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LIBEL AND SLANDER-TESTAMENTARY LIBEL

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LIBEL AND SLANDER—TESTAMENTARY LIBEL—Although the right to recover for injury from admittedly defamatory matter would seem to be clear, the law imposes a series of obstacles when the offending statements are embodied in a will. Of the few cases which have arisen in this area,[1] a recent decision, *Carver v. Morrow*,[2] serves to illustrate

[1] Gallagher's Estate, 10 Pa. Dist. 733 (1901); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1914); Citizens' and Southern National Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313 (1933); Nagle v. Nagle, 316 Pa. 507, 175 A. 487 (1934); Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945).

[2] (S. C. 1948) 48 S.E. (2d) 814.

the general problem. In this case, plaintiff claimed that portions of testatrix' will defamed him. After the will was probated, he brought an action against testatrix' executors on the ground that publication had been effected by probate, and that therefore a cause of action in libel existed against the estate. In affirming a lower court decision sustaining a demurrer to the complaint, the court held that, since publication did not occur until probate, testatrix could not have been sued for libel during her life. Hence, such an action will not lie against the estate unless the executor can be deemed her agent for the purpose of consumating the tort. Because the executor is an instrumentality of the law, he cannot be considered testatrix' agent in this sense. Further, there can be no agency uncoupled with an interest where there is no existent principal.

The initial questions to be faced will concern application to these facts of the doctrine that a "personal action dies with the person." In later discussion, the various remedial courses open to the defamed party will be considered: first, in jurisdictions applying the doctrine; and second, in jurisdictions where the doctrine has been held inapplicable.

I.

In the absence of a pertinent survival statute, a cause of action for defamation arising against the testator during his lifetime is extinguished at his death.[3] Prior to the American states' adoption of the common law, it is by no means evident[4] that this doctrine was literally applied to material facts in causes of action which arose after the testator's death.[5] Thus, no significant barriers of precedent exist to an American court's re-examination of the rule in this area on policy grounds. The actual bases at early common law for holding that causes of action in tort died with the wrongdoer probably stemmed from the quasi-penal character then attributed to torts,[6] and from the law's concern because the dead tortfeasor would be unable to testify in

[3] 134 A.L.R. 718 (1941).

[4] Winfield, "Death as Affecting Liability in Tort," 29 COL. L. REV. 239 at 241-250 (1929).

[5] Publication is a requisite to a cause of action in libel. PROSSER, TORTS 810 (1941). Therefore if publication occurred only at probate, a cause of action could not arise until that time. If publication occurred during life, as to witnesses at the execution of the will, an additional problem arises. One court has held that even though the cause of action thus accruing during life would die with the testator, the probate proceeding would be a republication and thus would give rise to another cause of action. Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945).

[6] See Winfield, "Death as Affecting Liability in Tort," 29 COL. L. REV. 239 at 249 (1929); Finlay v. Chirney, 20 Q.B. 494 at 504 (1888); POLLOCK, TORTS 61 (1920).

his own behalf.[7] The first of these reasons carries little authority today, since the law of torts is now directed toward compensating the injured plaintiff and not toward punishing the tortfeasor.[8] The second argument is indicated to be of equal insignificance by the number of survival statutes which in their very existence demonstrate the degree of unimportance placed on the absence of the tortfeasor from the witness stand.[9] Thus it appears that there is no present reasonable basis for application of the doctrine.

2.

Some courts, however, have held the rule to be applicable to a material fact in a cause of action.[10] In these states there are still several possible avenues of relief. The survival statutes might be held to apply, but most state statutes have been or would be held inapplicable either as a matter of form[11] or substance[12] to a cause of action in defamation not accruing until after death.

Another form of relief may be available, however, in those jurisdictions where the probate court is empowered to delete parts of the will.[13] Although the remedy has been utilized by some courts, certain difficulties would seem to limit its efficacy. First, by the very act of petitioning the court for deletion, it seems that publication would be

[7] Winfield, "Death as Affecting Liability in Tort," 29 COL. L. REV. 239 at 249 (1929).

