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Wills -- Compromise of Caveat Proceedings -- Right to Share in Proceeds of Compromise

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been specifically decided: The principal case, although doing lip-service to the right of a creditor to inflict some worry and concern, would seem to restrict the field of action considerably. It is to be hoped that the question of whether the creditor has acted justifiably, for which inquiry there is already precedent,[24] will be given more weight in the future.

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Wills—Compromise of Caveat Proceedings—Right to Share in Proceeds of Compromise.

Plaintiffs and defendants were heirs-at-law of one Smith who died leaving a will under which a $35,000 note was bequeathed to one Brawley, a stranger to the blood. Defendants notified plaintiffs of their intention to contest the will and upon being informed by plaintiffs that they would have nothing to do with the proceedings, filed a caveat. Defendants then effected a secret compromise with the legatee whereby they received $15,000 from him in consideration of their withdrawal from the contest. Plaintiffs brought this action to recover $5,000 claiming that they would have been entitled to one-third of the estate had the will been set aside. *Held,* a contract to compromise a caveat proceeding is valid, and as defendants received the money by virtue of their contract with Brawley, and not by virtue of the laws of descent and distribution, the plaintiffs were not entitled to a share therein.[1]

It is the majority rule that a contest of a will may be compromised by the parties to the proceedings[2] if there is no fraud or collusion involved,[3] and if the parties compromise nothing beyond their own interests.[4] The courts supporting this rule base their holdings on the ground that they do not wish to encourage litigation, and, since the legatees under a will cannot be made to accept their legacy, they are entitled to settle disagreements with parties having a valid claim to a caveat, before a will is probated in solemn form. These courts hold that since caveat proceedings are *in rem,* and there are actually no adverse parties, any

[24] Peoples Finance & Thrift Co. v. Harwell, 82 P. (2d) 994 (Okla. 1938); Barnett v. Collection Service Co., 214 Iowa 1303, 1312, 242 N. W. 25, 28 (1932): ". . . the door to recovery should be opened but narrowly and with due caution. A creditor or his agent has a right to urge payment of a just debt and to threaten to resort to proper legal procedure to enforce such payment."

[1] Bailey v. McLain, 215 N. C. 150, 1 S. E. (2d) 372 (1939).

[2] Dunham v. Slaughter, 268 Ill. 625, 109 N. E. 673 (1915); Baxter v. Stephens, 209 Mass. 459, 95 N. E. 854 (1911); Schoonmaker v. Gray, 208 N. Y. 209, 101 N. E. 886 (1913); Callaghan v. Corbin, 255 N. Y. 401, 175 N. E. 109 (1931); *In re* Seip's Estate, 163 Pa. 423, 30 Atl. 226 (1894).

[3] *In re* Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076 (1903).

[4] *In re* Seip's Estate, 163 Pa. 423, 30 Atl. 226 (1894).

person cited in the proceedings may withdraw at any time for any reason.

There are a few states, however, notably Wisconsin, which will not allow such a compromise of proceedings to contest a will, on the ground that such a compromise is against public policy, as it amounts to an illegal contract for the purpose of suppressing evidence in a proceeding before the court.[5] These courts also hold that a caveat proceeding is *in rem,* but take the view that since such a proceeding has an effect as against the whole world, the court will complete the proceeding on its own motion, the issue having been raised, even though one of the parties withdraws.

In North Carolina any interested person may file a caveat,[6] but all other persons affected must be cited to "see proceedings"[7] and are bound by the decision.[8] After a caveat has been filed, the court will decide the issue of *devisavit vel non,* regardless of objecting parties; and neither proponent nor contestant may suffer a nonsuit or withdraw the caveat, nor may the court dismiss the suit.[9] These cases seem to follow the minority, or Wisconsin, view rather than the majority.

The result of the instant case seems to be inconsistent with the North Carolina rules governing caveat proceedings. It appears that the contestants were allowed to do indirectly (compromise the proceedings by withholding evidence), what they could not do directly (compromise by withdrawing the caveat). They were allowed to withdraw in a body, with the result that there was no evidence presented on the issue of *devisavit vel non.* Until the principal case was decided, cases of family settlement[10] represented the only instances in which the North Carolina court allowed any compromise of a dispute over a will, but in this case, the doctrine clearly does not apply, since the legatee was a stranger in blood to the testator and to the contestants. Although the present holding appears inconsistent in principle with the earlier decisions, it is at least arguable that the court has now adopted a sounder point of view in this particular situation in the light of the reasons advanced by the courts adopting the majority rule.

[5] Lazenby v. Lazenby, 132 Ga. 829, 65 S. E. 120 (1909); *In re* Staab's Estate, 166 Wis. 587, 166 N. W. 326 (1918); Taylor v. Hoyt, 207 Wis. 520, 242 N. W. 141 (1932).

