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Wills -- Ghosts in North Carolina -- The Haunting Problem of the After-Discovered Will

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The defendant in *Atkins*, by confining its jurisdictional "presence" to a state that allowed assertion of remedies within only a very short time was permitted, in effect, to defeat both the right and the remedy created by the plaintiff's state. A persuasive case could be made, as Justice Rutledge pointed out in *Guaranty*, that the diversity clause was inserted to afford protection against exactly this form of abuse of state sovereignty.[49]

If the result in *Atkins* was required neither by *Erie*, nor by the Constitution, nor by congressional mandate, nor even by post-*Erie* case law, and if the relevant policy considerations militate against it, then why did the court of appeals feel constrained to deny plaintiff relief, particularly when, as the court itself admitted, the "equities" of the case "strongly favor[ed]" him?[50] The answer can be found in the confusion prevalent among the lower federal courts as to the proper scope of the *Erie* principle. Perhaps the injustice done Donald Atkins in the name of this doctrine will serve as a catalyst for resolution of the conflict. Certainly, *Byrd* and *Hanna* are evidence of growing dissatisfaction with the mechanistic application of "outcome-determination," and it is arguable that they foreshadow a trend towards dignifying the role of the federal court in diversity litigation, perhaps even by directly overruling *Guaranty* and the brood it has spawned. An appealing solution is that suggested by Justice Harlan, concurring in *Hanna*:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.[51]

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Wills—Ghosts in North Carolina—The Haunting Problem of the After-Discovered Will

Given a death in North Carolina, a will or intestate administration will normally follow fairly quickly, enabling all concerned to get their

[49] 326 U.S. at 118-19.
[50] 401 F.2d at 733-34.
[51] 380 U.S. at 475. *See* H. M. HART & H. WECHSLER, *supra* note 40. *Cf.* Angel v. Bullington, 150 F.2d 679 (4th Cir. 1945) (opinion of Dobie, J.), *rev'd*, 330 U.S. 183 (1947).

fair allotment from the estate. In the majority of cases distribution ends the matter, and there are no further problems. Suppose, however, that 75 years after a proper administration and distribution under the intestacy laws a distant relative finds what he alleges to be decedent's will and procedes to probate it? On appeal the question arises: May a will be probated in North Carolina after such a long period of time has elapsed? The answer is indisputably, "yes."[1] This note will explore whether this result is desirable and consonant with current North Carolina policy on will probate.

At common law there was no statute of limitations on the original probate of a will,[2] and neither the general statute of limitations[3] nor the registration statutes[4] were held applicable to original probate. Today, however, many states have statutes of limitation on the original probate of a will that run in length from sixth months[5] to five years.[6] North Carolina, however, continues to follow the common law doctrine.

North Carolina does impose some indirect limits upon probate. A nuncupative will may not be probated more than six months after being uttered by the decedent unless it is reduced to writing within ten days from the date of death.[7] An action to caveat a will must be instituted within three years or be barred completely.[8] Probate of a second will has been barred in North Carolina by the doctrines of laches[9] and estoppel.[10] It has also been held that one who has or knows of a will

[1] *In re* Thompson, 178 N.C. 540, 101 S.E. 107 (1919).

[2] *In re* Dupree, 163 N.C. 256, 79 S.E. 611 (1913); Boggan v. Somers, 152 N.C. 390, 67 S.E. 965 (1910); Steadman v. Steadman, 143 N.C. 345, 55 S.E. 784 (1906). *See also* 1 N. WIGGINS, WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 112 (1964).

[3] Ricks v. Wilson, 154 N.C. 282, 70 S.E. 476 (1911); McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

[4] Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919); Harris v. Dudley Lumber Co., 147 N.C. 631, 61 S.E. 604 (1908); Bell v. Couch, 132 N.C. 346, 43 S.E. 911 (1903).

[5] *In re* Elliot, 22 Wash. 2d 334, 156 P.2d 427 (1945).

[6] Sims v. Schavey, 234 Ark. 166, 351 S.W.2d 145 (1961). *See* L. SIMES, MODEL PROBATE CODE § 83 (1946).

