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Bertel M. Sparks
University of Kentucky

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ADMISSIBILITY OF ORAL DECLARATIONS OF A TESTATOR TO PROVE A LOST WILL IN KENTUCKY*

It is established beyond question that the fact that a will has been lost or destroyed or cannot be found does not of itself prevent the probate of the will in Kentucky.¹ In order to probate such a will its due execution, its contents, and the fact that it was never revoked by the testator must be clearly shown.² Since the will itself cannot be found, each of the three essential elements must be established by secondary or extrinsic evidence. Evidence offered for this purpose usually consists of testimony of attesting witnesses, testimony of draftsmen, testimony of other persons who have read the will, evidence of oral declarations of the testator made during his lifetime, or testimony concerning the will's physical existence and the surrounding circumstances tending to rebut any presumption that it was revoked by the testator.

When and for what purposes oral declarations of the testator may be admitted is a question surrounded with much confusion and misunderstanding. There appears to be little question as to the admissibility of ante-testamentary declarations to show a testamentary design or plan.³ Such declarations are admitted quite generally on the theory that the existence of a design or plan is some evidence that the design or plan was

*This note concerns lost wills only and does not purport to deal with the admissibility of the testator's declarations to impeach the validity of a will complete on its face by showing duress, undue influence, etc.

¹ Rowland v. Holt, 253 Ky 718, 70 S.W 2d 5 (1934), Muller v. Muller, 108 Ky. 511, 56 S.W 802 (1900) Steele v. Price, 44 Ky. (5 B. Mon.) 58 (1844) Beall v. Cunningham, 42 Ky. (3 B. Mon.) 390 (1843) Baker v. Dobyns, 34 Ky (4 Dana) 220 (1836) George Payne's Will, 20 Ky. (4 T. B. Mon.) 422 (1827)

² Madden 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).

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

³ "The admissibility of such evidence, on the analysis just outlined, is entirely settled." 6 WIGMORE, EVIDENCE (3d ed. 1940) sec. 1735.

carried out. If one clearly indicates his intention to make a will of a certain tenor, evidence of that intention will have some probative value in determining whether or not the will was actually made.⁴ Post-testamentary declarations raise a more serious question, for here the testator is declaring upon a fact done, and if another is permitted to testify as to that declaration when the fact declared upon is the point in issue it would seem, on first impression, that the testimony is nothing more than hearsay and must necessarily be excluded. Since the Kentucky courts have made little or no distinction between statements made by the testator before he executed his will and those made after the execution⁵ and since the question concerning the ante-testamentary declarations has hardly been raised in this state, this discussion will be confined to the admissibility of post-testamentary declarations.

Some courts and some legal writers have taken the position that although such declarations are hearsay, they are often the only evidence available and therefore should be admitted as a proper exception to the hearsay rule.⁶ The courts announcing such a doctrine usually cite the English case of *Sugden v Lord St. Leonards*⁷ as authority and then apparently consider their position secure. The *Sugden* case held that the testator's oral declarations made after the execution of his will were admissible to prove its contents. The case is somewhat weakened by the fact that the decision was by a divided court and that there was ample evidence to sustain the will without the testator's declarations. *Sugden v Lord St. Leonards* has not yet been overruled

⁴ 1 *Id.* sec. 112.

⁵ "The declarations of the deceased, whether before or after the alleged testamentary act, are competent in corroboration of other evidence of the main facts, but insufficient in and of themselves to prove either of the essential ingredients." *Ferguson v Billups*, 244 Ky. 85, 86, 50 S.W. 2d 35 (1932) "Declarations of the alleged testator, before and after the supposed testamentary act, are competent in corroboration of other evidence of the main fact to which the declarations are addressed." *Wood v. Wood*, 241 Ky. 506, 508-509, 44 S.W. 2d 539, 540 (1931). " post-testamentary declarations of the testator as to the contents of a lost will are admissible in corroboration of other evidence." *Atherton v Gaslin*, 194 Ky. 460, 468, 239 S.W. 771, 774 (1922)

⁶ *In re Morrison's Estate*, 198 Calif. 1, 242 Pac. 939 (1926) *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738 (1900), *McKELVEY, EVIDENCE* (5th ed. 1944) sec. 212.

