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BURDEN OF PROOF AND PRESUMPTIONS IN WILL CONTESTS IN TENNESSEE

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Burden of proof is a slippery phrase. It is used to describe the burden of producing evidence sufficient to justify a finding or the burden of persuading the trier to make a finding or both these burdens.[1] Thayer noted the confusion in the judicial opinions caused by this loose use of language. In his essay, in attempting to bring order into the subject, he stated first that the burden of persuasion is fixed by the pleadings or their equivalent at a stage of the proceedings preliminary to trial and second, that once fixed, it never shifts. These pronouncements have received verbal approval in numberless judicial opinions.[2] The Tennessee courts have joined this chorus.[3]

Alciatus, writing of the civil law in the sixteenth century, declared the subject of presumptions to be almost inextricably confused; Best, in 1844, found the common law in like condition; and Thayer, in 1898, agreed but thought that he could "relieve the subject of much of its obscurity."[4] The obscurity is deepened because presumption is a tricky word, encrusted with confusing judicial glosses. It is always used to express a relationship between two facts or groups of facts; but not always the same relationship. It may be said that if *A* is established, *B* is conclusively presumed. This is merely laying down a rule of substantive law, which might much better be expressed in other terms. For example, that a child under seven years of age is conclusively presumed to be incapable of committing a felony means only that a child under that age cannot be held criminally responsible for conduct which in an adult would be a felony. Or a court may declare that since *A* was established, *B* was presumed, meaning that the trier justifiably drew the inference of the existence of *B*. Or the statement that given *A*, *B* is presumed may mean that when *A* is established in an action, the trier must assume the existence of *B* unless and until certain specified conditions are fulfilled. The Tennessee courts have recognized these different usages. They have classified presumptions as presumptions of fact and presumptions

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1. Since evidence received at a trial may be used to support the case of the party against whom it is offered as well as that of the party who offers it, each burden would be more accurately described, as Wigmore has shown, as a risk, *i.e.*, the risk of nonproduction of evidence, and the risk of nonpersuasion. 9 WIGMORE, EVIDENCE §§ 2485, 2487 (3d ed. 1940).

2. Space does not permit discussion of the arbitrary character of this generalization, and its disregard of the reasons which govern the allocation of the burden.

3. See, *e.g.*, Whipple v. McKew, 166 Tenn. 31, 34, 60 S.W.2d 1006 (1932); Illinois Cen. R.R. v. H. Rouw & Co., 25 Tenn. App. 475, 479, 159 S.W.2d 839 (W.S. 1940).

4. See THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 *et seq.* (1898).

of law. Presumptions of fact are said to be natural presumptions meaning logically justifiable inferences.[5] Presumptions of law are of two kinds, conclusive and rebuttable or disputable. The conclusive presumptions are easily distinguishable and create no difficulty in application. It is the rebuttable presumption that causes trouble, and many courts label it a true presumption. It was with this that Thayer dealt and tried to reduce to its lowest terms. He concluded that the sole effect of a presumption, regardless of the considerations which caused its creation or justifies its continued existence, is to fix the burden of producing evidence sufficient to warrant a finding of the nonexistence of the presumed fact.[6] Although he had little or no authority to support him, his theory has been accepted in innumerable opinions and has in many instances received the approval of the Tennessee courts.[7]

It is obvious that if Thayer's theories as to the fixing and shifting of the burden of proof and of the function of presumptions are applied in combination, the establishment in an action of facts which raise a presumption can never affect the burden of persuasion. The impracticability of adhering to such a generalization and the reluctance of the courts to give it more than lip service in critical situations[8] are nowhere better illustrated than in the cases dealing with wills in Tennessee.

In Tennessee a will contest is an original proceeding in the circuit court to probate the will, and it is immaterial that the contest was instituted after probate in common form in the county court. Consequently the proponent begins with both burdens on the issue of execution. When he shows execution in due form, fair on its face, he makes what the Tennessee court calls a prima facie case, which in this situation means that a presumption arises; for in the absence of other evidence, the finding of due execution must follow. But if an attesting witness testifies to noncompliance with a statutory requirement, then the proponent must present full and clear evidence of execution according to statute.[9] The presumption has become *functus officio,* as Thayer's theory demands.

