

good faith purchaser from the reacquirer. Both the *West Boston Bank* and *Pistorino* cases were cited with approval. However, upon appeal,¹⁵ the Court of Appeals reversed the judgment because it appeared on the face of the note that it was not negotiable; however, the court expressly declined to pass on the rights of the parties in the event the note was negotiable.

Although the factual situation presented in these cases apparently seldom arises, it is submitted that an amendment to Negotiable Instruments Law is necessary. In none of the above cases did the court attempt to interpret the existing sections of the Negotiable Instruments Law; and, although Sec. 196¹⁶ of the Negotiable Instruments Law authorizes the application of the rules of the law merchant to situations which are not covered by the Negotiable Instruments Law, certainly a specific amendment to correct an obvious omission is preferable to possible divergent interpretations and constructions of existing sections of the Negotiable Instruments Law or resort to the law merchant.

ROBERT G. MCCLINTOCK*

DEFAMATION BY WILL

Should a man's wrong, because its effect and operation is postponed until after his death, be declared no wrong at all? This is probably an over-simplification of the problem, but in principle this question answered affirmatively may be the state of the law with regard to a libel contained in a will. An action by the defamed person has in some cases been dismissed on a general demurrer, or a motion to dismiss, for failure to state a cause of action.¹

15. 261 N. Y. 212, 185 N. E. 77 (1933).

16. Section 196 of the Negotiable Instruments Law provides:

In any case not governed by this act the rules of the law merchant shall govern.

* Member of the Missouri Bar; former member of the staff, WASH. U. L. Q.

1. In these cases, the person libelled generally sues the executor in each of the latter's two capacities: (1) as a party who helped commit the publication of the libel, and (2) as the decedents' personal representative. The defendant in his former capacity is invariably dismissed from the action since the acts of publication that he commits are done under compulsion of law under his statutory duty to probate the will. The executor as representative of the estate is the capacity with which we are in the main concerned in the present article.

The situation as aforementioned has come up for decision in only five states.² Although three of the cases allowed recovery,³ the reasoning used in two of them nullifies their persuasive authority. That leaves us with a dearth of authority, since in the other forty-three states, there is no case law.⁴

In two of the cases in which recovery was allowed,⁵ the important problem of publication was handled in a most unsatisfactory manner. The courts concluded that the executor of the estate is, for the purpose of publication, the agent of the deceased. This is, however, clearly contrary to the established principles of agency.⁶ To hold as these courts have done is to disregard entirely the principle of *stare decisis*.⁷ The most recent case which embraces the fact situation described in this note clearly recognizes that the executor could not be an agent of the deceased as to publication of the libel since the agency is not coupled with an interest.⁸

The law of principal and agent, therefore, cannot be used as a basis for granting recovery in this situation; however, there is another, and more realistic argument in favor of allowing the defamed person to recover. Professor Harper⁹ states that when the testator's intent is clear and malicious and the publi-

2. *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914). Noted in 12 MICH. L. REV. 489 (1913); 23 YALE L. J. 534 (1913); 62 U. OF PA. L. REV. 643 (1913). *Citizens and Southern National Bank v. Hendricks*, 176 Ga. 692, 168 S.E. 313 (1933) noted in 10 N. C. L. REV. 88 (1931). *Brown v. Mack*, 185 Misc. 368, 56 N.Y.S.2d 910 (Sup. Ct. 1945). *Carver v. Morrow*, 213 S. C. 199, 48 S.E.2d 814 (1948); noted in 97 U. OF PA. L. REV. 289 (1949), 62 HARV. L. REV. 318 (1949); 28 NEB. L. REV. 128 (1949); 33 MINN. L. REV. 171 (1949); 10 U. OF PIT. L. REV. 248 (1949); *Gallagher's Estate*, 10 Pa. Dist. 733 (1901).

3. *Harris v. Nashville Trust Co.*, *supra* note 2; *Brown v. Mack*, *supra* note 2; *Gallagher's Estate*, *supra* note 2.

4. There are some state statutes that would affect any case such as we pose here, even though no such case has arisen in that state. These statutes will be discussed at length later in this article.

5. *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914); *Gallagher's Estate*, 10 Pa. Dist. 733 (1901).

6. *Farmers' Loan and Trust Co. v. Wilson*, 139 N.Y. 284, 34 N.E. 784 (1893); RESTATEMENT, AGENCY § 120 (1933).

7. However, the restatements themselves provided for some exception. RESTATEMENT, AGENCY § 120 comment a, *caveat; accord*, *Glennan v. Rochester Trust and Safe Deposit Co.*, 209 N.Y. 12, 102 N.E. 537 (1913). The court in *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914) held that the executor was the agent of the deceased until the duty under the will was discharged; it is this reasoning that makes the case such poor authority for the proposition for which it stands.