1 P. D. 154 (1876).

in England but its authority has been seriously questioned.⁸ It has been repudiated by the United State Supreme Court,⁹ but among the states there is a conflict of authority¹⁰

The Kentucky Court has declared on numerous occasions that, "The declarations of the deceased, whether before or after the alleged testamentary act, are competent in corroboration of other evidence of the main facts, but are insufficient in and of themselves to prove either of the essential ingredients."¹¹ That statement would indicate that the testator's oral declarations are freely admissible as direct evidence of any one of the essential elements, the only restriction being that they be used as corroborative and not as the sole evidence in the case. Such has been the view taken by commentators as to the rule in Kentucky¹² But a careful examination of the cases reveals that the rule actually applied by the courts is much more limited in scope.

Much of the confusion results from the admitted admissibility of the testator's declarations to prove that a will once validly executed was never revoked. In such cases the testator's state of mind is a material factor and wherever a person's state of mind is relevant to an issue that person's own statements made in a natural manner in the normal course of affairs may be admitted as evidence of the mental condition.¹³ In order to constitute a valid revocation of a will there must be, not only a revocatory act, but the act must be accompanied by an intent to revoke.¹⁴ Regardless of the act of revocation, if the testator lacks the intent to revoke there is no revocation.¹⁵ Thus when the proponent of a lost will proves the due execution and the contents

⁸ "I do not desire to be understood as dissenting from the judgment of the majority of the Court of Appeals in *Sugden v. Lord St. Leonards*. I have expressed the doubts which I entertain; all I desire is to leave the question open should it hereafter come before your Lordships' House for decision." (Lord Herschell in *Woodward v. Goulstone*, L.R. 11 App. Cas. 469, 480-481 (1886))

⁹ *Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474 (1901)

¹⁰ 6 WIGMORE, *op. cit. supra* note 4, sec. 1736.

¹¹ *Ferguson v. Billups*, 244 Ky. 85, 86, 50 S.W. 2d 35 (1932) and cases there cited.

¹² 6 WIGMORE, *op. cit. supra* note 4, sec. 1736, note 3.

¹³ 6 *Id.* sec. 1725.

¹⁴ Ky. R. S. (1946) sec. 394.080.

¹⁵ *Allison's Devisees v. Allison's Heirs*, 37 Ky. (7 Dana) 90 (1838).

of the will and is burdened with the further task of proving that the will was never revoked by the testator, the most direct evidence of the non-revocation is proof that the testator never entertained any intent to revoke. That lack of intent to revoke may be shown either in a positive manner as where a testator, after receiving knowledge of the destruction of a will, demonstrated that the destruction occurred without any intent to revoke,¹⁶ or in a negative manner by proving that the testator continued until his death to be satisfied with the will as executed.¹⁷ In either event it is the testator's mental state that is in issue and his own declarations are clearly admissible to show that mental condition.

When a will is last seen in possession of the testator but cannot be found after his death, there is a presumption that it was destroyed by him with an intent to revoke.¹⁸ In such cases the declarations of the testator may be admitted to overcome this presumption.¹⁹ There is some question as to whether or not the presumption can be overcome by the testator's declarations alone. As indicated above the usual statement in the Kentucky cases is to the effect that the declarations of the testator are admissible as corroborative only and are insufficient in and of themselves to establish any one of the essential ingredients of a lost will. That would seem to indicate that even though the execution and contents of a will were clearly shown, its non-revocation could not be proved unless there was at least some evidence of non-revocation other than the testator's own statements. However, in *Steele v Price*,²⁰ the case often cited as establishing the doctrine in Kentucky, the only evidence of non-revocation other than the testator's own statements was evidence that the testator was a drunkard, a careless man, and one who

¹⁶ *Steele v. Price*, 44 Ky (5 B. Mon.) 58 (1844)

¹⁷ *Baltzell v. Ates*, 181 Ky 415, 205 S.W 548 (1918).

¹⁸ *Ferguson v. Billups*, 244 Ky 85, 50 S.W 2d 35 (1932) *Baltzell v. Ates*, 181 Ky 415 205 S.W 548 (1918), *Webster v. Lowe*, 107 Ky 293, 21 Ky L. Rep. 998, 53 S.W 1030 (1899) *Mercer v. Mercer's Adm'r.*, 87 Ky 21, 9 Ky L. Rep. 870, 7 S.W 307 (1888).

¹⁹ *Rowland v. Holt*, 25² Ky 718, 70 S.W 2d 5 (1934) *Baltzell v. Ates*, 181 Ky. 415, 205 S.W 548 (1918), *Steele v. Price*, 44 Ky (5 B. Mon.) 58 (1844).

²⁰ 44 Ky (5 B. Mon.) 58 (1844).

would be likely to casually lose a will or other valuable document.

