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Wills--Time for Contest--Admission to Probate of Non-Testamentary Instrument

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would seem that now the court must look only to the fault of the employer. The employer may actually be no more at fault than where consumers quit buying his products, forcing him to cut back labor costs where nevertheless the employee is allowed to recover benefits. See, Simrell, *Employer Fault vs. General Welfare as a Basis of Unemployment Compensation,* 55 YALE L. J. 181 (1945). This type of legislation compels the worker to serve under the penalty of forfeiting certain benefits granted to all workers by law. The employer can virtually say "This job is inconvenient. Your own domestic situation, or your health or other good causes counsel that you should abandon this job, but if you do, you will be deprived of the benefits which now under the law go to all workers who are without fault unemployed." *Montgomery Ward & Co. v. Board of Review,* (Ill. C. C. Cook County, 1941 [quoted 55 YALE L. J. 158 (1945)]).

Another seeming inconsistency is that if a worker quits to preserve his health he is denied benefits. However, if unemployed, he may refuse to accept unsuitable work and still retain benefits. "In determining whether work is suitable for an individual, the director shall consider: (1) the degree of risk involved to the individual's health, safety, and morals." W. VA. CODE c. 21A, art. 6, §5 (Michie, 1943). There is no reason why a worker should be allowed benefits if he refuses to accept work which will endanger his health when he is forced to suffer disqualification penalties when he quits work to preserve his health. *Fannon v. Federal Cartridge Co., supra.*

J. R. H.

WILLS—TIME FOR CONTEST—ADMISSION TO PROBATE OF NON-TESTAMENTARY INSTRUMENT.—Decedent died in Monongalia County, leaving an *unwitnessed,* typewritten testamentary paper signed by him, naming his wife as sole beneficiary. In an *ex parte* proceeding, the county clerk of that county admitted this paper to probate on December 27, 1944, and an order confirming probate was entered on December 28, 1944. W. VA. CODE c. 41, art. 5, §11 (Michie, 1943) provides that, "After a judgment or order entered as aforesaid in a proceeding for probate ex parte, any person interested who was not a party to the proceeding...may proceed by a bill in equity to impeach or establish the will...and if the judgment or order

was entered by the county court and there was no appeal therefrom, such bill shall be filed within two years from the date of such order of the county court. If no such bill be filed within the time prescribed, the judgment or order shall be forever binding." Plaintiff, decedent's half-brother, after acquiring the interest of all others who, in the event of intestacy, would have been decedent's heirs at law, brought a proceeding on April 29, 1948, primarily seeking to partition certain land of which decedent died seised. The Circuit Court of Monongalia County certified the following pertinent questions to the Supreme Court of Appeals: 1. Was the writing a will under the laws of West Virginia? 2. Were the probate proceedings by the county court illegal? 3. Did the probate proceedings, after a lapse of more than two years, have the effect of vesting title in the beneficiary under the instrument? *Held*, that apart from the probate proceedings, the instrument was not a valid will, but that the probate proceedings were legally effective to establish the paper as the will of the decedent and that the paper did vest title to the real estate of which he died seised in the beneficiary. *Cowan v. Cowan*, 54 S. E.2d 34 (W. Va. 1949).

The court did not distinguish between the probate of a paper which, on its face, was not validly executed or attested, and one which, though properly executed, is sought to be impeached on extrinsic grounds. Some courts have drawn this distinction and have concluded that where the defective execution appears on the face of the instrument, the decree or judgment of probate is an absolute nullity and subject to collateral attack. *Blacksher v. Northrup*, 176 Ala. 190, 57 So. 743 (1911); *Fortner v. Wiggins*, 121 Ga. 26, 48 S. E. 694 (1904); *Wall v. Wall*, 123 Pa. 545, 16 Atl. 598 (1888). This view is based on the theory that under such circumstances the court is without jurisdiction to probate the purported will. Illustrative of this position is *Blacksher v. Northrup, supra*, where the court stated that the probate court "has jurisdiction to probate wills, but not to convert something that the laws says is not a will into a will, and thus nullify, or in effect, amend or repeal, our statutes."

However, in interpreting our statute, the West Virginia court did not accept this view. Our court chose to adopt the position taken in several early Virginia cases, that an order admitting a will to probate is conclusive on all persons, and cannot be ques-

tioned except in the method prescribed by the statute. *Nalle's Representatives v. Fenwick,* 4 Rand. 585 (Va. 1826); *Vaughan v. Doe* ex dem. *Green,* 1 Leigh 287 (Va. 1829); *Parker's Ex'rs v. Brown's Ex'rs,* 6 Gratt. 554 (Va. 1850); *Schultz v. Schultz,* 10 Gratt. 358 (Va. 1853). A court of equity has no inherent jurisdiction to entertain a suit brought to impeach a will formally probated. Its jurisdiction is conferred by the statute hereinbefore referred to and the two-year time limitation prescribed therein is a limitation on the right as well as the remedy. *McKinley v. Queen,* 125 W. Va. 619, 25 S. E.2d 763 (1943). One eminent writer expresses the view that "from the earliest decisions to the latest, in both states, there has been one unbroken current of authority to maintain the unimpeachable character collaterally of a probate procedure." 1 HARRISON, WILLS AND ADMINISTRATION IN VIRGINIA AND WEST VIRGINIA §157 (1927). The principal case is the latest West Virginia decision in accord with what seemingly is the better, as well as majority, view. ATKINSON, WILLS §184 (1937); 57 AM. JUR. 619 (1948).

It is submitted that the decision is sound, not only from the standpoint of statutory construction, but also as respects public policy. The plain purpose of the statute was first to accelerate and then to stabilize the settlement of estates of decedents. *McKinley v. Queen, supra.* The two-year period allowed by the statute certainly grants persons interested in the distribution of the estate sufficient time to have their claims adjudicated. The significance of the principal case stems largely from the court's statement that "viewed *alone* it is not a valid will." (Italics added). This statement implies that an additional factor was necessary. That factor was supplied by the action of the county court in admitting the paper to probate and the subsequent lapse of more than two years without contest. The decision indicates that any interested person desiring to impeach the instrument, and the probate proceedings incident thereto, must institute his suit within the two-year statutory period, or be forever bound by the action of the county court. The only apparent exception to this requirement is taken from the court's language that the decision would not "apply to a probate procured by fraud."

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