

1903, with a dangerous and deadly weapon, to-wit, the revolving pistol aforesaid in and upon the head and body of him the said James P. McCann, divers and sundry mortal wounds he the said James P. McCann at the county of St. Louis and State of Missouri aforesaid, on the said 18th day of June, A.D. 1903, then and there of the mortal wounds aforesaid instantly died. And so the grand jurors upon their oath aforesaid, do say that the said Frederick Seymour Barrington, him the said James P. McCann, in the manner and by the means aforesaid, feloniously, willfully, deliberately, on purpose and of his malice aforethought did kill and murder, against the peace and dignity of the State.¹

authority of the State of Missouri, accuse Frederick Seymour Barrington of the crime of murder in the first degree, committed as follows:

The said Frederick Seymour Barrington on the 18th day of June, A.D. 1903, in the County of St. Louis, aforesaid, feloniously, willfully, deliberately, and of his malice aforethought, with premeditation, did kill and murder James P. McCann, with a pistol loaded with a leaden bullet, from the effects of which he died on June 18, 1903; against the peace and dignity of the State of Missouri.⁴

C. S. Potts.

PROBATE OF LOST WILLS IN MISSOURI

The fact that lost wills may be probated is clearly established. At an early date, ecclesiastical law took the position that the loss or destruction of a testament did not prevent its probate, if two witnesses could be found who saw and read the testament, remembered the contents, and deposed as to its tenor.¹ In the United States, the courts have allowed the probate of lost wills from early days.² In some states the matter is now regulated by statute.³

In Missouri there appears to be no statute referring expressly to the probate of lost wills, but from 1834 down to date, the probate of such wills has been allowed provided they can be sufficiently proved.⁴ The Missouri cases which have passed upon the question will be examined in this note. By lost wills here are meant wills which have been lost or destroyed before the testator's death but not revoked, and wills which have been lost or destroyed after the testator's death. In other words, the term "lost wills" includes those which have been burned or other-

¹ 198 Mo. 36-37.

⁴ THE MISSOURI CRIME SURVEY, p. 550.

² PAGE ON WILLS (2nd ed.), sec. 633, citing SWINBURN ON TESTAMENTS, part 6, sec. 14; see JARMAN ON WILLS, p. 124, n.

³ 40 Cyc. 1236; 28 R. C. L. 380; 1 PAGE ON WILLS (2nd ed.), p. 1057; 3 REDFIELD ON WILLS (2nd ed.), p. 15; SCHOULER ON WILLS, sec. 402; THORNTON ON THE LAW OF LOST WILLS. See also note in 34 A. L. R. 1304.

² WOERNER ON THE AMERICAN LAW OF ADMINISTRATION (3d ed.), p. 746.

⁴ Graham v. O'Fallon, (1834) 3 Mo. 507; Charles v. Charles, (1926) 313 Mo. 258, 281 S. W. 417. See also KELLEY'S MISSOURI PROBATE LAW AND PRACTICE (5th ed.), p. 59.

wise destroyed under such circumstances as not to amount to a revocation.

JURISDICTION

By statute the probate courts⁵ have exclusive original jurisdiction in all cases relative to the probate of wills.⁶ Likewise, the probate courts have exclusive original jurisdiction in all cases relative to the probate of lost wills.⁷

When a paper claimed to be a lost will has been accepted or rejected by the probate court, a proceeding may be instituted in the circuit court either to establish or reject the said will.⁸ The effect of this proceeding is the same as if an appeal had been taken from the probate court to the circuit court, and the proceedings are in effect transferred from the probate court to the circuit court.⁹ The proceeding in the circuit court is then one at law, and the issue of "will" or "no will" is submitted to a jury.¹⁰ The findings of fact by the trial court (circuit court), supported by evidence, are binding on the appellate court.¹¹

PROOF

At an early date, it was decided that a will which had been lost or destroyed might be established by secondary evidence, showing its contents, and that it was subscribed by the testator and two witnesses in his presence.¹² Probate may be granted upon a copy.¹³ Where there is no copy the contents of the will may be established by the subscribing witnesses, or others who have read it.¹⁴ It has been said that probate may be granted of so much of a will as can be proved.¹⁵ Where a page is ineffectually destroyed, its contents may be established.¹⁶ It is not necessary to prove every letter or word, but enough so that the court may be sure that it is the probate of the same will the testator executed.¹⁷ And when so restored the will becomes the written evi-

⁵ In 1827 the probate court was abolished and the jurisdiction transferred over to the county court. *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130. In 1877 the probate court was again established. *Laws of Missouri, 1877*, p. 229.