5. See Beretta v. American Casualty Co. of Reading Pa., 181 Tenn. 118, 124, 178 S.W.2d 753, 755 (1944).

6. See THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 *et seq.* (1898).

7. See, *e.g.,* Shelton v. State, 190 Tenn. 518, 230 S.W.2d 986 (1950); Brown v. Hows, 163 Tenn. 138, 155, 40 S.W.2d 1017 (1931), *rehearing denied,* 163 Tenn. 178, 42 S.W.2d 210 (1931), citing with approved Central of Georgia Ry. v. Fuller Combing Gin Co., 2 Tenn. C.C.A. 343 (1911). If this theory were applied, conflicting presumptions would necessarily cancel each other, but the Tennessee Supreme Court has held that this is not true; the stronger overcomes the weaker. See Nichols v. Mutual Life Ins. Co. of New York, 178 Tenn. 209, 156 S.W.2d 436 (1941).

8. See McMahan v. Tucker, 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948) for a full discussion. See also Hammond v. Union Planters Nat. Bank, 189 Tenn. 93, 222 S.W.2d 377 (1949) (presumption of sanity); Southern Motors Inc. v. Morton, 25 Tenn. App. 204, 154 S.W.2d 801 (W.S. 1941).

9. Fann v. Fann, 186 Tenn. 127, 208 S.W.2d 542 (1947). The court concedes that there are very respectable authorities to the effect that the attesting witness' repudiation is so highly suspicious as not wholly to destroy the effect of an execution fair on its face.

On the other hand, if contestant alleges forgery and introduces evidence of it, the presumption does not cease to operate. The contestant has the further burden of persuading the trier.[10] Not only does this completely abandon the Thayerian doctrine; it puts the burden on contestant of disproving an essential allegation of proponent's pleading. The court frankly concedes the illogic of the ruling, but justifies it on the grounds of policy and convenience. On like reasoning it has declared that where the circumstances of preparation and execution are shown to be suspicious, the burden of persuasion is upon the proponent. This must mean that the presumption either does not arise or vanishes, and the burden of persuasion which contestant's allegation of forgery would normally fix upon him has either remained with or swung back to the proponent. In *Hayes v. Mullins*,[11] the suspicious circumstances included the physical appearance of the document, but the language of the court did not limit the generalization to the particular facts.

Where the contest is upon the ground of testamentary incapacity, the contestant starts with both burdens and is further handicapped by the presumption that testator was sane. Since reasons of policy, aside from the presumption, fix both burdens upon contestant, the presumption could have no effect if Thayer's theory were applied. In some of the Pacific coast states a presumption is by statute a species of evidence. Commentators have been almost unanimous in asserting that this statutory mandate involves an impossible concept and cannot be applied in litigation. But the courts of those states have remained unconvinced. The Tennessee Supreme Court is equally obdurate without statutory compulsion[12] and in its latest pronouncement has said as to the issue of sanity, ". . . the same rule applies in contested wills cases as in other civil cases. In other words the question of testator's alleged insanity 'is to be submitted to the jury on the preponderance of the evidence with consideration of the presumption in favor of sanity.' "[13] If, however, testator's insanity at a date prior to execution of the will is established in the case, then a presumption of its continuance arises, and the burden shifts to the proponent to show testator's sanity, and if the evidence leaves the trier in doubt, the finding of insanity is required.[14] Thus

10. Keys v. Keys, 23 Tenn. App. 188, 129 S.W.2d 1103 (E.S. 1939).
11. 30 Tenn. App. 615, 209 S.W.2d 278 (E.S. 1947).
12. See Provident Life & Acc. Ins. Co. v. Prieto, 169 Tenn. 124, 76 S.W.2d 314 (1935).
13. Hammond v. Union Planters Nat. Bank, 189 Tenn. 93, 99, 222 S.W.2d 377, 380 (1949).
14. Melody v. Hamblin, 21 Tenn. App. 687, 697, 115 S.W.2d 233 (M.S. 1937); Bank of Commerce v. Stavros, 20 Tenn. App. 662, 665, 103, S.W.2d 593 (W.S. 1936); Bridges v. Agee, 15 Tenn. App. 351, 367 (M.S. 1932).

in dealing with the issue of insanity, Tennessee utterly repudiates the conclusions of Thayer.

