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Torts -- Libel in Will -- Publication -- Liability of Estate

Joseph F. Turner Jr.

seems to be a question over which reasonable men might differ and rightly a question for the jury.[21]

DONALD LEON MOORE

Torts—Libel in Will—Publication—Liability of Estate

Where a testator left ten dollars to his grandson and in the will accused him of squandering one thousand dollars, of deserting his mother and the testator by taking sides against him in a lawsuit, and of shirking his duty in World War II, the Oregon Supreme Court held that "an action will lie against the testator's estate for libelous matter contained in a will published after the death of the testator."[1] This decision, because of its rather clear logic, should help to swing the balance toward some degree of certainty in a field which, at the present time, shows little uniformity of result. There are three other decisions in this country in which the same result was reached as in the instant case[2] and three in which liability was denied.[3]

Two of the cases denying recovery do so on the theory that the common law maxim *actio personalis moritur cum persona* applies in these

[21] In affirming the granting of the motion for non suit, the court felt that the evidence was so clear that no other reasonable inference was deducible. Donlop v. Snyder, 234 N. C. 627, 630, 68 S. E. 2d 316, 319 (1951). *Cf.*, Cox v. Railroad, 123 N. C. 604, 607, 31 S. E. 848, 850 (1898): "The plaintiff's evidence must . . . be accepted as true, and construed in the light most favorable for him. . . . It is well settled that if there is more than a scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence." See also: Texaco Country Club v. Wade, 163 S. W. 2d 219, 221 (Tex. Civ. App. 1942): "The test of whether one on premises used for public purposes is an invitee at the exact place of injury seems to be whether the owner of the premises ought to have anticipated the member of the public at this point on the premises devoted to public use. It is not essential that the owner should have foreseen the precise injury to any particular individual, but merely that some like injury might, and probably would, result to someone lawfully on the premises. . . . The duty to keep premises safe for invitees does not necessarily apply to the entire premises. It extends to all portions of the premises which are included within the invitation, and which are necessary or convenient for the invitee to use in the course of the business for which the invitation was extended, and at which his presence should therefore reasonably be anticipated, or which he is allowed to go." *See, e.g.*, Heller v. Select Lake City Operating Co., 187 F. 2d 649 (7th Cir. 1951); Mulford v. Hotel Co., 213 N. C. 603, 197 S. E. 169 (1938); Texas Public Service Co. v. Armstrong, 37 S. W. 2d 294 (Tex. Civ. App. 1931).

[1] Kleinschmidt v. Matthieu, 266 P. 2d 686, 690 (Ore. 1954).

[2] Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945); In Matter of Gallagher's Estate, 10 Pa. Dist. 733 (Orphan's Ct. 1901); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1913).

[3] Citizens' and Southern Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933), *reversing* Hendricks v. Citizens' and Southern Nat. Bank, 43 Ga. App. 408, 158 S. E. 915 (1931); Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934); Carver v. Morrow, 213 S. C. 199, 48 S. E. 2d 814 (1948). The *Nagle* case would seem to overrule the decision allowing recovery in Gallagher's Estate, *supra* note 2, not by repudiating the basic theory of the lower court but by carrying the case into the field of privilege.

situations,[4] but those finding liability hold that since the publication complained of occurs after the testator's death, the right of action does not arise until after his death, and, therefore, could not have expired at the time the testator died, as contemplated by the maxim.[5] But, the finding that the maxim does not apply does not end the question, for there are other problems which must be considered before the estate can be held liable.

The question of whether the executor is the agent of the testator sometimes causes trouble. The Oregon court held in the principal case that there was no agency relationship before the death of the testator between the testator and the executor and that, consequently, in offering the will for probate the executor could not be acting as the agent of the testator.[6] Even under the agency theory different results are possible. The Tennessee court holds that the executor *is* the agent of the testator and the estate should be held liable,[7] while the South Carolina court, applying the rule that "agency terminates upon the death of the principal," holds that the estate is not liable.[8]

The best reasoning seems to be that of the Oregon court, which says that the person publishing the will "is an instrumentality through which the will is published, and when he does thus act he in effect publishes the

[4] Citizens' and Southern Nat. Bank v. Hendricks, *supra* note 3; Carver v. Morrow, *supra* note 3.

[5] Kleinschmidt v. Matthieu, 266 P. 2d 686 (Ore. 1954); In Matter of Gallagher's Estate, 10 Pa. Dist. 733, 736 (Orphan's Ct. 1901): "No right of action existed for the wrong alleged to have been done this claimant when Father Gallagher died; for the will had not and could not have been published, and was, therefore, obviously not within the letter of the rule."; Harris v. Nashville Trust Co., 128 Tenn. 573, 580, 162 S. W. 584, 586 (1913): "So the tort upon which this suit is based was not committed until after the death of Woodfin. This right of action arose after Woodfin's death, and could not have been buried with him. The case therefore falls without the letter of the old rule."