[7] N.C. GEN. STAT. § 31-18.3 (1966). It is arguable that the only purpose of the time limitation on probate is to insure that the will is accurately set down by the witnesses. *In re* Haygood, 101 N.C. 574, 8 S.E. 222 (1888).

[8] N.C. GEN. STAT. § 31-32 (1966).

[9] Stelges v. Simmons, 170 N.C. 42, 86 S.E. 801 (1915). *See also* Hayes v. Simmons, 136 Okla. 206, 277 P. 213 (1928).

[10] Stelges v. Simmons, 170 N.C. 42, 86 S.E. 801 (1915). *See also* Dowd v. Dowd, 621 Idaho 631, 115 P.2d 409 (1941); *In re* Stoball, 211 Miss. 15, 50 So. 2d 635 (1951).

has a positive duty to probate it,[11] and if he fraudulently suppresses it, he can be criminally prosecuted.[12] The executor has a similar duty to probate the will,[13] and if the Clerk of Superior Court knows of the suppression, he may compel production.[14] N.C. GEN. STAT. § 31-12 and § 31-15[15] taken together imply that probate of the will is required,[16] although the statutes do not place a time limit on the requirement.

In North Carolina to probate a second will discovered after the probate of the first, it is necessary to caveat the first.[17] The reasoning is threefold: first, in order for the probate of a will to be conclusive it must be determined to be the last valid will executed by the decedent. If a second will may be probated while a first is "still on the books," then the basic premise has been violated, for there is no more a single set of directions from the testator. Second, allowing probate of a second will leads to a multiplicity of actions.[18] Finally, the probate judgment has been likened to the civil judgment, which, when rendered by a court of competent jurisdiction, cannot be collaterally attacked.[19]

The North Carolina caveat statute[20] sets out two basic provisions regarding time limits on probate: the caveat action must be brought within three years of the probate of the will or it is finally and conclusively barred, and persons under certain named disabilities do not fall within the limitation until the disability is removed.[21] Thus, if a will was probated in North Carolina and ten years later a subsequent will was found, the second will could not be probated because such probate would be a collateral atack. Nor could the first will be caveated, as more than

[11] Wells v. Odum, 205 N.C. 110, 170 S.E. 145 (1933).
[12] *Id.*; N.C. GEN. STAT. § 14-47 (1966).
[13] *In re* Mark's Will, 259 N.C. 326, 130 S.E.2d 673 (1963).
[14] N.C. GEN. STAT. § 31-15 (1966).
[15] N.C. GEN. STAT. §§ 31-12, -15 (1966).
[16] Wells v. Odum, 207 N.C. 226, 176 S.E. 563 (1934).
[17] Powell v. Watkins, 172 N.C. 244, 90 S.E. 207 (1916); *see also* N.C. GEN. STAT. § 31-19 (1966). The North Carolina court views probate of a second will without caveat of the first as a collateral attack and expressly disapproves of it. *In re* Puett, 229 N.C. 8, 47 S.E.2d 488 (1948).
[18] After the action to probate the second will would follow an action to determine which will was valid, followed by a series of actions to quiet title in the various parcels of land involved. Conzet v. Hibbon, 272 Ill. 508, 112 N.E. 305 (1916).
[19] Springs v. Springs, 182 N.C. 484, 107 S.E. 839 (1921); *contra,* Schultz v. Schultz, 51 Va. (10 Gratt.) 358 (1853).
[20] N.C. GEN. STAT. § 31-32 (1966).
[21] Note that coverture is not a disability. *In re* Witherington, 186 N.C. 152, 119 S.E. 11 (1923).

three years would have passed before the finding of the will. However, if there were a one year old child interested in the estate at the time of the probate of the first will, caveat to the first would be allowed.[22] In contrast to the time limitations put on probate of a second will, the probate of a will subsequent to an intestacy is subject to almost no limits,[23] as it is by definition an original probate.[24]

The detrimental effects of imposing few or no limitations on probate of a will in this context may be most readily seen by an examination of the potential liabilities of distributees, who take by intestacy; of devisees and legatees,[25] who take by will; and of the transferees of the legatees.

