WILLS AND ADMINISTRATION OF ESTATES

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The statement that words are the tools of the lawyer is as true as it is trite. The trouble is that words are two-edged tools which have a way sometimes of cutting in a fashion not dreamed of by the user. The study of semantics as such is not generally considered part of the preparation of a lawyer but a consideration of the cases involving wills indicates that it well might be. Certainly the decisions should show clearly the importance of the right word in any testamentary disposition.

With this preliminary observation (which comes from sad but practical experience), we will proceed with the subject, dividing it as was the case in 1952 into procedure, construction, mental capacity and undue influence, executors and administrators, and statutes.

PROCEDURE

Trimble v. Fairbanks[1] was a partition proceeding brought by one devisee against another in which, by the terms of the will, each had a defeasible fee in a half interest in the subject realty. The court logically held that partition did not lie.

The law of year's support is involved in *Watts v. Baldwin*.[2] The court held that where a year's support is set apart to a widow and her minor child, the widow is entitled to the sole control and management of the property unless it be shown that she refuses to protect the property. This has been the rule since 1899,[3] but Judge Almand has rendered a real service in restating the rule as clearly and positively as he has.

Hartsfield v. Hartsfield[4] likewise is a year's support case. The case was tried in superior court on an appeal from the ruling on a caveat to an award of year's support. The trial court had refused to try the title to certain property which was disputed. The appellate court ruled the ordinary had no jurisdiction to try conflicting claims of ownership to property and that the superior court on appeal was equally without jurisdiction. The identical conclusion had been reached in 1952 in *Trusco Company v. Crowley*.[5]

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1. 209 Ga. 741, 76 S.E.2d 16 (1953).
2. 209 Ga. 673, 75 S.E.2d 1 (1953).
3. Ferris v. Van Ingen, 110 Ga. 102, 35 S.E. 347 (1900).
4. 87 Ga. App. 707, 75 S.E.2d 276 (1953).
5. 86 Ga. App. 268, 71 S.E.2d 294 (1952).

Again in *Hall v. First National Bank*[6] the allowance of year's support forms a basis of litigation. It was held that the court of ordinary retains full control of its orders and judgments (not founded on jury verdicts) during the term at which they are rendered and may reverse or vacate them as the ends of justice may require. Judge Felton dissented from this ruling on the theory that the ground for reversing or vacating a judgment is only such a one as could not have been urged before the rendition of the judgment sought to be set aside. With all respect to the learned judge and conceding the authority which he marshals is most impressive, it is submitted that the decision of the majority seems more nearly in accord with justice.

Daniels v. Daniels[7] is a truly remarkable case and illustrates the importance of the right word in the right place. The trial judge correctly charged the law with respect to the preponderance of evidence. He followed this with the words "I hasten to charge you also that preponderance of evidence does not necessarily lie with the greater number of witnesses." The case was a difficult one and was reversed because of the use of the word "hasten." The court reasoned that this was error in that it might have indicated to the jury the inner thoughts of the trial judge on the question of preponderance. Such might indeed have been the case but, at the same time, this is a perfect example of what the gag rule does to a trial judge.

Williamon v. Williamon[8] restates the rule that where an estate has no legal representative, a suit cannot be maintained directly at the instance of the sole heir at law to recover personal property of the decedent from a third person but that a sole heir at law may maintain ejectment for the realty.

Salter v. Salter[9] holds that Code section 37-403 means what it says—that is, that the court of ordinary has jurisdiction of the administration of estates and that a court of equity will not interfere except in a clear case of imminent loss or injury. *Salter v. Wetmore*[10] is but a repetition of the same case.

First National Bank v. Deloach[11] presented a question which is hardly procedural and is really impossible of classification. It simply holds that a contract to make a will based on the consideration of a resumption of the marital status is valid and not against public policy. The decision is as sound in law as it is in moral.

Finally, *Michael v. Poss*[12] is interesting as it appears to be the first case

6. 87 Ga. App. 142, 73 S.E.2d 252 (1952).
7. 87 Ga. App. 325, 73 S.E.2d 591 (1952).
8. 209 Ga. 494, 74 S.E.2d 71 (1953).
9. 209 Ga. 511, 74 S.E.2d 241 (1953).
10. 209 Ga. 513, 74 S.E.2d 242 (1953).
11. 87 Ga. App. 639, 74 S.E.2d 740 (1953).
12. 209 Ga. 559, 74 S.E.2d 742 (1953).

which has arisen under the 1945 Act[12a] providing for dispensing with administration. A reading of this case and the Act which made it possible would be a wise precaution to the older lawyer who might be inclined to forget this far-reaching change in the law.

CONSTRUCTION

The rules of construction are simple and well known; it is the application of them that is the difficulty. The cases are frequently of little general value since each will is sui generis, but they are helpful to the draftsman if for no other reason than to warn him of the pitfalls that are concealed in the simplest word.

Butts v. The Trust Company of Georgia[13] is a typical construction case. The testator made two devises, one to his nearest kin living at the time of his death, the other at the death of B to his nearest of kin then surviving. "Nearest of kin then surviving" was clearly ambiguous and the court very properly followed the statute of distribution. No one will ever really know what the testator intended because of the words he used. If he had meant his nieces and nephews to take, it would have been simple to have said so.

Townsley v. Townsley[14] is also typical. As decided by Mr. Justice Wyatt, it is so clear that it is difficult to see why the case was ever litigated. It was held that a devise to a wife for life with the right to sell or mortgage subject only to the duty to preserve the property and with a provision for disposition at her death gives to the wife a life estate with power of disposal.

