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of the representatives need appear, permitting the unincorporated association to select a representative group diverse from their adversary.³⁵

One more nick has been carved from the impractical common law rule by Section 301(a) of the Taft-Hartley Act³⁶ which provides for damage suits by or against unincorporated associations in federal courts for breach of collective bargaining contracts without regard to jurisdictional amount or the citizenship of the parties.

Because of the uncertainties and limitations of the North Carolina statutes which abrogate, in part, the common law rule as to suability of unincorporated associations, and because of the need for a simple method of suit *by and against* the many powerful and well established fraternal, religious, and trade union bodies that exist today, a specific statute allowing such suits in North Carolina courts and thereby in the federal courts sitting in North Carolina is again suggested.³⁷

HURSELL H. KEENER.

Wills—Two Methods of Probate in Solemn Form in North Carolina'

According to a recent statutory survey,¹ there are nineteen states which permit the probate of a will without requiring that notice be given to all interested parties as a condition precedent. North Carolina is listed as one of these states,² since in this jurisdiction both types of probate, common and solemn form, have been preserved.³ The author comments: ". . . it is clear that a rational basis exists for those [states] which follow the pattern of the English probate without notice, first, because estates commonly need the supervision of the executor immediately on the death of the testator; and, second, because in the vast majority of cases there is not the remotest possibility of a contest and the probate of the will can be reduced to an administrative formality. But since the heir then has no opportunity to contest before probate, he must be given that opportunity afterward."⁴ The increasing num-

³⁵ *Montgomery Ward & Co. v. Langer*, 168 F. 2d 182 (8th Cir. 1948); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (4th Cir. 1945); *Philadelphia Local 192 v. American Federation of Teachers*, 44 F. Supp. 345 (E. D. Pa. 1942); *International Allied Printing Trades Ass'n v. Master Printers Union*, 34 F. Supp. 178 (D. N. J. 1940).

³⁶ 61 STAT. 136 (1947); 29 U. S. C. A. §141-147 (Supp. 1947); Note, 2 *SOUTHWESTERN L. J.* 246 (1948).

³⁷ The text of such a statute was proposed in Note, 29 *N. C. L. REV.* 335, 338 (1950).

¹ Simes, *The Function of Will Contests*, 44 *MICH. L. REV.* 503 (1946).

² See *N. C. GEN. STAT.* §31-14 (1950); *A Survey of Statutory Changes in North Carolina in 1933*, 11 *N. C. L. REV.* 263 (1933).

³ *In re Will of Chisman*, 175 *N. C.* 420, 95 *S. E.* 769 (1918). This conclusion also follows by necessary implication from *N. C. GEN. STAT.* §31-32 (1950), which governs the filing of a caveat during or after probate "in common form."

⁴ Simes, *The Function of Will Contests*, 44 *MICH. L. REV.* 503, 539 (1946).

ber of cases which hinge on the procedural relationship between the clerk of superior court, who has *exclusive* jurisdiction over probates in common form,⁵ and the superior court, which has *derivative* jurisdiction over probates in solemn form,⁶ belies the appearance of simplicity imparted to the North Carolina system by the use of these two historically well-defined forms of probate.

All probate proceedings in this state commence with an application for probate to the clerk of superior court.⁷ Since the proceeding is *in rem*, no one interested is before the clerk except the propounders and witnesses,⁸ and if there is no objection to the will, it is admitted to probate. Such probate, called probate in common form, is conclusive of the validity of the will unless it is set aside in a later proceeding by direct attack.⁹ A collateral attack is only permitted if the clerk was deceived by fraud or perjury,¹⁰ or if the will is so vague as to be a nullity.¹¹ The clerk may set aside the probate on these grounds, but not on grounds which should be raised by caveat.¹² Such probate *must* be vacated, however, either by motion to the clerk or by caveat, and the probate of a later will is not sufficient to meet this requirement.¹³ All direct attacks are barred after three years from the date of probate unless the caveator is under twenty-one years of age, insane, or imprisoned, in which case the bar attaches three years from the removal of the disability.¹⁴ Should the caveator be found to have participated in a transaction which is dependent upon the validity of the will which was probated, he may be barred by estoppel to question the will.¹⁵

⁵ Anderson v. Atkinson, 234 N. C. 271, 66 S. E. 2d 886 (1951); Brissie v. Craig, 232 N. C. 701, 62 S. E. 2d 330 (1950).

