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Wills and Estates

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Several procedural problems were resolved in 1953. The notice of appeal from the Board of Review to the common pleas court is sufficient if the case be designated by docket number and the decision quoted. Greater detail is unnecessary.[5] Also, on appeal from the Board of Review to the common pleas court, a claimant can correct the failure to make the administrator a party and to serve him with notice within thirty days. Such is not a jurisdictional defect.[6] Then if the common pleas court determines the Board of Review order is "incorrect," the court of appeals will reverse the judgment and remand the case. The statutory authority for common pleas court action is to find the order "unlawful, unreasonable, or against the manifest weight of the evidence."[7]

If the administrator discovers that an unemployment compensation claim is void *ab initio*, he can within three years vacate any action on the claim. The provision making benefit determinations final after ten days from the date of the order is not applicable to claims void *ab initio*.[8]

On the claimant rests the burden of proof to establish the right to benefits. Failure to appear at the hearing or to offer evidence precludes an administrative order granting benefits.[9]

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WILLS AND ESTATES

Oral Contract to Make a Will

In 1953 a special statute of frauds was enacted in Ohio making unenforceable any agreement to make a will or to make a devise or bequest by will unless such agreement was in writing and signed by the party making it.[1] The Ohio Supreme Court in *Sherman v. Johnson*[2] held that by virtue of this statute an agreement to make a will, etc., is not enforceable *under any circumstances* unless it is in writing. It further held that the statute applies to any action instituted after its enactment, even though the action, as in the principal case, involves an oral contract entered into before its enactment, and even though performance of the contract had been partially completed at the time of the enactment of the statute.

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[5] Sander v. Board of Review, 92 Ohio App. 534, 111 N.E.2d 34 (1951)

[6] Joy Mfg. Co. v. Albaugh, 159 Ohio St. 460, 112 N.E.2d 540 (1953)

[7] Vest v. Board of Review, 93 Ohio App. 504, 114 N.E.2d 170 (1952)

[8] Cornell v. Perschillo, 93 Ohio App. 495, 114 N.E.2d 62 (1952)

[9] Gen. Motors Corp. v. Baker, 92 Ohio App. 301, 110 N.E.2d 12 (1952)

Declaratory Judgment Action Proper for Determining Whether Beneficiary Predeceased Testatrix

Freiberg v. Schloss[3] was an action for a declaratory judgment. An executor requested the probate court to determine and declare that Alice Seeman, one of four beneficiaries named in the testatrix' will, had predeceased testatrix and that the three other surviving beneficiaries were entitled to divide the residue of decedent's estate in equal thirds, in accordance with the provisions of the will in the event any of the beneficiaries predeceased the testatrix. Alice Seeman, the beneficiary whose death was in issue, had not been heard from since 1942, when, according to the evidence, she had been deported by the Nazis from her home in Germany to Poland, under circumstances indicating that she had been executed within a few months after her disappearance. The testatrix died in 1949. It was held that an action brought under the Declaratory Judgments Act[4] was proper, and that the plaintiff had established by a preponderance of the evidence that the beneficiary predeceased the testatrix and, therefore, was entitled to nothing under the will of the testatrix. The court further determined that neither the Presumed Decedents' Act[5] nor the Determination of Heirship law was applicable.[6]

Replevin Statutes Available to Owner of Chattel Against Executor or Administrator

That the replevin statutes are available to one who claims to own personal property and to be entitled to the immediate possession thereof, where it is being wrongfully detained from him by the personal representative of a decedent, was decided by the Ohio Supreme Court in *Service Transport Co. v. Matyas.*[7] In reversing the judgment of the court of appeals,[8] the court stated that if the plaintiff is the owner of the chattels, is entitled to their possession, and there is no question as to any divided interest in the chattels, he is not required to present a claim to an administratrix for them or to except to an inventory, for the reason that plaintiff has no claim against the estate and is not interested in the inventory. The plaintiff is simply claiming a right to recover possession of his personal property, and the replevin statutes apply in favor of anyone who

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[1] OHIO REV. CODE § 2107.04 (OHIO GEN. CODE § 10504-3a).

[3] 159 Ohio St. 209, 112 N.E.2d 326 (1953).

[3] 65 Ohio L. Abs. 331, 112 N.E.2d 352 (Hamilton Probate 1953)

[4] OHIO REV. CODE § 2721.02 (OHIO GEN. CODE § 12102-1).

[5] OHIO REV. CODE § 2121.01 (OHIO GEN. CODE § 10509-25)

[6] OHIO REV. CODE § 2123.01 *et seq.* (OHIO GEN. CODE § 10509-95 *et seq*).