Savannah Bank & Trust Company v. Mason[15] is more unusual. The will in question directed that M be paid a monthly salary so long as he should be in the employ of a certain corporation. Upon being relieved of his duties by the corporation, he sought to have the will construed so as to make him a legatee—an effort which the court stopped by demonstrating that he had no legacy which he could possibly claim.

Hurst v. McKissack[16] is a most interesting case. The testator devised certain property to her children, share and share alike. Obviously this was a gift to her class. All the members of the class save one waived their rights to the devise. It follows that the member who did not waive took the entire devise to the exclusion of the others.

Barfield v. Aiken[17] is a somewhat similar case in which it was held that

12a. Ga. Laws 1945, p. 167; GA. CODE § 113-1232 (Supp. 1951).
13. 209 Ga. 787, 75 S.E.2d 745 (1953).
14. 209 Ga. 323, 72 S.E.2d 289 (1952).
15. 209 Ga. 364, 72 S.E.2d 720 (1952).
16. 209 Ga. 440, 73 S.E.2d 91 (1952).
17. 209 Ga. 483, 74 S.E.2d 100 (1953).

a division which was to be equal among any and all children, showing no preference, contemplated a division per capita and not per stirpes.

The most interesting of these cases is *First National Bank v. Robinson*.[18] Here the decedent had in his lifetime executed a lease for a definite term. The executor decided, doubtless for excellent reasons, that it would be good business to modify and extend this lease. The court held in a comprehensive decision that it would not destroy the testamentary scheme set out in the will nor authorize the substitution of a new plan for that of the testator. This case is heartening as witness to the proposition that a person may make any disposition of his property which he may desire to make subject only to the general limitations imposed by law. Wills are not as easily broken as many laymen think.

Mental Capacity and Undue Influence

As always, cases have arisen in which wills have been attacked on these grounds.

Ware v. Hill[19] was a close, hard case as witness three dissents. The rule, of course, is that testamentary incapacity is determined as of the time of making the will. Here evidence was introduced of incapacity before the factum and likewise after. The majority held that where incapacity is shown to have existed prior to and subsequent to the making of the instrument, this is enough evidence of incapacity at the time of making to form a jury question.

In *Stephens v. Brady*[20] the trial court directed a verdict for the propounder of the will over a caveat on the grounds, inter alia, of fraud and undue influence. It would serve no useful purpose to set out the evidence here; we do feel that it would be helpful to quote from Judge Almand's decision.

> Since it seldom can be shown except by circumstantial evidence, including the surroundings of the testator and his associations with the person charged with exercising the undue influence, it is proper on an issue of this kind to consider the testator's dealings and associations with the beneficiary of his bounty; his habits, motives, feelings; his strength or weakness of character; the reasonableness or unreasonableness of the will; his mental and physical condition at the time the will was made; his manner and conduct; and generally every fact which will throw any light on the issue raised by the charge of undue influence.

These principles are elaborated in *Moreland v. Word*.[21] That case bears out the proposition that while the rules are easy to state, application of them to a factual situation is a difficult and delicate matter.

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18. 209 Ga. 582, 74 S.E.2d 875 (1953).
19. 209 Ga. 214, 71 S.E.2d 630 (1952).
20. 209 Ga. 428, 73 S.E.2d 182 (1952).
21. 209 Ga. 463, 74 S.E.2d 82 (1953).

EXECUTORS AND ADMINISTRATORS

The cases under this section have to do with the actual management of estates and procedural questions which arise in connection with them. The chief value of these cases is the demonstration of the fact that our probate code desperately needs a thorough revision.

Hilliard v. Toombs[22] deals with an attempted sale by an administrator to his own wife, which under both secular and divine law is obviously voidable.

Adler v. Adler[23] points out that a declaratory judgment may be had on the petition of one executor directing a sale of property of an estate where the executors could not agree as to the terms and manner of sale.

Thomas v. State,[24] a criminal case, holds that the conversion by an executor of money entrusted to him may amount to a crime and that a pretended loan to himself constitutes no defense or justification.

Ennis v. Carson[25] deals with the appointment of an administratrix.

STATUTES

The General Assembly at its January-February, 1953, session passed six statutes which should be considered in connection with wills and administration. Act No. 82[26] authorizes executors to execute a lease which will continue beyond the termination of the administration of the estate upon proper application to the judge of the superior court. There has been some doubt as to the authority of executors in such cases and with the growing importance of ground rents this Act is most helpful.

Act No. 334[27] deals with the exemptions allowed trusts and estates for income tax purposes.

Act No. 380[28] amends the earlier Act of 1943 with respect to the sale of unlisted stocks. Since the earlier Act was not satisfactory to transfer agents, the 1953 Act is of considerable help to executors and trustees, and the fact that it had to be amended illustrates the importance of proper draftsmanship in our statutes.

Act No. 400[29] remedies a loophole in our administrative law since it is the first provision in this state for the discharge of a temporary administrator.

22. 209 Ga. 755, 75 S.E.2d 801 (1953).
23. 87 Ga. App. 842, 75 S.E.2d 578 (1953).
24. 87 Ga. App. 769, 75 S.E.2d 193 (1953).
25. 86 Ga. App. 569, 71 S.E.2d 881 (1952).
26. Ga. Laws 1953, p. 44.
27. Ga. Laws 1953, p. 297.
28. Ga. Laws 1953, p. 378.
29. Ga. Laws 1953, p. 451.

Act No. 402[30] also takes up another loose provision in limiting applications for year's support to seven years from the date of the death of decedent.

Act No. 454[31] likewise is procedural since it clears up the law with respect to service of non-residents in the case of probate in solemn form.

30. Ga. Laws 1953, p. 453.
31. Ga. Laws 1953, p. 535.