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TORT ACTION IN KENTUCKY FOR THE WRONGFUL DESTRUCTION OF A WILL

In the case of *Allen v. Lovell's Adm'x*,¹ the Kentucky Court of Appeals recently had before it the question whether or not an action in tort will lie for the wrongful destruction of a will. A beneficiary under the will had sued the alleged spoliator to recover the value of the legacy he would have received had the will been probated. Recovery was denied on the ground that the plaintiff's petition did not allege that the will had ever been offered for probate as a lost or destroyed will and failed to show, or even allege, any reason why it could not be probated. The court stated by way of *dictum*, however, that if the situation were such that the will had been wrongfully destroyed and could not be probated because of the loss of evidence an action in tort could be maintained against the wrongdoer. The rule in Kentucky with regard to fraudulently destroyed wills, as indicated by the *Allen* case, appears to be as follows: If the will can be proven sufficiently to be probated as a lost will, resort must be had to the probate court; if the will cannot be probated, an action in tort will lie for damages caused by the wrongful destruction.

The above proposition suggests the question: Under what circumstances will a suitor have sufficient evidence to maintain an action at law for the loss of a legacy and yet have insufficient evidence to establish his right to that legacy in a probate court? In order to probate a lost will in Kentucky its execution, its contents, and its continued existence unrevoked by the testator must be established.² In the absence of any one of these elements it is difficult to see how a tort action could be maintained. If the will was never executed nothing was destroyed; if some evidence of its contents cannot be presented the complainant cannot show that he ever had even an expectancy and if it did not remain unrevoked by the testator it was the act of the testator, not the act of the spoliator, that deprived the complainant of his gift.

¹ 303 Ky. 238, 197 S.W. 2d 424 (1946)

Allen v. Lovell's Adm'x, 303 Ky. 238, 243, 197 S.W. 2d 424, 426 (1946).

² *Caudill v. Loar*, 293 Ky. 223, 168 S.W. 2d 757 (1943) *Madden v. Sevier*, 271 Ky. 688, 113 S.W. 2d 41 (1938) *Pritchard v. Harvey*, 272 Ky. 58, 113 S.W. 2d 865 (1938) *Rowland v. Holt*, 253 Ky. 718, 70 S.W. 2d 5 (1934) *Ferguson v. Billups*, 244 Ky. 85, 50 S.W. 2d 35 (1932) *Wood v. Wood*, 241 Ky. 506, 44 S.W. 2d 539 (1931) *Baltzell & Lilly v. Ates*, 181 Ky. 413, 205 S.W. 548 (1918) *Bradshaw v. Butler*, 125 Ky. 162, 30 Ky. L. Rep. 1249, 100 S.W. 837 (1907), *Chusholm's Heirs v. Ben, Celia, &c*, 46 Ky. (7 B. Mon.) 408 (1847).

The same three elements are required in other jurisdictions generally. *Evans, The Probate of Lost Wills* (1945) 24 NEB. L. REV. 283.

The court apparently recognized the right to an action in tort on the theory that there may be a difference in the character and degree of evidence required in the two types of cases. It has been held consistently that in order to probate a lost will each of the essential elements must be shown by clear and convincing evidence.⁴ The term "clear and convincing evidence" is not as objective as it might be but it evidently represents a higher requirement than the preponderance of probabilities or weight of evidence ordinarily required in civil cases. A situation might well be supposed in which it could be shown by the weight of the evidence that a beneficiary would be entitled to a legacy under a will if the will had not been destroyed, and yet such beneficiary would find himself unable to satisfy the substantive requirements of the probate court so as to probate the destroyed will. This can be better understood if it is always kept clearly in mind that in the tort action no attempt is made to probate the will or to take anything from the estate. Recovery is sought against the wrongdoer and the complainant, if successful, gets a personal judgment against him, the principle being the same as in any other action for damages for interference with the plaintiff's advantageous relations or prospective benefits. The proceeding is an ordinary action at law in which it is alleged that the plaintiff could establish his claim to a legacy if the defendant had not destroyed his evidence, *viz.*, the will. By the destruction of that evidence the defendant has deprived the plaintiff of his gift and should be held accountable for it.

In such an action the plaintiff has the added advantage of being materially aided by the presumption that exists against a wrongdoer who suppresses or destroys documents material to litigation against him.⁵ The tort action is always directly against the person

⁴Madden v Sevier, 271 Ky. 688, 113 S.W. 2d 41 (1938) Pritchard v. Harvey, 272 Ky. 58, 113 S.W. 2d 865 (1938), Ferguson v. Billups, 244 Ky. 85, 50 S.W. 2d 35 (1932).