In *Baltzell v Ates*²¹ the will was last seen in the hands of the testator but could not be found after his death. The only evidence offered to establish its non-revocation was evidence of the testator's oral declarations. The jury was given a peremptory instruction to find in favor of the will. The Court of Appeals reversed the decision but only because of the peremptory instruction, stating that it was for the jury to decide whether or not the will had been revoked. Thus the court seemed to approve the proposition that it is competent for a jury to find that a will was never revoked even though the only evidence of non-revocation consists of oral declarations of the testator.

In the more recent case of *Pritchard v Harvey*²² there was the usual presumption of revocation of the will and the only evidence to overcome the presumption was evidence of oral declarations of the testator. It was decided that these declarations standing alone could not overcome the presumption. However, the declarations themselves were discussed by the court and it was found that they were so vague and equivocal that even if they were accepted no definite conclusion could be drawn from them. Therefore, it is doubtful if this case can be said to actually rule on the question whether or not the declarations of the testator, if clear and specific, can overcome the presumption of a revocation. The court did not question the authority of *Baltzell v. Ates*, and there is no reason to suppose that the proposition laid down by implication in that case is not sound law. Assuming that it should be followed, it is difficult to understand the meaning of the court's repeated statement that evidence of a testator's declarations are admissible as corroborative evidence only but are insufficient in and of themselves to prove any one of the essential ingredients. A more accurate statement would appear to be to the effect that once the due execution and the contents of a will were clearly shown, then the declarations of the testator could be admitted to prove that the will was never revoked.

²¹ 181 Ky 415, 205 S.W. 548 (1918)

²² 272 Ky 58, 113 S.W. 2d 865 (1938)

When the testator's statements are admitted for the purposes outlined above, they are not admitted to prove the truth of the statements but rather to prove the condition of the mind of the testator when he made them. The propounder of the will seeks to prove that the will was never revoked by proving that there was never any intent to revoke. The statements made are then collateral to the main fact sought to be proved. The evidence offered is that the statements were made, not that the statements were either true or false. In such a case no question of hearsay can be raised. The testator's statement that he had casually lost a will and intended to make another like it may be admitted to show that there was no intent to revoke the will.²³ The declaration is not evidence of the manner of the loss but tends to show the mental state of the loser. A testator's persistent statements that he had given everything to his wife are admissible as evidence that he did not entertain any intention of revoking a will which he had executed accomplishing that purpose.²⁴ Evidence of a negative sort that the testator never exhibited any dissatisfaction with a particular will is likewise admissible.²⁵ A testator's statement that a will was destroyed at his orders is admissible as evidence that it was destroyed with an intent to revoke it.²⁶ Evidence of acts or conduct have the same tendency to prove intent as declarations, and are admitted on the same theory as the declarations. They are admitted, not to prove the acts or conduct, but to prove the state of mind which is thereby revealed. Thus evidence of a contract made by the testatrix was admitted to show a fixed intention to provide for certain persons actually provided for in a will.²⁷

No case has been found in Kentucky in which the declarations of the testator have been admitted to prove the due execution of a lost will. The cases refusing such evidence have apparently become the basis for the supposition that such declarations are admissible for that purpose if they are merely in support of other evidence. In *Chisholm's Heirs v Ben, Celia, &c*²⁸

²³ *Steele v. Price*, 44 Ky (7 B. Mon.) 58 (1844).

²⁴ *Baltzell v. Ates*, 181 Ky 415, 205 S.W 548 (1918)

²⁵ *Beall v Cunningham*, 42 Ky. (3 B. Mon.) 390 (1843)

²⁶ *Beauchamp's Will*, 20 Ky (4 T. B. Mon.) 361 (1827).

²⁷ *Combs v. Shields' Ex'r.*, 270 Ky 232, 109 S.W 2d 601 (1937).

²⁸ 46 Ky (7 B. Mon.) 408 (1847)

there was no unimpeached testimony concerning the due execution other than evidence that the testator during his lifetime exhibited a sealed paper which he declared to be his will and that during the last two years of his life he stated repeatedly that he had made a will. It was held that due execution was not established but there was some indication that if it were a case of clear spoliation where it could be otherwise shown that the will had been fraudulently destroyed, due execution might be established by such oral declarations. Although the case could well have been disposed of on the ground of lack of proper execution alone the court discussed each of the three essential elements necessary to the establishment of a lost will. In stating that the declarations of the testator were admissible to prove that the will had never been revoked the court said that such evidence was "corroborative only, even upon that question, being the lowest species of evidence,"²⁹ There was no explanation of what was meant by that statement and little indication of what the evidence was intended to corroborate. The apparent conclusion that has been drawn, though never actually applied, seems to be that the court intended to hold that the evidence was admissible as corroborative of any one of the main facts necessary to the establishment of the will.

