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THE SLEEPING TORT: TESTAMENTARY LIBEL

By LEONÀ M. HUDAK*

Good name in man and woman, . . . Is the immediate jewel of their souls; . . . he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed.¹

A man's last will and testament may be described as not only an express disposition of his earthly assets, but a valedictory to the living. This valedictory may in some instances irreparably blot the escutcheon of the living for a curious and hostile world to witness in perpetuity or, at least, until some unforeseen disaster destroys the probate records wherein it reposes.

The laws of all but three of our states enable a decedent to indulge his spites, prejudices, frustrations, animosities, and/or malice to full bent beyond the grave in revenge and retaliation for real or imagined slights, and the defaming testator dies secure in the knowledge that the victims of his censure are seemingly powerless to redress the harm thus wrought.

This article will examine the manner in which British Commonwealth and American courts have dealt with testamentary libel in the comparatively small number of *reported* cases where this issue has been placed before them.²

I. NOTEWORTHY EXAMPLES OF WILLFUL VITUPERATION

One of the earliest instances of libel by will appeared in 17th century England. Though amusing to us, it must have caused consternation to its victim. A famous, but now anonymous,³ Don Juan of noble lineage be-

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1. Shakespeare, *OTHELLO*, Act III, sc. 3 (Iago).

2. There are 31 reported cases in British Commonwealth and American Jurisprudence on the issue of testamentary libel. General discussions are found in: Note, *Testamentary Defamation*, 31 *LAW NOTES* 42 (1927); Freifield, *Libel by Will*, 19 *A.B.A.J.* 301 (1933); Note, *Testamentary Libel*, 27 *GEO. L. J.* 478 (1939); Note, *Defamation by Will*, 1950 *WASH. U. L. Q.* 122; Abrams, *Testamentary Libel Actions and Restraints on the Public of the Libel at Probate*, 8 *INTRAMURAL L. REV.* 292 (1953); Comment, *Legal Remedies Available to the Victim of Libel by Will*, 1 *U.C.L.A. L. REV.* 575 (1954); Comment, *Libel in a Will*, 38 *MARQ. L. REV.* 246 (1955); Note, *Libel in a Will*, 24 *FORDHAM L. REV.* 417 (1955); Cantor, *Libel by Will*, 32 *PENNA. B.A.Q.* 248 (1961); DiFalco, *Libel in Wills*, 8 *N.Y.L. FORUM* 495 (1962) (hereinafter cited as DiFalco); 34 *L.R.A. (ns)* 975 (1911); 49 *L.R.A. (nd)* 896 (1914); Annot., *Libel by Will*, 87 *A.L.R.* 230 (1933); Annot., *Libel by Will*, 21 *A.L.R.* 3d 754 (1968); 53 *C.J.S.*, *Libel and Slander*, §82 (1968); 33 *AM. JUR.*, *Libel and Slander*, §159 (1947); PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 789 (2d ed., 1964).

3. The style and citation of the case are reportedly lost, but it is mentioned in *In re Gallagher's Estate*, 10 *Pa. Dist.* 733, 737 (1901); and *In re Draske's Will*, 60 *Misc.* 587, 290 *N.Y.S.* 581, 584 (1936). See DiFalco, *Libel in Wills*, 87 *N.Y.L. FORUM* 495, 498 (1962).

queathed £50,000 to a certain lady who had spurned his advances, in alleged gratitude for her favors. In a subsequent codicil he revoked the legacy. How the court restored the ruined reputation is unknown; but its censure must not have been stringent, for the practice continued.

Philip, Fifth Earl of Pembroke, specifically willed Lord Sage *nothing* because he knew Sage would "faithfully distribute it unto the poor." To Lieutenant-General Cromwell, Philip gave "one of my words the which he must want, seeing that he hath never kept any of his own."⁴

A Canadian, Dr. William Dunlap, made devises to one sister "to console her for marrying a man she is obliged to henpeck," and to another "because no one is likely to marry her." To a brother-in-law, he bequeathed a punch bowl "because he will do credit to it."⁵

One hapless father left his son "five dollars and the world in which to make a living."⁶ Another gave his daughter-in-law and grandchildren a dollar each, which in his express estimation was more than they were worth. A third gave his son-in-law fifty cents "to buy a good stout rope with which to hang himself and thus rid mankind of one of the most infamous scoundrels."⁷

Another filial beneficiary of a similar legacy, overcome by sudden affection for his late departed father, upon hearing the clause read by the executor, allegedly sobbed: "God grant that my poor father had lived to enjoy it himself."⁸

Then there was the cuckolded Marquise D'Aligre whose will read in part:

To my wife I leave her lover, and the knowledge that I was not the fool she thought me; to my son I leave the pleasure of earning a living. For twenty years he thought the pleasure was mine.⁹

The will of one Harry Charles Preston of Philadelphia provided:

First. After payment of all my just debts, I give and bequeath to my wife, ANNA WALTERS PRESTON, one-third of my estate. It is my earnest desire and everlasting wish that the above-named aduress and fiend in human form, to whose wiles I fell a victim while temporarily separated from my first wife, this harlot whose insidious lies, poured into my ear daily, caused me to take the step which made a reconciliation with my first wife impossible, this she-devil who, in an effort to ruin my good name, has for the last three years circulated the most damnable lies about me

4. BRIGHT, *TO WILL OR NOT TO WILL* p. 72 (1939), as cited by Million, *Humor in or of Wills*, 11 VAND. L. REV. 737, 741, n. 19 (1958) (hereinafter cited as Million).

5. 15 GREEN BAG 583, 587 (1903), reprinted in 117 L.T. 158 (1904); 53 ALBANY L. J. 30 (1896), as cited by Million, *supra*, note 4, at 741, n. 21.

6. Gest, *Some Jolly Testators*, 8 TEMP. L. Q. 297, 310 (1934).

7. *Id.* at 311. The originals are located in the Philadelphia, Pennsylvania Register of Wills.

8. 44 CASE & COMMENT, No. 6, at 48 (May, 1939), as cited by Million, *supra* note 4, at 742, n. 22.

