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Burden of Proof of Capacity to Revoke a Will

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fine distinction made in the case of *McDermott v. Burke*¹⁵ where the intervening cause, once the child was attracted on to the premises by the pile of sand, was the child's act in resting his hand on the rope which ran over the sheave and the starting of which, injured him; and possibly, too, this distinction is to be found in the principal case, if the court is impelled to the conclusion that the attraction was the spoil bank and not the canal and that the child must have run down from the spoil bank to the canal wall, but how does that account for the language of the *Follett* case, as that the attractive nuisance need not be visible from the street, and the result reached in the *Anthony* case, where the pond or water did not have floating logs in it?

In the case of *Ramsay v. Tuthill Material Co.*,¹⁶ the court pointed to the fact that all the conditions together there made the attractive nuisance and that it was not necessary that the dangerous thing be visible from the street or that children should have been attracted to the premises by it. Is it stretching the application of the principle too far to say that in the principal case, while the unfinished canal, as such or the spoil bank, or the incline to the wall of the canal, or the wall itself with its four-foot wide top, each of itself, would not be an attractive nuisance, yet together, they might be?

It is feared that the case serves rather to heighten the confusion already existing in the law on the subject rather than to clarify the situation.

Even in a turn-table case, it was held by an Appellate court decision that where the child was injured when he went to the turn-table for the purpose of helping the men operating it, and not to satisfy his childish curiosity or childish instinct to play with it, he was not attracted by it as a nuisance.¹⁷ In one Appellate court case, a cistern filled with water covered by a wooden cover with a handle was held to be an attractive nuisance;¹⁸ an elevator in a building has been held to be such by the Supreme Court¹⁹ and an endless chain coal conveyor²⁰ and lumber piled on a sidewalk;²¹ but a wagon and a team of horses was held not to be.²²

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WILLS—CAPACITY TO REVOKE—BURDEN OF PROOF.—[Mississippi] A case¹ recently decided by the Supreme Court of Mississippi presents an interesting and somewhat novel problem in the burden of proof as to a testator's capacity to revoke his will.

The question arose on a bill in equity to establish and probate

15. 256 Ill. 401.

16. 295 Ill. 396.

17. *Belt Ry. Co. v. Charters* 123 Ill. App. 322, 328.

18. *Donk Bros. Coal Co. v. Leavitt* 109 Ill. App. 385, 386.

19. *Siddall v. Jansen* 168 Ill. 46.

20. *Stollery v. Cicero Street Ry. Co.* 243 Ill. 291.

21. *True & True Co. v. Woda* 201 Ill. 319.

22. *Scott v. Peabody Coal Co.* 153 Ill. App. 107.

1. *Watkins v. Watkins* (1926) 106 So. 753.

an alleged lost will. In 1918 the testator made a will whose validity was not disputed.

The evidence showed that it remained in the possession of the testator, and was in existence as late as 1922, but could not be found at the time of his death some months later.

To meet the presumption arising under these conditions that the will had been destroyed by the testator *animo revocandi*, the proponents introduced evidence tending to show that the testator became mentally incompetent in 1921, while the will was still in existence, and continued in that condition until his death.

The contestants introduced a large amount of evidence controverting such incompetency. The chancellor submitted the issue of revocation to a jury which found for the proponents; a decree was accordingly entered establishing the will, from which the contestants appealed.

In the Supreme Court the controversy was disposed of on the following basis:

"There then remains for consideration the question as to whether the issue of revocation of the will at a time when the testator was mentally capacitated to revoke the same was properly submitted to the jury. The evidence discloses that a very diligent search for this will was made, and that it could not be found, and, where a will is traced to the possession of the testator and can not be found after his death, the presumption arises that he destroyed it *animo revocandi*, but this presumption may be overcome by proof that the will was in existence at a time when the testator was mentally incapacitated to revoke the same and that he never thereafter became mentally capacitated to revoke it. 3 *Alexander on Wills*, p. 2012; *Tucker v. Whithead*, 59 Miss. 594. The degree of mentality required to revoke a will is the same as that required to make one . . . and in the case at bar *the burden of proof rested upon the proponents to show that the testator, at no time after the will was last shown to have been in existence, ever possessed mental capacity to revoke a will.* . . .

"The conflicts in the testimony, however, were for the jury to pass upon, and, although we may not be entirely satisfied with their findings, we can not invade their province by setting aside this verdict which has been approved by the chancellor."

It is not clear which burden of proof the court is talking about, whether it is the burden of producing evidence to meet the presumption, so as to make a question for the jury, or whether it is the ultimate burden of convincing the jury by a preponderance of the evidence of the truth of the proposition that the testator lacked sufficient capacity to revoke the will. If the court merely meant to say that at a particular stage of the case there was a burden on the proponent to produce sufficient evidence of lack of capacity to make a question for the jury, the statement is sound and hardly calls for comment.

