WILLS—PROBATE OF SUBSEQUENTLY-DISCOVRED WILL—RIGHTS OF HEIRS AND THEIR PURCHASERS

Caudell v. Scoggins[1] reaffirms Georgia's adherence to the common law rule that there is no time limitation for the probate of wills.[2] It also reaffirms that administration of an estate according to the laws of descent and distribution does not bar the redistribution of the property per the terms of an after-discovered will.

Here textatrix died presumably intestate leaving a husband and daughter as her heirs at law. Subsequently an administrator was appointed; the estate was divided equally between the husband's estate and that of the daughter; and the administrator received letters of dismission. Following the death of both husband and daughter and 15 years after testatrix's death, her will was found which left the estate equally to the daughter and testatrix's sister with the provision that "should anything be left after their death it goes to my people." The Court of Appeals held that the executor of testatrix's estate could recover from the executor of the husband's estate the funds wrongly distributed.[3] The court also held the will left the daughter a one-half interest in fee simple with an executory limitation defeasible upon her dying without having disposed of the property bequeathed to her. Thus the administrator of the daughter's estate was ordered to ascertain what part of the one-half interest distributed to the daughter remained undisposed of at her death. This remainder was adjudged owing to the executor of the testatrix's will.

The court reiterated the Georgia rule that "[W]here an administration of an estate is conducted on the presumption of intestacy and a will is afterward discovered, letters of administration previously issued are void 'except as to such portions of the estate as had been fully administered prior to the production and probate of the will.' "[4] The exception provided by the rule apparently protects bona fide purchasers[5] from the heirs at law. The court here expressly held the exception "[D]oes not mean that where no rights of third persons have intervened the mere fact that the administrator has parceled out

1. 120 Ga. App. 286, 170 S.E.2d 343 (1969).

2. Rebhan v. Mueller, 114 Ill. 343, 2 N.E. 75 (1885). *See* 95 C.J.S. *Wills* § 358 (1957); 57 AM. JUR. WILLS § 786 (1948).

3. The right to recover against the husband's estate was decided in Kimsey v. Caudell, 109 Ga. App. 271, 135 S.E.2d 903 (1964).

4. Caudell v. Scoggins, 120 Ga. App. 286, 288, 170 S.E.2d 343, 345 (1969).

5. A bona fide purchaser may be defined as "[a] purchaser in good faith for valuable consideration and without notice." BLACK'S LAW DICTIONARY 224 (Rev. 4th ed. 1968).

the estate among the wrong heirs will inevitably close the door on future judicial action . . . ."[6]

Possible adverse effects of this rule of law are not difficult to imagine. Suppose an heir at law enters upon his ancestor's land and builds a substantial house thereon. Could he be dispossessed 50 years later by a legatee of a subsequently-discovered will? Clearly under present Georgia law, such result would follow. Although the heir could recover in quantum meruit for the fair market value of the improvements, such recovery would rarely be sufficient to cover either the cost or the real value to him.

Some Georgia cases would allow the heir to raise the defenses of estoppel or laches in certain situations. In *Fitzgerald v. Morgan*[7] the legatee under the will asserted ignorance of the law as his excuse for a delay of 40 years in applying for probate.[8] The court held the propounder guilty of laches. However, decided the same year as *Fitzgerald* was *Fletcher v. Gillespie*.[9] The legatee knew of the existence of the will six weeks after the death of testator and made no attempt to probate the same for three years although he knew the sole heir had applied for and obtained the appointment of an administrator. Here the Georgia Supreme Court held that an action to establish and probate a will was a proceeding at law to which the equitable bar of laches did not apply. Apparently on the same reasoning, a 14 year delay was held not to bar probate in the widely cited case of *Walden v. Mahnks*.[10] Thus, it is doubtful that an heir is protected from a legatee who with knowledge of the will remains silent. The present case illustrates that the heir has never been protected against a legatee of a lost will subsequently discovered.

The policy considerations dictating that title to property should be secure and unclouded militate against allowing a testator's long dormant and unknown or concealed devise to arise and strike down an heir's title after the passage of many years.[11] In recognition of these considerations 17 states have statutes either limiting the time for probate[12] or barring probate after the lapse of a specified period

6. 120 Ga. App. at 288, 170 S.E.2d at 345.

7. 200 Ga. 651, 38 S.E.2d 171 (1946).

8. *Accord*, Hadden v. Stevens, 181 Ga. 165, 181 S.E. 767 (1935), *discussed infra*.

9. 201 Ga. 377, 40 S.E.2d 45 (1946).

10. 178 Ga. 825, 174 S.E. 538 (1934).

11. *See* Matthews v. Fuller, 209 Md. 42, 120 A.2d 356 (1956).

12. States having statutes limiting the time for probate: Alabama (5 years), Arkansas (5 years), Connecticut (10 years), Hawaii (5 years), Iowa (5 years), Kansas (1 year), Kentucky (10 years. Judicial interpretation of general statute of limitations), Maine (20 years), Massachusetts (20 years), North Dakota (6 years), Ohio (20 years), Pennsylvania (21 years), Tennessee (10

following the granting of administration upon the estate.[13] The statutes range from one year to 21 years after the death of the testator.[14] The older Model Probate Code[15] places a five year time limitation on probate while the newer Uniform Probate Code[16] establishes a basic limitation of three years.

