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APPEAL AND ERROR - THE ADMINISTRATOR AS A PARTY AGGRIEVED BY PROBATE OF WILL

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RECENT DECISIONS

APPEAL AND ERROR — THE ADMINISTRATOR AS A PARTY AGGRIEVED BY PROBATE OF WILL — In an action to prove the existence of a lost will executed by the deceased, judgment was rendered setting up the lost will and revoking the letters of administration which had been issued. The administrator appealed from this order, and the appellee moved to dismiss the appeal on the ground that the administrator had no such interest as entitled him to review. The governing statute permitted appeal by "any party aggrieved by any final order, judgment, or decree." [1] *Held*, that the administrator who has qualified as such was entitled to appeal under the statute, as the party aggrieved by the probate of the will. *Webb v. Lohnes*, (App. D. C. 1938) 96 F. (2d) 582.

The court, in holding that the administrator has such an interest as will constitute him a person aggrieved by a decree probating an alleged will, relies heavily on the analogy of an administrator to an executor named in a will. As the "champion of the will" an executor may appeal from an order refusing to admit it to probate;[2] yet it is held that his interest is not such as to disqualify him as an attesting witness of a will naming him executor.[3] He may oppose the admission of a later will to probate,[4] and he may appeal from an order setting aside the probate of the will naming him executor.[5] The District of Columbia court coins a phrase when it says that, if the executor named in a will is its champion, an administrator is equally the champion of the supposed intestacy of the deceased,[6] and as such should oppose the probate of any alleged will and appeal from the decree admitting it to probate. The fact that the deceased has expressed no intent that the administrator should manage his affairs does not

[1] D. C. Code (1929), tit. 18, § 26.

[2] Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980 (1912). The court in this decision states that there are no authorities holding the other way. Shirley v. Healds, 34 N. H. 407 (1857); Cowan v. Beans, 155 Wis. 417, 144 N. W. 1129 (1914); Marshall's Ex'r. v. Pogue, 226 Ky. 767, 11 S. W. (2d) 918 (1928); In re Collins' Estate, 174 Cal. 663, 164 P. 1110 (1917); Quirk v. Pierson, 287 Ill. 176, 122 N. E. 518 (1919); Cheever v. Circuit Judge of Washtenaw County, 45 Mich. 6, 7 N. W. 186 (1880); In re Stapleton's Will, 71 App. Div. 1, 75 N. Y. S. 657 (1902).

[3] McDonough v. Loughlin, 20 Barb. (N. Y. S. Ct.) 238 (1885); Meyer v. Fogg, 7 Fla. 292, 68 Am. Dec. 441 at 447 (1857); Richardson v. Richardson, 35 Vt. 238 (1862); Bear's Appeal, 161 Pa. 393, 29 A. 3 (1894). *Contra:* Jones v. Grieser, 238 Ill. 183, 87 N. E. 295 (1909).

[4] In re Langley's Estate, 140 Cal. 126, 73 P. 824 (1903); In re Murphy's Estate, 153 Minn. 60, 189 N. W. 413 (1922). See 36 MICH. L. REV. 685 (1938) for a note on Reed v. Home National Bank, (Mass. 1937) 8 N. E. (2d) 601, which holds that an executor of a prior will may not contest a subsequent one.

[5] In re Cavanaugh's Will, 72 Misc. 584, 131 N. Y. S. 982 (1911); Connelly v. Sullivan, 50 Ill. App. 627 (1893); Hesterberg v. Clark, 166 Ill. 241, 46 N. E. 734 (1897); In re Whetton's Estate, 98 Cal. 203, 32 P. 970 (1893); In re Bernhern's Estate, 82 Mont. 198, 266 P. 378 (1928); State ex rel. Huber v. Tazwell, 132 Ore. 122, 283 P. 745 (1930). *Contra:* Shock v. Berry, 221 Mo. App. 718, 285 S. W. 122 (1926).