⁶ Brissie v. Craig, 232 N. C. 701, 62 S. E. 2d 330 (1950); *In re* Will of Hine, 228 N. C. 405, 45 S. E. 2d 526 (1947).

⁷ N. C. GEN. STAT. §31-16 (1950). The court has said that "it is the policy of the law that wills should be probated," so it would seem that the application cannot be withdrawn once it is submitted to the clerk. Wells v. Odum, 207 N. C. 226, 228, 176 S. E. 563, 564 (1934).

⁸ See, e.g., *In re* Will of Rowland, 202 N. C. 373, 375, 162 S. E. 897, 898 (1932); *In re* Will of Chisman, 175 N. C. 420, 421, 95 S. E. 769, 770 (1918).

⁹ N. C. GEN. STAT. §31-19 (1950); and, e.g., *In re* Will of Puett, 229 N. C. 8 47, S. E. 2d 488 (1948); *In re* Will of Rowland, 202 N. C. 373, 162 S. E. 897 (1932). The record of probate in common form is not admissible as evidence in the caveat proceedings. *In re* Will of Etheridge, 231 N. C. 502, 57 S. E. 2d 768 (1950).

¹⁰ *In re* Will of Puett, 229 N. C. 8, 47 S. E. 2d 488 (1948); *In re* Will of Johnson, 182 N. C. 522, 109 S. E. 373 (1921).

¹¹ Burchett v. Mason, 233 N. C. 306, 63 S. E. 2d 634 (1951).

¹² *In re* Will of Hine, 228 N. C. 405, 45 S. E. 2d 526 (1947). *In re* Will of Brock, 229 N. C. 482, 487, 50 S. E. 2d 555, 559 (1948), for example, lists undue influence and lack of testamentary capacity as among the grounds for caveat.

¹³ *In re* Will of Puett, 229 N. C. 8, 47 S. E. 2d 488 (1948).

¹⁴ N. C. GEN. STAT. §31-32 (Supp. 1951).

¹⁵ Burchett v. Mason, 233 N. C. 306, 63 S. E. 2d 634 (1951) (holding that persons who participated in proceedings to sell timber from lands devised by the will in question are thereafter estopped from attacking the validity of the will).

The usual type of probate in solemn form is by formal caveat,¹⁶ which immediately raises an issue of fact (*devisavit vel non*). The clerk must then transfer the case to the superior court for trial.¹⁷ Citations must be issued to all interested persons,¹⁸ who may come in and align themselves with either the propounder or the caveator if they wish, but if they have notice, they are bound by the proceedings whether they participate or not.¹⁹ At this stage of the proceedings the matter is out of the hands of the interested persons, and there can be no agreed statement of facts, waiver of jury trial, or nonsuit.²⁰ Those interested persons not cited are not estopped to file a second caveat, even though the will was upheld following the first.²¹ The converse does not follow, however, for the court has indicated that the executor who propounds the will acts in a representative capacity for all persons who favor the will, and it might extend this concept to any propounder.²² Should a person who desires to attack a purported will be unable to get it propounded by another, he may both propound and caveat the will, and thus secure an early determination of its invalidity.²³

The other type of probate in solemn form, which may be concluded without a formal caveat, has remained in the background until recently. This is the proceeding by which the propounder petitions the clerk to issue citations to all interested persons to come and "see proceedings." In 1834, Chief Justice Ruffin, well known for his comprehensive opinions, set out the procedure for such a probate as follows: "To enable

¹⁶ See N. C. GEN. STAT. §31-32 (Supp. 1951).

¹⁷ N. C. GEN. STAT. §31-33 (1950).