[8] PROSSER, TORTS 10 (1941).

[9] Evans, "A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators," 29 MICH. L. REV. 969 (1931); 27 ILL. L. REV. 220 (1932).

[10] Citizens' and Southern National Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313 (1933); Brown v. Mack, 185 Misc. 368 at 371, 56 N.Y.S. (2d) 910 (1945) (court implied that maxim applies, but decided survival statute also applicable); United States Casualty Co. v. Rice, (Tex. Civ. App. 1929) 18 S.W. (2d) 760; Shupe v. Martin, 321 Mo. 811, 12 S.W. (2d) 450 (1928).

[11] Shupe v. Martin, 321 Mo. 811, 12 S.W. (2d) 450 (1928); United States Casualty Co. v. Rice, (Tex. Civ. App. 1929) 18 S.W. (2d) 760. In both of these cases the statute read: "All causes of action upon which suit... may be hereafter brought... shall not abate by reason of the death of the person against whom such cause of action shall have accrued." Contra: Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945), where the statute read: "No cause of action... shall be lost because of the death of the person liable for the injury."

[12] Evans, "A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators," 29 MICH. L. REV. 969 (1931), in which the author cites six states allowing survival of a defamation action where the statute applies in form. It seems that New York must be added to this list. Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945).

[13] In re Draske, 160 Misc. 587, 290 N.Y.S. 581 (1936); 21 MINN. L. REV. 870 (1937).

effected, although by the deletion the extent of publication would be limited. Second, in many cases deletion of defamatory matter might not be possible because of its connection with the dispository function of the will.[14] Still another possibility, although a highly unlikely one,[15] is to avoid application of the doctrine by invoking the remedial fiction of quasi-contract, the required "benefit" to the dead tortfeasor being the saving of expenditure in his not having had to purchase the right to libel the plaintiff.[16]

3.

Some courts have held, with what seems like greater justification, that the rule has no application to material facts occurring during the tortfeasor's life if the cause of action of which they are a part did not accrue until after his death.[17] Under this view a further mode of relief may be available in the form of an action against the executor, *qua* executor, without recourse to a survival statute.[18] A major obstacle to such a suit exists, however, in the very fact that the cause of action did not accrue until after the testator's death. Assuming that a dead man cannot commit a tort, on what theories can liability be based? Two courts have held that the executor was the testator's agent for the purpose of publishing the libel.[19] Coupled with the rule that a principal is liable for defamation by his agent, at least within the scope of his express authority,[20] this would seem

[14] Where a will reads, "To *A*, my illegitimate son, nothing; to *B*, my legitimate son, $1000," the word "illegitimate" might be made the basis for an action by *A* to deny probate, if *A* is in fact legitimate and *B* is illegitimate. See Freifield, "Libel by Will," 19 A.B.A.J. 301 (1933).

[15] See Plefka v. Detroit United Ry., 147 Mich. 641, 111 N.W. 194 (1907); Singley v. Bigelow, 108 Cal. App. 436, 291 P. 899 (1930).

[16] See the dissent in Phillips v. Homfray, 24 Ch. Div. 439 (1883).

[17] Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1913); Gallagher's Estate, 10 Pa. Dist. 733 (1901).

[18] Suit could also be brought against the executor individually. However, since he is under a duty to probate the will [2 WOERNER, ADMINISTRATION 703 (1923)], his publication at probate is considered to be absolutely privileged. Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1913). It should be noted, however, that the executor is under a duty to protect and preserve the estate. Casperson v. Dunn, 42 N.J. Eq. 87 (1886). In a state allowing deletion of defamatory matter, where the matter is clearly non-dispositive and where a recovery in libel is later had against the estate, it would seem that an action for breach of the executor's duty would lie for the excessive publication. See 32 VA. L. REV. 189 (1945).

[19] Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1913); In re Gallagher's Estate, 10 Pa. Dist. 733 (1901).

