclesiastical courts allowed a lost will to be probated, as long as satisfactory proof could be introduced to show it was unrevoked, regardless of the time at which it was lost or destroyed.[2] Many of the states have legislation to this effect.[3] Other states have enacted statutes substantially identical to the Washington statute.[4] Such enactments present a problem of construing the words "existence at time of testator's death." Existence can mean either physical existence of the instrument itself, or legal existence when the instrument is not in physical existence. A will is said to be legally in existence when it has been lost or accidentally destroyed; or when it has been concealed or destroyed by fraud; or, upon a theory of dependent relevant revocation, when the will has been revoked on a condition not occurring. In the instant case, since the will was physically destroyed, it is essential first to determine whether it was in legal existence at the time of the testator's death. It is clear that the will was destroyed at testator's direction and in accordance with the statutory provision for revocation of wills.[5] To rebut the presumption that the will was revoked in this case, it is necessary to rely upon the doctrine of dependent relative revocation.[6] The court was willing here to apply this principle and admitted that the will was in legal existence at the time of the testator's death. But the court went on to declare that the Washington statute required physical existence,

[2] Davis v. Davis, 2 Add. 223, 162 Eng. Rep. 275 (1824); Trevelyan v. Trevelyan, 1 Phill. Ecc. 149, 161 Eng. Rep. 944 (1810) (will destroyed in lifetime of testator, without his knowelge, substituted and admitted to proof); In re Estate of Southerden, [1925] Prob. 177 (testator burned will, meaning to revoke, under mistake of law as to descent in intestacy; probate was allowed).

[3] ATKINSON, WILLS, § 186 (1937); 2 PAGE, WILLS, 3d ed., 377 (1941); Hodge v. Joy, 207 Ala. 198, 92 So. 171 (1921); In re Stockdale's Estate, 157 Mich. 593, 122 N. W. 279 (1909); Mann v. Balfour, 187 Mo. 290, 86 S. W. 103 (1904).

[4] SIMES, CASES AND MATERIALS ON TRUSTS AND SUCCESSION 195, note 4 (1942); Ariz. Code Ann. (1939), § 38-222; Cal. Prob. Code (Deering, 1941), §§ 350, 351; Idaho Code Ann. (1932), §§ 15-230, 15-231; N. Y. Surrogate's Court Act (1920), § 143; Minn. Gen. Stat. (Mason, 1927), § 8765.

[5] Wash. Rev. Stat. Ann. (Remington, 1932), § 1398 "No will in writing . . . shall be revoked except by a subsequent will in writing, or by burning, canceling, tearing, or obliterating the same, by the testator or testatrix, or in his or her presence, by his or her consent or direction."

[6] 62 A. L. R. 1367 at 1401 (1929); 22 HARV. L. REV. 374 at 375 (1909), stating, "The solution of each case [of revocation] turns upon the intent of the testator, and that, as a question of fact, is for the jury to determine"; 50 YALE L. J. 518 at 521 (1940), stating "dependent relative revocation should be applied to nullify revocations only where the evidence affirmatively indicates that the deceased would prefer reinstatement of the revoked will to intestacy." For development and extent of the doctrine, see Cornish, "Dependent Relative Revocation," 5 So. CAL. L. REV. 273 (1932); Warren, "Dependent Relative Revocation," 33 HARV. L. REV. 337 (1920); Re Penniman's Will, 20 Minn. 245 (1873); Thomas v. Thomas, 76 Minn. 237, 79 N. W. 104 (1899); In re Thompson, 116 Me. 473, 102 A. 303 (1917).

as contrasted to mere legal existence, the only exception being where the will was fraudulently destroyed during testator's lifetime. The court, in so deciding, pointed out that if legal existence alone was required, then the fraudulent destruction provision in the statute would be superfluous. Several other jurisdictions follow the view of the principal case.[7] However, other courts with similar statutes, such as Minnesota, have felt it is better not to require actual existence, for to do so would make a serious inroad on the doctrine of dependent relative revocation.[8] It would seem that, as between the two interpretations of the statute, the view allowing legal existence to satisfy the statutory requirements is preferable. This view permits a will which has been destroyed without the consent of the testator to be admitted to probate rather than leaving the will unrevoked [9] and yet not admissible to probate—surely a strange and undesirable

[7] In re Calvin's Estate, 188 Wash. 283, 62 P. (2d) 461 (1936) (distinguishable from the principal case in that no clear evidence was offered that there ever was a will); Kellogg v. Ridgely, 161 Ind. 110, 67 N. E. 929 (1903) (complaint alleging will had been executed and that it was unrevoked at time of testatrix' death, but failure to charge that the will was in existence at time of her death, or that it had been destroyed in her lifetime without her consent or otherwise fraudulently disposed of, as required by statute to probate lost will, was insufficient to authorize a judgment establishing it as a lost will); Knapp v. Knapp, 10 N. Y. 276 (1851) (court required evidence either of existence of will at death of testator, or of fraudulent destruction in his lifetime, to authorize parol proof of contents of a missing will); Estate of Kidder, 57 Cal. 282 (1881); In re Patterson's Estate, 155 Cal. 626, 102 P. 941 (1909) (statute provided for admission of lost or destroyed will where destroyed by public calamity in testator's lifetime).

