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# Wills -- Caveat by Proponent

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relief of rescission is sought on the ground of fraud, the elements of fraud which must be proved are identical. This includes of course the necessity of proving scienter in an action for either relief.

Although the court in the principal case chose to ignore *Ebbs v. St. Louis Union Trust Co.*, the two cases are almost identical on their facts.[16] The *Ebbs* case was an action for rescission and damages on the basis of fraud, and the principal case was an action for damages based on fraud. It is rather evident from the two cases, that the misrepresentations were either made with knowledge of their falsity, or in conscious ignorance as to their truth or falsity. The one making the false representation in each case was a real estate agent, who was or should have been experienced in the fundamentals of house construction. Since the facts of both cases show only a lack of knowledge of truth or falsity, with relief being granted in one and denied in the other, the necessary conclusion follows that the two cases are in substance inconsistent.

It would seem that the court in the *Ebbs* case completely overlooked the long line of decisions in North Carolina which support the holding of the principal case that actual knowledge of the falsity of a misrepresentation is not necessary to a finding of fraud. On the basis of the instant case as supported by the chain of decisions, the *Ebbs* case (which was never sound law) is no longer the law in North Carolina, in spite of the failure of the court in the principal case expressly to overrule the decision there.

EDWIN B. ROBBINS.

**Wills—Caveat by Proponent**

One B died, apparently intestate. His heirs at law and next of kin recovered all of his personal papers and turned them over to the Clerk

But in Cheek v. Southern R.R., 214 N. C. 152, 156, 198 S. E. 626, 628 (1938) the court said, "The court has not adopted the doctrine that an unilateral mistake—or mistake alone of the party seeking to avoid the contract—unaccompanied by fraud, imposition, undue influence, or like circumstance of oppression, is sufficient to avoid a contract." It was indicated in this latter case, however, that it would be difficult to imagine a case, in which there were innocent misrepresentations on the one side and a mistake on the other induced by such innocent misrepresentations, that could not be resolved into mutual mistake. *E.g.*, Vail v. Vail, 233 N. C. 109, 63 S. E. 2d 202 (1951); Breece v. Standard Oil Co. of N. J., 209 N. C. 527, 184 S. E. 86 (1936); Hinsdale v. W. I. Phillips Co., 199 N. C. 563, 155 S. E. 238 (1930); Bell v. Harrison, 179 N. C. 190, 102 S. E. 200 (1920); Oltman v. Williams, 167 N. C. 312, 83 S. E. 348 (1914).

[16] 199 N. C. 242, 153 S. E. 858 (1930); Note, 9 N. C. L. REV. 86 (1930) (real estate broker represented house to be perfectly constructed and made of stone, when in fact, it was stone veneer; *held*, representations made without knowledge of their falsity, and consequently without intent to deceive). This case was cited in the Brief for Appellees, pp. 4, 11, Atkinson v. Charlotte Builders, Inc., 232 N. C. 67, 59 S. E. 2d 1 (1950).

of the Superior Court of Mecklenburg County. Included among the papers was an instrument which in form appeared to be a holographic will, dividing his property among the relatives of his deceased wife as well as some of his own kin. The Clerk appointed a collector. No probate in common form was had.

The heirs at law and next of kin brought an action to remove cloud on title under N. C. GEN. STAT. §41-10 (1943) which prayed (1) that the instrument be declared not to be the will of the deceased and (2) ownership of the property of their kinsman free of any claim of the defendants, who were the beneficiaries under the unprobated instrument. The defendants contended the paper writing constituted a valid holographic will and should be probated as the last will of B. The issues submitted by the trial court were as follows: (1) Was the said paper writing found among the valuable papers and effects of the said B after his death? (2) Is the said paper writing the last will and testament of B? The trial judge instructed the jury to answer the first issue, No. On appeal the defendant's demurrer ore tenus for want of jurisdiction in the Superior Court, was sustained by the Supreme Court which held that an attack on a will must originate by probate, which is exclusively within the jurisdiction of the Clerk of the Superior Court, and that a caveat is the proper proceeding to try the issue of *devisavit vel non*.[1]