9. 40 CASE & COMMENT, No. 1, at 22, as cited by Million, *supra* note 4, at 742, n. 24.

ever uttered by human tongue, this unnameable beast, who has made life for me a living hell for the last three years or more, and by whom I stand in daily fear of being murdered while asleep I repeat, it is my everlasting wish that this woman, whom I am compelled by law to call my wife, shall not receive one cent more of my very modest estate than she is entitled to under the laws of the State of Pennsylvania.¹⁰

One John Hylett Stow directed his executors to have a five-guinea drawing made of a snake biting the hand of a person who had saved him from dying in the snow, and to present the portrayal to a named lawyer.¹¹

Posthumously, Napoleon dramatically declared: "I die prematurely, assassinated by the English oligarchy."¹²

A French lawyer left a comparatively large number of francs to the local insane asylum, seemingly as an act of restitution to his clients who had been so mad as to engage his services.¹³

There is no dearth of testators who have vented their spleens upon their widows through the medium of the will—perhaps daring in death what they dared not in life. One of the Earls of Stafford described his spouse as "the worst of women . . . unfortunately, my wife,"¹⁴ and cut her off without a shilling. A Colonel Nash left an annuity to certain bell ringers, conditioned upon two performances: on his wedding anniversary, they were to toll a dirge from 8 A.M. to 8 P.M.; and on his death anniversary, the bells were to peal in celebration of his freedom from the bonds of matrimony.¹⁵ Another Englishman left his wife only £1,000, remarking that he would have left her £10,000 had she let him read the evening paper in peace.¹⁶ A London saloonkeeper required his wife, as a condition precedent to receiving her legacy, to walk barefooted to the marketplace on the anniversary of his death, carrying a candle and reading a confession which stated that her improper conduct had hastened his death.¹⁷

The eccentricities of devises, bequests, and legacies born of ill will are as varied as human nature itself. Fortunately, most of them are buried in probate files; a small number remain for perusal by posterity in reported cases. How many more vindications were never uttered or were expressed in diminished testamentary grants or by total disinheritance are known to God alone.

10. Philadelphia, Pa. Register of Wills, No. 220 (1932), as cited by Gest, *supra* note 6, at 315.

11. *Eccentric Wills*, 5 GREEN BAG 188 (1893), as cited by Million, *supra* note 4, at 743, n. 28.

12. *Id.* at 743, n. 29.

13. *Id.* at 749.

14. Friedman, *On Wills*, 23 GREEN BAG 574, 577 (1911), reprinted in 3 AM. LAW SCH. REV. 69 (1912), as cited by Million, *supra* note 4, at 749, n. 63.

15. *Eccentricities of Testators*, 15 GREEN BAG 583 (1903), reprinted in 117 L. T. 158 (1904), as cited by Million, *supra* note 4, at 749, n. 63.

16. Million, *supra* note 4, at 749, n. 64.

17. *Id.*

II. WHAT CONSTITUTES TESTAMENTARY LIBEL: THEORIES OF LIABILITY

Libel is any false and malicious defamation of another in print or in writing or in the form of signs or pictures tending to denigrate the memory of one who is dead or the reputation of one who is alive, exposing him to public hatred, contempt, or ridicule. The essential element of recovery on the action is communication of any of the above to a third party.¹⁸

Courts have handled libel in wills in various manners, depending on the theory under which they have proceeded. To date, no British Commonwealth court has entertained an action in tort for testamentary libel.¹⁹ Rather, they have either omitted from the probate copy the offensive portion of the will, or they have declined to do so. Their rationale is that such juridical editing, when justified, is in furtherance of the testator's intent, *i.e.*, to benefit his beneficiaries by protecting the estate from probable diminution as a result of a libel suit. Generally, such suppressed writing was neither dispositive of assets nor material to the distribution of the estate. Never has a court refused probate of an entire will on grounds of libelous content.

Some American courts have also followed the above practice. Others have faced the issue of libel squarely and have either allowed damages or refused them. Where the latter occurred, it was under the common law maxim *actio personalis moritur cum persona* (a personal injury action dies with the defendant), and neither the estate nor the executor was held liable.²⁰ The executor was deemed a creature of the law and not testator's agent since death terminates an agency not coupled with an interest. A few courts have denied liability upon grounds that a will is exempted by absolute privilege—its statements being part of a judiciary proceeding.

American courts which recognized the harshness of the above practices generally proceeded under those sections of their state constitutions which provide a remedy for every wrong or injury done to a person or his property. Thus, a viable cause of action has been recognized against the testator's estate or against the estate and the executor in his representative capacity. No executor has ever been held personally liable for libel in his testator's will.

18. *Citizens & Southern Nat'l Bank v. Hendricks*, 176 Ga. 692, 693, 168 S.E. 313, 314. See Annot., *Libel by Will*, 87 A.L.R. 230 at 231 (1933); Annot., *Libel by Will*, 21 A.L.R. 3d 756 (1968).

19. This may be due to the English survival statute of 1934, which provides that all tort actions survive for the benefit of the decedent's estate or against it, except such purely personal actions as defamation, seduction, etc. Law Reform Act (miscellaneous provisions), 1934, 24 and 25 Geo. V, ch. 41, §1.

20. In states having no survival statutes, this maxim applies. It should be noted that in states where survival statutes exist, defamation actions are excepted. See PROSSER, *LAW OF TORTS*, 789 (3d ed., 1964); Evans, *A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators*, 29 MICH. L. REV. 969 (1931); Livingston, *Survival of Tort Actions*, 37 CALIF. L. REV. 63 (1949); Note, *Damages for Testamentary Libel*, 48 HARV. L. REV. 1008 (1935); DiFalco, *supra* note 2, at 499, 500.