Georgia has two statutes encouraging prompt probate. Ga. Code Ann. Section 113-615 (Rev. 1959) directs an executor to offer the will for probate as soon as practicable and to qualify within 12 months after the same is admitted to probate. Ga. Code Ann. Section 113-610 (Rev. 1959) requires every person having possession of a will to file it with the ordinary and authorizes the ordinary to punish failure to do so with fine and imprisonment. While these two statutes imply that probate of a will should be promptly made following the death of the testator, such failure does not make the will any less entitled to probate at a later date. The only time limitation is for a nuncupative will which requires application for probate within six months after the death of the testator.[17]

Two other general limitation statutes have been held not to bar probate. GA. CODE ANN. Section 3-702 (Rev. 1962), requiring proceedings to set aside judgments to be brought within three years from the rendering of the judgment, has been held not to prevent probate of a will after the appointment of an administrator on the supposition that the decedent was intestate.[18] As previously mentioned, the statutory limitation of laches, GA. CODE ANN. Section 3-712 (Rev. 1962),[19] has been held not to apply to probate.[20]

Conceding a subsequently-discovered will is entitled to probate, are innocent third persons, who purchase for value and without notice from

years), Texas (4 years). In some states exceptions are written into the statute, or the court is given discretion to waive the limitation. In other states no exceptions are made. For a discussion of the statutes in most of these states, *see* L. SIMES, MODEL PROBATE CODE 307, Statutory Note, (1946).

13. States barring probate after the lapse of a specified period following the granting of administration upon the estate: Florida (3 years), Louisiana (5 years), Missouri (1 year).

14. *See* notes 12 and 13 supra.

15. L. SIMES, MODEL PROBATE CODE § 83 (1946).

16. UNIFORM PROBATE CODE § 3-233 (3rd Working Draft, Nov. 1967).

17. GA. CODE ANN. § 113-617 (Rev. 1959). Since GA. CODE ANN. § 113-503 (Rev. 1959) requires a nuncupative will to be reduced to writing within 30 days after testator speaks the same, it is arguable that section 113-617 was enacted to assure prompt probate rather than to insure that the will is accurately set down by the witnesses.

18. Walden v. Mahnks, 178 Ga. 825, 174 S.E. 538 (1934).

19. "[C]ourts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights."

20. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946).

the heirs, protected in Georgia as against those who claim under the will? The instant case and others[21] imply such persons are protected. Moreover, Georgia is listed among those states which afford protection to bona fide purchasers taking from an heir.[22] However, the only case directly holding such purchasers protected seems to be *Hadden v. Stevens*.[23] This case represents poor authority in that it was based more on estoppel than protection for bona fide purchasers. The legatee knew of the will from the time of the testator's death. His failure to apply for probate for over 13 years was held to constitute gross negligence constituting constructive fraud against the purchaser from the sole heir without notice of the will, estopping the legatee from setting up title against such purchaser. Georgia's bona fide purchaser statutes[24] would apparently protect our innocent purchaser if the claim of the legatee is said to be equitable. However, if the claim be legal, such statutes might not afford protection.[25] Some states have statutes expressly providing that the title of a bona fide purchaser from the heir is not affected unless the will is offered for probate within a specified time.[26] In absence of statutes of this type, such purchasers are usually not protected.[27]

It is clear that at present Georgia affords the heirs at law no protection against a subsequently-discovered will and affords bona fide purchasers inadequate protection. Such protection could easily be afforded by adopting a statute of limitations on probate and by strengthening the bona fide purchaser statutes to protect the grantee from an heir.[28]

ALTON M. ADAMS

21. Other cases implying a bona fide purchaser is protected: Scarborough v. Long, 186 Ga. 412, 197 S.E. 796 (1938); Walden v. Mahnks, 178 Ga. 825, 174 S.E. 538 (1934); Martin v. Dix, 134 Ga. 481, 68 S.E. 80 (1910); Thomas v. Morrisett, 76 Ga. 384 (1886); Crow v. Whitfield, 105 Ga. App. 436, 124 S.E.2d 648 (1962).

22. 22 A.L.R.2d 1107, 1111 (1952). Annotation dealing with the relative rights to real propery as between purchasers from or through decedent's heirs and devisees under a will subsequently sought to be established. *Also*, 3 BOWE-PARKER: PAGE ON WILLS § 26.31-32 (3rd ed. 1961).

23. 181 Ga. 165, 181 S.E. 767 (1935).

24. GA. CODE ANN. § 37-111 and 114 (Rev. 1962). Section 37-111 reads: "A bona fide purchaser for value, and without notice of an equity, will not be interfered with by equity."

25. *Cf.* Wells v. Walker, 29 Ga. 450 (1859); Daniel v. Hollingshead, 16 Ga. 190 (1854).

26. *E.g.*, VA. CODE ANN. (Michie, 1968) § 64.1-95 (1 year); N.C. GEN. STAT. § 31-39 (1966) (2 years).

27. T. ATKINSON, ATKINSON ON WILLS § 94 at 486 (2d ed. 1953).

28. For an excellent analysis of the same problem in North Carolina in which the author advocates enactment of a statute of limitations, *see* Note, *Wills—Ghosts in North Carolina—The Haunting Problem of the After-Discovered Will*, 47 N.C. L. REV. 723 (1969).