WILLS AND ADMINISTRATION OF ESTATES

By WILLIAM C. TURPIN*

The decisions and statutes appearing during the period under review are neither new nor startling. They follow generally the pattern of former years and are principally interesting as illustrative of the fact that the law in Georgia with respect to wills and estates is antiquated, cumbersome and, in part at least, uncertain. With the development of our civilization from an agrarian society into an industrial community and with the consequent increase in wealth and complexity in the economic structure, it is submitted that a complete revision of our law touching the devolution of property is becoming necessary. This is a task which will require a great deal of time and hard work and it is suggested that the ground work at least might well be done by the three recognized law schools in this state, assisted by attorneys and trust men who are familiar with the problems presented. This is not the place for a discussion of this necessity but it is respectfully suggested that it be given careful consideration.

PROCEDURE

Four cases arose during the year which were decided on the sound principle that a person who is a stranger to a will is not a proper party to litigate over it. These cases are *Baker v. Henderson*,[1] *Berry v. Smith*,[2] *Lawrence v. Lawrence*,[3] and *Ware v. Martin*,[4] and as illustrative of our antiquated procedure, the old rule is restated that an appeal from the ordinary to the superior court is a *de novo* investigation.

Questions of evidence arose in probate cases three times. In *Crawley v. Selby*[5] it was held that in an action by purported heirs, statements by one of these heirs that the parties were the only heirs at law of the deceased were testimony and not declarations and hence were admissible. In *Denmark v. Rushing*[6] the rule with respect to attestation by a beneficiary was held to apply to nuncupative wills and the older case of *Smith v. Crotty*[7] was disapproved. In *Rabun v Wynn*[8] federal income tax returns were allowed in evidence in a suit involving ownership of property, and in *Johnson v. Bogdis*[9] the court said that residuary legatees are not assignees or transferees within the meaning of Code section 38-1603 so as to render the testimony of a legatee inadmissible.

*Member of the firm of Turpin, Lane & Mattox, Macon; A.B., 1911, University of Georgia; LL.B., 1914, Mercer University; Member Federal Bar, Macon, Georgia, and American Bar Associations.

1. 208 Ga. 698, 69 S.E.2d 278 (1952).
2. 85 Ga. App. 710, 70 S.E.2d 62 (1952).
3. 86 Ga. App. 8, 70 S.E.2d 549 (1952).
4. 209 Ga. 135, 70 S.E.2d 759 (1952).
5. 208 Ga. 530, 67 S.E.2d 775 (1951).
6. 208 Ga. 557, 67 S.E.2d 766 (1951).
7. 112 Ga. 905, 38 S.E. 110 (1901).
8. 209 Ga. 80, 70 S.E.2d 745 (1952).
9. 84 Ga. App. 741, 67 S.E.2d 189 (1951).

The perennial question of an oral contract to make a will arose one time in *Mann v. Moseley.*[10] This case is notable for its incisive and accurate statement of the law. The court says with ample authority that such contracts on a valuable consideration are perfectly valid; that a plaintiff seeking to enforce such a contract must prove the precise contract beyond a reasonable doubt; that the contract must also be fair and just; that its fairness is usually to be determined as of the date of its making; and that the person seeking performance of such a contract must show a substantial compliance with his part of it. This decision, which is a headnote one covering less than two pages, is a model of incisive reasoning and judicial clarity.

Finally, attention is directed to two cases having to do with jurisdiction. *Fambrough v. Fambrough,*[11] holds that the ordinary is without jurisdiction to determine the rights of parties under a contract to sell made by the decedent. The decision in *Ray v. Dooley*[12] is important as an exception to the general rule. The case holds that a court of equity has jurisdiction to set aside the appointment of an administrator which appointment was procured by fraud on the ordinary.

CONSTRUCTION

Cases dealing with construction are in most instances of limited value. Every will is *sui generis* and it is rare that a case will be found of any great value in the actual construction of another will.

In *Blanchard v. Gilmore*[13] the rule is restated that a will is to be construed under the law as it existed at the death of the testator. In *Darnell v. Tate*[14] it was held that where a will gave "legatees" the right to name an executor, the word "legatees" includes all the beneficiaries under the will, while in *Bell v. Brown*[15] it was determined that an heir could change his mind in this respect at any time up to the actual appointment.

In *Whitlock v. Michael,*[16] the devise of a life estate having been assented to by the executor, it was held that the life estate is subject to levy and sale.