⁶ *Banks v. Banks*, 65 Mo. 432; *Harrell v. Harrell*, 284 Mo. 218, 223 S. W. 919. R. S. Mo. 1919, sec. 517.

⁷ *Graham v. O'Fallon*, *supra* footnote 4; *Jackson v. Jackson*, 4 Mo. 210 (county court had jurisdiction at that time—see footnote 5); *Harrell v. Harrell*, *supra* footnote 6.

⁸ *Dickey v. Malechi*, *supra* footnote 5; *Harrell v. Harrell*, *supra* footnote 6; R. S. Mo. 1919, sec. 525.

⁹ *Schaaf v. Peters*, 111 Mo. App. 47, 90 S. W. 1037. Formerly a will contest it was changed from five years to two years. *Laws 1907*, p. 451. In 1917 it was reduced to one year. *Laws 1917*, p. 106.

¹⁰ *Schaaf v. Peters*, *supra* footnote 9.

¹¹ *Schaaf v. Peters*, *supra* footnote 9; *Charles v. Charles*, *supra* footnote 4.

¹² *Harrell v. Harrell*, *supra* footnote 6, citing *Graham v. O'Fallon*, *supra* footnote 4; *Schaaf v. Peters*, *supra* footnote 9.

¹³ *Graham v. O'Fallon*, *supra* footnote 4; *Odenwaelder v. Schorr*, 8 Mo. App. 458.

¹⁴ *Graham v. O'Fallon*, *supra* footnote 4.

¹⁵ *Jackson v. Jackson*, *supra* footnote 7; *Dickey v. Malechi*, *supra* footnote 5.

¹⁶ *Varnon v. Varnon*, 67 Mo. App. 534.

¹⁷ *Odenwaelder v. Schorr*, *supra* footnote 13.

dence of the will of the testator, and takes the place of the lost instrument, and for all practical purposes stands in its stead and is the will of the testator.¹⁸

Although the statute¹⁹ provides the method for revoking wills, it is true that if the will was last known to have been in possession of the testator, and after his death could not be found, the presumption is that it was revoked by destroying it, *animo revocandi*.²⁰ This presumption stands in, the absence of positive proof, but may be rebutted.²¹ The statements of the testator tending to show the continued existence of the will are competent to rebut this presumption.²² But the presumption that the will was revoked does not exist where it is shown that another person was in custody of the will.²³

The admission of secondary evidence does not dispense with any of the provisions required by the statute to give solemnity to the instrument sought to be established as a last will and testament. After its existence has been proved and its subsequent loss, then it must equally be proved that it was subscribed by the testator, and that the two witnesses each subscribed in his presence.²⁴ One of the witnesses will be enough to establish the due execution of the will if he can prove that he saw the other witness subscribe it in the testator's presence.²⁵

As in the case of other wills, in a suit to establish a lost will, the burden of proof is upon the proponents to show the due execution of the will, and this rule requires the showing of mental capacity to make a will, as well as age.²⁶

In the case of a lost will the question is, not whether the lost instrument has been established by the best evidence, but whether or not it has been established by the best evidence procurable under the peculiar circumstances.²⁷ One witness is sufficient to establish the contents of a lost will.²⁸ The same is true as to the establishment of one page, where that is all that is sought to be established.²⁹ The contents may be established by the subscribing witnesses, or others who have read it.³⁰ Legatees and devisees are competent witnesses in a will contest, except as to the formal execution of the instrument.³¹

¹⁸ *Schaaf v. Peters*, *supra* footnote 9.

¹⁹ Now R. S. Mo. 1919, sec. 508.