[7] 159 Ohio St. 300, 112 N.E.2d 20 (1953).

[8] 63 Ohio L. Abs. 236 and 244, 108 N.E.2d 741 (App. 1952).

owns chattels and is entitled to their possession, as against anyone who wrongfully detains the possession, regardless of who that person may be.

Will Contest: Naming and Serving Corporate Executor In Corporate Capacity Insufficient

In an action to contest a will the Ohio Code[9] provides that all devisees, legatees, heirs of the testator and other interested persons, including the executor or administrator, must be made parties to the action. That such requirement is not sufficiently complied with by listing the corporate executor in the caption of the petition in the executor's corporate capacity and serving summons upon it in its corporate capacity, even though the corporation was not a legatee or devisee under the will, and even though there was a reference to such defendant as executor in the body of the petition, was decided by the court of appeals in *Martin v. Mansfield Savings & Trust Nat. Bank.*[10]

Devisee: Right to Bring Action for Cancellation of Deed

In *Eysenbach v. Reilly,*[11] the court of appeals held that where a grantor dies testate, the right to maintain an action to cancel a deed obtained from the grantor by fraud and undue influence vests not in the grantor's executor, but in the grantor's devisee, who would have taken the property had not the deed been wrongfully obtained.

Construction of Will

Enyeart v. Driver[12] was a suit for construction of a will in which testatrix devised a farm to her son and her daughter for their lives, and at their death to testatrix' nearest blood descendants. Testatrix died in 1922. Both her son and daughter survived and took a life estate in the property. In 1945, however, the son died intestate, leaving the plaintiff as his only child and the nearest blood descendant of testatrix, except defendant, the daughter of testatrix, who was still living. The question presented was whether, on the death of the testatrix' son, the plaintiff took a vested estate in fee simple in an undivided one-half interest in the realty, or whether the defendant daughter, as survivor of the life tenants, became possessed of a life estate in the entire property. On appeal on questions of law and fact, the court of appeals held that the will created a single life tenancy to be enjoyed by the son and the daughter until the death of

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[9] OHIO REV. CODE § 2741.02 (OHIO GEN. CODE § 12080).

[10] 92 Ohio App. 465, 110 N.E.2d 814 (1952).

[11] 92 Ohio App. 207, 109 N.E.2d 664 (1951).

[12] 93 Ohio App. 500, 113 N.E.2d 739 (1952).

one of them, and thereafter to be enjoyed by the survivor in the whole of the property.

In *Perdue v. Morris*,[13] it was held that a will by which, in item two, testator provided: " I give, devise and bequeath all my property both real and personal to my wife. . At her demise, I request that each of our children be given his or her proportionate share of the estate due consideration being given to those children and persons working and caring for the farm property," gives a fee simple title to testator's wife.

In *Routzong v. Minsterman*[14] testatrix' will provided: "the remainder of my property I hereby will to my niece for her use in any manner she may deem proper without any limit or restriction whatever, with full power and authority, to sell or to exchange, and to reinvest any of my property as she deems best. . It is, however, my wish and will that she preserve as far as she conveniently can the identity of the property and if any remains unused at her death it is my will that four hundred dollars be paid to St. Paul's Reformed Church and that one hundred dollars be paid to the Women's Missionary Society of said church. Of the remainder of my property, I will five-sixth to my sister. " Held: The will gives to the niece a life estate with power to consume the principal. That portion of the estate remaining unconsumed at the niece's death passes to the beneficiaries named as remaindermen in the will.

Half and Half Statute

In *Millar v. Millar*,[15] a wife in 1939 received 1350 shares of stock by the will of her husband. In 1948 she received a stock dividend of 2700 shares of stock. In 1951 she died intestate and without issue, possessed of the above 4050 shares of stock. Held: Under the "half and half" statute,[16] which provides for the descent of property when a relict dies intestate and without issue possessed of identical property which came to the relict from the deceased spouse, only the original 1350 shares of stock received from her husband's estate are identical and pass under the "half and half" statute.

Appeal from Denial of Admission to Probate

It was held in In re *Bowles' Estate*[17] that proceedings to admit to probate lost, spoliated or destroyed wills are purely statutory in nature, and

[13] 93 Ohio App. 538, 114 N.E.2d 286 (1952).
[14] 94 Ohio App. 281, 115 N.E.2d 54 (1952).
[15] 114 N.E.2d 119 (Ohio App. 1953).
[16] OHIO REV. CODE § 2105.10 (OHIO GEN. CODE § 10503-5)
[17] 93 Ohio App. 461, 113 N.E.2d 259 (1952). For further proceedings in the case see 66 Ohio L. Abs. 73, 114 N.E.2d 229 (App. 1953).