In the case of a distributee of real property,[26] it is established that if he has the property he is liable for the return of it to its newly established owner.[27] Likewise, a distributee of personal property[28] is liable to a subsequent and rightful owner for the return of the property in specie if it is in the former's possession.[29]

The more difficult case occurs in the situation where the distributee no longer has the property in specie, but has sold it to someone from whom the rightful owner may not recover.[30] Though not completely clear, it appears that the new owner may claim the proceeds from the original

[22] N.C. GEN. STAT. § 31-32 (1966). He would have 23 years from the date of probate. Probate of the second will would be just as incorrect here as it was in the former situation.

[23] There are some limits on probate after an intestacy. See cases and statutes cited notes 7-16 *supra.*

[24] See cases cited note 2 *supra.*

[25] For the remainder of this note the single term "distributee" will be used to denote any party taking under a will or an intestate administration.

[26] Title vests in the heirs at the date of death subject to divestment by later will. Hargrave v. Gardner, 264 N.C. 117, 141 S.E.2d 36 (1965). Title vests in the devisee at the date of probate but relates back to the testator's date of death. Steadman v. Steadman, 143 N.C. 345, 55 S.E. 784 (1906).

[27] *In re* Walker's Estate, 160 Cal. 547, 117 P. 510 (1911); Cousens v. Advent Church, 93 Me. 292, 45 A. 43 (1899).

[28] It is an interesting question as to who has title to personal property if there is no administration, but only a family settlement. An equally interesting solution is offered by *Brobst v. Brobst,* 190 Mich. 63, 155 N.W. 734 (1916), holding that only the legal title vests in the personal representative, if there is one. The equitable title vests at death in the distributee. If there is an administration, the distributee gets both legal and equitable title. If there is no administration, but a family settlement, the distributee gets no legal title but is estopped to deny the title of others. *See also* cases cited note 26 *supra.* Real and personal property are treated similarly in this instance.

[29] *In re* West, 2 Ch. 180 (1909).

[30] Rights of a subsequent distributee, legatee, or devisee as against the purchaser for value will be discussed *infra* at pages 727-29.

beneficiary.[31] The best authority for this proposition in North Carolina is *Whitehurst v. Hinton*,[32] where, after a successful caveat of the will involved, the referee, and subsequently the trial judge, held that since the property in question had been sold, the proceeds from the sale could be followed into the hands of the original devisees. The North Carolina Supreme Court did not directly decide the issue; however, by affirming the decision of the trial court, the decision as to the proceeds was affirmed by implication.[33]

The original distributee is thus subject to almost strict liability either for the return of the property in specie or for the return of its proceeds. Consider the case where a man has inherited property, builds a substantial home upon it, and then awakens twenty years later to find himself dispossessed by a devisee under a newly discovered will. Even though he may recover for the fair market value of the improvements,[34] the likelihood of his recovering either the cost or their real value to him is miniscule. Other similar situations are not hard to imagine. Obviously an indiscriminate and indefinite statute of limitations on original probate is not desirable from the standpoint of those who inherited from the original intestacy or will.

The other individual who can be harmed by the probate of a second will, or a like action, is the bona fide purchaser[35] from the distributee. Until 1915[36] North Carolina did not have a statute protecting the innocent purchaser, and as a result, in at least two decisions, the bona fide purchaser was held not to be protected.[37] The theory of these cases was that the title acquired by the subsequent distributee related back[38] to the date of death of the decedent; therefore, the original distributee had

[31] See Thompson v. Samson, 64 Cal. 330, 30 P. 980 (1883); *In re* West, 2 Ch. 180 (1909).

[32] 209 N.C. 392, 184 S.E. 66 (1936).

[33] The opinion must be read to be believed. The holding of the referee may be found at 209 N.C. 392, 399, 184 S.E. 66, 70 (1936) (holding number six) and that of the trial judge at 209 N.C. 392, 401, 184 S.E. 66, 71 (1936). *See also* Gray v. Goddard, 90 Conn. 561, 98 A. 126 (1916); Palmer, *Restitution of Distributions by a Fiduciary to Which the Recipient Was Not Entitled*, 19 HASTINGS L. REV. 993 (1968); Comment, *Wills—Executors and Administrators*, 36 MICH. L. REV. 120 (1937).

[34] The remedial theory is quantum meruit.