¹⁸ N. C. GEN. STAT. §31-33 (1950); *In re* Will of Rowland, 202 N. C. 373, 162 S. E. 897 (1932).

¹⁹ See *Mills v. Mills*, 195 N. C. 595, 143 S. E. 130 (1928); *Redmond v. Collins*, 15 N. C. 430 (1834).

²⁰ See, e.g., *In re* Will of Morrow, 234 N. C. 365, 67 S. E. 2d 279 (1951); *Collins v. Collins*, 125 N. C. 98, 34 S. E. 195 (1899). But see *Bailey v. McLain*, 215 N. C. 150, 1 S. E. 2d 372 (1939) (caveator allowed to withdraw pursuant to agreement with propounder), criticized in Note, 18 N. C. L. Rev. 76 (1939).

²¹ *Mills v. Mills*, 195 N. C. 595, 143 S. E. 130 (1928).

²² *Redmond v. Collins*, 15 N. C. 430, 442 (1834).

²³ Such a problem faced the plaintiff in *Brissie v. Craig*, 232 N. C. 701, 62 S. E. 2d 330 (1950). He was in doubt as to whether he had a sufficient interest to propound the will and feared that, if he did, he might then be estopped to file a caveat, so he sued in superior court for a judgment declaring the instrument in question to be invalid as a will. He desired to remove the instrument as a threat to his title to property inherited from the purported testator. The superior court rendered judgment for the plaintiff, but the supreme court reversed, holding that the superior court had no jurisdiction to hear a case within the exclusive jurisdiction of the clerk. Justice Ervin, speaking for the court, by way of dictum, proposed to the plaintiff that he should have simultaneously propounded and filed a caveat to the will. Two conclusions are implicit in the decision: first, that N. C. GEN. STAT. §31-15 (1950), which gives the clerk the power to compel the production of a will for probate, does not give him the power to compel probate of the will when produced; and second, that a propounder is not estopped to caveat the will which he is propounding. This case is discussed in Note, 29 N. C. L. Rev. 331 (1951).

the propounder to bind others a decree is taken out by him to summon all persons, 'to see proceedings,' not to become parties, but to witness what is going on, and take sides if they think proper. If the propounder does not choose to adopt that course, he may at once take his decree; which in relation to this subject is called proving the will in common form. If he take out a decree and summon those in interest against him, 'to see proceedings,' they are concluded, whether they appear and put in an allegation against the will or not, and as against those summoned this is called probate in solemn form."²⁴ This judicial type of probate was recognized by Justice Pearson in 1855,²⁵ but, except for an occasional quotation,²⁶ the procedure so clearly set out lay dormant until approval was again granted in 1952. In the latter year, the North Carolina Supreme Court decided the case of *In re Will of Ellis*.²⁷ Citations had been issued to the interested persons, and the clerk had held a hearing. One of the witnesses to the will had testified that he did not sign in the presence of the testator. This testimony was contradicted by that of three other persons, but the clerk had refused to admit the will to probate. The propounder had appealed to the superior court, which had granted a motion by the heirs to remand the proceedings to the clerk, holding that the hearing before the clerk constituted a final trial on the merits which concluded the propounder on the issue of *devisavit vel non*. The propounder then appealed to the supreme court, which reversed the superior court order. Justice Denny, speaking for a unanimous court, held that the ruling of the clerk is only conclusive on the subject when no issue of fact is raised by the parties,²⁸ and that if there is an objection to the will, whether by formal caveat or not,

²⁴ *Redmond v. Collins*, 15 N. C. 430, 437-38 (1834).

²⁵ *Etheridge v. Corprew*, 48 N. C. 14, 17 (1855).

²⁶ *Mills v. Mills*, 195 N. C. 595, 597, 143 S. E. 130, 132 (1928). Without citation of authority, the following language is found in DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA, §43 (1948): ". . . the propounder may himself elect to have the original probate in solemn form and thus force all dissatisfied persons to file a caveat then or never. The law is not entirely clear as to how this should be done, but it would seem that the propounder may file a petition asking for probate in solemn form and obtain an order from the clerk for citations to be issued to all interested parties, returnable on a day named in the citation, notifying them of the application for probate and directing them to appear if they wish to do so and 'see proceedings,' in the same general form as citations in cases of caveats. When such a procedure is followed, dissatisfied persons must file a caveat in these proceedings, or be forever barred from doing so."