The plaintiffs, believing they had a valid defense to the instrument, faced a dilemma as to the procedure they should follow in order to initiate an action to contest the validity of the will. The statutes provided a means whereby they could get the instrument into the hands of the Clerk of the Superior Court but no means to compel anyone to offer it for probate.[2] Since there is no limitation on the period in which a will may be offered for probate the heirs at law held a title of questionable value.[3]

An unprobated will does not pass any title,[4] and mere assertions of an adverse claim standing alone are not sufficient to constitute a cloud.[5]

[1] Brissie v. Craig, 232 N. C. 701, 62 S. E. 2d 330 (1950).

[2] N. C. GEN. STAT. §31-5 (1943).

[3] Cooley v. Lee, 170 N. C. 18, 86 S. E. 720 (1915); Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784 (1906); N. C. GEN. STAT. §31-12 (1943) provides in part ". . . Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after the death of the testator or devisor. . . ." While this might protect subsequent purchasers from the heirs at law it offers no protection to the heirs at law.

[4] N. C. GEN. STAT. §31-39 (1943): "No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county. . . ." Paul v. Davenport, 217 N. C. 154, 7 S. E. 2d 352 (1940); Osborne v. Leak, 89 N. C. 433 (1883).

[5] Welles v. Rhodes, 59 Conn. 498, 22 Atl. 286 (1890); Israel v. Wolf, 100 Ga. 339, 28 S. E. 109 (1897); Trustees of Schools v. Wilson, 334 Ill. 347, 166 N. E. 55 (1929); Lovell v. Marshall, 162 Minn. 18, 202 N. W. 64 (1925); Sulphur Mines Co. v. Boswell, 94 Va. 480, 27 S. E. 24 (1897).

Cloud on title as it developed in equity is not broad enough to cover the above situation.[6] The action to remove cloud on title in North Carolina is statutory[7] and has been given a liberal construction, thereby broadening this equitable remedy.[8] Accordingly a probated will can be construed in this type of action, the question being what interest or title passes and not the validity of the will.[9] The aim of the principal case, as disclosed by the prayer for judgment and the issues submitted, was to contest the validity of the will and since this can only be done by a will contest the plaintiff's action under this statute was improper.

Similar difficulties would have confronted the plaintiffs had they tried to proceed under the declaratory judgment act.[10] Only the construction of a probated will could be tested in this type of proceeding.[11] There could not be an attack on the validity of the will nor could the construction of an unprobated will be obtained.[12] Also, the equitable relief of injunction is not available to enjoin the probate of a will where exclusive probate jurisdiction is conferred upon one court.[13]

By dictum the court pointed out the only relief available to the plain-

[6] "Cloud on title is something which constitutes an apparent incumbrance upon it or an apparent defect in it; something that shows prima facie some right of a third party, either to the whole or some interest in it." Detroit v. Martin, 34 Mich. 170 (1876); McArthur v. Griffith, 147 N. C. 545, 61 S. E. 519 (1908).

[7] N. C. GEN. STAT. §41-10 (1943).

[8] "And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property. . . . And it should be allowed, too, when existent records or written instruments reasonably present such a claim. . . ." Satterwhite v. Gallagher, 173 N. C. 525, 528, 92 S. E. 369, 370 (1917); see also, Platkin v. Merchants Bank, 188 N. C. 711, 125 S. E. 541 (1924); Southern State Bank v. Summer, 187 N. C. 762, 122 S. E. 848 (1924); Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99 (1918).

[9] Lewis v. McConchie, 151 Kan. 778, 100 P. 2d 752 (1940); Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551 (1943); Johnston v. Johnston, 218 N. C. 706, 12 S. E. 2d 248 (1940); Nobles v. Nobles, 177 N. C. 243, 98 S. E. 715 (1919); Franklin v. Margay Oil Co., 194 Okla. 519, 153 P. 2d 486 (1944).

