WILLS AND ADMINISTRATION OF ESTATES

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This survey period produced many appellate decisions but few, if any, questions of first impression. There were no cases involving the validity of wills but several wills required interpretation.

Hirsh v. Hirsh[1] involved the construction of a will which provided that the testator's sons should receive the *net income* from his estate during their lives. After their deaths, the corpus was to be distributed among the testator's grandchildren. The will authorized the executors to sell any part of the estate but provided that the proceeds should take the place of property sold. The Supreme Court, reversing the trial court, held that gains and losses from the sales of capital assets should be treated as gains and losses of corpus. The testator did not intend for capital gains to be distributed as net income.

A testator is presumed to have intended to dispose of his entire estate. In *Lewis v. Mitchell*,[2] the Supreme Court interpreted a will in the light of this rule of construction. The will gave the testator's daughters remainder interests in all his property. A subsequent clause provided that the estate should be held intact for the use and benefit of the daughters so long as either of them remained dependent or unmarried. Upon the death or marriage of either daughter, the share was to be ". . . left intact with the other shares of the estate . . . ." The will authorized the daughters to jointly dispose of the property. The court held that the testator intended to devise the property in fee simple to the survivor of the daughters.

Dodson v. Trust Company of Georgia[3] involved the construction of a will which devised all the testator's property in trust. Half the trust income was bequeathed to the testator's son, A, for life, remainder to A's widow for life. The other half of the income was bequeathed to the testator's son, B, for life, remainder to B's "legal heirs." Upon the deaths of all the life tenants, the corpus was to pass to ". . . my heirs-at-law who may then be in life . . . ." A and B died without issue and were survived by their wives. The Supreme Court held that the will created life estates with remainders over to the testator's descen-

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1. 216 Ga. 379, 116 S.E.2d 611 (1960).
2. 216 Ga. 526, 117 S.E.2d 901 (1961).
3. 216 Ga. 499, 117 S.E.2d 331 (1960).

dents who might survive the life tenants. This was so since "heirs at law" and "legal heirs" are construed as meaning children or descendents of children unless a contrary intention is indicated.[4] Since A and B, the testator's only children, died without issue, the estate in remainder failed. The corpus of the estate will revest when A's wife dies. The reversionary interest vested in A and B, the testator's heirs, and upon their deaths descended to their heirs.

Veal v. King[5] involved the construction of another complicated will. The first portion of the will consisted of specific devises. Some of these devises were subject to forfeiture or reversion under stated conditions. The provision in controversy was the residuary clause which divided all undisposed of property ". . . equally among my surviving children or *their bodily heirs,* that is, among my children who are in life at my death . . . ." (emphasis supplied). One of the testator's sons predeceased him. The petitioners, children of the predeceased son, contended that they should stand in their father's place. The Supreme Court, reversing the trial court, rejected this contention. The court felt that the residuary clause constituted a class gift to the testator's *surviving* children. The words "bodily heirs" referred to the heirs of the testator's surviving children who might die prior to the ultimate distribution of the estate.

A declaratory judgment may be granted only when necessary to relieve the petitioner from the risk of taking undirected action which might be hazardous to his interests. In *Brewton v. McLeod,*[6] certain legatees sought a declaratory judgment relative to their rights under a will. The petition described the provisions of the will and alleged that the executors had filed application for permission to sell property which the will devised to the petitioners. The petition failed to state a proper cause for declaratory judgment but the pleadings were sufficient to warrant a construction.[7]

In *Friedman v. Cohen,*[8] the Supreme Court held that the testator's divorce served as revocation of his will. This was held to be so even though the execution of the will occurred prior to the enactment of GA. CODE ANN. §113-408 (1959 Rev.). That section provides that the divorce or marriage of a testator, or birth of his child subsequent to

4. GA. CODE ANN. §85-504 (1955 Rev.).
5. 216 Ga. 298, 116 S.E.2d 223 (1960).
6. 216 Ga. 686, 119 S.E.2d 105 (1961).
7. Ga. Laws 1959, p. 236, GA. CODE ANN. §110-1102(a) (1959 Rev.) provides: "In all such cases [where declaratory judgment is sought], the court shall award to the petitioning party such relief as the pleadings and evidence show him to be entitled, and the failure of such petition to state a cause of action for declaratory relief shall not affect the right of such party to any other relief, legal or equitable, to which he may be entitled."
8. 215 Ga. 859, 114 S.E.2d 24 (1960).

the execution of a will, revokes the will unless provision is made in contemplation of such event.