Perhaps the origin of this theory is the Roman law principle of universal succession, whereby one man was invested with the legal clothing of another, which included the latter's rights and liabilities. The successor was not merely a representative of the decedent (like our administrators or executors) but an extension of his legal and civil existence which continued until extinguished by operation of law. Death did not terminate rights and obligations. These (both in contractu and ex delictu) descended to the heirs, and were assumed by them, and attached to them either as assets or liabilities. Thus the estate of a deceased Roman might be described as an artificial person—a legal fiction unknown to our common or statutory law.²¹

A. *The English Cases*

The first recorded English case on the issue of testamentary libel is *Curtis v. Curtis*.²² In his holographic will written in 1823, the decedent, James Curtis, left all his property to his sister Mary, "in consequence of the cruel and murderous conduct of . . . [my] wife in this illness, as well as in past instances."²³ His relict objected to the probate of the will on grounds that the decedent was of unsound mind when he wrote it. She agreed, however, not to contest the gift, in view of the negligible value of the estate, if the objectionable clause were eradicated. To this the opposing party consented. Sir John Nicholl of the Prerogative Court held that he was without authority to strike out or expunge any part of the will itself. Irrespective of how immaterial the offensive portion might be to any disposition of property, he could not strike out the clause on the basis of unsupported verbal allegations regarding decedent's unfitness, even though such action was agreed to by all parties whose interest it could possibly affect. The judge cited an earlier, similar application of this rule involving a nobleman whose wife's will had cast serious reflections upon him. Deletion of the defamatory passage had been rejected by his predecessor in the court, even though all parties had also consented.

The issue next presented itself in the case of *In re Goods of George Wartnaby*.²⁴ The executrix-widow's attorney moved the Prerogative Court to omit from the probate copy of the will certain passages (which would remain in the original will) of a "purely voluntary and atrocious libel on a mere stranger, unconnected with the testamentary disposition of the deceased." The action was one of first impression, as Sir Herbert Jenner Fust noted, and he was reluctant to grant the prayer for want of a precedent and from apprehension of what a positive ruling on the motion would lead

21. MAINE, *ANCIENT LAW*, at 179-83, 313-14 (16th ed., 1897); Note, *Damages for Testamentary Libel*, 15 HARV. L. REV. 483, 484 (1902); DiFalco, *supra* note 2, at 500, 501.

22. 162 Eng. Rep. 393 (Prerog, 1825).

23. *Id.*

24. 163 Eng. Rep. 1088 (Prerog, 1846).

to. However, presumably having pondered the matter in his sleep thereafter, he permitted the will to be probated with the offensive passages deleted.

In *Marsh v. Marsh*,²⁵ decided 14 years later, decedent was survived by one sister and numerous nieces and nephews. His will and its codicils consisted of some 17 pages, on paper of 3 different sizes. Partly in his handwriting, and prepared in other parts by several lawyers at various times, this will presented some complicated issues for the court to determine. Among them was a prayer to except from probate certain expressions in the last codicil, deemed derogatory to heirs of the Roscoe family (a predeceased sister of the testator had been married to one W. S. Roscoe). Sir Cresswell doubted that the words were of a character serious enough to warrant the application. Also, he feared that allowing the petition would lead to future inconveniences by setting a precedent. When all parties consented, however, he entered the order as prayed. He was apparently unaware that the precedent had already been established in *Wartnaby*.

The final paragraph of Robert Honeywood's will, probated in 1871,²⁶ requested that a brief filed in a contested will action in 1859, be kept in his family and be handed down to all ages as a "witness of terrible iniquity." He felt that this brief had robbed him of his birthright and had "blotted out the Essex branch of Honeywood forever," and that through it, one F. E. H. had "deliberately and designedly" defrauded him and his heirs of their patrimony. He also recorded in the same paragraph his "most solemn conviction" that his named predeceased brother was innocent of what had been done, having been "simply an instrument in the hands of his wicked and remorseless wife." Honeywood's executors moved to have this paragraph deleted from the engrossment of the will for probate and from the copy inserted in the court's registry books, in order to avoid further ill-feeling in the family.

Lord Penzance rejected their motion, although he admitted that there was sufficient precedent for the action. In his opinion, the power was one to be exercised with great moderation. In the case at bar, he thought the testator had merely expressed strong anger over losing a lawsuit and this was not serious enough to warrant the court's interference. Any court action would result in putting "before the world under its seal a document professing to be, but actually not, a true copy of the will," since it was not likely that any one would "feel hurt."²⁸ F. E. H. and Honeywood's sister-in-law, no doubt, harbored quite different sentiments.

In *In re Estate of White*,²⁹ decedent's brother, who was sole legatee and

25. 164 Eng. Rep. 845 (Prob. 1860).

26. *In re Goods of Honeywood*, (1871) 2 P. & D. 251.

27. *Id.* at 251.

28. *Id.* at 252.

29. (1914) P. 153.

executor, moved to omit from probate the reasons the testator gave for cutting his widow out of his will. These reasons were said to be scandalous and defamatory, although they were not read in open court. Justice Deane reviewed *Curtis*, *Wartnaby*, *Marsh*, and *Honywood*, noting that they had laid no principle of law but, on the contrary, were in conflict. His own view was that a will should not be a purveyor of slander; and that any defamatory words contained in the document should be expunged if such language served no useful purpose. However, since no reported case had ordered this done to the original will, he could go no further than to have the objectionable material removed from the probate copy, as requested in the motion. He also observed that the registrar could issue copies made from the probate copy only under this order.

In re Estate of Heywood,³⁰ although not dealing with testamentary libel, proved that courts have the power to carve out an exception to almost any rule if necessity demands it. The decedent was an army officer who had died in Belgium on February 15, 1915, of wounds sustained in action. On February 8, 1915, he had written a letter to his father-in-law which included the clause: "I have made no will and so all what little there is apart from the marriage goes to her."³¹ There were affidavits proving his handwriting and signature and identifying "her" as Barbara, decedent's widow, who was applying for letters of administration and probate of portions of the letter as a soldier's will under the Wills Act of 1837.³² Other affidavits indicated that military authorities had requested that the letter not be published in its entirety. The net estate was valued at £8391. There were no children, and the only next of kin, the testator's father, had agreed to be bound by any order the court might make. The widow's attorney moved that only those extracts set out in her affidavit be filed and included in the probate, and that the remainder of the letter be excluded.

Justice Deane ruled that only that portion of the letter which was testamentary, along with any words and figures which rendered it intelligible—all of which had been set out in petitioner's affidavit—were to be filed in probate. The remainder of the letter was to be ignored. His rationale was that ordinary practice could not prevail over the exigencies of public service in time of war.

The widow of Dr. William Caie³³ also moved to have certain clauses excluded from the probate copy of his will, which were in no way dispositive of his property and were allegedly "offensive and objectionable to persons professing the Christian religion." The issue was whether or not the latter reason constituted a ground for their omission from probate. Justice Hill dismissed Mrs. Caie's motion. It appeared that the first clause

30. (1916) 1 P. 47.