[8] In re Estate of Havel, 156 Minn. 253, 194 N. W. 633 (1922), where a will was made in the Bohemian language and to take its place an English translation was immediately prepared, but the English will was ineligible for probate due to failure to have the will properly witnessed, it was held that the Bohemian will could be probated even though it had disappeared before the death of the testator and was not thereafter found. The Minnesota statute was very similar to the statute in the principal case.

In Re Estate of Eder, 94 Colo. 173 at 182, 29 P. (2d) 631 (1934), the court said, viewing the statute in the light of ordinary rules relating to secondary evidence, "The original of a will must, of course, be produced if it is available, but if it is not, secondary evidence thereof may be adduced, and, if it shall then appear that the will had not, prior to the testator's death, been revoked in accordance with the statute . . . it must be held to be in existence." Cornish, "Dependent Relative Revocation," 5 So. CAL. L. REV. 273, 393 at 413 (1932), makes this comment: "Where such a construction is given [that requiring physical existence], it would seem to exclude from the operation of the doctrine [of dependent relative devocation] all cases in which the will for which probate is sought has been destroyed in such a manner that it no longer has physical existence." See also 8 MINN. L. REV. 51 (1923).

[9] Parsons v. Balson, 129 Wis. 311, 109 N. W. 136 (1906), holding that a lost will can be established and admitted to probate only where testator did not have knowledge of its destruction in time reasonably to enable him to reproduce it or was prevented from doing so. Destruction was three years before his death, with his knowledge, and subsequent adoption of a child barred its probate. The court treated the acquiescence as ratification of revocation. In most jurisdictions the will would have been unrevoked, because of no intent to revoke, despite the destruction and

situation.[10] It does not seem likely that there will be as much opportunity for fraud by the introduction of spurious wills under the Minnesota view as there is for unscrupulous persons to destroy or secrete valid wills under the other view. It is submitted that it is easier to prove that a will which is offered for probate is spurious than it is to show that it was destroyed or hidden by some fraudulent action. It would appear the wiser course to allow the probate of lost or destroyed wills, even though only in legal existence at the death of the testator. It would be better to consider the provision as to fraudulent destruction of the will "excess verbiage" than to bar from probate a will destroyed during the life of the testator by accident or because of mistaken assumption. Unless the payment of $5,000 to the legatee constituted a "satisfaction" of the legacy (which it may well have been), the result reached in the instant case may be justified on the basis that testator might have preferred, even applying the doctrine of dependent relative revocation, that his estate be distributed by intestacy rather than by will if it would mean his fiancee would be able to claim another $5,000. But the ground upon which the decision is based, namely, the requirement of physical existence of the will at testator's death, does not seem to be in accord with the more advisable interpretation of the statute as set out in the Minnesota case.[11]

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acquiescence. See Rich v. Gilkey, 73 Me. 595 at 598 (1881), quoting 1 JARMAN, WILLS, 5th Am. ed., 130 (1881), to the effect that "The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting." See also Appeal of O'Brion, 120 Me. 434 at 436, 115 A. 169 (1921).

[10] ATKINSON, WILLS 454 (1937): "The authorities are conflicting as to whether destruction of a will without testator's knowledge or consent is fraud within the meaning of the statute where there is no actual fraudulent intent." It is submitted this is one of the crucial issues in the proper construction to be given such statutes. Constructive fraud recognized: Schultz v. Schultz, 35 N. Y. 653 (1866); Matter of Dorrity's Will, 118 Misc. 725, 194 N. Y. S. 573 (1922). Contra, In re Reiffeld's Will, 36 Misc. 472, 73 N. Y. S. 808 (1901).

It is stated in 8 MINN. L. REV. 51 at 54-55 (1923), "If a will admittedly is unrevoked according to the revocation statute, which has received the strictest interpretation, but its physical existence can not be proved and it can not be proved to have been fraudulently destroyed under the strict interpretation of that term, we have the anomaly of a will which is unrevoked according to one statute, but which can not be probated by reason of another."

[11] In re Estate of Havel, 156 Minn. 253, 194 N. W. 633 (1922). Since the decision in this case, the Minnesota legislature has adopted the view taken by the court and changed the statute so that physical existence is no longer required. Minn. Stat. (Mason, 1940 Supp.), § 8992-62: "No such will shall be established unless it is proved to have remained unrevoked nor unless its provisions are clearly and distinctly proved." Thus if the will is unrevoked, although not in existence at the time of the testator's death, it would still be admissible to probate under this provision of the statute. The action of the Minnesota legislature would seem to set a good example for other states having similar statutes.