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## "The Evil that Men Do"

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## MORALITY IN LEGAL PRACTICE

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The present hypothetical is offered to stimulate the thinking of our readers upon some moral implications of the use of statutory objections to exclude evidence, of formal pleadings without factual support, and of offering evidence yielding inferences which are negated by known facts. The setting is in probate practice, but the generic problems recur in other branches of the law.

A solution will be offered by Father Cahill in the Spring 1960 issue of the *Catholic Lawyer*. He will be grateful to receive comment and suggestions from our readers, to guide his discussion. To be helpful, communications should be received before the first of April.

### ***“THE EVIL THAT MEN DO . . .”***

*A petition, asking the probate of a certain writing as the last will and testament of Baron Black, has been filed in the State of New Island by James Joiner, attorney for George Green. The petition shows that the deceased left him surviving George Green, who is named as executor in the will offered, Gertrude Gray, a first cousin and a named legatee, and The Pebble Beach Orphanage, a charitable institution incorporated in the State of New Island, interested as residuary legatee. It shows, further, that the decedent left him surviving no widow and no distributee other than Gertrude Gray. The propounded instrument gives a legacy of \$5,000 to Gertrude Gray, and the residue of the estate to the Orphanage.<sup>1</sup>*

*Black was a resident of New Island from January 1, 1957 until he died on November 2, 1959. Joiner and Green have inventoried the property of Black's estate; they find that all of it is situated in New Island and they estimate its value at \$60,000.*

*Objection to probate has been filed by Samuel Sawyer, attorney for*

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<sup>1</sup> The law of New Island does not limit the amount of charitable gifts made by will, or invalidate such gifts or wills containing them because such wills were made within a limited period before the testator's death. Such gifts may, of course be diminished by exercise of a surviving spouse's right of election which is mentioned in footnote 3.

*Gertrude Gray, alleging that "the instrument offered for probate was not freely and voluntarily executed by the decedent as his last will, but was obtained, and the subscription and publication thereof were procured, if in fact it was subscribed and published by the testator, by fraud and undue influence."<sup>2</sup>*

*Objection has been filed also by Carl Carpenter, attorney for Molly Mauve, a resident of the State of Connshire, who asserts that by reason of a common-law marriage contracted in that State she has an interest in the proceeding as Black's surviving spouse. Her objection alleges that "at the time the instrument offered for probate purports to have been executed, the decedent was not competent to make a will in that he was not at that time of sound mind and memory."*

*The judge in whose court the petition and objections were filed asked the three lawyers to confer with Francis Farmer who is attorney for the Orphanage, for the purpose of discovering whether the issues raised by the pleadings may be settled amicably. When the lawyers met, Carpenter announced that as soon as letters are issued he will demand payment of a debt of \$4,000 owing to his client from the deceased since 1956. If probate be denied, his client, as widow, will claim the entire estate. If the will be admitted, she will exercise her right as surviving spouse to take against the will.<sup>3</sup> Farmer remarked that the Orphanage trustees were distressed by the prospect of litigation, particularly if it were to bring to public attention allegations of fraud, insanity and meretricious relations. Joiner and Sawyer said that they could contribute nothing to the purpose of the conference until they had discussed Carpenter's statements with their clients.*

*Green told Joiner he is certain that Black died owing Molly \$4,000. He learned from a Mr. and Mrs. Ben Brown, friends of Black, that the decedent had borrowed "about \$4,000" from Molly Mauve while they were living together in Connshire and had not repaid the loan. Green has a passbook representing an account opened by Black in July of 1956, in which only one deposit, in amount \$4,000, was made and from which*

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<sup>2</sup> In New Island practice, objections to probate of a will may be filed in the forms illustrated in this and the following paragraph of the accompanying text. In the papers filed, no more particular facts need be alleged.

<sup>3</sup> In the law of New Island, the widow of an intestate who leaves him surviving no descendant, parent, brother, sister, nephew or niece, is entitled to the entire net estate of the decedent intestate. If a decedent's will, admitted to probate, gives less than half the net estate to a widow who survives him, she may elect to take, against the will, her intestate share. Her share, however, is limited in such a case to one half portion of the net estate, and the will is effective to dispose of that portion of the estate which is not taken by the electing spouse.