In *Mercer's Adm'r v Mackin*³⁰ the only evidence of the execution of an alleged lost will were repeated statements by the supposed testator that he had made a will, had written it all himself, and did not intend to live a day without a will. There was also much circumstantial evidence that the testator desired to dispose of his property in the manner provided for in the will. The will was not sustained, the court saying that the execution of a lost will could not be established by the declarations of the testator alone. The only affirmative statements in the opinion concerning the admissibility of such evidence were to the effect that it would have been admissible in case the will had been fraudulently destroyed, and even there, it was said, the fraudulent destruction must first be clearly established.

In refusing to permit the due execution of a will to be shown by the testator's declarations in the cases mentioned above

²⁹ *Id.* at 414.

³⁰ 77 Ky. (14 Bush) 434 (1879).

it is doubtful if the court intended to reserve any situation for the admission of such declarations except possibly in cases of fraudulent destruction. Certainly they cannot be admitted to prove proper execution, as they are admitted when the question of non-revocation is in issue, on the theory that they are evidence of the testator's state of mind. In the absence of a question of lack of capacity, the fact of execution or non-execution does not ordinarily depend upon the state of mind of the testator, but rather upon what was done. Whether or not the will was in writing, signed by the testator, attested and subscribed by the proper number of witnesses, etc., are the pertinent facts to be proved. The best that can be said for oral declarations by the testator is that they constitute evidence that the testator believed that he had done all that was necessary to the execution of a valid will. In this it is quite possible that he may have been seriously mistaken.

It is likewise doubtful whether the *dicta* in *Chisholm's Heirs v Ben, Celia, &c* and *Mercer's Adm'r v. Mackin* to the effect that the oral declarations of the testator are admissible to prove the execution of a will that has been fraudulently destroyed are of much value. The wrongful destruction should not be allowed to alter the rule against hearsay evidence. However, if the *dicta* are taken to mean nothing more than that additional evidence is not necessary to the establishment of a will that has been fraudulently destroyed they are probably sound, although an appropriate case for its application has not been found. In such a case, it would be the presumption that exists against a spoliator,³¹ not the admission of hearsay evidence, that would establish the will. It has been held that the wrongful destruction of an evidentiary document by a litigant creates a presumption that it was properly executed³² and that its contents were as

³¹ When a document is fraudulently destroyed by a litigant, the jury is usually allowed to draw an inference that the instrument, if it could be produced, would support the claim of the adversary. *In re Holmes' Estate*, 98 Colo. 360, 56 P 2d 1333 (1936), *Evans, Torts to Expectancies in Decedents' Estates* (1944) 93 U. OF PA. L. REV. 187, 197.

³² 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 properly executed. *Sullivan v. Sullivan*, 188 Mass. 380, 74 N.E. 608 (1905)

alleged by the adversary³³ Thus when the fraudulent destruction of a will is clearly shown a presumption might well be raised that it was executed in compliance with the statute and that its contents were as alleged by the propounder. Evidence of the testator's oral declarations might then be admitted to show that he never entertained any intention of revoking the will.

Wigmore includes Kentucky among those states which have invoked a special exception to the hearsay rule in order to admit oral declarations of the testator to prove lost wills,³⁴ and cites four Kentucky cases³⁵ as holding that such utterances may be used to prove the will's contents. When these cases are examined it is difficult to see how any of them can be said to establish any such rule other than as mere *dicta*.

In *Muller v Muller*³⁶ certain contestants who were not notified of the probate proceedings appealed to the circuit court on the ground that the will admitted to probate had been revoked by a subsequent will. The alleged subsequent will had been lost. Its due execution was properly proved. The circuit court then excluded all evidence of the contents of the lost will on the ground of immateriality and instructed the jury that if any subsequent will had been properly executed the prior will was revoked. The Court of Appeals reversed and held that even though the subsequent will had been executed it did not revoke the prior will unless it contained a revocation clause or made an inconsistent disposition of property. The court then stated, without citing any authority, that the declarations of the testator would be competent evidence of the contents. However, there was no indication in the opinion that any such declarations had been offered in evidence and there was no apparent reason for the statement.

³³ Some courts have held that the wrongful destruction of such a document by a litigant creates a conclusive presumption that the contents were as claimed by the adversary *Middleton v. Middleton*, 188 Ark. 1022, 68 S.W. 2d 1003 (1934)

³⁴ 6 WIGMORE, *op. cit. supra* note 4, sec. 1736, note 3.