It was apparently conceded that the will remained in the testator's possession and that it could not be found after his death.

These facts gave rise to the familiar presumption of destruction by the testator *animo revocandi*.²

Of course, destruction of his will by a testator while insane or lacking proper mental capacity would not work a revocation.³

But there is a general presumption of sanity,⁴ which would make it unnecessary to produce evidence of sanity in the first instance.

The effect of these two presumptions would obviously entitle the contestants to a directed verdict on the issue of revocation if no other evidence had been introduced, without regard to which side had the ultimate burden on the issue of capacity in case that question were submitted to the jury.

It seems more probable, however, that the court had in mind the ultimate burden of convincing the jury of the lack of capacity.⁵

Assuming that the court's statement should be understood as placing on the proponents the burden of establishing lack of capacity to revoke, the question presented is one of considerable doubt and difficulty.

It can not be settled by precedent because of the lack of adjudicated cases where the point has really been determined.

It can not be settled by mere logic, any more than the burden of proof as to capacity to make a will. On the latter point, it is well settled in England that the burden is on the proponents to establish to the satisfaction of the jury that the testator possessed the necessary mental capacity.⁶

This result was reached in the *Sutton* case on the following reasoning:

"Now, he who relies on a will in opposition to the title of the heir at law, must allege that it is a will of a person of sound and disposing mind; he must therefore prove it. . . . The onus remains on him throughout, and the court or jury who have to decide the question in dispute must decide upon the whole of the evidence so given; and if it does not satisfy them that the will is valid, they ought to pronounce against it."

2. *Whiteley v. King* (1864) 17 C. B. (n. s.) 756; *Sugden v. St. Leonards* (1876) L. R. 1 P. D. 154; *Leemon v. Leighton* (1925) 314 Ill. 407; *Smith v. Smith* 138 N. E. 539 (Mass.); *McMurtry v. Kopke* 250 S. W. 399 (Mo.); *Wendt v. Ziegenhagen* (1912) 148 Wis. 382.

3. *Brunt v. Brunt* L. R. 3 P. & D. 37; *Rich v. Gilkey* 73 Me. 595; In re *Goldsticker* 192 N. Y. 35; *Shacklett v. Roller* 97 Va. 639.

4. *Davis v. U. S.* (1895) 160 U. S. 469; *Baxter v. Abbott* (1856) 7 Gray 71.

5. If the ultimate burden was on the contestants to establish revocation, including capacity to revoke, a verdict for the proponents would not necessarily mean anything more than that the jury were not affirmatively convinced of the testator's capacity. And hence, as there was substantial evidence both ways, a verdict against the party having the burden would hardly call for an extensive review of the evidence.

Whereas if the burden of establishing lack of capacity to revoke was on the proponents, a verdict in their favor was an affirmative finding on that proposition which would naturally call for a review of the evidence in a chancery case, though the court might be unwilling to disturb a verdict approved by the chancellor, if not manifestly wrong.

6. *Sutton v. Sadler* (1857) 3 C. B. (n. s.) 87.

Since the action in that case was ejection, and the plea the general issue, the court's statement that the party relying on a will must *allege* that it is the will of a person of sound and disposing mind, etc., can only mean that one who relies on a will impliedly asserts the capacity of the testator because capacity is essential to testamentary intent.

The same logic would place the burden on the prosecution to establish the capacity of a defendant in a criminal case, since capacity is equally essential to criminal intent. But as a matter of fact the English courts place the burden of establishing insanity or lack of capacity in a criminal case on the defendant.⁷

The Supreme Court of the United States on the other hand has taken the contrary view and placed the burden of establishing criminal capacity on the prosecution.⁸

The reasoning of the *Davis* case is this:

"It [the plea of not guilty] is not in confession and avoidance, for it is a plea that contradicts the existence of every fact essential to constitute the crime charged. . . . And his guilt can not in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing the crime."

This logic would place the burden of establishing capacity on the proponent in the will cases.

But notwithstanding logic the Supreme Court places the burden on the contestants to establish lack of capacity.⁹ In the *Davis* case the presumption of sanity is treated as merely relieving the prosecution of the burden of producing evidence of capacity in the first instance.

In the *Brosnan* case the presumption of sanity is invoked to place the burden of establishing lack of capacity on the contestant.

The apparent inconsistency of each court in dealing with the problem of capacity to make a will and capacity to commit a crime is obvious.