*there were no withdrawals. Green does not find any indication of withdrawals from Black's other accounts which might have been made to pay the debt. Green, however, does not find Molly Mauve's name in the small account book in which Black had listed promissory notes issued by him.*

*Sawyer had not yet told Gertrude Gray about Molly Mauve's objection in the probate proceedings. When she learned of this and of Farmer's remarks, she asked Sawyer to inquire of Farmer what part of the residue the Orphanage might give her if she withdrew her objection. She said, "As I told you, I have nothing to go on except my own feeling that Cousin Baron must have been pressured by the Orphanage trustees when he gave the home so large a share in his will. You told me we would not need facts to put in the court papers, but that we'd better have facts if it came to a trial. I think we'd better settle with the Orphanage now, before they start dickering with Molly."*

*Carpenter asked Molly Mauve for authorization to inquire of Francis Farmer what money settlement the Orphanage might offer her for withdrawing her objection to probate and for not asserting her right as widow to share in the estate. Molly replied that Carpenter might so inquire, but he should insist that the \$4,000 debt must be paid to her in any event. Carpenter pointed out to his client that any representative of the estate would have the right to object to admission of her testimony on her dealings with Black in the matter of the debt.<sup>4</sup> Therefore, he counselled her that she should throw into her negotiations with the Orphanage her promise not to pursue this debt. He said to her, "We know the debt is owing, but we have no proof in writing, and you are the only witness. If Green knows of the debt, he may pay it without difficulty, but if he doesn't know of it or doesn't want to pay it, he can bar your testimony and prevent your enforcing it." She accepted his advice, and he continued, "We cannot offer proof to sustain our objection to probate, for you have told me from the beginning that you know no facts indicating that Black was not fully competent when he made his will. We put in that objection only to broaden your bargaining position as widow. Your claim to a widow's share, against the will or in intestacy, is our strongest point in the bargaining, and we can make it stand up on trial. I know from what you have told*

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<sup>4</sup> New Island has a "dead-man's statute" which provides that in any trial or hearing on the merits, a person interested in the event, or a person through whom another person has acquired an interest in the event, shall not be examined as a witness on his own behalf, or on behalf of such other person, against the representative or successor in interest of a deceased person, concerning a personal transaction or communication between the witness and the deceased person. The deceased person's representative or successor may waive the prohibition of the statute only at a trial or hearing on the merits. To exclude such testimony at the trial or hearing, a proper objection is required.

*me that Black never meant to make you his wife. He lied to you about his having an 'ever-faithful teen-age wife,' and he used that as an excuse for not having a marriage ceremony with you, and for not putting in writing anything which would show that he and you had contracted a common-law marriage, as you could do legally in Connshire. He used it in the same way when he told you his conscience would not permit him to participate in an exchange of marriage vows between the two of you alone; you recall that you proposed such an exchange at my suggestion. It was only at Christmas time in 1956 that you told him I had investigated that 'teen-age marriage' of his and found he had never married. You told me he then admitted that he had never married anyone, but said he had determined to leave you, and he did leave a few days later. Yet we can call a dozen witnesses who can say truthfully that he introduced you as his wife to people in Connshire who knew you were living together there, that he paid bills there which were charged to you as Mrs. Baron Black, and that in the neighborhood where you and he lived together for three years you were reputed to be his wife."*<sup>5</sup>

*Moral Questions:*

1. *Should Green, as Black's representative, pay the \$4,000 debt to Molly Mauve without having that debt established on a trial?*
2. *Should Green, through Joiner, object to the admission of Molly Mauve's testimony on the debt at a trial which will determine that the debt is owing?*
3. *What is the moral quality of the conduct of Sawyer and his client Gertrude Gray, and that of Carpenter and his client Molly Mauve, in objecting to probate of Black's will?*
4. *What is the moral quality of the purposes of Carpenter and his client Molly Mauve, to bargain with the Orphanage for the withdrawal of her widow's claim, or to pursue that claim on trial?*

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<sup>5</sup>The highest court of New Island has held in a similar case, "Our courts may draw, from evidence that a woman was reputed in the State of Connshire to be the wife of a certain man when she lived with him in that State, the inference that the agreement in praesenti, which alone creates marriage in the common law of that State, had been made between that man and that woman."