[10] N. C. GEN. STAT. §1-253 to §1-267 (1943).

[11] Smith v. Nelson, 249 Ala. 51, 29 So. 2d 335 (1949); Fillmore v. Yarborough, 246 Ala. 375, 20 So. 2d 792 (1945); Howard v. Bennett, 53 Cal. App. 2d 546, 127 P. 2d 1012 (1942); Colden v. Costello, 50 Cal. App. 2d 363, 122 P. 2d 959 (1942); Lloyd v. Weir, 116 Conn. 201, 164 Atl. 386 (1933); Sample v. Ward, 156 Fla. 210, 23 So. 2d 81 (1945); Weppler v. Hoffine, 218 Ind. 31, 29 N. E. 2d 204 (1940); Sharpe v. Sharpe, 164 Kan. 484, 190 P. 2d 344 (1949); Brown v. Trustees, 181 Md. 80, 28 A. 2d 582 (1942); Bank v. Morey, 320 Mass. 492, 70 N. E. 2d 316 (1946); Wachovia Bank & Trust Co. v. Lambeth, 213 N. C. 576, 197 S. E. 179 (1938); Roundtree v. Roundtree, 213 N. C. 252, 195 S. E. 784 (1938); Anderson v. Anderson, 150 Ore. 476, 46 P. 2d 98 (1935); Chapin v. Collard, 29 Wash. 2d 788, 189 P. 2d 642 (1948). For example of restrictions on this point see Note, 26 N. C. L. REV. 69 (1947).

[12] Pennington v. Green, 152 Kan. 739, 107 P. 2d 766 (1941); Poore v. Poore, 201 N. C. 791, 161 S. E. 532 (1931); *cf.* Roundtree v. Roundtree, 213 N. C. 252, 195 S. E. 784 (1938).

[13] Furr v. Jordan, 196 Ga. 862, 27 S. E. 2d 861 (1943); Ragan v. Bank of Rome, 177 Ga. 686, 170 S. E. 889 (1933); Israel v. Wolf, 100 Ga. 339, 28 S. E. 109 (1897); Feamster v. Feamster, 123 W. Va. 353, 15 S. E. 2d 159 (1941).

tiffs. "He may invoke such remedy by the simple expedient of simultaneously applying to the Clerk of the Superior Court having jurisdiction to have the script probated or proved, i.e., tested, and filing a caveat asking that it be declared invalid as a testamentary instrument."[14] This result is made possible by the construction placed upon the phrase "any person interested in the estate" as found in the statute for probate[15] and caveat to a will.[16] Since the heirs at law would take the property had the owner died intestate, they are recognized as parties interested in the estate.[17] While this relationship might justify proceeding under either one of the statutes, to permit the heirs at law to combine the above statutes and be both proponents and caveators produces an unusual situation. Indeed one court said, "He is both proponent and defendant. His positions are incongruous. As a matter of procedure, he cannot be a party of record on opposite sides of the same proposition."[18] A proponent, however, is by definition a party who offers an instrument for legal adjudication.[19] It does not seem that this would require him to be interested in having the validity sustained no matter how often such interests coincide. This objection to caveat by a proponent is met also by the fact that a will contest is a proceeding in rem and not between the parties.[20] The sole issue is whether or not the instrument is a valid will. Accordingly most of the courts which have passed upon this point have held that no estoppel operates to prevent a proponent from caveating the will, and especially is this true where the caveator was under a duty to produce the will for probate.[21]

[14] Brissie v. Craig, 232 N. C. 701, 706, 62 S. E. 2d 330, 334 (1950).

[15] N. C. GEN. STAT. §31-13 (1943): "If no executor apply to have will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application. . . ."

[16] N. C. GEN. STAT. §31-32 (1943) ". . . any person entitled under such will, or interested in the estate, may . . . enter a caveat to the probate of such will. . . ."

