

## REBUTTING THE PRESUMPTION OF REVOCATION OF LOST OR DESTROYED WILLS

The law is well settled that a will may be entitled to probate even though the proponent is unable to produce the document before the court.<sup>1</sup> To entitle a missing will to probate, the proponent must prove its due execution and contents.<sup>2</sup> Evidence sufficient to convince the court and the jury that the testator did not destroy the will with an intent to revoke it is essential to the probate of a missing will, since the proponent is faced with the necessity of rebutting the presumption of destruction by the testator *animo revocandi*.<sup>3</sup> This presumption doubtless has its roots in the extreme solicitude of the law for the descent and distribution of property in conformity with the desires of the deceased owner. Where there is no will, in the sense that no physical document is produced, the presumption that the will was destroyed by the testator *animo revocandi* operates as a safeguard against the attempted probate of spurious or fraudulent wills. It is the purpose of this note to attempt some classification of those circumstances which appear sufficient to rebut this presumption, and to treat briefly some of the legal difficulties to be overcome in establishing such proof.

### I. GENERAL TREATMENT OF THE PRESUMPTION

Although a will validly executed remains in effect until revoked, it is settled that where a will offered for probate cannot be produced the presumption arises that it was destroyed by the testator *animo revocandi*, at least when it appears that the will was in the possession of or accessible to the testator.<sup>4</sup> Thus it is apparent that the presumption covers both elements necessary to an effective revocation of a will—the actual physical destruction of the document itself and an intention on the part of the testator to revoke his will.<sup>5</sup> Where it appears that after the due execution of a will the testator placed it in the custody of another, some courts hold that no presumption arises upon inability to find it at the testator's death, but that on the contrary it is

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1. Atkinson, *Wills* (1937) 452; Note (1927) 12 *ST. LOUIS LAW REVIEW* 283.

2. See cases collected in 68 *C. J., Wills* (1934) 1031-1033, secs. 820-821.

3. *Wood v. Achey* (1918) 147 *Ga.* 571, 94 *S. E.* 1021; *Schultz v. Schultz* (1886) 35 *N. Y.* 653, 91 *Am. Dec.* 88; *Behrens v. Behrens* (1890) 47 *Ohio St.* 323, 25 *N. E.* 209, 21 *Am. St. Rep.* 320.

4. For general collection of cases see Note (1925) 34 *A. L. R.* 1309.

5. *Managle v. Parker* (1908) 75 *N. H.* 139, 71 *Atl.* 637, 24 *L. R. A.* (N. S.) 180, *Ann. Cas.* 1912 A 269; *In re Pattison's Will* (*Surr. Ct.* 1912) 140 *N. Y. S.* 478.

assumed that the will was lost.<sup>6</sup> The language of other opinions indicates that proof that the will was not in the custody of the testator is a circumstance sufficient to overcome or rebut the presumption of destruction by the testator *animo revocandi*,<sup>7</sup> though the better rule would seem to require proof that the testator had no access to the document.

Since the presumption of destruction by the testator *animo revocandi* arises upon the mere nonproduction of the physical document, though the actual cause of its unavailability is not apparent,<sup>8</sup> *a fortiori*, where it is shown affirmatively that the testator destroyed his will or acquiesced in its destruction, the presumption is that he did so with an intent to revoke it.<sup>9</sup> It has even been held that where the testator was aware of the loss or destruction of his will while in his custody and made no attempt to republish it notwithstanding ample opportunity to do so, actual revocation will be presumed.<sup>10</sup>

In the case of a will executed in duplicate or triplicate, where one copy is retained by the testator, the nonproduction of that copy raises a presumption of destruction of the will by the testator *animo revocandi*.<sup>11</sup> Where however the testator retained all the copies in his possession, the presumption which arises from the inability to produce one of them has been said to be of the weakest character;<sup>12</sup> and where the other copy or copies have been carefully guarded and preserved by the testator, the presumption does not of itself furnish sufficient ground for the denial of probate.<sup>13</sup>

It is clear that the presumption of destruction by the testator *animo revocandi* is not conclusive.<sup>14</sup> It has been said that the

6. *Allen v. Scruggs* (1914) 190 Ala. 654, 67 So. 301; *Mann v. Balfour* (1905) 187 Mo. 290, 86 S. W. 103; *McElroy v. Phink* (1903) 97 Tex. 147, 76 S. W. 753.

7. *In re Robinson's Estate* (1928) 149 Wash. 307, 270 Pac. 1020; *In re Harris' Estate* (1895) 10 Wash. 555, 39 Pac. 148.

8. *McClellan v. Owens* (1934) 335 Mo. 884, 74 S. W. (2d) 570, 95 A. L. R. 711.

9. *Almeida's Estate* (1912) 21 Pa. Dist. 161; *Howard v. Combs* (Tex. Civ. App. 1938) 113 S. W. (2d) 221.

10. *Deave's Estate* (1891) 140 Pa. St. 242, 21 Atl. 395; see also *Steele v. Price* (1844) 5 B. Mon. (Ky.) 361. See *infra*, note 56.

11. *In re Vogelsang's Will* (Surr. Ct. 1928) 232 N. Y. S. 654; *In re Schofield's Will* (Surr. Ct. 1911) 129 N. Y. S. 190. For general treatment of problem as related to duplicate wills see Note (1927) 48 A. L. R. 297.

12. *In re Shield's Will* (Surr. Ct. 1921) 190 N. Y. S. 562.

13. *Ibid.*

14. *In re Eder's Estate* (1934) 94 Colo. 173, 29 P. (2d) 631; *In re Ladman's Estate* (1935) 128 Neb. 483, 259 N. W. 50; *Williams v. Miles* (1903) 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 4 Ann. Cas. 306, 62 L. R. A. 383; *Foster's Appeal* (1878) 87 Pa. St. 67, 30 Am. Rep. 340.

force of the presumption varies greatly, being weak or strong according to the circumstances,<sup>15</sup> and it is settled that it may be entirely rebutted and overcome by competent proof that the will was not destroyed by the testator with an intent to revoke it.<sup>16</sup>

## II. METHOD OF PROOF

Since the presumption of destruction by the testator *animo revocandi* may be rebutted by competent evidence, it becomes important to understand the method of introducing counterbalancing circumstances. The presumption may of course be rebutted by direct proof that the will was otherwise destroyed.<sup>17</sup> Although it is not overcome or rebutted by the general presumption of continuing existence at a subsequent time of a fact or condition shown to have existed at a previous time,<sup>18</sup> circumstantial evidence showing no intent by the testator of revoking his will is competent to rebut the presumption that the will was destroyed by the testator *animo revocandi*.<sup>19</sup> The proponents of a missing will need not, however, prove the exact manner of destruction or the person by whom the will was taken or destroyed<sup>20</sup> but need only show that it was not destroyed by the testator with an intent to revoke.

The greatest conflict among the authorities as to the method of proving that a missing will is unrevoked is on the issue of whether the declarations of the testator are competent to overcome the presumption by the testator *animo revocandi*. The rule in most jurisdictions is that declarations of the testator made between the time of the execution of the will and his death are admissible on the issue of revocation arising from the operation of the presumption of destruction by the testator *animo revocandi*;<sup>21</sup> and it has even been held that declarations of the testator made prior to the execution of his will are likewise admis-

15. See Note (1914) 50 L. R. A. (N. S.) 861, 865.

16. *Rose v. Hunnicutt* (1924) 166 Ark. 134, 265 S. W. 651; *In re Walsh's Estate* (1917) 196 Mich. 42, 163 N. W. 70, Ann. Cas. 1918 E 217; *Gfeller v. Lappe* (1904) 208 Pa. 48, 57 Atl. 59.

17. *Burton v. Wylde* (1913) 261 Ill. 397, 103 N. E. 976; *Foster's Appeal* (1878) 87 Pa. St. 671, 30 Am. Rep. 340; *Pemberton v. Pemberton* (Chan. 1807) 13 Ves. Jun. 290, 33 Eng. Rep. 303.

18. *In re Ross' Estate* (1926) 199 Cal. 641, 250 Pac. 676. Cf. *In re Sweetman's Estate* (1921) 185 Cal. 27, 195 Pac. 918.

19. *Spencer's Appeal* (1905) 77 Conn. 638, 639, 60 Atl. 289; *Aldrich v. Aldrich* (1913) 215 Mass. 164, 102 N. E. 487; *Gavitt v. Moulton* (1903) 119 Wis. 35, 96 N. W. 395.

20. *McClellan v. Owens* (1934) 335 Mo. 884, 74 S. W. (2d) 570, 95 A. L. R. 711.

21. See in this connection Note (1932) 79 A. L. R. 1493, 1498.

sible.<sup>22</sup> There is, however, substantial authority holding that declarations of the testator are admissible only when shown to be a part of the *res gestae*.<sup>23</sup> The theory of the courts following this view is that the fact to be proved in such cases is the act claimed as a revocation together with the intent with which it was done, and that all declarations of the testator which do not accompany the act are to be regarded as mere hearsay.<sup>24</sup> It has been pointed out that as the destruction of the will is merely presumed from the fact it could not be found, there are no *res gestae*; consequently no basis exists on which to refuse to admit the declarations of the testator in evidence.<sup>25</sup> The better rule would seem to be the one recognized by the majority of jurisdictions to the effect that statements showing an intention to do a given act are admissible to prove the probability of corresponding conduct.<sup>26</sup> The state of mind of the testator is relevant on the issue of intention with which the act was done, and may fairly be implied from his declarations when they are made under conditions that negative any motive to deceive.<sup>27</sup>

Under the rule followed by some courts admitting declarations of the testator only when accompanied by acts and constituting a part of the *res gestae*, it is obvious that such declarations alone are not sufficient to rebut the presumption of destruction by the testator *animo revocandi*. Some confusion has resulted, however, from the language adopted by courts not purporting to follow that rule. It has been rightly held, for instance, that the testator's declarations subsequent to the execution of his will are admissible to corroborate other evidence that the will was lost or destroyed with no intent to revoke.<sup>28</sup> This language would seem to imply that the declarations standing alone are insufficient. But against the contention that such statements are sufficient to rebut the presumption only when supported by other evidence, it has been held that statements of the testator tending to show the continued existence of the will are competent to rebut the

22. *Howard v. Combs* (Tex. Civ. App. 1938) 113 S. W. (2d) 221; *Compton v. Dannenbauer* (1931) 120 Tex. 14, 35 S. W. (2d) 682.

23. *Waterman v. Whitney* (1854) 11 N. Y. 546, 62 Am. Dec. 71; *Eighmy v. People* (1880) 79 N. Y. 546.

24. *Waterman v. Whitney* (1854) 11 N. Y. 546, 62 Am. Dec. 71.

25. *Jackson v. Hewlett* (1913) 114 Va. 573, 77 S. E. 518; *contra Throckmorton v. Holt* (1900) 180 U. S. 552.

26. Note (1925) 38 Harv. L. Rev. 709.

27. *Hinton, Post-Testamentary Statements to Prove a Lost Will Unrevoked* (1927) 21 Ill. L. Rev. 821, 828.

28. *Mann v. Balfour* (1905) 137 Mo. 290, 86 S. W. 103; *Charles v. Charles* (1926) 313 Mo. 256, 281 S. W. 417; *Sugden v. Lord St. Leonards* (1876) L. R. 1 Prob. Div. 154, 45 L. J. Prob. (N. S.) 49, 34 L. T. (N. S.) 372, 24 Week. Rep. 479.

presumption that a will in the custody of the testator which could not be found at his death was revoked.<sup>29</sup>

It is to be noted that statutes in several states provide that no lost or destroyed will shall be established unless the same is proved to have been in existence at the time of the testator's death, or to have been fraudulently destroyed during his lifetime.<sup>30</sup> In states following a strict construction of the statute, notably New York, it is necessary to prove physical existence of the document at the time of the testator's death if it cannot be shown that the destruction was fraudulent.<sup>31</sup> Thus, in these jurisdictions, proof that the loss or destruction was accidental is insufficient to rebut the presumption.<sup>32</sup> The courts in at least one jurisdiction have, however, construed the statute to mean that proof of the physical existence of the document is not necessary, existence in contemplation of law being regarded as sufficient.<sup>33</sup> Under such a view proof of accidental loss or destruction is pertinent to rebut the presumption of revocation. Where, as in most states, there is no similar statute, proof of accidental loss or destruction is entirely competent as a rebutting circumstance.<sup>34</sup>

