WILLS AND ADMINISTRATION

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Although there were a few changes in the statutory law with reference to administration of estates and the probate of wills, the cases decided during the period of this survey on the law of wills and administration of estates have adhered in the main to the time worn precedents as laid down by our courts in the past.

PROCEDURE

Since virtually every case depends upon or concerns, to a certain extent, questions of procedural law in addition to questions of substantive law, cases relating incidentally to procedural law will be dealt with here only if they invoke novel or significant questions of procedure.

The case of *Jones v. Mangum*,[1] involved a procedural question which is not limited in its scope to the law of wills and administration of estates. In a proceeding to probate a will, the appeal of the propounder was dismissed for lack of jurisdiction upon the ground that the bill of exceptions and the record revealed that there were two separate caveats to the will, but only the attorney for one of the caveators had acknowledged service of the bill of exceptions and the other interested persons were not made parties or properly served with the bill of exceptions.

May v. Hadden,[2] held that mandamus to compel the court of ordinary to enter an appeal would not lie where no judgment had been rendered since the superior court would thereby be required to make an initial determination of the question.

The case of *May v. Braddock*[3] involved a caveat to the sale of land and was transferred by the supreme court to the court of appeals since the caveat involved no questions which would confer jurisdiction upon the supreme court.

The law of Georgia provides that probate in solemn form ". . . is conclusive upon all persons notified. . ."[4] The case of *Byrd v. Riggs*[5]

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1. 211 Ga. 57, 84 S.E.2d 25 (1954).
2. 211 Ga. 84, 84 S.E.2d 65 (1954).
3. 211 Ga. 285, 85 S.E.2d 421 (1955).
4. GA. CODE § 113-602 (1933).
5. 211 Ga. 493, 86 S.E.2d. 285 (1955).

is one of first impression in Georgia upon the question of whether probate in solemn form in which all persons entitled to notice are not notified is void in toto or in part. The conclusion is that the probate should have been revoked as to all parties and not merely as to those who were not notified. The court gives an excellent example of the results which could be reached if the rule were otherwise. Even though undesired results can be occasioned by the total revocation of probate in solemn form, this rule seems to be the lesser of the evils.

The cases of *Gill v. Gill*[6] and *Bandy v. Smith*[7] restate the general rule that equity will not interfere with the regular administration of estates except where there is danger of loss or injury to the estate or an inadequate remedy at law.

YEAR'S SUPPORT

The questions which arise in proceedings for year's support are varied and frequently quite novel, as will be borne out by the following cases.

The case of *Touchton v. Mock*[8] held that on an application for year's support, the award of the appraisers is prima facie correct. This case also holds that on the question of values of property, the jury is not bound to accept as correct the opinions of witnesses, even though such opinions are uncontradicted by other testimony.

The question presented in *Diggs v. Diggs*[9] was whether the children of a void second marriage were entitled to a year's support from their father's estate. In this case both marriages were ceremonial and the second was void because the former was undissolved. Following the authority of *Campbell v. Allen*[10] the court held that the children of the second marriage are legitimate and entitled to a year's support where such second marriage had not been declared void and a prosecution for polygamy had not been instituted.

"After the payment of expenses of administration and the debts of the deceased, the balance of the estate . . . shall stand subject to distribution. . . ."[11] The only manner in which support for the family of the deceased can be obtained is through year's support. The case of *White v. Wright*,[12] held that an agreement to marshal

6. 211 Ga. 567, 87 S.E.2d 389 (1955).
7. 211 Ga. 192, 84 S.E.2d 449 (1954).
8. 91 Ga. App. 689, 86 S.E.2d 699 (1955).
9. 91 Ga. App. 634, 86 S.E.2d 639 (1955).
10. 208 Ga. 274, 66 S.E.2d 226 (1951).
11. GA. CODE § 113-1001 (1933).
12. 211 Ga. 556, 87 S.E.2d 394 (1955).

all assets of the estate and use whatever is necessary for the support of the minor children until they are self-supporting, and then to divide the balance, can be accomplished only by application for a year's support and the agreement is not violated thereby.

May v. Braddock[13] held that a caveat to the sale of land of the deceased husband's estate, upon the ground that the wife's estate was entitled to a second year's support, is defective for failure of the wife to allege that she elected or could elect to take property in lieu of money.

CONSTRUCTION

While the rules for construction of wills are well settled, each will, like the person for whom it speaks, is sui generis and can be decided only on its own facts and therefore, to this extent these cases usually will have little value as precedents.