²⁰ *Hamilton v. Crowe*, 175 Mo. 634, 75 S. W. 389; *Vesser v. Neff*, —Mo. —, 214 S. W. 185; *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103; *Dickey v. Malechi*, *supra* footnote 5.

²¹ *Hamilton v. Crowe*, *supra* footnote 20; *McMurtrey v. Kopke*, (Mo. 1923), 250 S. W. 399.

²² *McMurtrey v. Kopke*, *supra* footnote 21.

²³ *Charles v. Charles*, *supra* footnote 4.

²⁴ *Graham v. O'Fallon*, *supra* footnote 4.

²⁵ *Graham v. O'Fallon*, *supra* footnote 4; *Graham v. O'Fallon*, 4 Mo. 601; *Harrell v. Harrell*, *supra* footnote 6.

²⁶ *McMurtrey v. Kopke*, *supra* footnote 21.

²⁷ *Charles v. Charles*, *supra* footnote 4.

²⁸ *Graham v. O'Fallon*, 4 Mo. 601; *Dickey v. Malechi*, *supra* footnote 5.

²⁹ *Varnon v. Varnon*, *supra* footnote 16.

³⁰ *Supra* footnote 14.

³¹ *Mann v. Balfour*, *supra* footnote 20.

Where the issue is not regarding a lost will, testimony as to what the testator said after making the will, in relation to the causes which influenced him in making it, is incompetent, as hearsay evidence.³² But as to quantum and quality of proof, a clear distinction has been drawn between a mere will contest and the proof of a lost will. In the case of a lost will of whose contents secondary evidence alone is obtainable, what the testator himself said about it may be admitted to corroborate other substantial evidence of the due execution and the loss of the will, and that it was not subsequently revoked.³³

C. SIDNEY NEUHOFF.

THE ELEMENT OF "MALICE" IN THE TORT ACTION FOR INDUCING BREACH OF CONTRACT

To a novice in the law many commonplace words are confusing as having a peculiar legal meaning quite different from their inflexible lay usage; and of this class one of the most elusive is "malice." Nor do the courts enlighten one much, though their definitions are impressive tributes to the casuistry of modern judges who carry on in a venerable scholastic spirit by repeating the ancient platitudes concerning malice, the gist of all of which seems to be that malice is wrong and therefore wrongful—for to the juridical mind there is evidently some nice distinction between the adjective and the noun—a wrongful act is an act without legal justification and therefore an unlawful act, and therefore an actionable one. In an early authority we read, "A malicious act is in law and fact a wrong act and therefore a wrongful act and therefore actionable if injury ensues,"¹ and subsequently this definition is accepted as authoritative. Or to put it in the unimpeachable and universal formula: "Malice is the intentional doing of a wrongful act without just cause or excuse."² The weight of authority behind these formulas is impressive, but as Sir Frederick Pollock remarks, "We do not need the House of Lords to tell us that a wrongful procurement of a breach of contract is wrongful or that an unlawful act or an act without lawful justification is unlawful." As to what constitutes lawful justification, the courts are vague and ambiguous, or absolutely silent.

The difficulty seems to be that in the early days of the action, the courts were trying to circumvent a maxim generally relied on at that time, and upheld by such an able jurist as Cooley: that "Malicious motives make a bad case worse, but they cannot make that wrong which

³² Schierbaum v. Schemme, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; Walton v. Kendrick, 122 Mo. 54, 27 S. W. 872, 25 L. R. A. 701.

³³ Charles v. Charles *supra*, footnote 4; Mann v. Balfour, *supra* footnote 20.

¹ Bowen v. Hall, 6 Q. B. D. 333.

² Brennan v. United Hatters of No. America Local No. 17, 73 N. J. L. 729, 65 Atl. 165; So. Wales Miners' Fed. v. Glomorgan Coal Co. A. C. (1905) 239, 244; Walker v. Cronin, 107 Mass. 555 (1871); Beekman v. Marsters, 195 Mass. 205 (1907); Campbell v. Gates, 236 N. Y., 457; Wheeler Stenzel Co. v. Am. Window Glass Co., 202 Mass. 471; Lamb v. Cheney, 227 N. Y. 418; Luke v. Du Pree, 124 S. E. 13.