Probably the most interesting case covered in this period is *Love v. McManus.*[17] There is nothing new in this case but it is a clear and forceful statement of the old rule that in the construction of a will the cardinal rule is that the intention of the testator should be the first and great object of inquiry and this is to be sought by looking at the whole will and not at detached parts of it and when so ascertained shall be given effect as far as may be consistent with the rules of law. Applying this rule, the court

10. 208 Ga. 420, 67 S.E.2d 128 (1951).
11. 209 Ga. 23, 70 S.E.2d 468 (1952).
12. 208 Ga. 811, 69 S.E.2d 766 (1952).
13. 208 Ga. 846, 69 S.E.2d 753 (1952).
14. 84 Ga. App. 831, 67 S.E.2d 819 (1951).
15. 84 Ga. App. 104, 65 S.E.2d 628 (1951).
16. 208 Ga. 229, 65 S.E.2d 797 (1951).
17. 208 Ga. 447, 67 S.E.2d 218 (1951).

concluded that a bequest to a trustee for *A* for life with remainder to *B* and *C* at the death of *A*, if *B* and *C* survive *A* or to the children of *B* and *C* should children survive them, constitutes a defeasible vested interest in the children of *B* and *C* and the assignment by *B* and *C* of their rights under the will would not affect the rights of their children. This case is noteworthy for its clear statement of the applicable law and its application to the facts before the court. It would seem that this would be an excellent case for the consideration of law students.

Mental Capacity and Undue Influence

Each year cases arise in which wills are attacked for lack of mental capacity and alleged undue influence. It is gratifying that so few of these attacks, most of which are based on the personal feelings and desires of the person attacking the will, are successful.

In *Brooker v. Brooker*[18] the rule was restated that a witness to a will may testify to the mental capacity of the testator without qualifying as an expert, and *Orr v. Orr*[19] lays down the same rule, while at the same time setting out at least some of the proof required to show mental incapacity. As dealing with evidence, attention is directed to *Hodo v. Jenkins*[20] which holds that prior contradictory statements of witnesses as to minor details are not impeaching evidence as to the mental condition of the testator.

Reid v. Wilson[21] is a completely typical will case. The testator devised his property to charity. The heirs, being left out, bitterly objected on the usual grounds that the will was too indefinite, contradictory, void and unenforceable. They added, according to the standard pattern, charges of undue influence and mental weakness. Finally, they said it was unfair. The court disposed of these contentions by three obviously correct statements: (1) that the subscribing witnesses could testify to the mental capacity of the testator; (2) that probate simply adjudicates the *factum* of the will and an attack on the will itself constitutes no valid ground for caveat; and (3) that declarations of the testator two years after the will was made are inadmissible to show dissatisfaction with it.

Executors and Administrators

Under this general heading there are grouped a number of cases which largely have to do with the practical details of the management of estates. The number of these cases indicates the importance of proper draftsmanship in wills and the need for clarification of our law.

The court, in *Salter v. Salter*,[22] held that even though a will relieves the executor from making any inventory or accounting, the executor is still amenable to a court of equity which may require of him an accounting of his stewardship.

18. 208 Ga. 387, 67 S.E.2d 117 (1951).
19. 208 Ga. 431, 67 S.E.2d 209 (1951).
20. 209 Ga. 4, 70 S.E.2d 452 (1952).
21. 208 Ga. 235, 65 S.E.2d 913 (1951).
22. 209 Ga. 90, 70 S.E.2d 453 (1952).

There are two cases dealing with secured debts of the decedent. *King v. Dalton*[23] holds that funeral expenses have priority over purchase money mortgages. Lawyers and laymen are so accustomed to saying "mortgage" when they mean "deed to secure debt" that this case is shocking on hasty reading, but of course the use of deeds with power of sale rather than mortgages makes it unimportant. In *Chapman v. Commercial National Bank*[24] it was properly held that the power of sale in a deed to secure debt or a deed with power of sale may be exercised without awaiting the statutory year.

As usual, there are numerous cases dealing with year's support. This topic seems to be, for reasons unknown to the writer, a favorite of our law. Personal observation indicates that it is generally used either to clear a defective title or to give the widow an unconscionable advantage over creditors. Be that as it may, there is some light in *Riggs v. Prather*[25] which holds that a year's support to a minor child will not be allowed where its support is otherwise provided for. On the other hand, in *Smith v. Sanders*[26] it was held that the widow's right to a year's support survives her death, thus carrying legal fiction to the point where support is provided for one presumably taken care of in happier climes. This case reviews the earlier cases and is probably the law in Georgia from now on.

Administrators and executors deal with every phase of life and death, so it is not surprising that in *Berry v. Berry*[27] it was held that where a marriage is dissolved by final verdict of divorce and alimony is awarded the wife, this alimony is not a charge on his estate after his death.