[35] A bona fide purchaser may be defined as "[a] purchaser in good faith for valuable consideration and without notice." BLACK'S LAW DICTIONARY 224 (Rev. 4th ed. 1968).

[36] See Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919).

[37] *Id.*; Cooley v. Lee, 170 N.C. 18, 86 S.E. 720 (1915).

[38] Steadman v. Steadman, 143 N.C. 345, 55 S.E. 784 (1906).

no title to pass. Since the grantee never had title, whether the subsequent purchasers were bona fide became moot[39] and made alienation of property a "trap for the unwary."[40]

Bona fide purchasers are now protected by two North Carolina statutes.[41] Both purport to extend coverage to the purchaser for value and without notice.[42] Both provide that a purchase from a distributee by an innocent purchaser for value without notice is protected after more than two years from the date of death of the decedent.[43] A purchase is also protected, even if made within two years, if not challenged until the period has elapsed.[44]

It would appear that a two year "wall" is erected by the statutes between the innocent purchaser and the subsequent distributee. This result does not necessarily follow, however. For instance, if one buys property from a distributee of a nonresident decedent, safety from attack is not guaranteed until five years from the date of death of the decedent.[45] In addition, both statutes seem to be directed toward real property only.[46] If a legatee of 100 shares of stock sold the same two years after the testator's date of death to a bona fide purchaser, who in turn immediately sold the stock on the market, making it untraceable, will not the bona fide purchaser be liable to a legatee of the same stock under a subsequent will? Under the North Carolina statutes it would seem that the pur-

[39] *Id.*

[40] Matthews v. Fuller, 209 Md. 42, 120 A.2d 356 (1956).

[41] N.C. GEN. STAT. § 28-83 (1966) [hereinafter cited as section 28-83]; N.C. GEN. STAT. § 31-39 (1966) [hereinafter cited as section 31-39]. The former is concerned with creditors' rights as opposed to those of the bona fide purchaser. The latter deals with the later probated will and the innocent purchaser.

[42] Section 28-83 protects the "bona fide purchaser for value and without notice"; section 31-39 protects "innocent purchasers for value," thus seeming to eliminate the notice requirement.

[43] Note that section 28-83 also protects a purchase made after the filing of the final account by the personal representative.

[44] Section 28-83 and section 31-39.

[45] Section 28-83 provides in part:

> [I]f the decedent was a nonresident, such conveyances shall not be valid unless made after two years from the grant of letters. But such conveyances shall be valid, if made five years from the death of a nonresident decedent, notwithstanding no letters testamentary or letters of administration shall have been granted.

[46] Section 28-83 protects "[a]ll conveyances of *real property* of any decedent made by any devisee or heir at law . . . ." (emphasis added). Section 31-39 provides that "the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator . . . ." (This sentence arguably refers back to a previous one having as its subject "a will devising real estate.")

chaser is liable for the price of the stock at the date of its sale by him since it is personal, and not real, property involved.[47] Finally, suppose a bona fide purchaser bought real property from a devisee more than two years after the testator's death but before three years from the death. A second will was then found and used successfully to caveat the first. Is a bona fide purchaser from the devisee protected by the statute from the devisee of the second will? The applicable statute[48] says that "the probate and registration of any will shall not affect the rights of innocent purchasers for value from the *heirs at law* of the testator . . . ."[49] The purchase given in the example was not from the heirs at law, but from the original devisee; therefore, the statute[50] does not protect the bona fide purchaser.[51]

Since it is clear that in certain situations neither the original distributee of the property nor the innocent purchaser will be protected, there should be some strong policy to justify such possibly harsh results. In the case of the bona fide purchaser, problems are caused not so much by

[47] *But see* 3 AMERICAN LAW OF PROPERTY § 14.40 (A. J. Casner ed. 1952) pointing out that most states have protected the innocent purchaser from the taker by will. Unfortunately, the two North Carolina cases cited by Mr. Casner as authority for this proposition concern real property. Whitehurst v. Hinton, 209 N.C. 392, 184 S.E. 66 (1936); Newbern v. Leigh, 184 N.C. 166, 113 S.E. 674 (1922). In Cooley v. Lee, 170 N.C. 18, 86 S.E. 720 (1915) and Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919), both involving real property, the bona fide purchaser was not protected. These cases were overruled by statute which did not refer to personal property, and presumably the status of the law relating to personalty is the same as was that of real property in 1915-19.