⁵An action for the destruction of evidence is similar to an action against a witness who, after being personally served with a subpoena duces tecum, disobeyed the subpoena and caused the litigant to be non-suited. Such an action has long been recognized both in England and in the United States. Lane v. Cole, 12 Barb. 680 (N.Y. 1852), Davis v. Lovell, 4 M. & W. 678, 150 Eng. Rep. R. 1593 (1839). In Lane v. Cole it was even held that recovery might be had in such a case without showing that the plaintiff had a good cause of action in the case for which the subpoena was issued.

⁶At an early date Chief Justice Holt stated, "that if a man destroys a thing that is designed to be evidence against himself, a small matter will supply it." Anon. 1 Ld. Raym. 731, 91 Eng. Rep. R. 1388 (1698). This doctrine appears to be well established in both England and America.

In an action on a promissory note it was held that if the jury found that the defendant gave the note for valuable consideration and later destroyed the note, they had a right to infer that it was

who allegedly destroyed the instrument. In such a case the jury will be allowed to draw an inference that the instrument, if it could be produced, would support the plaintiff's case.⁷ Thus, instead of the plaintiff having the burden of establishing the essential elements of the will by "clear and convincing" evidence, he is provided with an inference against his adversary and placed in a position at the outset in which only slight evidence will be sufficient to support his case.⁸ It has been held that the wrongful destruction of an evidentiary document by a litigant creates a conclusive presumption that its contents were as claimed by the adversary.⁹ If such should be the rule it would appear that in the tort action for the destruction of a will the plaintiff would have little more to prove than that the instrument was actually destroyed by the wrongdoer. Once that fact were established the presumption would arise that it was properly executed, that it was unrevoked by the testator, and that its contents were as alleged by the plaintiff.

Such an inference or presumption does not arise in the probate court, for there the action is not against the spoliator but is a direct *in rem* action for the probate of the will, and may be contested by any or all persons interested in the estate. It should also be noted that the wrongful destruction must be satisfactorily proved before any inference can be drawn. The proper procedure is to prove the wrongful destruction of the document and then permit the jury to draw such inference concerning its being unfavorable to the alleged spoliator as all the circumstances justify. The inference will be particularly strong where it is shown that the wrongdoer is an heir or other person who would tend to profit by defeating the will.

Even in the absence of any inference against the defendant the plaintiff might find it possible to satisfy the requirements properly executed. *Sullivan v. Sullivan*, 188 Mass. 380, 74 N.E. 608 (1905).

The defendant's destruction of a partnership account book after suit was brought was held sufficient to justify an inference that the accounts were as alleged by the plaintiff. *Pomeroy v. Benton*, 77 Mo. 64, 85-86 (1882).

The secretary of a lodge, one of several defendants in an action in which the lodge records were material, destroyed the records after action was brought. It was held that the destruction was sufficient to raise a presumption that the records, if produced, would be injurious to the defendants. *Harrill v. Penn*, 134 Okl. 259, 273 Pac. 235 (1927).

See generally, 2 WIGMORE, EVIDENCE (1940) sec. 291, *Evans, Torts to Expectancies in Decedents' Estates* (1944) 93 U. OF PA. L. REV. 187, 197.

⁷ *In re Holmes' Estate*, 98 Colo. 360, 56 P. 2d 1333 (1936).

⁸ *Anderson v. Irwin*, 101 Ill. 411 (1882), *Anon.*, 1 Ld. Raym. 731, 91 Eng. Rep. R. 1388 (1698).

⁹ *Middleton v. Middleton*, 188 Ark. 1022, 68 S.W. 2d 1003 (1934).

of an action at law where the mere weight of the evidence will permit him to prevail when he could not provide the "clear and convincing" evidence required in the probate court. Thus in Michigan where it is declared by statute that the testimony of at least two witnesses is necessary to establish a lost will in a probate court,¹⁰ it has been held that the testimony of one witness is sufficient to maintain an action in tort against a person who wrongfully destroyed the will.¹¹ Likewise in North Carolina where it is apparently required that the entire contents of a lost will be proved before any part can be probated,¹² it is held that an action in tort may be maintained against a spoliator by proving the gift to the plaintiff only.¹³ In such situations no effect is given to the will itself. The court in reality finds that the will could be given effect had it not been for the wrongful act of the defendant. The injured party is then given a remedy not in the nature of specific performance of the will, but in the form of a judgment against the wrongdoer.