But see Note, *Right of Recovery for Testamentary Libel,* 27 HARV. L. REV. 666, 668 (1914), where the proposition is put forth that "if no tort is committed till after death, there is then no tortfeasor to punish"—a legalistic bit of thought which contemplates putting an end to the matter without contributing too much to a sound analysis of the problem. See also Hegel v. George, 218 Wis. 327, 259 N. W. 862, 864 (1935), for an example of the type of case in which the logic used in the principal case is employed to deny recovery in a wrongful death action. Howe, plaintiff's intestate, was the driver of a car involved in a collision with a car driven by George. George died a few hours before Howe. George was found negligent. The statute declared that "actions for wrongful death survive the death of the wrongdoer." The court held that, since the death of the wrongdoer preceded the death of the plaintiff-decedent, "there was and is no cause of action." A similar case is Martinelli v. Burke, 298 Mass. 390, 10 N. E. 2d (1937); this case is the subject of annotation in 112 A. L. R. 341 (1938).

[6] Kleinschmidt v. Matthieu, *supra* note 5.

[7] Harris v. Nashville Trust Co., 128 Tenn. 573, 578-9, 162 S. W. 584, 585-6 (1913): "It is well settled that a principal is responsible when authority is given to an agent to publish libelous words and a publication is made by the agent in substantial accord with his authority. . . . The publication of this libel was made by the agent, the executor. . . . if liability exists the principal should be responsible."

[8] Carver v. Morrow, 213 S. C. 199, 204, 48 S. E. 2d 814, 817 (1948). That this is the prevalent doctrine in agency law can hardly be contested. RESTATEMENT, AGENCY § 120 (1933).

will at the behest of the testator."[9] Indeed it is difficult to see that a strict agency theory is necessary, for one who is the author of libelous material and places it in such circumstances that publication will necessarily result, is liable for the eventual publication.[10] Thus there will be publication of the libel in the will, not only by filing the will for probate, but also during the probate proceedings, and after probate when the will is on file as a public record. "No more effective means of publishing and perpetuating a libel can be conceived than to secure the inscription of such matter in court records, as by probate of a will."[11] When one executes a will he does so with the knowledge and expectation that such will is to be published after his death; this is the natural course of events, and at any rate it is probably the common law duty of one in possession of a will to file it with the proper court after the death of the testator.[12] Further, many states by statute have made provisions to force one having possession of a will to present the same for probate.[13] The better reasoning would therefore seem to be that the testator, and not the person who physically publishes the will, is the party responsible for the publication.

Having established that there was no agency, the court in the instant case then reasoned that the executor "is not an officer or agent of the court until he is appointed and letters testamentary issued to him";[14] therefore, there is a "hiatus between the testator's death and the court appointment of the executor," and when the executor "or the custodian of the will, files the same with the clerk, he is not acting for the court but necessarily for the deceased. . . ."[15] In this manner the court com-

[9] Kleinschmidt v. Matthieu, 266 P. 2d 686, 689 (Ore. 1954).

[10] Some examples are: (1) sending libelous matter to a blind person, Lane v. Schilling, 130 Ore. 119, 279 Pac. 267 (1929); (2) sending letter to fourteen-year-old boy accusing him of theft, Hedgepeth v. Coleman, 183 N. C. 309, 111 S. E. 517 (1922); (3) sending libelous matter with good reason to believe that it will be opened by authorized person other than addressee, Riley v. Askin and Marine Co., 134 S. C. 198, 132 S. E. 584 (1926); (4) sending letter to known illiterate, Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244 (1892); Allen v. Worthan, 89 Ky. 485, 13 S. W. 73 (1890).

[11] Harris v. Nashville Trust Co., 128 Tenn. 573, 578, 162 S. E. 584, 585 (1913).

[12] 2 PAGE, WILLS § 585 (3rd ed. 1941).

[13] *E.g.*, N. C. GEN. STAT. § 31-15 (1950). See also 2 PAGE, WILLS § 586 (3rd ed. 1941).