### III. BURDEN OF PROOF

Another problem confronting the proponent of a missing will is the necessity of sustaining the burden of proof. No little confusion is caused by the indiscriminate use of the term by the courts where it is sought to probate a missing will.<sup>35</sup> Where the will is produced, the burden of establishing revocation is held to rest upon the contestant;<sup>36</sup> but in the event of nonproduction of the will it is generally said that the burden of proving circumstances sufficient to rebut the presumption of destruction by the testator *animo revocandi* rests upon the proponent.<sup>37</sup> It is difficult to ascertain whether the term "burden of proof" is used in the sense that the ultimate risk of non-persuasion rests upon the proponent, or whether it simply means that the duty is in-

29. *McClellan v. Owens* (1934) 335 Mo. 884, 74 S. W. (2d) 570, 95 A. L. R. 711.

30. Atkinson, *Wills* (1937) 453; Note (1925) 34 A. L. R. 1304.

31. Note (1923) 8 Minn. L. Rev. 51.

32. *Matter of Reiffeld's Will* (Surr. Ct. 1901) 73 N. Y. S. 808.

33. *In re Havel's Estate* (1923) 156 Minn. 253, 194 N. W. 633.

34. *Hamilton v. Crowe* (1903) 175 Mo. 634, 75 S. W. 389; *McIntosh v. Moore* (1899) 22 Tex. Civ. App. 22, 53 S. W. 611.

35. Atkinson, *Wills* (1937) 519-522.

36. *Ibid.*

37. *Scott v. Maddox* (1901) 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263; *St. Mary's Home v. Dodge* (1913) 257 Ill. 518, 101 N. E. 46; *Scoggins v. Turner* (1887) 98 N. C. 135, 3 S. E. 719.

cumbent upon him to meet the presumption of revocation, thus placing the ultimate burden on the contestant to establish revocation. Two reasons have been advanced for the position that the risk of non-persuasion is on the proponent where the presumption of revocation is invoked. One is that the proponent is required to prove nonrevocation as well as execution; the other is that the actual effect of the presumption may be to shift the risk of non-persuasion.<sup>38</sup> The latter theory has been shown to be contrary to the general rule that the risk of non-persuasion remains constant throughout the trial.<sup>39</sup>

It is generally said that proof sufficient to rebut the presumption of revocation must be clear, satisfactory, and free from doubt.<sup>40</sup> The presumption has been said to stand in the place of positive proof, and the courts will not weigh the probability of decedent's wishes or otherwise speculate as to the motives which may or may not have influenced him in the direction of intestacy.<sup>41</sup> A literal reading of these cases might seem to indicate that a mere preponderance of the testimony would not suffice to rebut the presumption of revocation; however, a probate proceeding being civil in nature, those cases expressly holding a preponderance of the testimony to be sufficient appear to follow the correct view.<sup>42</sup> Whether the circumstances are sufficient to rebut the presumption becomes a question of fact for the court or the jury, and the whole evidence must be inquired into in the determination of the question.<sup>43</sup>

#### IV. CIRCUMSTANCES REBUTTING THE PRESUMPTION OF REVOCATION

##### *A. Proof of Probable Adherence to the Will*

Where it appears that the testator died believing his will was in existence and unrevoked, such proof is generally admitted as tending to rebut the presumption of revocation that arises when the physical document cannot be produced.<sup>44</sup> Thus declara-

38. Atkinson, *Wills* (1937) 519.

39. Atkinson, *Wills* (1937) 520; see 5 Wigmore, *Evidence* (2d ed. 1923) 448, sec. 2489.

40. *Thomas v. Thomas* (1905) 129 Iowa 159, 105 N. W. 403; *McMurtrey v. Kopke* (Mo. 1923) 250 S. W. 399; *In re Colbert* (1905) 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439, 3 Ann. Cas. 952; *Michell v. Low* (1906) 213 Pa. 526, 63 Atl. 246.

41. *Collyer v. Collyer* (1888) 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405.

42. Comment (1938) 6 Fordham L. Rev. 329.

43. *Southworth v. Morgan* (C. C. E. D. Wis. 1882) 22 Fed. Cas. No. 13,194.

44. *In re Thompson's Estate* (1921) 185 Cal. 763, 198 Pac. 795, where during last illness testatrix talked of her will to nurse and had often

tions of the testator on his deathbed that he has a will and has not revoked it are relevant.<sup>45</sup> Likewise, proof that it was very improbable the testator had revoked his will has been held a circumstance competent to overcome the presumption.<sup>46</sup> Accordingly, proof that the circumstances of the testator had remained substantially unchanged and that good will and affection had continued to exist between the testator and his beneficiaries is generally sufficient to rebut the presumption.<sup>47</sup> The testator's mere expression of satisfaction with the will has been held suitable proof to rebut the presumption even though several days intervened between the last such expression and the death of the testator.<sup>48</sup> These decisions would appear to conflict with the holding of some courts that every possibility of destruction of the will by the testator himself must be excluded before the will may be established;<sup>49</sup> but such decisions may readily be justified under the rule that the evidence necessary to repel the presumption need not amount to positive certainty but need only be such as reasonably produces moral certainty.<sup>50</sup> It has been held that

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written her sister concerning it; *Dickey v. Malechi* (1839) 6 Mo. 177, 34 Am. Dec. 130, where witness heard testator confirm will and was with him until his death the next day; *Glockner v. Glockner* (1919) 263 Pa. 393, 106 Atl. 731, where testator referred to will during his last moments of consciousness.

45. In the matter of *Page* (1886) 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395; *Ewing v. McIntyre* (1905) 141 Mich. 506, 104 N. W. 787; In re *Miller's Will* (1907) 49 Ore. 452, 90 Pac. 1002, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277.

46. *Spencer's Appeal* (1905) 77 Conn. 639, 60 Atl. 289.

47. The following are typical situations in which the proof has been held sufficient to rebut the presumption: In re *Bradley's Estate* (1921) 215 Mich. 72, 183 N. W. 897, where testator feared irresponsible daughter would squander estate, and for sentimental reasons wished his property to revert to his family at her death; *McMurtrey v. Kopke* (Mo. 1923) 250 S. W. 399, where testator made constant references to his will before his death; *Gfeller v. Lappe* (1904) 208 Pa. 48, 57 Atl. 59, where testator showed constant anxiety for his will and had promised his mother on her deathbed to make certain dispositions of his property; In re *Auritt's Estate* (1933) 175 Wash. 303, 27 P. (2d) 713, where testatrix was shown to have a strong affection for her brother from the time she executed her will until her death and made repeated affirmations until shortly before her death that she had made a will in his favor; In re *Lamburg's Will* (1920) 170 Wis. 502, 175 N. W. 925, where declarations of testatrix showed no intent to revoke and indicated steadfast adherence to purpose of providing for daughter who had aided her and for a son mentally and physically unable to care for himself.

48. *McClellan v. Owens* (1934) 335 Mo. 884, 74 S. W. (2d) 570, 95 A. L. R. 711; see also In re *Sweetman's Estate* (1921) 185 Cal. 27, 195 Pac. 918. Cf. *Holler v. Holler* (1921) 298 Ill. 418, where the testator's statements of dissatisfaction with the will were held to prove probable revocation.

49. In re *Ascheim's Will* (Surr. Ct. 1912) 135 N. Y. S. 515.

50. *Jackson v. Hewlett* (1913) 114 Va. 573, 77 S. E. 518.

where wills have been made pursuant to a valid contract between the parties, each in consideration of the other, they may not be revoked by one party without the consent of the other; nor can the court find a revocation was intended if no will can be found upon the death of one of the parties to the contract.<sup>51</sup>

### B. Location of Will

The last reported location of a will prior to its disappearance is often a circumstance of sufficient weight to rebut the presumption of destruction by the testator *animo revocandi*. Where the testator has no control over or actual access to the will, proof of such facts is in itself sufficient to rebut the presumption.<sup>52</sup> Indeed some cases hold that in such a situation the presumption of revocation by the testator does not even arise.<sup>53</sup> Whether it be said that the presumption does not arise or that it is rebutted, the ultimate result under such facts is the admission of the will to probate.

Where the testator places his will in a depository to which he has access and it is subsequently destroyed without his consent, proof of such fact is usually held sufficient to rebut the presumption of revocation by the testator. It is obvious that in such a situation the elements of intent to revoke and the act of destruction by the testator are absent, and consequently there can be no effective revocation. Thus where it appears that the will was left in a building destroyed by a public calamity, the presumption is said to be overcome.<sup>54</sup> And where it was apparent that mice had destroyed the contents of a box wherein the testator customarily kept his important papers, the presumption was likewise said to be rebutted.<sup>55</sup> A few cases, however, have held that where the testator, knowing some time before his death that his will was lost or destroyed, had ample opportunity to execute a new one but failed to do so, his conduct was to be deemed an adoption of the loss or destruction as a revocation.<sup>56</sup>

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51. *Chambers v. Porter* (Iowa 1921) 183 N. W. 431; *Howard v. Combs* (Tex. Civ. App. 1938) 113 S. W. (2d) 221.

52. *In re Robinson's Estate* (1928) 149 Wash. 307, 270 Pac. 1020; *In re Harris' Estate* (1895) 10 Wash. 555, 39 Pac. 148.

53. *In re Rowe's Estate* (Surr. Ct. 1917) 165 N. Y. S. 1064; but see *Thomas v. Thomas* (1905) 129 Iowa 159, 105 N. W. 403. Cf. *In re Fisher's Estate* (1929) 47 Idaho 668, 279 Pac. 291, where the presumption rebutted was one arising where the will was found cancelled and obliterated.

54. *Re Patterson* (1909) 155 Cal. 626, 102 Pac. 941, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, 26 L. R. A. (N. S.) 654; *In re Gardner* (Prob. Div., and Adm. 1858) 1 Sw. & Tr. 109, 164 Eng. Rep. 651.

55. *McMurtrey v. Kopke* (Mo. 1923) 250 S. W. 399.

56. *Deave's Estate* (1891) 140 Pa. St. 242, 21 Atl. 395; *Steele v. Price* (1844) 5 B. Mon. (Ky.) 361.



It is submitted that such a rule ignores the elementary requirements of a valid revocation, inasmuch as there is no act of destruction by the testator or by another at his direction or in his presence. Even though an intent to adopt the loss as a revocation be inferred from the circumstances, it is elemental that the intent and the act must concur.<sup>57</sup>

Where it affirmatively appears that the will was taken or destroyed by a person other than the testator, especially where such person is one interested adversely to the will, the presumption of destruction by the testator *animo revocandi* does not obtain.<sup>58</sup> So, the presumption was held to be rebutted where it was shown that the safe containing the will was carried off and opened by the testator's brother, the brother being interested in the destruction of the will.<sup>59</sup> Mere proof that parties interested adversely to the will had an opportunity to destroy it is not sufficient to rebut the presumption of revocation, for the law does not presume fraud.<sup>60</sup> Such proof may, however, be considered by the court or the jury along with other circumstances tending to rebut the presumption.<sup>61</sup>

### C. Mental or Physical Incapacity

Destruction of a will by an insane testator does not constitute a valid revocation.<sup>62</sup> And so proof that the will was lost or destroyed at a time when the testator had no testamentary capacity is a circumstance sufficient to rebut the presumption of destruction by the testator *animo revocandi*.<sup>63</sup> It must be shown that the will was in existence when the testator suffered impairment of his mental capacity, and it must further appear that he never thereafter regained the mental capacity essential to a revocation.<sup>64</sup> Mere proof that the testator was of unsound mind during a part of the period following the execution of his will does not give rise to a presumption that the loss or destruction occurred during his disability, particularly where time inter-

57. Atkinson, *Wills* (1937) 374.

58. In re Coolman's Estate (1931) 112 Cal. App. 744, 297 Pac. 593.

59. McClellan v. Owens (1934) 335 Mo. 884, 74 S. W. (2d) 570, 95 A. L. R. 711.

60. Griffith v. Higinbotom (1914) 262 Ill. 126, 104 N. E. 233, Ann. Cas. 1915 B 250; In re Ascheim's Will (Surr. Ct. 1912) 135 N. Y. S. 515.

61. Gumtow v. Janke (1913) 177 Mich. 574, 143 N. W. 616; Gavitt v. Moulton (1903) 119 Wis. 35, 96 N. W. 395.

62. Inlow v. Hughes (1906) 38 Ind. App. 375, 76 N. E. 763.

63. Harris v. Camp (1912) 138 Ga. 752, 76 S. E. 40; Schaaf v. Peters (1901) 111 Mo. App. 447, 90 S. W. 1037. See Note (1909) 18 L. R. A. (N. S.) 99.

64. Watkins v. Watkins (1926) 142 Miss. 210, 106 So. 753; In re Sharp's Will (Surr. Ct. 1929) 235 N. Y. S. 692.

vened between the end of such disability and the testator's death within which he may have accomplished the destruction.<sup>65</sup>

Similarly, proof that the will was in existence at a time when the testator became physically unable to gain access to it and that such inability continued until his death is a strong circumstance to repel the presumption that the testator destroyed it *animo revocandi*.<sup>66</sup>

#### D. Fraud and Undue Influence

Where a missing will is offered for probate, no presumption arises that it was fraudulently destroyed by another, for that would be presuming a fraud or a crime.<sup>67</sup> Thus the presumption of revocation may not be rebutted by mere proof that another had an opportunity or a motive to destroy the will.<sup>68</sup> It is well settled, however, that proof tending to show the actual fraudulent destruction of the will by another is relevant to rebut the presumption that the testator destroyed it *animo revocandi*, and it is immaterial whether such destruction occurred before or after the death of the testator.<sup>69</sup>

The revocation of a will by a testator devoid of his free agency is invalid.<sup>70</sup> Consequently, where the destruction of a will is shown to have been provoked by the exercise of undue influence upon the testator, the presumption that he intended to revoke is overcome, and the will may be admitted to probate on proof of facts showing its due execution and its destruction by reason of such influence.<sup>71</sup>

#### E. Accident and Mistake

Since the concurrence of the act of destruction and the intent to revoke is necessary to constitute a valid revocation, it is obvious that clear proof of accidental destruction by the testator is a circumstance sufficient to rebut the presumption of revocation. In such a situation the element of intent to revoke is missing. It is also clear that accidental destruction by a person other than the testator is likewise a competent rebutting circumstance,

65. *McIntosh v. Moore* (1899) 22 Tex. Civ. App. 22, 53 S. W. 611.

66. *Hodgson's Estate* (1921) 270 Pa. 210, 112 Atl. 778; *Jackson v. Hewlett* (1913) 114 Va. 573, 77 S. E. 518.

67. *In re Ascheim's Will* (Surr. Ct. 1912) 135 N. Y. S. 515.

68. *Gumtow v. Janke* (1913) 177 Mich. 574, 143 N. W. 616; *Gavitt v. Moulton* (1903) 119 Wis. 35, 96 N. W. 395; and cases *supra*, note 60.

69. *Thomas v. Thompson* (1934) 114 Fla. 833, 185 So. 321; *Schultz v. Schultz* (1866) 35 N. Y. 653, 91 Am. Dec. 88.

70. *Vaughn v. Vaughn* (1928) 217 Ala. 364, 116 So. 427.

71. *Neal v. Caldwell* (1930) 326 Mo. 1146, 34 S. W. (2d) 104; *Voorhees v. Voorhees* (1903) 39 N. Y. 463, 100 Am. Dec. 458; *Cole v. McClure* (1913) 88 Ohio St. 1, 102 N. E. 264.

whether the destruction be before or after the death of the testator. In such a case neither element of a valid revocation is present, and a contrary rule would work a constructive fraud on the decedent. It should be remembered, however, that under the construction placed upon the statutes of some states, it is necessary to prove the physical existence of a will at the death of the testator, or show that it was fraudulently destroyed.<sup>72</sup> In such jurisdictions proof of the accidental destruction of a will is insufficient to rebut the presumption of revocation.<sup>73</sup>

Where the testator destroys his will under a mistake of law or of fact, the question of overcoming the presumption of revocation depends upon an application of the doctrine of dependent relative revocation. Thus where the testator labored under the mistaken belief that his account book would have the same effect as his will and destroyed the latter in an attempt to relieve his estate from the payment of inheritance taxes, the presumption of revocation was held to be rebutted under the doctrine of dependent relative revocation.<sup>74</sup> The theory of the case was that the testator would not have intended to revoke his will had he known the substitution of the account book would be ineffective. The variety of the fact situations arising under the doctrine of dependent relative revocation as applied to missing wills takes a further discussion of the problem out of the scope of this note.<sup>75</sup>

#### V. CONCLUSION

An analysis of the decisions shows that the policy of the courts and the legislatures plays an important role in determining the sufficiency of the circumstances to rebut the presumption of revocation by the testator where it is sought to probate a missing will. There is small doubt that the fraudulent destruction of wills is a widespread evil.<sup>76</sup> As a consequence most courts are quite liberal in permitting the probate of missing wills where there is any appreciable evidence to show there was no intent on the part of the testator to revoke his will. Such an attitude is praiseworthy inasmuch as it safeguards the decedent's right to dispose of his property as he may desire. In some jurisdictions however statutes have been enacted which admit a will to probate only when it is shown to have been in existence at

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72. Note (1923) 8 Minn. L. Rev. 51.

73. *Matter of Reiffeld's Will* (Surr. Ct. 1901) 73 N. Y. S. 808.

74. *Flanders v. White* (1933) 142 Ore. 375, 18 P. (2d) 823.

75. For a good and concise treatment of the doctrine of dependent relative revocation see Atkinson, *Wills* (1937) 386.

76. Bauer, *The Fraudulent Destruction of Wills—Suggestions for a Legislative Preventive* (1919) 88 Cent. L. J. 190.

the death of the testator, or to have been fraudulently destroyed.<sup>77</sup> As previously noted, courts strictly construing such statutes have required proof of the physical existence of the will in lieu of a clear showing that it was fraudulently destroyed.<sup>78</sup> The policy of these states reveals a realization that there might be danger of fraudulent manufacture or alteration of wills as well as danger of their fraudulent destruction.

Even in the majority of states, however, where there are no such statutes, the danger of probating a will never made is apparently recognized. The mere existence of the presumption of revocation by the testator would seem to indicate a universal awareness of the danger. Consequently, the language of the cases is replete with statements that the proof necessary to rebut the presumption of revocation must be clear and satisfactory.<sup>79</sup> In addition, though the presumption has been held to be overcome by satisfactory proof of a single rebutting circumstance,<sup>80</sup> it will be noted that the majority of cases allowing the probate of a missing will have involved a combination of circumstances going to rebut the presumption.

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77. Atkinson, *Wills* (1937) 453; Note (1925) 34 A. L. R. 1304.

78. Estate of Kidder (1881) 66 Cal. 487, 6 Pac. 326; In re Sheldon (App. Div. 1913) 144 N. Y. S. 94, 97; Kellogg v. Ridgely (1903) 161 Ind. 110, 67 N. E. 929.

79. Thomas v. Thomas (1905) 129 Iowa 159, 105 N. W. 403; In re Colbert (1905) 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439, 3 Ann. Cas. 952; Michell v. Low (1906) 213 Pa. 526, 63 Atl. 246.

80. Chambers v. Porter (Iowa 1921) 183 N. W. 431; Flanders v. White (1933) 142 Ore. 375, 18 P. (2d) 823. The following are typical cases where there is clearly a *combination* of circumstances sufficient to rebut the presumption of revocation by the testator: Townes' Adm'r v. Robertson (1910) 138 Ky. 652, 128 S. W. 1069, where testator destroyed will without mental capacity and under undue influence; Hodgson's Estate (1921) 270 Pa. 210, 112 Atl. 778, where testator was physically incapable of destroying will, others hostile to his intentions had access to the document, and testator during last illness referred to his will as in existence; In re Ziegenhagen's Will (1912) 148 Wis. 382, 134 N. W. 905, where testator expressed satisfaction with will and refused to change it at wife's request in favor of son, but wife obtained key to drawer containing will during last illness of testator; Podmore v. Whatton (Prob. 1864) 10 L. T. R. (N. S.) 754, where testator was too ill to have access to will, and proof tended to show it was suppressed or destroyed by one subsequently appointed administrator.