[48] Section 31-39.

[49] *Id.* (emphasis added). N.C. GEN. STAT. § 29-2(3) (1966) defines "heir" as "any person entitled to take real or personal property upon intestacy under the provisions of this chapter." This definition is broader than that of the term "heirs at law" used in section 31-39. The latter term at common law was defined to mean persons entitled to inherit real property. In light of this definitional vacuum there is a grave doubt whether a bona fide purchaser of personal property is extended coverage under section 31-39.

[50] Section 28-83 provides that conveyances by an heir or devisee made within two years are void as to creditors, executors, administrators, and collectors of the decedent. If made after two years from the date of death or the filing of the final account, they are valid, "even as against creditors." Thus as to all parties except the four named conveyances by an heir or devisee are valid; and those conveyances made after two years are valid even as against the four classes. If this is a correct interpretation of the statute, section 28-83 protects a bona fide purchaser from a devisee of a second will. A better solution would be to amend section 31-39 to cover this situation.

[51] It is possible that the bona fide purchaser could be protected by decisional law. See cases cited note 47 *supra*. These decisions do not cover personal property, and also it is arguable that the statute has preëmpted this area and conclusively states that only purchases from parties named in the statute will be protected.

a conclusive state policy limiting protection of the innocent purchaser as by looseness of statutory language. Much of this could be clarified by redrafting and possibly combining the two bona fide purchaser statutes. What seems to be the single justification in North Carolina for the lack of protection of the original beneficiary is the desire to insure probate of holographic wills. Because of the sometime secretive nature of the holographic will, and its penchant for being found in dark corners, an open statute of limitations for probate seems desirable in order to give the beneficiaries every chance to find and probate it. The North Carolina statute controlling holographic wills,[52] however, requires that the will must be found either among the decedent's valuable papers or in some reasonably obvious depository.[53] Therefore, it would be the rare case in which a holographic will is discovered years after the decedent's date of death and yet qualify under the statute.[54]

In conflict with the above is a strong North Carolina policy favoring probate, which has been affirmed in numerous statutes and decisions.[55] The statement of the court in *In re Will of Pendergrass*[56] is demonstrative: "It is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law."[57] Behind the desire to encourage speedy probate is the even more basic policy of the law to encourage free and unrestricted alienation of property.[58]

In balance, it is hardly conceivable that the policy favoring holographic wills could outweigh a strong policy favoring both speedy probate and free alienation of property, when the effects on the devisee, legatee, distributee, and the innocent purchaser are taken into account. At the very least it is clear that the policy behind the law, or lack of it, has weakened

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[52] N.C. GEN. STAT. § 31-3.4(3) (1966).

[53] N.C. GEN. STAT. § 31-3.4(3) (1966). This section provides that the will must be

> [f]ound after the testator's death among his valuable papers or effects, or in a safe deposit box or other safe place where it was deposited by him or under his authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping.

[54] What constitutes a "valuable paper"? If the phrase is interpreted broadly, then a will found almost anywhere could be accepted.

[55] Cases and statutes cited notes 6-14 *supra.*

[56] 251 N.C. 737, 112 S.E.2d 562 (1960).

[57] *Id.* at 742, 112 S.E.2d at 566 (*quoting* Wells v. Odum, 207 N.C. 226, 228, 176 S.E. 563, 564 (1934)).

[58] Simpson v. Cornish, 196 Wis. 125, 154, 218 N.W. 193, 204 (1928).

considerably over the years. Moreover, the problem can be readily cured by adopting a statute of limitations on probate[59] and by strengthening the bona fide purchaser statutes. Given these factors it would seem an appropriate time for the legislature to heed the Latin maxim *Cessante Ratione Legis, Cessat Et Ipsa Lex.*[60]

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[59] Why should the legislature not adopt the five year statute contained in the MODEL PROBATE CODE? See L. SIMES, MODEL PROBATE CODE § 83 (1946).

[60] BLACK'S LAW DICTIONARY 288 (Rev. 4th ed. 1968). ("The reason of the law ceasing, the law itself also ceases.")