Future cases will be necessary to mark the limits of the tort action first recognized in Kentucky by *dictum* in the *Allen* case, but from the above principles on which the action is based it can be seen that it has a proper place in our legal system. While the tort itself is new the principle involved is old,¹⁴ and even if statu-

¹⁰ 3 COMP. LAWS MICH. (1929) sec. 15547.

¹¹ *Creek v. Laski*, 248 Mich. 425, 227 N.W. 817, 65 A.L.R. 1113, 1119 (1929).

This specific problem would not arise in Kentucky since Kentucky permits a lost will to be established by only one witness. *Baker v. Dobyns*, 34 Ky. (4 Dana.) 220 (1836). However, it is an illustration of the fact that a lower degree of evidence may be sufficient to maintain a tort action for destruction of a will than is essential to satisfy the requirements of a probate court.

¹² "Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief." 2 GEN. STAT. N.C. (1943) sec. 98-6.

¹³ In the course of its opinion the court stated, "If she cannot prove the destroyed will because unable to prove the entire contents thereof, surely she is entitled to recover of the defendants for the wrong they have done her by the conspiracy and destruction of the will, and the measure of her damages will be the legacy of which she has been deprived." *Dublin v. Bailey*, 172 N.C. 608, 90 S.E. 689, 690 (1916).

¹⁴ As far back as 1746 a similar remedy was recognized in England. A disappointed heir suppressed a valid will and the husband of the beneficiary, without attempting to probate the will, brought a bill in equity for a decree commanding the heir to pay the legacy. The decree was granted the court saying, "I think in such cases of malicious and fraudulent *spoliations*, the court will not put the plaintiff under the difficulty of going into the ecclesiastical court, [the court of probate at that time] where he must meet with much

tory grounds were considered necessary such could be found.¹⁵ The tort here recognized might also be considered as nothing more than another application of the doctrine that an action may be maintained for wilful interference with the advantageous economic situation of another. Such a tort has long been recognized against one who by threats or violence frightens away the prospective workmen or customers of another,¹⁶ or who by spiteful shooting frightens away another's game.¹⁷ It has been extended to include the fraudulent interference with a mere expectancy¹⁸ and there appears to be no reason why it should not be applied to the destruction of a will when the wrongful act was done for the deliberate purpose of depriving the prospective beneficiary of his gift. It should be noted that where the action has been maintained for such wrongful interference with advantageous economic relations, the element of fraud or wrongful intent has usually been present, and that where damages were sought for mere negligent interference recovery has been denied.¹⁹ Since there is such a close similarity between the wrongful destruction of a will and the other situations where wrongful interference with economic advantages has been recognized as a tort, an action for mere negligent spoliation would most likely fail. However, there appears no theoretical reason why negligent interference with one's favorable economic relations is not as much a civil wrong as any other negligent act for which damages are allowed, and it is not impossible that the law may change in this respect.

In some cases of the past in which attempts to probate destroyed wills have been unsuccessful because the propounder was unable to produce the required "clear and convincing" evidence, it is probable that his real difficulty lay in the fact that he misconceived his remedy, and that the action should have been one in tort with no effort to give effect to the will itself. An examination of some of the earlier cases might aid in determining when an opportunity for such a remedy could exist.

In *Chusholm's Heirs v. Ben, Celia, &c*²⁰ the probate of a lost will was denied on the ground that its due execution and contents were

more difficult than proving the contents of a deed at law, which has been lost or secreted." *Tucker v Phipps*, 3 Atk. 360, 26 Eng. Rep. R. 1008 (1746).

¹⁵ The fraudulent concealment or destruction of a will in Kentucky is a criminal offense. Ky. R.S. (1946) sec. 434.280. Any person injured by violation of a criminal statute is given a right to recover damages from the offender. Ky. R.S. (1946) sec. 446.070.

¹⁶ *Tarleton v McGawley*, Peak 270, 170 Eng. Rep. R. 153 (1793), *Garret v. Taylor*, Cro. Jac. 567, 79 Eng. Rep. R. 485 (1621)

¹⁷ *Keeble v. Heckerngill*, 11 East. 574, 103 Eng. Rep. R. 1127 (1809).

¹⁸ *Mitchell v Langley*, 143 Ga. 827, 85 S.E. 1050 (1915).

¹⁹ *Balden v. Shorter*, 1 Ch. (1933) 427.