[6] N. C. CODE ANN. (Michie, 1935) §4158.

[7] *Id.* §4159.

[8] Redmond v. Collins, 15 N. C. 430 (1834); see Mills v. Mills, 195 N. C. 595, 597, 143 S. E. 130, 132 (1928).

[9] Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85 (1889); see Collins v. Collins, 125 N. C. 98, 104, 34 S. E. 195 (1890); *In re* Westfeldt, 188 N. C. 702, 705, 125 S. E. 531, 533 (1924).

[10] Tise v. Hicks, 191 N. C. 609, 132 S. E. 560 (1926); see *In re* Will of McLelland, 207 N. C. 375, 376, 177 S. E. 19, 20 (1934); Reynolds v. Reynolds, 208 N. C. 578, 622, 182 S. E. 341, 347 (1935).

Assuming that the compromise of a caveat is valid, what effect does such a compromise have on parties not actively participating in the caveat or in the compromise? There is very little authority involving this direct point. *In re Seip's Estate,*[11] a Pennsylvania case, allowed a party cited inadvertently as a proponent, but who paid part of the expenses of the contest, to recover a part of the proceeds of the compromise. However, the court said that it was not necessary that the party claiming part of the compromise money take an active part in the caveat proceedings, since all persons must be brought in, and, if notice of the compromise was not given to all interested parties the party not receiving notice might have the verdict, handed down on the contest proceedings, set aside.[12]

In a later Pennsylvania case[13] the plaintiff asked to have an appeal from probate proceedings reinstated after defendants had compromised the proceedings. Plaintiff sought relief under a statute[14] allowing compromise of will disputes, but which provides that if a compromise is made without notice to all interested parties, the party not receiving notice may have the verdict set aside and the caveat reinstated. Plaintiff had received no notice, but failed to have the proceedings reinstated, for the reason that plaintiff was not an interested party under the act. However, the court said by way of dictum: "Clearly, active contestants to a will may not secretly agree to settle their contest to the prejudice of other parties in interest, whose inactivity may be due to a justified reliance upon the active parties to see that the contest is prosecuted to a deliberate conclusion by the court . . . likewise where contestants of a will receive money in virtue of a settlement of the contest, they may not exclude from a share therein one who is equally entitled, although not an active contestant of the will and not a party to the settlement."[15]

Jenness v. Ambler,[16] a New Hampshire case, followed by the court in the instant case, did not allow recovery when a party who refused to join in the appeal of the probate later sued to share in the money paid under a compromise agreement. The court held that it was inequitable to allow the plaintiff to recover when she had a chance to aid in the appeal and refused to do so. This case is distinguishable from the principal case because the plaintiff had notice of the compromise and also refused to sign an agreement drawn up by the heirs-at-law providing for a committee to negotiate with the legatee and for distribution of the proceeds of any compromise among them, whereas, in the principal case the plaintiff had no notice of the compromise. But the court

[11] 163 Pa. 423, 30 Atl. 226 (1894). [12] *Id.* at 433, 30 Atl. at 227.
[13] *In re* Crawford's Estate, 320 Pa. 444, 182 Atl. 252 (1936).
[14] PA. STAT. (Purdon, 1936) tit. 20, §787.
[15] See *In re* Crawford's Estate, 320 Pa. 444, 447, 182 Atl. 252, 253 (1936).
[16] 62 N. H. 569 (1883).

in *Jenness v. Ambler* made no mention of the effect of notice on the plaintiff's right to recover, basing its decision solely on the plaintiff's refusal to join in the contest in any way.

Of the two views, apparent in these cases, the better rule would seem to be that which allows a party having no notice of the compromise to recover a part of the proceeds thereof, even though such party did not engage in the caveat. If the caveat had been prosecuted to a successful conclusion, such party would have shared in the proceeds, therefore he should share in the compromise. Even if he is allowed to reinstate the proceedings, it is possible that he might have no evidence on which to base a caveat. This rule would also serve to prevent one group of heirs-at-law from defrauding another group by making a secret compromise with the legatee.

On the other hand, where, as in the instant case, the plaintiff has an opportunity to participate in the caveat and refuses, it may be argued that he is in no position to demand participation in the benefits produced by the diligence of the caveator, even though the benefits of the caveat would have enured to the plaintiff if the proceeding had been prosecuted to a successful conclusion.

The better result might be achieved by the adoption in North Carolina of a statute similar to the Pennsylvania act.[17] However, such a statute should state clearly whether the party not receiving notice of the compromise is confined to the remedy of reinstatement of the proceedings or whether such a party might also sue for a share in the proceeds of the compromise.

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[17] PA. STAT. (Purdon, 1936) tit. 20, §787.