31. *Id.* at 47.

32. Wills Act, 1837, 1 Vict., ch. 26, §11.

33. *In re Estate of Caie*, 43 L.R. 697 (1927).

merely stated the age at which decedent wanted his children to choose a Christian church to belong to and the second, merely exhorted them to become Freemasons. The court held that the fact that the will expressed views which did not coincide with petitioner's was insufficient to constitute libel of any individual. However, another motion which requested omission from probate of words highly defamatory of a living person was granted.

In the Estate of Davis,³⁴ decided on the same date, was an action similar to *Caie*, *i.e.*, an effort to exclude from probate certain words deemed highly defamatory of a living person who was a well-known and respected resident of Hastings, England. Justice Hill allowed the request.

In *In re O'Reilly's Will*,³⁵ the Supreme Court of Australia refused to order the sentence—"I make no provision for my wife on account of her intemperate habits & other misconduct."—removed from the probate copy of the will, observing that although it had jurisdiction to omit scandalous or defamatory words which were in no way germane to the disposition directed in the will, such discretion should be exercised with great care.

Following the precedents of *Wartnaby*, *Marsh*, *White*, and *Caie*, Justice Hill, in *In re Maxwell*,³⁶ ordered an offensive but nondispositive paragraph to be omitted from the probate copy of the will as an alternative to expunging it from the original. The motion was brought, not by the person defamed, but by the testator's sister, who was a residuary legatee. Petitioner had argued that if the words were left in the original document, anyone might go to Somerset House, ask to see it and read it. Defending his decision, the judge noted that while anyone might inspect the original, he would be foolish to publish the paragraph in issue without running the risk of a libel suit. He also observed that the probate court can enjoin a person from doing so. Finally, he commented that courts are loath to alter original documents, mindful that in the future they may well become historically valuable.

*In re the Goods of Bowker*³⁷ was unique in that, even though it contained no personal allusions defamatory of anyone, Lord Merrivale excluded from the probate copy of the will certain directions as to the disposal of the remains of the testator and to his funeral, upon petition of the executor. The supporting affidavit stated that the words were "offensive and objectionable and repugnant to the members of the deceased's family and unless omitted would be broadcast in the press and particularly in the locality where the deceased was well known and where the deponent and other members of the family lived."³⁸ The omitted words were described as "not dispositive;" however, that is open to argument. Certainly the case carved out an exception to the nondispositive requirement of the rule.

34. 71 Sol. J. 898 (1927).

35. (1927) Vict. L. R. 533; (1927) Austl. Argus L. R. 396.

36. 140 L. T. 471 (1929). See 73 Sol. J. 159 (1929).

37. [1932] P. 93.

38. *Id.*

*In re Estate of Rawlings*³⁹ was a motion by the executors of John Rawlings' will to exclude the words "that rascal" from the probate copy on grounds that they were scandalous and unnecessary. It appears that the decedent gave one Mary Ann Webster (apparently a relative) £5,000, his home, and its contents on condition that she "not in any way give, lend, or have anything to do with that rascal her husband or any of his family, except Cyril Richard, her son."⁴⁰ Citing *Curtis, Wartnaby, Marsh, Honywood, Heywood, Caie, and Bowker*, Sir Merriman held that the words in question ought not to be excluded as they might be of assistance to the court in construing the conditions of which they formed a part.

In the last reported English case, *In re Estate of Hall*,⁴¹ the court utilized much the same rationale. Justice Barnhill denied the motion of a man named in a codicil to the will of Louisa Hall, to strike out certain nondispositive words which allegedly were scandalous, offensive, and libelous. However, these words did explain why the testatrix made the codicil which revoked certain provisions of her will. The court ruled that the words in issue were not defamatory per se; nor were they put in to injure the character or reputation of the complainant. It held that "a testator not only has the right to dispose of his property, but he also has the right to give [his reasons for so doing]."⁴² Expressing "considerable doubt," Justice Barnhill relented in giving permission to exclude from probate the words "for the family honour," on grounds that they might suggest to someone reading the will that something dishonorable had been done, but he admitted that this was farfetched.⁴³

*B. American Cases Following the English Rule:
Judicial Deletion of Libelous Matter*

In the first reported case of testamentary libel in the United States was *In re Bomar's Will*, in King's County, Surrogate Court, New York.⁴⁴ Thomas Bomar had been predeceased by his son, who had separated from his wife after the birth of their child. Custody of the infant was given the mother. The grandfather vindictively sought to disinherit his grandson by the following clause in his will:

And whereas, one of my sons . . . is deceased, and there is a child in existence which is claimed to be his, and which is named . . . , now it is my will that no portion of my estate, real or personal, shall go to or belong to him, his heirs, or representatives.⁴⁵

39. 78 Sol. J. 338 (1934).

40. *Id.* at ____.

41. 2 All E. R. 159 (1943).

42. *Id.* at 160.

43. *Id.*

44. 27 Abb. N. Cas. 425, 1 Power 35, 18 N.Y.S. 214 (Surr. Ct. 1892).

45. *Id.* at 215.

The guardian ad litem of the infant filed objections to the clause on grounds of its superfluous and libelous nature. At the hearing, the testator's other sons introduced evidence of the child's legitimacy and the validity of their brother's marriage to the child's mother.

Citing *Wartnaby* and noting that the offensive clause was not a dispositive one, Surrogate Abbott allowed the guardian's motion to refuse probate and record to "the unwarranted slur upon an innocent child," declaring that a will "should not be a vehicle for libel and contumely."⁴⁶

Nineteen years later, in the case of *In re Meyer*,⁴⁷ the New York County Surrogate Court was asked to strike from a codicil certain language (not recited in the opinion) as being scandalous, improper, and nondispositive. Surrogate Fowler remarked that such a motion, if it could be entertained at all, is properly made before a will is admitted to probate. Then, reviewing *Wartnaby*, *Curtis*, and *Bomar*, he concluded that the surrogates of New York did not have authority to expunge matter from an original will or codicil brought into court for probate because these papers were not the property of the state. After recordation, they were returned to their rightful claimants, rendering the court powerless to destroy or mutilate property entrusted to its care. Consequently, the motion could only be regarded as one to refuse probate and record to the offensive matter and not to expunge it from the original. Agreeing that the power to omit clearly scandalous, vituperative, or scurrilous matter should be sparingly exercised, as per *Honywood*, Fowler ruled that the words in question were not grave enough to be harmful to complainant and he denied the motion. He also commented that even though he possessed the power invoked, he preferred not to exercise it. In spite of his pronouncement about the innocuousness of the words objected to, he substituted asterisks in their stead in the opinion.