[20] 20 MINN. L. REV. 805 (1936); 150 A.L.R. 1330 (1944).

to ground liability for the testator and hence for the estate. However, in most states, a will does not create the executorship, but merely nominates for an appointment effected by law.[21] Thus, in these states an execution cannot be considered an agent.[22] Further, an agency cannot be created to take effect at death unless it is coupled with an interest,[23] and the right of the executor to reimbursement for services does not provide such an interest.[24]

Liability can be based on another more substantial theory, however. Where a writer of defamatory matter intends or has reason to suppose that the matter will reach third parties, there is responsibility for the publication.[25] This is clearly the situation in the case of a will since the testator, by naming an executor who is under a duty to probate the will,[26] certainly has reason to suppose that probate will be effected. This being the case, although no cause for action arises until after the testator's death, the responsibility for publication is fully the testator's during life, and an action should lie against his estate.[27]

One further problem remains. It is the general rule that absolute immunity attaches to defamatory matter published in the course of and relevant to a judicial proceeding.[28] Since this immunity has been held to attach to publications which constitute a step in such proceeding,[29] the defense would seem to be available with respect to publications effected in the process of probate.[30] Before the immunity at-

[21] 1 WOERNER, ADMINISTRATION 589 (1923).

[22] "In the broad sense, agency denotes the relation which exists when one person is employed to act for another." MECHEM, AGENCY, 3d ed., 6 (1923). Some courts do hold that the executor derives his authority from the will. 1 WOERNER, ADMINISTRATION 589 (1923).

[23] Wellborn v. Weaver, 17 Ga. 267 (1855).

[24] Gardner v. First Nat. Bank of Billings, 10 Mont. 149, 25 P. 29 (1890).

[25] Hedgepeth v. Coleman, 183 N.C. 309, 111 S.E. 517 (1922); 24 A. L. R. 232 (1922); Lane v. Schilling, 130 Ore. 119, 279 P. 267 (1929).

[26] 2 WOERNER, ADMINISTRATION 703 (1923).

[27] Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945).

[28] Veeder, "Absolute Immunity in Defamation," 9 COL. L. REV. 463 at 474 (1909). There is authority to the contrary. 16 A.L.R. 750 (1922).

[29] Veeder, "Absolute Immunity in Defamation," 9 COL. L. REV. 463 at 487 (1909).

[30] One court has held that since the testator's execution of the will is not a part of a judicial proceeding, the concept of immunity is inapplicable to an action against the estate. Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945). It is submitted that the circumstances in execution are irrelevant as long as the offensive publication is found to have been consummated in the course of a judicial proceeding. The further publication effected by recordation of the probate judgment would also seem to come within the immunity, since such action is apparently an inherent part of the process. 57 AM. JUR., Wills, §933 (1948).

taches, however, it must appear that the publication is relevant.[31] The narrowest definition given to "relevant" is that the matter must be pertinent to some issue in the case.[32] Other courts have held that a statement is relevant if it relates or refers to the subject of inquiry.[33] On this basis, under either view, if the defamatory matter is pertinent to the expression of dispository intent, the immunity should attach to inclusion of the language by the testator in his will.[34] If the matter does not meet either test of relevancy, a suit should lie against the executor in his representative capacity.[35]

Charles Hansen, S.Ed.

[31] Veeder, "Absolute Immunity in Defamation," 9 COL. L. REV. 463 at 489 (1909).
[32] White v. Carroll, 42 N.Y. App. 161, 1 A.R. 503 (1870).
[33] PROSSER, TORTS 825 (1941).
[34] Nagle v. Nagle, 316 Pa. 507, 175 A. 487 (1934); contra, Brown v. Mack, 185 Misc. 368, 56 N.Y.S. (2d) 910 (1945).
[35] Where a testator drafts a will for the primary purpose of defaming, it seems that unless the matter is determined to be irrelevant, the immunity will still attach. Gaines v. Aetna Ins. Co., 104 Ky. 695, 47 S.W. 884 (1898) (knowingly false and defamatory matter included in pleadings); 16 A.L.R. 749 (1922). Such a holding may well go beyond the point of proper balance between individual rights and the interest of society in securing full discussion of all matters before its judicial tribunals.