[14] Kleinschmidt v. Matthieu, 266 P. 2d 686, 688 (Ore. 1954); *Cf.* Lindley v. United States, 59 F. 2d 336 (9th Cir. 1932); Fistel v. Beaver Trust Co., 94 F. Supp. 974 (S. D. N. Y. 1950); *In re* Estate of Doefler, 348 Ill. App. 347, 109 N. E. 230 (1952); Davenport v. Sandeman, 204 Iowa 927, 216 N. W. 55 (1927); *In re* Ballard's Estate, 362 Mo. 1150, 247 S. W. 2d 683 (1952); *In re* Garris's Estate, 46 A. 2d 76 (Orphan's Ct. N. J. 1946); Dodd v. Anderson, 179 N. Y. 466, 90 N. E. 1137 (1910). But at common law the executor derived his authority from the will and did not have to wait for probate. Grant v. Spann, 34 Miss. 294 (1857); State v. Tazewell, 132 Ore. 122, 283 Pac. 745 (1930). *See* Harris v. Citizens' Bank and Trust Co., 172 Va. 111, 200 S. E. 652 (1939).

[15] Kleinschmidt v. Matthieu, 266 P. 2d 686, 688 (Ore. 1954). It would also appear to this writer that there should be ample opportunity for a libelous publication other than by the filing of the will for probate, since it seems quite likely that

pletely renders irrelevant the matter of whether the probate was a pleading in a court action and therefore privileged.

The instant case held that the publication "is not privileged because publication antedates the probation."[16] If, however, it is held that the mere filing of the will with the probate court is a part of the judicial proceeding, then the question of privilege becomes a much more difficult problem, for when this reasoning is used the publication is frequently held to be privileged on the ground that it is much the same as a party's pleading in a civil action.[17] One answer to such an argument is that, even though this may be a pleading, it is not privileged because the injured party cannot answer in a statement that will be included in the record.[18] It should be noted that the matter must be relevant for this privilege to apply.[19]

One method of providing a partial answer to the problem has been to allow the petitioner for probate to call possible libelous passages to the court's attention and to petition for their omission from the will. This procedure has been allowed in a few New York and English cases where the matter omitted from the will was not material to the disposition of the property.[20] Such a procedure is of questionable value,[21] for

someone other than the libeled party will read the will prior to the probate thereof and such communication, even to one person, would constitute publication. Simms v. Clark, 194 So. 123 (La. Ct. App. 1946); Josa v. Maroney, 125 La. 813, 51 So. 908 (1910); Hedgepeth v. Coleman, 183 N. C. 309, 111 S. E. 517 (1922); Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505 (1931); Bradley v. Conners, 169 Misc. 442, 7 N. Y. S. 2d 294 (Sup. Ct. 1938). *See* Mims v. Metropolitan Life Ins. Co., 200 F. 2d 800 (5th Cir. 1952), *cert. denied* 345 U. S. 940 (1953).

[16] Kleinschmidt v. Matthieu, 266 P. 2d 686, 689 (Ore. 1954).

[17] It has been held that the filing of a will for probate is clearly analogous to a plaintiff's pleading in a civil action in that it is the beginning of a judicial proceeding. "We believe that the rule which makes the pleading in a judicial proceeding absolutely privileged may properly be applied to a will in which there is no apparent purpose to injure the reputation of any one but merely a purpose to insure distribution of the testator's estate to his intended beneficiaries and to protect it from possible claims of persons whom he does not desire to share in the distribution." Nagle v. Nagle, 316 Pa. 507, 510, 175 Atl. 487, 488 (1934).

[18] *In re* Gallagher's Estate, 10 Pa. Dist. 733, 737 (Orphan's Ct. 1900). It would appear that the view of the *Gallagher* case is not without merit, but the value of this particular part of the opinion as a precedent is doubtful, for the Pennsylvania Supreme Court has held that such a filing is part of the judicial proceeding and is privileged. Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934). However, a lower court of New York seems to approve of the language used in the *Gallagher* case. Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945).

[19] North Carolina has held that pleadings are privileged when pertinent and relevant even if false and malicious, but where the defamatory matter is not relevant the party is stripped of the privilege. Harshaw v. Harshaw, 220 N. C. 145, 16 S. E. 2d 666 (1941). This view is also adopted in Scott v. Statesville Plywood and Veneer Co., 240 N. C. 73, 81 S. E. 2d 146 (1954); PROSSER, TORTS § 94 (1941). See also Note 48 HARV. L. REV. 1027, 1028 (1935) for a discussion in which the writer concludes: "although redress should be allowed where libelous material is irrelevant and engendered by malice, recovery should be limited to compensatory damages since it is the estate rather than the guilty testator which must suffer."