[17] Hall v. Proctor, 242 Ala. 636, 7 So. 2d 764 (1942); *In re* Stoiber's Estate, 101 Colo. 192, 72 P. 2d 276 (1937); *In re* Kinney's Estate, 233 Iowa 600, 10 N. W. 2d 73 (1943); Hemonas v. Orphan, 191 S. W. 2d 352 (Mo. 1946); *In re* Morrow's Will, 41 N. M. 723, 73 P. 2d 1360 (1937); Bailey v. McLain, 215 N. C. 150, 1 S. E. 2d 372 (1939); Weis v. Weis, 147 Ohio St. 416, 72 N. E. 2d 245 (1947); *In re* Harjoche's Estate, 193 Okla. 631, 146 P. 2d 130 (1944).

[18] Appeal of Thompson, *In re* Nichol's Estate, 114 Me. 338, 96 Atl. 238 (1915).

[19] BLACK, LAW DICTIONARY (3rd Ed.) 1449.

[20] *In re* Cassada's Will, 228 N. C. 548, 46 S. E. 2d 468 (1948); *In re* Lomax' Will, 226 N. C. 498, 39 S. E. 2d 388 (1946); Burney v. Holloway, 225 N. C. 633, 36 S. E. 2d 5 (1945); Bailey v. McClain, 215 N. C. 150, 1 S. E. 2d 372 (1939); *In re* Brown's Will, 194 N. C. 583, 140 S. E. 192 (1927); *In re* Young, 123 N. C. 358, 31 S. E. 626 (1898); Hutson v. Sawyer, 104 N. C. 1, 10 S. E. 85 (1889).

[21] *In re* Biehn's Estate, 41 Ariz. 403, 18 P. 2d 1112 (1933); Blatt v. Blatt, 79 Colo. 57, 243 Pac. 1099 (1926); Abercrombie v. Hair, 185 Ga. 728, 196 S. E. 447 (1938); Howard v. Howard, 268 Ky. 552, 105 S. W. 2d 630 (1937); Scott v. Dawson, 177 Okla. 213, 58 P. 2d 538 (1936); Letts v. Letts, 73 Okla. 313, 176 Pac. 234 (1918). As to statutory duty to produce will for probate see Blatt v. Blatt, *supra.*

The court's denial of the requested equitable relief because a remedy existed at law is not objectionable in the principal case as a blind adherance to procedure which postpones adjudication on the merits. Rather, it is a question of fundamental power to hear and determine probate matters. The right to dispose of one's property by will is not an inherent or guaranteed one, but rather one granted by the legislature.[22] Nor is is an unrestricted right. The Clerk of the Superior Court is given exclusive original jurisdiction in probate matters under the statutes.[23] The court had no alternative but to dismiss the action and the suggested course of action, while unusual, represents no more than a liberal interpretation of the statutes to meet an unanticipated situation.

KENNETH R. HOYLE.

**Unincorporated Associations—Capacity to Sue and Be Sued**

In a recent case[1] the Supreme Court of North Carolina held that under N. C. GEN. STAT. §1-97(6) (1943)[2] an unincorporated association could sue or be sued in its common name. Although the statute in question does not expressly authorize this departure from the common

[22] Wescott v. Bank, 227 N. C. 39, 40 S. E. 2d 461 (1946); Peace v. Edwards, 170 N. C. 64, 86 S. E. 807 (1915); Pullen v. Commissioners, 66 N. C. 361 (1872).
[23] N. C. GEN. STAT. §2-16 (1943); N. C. GEN. STAT. §28-1 (1943); N. C. GEN. STAT. §§31-12 to 31-27 (1943).

[1] Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Company, 232 N. C. 252, 59 S. E. 2d 829 (1950).

[2] "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts, and processes may be served upon the secretary of state of the state of North Carolina. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the secretary of state, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection shall be valid and may be collected out of any real or personal property belonging to the association or organization.

"Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, such processes and precepts may be served upon the secretary of state, as provided in this subsection. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization."