

STANLEY, J. The evidence that the plaintiff had a wife and child was competent on the question of damages. The plaintiff was entitled to compensation for mental suffering, and that suffering might be heightened, and his damages consequently increased, by the fact that his wife and child would suffer from the disgrace thrown upon him by the charge that he was a thief. *Fay v. Parker*, 53 N. H. 342, 366, 369, 372, 384; *Bixby v. Dunlap*, 56 N. H. 456, 462, 463; *Larned v. Buffinton*, 3 Mass. 546; *Bodwell v. Swan*, 3 Pick. 376; *Howe v. Perry*, 15 Pick. 506; *Tillotson v. Cheetham*, 3 Johns. 56; *Klumph v. Dunn*, 66 Penn. St. 141—*S. C.*, 5 Am. R. 356, 359; Towns. Lib. & Slan. 659; Field Dam. 553.

The evidence as to the publication of the card was properly received. The publication of the libellous matter was admitted, and under the pleadings the question of intent was material, and any evidence tending to show the intent of the defendants in the publication was relevant and competent. Whether the card was voluntarily published or not tended to show whether the intent of the defendants was faithfully to give the public the truth concerning the plaintiff. The charge was that he was a thief. The card tended to show that, from the acquaintance of the signers with him, the charge was unfounded, or, at least, that the signers so believed. The defendants were under no legal obligation to publish the card without pay, but their refusal to publish it gratuitously, to counteract, so far as it would, their gratuitously published charge of crime, tends to disprove their averment that, as publishers of a newspaper, they intended to give the public correct news about the plaintiff. 2 Greenl. Evid., s. 418, and notes; Towns. Lib. & Slan. 126; *Eaton v. Welton*, 32 N. H. 352; *Tucker v. Peaslee*, 36 N. H. 167.

*Judgment on the verdict.*

ALLEN, J., did not sit: the others concurred.

---

GRAY v. GRAY & a.

Upon a hearing on a petition for the probate of a will in common form, the appearance of counsel for the heirs, and the cross-examination by them of the witnesses to the will, will not ordinarily have the effect to waive the probate in solemn form.

APPEAL from a decree of the judge of probate, ordering the probate, in solemn form, of the will of George Gray, deceased. Facts found by a referee.

The appellant was the wife of George Gray, deceased, and, December 25, 1877, she was appointed administratrix on his estate, and

took upon herself that trust. Subsequently, at the instance of one of the heirs, she was cited to settle her account as administratrix, June 24, 1879. She appeared, and at that time filed a petition to prove a lost will of the deceased in common form. This fact becoming known to the counsel for the heirs, he appeared and cross-examined the witnesses, and asked and obtained a postponement of the hearing. At the time to which the hearing was adjourned, the counsel for the heirs appeared, and stated that he did not then desire to contest the matter further, but wished to have the will proved in solemn form at some other time. No notice of probate in common form was given to the heirs.

The other facts, material, appear in the opinion.

*Atherton*, for the appellant.

*Fassett*, for the appellees.

STANLEY, J. The question is, whether the probate court was right in decreeing probate of the will in solemn form. The appellant claims that, although her petition was for probate in common form, and was without notice to the heirs, yet from the fact that the heirs were represented by counsel at the hearing on that petition, who examined the witnesses, the notice to the heirs required by the statute was unnecessary, and the probate was, in legal effect, in solemn form.

Probate of a will in solemn form is made after all persons whose interests may be affected have been duly notified and had opportunity to be heard. *Noyes v. Barber*, 4 N. H. 406; 21 N. H. 301. The statute requires notice to the executor, and by publication to all persons interested. G. L., c. 100, § 1.

From the report of the referee it appears that, June 24, 1879, the appellant, having been cited to settle her account as administratrix, appeared and presented a petition for the probate, in common form, of the will of her deceased husband. Unless the requirements of the statute were waived by the heirs, there was not a probate in solemn form. On the question of waiver, the referee finds that none of the heirs were present or had any knowledge of any proceedings to prove the will of the deceased. They had not employed or instructed counsel in regard to a lost will. The fact that the hearing was postponed at the request of counsel, taken in connection with the other fact that at the adjourned hearing the appellant was notified that the heirs wished the will proved in solemn form, shows that they did not intend to waive the notice required by the statute, and the further fact that the judge of probate decreed that the will should be proved in solemn form also shows that he did not understand that there was any waiver of a compliance with the statute.

*Appeal dismissed.*