[20] *In re* Draske's Will, 160 Misc. 587, 290 N. Y. S. 581 (Surr. Ct. 1936); *In re* Payne's Estate, 160 Misc. 224, 290 N. Y. S. 407 (Surr. Ct. 1936); *In re* Speiden's Estate, 128 Misc. 899, 221 N. Y. S. 223 (Surr. Ct. 1926); *In re* Bomar's Will, 27

a publication occurs between the time the will is offered for probate and the decision is reached as to what portions should be omitted. Therefore, the harm is done even though the libelous portions are stricken from the will.[22] Where the libelous material is omitted, the determination of what is actually dispositive must be liberally made in order to guard against the omission of possible explanations as to the reasons for the disposition of the property. The omitted matter may prove to be of value if the will is contested.[23]

There does not seem to be a North Carolina case dealing with libel by will. This naturally poses the question as to what action the North Carolina courts will take when faced with this situation. North Carolina General Statute § 28-175 provides in part: "The following rights of action do not survive: 1. Causes of action for libel and slander." It would seem that the same reasoning would apply to this statute as the courts have applied to the common law maxim that a personal right of action dies with the person, and that it should be held that the statute does not apply to the fact situation that exists in the principal case.[24] However, this would still leave the court free to decide the case either for or against allowing the action to be brought, and a combination of the reasons given in the decided cases could be used to allow or deny recovery. It would seem that even if the court ignored the fact that the libeled party may not answer and considered the probate of the will as a pleading in a civil case (and consequently privileged) there would still

Abb. N. C. 425, 44 N. Y. S. R. 304, 18 N. Y. S. 214 (Ct. Com. Pl. 1892); In the Estate of Caie, 43 T. L. R. 697 (1927); Marsh v. Marsh, 1 Swa. and Tr. 528, 164 Eng. Rep. 845 (1860).

[21] This conclusion is contrary to the conclusion reached by the author of a note in 10 N. C. L. REV. 88, 90 (1931), which was written on the case of Hendricks v. Citizens' and Southern Nat. Bank, 43 Ga. App. 408, 158 S. E. 915 (1931), *rev'd*, Citizens' and Southern Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933). There the author states: "In view of the American holdings it seems desirable for the legislature to give to the probate court authority to expunge from a will libelous matter which is not strictly dispositive."

[22] *See* Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910, 922 (Sup. Ct. 1945) where the court discusses the probable value of a petition for expungement at the time the will was presented for probate and concludes that even if the matter were expunged there would only have been "a reduction in the extent of the publication of the libel; it would not have prevented the publication." See also 4 PAGE, WILLS § 1768 (3d ed. 1941).

[23] But in some cases the expungement is from the probate copies only, and it would seem that some of the disadvantages of expungement are avoided in this manner. *In re* Croker's Will, 105 N. Y. S. 2d 190 (Surr. Ct. 1951); In the Estate of Heywood, [1916] P. 47; In the Estate of White, [1914] P. 153; *In re* Goods of Wartnaby, 1 Rob. Ecc. 423, 163 Eng. Rep. 1088 (1846).

But see the following where expungement was denied on the grounds: (1) that the testator's wishes as to publication must be allowed, Hagen v. Yates, 1 Dem. 584 (N. Y. Surr. 1893); (2) that the court did not have the authority to order expungement, Curtis v. Curtis, 3 Add. Ecc. 33, 162 Eng. Rep. 33 (1825).

[24] One must keep in mind that a holding by the court that the party has a cause of action does not settle the question, for the defendant still has the defense of truth. Hamilton v. Nance, 159 N. C. 56, 74 S. E. 627 (1912); PROSSER, TORTS § 95 (1941).

be cases, at least where the matter is clearly irrelevant, in which the plaintiff should be allowed to prosecute his case.[25]

The result reached in the principal case seems to be more in line with modern concepts of justice than does the proposition that one may defame his fellow man and escape liability for the act. It is true that it is the heirs who must suffer because of his indiscretion, since the estate must pay the judgment, but this fact alone will exert a strong influence on the maker of a will and cause him to be a bit more careful of the reputations of those who might survive him.[26]

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[25] It is suggested that the legislature should amend the present statute so as to specifically provide recovery for libelous material in a will, particularly where this material is not relevant.

[26] Some of the reasons advanced for allowing recovery are: that the testator composed the libel and selected a means of publication that was almost certain to attain the desired results, Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945); the alleged libel is written with premeditation and the writer intends to escape liability by a publication of the item when he will not be subject to an action and further with the knowledge that the libel will be a part of a public record to be a "perpetual reminder of the charge," In Matter of Gallagher's Estate, 10 Pa. Dist. 733, 736 (Orphan's Ct. 1901); "If relief be denied this plaintiff in this suit, she is indeed in a bad plight. There is no other way in which she may vindicate the virtue and integrity of her mother and establish for herself the position in society which she is entitled to occupy. . . . It cannot be said that the law affords no remedy for a wrong such as the one perpetuated by this testator." Harris v. Nashville Trust Co., 128 Tenn. 573, 585, 162 S. W. 584, 587 (1913).