²⁷ 235 N. C. 27, 69 S. E. 2d 25 (1952).

²⁸ The opinion quotes the following statement as a correct analysis of the law on the two forms of probate in solemn form: "(1) Where the next of kin and other interested persons are cited to appear and 'see proceedings'—and a judgment is entered for or against the will, but there is no verdict of a jury because no issue is raised by the parties; (2) where a person, entitled to do so, intervenes and enters a caveat—denies the validity of the will—and thereby raises an issue of *devisavit vel non*, upon which issue a verdict is taken, and judgment entered in accordance with the verdict." 2 MORDECAI, LAW LECTURES 1211 (2d ed. 1916).

then the issue of *devisavit vel non* is raised and must go to the superior court to be tried by a jury.²⁹ Nothing in the opinion conflicts with the original statement of Chief Justice Ruffin,³⁰ and this intermediate procedure, standing between probate in common form and formal caveat, as defined in 1834 and clarified one hundred and eighteen years later, will bridge the gap confronting persons who seek to get the *validity* of a will settled without having to wait for the three year limitations period on caveats to expire.³¹ They may now force an early caveat or none at all, which is the converse of the situation dealt with in *Brissie v. Craig*,³² where a prospective caveator was seeking to have the *invalidity* of a will settled. In completing the picture of will probates by the decisions in *Brissie v. Craig* and the *Ellis* case, the court has followed the path of logic with consistency and accuracy, and the way is now clear for rapid settlement of estates.

HARPER JOHNSTON ELAM, III.

Workmen's Compensation—Right of Employee to Bring Common Law Action Against Negligent Co-employee

Plaintiff was injured while riding in an automobile driven by the president of the corporation by which plaintiff was employed. The plaintiff was awarded compensation under the North Carolina Work-

²⁹ *In re* Will of Ellis, 235 N. C. 27, 32, 69 S. E. 2d 25, 28 (1952). The court cited as authority N. C. GEN. STAT. §1-273 (1943), which requires the clerk to transfer cases to superior court when issues of law and fact, or of fact, are raised before him *in civil cases*. In view of the constant reiteration by the court of the proposition that will probates are proceedings *in rem*, perhaps a stronger basis for the requirement of a jury trial on the issue of *devisavit vel non* is found in the following language from *In re* Will of Roediger, 209 N. C. 470, 476, 184 S. E. 74, 77 (1936): "A trial by jury cannot be waived by the propounder and the caveator. Nor can they submit to the court an agreed statement of facts, or consent that the judge may hear the evidence and find the facts determinative of the issue. The propounder and the caveator are not parties to the proceeding in the sense that they can by consent relieve the judge of his duty to submit the issue involved in the proceeding to a jury.

"In the instant case, it was error for the judge to render judgment on the facts agreed upon by the propounder and the caveator, and supplemented by the facts found by him, with their consent. The proceeding was *in rem*, and could not be controlled by the propounder and the caveator, even with the consent and approval of the judge. *In that respect it is distinguishable from a civil action.*" (Italics added.) See also *In re* Will of Morrow, 234 N. C. 365, 67 S. E. 2d 279 (1951).

³⁰ Respondents relied on the statement by Chief Justice Ruffin that "if he [the propounder] take out a decree and summon those in interest against him, 'to see proceedings,' they are concluded, whether they appear and put in an allegation against the will or not. . . ." The court did not concern itself with this point, but a reasonable interpretation of this language, and one which would reconcile it with the holding of the *Ellis* case, is that it means only that those interested persons cited are bound by the final disposition of the case, rather than that the parties are precluded from appealing to the superior court from the decision of the clerk.

³¹ See REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES §2 (1939) (where it is suggested this procedure be provided by statute).

³² See note 22 *supra*.