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Libel and Slander -- Liability of Estate for Libel in Will

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possible to ascertain whether he is prejudiced or not, unless such questions are propounded to him?13 It would seem that the court in the instant case has made satisfactory answer to this question.

JAMES O. MOORE.

Libel and Slander—Liability of Estate for Libel in Will.

The will of testatrix contained an implication that her grandson was illegitimate. The grandson sued the estate for libel and recovery was allowed.1 The appellate court, in conscious disregard of common law principles, based its decision on the theory that everyone is presumed to intend the natural consequences of his act, and that since testatrix deliberately inserted the defamatory statement in her will, knowing it would be published, her estate should be held liable. No attempt was made to place liability on the executor, as the legal requirement that the will be probated2 makes the act privileged.3

Libel and slander are personal actions, and are abated by the death of the tortfeasor.4 The Georgia court, however, evades this difficulty by holding that as the cause of action did not accrue until the probate of the will, which was after the death of the testatrix, it was not abated by her death.

Only two other decisions have been found involving the same question and both these cases allowed recovery on the theory that the executor was the agent of the testator and therefore the estate was liable.5 This theory has been severely criticized.6 There can be no agency where no principal exists.7 If an agency is created before death, death will ordinarily revoke the agency,8 and it has been held that death cannot create an agency.9 The Georgia court men-

13 People v. Reyes, supra note 5.
1 Hendricks v. Citizens' & Southern Nat. Bank, 158 S. E. 915 (Ga. 1931).
4 Actio personalis moritur cum persona.
7 1 MECHEN, THE LAW OF AGENCY (2nd ed. 1914) §26, n. 2.
8 Hunt v. Rousmanier's Adm'rs., 8 Wheaton 174 (1823); 1 MECHEN, THE LAW OF AGENCY (2nd ed. 1914) §§651, 652, 655. The two exceptions to this rule—where the agency is coupled with an interest in the subject matter, and when the revocation would involve the agent in liability to third parties—obviously do not apply.
tions but does not base its holding on this theory, preferring to indulge in a little judicial legislation in order to give plaintiff relief.

Admitting that plaintiff has suffered a wrong for which he should have a remedy, still it seems unwise to entirely disregard common law principles. In the first place, the probate of the will, which is the basis of plaintiff's suit, is required by statute, and no tort can be predicated upon an act which is required by law, for in legal contemplation there can be no wrong if the act complained of is legal. Secondly, permitting plaintiff to recover seems to violate the rule that an estate can only be held for debts owed by the testator at his death. Thirdly, it has been suggested that if the rule of the instant case is to prevail, it might enable the testator to avoid certain statutes based on public policy forbidding the devising of money above a certain proportion of the estate to certain classes, as mistresses and illegitimates. The testator could, in such case, by simply inserting any libellous statement in his will, allow them to obtain a larger portion of his estate. Fourthly, even if recovery is allowed, it is obvious that it would be a tax not on the testator or his property but on the inheritance, as the property vests in the heirs as of the testator's death.

In England such a suit has never arisen. The English practice is to expunge from a will defamatory matter which is not dispositive. The American courts have been reluctant to adopt this view. Only one case has been found where a scandalous clause was stricken from probate. Several cases hold that the court has no authority to strike out any part of a will. In view of the American holdings it

10 GA. ANN. CODE (Michie, 1926), supra note 2.
11 2 COOLEY, THE LAW OF TORTS, supra note 3.
12 Eustace v. Jahns, 38 Cal. 1, 23 (1869); 2 WILLIAMS ON EXECUTORS (4th ed. 1855) §§1470, 1471.
13 (1914) 23 YALE L. J., supra note 6 at 538.
14 S. C. CODE OF LAWS (1922) §3217; LA. REV. CIV. CODE (Saunders, 2nd ed. 1920) §1470.
15 GA. ANN. CODE (Michie, 1926) §3831.
16 GATLEY, LIBEL AND SLANDER (2nd ed. 1929) 458, n. 15; 2 REIDFIELD, THE LAW OF WILLS (3rd ed. 1866) 43; see In the Goods of Honywood, L. R. 2 P. & D. 251, 252 (1871).
18 Woodruff v. Hundley, 127 Ala. 640, 29 So. 98, 85 Am. St. Rep. 145 (1900); In re Pforr's Estate, 144 Cal. 121, 77 Pac. 825 (1904); In re Meyer, 72 Misc. 566, 131 N. Y. Supp. 27 (1911).
seems desirable for the legislature to give to the probate court author-
ity to expunge from a will any libellous matter which is not strictly
dispositive. This solution, in accord with the time-proven English
practice, tends to preserve common law principles and at the same
time prevents injurious publication.

ROBERT A. HOVIS.

Malicious Prosecution—Probable Cause as Question for Judge
or Jury—Authority of Agent to Institute Prosecution
Under Bad Check Law.

In the recent case of Dickerson v. Atlantic Refining Co.,1 the
plaintiff gave an agent of the defendant company a check in payment
for certain goods. Three hours later, and before presentation of the
check to the drawee bank, the plaintiff was arrested on a warrant
sworn out by said agent charging him with uttering a worthless
check. Due to a subsequent deposit, the check was paid when pre-
sented by the general manager of the local branch of the defendant
corporation. The case against the plaintiff was "nol. pros'd. with
leave," and this action for malicious prosecution was then instituted
against the defendant company and its agents. It was held that a
prosecution for uttering a worthless check, instituted chiefly to col-
clect a debt and before presentation, was prima facie evidence that
the prosecution was without probable cause, and that the evidence
was sufficient to take the case to the jury.

Although some of the earlier decisions are to the effect that prob-
able cause is a question to be determined by the jury,2 the more
numerous and later cases establish the principle that it is a question
of law to be determined by the court.3 The jury are to find the facts

1 201 N. C. 90, 159 S. E. 446 (1931).
3 Overton v. Combs, 182 N. C. 4, 108 S. E. 357 (1921); Humphries v. Ed-
wards, 164 N. C. 154, 80 S. E. 165 (1914) (when the facts are admitted or
established, the question of probable cause is one of law); Bowen v. Pollard and
Co., 173 N. C. 129, 91 S. E. 711 (1921) (is a question of law to be decided by
the court upon the facts as they may be found by the jury); Tyler v. Mahoney,
166 N. C. 509, 82 S. E. 870 (1917) (a mixed question of law and fact); see
Jones v. R. R., 125 N. C. 227, 229, 34 S. E. 398, 399 (1899).

Despite this fact many cases state that a criminal prosecution for the purpose
of collecting a debt is prima facie evidence of lack of probable cause. Mc-
810 (1900) (is not conclusive in establishing want of probable cause, but is
prima facie evidence).