By contrast, 15 years later Surrogate Foley, of the same court (New York County), in *In re Speiden's Estate*,⁴⁸ described the power of a probate court to exclude objectionable matter in a will from probate and record as *complete*, "particularly where the omission does not change the legal effect of the paper or constitute an operative portion of the instrument."⁴⁹ He emphasized that "only by the exercise of such power may the publication of a post mortem libel or the recording of indecent or offensive language, written by a testator or by the draftsman of a will, be denied judicial recognition."⁵⁰ On the strength of *Bomar* and *Meyer*, he ordered stricken a nondispositive defamatory paragraph added to a codicil, which explained the substitution of a new trustee in lieu of a previous one.

In accordance with *Speiden*, Surrogate Wingate, also of the King's

46. *Id.*

47. 72 Misc. 566, 131 N.Y.S. 27 (Surr. Ct. 1911).

48. 128 Misc. 899, 221 N.Y.S. 223 (Surr. Ct. 1926).

49. *Id.* at ____, 221 N.Y.S. at 225.

50. *Id.*

County Court, New York, in the case of *In re Draske's Will*,⁵¹ ordered omitted from probate a certain presumptively libelous statement explaining the testatrix' reasons for limiting her gift to an indicated male beneficiary. Being nondispositive, the statement was not properly part of the will. The issue centered upon the Court's obligation to compel and participate in the publication and perpetuation of defamatory and libelous testamentary language, when all the parties to the action stipulated, consented, agreed, and requested the court to exclude the matter from probate on the ground that it was neither dispositive nor an essential testamentary provision. Surrogate Wingate observed that because title to real estate was involved in the instant devise, the record, when made by the court, would inevitably be inspected from time to time in perpetuity.

Reviewing the entire reported common law history of the United States and England on the issue of testamentary libel, the court concluded that not only was it under no compulsion to admit to probate defamatory statements possessing no dispositive value; to the contrary, it was under a *duty* to delete them from papers to be recorded. The basic right of testamentary disposition, it continued, concerned only affirmative donative directions; expressions of reasons or motives for a given devise or bequest were wholly immaterial. Thus a "testator could not require from the administrators of the law the recognition or perpetuation of any expression of wish or feeling which was not directly relevant to an affirmative disposition of his assets."⁵² Since the desire of the testator was to benefit those whom he had designated as recipients of his bounty, the prevention by the court of publication of the libel was in furtherance of the basic testamentary intent and an advantage to the named beneficiaries.⁵³

*In re Payne's Estate*⁵⁴ presented the Surrogate Court of Monroe County, New York, with a unique problem. David Payne, a childless widower in his late seventies, composed and executed a will three years before his death. It directed the executor to liquidate his assets and use the proceeds (\$3,275.00) to publish and distribute to public libraries a religious tract entitled "The Elijah Message" which the testator had written. The purpose of the treatise, based on the work and service of the prophet Elijah, was to promote a purer form of religion than that which the testator had found in contemporary churches. The executor petitioned for a construction of the will. Testator's next of kin urged the court to declare the trust void for vagueness.

51. 160 Misc. 587, 290 N.Y.S. 581 (Surr. Ct. 1936). See Note, *Deletion of Defamatory Matter in Will*, 6 FORDHAM L. REV. 150 (1937); Note, *Authority of Probate Court to Omit Libelous Matter from Probate*, 17 BOSTON L. REV. 268 (1937); Note, *Wills—Deletion of Libelous Matter*, 35 MICH. L. REV. 854 (1937); Note, *Wills—Exclusion of Testamentary Libel*, 25 GEO. L. J. 1063 (1937); Note, *Omission of Libelous Matter from Probate*, 21 MINN. L. REV. 870 (1937).

52. 160 Misc. at _____, 290 N.Y.S. at 589.

53. *Id.* at _____, 290 N.Y.S. at 590.

54. 160 Misc. 224, 290 N.Y.S. 407 (Surr. Ct. 1936).

Surrogate Feely held that "there was nothing indefinite or impracticable about the ways and means decedent had outlined for publishing his work," and "that the book had a definite scientific value as the naive, sincere, and spontaneous record of the reaction to religion and churches of a thoughtful self-educated man."⁵⁵ There arose an issue, however, over some 45 lines out of a total of 4400 which the court said might be found defamatory (*e.g.*, the named leader of a religious sect was termed a fakir (*sic*) and a fraud by the testator. Though the will was not deemed libelous on its face, executing it might subject the estate or the executor, or both, to an action for libel. However, the testator had empowered the executor to make discretionary changes in the manuscript by obliterating offensive passages. The court held that the executor was responsible for the complete discharge of the editorial duty, with an able assist in the form of blue-pencilling, volunteered by Surrogate Feely himself.⁵⁶

Surrogate Frankenthaler, in *In re Palmer's Estate*,⁵⁷ followed *Meyer, Speiden, Payne, and Draske* in ordering expunged from probate records and files certain nondispositive but objectionable wording. He granted petitioner's motion without making *any* determination as to whether or not the excised words were libelous and without prejudice to the legal rights of interested parties. (The proponents of the will did not oppose the motion.) He also ordered the original will to be placed in a sealed envelope, to be exhibited only upon direction or order of the court.