It is clear that a testator may lack testamentary capacity in being unable to comprehend the extent of his property and the natural objects of his bounty and yet fully understand the exact content of the executed document and intend it to be his will. Ordinarily, the presumption arising from the proof of execution in due form includes that of testator's understanding what he was doing. But where his signature is by mark or there are other suspicious circumstances, the presumption either does not arise or loses its effect when evidence of such circumstances is introduced. Proponent's showing that testator understood the content of the will must then be full and clear.[15] Now suppose that contestant's claim is that testator's lack of understanding of what he was doing was due to mental incapacity. Here the issue is almost identical with that of lack of testamentary capacity; but here it concerns also an element of execution, an issue as to which the burden is, in such a situation, upon the proponent. When faced with the problem in *Burrow v. Lewis*,[16] the court met it squarely. The burden was upon proponent to prove that the testator "comprehended the business in which he was engaged and understood the contents of the paper signed as his will. This implies necessarily a showing of soundness of mind at the very time the will was executed."[17] The fact that the same condition of mind was involved in the issue of testamentary capacity did not change the burden on the issue of due execution.

On the issue of undue influence, the contestant begins with both burdens and is aided by no presumption unless he can show a confidential relation between the testator and the person whose undue influence is alleged. The Tennessee cases have not generally used the term presumption in this connection but have said that the proponent must fully satisfy the jury that the testator knew the content of the alleged will and approved it. In *Watterson v. Watterson*,[18] and *Maxwell v. Hill*,[19] the will was written by the beneficiary and was signed by mark. In *Nobles v. Farmer*,[20] the testator was old, blind and almost deaf, and the beneficiary secured the witnesses and a notary. The court in the *Nobles* case laid down the rule: " 'When a will is executed through the intervention of the person occupying an influential position to his advantage, the law casts upon him the burden of removing the

15. Bartee v. Thompson, 67 Tenn. 508 (1875); Burrow v. Lewis, 24 Tenn. App. 253, 142 S.W.2d 758 (E.S. 1940); Walker v. Verble, 5 Tenn. C.C.A. 651, 657 (1915).
16. 24 Tenn. App. 253, 142 S.W.2d 758 (E.S. 1940).
17. *Id.* at 262, 142 S.W.2d at 763.
18. 38 Tenn. 1 (1858).
19. 89 Tenn. 584, 14 S.W. 253 (1891).
20. 9 Tenn. App. 6 (W.S. 1928).

suspicion by proof showing that the will was the free and voluntary act of the testator.' "[21] On the facts it said that the proponent must show that he observed the utmost good faith in the preparation and execution of the will; the burden thus imposed seems to be the burden of persuasion.

Of course, no such situation would arise where the drafting and execution were under the supervision of an attorney. But if a testator intends to make his attorney a beneficiary, another attorney should see to the execution of the will and make sure that the testator thoroughly understood what he was doing and that he was acting upon his own considered judgment. Though no Tennessee cases of this sort have been found, the books are full of them; and burden of proof is sometimes the crucial problem in the case.

Where the contestant alleges revocation, he has the burden of going forward and the burden of persuasion. But if the will was in the control of the testator and cannot be found, a presumption arises that it was revoked. The revocation, other than by a later will, must be by some injury to the document itself. There is no such thing as a symbolic destruction of a will.[22] But there seems to be no question that the failure to produce a will that was in the custody of the testator puts upon the proponent the burden of persuading the trier that it was not revoked, for the Tennessee court approves Pritchard's statement which puts execution and lack of revocation in the same category, so far as proof is concerned.[23]

It would not be unfair, speaking generally, to conclude that in these cases the Tennessee courts have dealt with the burden of persuasion upon the sound principle that it should be fixed as considerations of fairness, convenience and policy dictate in the situation as it appears at the time the case is submitted to the trier for decision.

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21. *Id.* at 11. The quotation is from PRITCHARD, WILLS AND ADMINISTRATION § 113 (2d ed., Sizer, 1928).

22. Gregory v. Susong, 185 Tenn. 232, 205 S.W.2d 6 (1947).

23. Moore v. Williams, 30 Tenn. App. 479, 481, 207 S.W.2d 590, 591 (M.S. 1947), citing PRITCHARD, WILLS AND ADMINISTRATION § 50 (2d ed., Sizer, 1928).