The case of *Butler v. Citizens & Southern Nat'l Bank*[14] involved the question of whether the heirs of testator who would take the residium of his estate were to be determined as of the date of testator's death or as of the date of the life beneficiary's death. The will in question devised realty to the trustee for the benefit of testator's wife for life and conferred upon her the power to dispose of the residium, which power she failed to exercise. The will was construed as creating an executory trust by which the testator completely divested himself of any interest in the trust estate, and upon the failure of the life beneficiary to exercise the power, at her death a resulting trust by operation of law was created for the benefit of testator's heirs as of the date of the death of the wife.

In *Wells v. Scott*[15] the ever-present question of the intent of the testator is involved. The will devised to the widow the income from business property for life and provided a fund from which the debts of the estate were to be paid. In addition, it provided that if a residue remained after the debts were paid, it should be paid to the widow, but if the fund proved insufficient, the deficit was to be paid by the widow out of the interest bequeathed to her. Contrary to the contention of the wife that she should take the interest devised to her free from any charge upon it, it was held that the testator clearly intended that any deficit should be paid out of the property bequeathed to her and she would not be allowed to take the benefits under the will and reject the burdens.

13. 91 Ga. App. 853, 87 S.E.2d 365 (1955).
14. 211 Ga. 414, 86 S.E.2d 520 (1955).
15. 210 Ga. 756, 82 S.E.2d 697 (1954).

The case of *Renney v. Kimberly*,[16] restates the general rule that where there is a devise to a class, the members of the class are to be determined as of the date of testator's death and unless a contrary intention is clearly shown, the child of a member of the class who died before the testatrix can take no interest under the will.

McClelland v. Johnson[17] merely holds that where the language of a will is clear and unambiguous, the courts will not, by construction, change the meaning but will give effect to the will as written.

In the case of *Napier v. Napier*[18] the testator devised certain property to his two children and provided that upon the death of each child, the property should go to their children, if any and if none, to their respective grandchildren. If, however, either child died without children or grandchildren surviving, his respective interest would go to the other child. It was held that one child's taking the interest of the other child was contingent only upon the event of the other child's dying without children or grandchildren surviving, and that in such an event it was not necessary for the other child to survive. It clearly appeared that the testator intended that the land involved should in all events become the property of his children's children or grandchildren and upon the death of one without either, his interest would pass to the other, but if such other had predeceased, the property would pass to his children or grandchildren and intestacy would not be declared.

The question of whether a devise for the blood relative of the testator is a public charity is presented, too, for the first time in Georgia in the case of *Hardage v. Hardage*.[19] The will in question provides medical expenses for blood relatives and education benefits for dependents of blood relatives. Following the majority rule in the United States, the court held that such a devise is too limited to be a public charity and that the devise is not, therefore, removed from the ban of the rule against perpetuities.

The decision in the case of *Rainey v. Woodcock*,[20] is predicated upon grounds: (1) That a petition for construction is not maintainable by a devisee under the will sought to be construed; and (2) Equity will not interfere with the administration of estates except where there is danger of loss or other injury to the person applying.

Creech v. Scottish Rite Hospital for Crippled Children,[21] holds

16. 211 Ga. 396, 86 S.E.2d 217 (1955).
17. 211 Ga. 348, 86 S.E.2d 97 (1955).
18. 211 Ga. 145, 84 S.E.2d 56 (1954).
19. 211 Ga. 80, 84 S.E.2d 54 (1954).
20. 211 Ga. 101, 84 S.E.2d 41 (1954).
21. 211 Ga. 195, 84 S.E.2d 563 (1954).

that where it appears that testator intended to create a charitable trust for tubercular children, even though the named recipient of the trust does not exist, the object still exists and the doctrine of cy pres will be applied.

Gray v. Trust Company of Georgia,[22] holds that the supreme court has jurisdiction to make an agreement between beneficiaries—which was entered into pending construction proceedings—the decree of the court, and such a decree cannot be set aside for want of jurisdiction of the court to render it.

Martin v. Smith[23] holds that a conveyance of a present estate with possession postponed until the death of the grantor is a deed and is not invalid as a purported will.

Executors and Administrators

These cases could properly be dealt with under other subdivisions and are included here only because they concern primarily procedural questions pertaining to executors and administrators.

It was held in *Salter v. Wetmore*,[24] that on an application for authority to sell land, that the fact of assent to devise of the land sought to be sold is no ground for caveat to the application, the devisee's remedy being a claim filed in the court of ordinary, returnable to the superior court.

The case of *Estes v. Collum*,[25] presents the question of whether a plaintiff heir who has brought money into the estate by successfully recovering property held adversely to the estate by administrators, can obtain an order of the court of ordinary granting attorneys' fee to her for the use of her attorneys. In answering the question in the affirmative, the court (with one dissent) held that where the administrator is the wrongdoer, the heir prosecuting the action is performing a duty of the administrator and is, therefore, entitled to reasonable attorneys' fees for the use of his attorneys for bringing the fund into the estate.