Following *Palmer* by six weeks was *In re Croker's Will*.⁵⁸ Surrogate Hazelton of Suffolk County, New York, reviewing the history of omitting defamatory matter from probated wills, and commenting on the lack of appellate authority on the issue, nevertheless, ordered certain scandalous, libelous, and scurrilous—but nondispositive—passages deleted from the probate copy on the basis of the same cases we have discussed above. The original will, as in *Palmer*, was sealed in an envelope "to be preserved as a safeguard against the human fallibility of even the surrogate" and to be exhibited only upon direction or order of court, so as not to be "accessible to the curious or morbid."⁵⁹

In *In re Schell's Estate*,⁶⁰ a case of first impression in Pennsylvania, the register of wills certified to the Orphan's Court of Montgomery County the question of whether he had the power to probate testamentary writings after deleting therefrom paragraphs libelous in nature, or whether he had to probate them in their entirety. Probate Judge Taxis ruled that the

55. *Id.* at ____, 290 N.Y.S. at 412.

56. *Id.* at ____, 290 N.Y.S. at 416.

57. 104 N.Y.S. 2d 643 (Surr. Ct. 1951).

58. 201 Misc. 264, 105 N.Y.S.2d 190 (Surr. Ct. 1951). See Note, *Testamentary Libel: Disposition of the Original Instrument*, 37 Cornell L. Rev. 336 (1952).

59. 201 Misc. at ____, 105 N.Y.S.2d at 198.

60. 10 Fiduciary R. 123, 20 Pa. D. & C.2d 628, 76 Montg. Co. L. R. 142 (1960). See Annot., *Libel by Will*, 21 A.L.R.3d 754, 759 (1968).

statements in question were presumptively libelous and clearly not dispositive. By authority of *Draske, In re Rockett Will*,⁶¹ and *In re Rockett's Estate*,⁶² he ordered that the register had authority to omit the objectionable words before admission of the will to probate, and that he should then engross such copy "fair" (denoting that alterations have been made in the original instrument, which was to be impounded and examined only by further order of the court).⁶³

1. Finding Testamentary Libel Actionable

*In Re Gallagher's Estate*⁶⁴ was the first reported case in the United States to recognize the necessity of an action grounded in tort and based upon alleged defamatory language contained in a will.⁶⁵ The cause arose in Orphan's Court, Pittsburgh, Pennsylvania. Plaintiff Patrick J. Brady, an attorney-at-law residing in Cleveland, Ohio, was decedent's cousin. He filed his petition for libel and damages in the amount of \$50,000, pending the audit of the final account in the settlement of the estate. The testator, in Item 4 of his will, stated that Brady owed him more than \$3,000.00 for clothing, educating, and otherwise maintaining him for 10 years, and that he had never kept his promises to repay even one dollar of the amount. The testator bequeathed the sum to two first cousins in equal share, with the direction that they collect the debt themselves. Brady denied the existence of the debt and claimed great prejudice to his credit and reputation, and public scandal, infamy, and disgrace. The estate demurred.

In response to defendant-executor's objection to jurisdiction, the court replied that since it had probate jurisdiction over creditors' claims for damages sounding in tort, it could not see why it did not have jurisdiction over those arising out of simple torts. It held defamatory matter contained in a will to be, in the strict sense, not a libel but only in the nature of a libel.⁶⁶ Plaintiff was allowed to prosecute his suit upon the stipulation that as a non-resident, he would abide by the decision of the court and not relitigate the matter elsewhere; and, if unsuccessful, he would pay court costs.

In strong language, Judge Swartz expressed his disapproval of libel by will, as he overruled defendant's demurrer:

It was written in cold blood in contemplation of publication at a time when no action could be brought against the person of the wrongdoer, and

61. 48 Pa. D. & C. 6, 16 (1942).

62. 348 Pa. 445, 35 A.2d 303 (1944).

63. 10 Fiduciary R. 123 at ____, 20 Pa. D. & C.2d at 683, 76 Montg. Co. L. R. at ____ (1960).

64. 10 Pa. Dist. 733, 49 Pitts. L. J. 161 (1900).

65. See Annot., *Libel by Will*, 87 A.L.R. 234; Annot., *Libel by Will*, 21 A.L.R.3d 754, 761-62 (1968); Note, *Damages for Testamentary Libel*, 15 HARV. L. REV. 483 (1902).

66. 10 Pa. Dist. 733, 735 (1900).

in a public record which would be a perpetual reminder of the charge . . . Refusal to grant relief in such case would amount to denial of justice and to a premium on irresponsible libel. No one would be safe from the "slings and arrows of outrageous" malice. It ought not be permitted that a solemn testamentary disposition should be made the vehicle of libelous matter.⁶⁷

Whether or not Brady subsequently pursued his suit is nowhere indicated in reported sources.

Harris v. Nashville Trust Co.,⁶⁸ was the next case to consider testamentary libel. Plaintiff Cleo Harris and her husband sued the executor and her uncle's estate. In their petition they averred that in retaliation for Mrs. Harris's previous suit against her uncle to recover her interest in her grandmother's estate, her uncle added a codicil to his will gifting to her and to her brother the sum of \$1.00 each and declaring them to be the "illegitimate children of his brother James Woodfin." Defendant's demurrer was sustained by the trial court, but it was overruled by both the appeals court and the Supreme Court of Tennessee. The estate was held liable for damages; the defendant executor was not.

Justice Green observed that although the action was without precedent, it should not be defeated upon that ground if it could be sustained upon sound principles of law; that the enjoyment of private reputation unassailed was a right entitled to the protection of the law and of the Constitution to the same extent as are the rights of the possession of life, liberty, or property; that if plaintiff was denied relief, there would be no way in which she could vindicate her mother's virtue and integrity and establish for herself the position in society which she was entitled to occupy; that she and her descendants for generations would bear the reproach of the bar sinister. It was held libelous per se to charge one in writing or in print with being illegitimate.⁶⁹

In *Brown v. Mack*,⁷⁰ the issue of testamentary libel reached an appellate level in New York for the first time. The widow Brown, legally separated from decedent for 25 years, sued his estate and his executor in both his representative capacity and individually. In his will, Christopher Brown limited plaintiff, whom he described as "unfortunately my wife," to her lawful dower rights for a reason expunged by the court and because he claimed he had never lived with her.

Justice Walsh, in a lengthy opinion, reviewing the pertinent law of both

67. *Id.* at 737.

68. 128 Tenn. 573, 162 S.W. 584 (1914). See Note, *Liability of Testator's Estate for Libel Contained in His Will*, 12 MICH. L. REV. 489 (1914); Note, *Charge of Illigetimacy in a Will*, 62 U. PA. L. REV. 643 (1914); Comment, *Can Estate be Held Liable for Libel?*, 23 YALE L. J. 534 (1914).