³⁵ *Rowland v. Holt*, 253 Ky. 718, 70 S.W. 2d 5 (1934) *Wood v. Wood*, 241 Ky. 506, 44 S.W. 2d 539 (1931) *Atherton v. Gaslin*, 194 Ky. 460, 239 S.W. 771 (1922) *Muller v. Muller*, 108 Ky. 511, 56 S.W. 802 (1900).

³⁶ 108 Ky. 511, 56 S.W. 802 (1900).

*Atherton v. Gaslin*³⁷ was not a case of a lost will but a case of an alleged forgery. Evidence of the testator's statements as to the contents of his will were admitted but they were not admitted for the purpose of proving contents. They were admitted collaterally to show that his statements as to the contents were consistent with the contents of the instrument offered and in that manner to disprove the accusation of forgery. In such a case where the fact of the statements of another rather than the truth of his statements is material no question of hearsay can be raised. It certainly is not authority for the proposition that the testator's declarations as to the contents of a will are admissible to prove those contents. The court did say in its opinion, without any citation of authority, that long before *Sugden v. Lord St. Leonards* "we had adopted the rule that post-testamentary declarations of the testator as to the contents of a lost will are admissible in corroboration of other evidence."³⁸ If the court meant to say that such utterances are admissible to prove the contents they certainly went far beyond what was necessary to the decision of the case in hand, and it is difficult to find where they found authority for saying that the rule had been adopted long before.

In *Wood v. Wood*³⁹ there was no evidence of the will except that of oral declarations of the testator. Although denying probate, the court made certain statements⁴⁰ to the effect that such declarations were admissible when in corroboration of other evidence. But since there was no opportunity for the application of the thesis announced, these statements are mere *dicta* and as such cannot be given the effect of a rule of law.

In *Rowland v. Holt*⁴¹ evidence that the testator declared on numerous occasions, continuing until shortly before his death, that his will was of a certain tenor was admitted. The statements thus admitted were of the contents of the will. However, both the contents and the due execution were otherwise satisfactorily proved and the evidence offered was for the purpose of showing

³⁷ 194 Ky. 460, 239 S.W. 771 (1922)

³⁸ *Atherton v. Gaslin*, 194 Ky. 460, 468, 239 S.W. 771, 774 (1922).

³⁹ 241 Ky. 506, 44 S.W. 2d 539 (1931)

⁴⁰ *Wood v. Wood*, 241 Ky. 506, 510, 44 S.W. 2d 539, 540 (1931).

⁴¹ 253 Ky. 718, 70 S.W. 2d 5 (1934).

the testator's continued satisfaction with the will and to thereby rebut any presumption that it had been revoked. The evidence was not admitted to prove the contents of the will.

There are ample *dicta* in the Kentucky cases to the effect that the oral declarations of an alleged testator, made either before or after the execution of the will, are admissible to corroborate other evidence of due execution, contents, or non-revocation of the will. No case has been found where the evidence has been actually used for any purpose except to prove the non-revocation by the testator. Here the evidence is used collaterally to show the testator's state of mind, the state of mind being a material factor in the determination of whether or not the will was revoked. Should the evidence be used to prove either of the other two essential ingredients the effect would be to admit the testator's oral statements as to what he had done to prove that such things were done. Such declarations are clearly hearsay and it is difficult to find any logical reason for creating a special exception for them. If a deceased person's statements that he had made a will of a certain tenor may be used to prove that he made the will, there appears to be no reason why his statements could not be admitted to prove a deed, promissory note, or other instrument.

It is very unlikely that it would be sound policy to admit the oral declarations of an alleged testator to prove the execution or contents of a lost will. It would be an invitation to fraud of the grossest kind by making the establishment of spurious wills a comparatively easy matter. It gives third persons an opportunity to come in and testify as to the oral statements of the testator after his own lips have been sealed by death. He no longer has an opportunity to either affirm or deny and the sole requirement for the admission of the declarations is that the declarant be dead. In no other field of the law is there such a broad exception to the hearsay rule. Even if we assume that the testifying witnesses would always tell the truth, the admission of such evidence is still unsound. Persons often make false or misleading statements when talking about their own wills for the very purpose of concealing the truth. There is probably no subject about which one is less likely to tell the truth than that of

the contents of his own will. He may have various reasons for wishing to keep the matter secret, and it would be dangerous indeed to permit the statements he might have made with intent to mislead or mystify curious or expectant relatives to be used as the truth in establishing the will after his death.

Although some courts have actually used the declarations of the testator to prove the execution and contents of a lost will, it is believed that such is unsound in principle and that the *dicta* supporting such a view in Kentucky should be repudiated.

BERTEL M. SPARKS.