8. *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948).

9. Professor Fowler Vincent Harper, at present a professor of law at Yale Law School.

cation is inevitable, then the publication should be charged back or related to the person setting the force of evil into motion, i. e., to the deceased.¹⁰ Further, there is some good case authority to the effect that when a person writes libelous material and puts it into motion in such a way that he must certainly know that third parties will receive intelligence of the libel, he has at the time the material left his hands committed the publication of the libel.¹¹ If, as these cases indicate, the sender of a libelous letter which he mailed to the libeled party is liable to such person when he should have known that third persons would read the libelous material, then a testator who has every intention to have his will probated and who must know that it will be spread for all time upon the public record for all to see, should be held to have committed the publication when he puts the will in the hands of his attorney or into the hands of any third party for safeguarding.

When one follows Professor Harper's doctrine of relation back¹² one becomes enmeshed in the problem of abatement and survival of causes of action. At common law it was pretty well established that *actio personalis moritur cum persona*, that is personal actions die with the person.¹³ This held true whether

10. HARPER, TREATISE ON THE LAW OF TORTS § 236 (1933); BOWER, CODE OF ACTIONABLE DEFAMATION 5 (1923); *Scott v. Shepard*, 3 Wils. 403, 95 Eng. Rep. 1124 (1773), which stated that where an injury is caused by a force set in motion and its result is inevitable, it is a direct injury sufficient to be a trespass to the person. This last historical reference is analogous to the principal fact situation in that the common law's strict requirements for trespass were broken down where the results were inevitable and the requirement for publication presently is hardly as well entrenched or crystallized a rule as to be susceptible to the same exception today.

11. *Lane v. Schilling*, 130 Ore. 119, 279 Pac. 267 (1929), where the defendant wrote the plaintiff, knowing that the plaintiff was blind and that others would read the letter to him; the court held that the sending of the letter was the publication; *Riley v. Askin & Marine Co.*, 134 S.C. 198, 132 S.E. 584 (1926), where a department store wrote a letter to a young lady accusing her of attempting to avoid paying a bill owed to them. The court held that if the defendant had reason to believe others besides the girl would read the letter, the sending was publication. Note that this decision was reached in the same jurisdiction in which *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948) was decided. Cf. *Blakely v. Estate of Shortal*, 236 Iowa 787, 20 N.W.2d 28 (1945).

12. HARPER, TREATISE ON THE LAW OF TORTS § 236 (1933).

13. Although the axiom at common law was well established, a research has indicated to this writer that its evolution was the result of an erroneous application of an entirely different rule. 3 *HOLDSWORTH, HISTORY OF THE ENGLISH LAW* 576 (3rd ed. 1923) where he indicates that the original maxim was "action for penalties die with the person." He deduces this from his reading of three early cases in 1410, 1440, and 1521. These cases

the dying party were the tortfeasor or the victim. This being true, the court in any case in which a publication can be spelled out so as to result in a libel is nevertheless bound to find that the tortfeasor's death destroyed any cause of action which might have arisen.

To effectuate Professor Harper's theory, therefore, there would have to be a statutory change providing for the survival of causes of action in libel cases. Professor Harper's reasoning might be applied even in the absence of such a statute if the court indulges in a fiction of dual time of publication, which will be discussed at length later.

A search of state statutes has indicated some considerable abrogation of this dogmatic axiom.¹⁴ In sixteen states¹⁵ the axiom *per se* has been expressly abolished but actions arising in in defamation have, for some obscure reason, been reserved as actions which still follow the common law axiom and abate or die with the person of either the tortfeasor or victim. Two other states have codified the common law rule of the non-survival of actions but have listed certain exceptions; thus all personal actions not expressly excepted therein still abate and die with the death of either party.¹⁶

used the phrase as quoted in the note where the action was trespass *quare clausum fregit*. The liability in trespass to land was pretty nearly absolute at common law and thereby almost penal in nature whereas an action of slander or libel was in the nature of case for words, the gist of which was damages suffered by the plaintiff. The conclusion that Holdsworth reaches is that the axiom was misinterpreted at later common law as including all actions for damages as well as those penal in nature.

In addition, the cases which originally applied the maxim were cases in which the deceased party was not the defendant but the person who would be the plaintiff. Following this pattern it is easy to discern some logic even in the later common law maxim. A personal injury is one which injures one person and no one else. For his suffering he was the party to be recompensed and thus if he died, the suffering, which was the element essential to the action, ceased. But the situation posed in this note indicates no such circumstance; here the dying party was the person causing the injury and the suffering continued despite his death.