The explanation of the English rule in the wills cases, which is followed in many of the American states, seems to be that the court, consciously or unconsciously, felt that it was unfair that the heir should be deprived of his inheritance where the capacity of the testator was doubtful. Accordingly, a logical basis was formulated for the desired result, i. e., that capacity was a necessary ele-

7. *Reg. v. McNaughton* (1843) 10 Cl. & F. 200.

8. *Davis v. United States* (1895) 160 U. S. 469.

9. *Brosnan v. Brosnan* (1923) 263 U. S. 345.

In this case it was said by Mr. Justice Sandford:

"And viewed from a practical rather than an academic standpoint [the burden on the contestant] gives effective weight to the presumption of the testator's sanity and obviates the difficulty which would arise if such presumption were treated as one which merely establishes a prima facie case in favor of the proponent of the will but did not relieve him of the ultimate burden of persuasion on the question of the testator's mental capacity."

This simply means that for various reasons the court thought that the contestant ought to bear the risk of non-persuasion.

ment in the making of a will, and therefore the proponent must prove it. In the criminal cases the English court felt, consciously or unconsciously, that it would be too easy to cheat the gallows by mere doubts of capacity, and hence a different rule of presumption was evolved to place the burden where the court thought it ought to be.¹⁰

The natural reaction of the Supreme Court of the United States was exactly the reverse in each class of cases.

It instinctively felt that it was unfair to hang a man whose capacity was doubtful, and the burden accordingly was placed on the prosecution to exclude the doubt.

But the court lacked the English consideration for the heir. It felt rather that the testator, who had accumulated the property, was entitled to dispose of it as he pleased, and should not be balked of his desires unless his lack of capacity was clear. Accordingly the desired result was accomplished, and the presumption was invoked to furnish a plausible justification. There is no magic about presumptions. They merely call on the party against whom they operate to produce evidence to make a question for the jury. When another rule is added placing the risk of non-persuasion the real explanation is policy.

Many other illustrations might be given where policy has much more to do with placing the burden of proof than logic.

In that disfavored action of malicious prosecution the plaintiff was loaded with the almost impossible burden of establishing the negative, that there was no probable cause.¹¹

In libel and slander, by all logic, the burden ought to be on the plaintiff to establish the falsity of the accusation, since we think of libel or slander as a false imputation, but the difficulty of establishing a blameless life, together with an instinctive feeling that the defamer ought to make good his charge, otherwise there would be little check on slander, has resulted in the universally accepted rule that the defendant must plead and prove truth as a justification.¹²

There is also the well known hopeless conflict in opinion in negligence cases as to whether the defendant must establish contributory negligence or the plaintiff must establish the absence of fault on his part. The reasoning of Brett, Master of the Rolls in the *Wakelin*¹³ case, that the plaintiff must prove freedom from contributory negligence because there would be no liability if the plaintiff was guilty of contributory negligence, proves too much, for it would saddle the plaintiff with the burden of excluding all possible defenses, except matter operating to destroy or discharge an existing liability.

Courts which place the burden on the defendant found sufficient justification in the pleadings. The declaration was not re-

10. *State v. Klünger* (1868) 43 Mo. 127.

11. *Abrath v. North Eastern Ry. Co.* (1883) L. R. 11 Q. B. D. 440.

12. *Smith v. Richardson* (1737) Willes 20; *Thomas v. Dunaway* (1863) 30 Ill. 373.

13. *Wakelin v. L. & S. W. Ry. Co.* (1886) 55 L. T. R. 709.

quired to allege the absence of contributory negligence,¹⁴ hence proof of contributory negligence must be an affirmative defense to be established by the defendant.

It seems likely that the courts which placed the burden on the plaintiff were unconsciously moved to that course by the fact that juries were hostile to the defense and frequently ignored what the court regarded as a clear showing of contributory fault.¹⁵

These illustrations ought to make it sufficiently clear that in the debatable cases policy is a stronger factor than logic in apportioning the burden of proof.

Returning to the problem in hand, where revocation of a will by some subsequent writing has been involved the courts have quite generally placed the burden of proving the execution of the revocatory writing on the contestant.¹⁶ This seems in accordance with the general analogies. Where the heir is favored by placing the burden on the proponent to prove the capacity of the testator, the policy favoring the heir is not carried to the extreme of forcing the proponent to establish the absence of undue influence. That burden is almost universally placed on the contesting heir.¹⁷

In states where the contestant is thought of as attacking an existing will, he must establish the grounds of his attack, whether it is lack of capacity,¹⁸ undue influence,¹⁹ or revocation.²⁰ If such a revocation case further involved the question of capacity to revoke, it is probable that the courts would follow the analogy suggested by capacity to make a will, especially if in the course of time the original policy of that rule had been lost sight of, and the rule itself had become settled on familiar conventional reasoning. In that case courts, which place the burden on proponent to establish the capacity of the testator to make a will because he impliedly alleges capacity, by the same process could naturally place the burden of establishing capacity to revoke on the contestant because he relies on revocation and thereby impliedly asserts capacity. While

14. *Thompson v. Ry.* (1873) 51 Mo. 190.