A few cases during the period considered problems involving year's support.

An appraiser's return setting aside year's support is final unless timely objections are filed. It is error for an ordinary to later modify the return.[9] Only causes apparent on the face of the record, such as want of jurisdiction of person or subject, affect the validity of a judgment setting aside year's support.

Where year's support for a stepmother and a stepdaughter had been set aside, the stepdaughter was entitled to an accounting at law and a money judgment for her share of the rents from the property.[10] An accounting at law rather than equity was the adequate remedy since the petition indicated that the accounting would not be complex or intricate.

Year's support can, of course, be set aside only from property belonging to the estate. If an ordinary sets aside property not belonging to the estate, the act is void and may be attacked at any time.[11] The ordinary is not authorized to try title disputes.

Browne v. Hendley[12] was the only case during the period involving powers of appointment. The Supreme Court, adopting the trial court's opinion, affirmed the principle that an *inter vivos* exercise of a testamentary power of appointment is ineffective. A subsequent testamentary exercise of the power was effective. A clause in the will provided that legatees who asserted claims under the purported *inter vivos* exercise of the power would forfeit their rights under the will. This forfeiture provision was held to be void.[13]

A few cases discussed the rights and authority of personal representatives.

Personal representatives are estopped to seek specific enforcement of contracts against the estate.[14] It makes no difference that there are personal representatives other than the one who seeks specific enforcement.[15]

Adler v. Adler[16] restated the principle that executors and trustees do not have authority to grant options to purchase estate property.

9. Raper v. Smith, 216 Ga. 326, 116 S.E.2d 554 (1960); *reversing* Raper v. Smith, 101 Ga. App. 557, 115 S.E.2d 234 (1960).
10. Dorough v. Pettus, 101 Ga. App. 797, 115 S.E.2d 440 (1960).
11. Nuckolls v. Merritt, 216 Ga. 35, 114 S.E.2d 427 (1960).
12. 216 Ga. 411, 116 S.E.2d 537 (1960).
13. For a discussion of the effect of In Terrorem conditions in Georgia, see: REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA 303 (1938).
14. Maxwell v. Hollis, 216 Ga. 224, 115 S.E.2d 360 (1960).
15. Spratlin v. Spratlin, 216 Ga. 27, 114 S.E.2d 370 (1960).
16. 216 Ga. 553, 118 S.E.2d 456 (1960).

This is so notwithstanding a fiduciary's power to sell, invest, lease or transfer the property. The best interest of the estate is said to require that the fiduciary exercise his judgment at the time of the sale.

The personal representative of an estate is the proper party to institute actions for damages done to the estate's real and personal property. *City of Griffin v. McKneely*[17] held that this is also the case where the damage occurs after the intestate's death but prior to the appointment of an administrator. The defendant cannot successfully dispute the right of a duly appointed administrator to bring such an action. If the estate has no legal representative, the heirs may sue for damages to real property but not for damages to personalty. In the latter case, a representative must be appointed to bring the action.

In *Gaines v. Johnson*,[18] the petitioner sought to force the executor to distribute the estate. The testator's will devised all his property to his wife for life, remainder to the petitioner in fee. The petitioner alleged that the executor had sold the property pursuant to an agreement among the executor, the widow, and the remainderman. The agreement allegedly provided that the property should be sold and the proceeds distributed among the heirs. The Supreme Court held that the executor could not be required to distribute the proceeds since the will called for distribution upon the termination of the life estate.

Letters of administration for a non-resident decedent's estate may be issued in any county where the estate has assets.[19] A decedent's liability insurance policy constitutes assets within the meaning of the statute. Thus, where a decedent was killed in a Georgia county, the decedent's liability insurance policy with an insurer doing business in the state was a sufficient asset to warrant the granting of letters of administration.[20]

An agreement to adopt is not self executing.[21] Heirship does not automatically grow out of such an agreement but the contract is specifically enforceable if acted upon. An ordinary court is without jurisdiction to enforce a contract to adopt.[22] All actions for specific performance sound in equity and must be brought in the superior courts.