Executors likewise have the problem of alleged contracts for services rendered the decedent. The court, in *Guyton v. Young*[28] summarized the law as it stands in Georgia excellently well, holding that a suit on a *quantum meruit* for the reasonable value of services rendered under an implied contract will lie where there is no family relationship between the plaintiff and the deceased to raise the presumption that services were rendered gratuitously, no intent on plaintiff's part to render the services gratuitously and that the deceased accepted these services intending to pay for them. It would require considerable skill on the part of a plaintiff to meet these requirements and the case would be more interesting if the method of proof were set out in some detail.

There is another perennial source of litigation arising out of alleged oral contracts to make a will. In *First National Bank v. Falligant*[29] the court held that such a contract by which a person for a valuable consideration agrees to make a certain will may be enforced by specific performance, but that this will not be decreed unless the contract be definite and specific, based upon a sufficient legal consideration and the proof of it clear, strong

23. 85 Ga. App. 641, 69 S.E.2d 907 (1952).
24. 86 Ga. App. 178, 71 S.E.2d 109 (1952).
25. 86 Ga. App. 178, 71 S.E.2d 109 (1952).
26. 84 Ga. App. 785, 67 S.E.2d 735 (1951).
27. 208 Ga. 285, 66 S.E.2d 336 (1951).
28. 84 Ga. App. 155, 65 S.E.2d 858 (1951).
29. 208 Ga. 479, 67 S.E.2d 473 (1951).

and satisfactory. Furthermore, if the contract is entire and one portion is indefinite, the entire contract falls. Certainly if the written expression of the testator's intent is to be changed by oral contract, these requirements should be strictly met.

STATUTES

The General Assembly in its 1952 session made four changes in the law as affecting decedents' estates.

Act 777[30] provides that bank deposits of deceased depositors may be paid to certain relatives up to $600. This is the fourth effort the legislature has made along these lines. The first was in 1919 when such payments of not more than $300 were authorized; in 1927 when such deposits were exempted from garnishment; in 1943 when $300 was changed to $600 and, we hope, finally in 1952, when it was provided that $600 of a larger account be paid under the circumstances set out.

Act 782[31] very wisely adds total divorce as one of the acts which will serve to revoke a will. This seems to the writer an intelligent and wise provision.

In Georgia, certainly since 1855,[32] the rule has been that the executor of an executor becomes the executor of the older will. Blackstone's Commentaries are given as authority for this proposition, which has frequently had unfortunate consequences. Act 638[33] relieves this by providing that where the only executor dies testate himself, any person or persons having an interest in the estate of the first decedent shall have the right to apply to the court of ordinary for the appointment of an administrator de bonis non with the will annexed. The ordinary is given discretionary powers with respect to the grant or denial of the petition. We believe this to be a real step forward but it seems that as a practical matter there should be a time limit for the application to be filed. After all, it would work a tremendous hardship if an executor went into his duties in good faith and was removed at some indefinitely later date. But on the whole this Act is most helpful.

The most remarkable of these new laws is that denying inheritance to certain persons as set out in Act 865,[34] which is really a double-barrelled enactment. The first section denies the right of inheritance to any person who shall with malice aforethought kill another person for the purpose of inheriting the property of the person so killed, or who shall conspire with another to kill or procure another to kill any such person for the purpose aforesaid. The second section denies the right to receive or take any benefits from any insurance contract or policy to any person who shall with malice aforethought kill any person for the purpose of receiving any benefits under any insurance contract or policy on the life of the deceased, or conspire with another to kill or procure another to kill an insured per-

30. Ga. Laws 1952, p. 189.
31. Ga. Laws 1952, p. 196.
32. Burch v. Burch, 19 Ga. 174 (1855).
33. Ga. Laws 1952, p. 87.
34. Ga. Laws 1952, p. 288.

son even though the person doing the killing is the beneficiary of the policy. This section likewise provides that in such event the proceeds shall go to the heirs of the deceased.

It is submitted that this Act is of the best possible intent but it presents difficulties almost insuperable. How the executor is to determine the purpose of the killing does not appear and at the least, an interpleader would probably be necessary to protect the executor. The risk is even greater under the insurance section which not only deprives the murderer from receiving the benefits under the circumstances named but provides that they shall go to the heirs at law of the deceased. The effect of this is to force the insurance carrier to determine at its peril the fact of the felonious homicide, which is difficult enough, but also to determine the purpose of the homicide. This question, incidentally, has already arisen in actual practice and will continue to arise so long as the Act stays in its present condition.

It is submitted that these four Acts, three of which are undoubtedly beneficial, demonstrate, first, the imperative need for a complete revision of our probate law rather than piecemeal patchwork and, second, that Acts of the legislature should be drafted with a great deal more care and skill than is possible under the present system.