14. The reference is to *actio personalis moritur cum persona*.

15. Mo. REV. STAT. § 98, 99 (1939); PA. STAT. ANN. tit. 20 § 771 (Purdon, 1939); ALA. CODE tit. 7, § 150 (1940); ARK. STAT. tit. 27 § 902 (1947); COLO. STAT. ANN. c. 176, § 33 (1935); DEL. REV. CODE § 4637 (1935); KAN. GEN. STAT. § 60-3203 (1935); KY. REV. STAT. § 411.140 (1948); MD. ANN. CODE art. 75, § 29 (1939); MINN. STAT. § 9656 (Mason, 1927); NEB. REV. STAT. § 25-1401 (1943); N.C. GEN. STAT. § 28-175 (1) (1943); OKLA. STAT. tit. 12-1052 (1941); ORE. STAT. ANN. § 5-701 (1930); TENN. CODE ANN. § 8694 (Williams, 1934); WIS. STAT. § 287.01 and 331.01 (1947).

16. WYO. COMP. STAT. ANN. § 3-402 (1945) as interpreted in Tuttle v. Short, 42 Wyo. 1, 288 Pac. 524 (1930); W.VA. CODE § 5687 (1943) as interpreted in Woodford v. McDaniels, 73 W.Va. 736, 81 S.E. 544 (1914).

In a recent South Carolina case on libel in a will,¹⁷ the court decided that there was no publication and thus no libel. In the dictum of this case the court went on to discuss the survival statute of South Carolina. This statute is typical of a number of states and hence will be set out herein:

Causes of action for and in respect to . . . any and all injuries to the person . . . shall survive both to and against the personal representatives of the deceased person.¹⁸

In four states this type of statute has been interpreted as excluding actions for defamation.¹⁹ There have been a variety of reasons proffered by the courts for such exclusion. For example, the South Carolina court said that injuries to reputation are not injuries to the person.²⁰ On the other hand the Washington Supreme Court nullified the effect of its statute,²¹ interpreting it to mean that if an action survived at common law, it still survived under the statute—nothing more, nothing less.²² Ten other states have a statute similar in form to the South Carolina statute quoted *supra*. These states have interpreted their statutes quite differently from the interpretations found in the other four states. All of these states have allowed the survival of libel actions and most have allowed the survival of any action which sounds in defamation.²³ In one of these states (New York) a case was decided in which the exact problem under consideration in this note was presented; in its decision the court interpreted a statute virtually identical to the South Carolina

17. *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948).

18. S.C. CODE § 419 (1942).

19. S.C. CODE § 419 (1942); MASS. LAWS ANN. c. 228, § 1 (1933); R.I. GEN. LAWS c. 512-1 (1938); WASH. REV. STAT. § 967 (Rem., 1932).

20. *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948).

21. WASH. REV. STAT. § 967 (Rem., 1932).

22. *Dyer v. Missouri State Life Ins. Co.*, 132 Wash. 378, 232 Pac. 346 (1925).

23. N.Y., Decedent Estate Laws § 118 (1938); CONN. GEN. STAT. § 6030 (1930); FLA. STAT. § 45.11 (1941) provides for non-survival of actions of slander, but the court in *State ex rel. Wolfe Construction Co. v. Parks*, 129 Fla. 50, 175 So. 786 (1937) held that the statute by enumerating those which do not survive meant that all others would, and that since libel is not specifically mentioned it should survive. IDAHO CODE ANN. § 5-319 provides for non-abatement but the supreme court in *Doolittle v. Eckert*, 53 Idaho 384, 396, 24 P.2d 36, 39 (1933) held that this applied also to the survival of actions. IND. STAT. ANN. § 2-403 (as amended in 1937) (Burns, 1933); IOWA CODE § 611.20 (1946); ME. REV. STAT. c. 152, § 8 (1944); MISS. CODE ANN. § 609 (1942); N. H. REV. STAT. c. 355:9, 355:15 (1942); OHIO CODE ANN. § 11235 (Throckmorton, 1940); see *Estrick, Survival of Causes of Action of Libel, Slander, Malicious Prosecution and Nuisance Under the Ohio Law*, 6 U. OF CIN. L. REV. 404 (1932).

statute²⁴ in an opposite manner and allowed recovery.²⁵ In only two states are there statutes which specifically cover the situation under discussion here. In these states, the rule of non-survival does not apply where the injured party still lives and the guilty party is the one who has died.²⁶ One statute is couched in just those words,²⁷ while the other statute excepts all cases of slander and libel from the operation of the survival rule no matter which party has died.²⁸

There has been suggested in a Tennessee case²⁹ a solution which would bypass all the problems that have previously been discussed. The court in that case reasons that since the death brought about the libel, it could not at the same time be the operative fact precluding the bringing of an action upon the libel. The inconsistency and injustice of a contrary holding has been recognized by case as well as secondary authority.³⁰ Yet the most recent article to discuss this problem³¹ decries the reasoning of the aforementioned Tennessee case³² as a mere indulgence in dialectics.