The case of *Youngblood v. Logan*,[26] holds that in the absence of a contract between husband and wife, payment by the husband of debts of the wife will be presumed to be a gift and improvements made by the husband upon property of the wife will be presumed to be voluntary and an application for leave to sell upon these grounds fails to show debts owed by the estate and a necessity for the sale.

22. 211 Ga. 332, 85 S.E.2d 721 (1955).
23. 211 Ga. 600, 87 S.E.2d 406 (1955).
24. 90 Ga. App. 672, 83 S.E.2d 852 (1954).
25. 91 Ga. App. 186, 85 S.E.2d 561 (1954).
26. 92 Ga. App. 107, 88 S.E.2d 173 (1955).

REVOCATION OR ALTERATION

Driver v. Sheffield,[27] holds that a prior will is revoked by a later lost or destroyed will upon proof of the execution of the latter and the revoking clause thereof and the loss or destruction of the latter does not per se, revive the first.

The case of *Nassau v. Sheffield*,[28] holds that where a properly executed will is subsequently changed or altered by third persons without the knowledge and consent of testator, and the changes can be shown by the will itself or extrinsic evidence, such will as originally executed may be admitted to probate.

MENTAL CAPACITY AND UNDUE INFLUENCE

The case of *Beman v. Stembridge*[29] restates the law to the effect that the condition of the testator's mind at the time of the execution of the will determines his testamentary capacity and the prima facie case made out by the subscribing witnesses is not overcome by proof of testator's condition at other times. This case also holds that where the wife of testator is not excluded from the will but is bequeathed $1.00 thereby, such will is not to be closely scrutinized as required by law where the wife is entirely excluded.[30]

To the same effect is the case of *Bowles v. Bowles*,[31] holding that proof of the factum of the will and testamentary capacity at the time of execution makes a prima facie case for propounders. The novel contention by caveators that serious charges made in the caveat were not rebutted by evidence and should therefore be treated as well founded as implied admissions[32] was rejected as unsound by the court.

The case of *McGahee v. Phillips*[33] holds that it is for the jury to determine whether or not from reading testator's will a conclusion could be reached as to testator's condition, and allowing an expert witness to give his opinion thereto was an invasion of the province of the jury.

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27. 211 Ga. 316, 85 S.E.2d 766 (1955).
28. 211 Ga. 66, 84 S.E.2d 4 (1954).
29. 211 Ga. 274, 85 S.E.2d 434 (1955).
30. GA. CODE § 113-106 (1933), provides that where the wife is excluded, the will should be closely scrutinized.
31. 211 Ga. 461, 86 S.E.2d 318 (1955).
32. GA. CODE § 38-409 (1933), provides that "Acquiescence or silence, when the circmstances require an answer or denial or other conduct, may amount to an admission."
33. 211 Ga. 118, 84 S.E.2d 19 (1954).

STATUTES

Six statutes were enacted by the General Assembly during the January-February Session of 1955, which are pertinent to the law of Wills and Administration of Estates. Act No. 109[34] provides for service by publication in a proceeding for probate in solemn form upon parties who are unknown or known parties who are non-residents or known parties who reside without the state under circumstances making it difficult to determine whether they are residents of Georgia. This act further provides that service by publication pursuant thereto shall be equivalent to personal service.

Act. No. 222[35] changes the onus with regard to powers of sale contained in wills, deeds or other instruments by providing that such power of sale authorizes private sales by the donee or his successor unless the instrument creating the instruments expressly limits the power.

Act No. 385[36] amends the act of 1937, with respect to dower being barred by failure of wife to apply therefor prior to sale by administrator or executor.

Act No. 388[37] provides that the widow's right to year's support is barred by remarriage prior to setting it apart or by death of widow twelve months after death of decedent and prior to application therefor.

Act. No. 397[38] provides that a minor's right to year's support is barred by the death of the minor or by attaining the age of twenty-one prior to application for support.

Act No. 417[39] provides that the right of a widow or a minor child to year's support is barred by the authorized sale of such land prior to the time the same is set apart.

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34. Ga. Laws Jan.-Feb. Sess. 1955, p. 217.
35. Ga. Laws Jan.-Feb. Sess. 1955 p. 430.
36. Ga. Laws Jan.-Feb. Sess. 1955, p. 616.
37. Ga. Laws Jan.-Feb. Sess. 1955, p. 626.
38. Ga. Laws Jan.-Feb. Sess. 1955, p. 638.
39. Ga. Laws Jan.-Feb. Sess. 1955, p. 731.