[6] Principal case, 96 F. (2d) 582 at 584.

bother the court, which points out that an administrator *cum testamento annexo*, who also acts with no direct mandate from the deceased, may appeal from a judgment setting aside the probate of the will under which he was appointed.[7] If he is allowed to do this, upholding the supposed intent of the testator, with no appointment by him, the ordinary administrator should also be permitted to do so, thus protecting the intent of the deceased that his property go by intestate succession. This decision does not go so far as to make the public administrator a standing contestant to the probate of all wills,[8] but merely holds that an administrator who has been appointed has such an interest that he is a party aggrieved by the admission to probate of a will, and as such that the appeal from the decree may be granted. At the foundation of our law controlling the distribution of the property of a deceased person lies the principle that, within certain limits, the wishes of the deceased as expressed by will or by intestacy shall be observed.[9] To be consistent, there must be some means of preventing the probate of a false will, of protecting the deceased's intent, in this case presumably that his property go by intestate succession. Where the heirs are present, their self-interest will usually be sufficient to insure this; but where, as in this case, no heirs can be found, the appointed administrator as the representative of any possible heirs should have the right to appeal the probate of a will.[10] The case seems to line up with others which have allowed an administrator to appeal.[11] The court disregards the financial interest in the fees to be received for administering the estate, and bases the decision upon the representative character

[7] Bell v. Davis, 43 Okla. 221, 142 P. 1011, Ann. Cas. 1917C 1075 at 1079 (1914); Emhardt v. Collett, 191 Ind. 215, 131 N. E. 48 (1921). Here the administrator *cum testamento annexo* was allowed to appeal from a judgment setting aside the probate of the will under which he was appointed, when none of the beneficiaries under the will joined in the appeal.

[8] In re Sanborn's Estate, 98 Cal. 103, 32 P. 865 (1893), cited in In re Hickman's Estate, 101 Cal. 609, 36 P. 118 (1894), and by Montana court in State ex rel. Eakins v. District Court of Second Judicial District, 34 Mont. 226, 85 P. 1022 (1906), denied to the public administrator the right to contest the probate of a will, saying that he has no interest in the estate or in the probate. This is a wise decision, since a contrary one would lead to endless nuisance suits by public administrators. However, the court does not consider the question of an appeal by a duly appointed administrator from an order revoking his letters and admitting the will to probate.

[9] Principal case, 96 F. (2d) 582 at 584; 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d rev. ed. § 4 (1923).

[10] The following cases permitted the administrator to appeal without discussing the question of his interest: Doran v. Mullen, 78 Ill. 342 (1875); Matter of Page, Admr., 118 Ill. 576, 8 N. E. 852 (1886); Re Cornelius, 14 Ark. 675 (1854); Reid v. Lord, 102 Conn. 365, 128 A. 521 (1925). An attempt is made to distinguish this case in In re Avery, 117 Conn. 201, 167 A. 544, 88 A. L. R. 1154 at 1158 (1933), in which the court denies the appeal of an administrator.

[11] A presumption of intestacy arises on proof of death. Warner v. Flack, 278 Ill. 303, 116 N. E. 197 (1917); Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75 (1908); Richmond Cedar Works v. Stringfellow, (D. C. N. C. 1916) 236 F. 264. But this presumption is defeated by a legally executed will. To assure that only true wills upset the presumption, the executor in his representative capacity should be able to appeal from the probate of what he believes to be a spurious will.

of the administrator. It repudiates those cases which state that the interest must be a pecuniary one in the estate.[12] The position in which the administrator stands as representative of the estate and of the heirs gives him such an interest that he may oppose the probate of a will and appeal from a decision admitting it to probate.[13]

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[12] The following cases refuse the appeal of the administrator on the ground that he lacks a pecuniary interest in the estate. Cairns v. Donahey, 59 Wash. 130, 109 P. 334 (1910); Cajoleas v. Attaya, 145 Miss. 436, 111 So. 359 (1927); Arai v. Saenz, (Tex. Civ. App. 1932) 52 S. W. (2d) 383.

[13] Smith v. Sherman, 4 Cush. (58 Mass.) 408 (1849), allows an administrator appointed in the District of Columbia to appeal from the appointment of one in Massachusetts. The court finds that he is interested in a representative capacity defending the rights of creditors and heirs. In re Davis' Will, 182 N. Y. 468, 75 N. E. 530 (1905), permits a foreign administrator to intervene in the probate of a will. The case holds that he has a personal interest in his fees, but also a more important representative interest. Barnes v. Logsdon, 178 Okla. 645, 63 P. (2d) 964 (1937), allows the appeal by an administrator from a decree admitting a will to probate. This court says it will allow such an appeal where the administrator has an interest to protect in a representative capacity, but would deny it where his only interest is personal.