69. Annot., *Libel by Will*, 87 A.L.R. 235 (1933).

70. 185 Misc. 368, 56 N.Y.S.2d 910 (1945). See Annot., *Libel by Will*, 21 A.L.R.3d 751, 764 (1968); Note, *Liability of Estate and Executor for Libelous Will*, 32 VA. L. REV. 189-90 (1945).

probate and tort and their ramifications, found that the complaint stated a cause of action in that the words in question were libelous per se. The estate and the executor in his representative capacity were held liable. Individually, the executor was exonerated on grounds of absolute privilege. Justice Walsh commented that a testator may properly give reasons for disinheriting the natural objects of his bounty, and that frequently such reasons are important in a probate proceeding; but justice and public policy demand that he not have a shield of privilege. If the allegedly libelous words are true, his estate has the defense of justification. If not, it must bear the burden of his wrongs.⁷¹

The issue of liability of an estate for testamentary libel was next reported in *Kleinschmidt v. Mattheiu*,⁷² a case of first impression in Oregon. Decedent bequeathed his grandson only ten dollars because the latter had borne witness against him and his mother (testator's daughter). The will also alleged that the grandson had been a slacker in World War II, having evaded the draft. Holding that plaintiff grandson had a viable cause of action against his grandfather's estate for libelous matter contained in his will, Chief Justice Latourette, of the Oregon Supreme Court, reversed the trial court which had sustained a demurrer to the complaint. He deemed the rule of *Harris* the most salutary one, after reviewing some of the authorities cited herein. He commented that a court should not be deterred by fear of being accused of judicial legislation in a novel case, and that a cardinal virtue of the common law is its capacity to discover and apply remedies for acknowledged wrongs.⁷³

*Brown v. DuFrey*⁷⁴ brought the issue of testamentary libel squarely before the New York Court of Appeals. Plaintiff had divorced testatrix in 1917 and remarried in 1924. In her will, the testatrix indicated that she was intentionally making no provision for her former spouse because he had abandoned her during her lifetime, had not supported her, and had treated her with complete indifference and lack of affection.⁷⁵ The New York *Amsterdam News* on October 20, 1951, carried a feature about the will on

71. 185 Misc. at ____, 56 N.Y.S.2d at 917.

72. 201 Ore. 406, 266 P.2d 686 (1954). See Annot., *Libel by Will*, 21 A.L.R.3d 754, 760, 764 (1968); Note, *Testamentary Libel—Action for Injuries Resulting After Death of Tortfeasor*, 33 TEXAS L. REV. 146 (1954); Comment, *Liability of Testator's Estate for Libel Incorporated in Will and Published in Probate Proceedings*, 12 WASH. & LEE L. REV. 288 (1955); Note, *Libel in Will—Liability of Estate*, 33 N. C. L. REV. 146 (1954); Note, *Libel and Slander*, 33 CHI.-KENT L. REV. 170 (1955); Note, *Torts—Libel by Will*, 16 U. PITT. L. REV. 74 (1954); Note, *Testamentary Libel—Recovery Against Estate*, 8 VAND. L. REV. 158 (1954); Note, *Torts—Survival of Actions—Testamentary Libel*, 7 ALA. L. REV. 211 (1954).

73. 201 Ore. 406 at ____, 266 P.2d 686 at 690 (1954).

74. 1 N.Y.2d 190, 151 N.Y.S.2d 649, 134 N.E.2d 469 (1956). See Annot., *Libel by Will*, 21 A.L.R.3d 754, 760, 761 (1968); Note, *Libel—Testamentary*, 21 ALBANY L. REV. 120 (1957); Note, *Torts—Libel per se—Words Imputing Marital Discord*, 23 BROOKLYN L. REV. 156 (1957).

75. 1 N.Y.2d 190 at ____, 151 N.Y.S.2d 649 at 652, 134 N.E.2d 469 at 471 (1956).

page one, captioned: "Husband Deserted Her; Woman Bequeaths Fortune to Church." A Mason and an Exalted Ruler of the Elks, plaintiff won a \$5,000.00 jury verdict. The court of appeals, Chief Judge Conway presiding, upheld a finding that the gratuitous insert in the will contained words libelous per se and actionable without allegation or proof of special damage, causing complainant great humiliation and mental anguish. The insertion was deemed gratuitous by testatrix because the divorce which the plaintiff had obtained from her had severed their marital bond and by New York statute, his right to share in her estate had been terminated. Thus, the decedent was not justified in making such charges against him in her will.⁷⁶

2. Finding Testamentary Libel Not Actionable

The celebrated case of *Citizens and Southern National Bank v. Hendricks*⁷⁷ also dealt with a statement of illegitimacy contained in a will. Testatrix bequeathed to her grandson only \$100.00, giving as her reason: "I do not recognize him as a grandson, descendant of my blood." The grandson sued both the estate and the executor. The trial court sustained defendants' demurrer. The court of appeals found that a viable cause of action existed. The Supreme Court of Georgia, Justice Atkinson presiding, reversed, giving as its rationale the following:

[If a paper executed as a will expresses libelous matter] . . . and the perpetrator dies, the maxim *actio personalis moritur cum persona* [a right of action abates with the death of the tortfeasor] will apply . . . If it be said that the act of the executor in propounding the will could be taken into account, the reply is that the executor was a creature or agency of the law to administer the estate, and was not the testator's representative. . . .⁷⁸

Presumably, in Georgia, one can defame to his heart's content in a will, with complete impunity.

In *Nagle v. Nagle*,⁷⁹ plaintiff sued her father's estate and won a jury verdict of \$150,000 on which the trial court entered judgment *non obstante veredicto*, on grounds that a will is privileged. The Pennsylvania Supreme Court, Justice Schaffer presiding, affirmed. The action was trespass in the nature of libel. Testator maintained in his will that he had only two children and that any other claim of such a relationship to him was fraudulent—a claim he directed his executor to resist to the last. For 27 years

76. *Id.* at —, 151 N.Y.S.2d 649 at 656, 134 N.E.2d 469 at 474.

