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## TORTS - FRAUDULENT INTERFERENCE WITH TESTAMENTARY BENEFITS

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TORTS — FRAUDULENT INTERFERENCE WITH TESTAMENTARY BENEFITS — Instituting a suit for damages, plaintiff alleged by way of application

for order of examination that defendants had, by fraudulent misrepresentations, diverted the established intention of decedent to provide for plaintiff in the testamentary disposition of decedent's estate, and consequently no disposition in plaintiff's favor was made, to plaintiff's loss. *Held*, that plaintiff stated a cause of action in tort. *Bohannon v. Wachovia Bank & Trust Co.*, 210 N. C. 679, 188 S. E. 390 (1936).

Does one have a legal right to protection against fraudulent interference with his potential testamentary benefits, so that violation of such right will give rise to an action in tort? Where the interference occurs before the death of the testator, one finds surprisingly little judicial answer to this query. There is one case concurring with the principal case,<sup>1</sup> and two decisions contra.<sup>2</sup> But where the interference consists in spoliation, destruction, or suppression of testator's last will, the weight of available authority declares this to be a tort,<sup>3</sup> although at least one jurisdiction requires that relief be first sought at the court of probate.<sup>4</sup> It would seem that the same right is involved whether the fraudulent interference occurs before or after the death of the testator.<sup>5</sup> However, it is objected that in the former instance plaintiff's interest is too contingent and remote to be thus protected.<sup>6</sup> The trend of modern law weakens the validity of this objection. Thus, in *Mitchell v. Langley*<sup>7</sup> plaintiff recovered a judgment in damages because defendant fraudulently induced decedent insured to replace plaintiff as beneficiary of a fraternal benefit policy. The court in the principal case relied on this decision, quoting from it at length.<sup>8</sup> Other judicial indicatives are also available. For example, not only is there a right to

<sup>1</sup> *Lewis v. Corbin*, 195 Mass. 520, 81 N. E. 248, 122 Am. St. Rep. 261 (1907). However, the court sustained defendant's demurrer to the declaration because it did not contain necessary causal allegations that testatrix's intention to benefit plaintiff by testamentary disposition continued until her death.

<sup>2</sup> *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104 (1845). The court cites no authority for its position. *Cunningham v. Edward*, 52 Ohio App. 61, 3 N. E. (2d) 58 (1936). For discussion of this case see 35 MICH. L. REV. 348 (1936).

<sup>3</sup> *Dulin v. Bailey*, 172 N. C. 608, 90 S. E. 689 (1916); *Morton v. Pettit*, 124 Ohio St. 241, 177 N. E. 591 (1931), noted in 31 COL. L. REV. 1203 (1931); 30 MICH. L. REV. 478 (1931), and 9 N. Y. UNIV. L. Q. REV. 506 (1932); *Creek v. Laski*, 248 Mich. 425, 227 N. W. 817, 65 A. L. R. 1113 (1929), noted in 30 COL. L. REV. 409 (1930) and 14 MINN. L. REV. 704 (1930).

<sup>4</sup> *Thayer v. Kitchen*, 200 Mass. 382, 86 N. E. 952 (1909). This seems justifiable only in so far as it goes to the question of causation and extent of damages. Thus, the Ohio court allowed recovery in *Taylor v. Bennett*, 1 Ohio C. C. 95 (1885), where ultimate probate was successful, but confined damages to extra costs of probate incurred because of defendant's spoliation.

<sup>5</sup> The two situations are distinguishable only in that the causal connection is more certain in the latter instance.

<sup>6</sup> *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104 (1845); *Cunningham v. Edwards*, 52 Ohio App. 61, 3 N. E. (2d) 58 (1936).

<sup>7</sup> 143 Ga. 827, 85 S. E. 1050, L. R. A. 1916C 1134 (1915).

<sup>8</sup> The Georgia court said (143 Ga. 827 at 835), by way of dictum, "Is it possible that where a will has been made, leaving a devise, a third person can fraudulently and maliciously cause the testator to revoke the devise, and thus cause a loss to the devisee, without any redress on the part of the latter?"

be free from intentional, unprivileged interference with existing contractual relations, including those terminable at will by one of the parties,<sup>9</sup> but there is authority recognizing the right to be protected against malicious interference with wholly prospective contractual relations.<sup>10</sup> The Minnesota court recognized plaintiff's right to conduct his business free from a competition actuated only by motives of malicious destruction of that business.<sup>11</sup> Likewise, the right of privacy is finding remedy in tort.<sup>12</sup> Equally so, the right to redress for defamatory injuries,<sup>13</sup> and for special damage designedly caused by non-defamatory false words.<sup>14</sup> This does not exhaust the list.<sup>15</sup> Another objection which may arise as to certain applications<sup>16</sup> of the principal ruling is that it constitutes a collateral attack upon the probate decree.<sup>17</sup> This problem arises also in connection with equitable relief,<sup>18</sup> and the answer would seem to be that if plaintiff has such a tort right as we have referred to, it would not be in issue in a proceeding for the probate of a will, and he should not be bound by that proceeding.<sup>19</sup> In conclusion it is submitted that the judicial stage is set for full recognition of the tort right to be free from fraudulent interference with potential testamentary benefits.<sup>20</sup> And it would seem that social policy commends this result.

<sup>9</sup> See Carpenter, "Interference With Contract Relations," 41 HARV. L. REV. 728 (1928). See also, 33 MICH. L. REV. 943 (1935).

<sup>10</sup> Lewis v. Bloede, (C. C. A. 4th, 1912) 202 F. 7; Kamm v. Flink, 113 N. J. L. 582, 175 A. 62 (1934); Skene v. Carayanis, 103 Conn. 708, 131 A. 497 (1926).

<sup>11</sup> Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946 (1909).

<sup>12</sup> See HARPER, TORTS, § 277 (1933).

<sup>13</sup> Ibid., c. 14; ODGERS, LIBEL AND SLANDER, 6th ed., c. 2, c. 3 (1929).

<sup>14</sup> ODGERS, LIBEL AND SLANDER, 6th ed., 66 (1929).

<sup>15</sup> It would seem, then, that modern courts are protecting interests, by tort remedy, which are no more certain and tangible than that here principally involved. Permeating these decisions is a recognition that many objections to protecting such inchoate interests are really misdirected cautions as to the essential element of causal connection.

<sup>16</sup> Note that this objection is not pertinent where no last will is left by decedent, or where defendant's interference was not such as would prevent probate of the will.

<sup>17</sup> Hall v. Hall, 91 Conn. 514, 100 A. 441 (1917).

<sup>18</sup> See extensive annotation, 52 A. L. R. 779 (1928).

<sup>19</sup> Note in this connection that the judgment in tort for damages does not in any direct sense disturb the distribution defined by the probated will.

<sup>20</sup> By analogy, a like right should exist in case of potential donative benefits, not testamentary, and in case of potential insurance beneficiary benefits.