In Illinois and a few other states the declaration is required to negative contributory negligence; *Chicago Ry. v. Cooney* (1902) 196 Ill. 466.

15. Williams, J. in *Toomey v. Ry.* (1857) 3 C. B. (N. S.) 146:

"It is not enough to say that there is some evidence; for, every person who has had experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result."

16. *Webster v. Yorty* (1902) 194 Ill. 408; *Giles v. Giles* (1910) 204 Mass. 383. In *re Shelton's Will* (1906) 143 N. C. 218.

17. *Boyce v. Rossborough* (1857) 6 H. L. C. 2; *Baldwin v. Parker* (1868) 99 Mass. 78; *Campbell v. Carlisle* (1901) 162 Mo. 634; but see *Sheehan v. Kearney* (1903) 82 Miss. 688, placing the burden of establishing the absence of undue influence on the proponent because he asserts that it is the testator's will, and this assertion is not true if it was not the testator's voluntary act.

18. *Donovan v. St. Joseph Home* (1920) 295 Ill. 125.

19. *Michael v. Marshall* (1903) 201 Ill. 70. In *re Kindberg* (1912) 207 N. Y. 220.

20. *Behrens v. Behrens* (1890) 47 Ohio St. 323; *Webster v. Yorty* (1902) 194 Ill. 408.

courts, which place the burden on contestant to establish lack of capacity to make a will because he must overcome the presumption of capacity,²¹ by a like process would naturally place the burden of establishing lack of capacity to revoke on the proponent because he encounters the same presumption of capacity now operating in favor of the contestant. On analogy alone the Supreme Court of Mississippi should have placed the burden on contestant to establish capacity to revoke, since it follows the English rule in placing the burden on the proponent to establish capacity to make a will,²² unless the missing will, presumably destroyed by the testator presents such a different problem as to make the analogies inapplicable. By implication the Court of Appeals of Virginia placed the burden on proponent, seeking to probate a lost will, to establish lack of capacity to revoke,²³ though that court also follows the rule placing the burden on the proponent to establish the capacity of the testator to make a will.²⁴

The facts in the *Shacklett* case are much like those in the *Watkins* case. The will could not be found after the testator's death, and there was evidence of the impairment of his mind. The lower court admitted the lost will to probate, but the decree was reversed because the evidence did not satisfactorily establish that the will was in existence after the testator became mentally incompetent.

In other words, assuming that the testator destroyed the will according to the usual presumption, the evidence did not establish that he lacked capacity, because the time of the destruction was unknown. The reason assigned by the court was:

"It is not sufficient in a case like this to show that the will may have been in existence after the testator's mind had become so impaired that he could not revoke it; but it must appear that *it was* in existence after that time. Courts of equity do not set up lost papers except where it is clearly shown that it should be done."

The case is not squarely in point because it may be said that the presumption of sanity at the time of destruction is not shaken by proof of lack of capacity toward the end of the testator's life when the destruction might have taken place. But the implication is fairly clear that in the lost will cases the proponent is to bear the risk of non-persuasion of lack of capacity to revoke.

It is not a serious objection to this view that it is more or less inconsistent with the rule placing the burden on proponent to establish testator's capacity to make the will, for the courts are consistently inconsistent in dealing with the burden of proof. And this is as it should be, because in judicial legislation desirable results are the object rather than a symmetrical system.

To the instinctive, rather than reasoned, reaction of the court that a presumably revoked will should not be probated unless it was

21. *Egbers v. Egbers* (1892) 177 Ill. 82; *Donovan v. St. Joseph Home* (1920) 295 Ill. 125.

22. *Sheehan v. Kearney* (1903) 82 Miss. 688.

23. *Shacklett v. Roller* (1899) 97 Va. 639.

24. *Gray v. Rumrill* (1903) 101 Va. 507.

clear that the revocation was not effective, a practical objection may be urged, that it does not adequately protect a testator, whose capacity has become doubtful because of age or disease, from an accidental destruction of his will, or from its spoilation by interested persons.²⁵

The contrary tendency was shown by the English court of probate in the *Sugden-St. Leonards*²⁶ case, where it stretched the hearsay rule to the breaking point in order to establish the contents of a missing will.

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25. The difficulty of rebutting the presumption of destruction by the testator is great, since it is not sufficient to show that those interested in the destruction of the will had the opportunity, *Gavit v. Moulton* (1903) 119 Wis. 35.

26. (1876) L. R. 1. Pro. Div. 154.