77. 43 Ga. App. 408, 158 S.E. 915, *rev'd*, 176 Ga. 692, 168 S.E. 313, *conformed to in Hendricks v. Citizens & Southern Nat'l Bank*, 46 Ga. App. 670, 168 S.E. 925 (1933). *See Note, Right to Recover Damages for Libel in Will*, 16 MINN. L. REV. 93 (1931); *Note, Liability of Estate for Libel in Will*, 10 N. C. L. REV. 88 (1931).

78. 176 Ga. 692 at 697, 168 S.E. 313 at 315 (1933).

79. 316 Pa. 507, 175 A.287 (1934).

during decedent's lifetime, there was litigation in four courts wherein he disavowed his parenthood of plaintiff, but during the course of which he had paid over substantial sums of money in amicable settlements. Justice Schaffer held that the rule making pleadings in judicial proceedings absolutely privileged is applicable to a will which discloses no apparent purpose to injure anyone's reputation, but merely attempts to assure distribution of testator's estate to proper and desired beneficiaries.

The rule of *Nagle* was followed in the unpublished Texas Court of Appeals opinion of *Martin v. Graham*.⁸⁰ The objectionable clause, which resulted in a libel suit brought by testator's daughter, recited:

1. In order that there may be no misunderstanding, I do hereby declare that there was no child or children born of my first wife, fathered by me.⁸¹

The will was offered to probate by decedent's widow who learned for the first time that she was his third wife, and that his first wife had borne him a child when he was married to her. Without discussing the *actio personalis moritur cum persona* doctrine, the court held:

It matters not what his [testator's] motives may have been, the publication of the will was made in the course of a judicial proceeding and was absolutely privileged.⁸²

*Carver v. Morrow*⁸³ brought testamentary libel as a case of first impression in 170 years of statehood before the Supreme Court of South Carolina, which adopted the lower court's opinion as its own and followed the rule established by *Hendricks*. The demurrers of both the estate and the administrator were sustained. The rationale of the court was that allowance of such an action would open the floodgate to many other different causes of action. Thus, regardless of how wicked a libel and its publication might be, and no matter how serious the damages and consequences suffered, the cause of action dies with the decedent and the injured party has no redress in South Carolina; just as he has none in Georgia or Texas.

In the final reported American case on the subject of libel by will, *Nolin v. Nolin*,⁸⁴ the sole issue was whether or not a cause of action existed against one who presented for probate a will containing defamatory words. The alleged cause of action was for libel to the character and reputation of a person or for slander of title to real estate. The court was not called upon to decide whether or not a cause of action, under the same facts, exists against the estate of a decedent who makes and executes such a will, nor whether or not the recitations complained of were libelous per se.

80. No. 11105 (Tex. App. 1942).

81. As quoted in Di Falco, *Libel in Wills*, 8 N.Y.L. FORUM 494, 505 (1962).

82. *Id.* at 506, as quoted in Note, *Action for Injuries Resulting After Death of Testator*, 33 TEXAS L. REV. 146, 147 (1954).

83. 213 S.C. 199, 48 S.E.2d 814 (1948).

84. 68 Ill. App.2d 54, 215 N.E.2d 21 (1966).

Presiding Justice Coryn held that the executor of an estate could not be held liable in his individual capacity for presenting such a will for probate, as per *Harris*.⁸⁵

III. CONCLUSION

There are 31 reported cases in the history of British Commonwealth and American jurisprudence dealing with defamatory material contained in a will. The courts of England (12), Australia (1), New York (9), Pennsylvania (3), Tennessee (1), Texas (1), Oregon (1), Georgia (1), Illinois (1), and South Carolina (1) have treated the issue the number of times indicated in parentheses. Presumably, it has not presented itself in the courts of the other states.⁸⁶

English, Australian, New York, and Pennsylvania courts have either ordered the objectionable material deleted from the probate copy of the will or have not deemed it offensive enough to merit expunging. No court has ever ordered the original will altered. A few have ordered the testament impounded and sealed, subject to examination only upon official order.

The Supreme Courts of Georgia and South Carolina denied to plaintiffs relief for libel in wills, applying the maxim *actio personatis moritur cum persona* (a right of action abates with the death of the tortfeasor). The Pennsylvania Supreme Court and the San Antonio, Texas, Court of Appeals denied relief on grounds of absolute privilege of pleadings in judicial proceedings, which includes wills. An Illinois court of appeals held that an executor cannot be held liable for defamation by will in his individual capacity.

The Orphans Court of Pittsburgh, in 1902, was the first American court to recognize the viability of an action "in the nature of" a testamentary libel. The Supreme Court of Tennessee, in 1913, first held the estate, but not the executor, liable for damages for testamentary libel. This rule was followed by the Oregon Supreme Court. The New York case of *Brown v. Mack*⁸⁷ found both the estate and the executor in his representative capacity liable. The New York Court of Appeals, in *Brown v. DuFrey*,⁸⁸ held the executor as representative of the estate liable; it made no mention of the liability of the estate itself.

It is the opinion of this writer that an action for testamentary libel is an idea whose time is far overdue. Courts have twiddled in legal fictions in this regard for several centuries as testators continue to indulge their

85. *Id.* at ____, 215 N.E.2d at 24.

86. In an interview on June 8, 1971, Ellis V. Rippner, former Probate Court Judge of Cuyahoga County, Cleveland, Ohio, and Professor of Wills and Probate, Cleveland State University Law School, stated that to his knowledge, the question has not been raised in Ohio courts.

87. 185 Misc. 368, 56 N.Y.S.2d 910 (1945).

88. 1 N.Y.2d 190, 151 N.Y.S.2d 649, 134 N.E.2d 469 (1956).

spites. If it be judicial legislation to declare libel by will an actual bona fide tort, then so be it. The innocent victims of such vituperation deserve redress. If the testator wants to "get his kicks" in this manner after death, then he must, as the Spanish proverb says, take what he wants and pay for it. Unfortunately, the natural objects of his bounty—his heirs (who took no part in the defamation)—must bear the brunt in the form of diminished gifts. However, a few such well-publicized juridical lessons may put the quietus on libelling in future wills. Justification for such a tort lies in that portion of each state's constitution which provides a remedy for every wrong or injury done a person or his property.