Thus, in the present state of the law there are found virtually insurmountable obstacles in the path of granting such relief under the reasoning set forth above: (1) There must be a publication of the libel which is chargeable to the party who is to be sued, i. e., to the estate of the deceased. (2) Principal-agent law cannot be employed to effect such a finding since the estate does not publish the will, but it is rather done by the

24. S.C. CODE § 419 (1942).

25. *Brown v. Mack*, 185 Misc. 368, 56 N.Y.S.2d 910 (Sup. Ct. 1932) where the defendant was sued both as an individual and as executor; the demurrer to the complaint as failing to state a cause of action against him individually was sustained but the demurrer for failing to state a cause of action against him as executor was overruled. In this case the court followed Professor Harper's reasoning and then considered N.Y. Decedent Estate Law § 118 (1938), which was identical with the S.C. CODE § 419 (1942). The court held that personal injury meant any legitimate, valid action that could be brought by the person, which if not specifically prohibited or abolished by law survived. Actions for libel were then held not within the purview of the statute.

26. Cf. the historical discussion in Note 13, *supra*.

27. NEW M. STAT. § 19-701 (1941): "A cause of action for personal injury survives the death of the party responsible therefor." This is such a recent statute that no case could be found interpreting it.

28. TEX. REV. CIV. STAT. § 5525 (1948).

29. *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914).

30. *Gallagher's Estate*, 10 Pa. Dist. 733 (1901); *Harris v. Nashville Trust Co.*, *supra* note 29.

31. Note, 97 U. of PA. L. REV. 289, 290 (1948).

32. *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914).

executor. (3) The executor is an agent of the court and not of the deceased nor of the estate.³³ (4) If one follows Professor Harper's doctrine of the relation back of the libel,³⁴ one is confronted with the survival statutes previously discussed.

One possible solution is to call the estate an after-death manifestation of the testator, and to hold that the will, being of value to the estate, should also be charged as a detriment against the estate when necessary. Thus when the will is used by the executor to benefit the estate in the administration of estate affairs, and such use results in the commission of a libel, any injury caused by the commission of such libel should be compensated for by the estate, to whose benefit it is that the will be probated.

This is at best countering a very bad fiction with a new one. Again, this should be regarded as a mere temporary expedient until the obstacles to the more realistic lines of reasoning mentioned previously can be obviated by the legislatures or by the courts.

A solution that has been suggested to eliminate the entire problem of libelous wills is that the defamatory parts of a will be removed before probate, or that a will which contains defamatory matter be denied probate.³⁵ Neither of these suggested solutions is, it would seem, an ideal answer to the problem. As to the latter suggestion (refusing probate to a will which contains libelous matter), the effect of a refusal to probate would be to defeat the rights of innocent third parties who would have been the recipients of the testator's bounty had the will been given effect; clearly this is an undesirable result. As to the former suggestion (the elimination of libelous matter from the will prior to probate), the mere reading of the will to determine what is libelous is itself a form of publication and the real harm will have been done, especially if a court battle ensues as to what should or should not be eliminated.

33. *Brown v. Mack*, 185 Misc. 368, 56 N.Y.S.2d 910 (Sup. Ct. 1945); *Carver v. Marrow*, 213 S.C. 199, 48 S.E.2d 814 (1948).

34. Professor Fowler Vincent Harper, at present a professor of law at Yale Law School.

35. *In re Draske's Will*, 160 Misc. 587, 290 N.Y.S. 581 (Surr. Ct. 1936).

CONCLUSIONS

That there should be recovery in this type of case seems clearly a desirable result. Injuries such as may be sustained from the publication of a libel by will or otherwise should not be allowed to go unredressed upon such an excuse as the death of the wrongdoer. The principal problem in granting relief in this situation is to find a legal ground upon which to rest the decision while doing minimum violence to well established doctrine. The problem is extremely difficult of solution on common law grounds. Obvious fictions would have to be used to circumvent entirely the publication and survival problem. The doctrine of inevitable cause and relation back seems to be the most rational approach, but legislation is needed to clear away the obstacle of non-survival. Specifically it seems necessary that statutes be enacted to enable a libel action to survive the death of the tort-feasor.

SIDNEY RUBIN*

* Member of the Missouri bar; former member of the staff of the WASH. U. L. Q.