²⁰ 46 Ky. (7 B. Mon.) 408 (1847).

insufficiently proved. In that case one of the two principal witnesses was impeached and the other was of doubtful credibility. The court indicated, however, that if it had been a case of clear spoliation where all doubts could properly have been resolved against the wrongdoer, a different result might have been reached.²¹

In numerous Kentucky cases it has been held that declarations of the alleged testator may be admitted as corroborative evidence of the essential elements necessary to probate a lost will but that they are insufficient of themselves to establish those elements.²² Since they are admissible,²³ if the wrongful destruction could first be pinned upon the person who would tend to profit by the failure of the will, and an inference thereby be created against him, these declarations might well be considered corroborative of this inference and enable the jury, from all the circumstances, to find in favor of the disappointed legatee in an action in tort. Such evidence would be insufficient in probate proceedings, for to permit a will to be established by oral statements would evade the requirement of the *Wills Act*²⁴ that it be in writing. However, in a tort action if the wrongful destruction can be otherwise shown and the inference of the validity of the will thus be created, there appears no reason why the declarations of the testator should not be admitted. These would show his state of mind and would be corroborative.

Another possible application of the tort recognized in the *Allen* case is an action for damages caused by the added expense imposed upon the legatee even in situations where he was successful in the probate of the will. In *Taylor v. Bennett*²⁵ the defendant spoliated a will. The legatee succeeded in probating the instrument in spite of the fraudulent act of the wrongdoer but incurred additional expense in doing so that would not have been necessary but for the act of the defendant. In a separate action he was permitted to recover from the defendant that additional expense. Such a result seems reasonable since the action is essentially one for the destruction of evidence and the plaintiff should not be precluded from recovery merely because his damage was not as great as the defendant might have hoped or anticipated.

Another consideration is that a judgment in an action in tort does not seem to preclude a subsequent action for the probate of

²¹ *Id.* at 411.

²² *Ferguson v. Billups*, 244 Ky 85, 50 S.W 2d 35 (1932), *Wood v Wood*, 241 Ky. 506, 44 S.W 2d 539 (1931), *Mercer's Adm'r v Mackin*, 77 Ky. (14 Bush) 434 (1879)

²³ McKelvey gives strong support to the admission of declarations of a testator concerning the contents of a lost will as a proper exception to the hearsay rule. MCKELVEY, EVIDENCE (5th ed. 1944) 405.

²⁴ Ky. R.S. (1946) sec. 394.040.

²⁵ 1 Ohio C.D. 57 (1885).

the will,²⁶ and an unsuccessful attempt to probate the instrument does not preclude a subsequent tort action for the wrongful destruction of it.²⁷ This is true even though both actions might involve the same parties and the same issues since they are essentially different causes of action.²⁸ Thus the beneficiary is given the opportunity of pursuing either remedy without losing his right to the other.²⁹

Should the *dictum* in the *Allen* case be accepted, then it appears that the following principles may be stated as to the law in Kentucky:

1. Where a will has been fraudulently destroyed for the purpose of depriving a beneficiary of his gift, it should still be probated if possible. If the probate is not possible a tort action for damages may be maintained against the wrongdoer. The possibility that a tort action would lie for a mere negligent destruction, although still open to question, is very unlikely under the present state of the law.

2. While the due execution, contents, and continued existence of the will unrevoked by the testator at his death must be shown by clear and convincing evidence in order to probate a destroyed will, it appears that a tort action can be maintained by the mere weight of the evidence.

3. While none of the essential elements necessary to the probate of a destroyed will may be established by the declarations of the testator alone, there is reason to believe that they might be considered sufficient to maintain a tort action where the wrongful destruction by the one who benefited from the act could first be shown and an inference thus be created against him.

4. Neither an unsuccessful action for probate nor an unsuccessful action in tort can be considered *res judicata* as to the other.

5. In case of a destroyed will it appears that a tort action could be maintained for the wrongful destruction of evidence even though the proponent were successful in the probate court.

²⁶ See *Allen v. Lovell's Adm'x*, 303 Ky. 238, 197 S.W. 2d 424 (1946).

²⁷ *Creek v. Laski*, 248 Mich. 425, 227 N.W. 817, 65 A.L.R. 1113, 1119 (1929).

²⁸ *Ibid.*

²⁹ This does not mean that the beneficiary would be allowed recovery in both actions. It would appear that a successful attempt to probate would *ipso facto* preclude any tort action except possibly for added expense in proving the will made necessary by the wrongful destruction. Since the tort action is not allowed except when the probate is impossible, there appears to be no occasion for attempt to probate after success in tort. Consequently, a problem in double recovery is not likely to arise.

It is difficult to predict the future of Kentucky's recognition of a tort in this type of case. However, it is believed that the doctrine announced in *Allen v. Lovell's Adm'r* is sound, that it is well supported by both reason and authority, and that it represents a healthy trend in this branch of the law.

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