Two cases were primarily concerned with evidentiary problems. In *Ganns v. Worrell*,[23] there was evidence that the decedent's alleged

17. 101 Ga. App. 811, 115 S.E.2d 463 (1960).
18. 216 Ga. 668, 119 S.E.2d 28 (1961).
19. GA. CODE ANN. §113-1211 (1959 Rev.).
20. Tweed v. Houghton, 103 Ga. App. 57, 118 S.E.2d 496 (1961).
21. Banes v. Derricotte, 215 Ga. 892, 114 S.E.2d 12 (1960).
22. Lackey v. Lackey, 216 Ga. 177, 115 S.E.2d 565 (1960).
23. 216 Ga. 512, 117 S.E.2d 533 (1960).

husband had been married prior to marrying the decedent. He contended that he was entitled to take the decedent's estate as her sole legal heir. Since there was no evidence that the prior marriage had been dissolved, the alleged husband was not entitled to a directed verdict.

If it is proved that a legatee who is charged with undue influence occupied a confidential relation with the testator, a presumption of undue influence arises and the burden of proving the validity of the will is shifted to the propounder.[24] This principle also applies in actions to recover inter vivos gifts to one who enjoyed a confidential relation with the decedent.[25] It is reversible error for a trial court to refuse to charge relative to undue influence, confidential relation and the shifting of the burden of proof.

GA. CODE ANN. §37-1004 provides that it is not necessary for legatees, distributees and wards to join others interested in the estate as parties to actions against executors, administrators and guardians.

In *Deen v. McCorkle*,[26] the Supreme Court held that this section does not prohibit interested parties from intervening in such actions. The statute merely prevents the parties from being essentials.

LEGISLATION

The survey period produced very little legislation in the field of wills and administration of estates.

A statute[27] was enacted which should advance the cause of modern practice and procedure. This statute authorizes examination by written interrogatories of witnesses to wills. All such witnesses may be examined in proceedings for probate in common form.[28] All witnesses may be examined in proceedings for probate in solemn form where no caveat is filed before or within ten days of service.[29]

If a caveat is filed to a probate in solemn form, examination by written interrogatory must be pursuant to chapter 21 of title 38 of the Code.[30] Examination pursuant to this chapter is authorized only if (1) the witness resides out of the country;[31] or (2) because of health, age or occupation, the witness cannot attend court;[32] or (3) when the witness is about to move or is going on an extended trip;[33] or

24. REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA 73 (1938).
25. McGahee v. Walden, 216 Ga. 352, 116 S.E.2d 559 (1960).
26. 216 Ga. 20, 114 S.E.2d 369 (1960).
27. Ga. Laws, 1961, p. 558.
28. Ga. Laws, 1961, p. 558, §1.
29. *Ibid.*
30. Ga. Laws, 1961, p. 558, §2.
31. GA. CODE ANN. §28-2101 (1) (1952 Rev.).
32. *Id.* at §28-2101 (2).
33. *Id.* at §28-2101 (3).

(4) where he is the only witness to a material point in the case.[34]

The inheritance rights of the principals in an adoption proceeding were clarified somewhat by a statute enlarging the rights of a natural parent.[35] This matter had gone through several changes prior to this statute. Beginning with the provisions of an act approved in 1941,[36] an adopting parent could never inherit from the adopted child. An amendment passed in 1957[37] relaxed this prohibition to the extent of allowing the adopting parent to inherit from the adopted child any property acquired by the adopted child subsequent to the final order except property acquired or inherited by the child from blood relatives. The 1961 act further relaxed the prohibition to provide that when one of the adopting persons is the spouse of the natural father or mother of the child, his joining in the petition for adoption shall have no effect upon the rights and obligations existing between the adopted child and the natural mother or father who so joins in the petition for adoption.

34. *Id.* at §28-2101 (5).
35. Ga. Laws 1961, p. 219.
36. Ga. Laws 1941, p. 300.
37. Ga. Laws 1957, p. 339.