



---

January 1950

## Wills and Estates

Sam E. Daugherty

---

### Recommended Citation

Sam E. Daugherty, *Wills and Estates*, 4 Sw L.J. 357 (1950)  
<https://scholar.smu.edu/smulr/vol4/iss3/18>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## WILLS AND ESTATES

## CONSTRUCTION OF WILLS

*Texas.* In *Heinatz v Allen*<sup>1</sup> testatrix devised to her daughter "the surface rights exclusive of the mineral rights" and to trustees for all of her children "the mineral rights" in some 400 acres of land. Petitioner, who claimed under the trustees, recovered judgment in the trial court against the respondents, who claimed under the daughter for the title and possession of the mineral rights and estate in the land "including commercial limestone and building stone." Monetary damages for limestone already taken from the land were also allowed, as well as an injunction restraining respondents from quarrying or removing any commercial limestone or building stone. The court of civil appeals reversed, holding that commercial limestone was not included in the devise of "the mineral rights." The Texas Supreme Court affirmed, saying that it did not understand the opinion of the court of civil appeals to be based in part upon evidence as to circumstances attending the execution of the will or as to what the testatrix might have had in mind. It did understand the civil appeals court to hold as a matter of law, from the terms of the will itself and without looking to evidence as to the surrounding circumstances, that the devise of "the mineral rights" did not include commercial limestone. The supreme court said that, in view of the simple and plain terms of the will, the intention of the testatrix as to what was devised is to be ascertained without aid from evidence as to the attending circumstances.

The crucial question in the case was whether commercial limestone was included in the devise of "the mineral rights" in the tract of land. In deciding this question the court said,

"We must look to the evidence as to the nature of the limestone, its relation to the surface of the land, its use and value, and the method and effect of its removal."<sup>2</sup>

---

<sup>1</sup> ———Tex.———, 217 S. W. 2d. 994 (1949).

<sup>2</sup> 217 S. W. 2d. at 995, 996.

The court disposed of the cases and reference material such as histories, encyclopedias and almanacs, cited by the petitioners as being authority for including limestone in the term "minerals" as being instances where the term "minerals" was used in its scientific or technical meaning. It said that in such a sense sand and gravel are classified as minerals or mineral resources. After reviewing the geological aspects of the land, the court concluded that the limestone on the land having value only for building purposes, underlying most, if not all, of the land at varying and usually shallow depths, outcropping in all of the ravines, and removed by quarrying, is so closely related to the soil that it is reasonably and ordinarily considered a part of the soil and as belonging to the surface estate rather than as a part of the minerals or mineral rights. The court bolstered its argument by adverting to the fact that the limestone was only recoverable by quarrying (open pit method), which destroys the surface for agricultural and grazing purposes.

It is submitted that the decision in the case is very clear and is in accord with the well established principle that the intent of the testator is the paramount consideration in construing wills. Where there is no indication in a will that particular words are used in their scientific or technical sense, their ordinary and natural meaning will be given them.

The case is probably unique in that a search of the digests reveals no other *wills* case exactly in point, but the cases are numerous involving deeds which are in accord.<sup>3</sup>

#### CONTINGENT OR CONDITIONAL WILL

*Texas.* In *Bagnall v. Bagnall*<sup>4</sup> the deceased left a will as follows:

---

<sup>3</sup> *Beury v. Shelton*, 151 Va. 28, 144 S. E. 629 (1928); *Kinder v. LaSalle County Carbon Coal Co.*, 310 Ill. 126, 141 N. E. 537 (1923); *Campbell v. Tennessee Coal, Iron and R. Co.*, 150 Tenn. 423, 265 S. W. 674 (1924); *Rudd v. Hayden*, 265 Ky. 495, 97 S. W. 2d. 35 (1936); see 1 A.L.R. 2d. 787, 795 (1948); 86 A.L.R. 986 (1933); 17 A.L.R. 161 (1922).

<sup>4</sup> ——— *Tex.* ———, 225 S. W. 2d. 401 (1949).

"Oct. 5, 1929

Remember me W. W. Bagnall by this. If anything happens to me. While gone. All my belongings and estate goes to James B. Bagnall Brother of mine.

W. W. Bagnall

Oct. 5, 1929"

The deceased did not die until 1947, and another brother attacked the will on the ground that it was a contingent or conditional will. At the conclusion of testimony in the district court, the case was taken from the jury and judgment was rendered denying probate. The court of civil appeals reversed and held that the instrument was entitled to probate. In a split decision (Justices Griffin and Garwood dissenting) the Texas Supreme Court reversed the court of civil appeals and reinstated the judgment of the district court. The court said that the principles of law were not in dispute and that the sole question for determination was the construction of the terms of the instrument. The generally accepted definition of a "contingent will" as one which is intended to take effect only on the happening of a specified contingency was stated. The court said that if the language used makes a will contingent and the contingency does not happen, then it is not entitled to probate; but if the language used merely shows an inducement or motive, then upon the testator's death the will is entitled to probate even though such event has not taken place.

The dissent argued that a will should be construed as a general will unless the contrary clearly appears; that if the event mentioned merely indicates inducement and the testator's intent to make it contingent is not apparent, then it is entitled to probate; that if a will is equally capable of two constructions, the one upholding validity is preferred; that the fact that a testator left a will implies that he did not intend to die intestate; and that the authorities cited by the majority were cases where the condition was plainly and clearly expressed on the face of the will.

While the case establishes no new principle of law, it demonstrates how widely the courts may differ in applying a well settled

principle. The fact that the probate and district courts held one way, the court of civil appeals reversed, and the supreme court reinstated the finding of the lower courts but with two dissenting justices, shows that Texas courts are no different from other jurisdictions. Atkinson<sup>5</sup> states that the cases are irreconcilable and that with respect to the same or similar language there is as much authority on one side as on the other.

#### DOWER—STATUTORY CONSTRUCTION

*Arkansas.* In *Maloney v. McCullough*<sup>6</sup> three children, appellees, sued the widow of a fourth child, appellant, to quiet title to a tract of land which had been the family homestead. The father owned and occupied the tract as his homestead until his death in 1940. The widow then occupied it as her homestead until 1948, when she died. None of the children, who were all of age at the time of their father's death, occupied the land after the death of their father and prior to the death of their mother.

Appellant, whose husband died intestate and without issue in 1945, claimed dower rights under Arkansas Statutes 1947, Section 61-206:

"If a husband dies, leaving a wife and no children, such widow shall be endowed in fee simple of one-half the real estate of which such husband died seized, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs; but as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and of one-third of the personal property absolutely, provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors."

*Held*, the judgment of the trial court denying appellant any interest should be affirmed. The court said that the dower statutes had been construed by prior decisions and that the construction

---

<sup>5</sup> ATKINSON, HANDBOOK OF THE LAW OF WILLS (1937) § 150.

<sup>6</sup> ———Ark.———, 221 S. W. 2d. 770 (1949).

given them was that the legislature did not intend to give the widow an estate in her deceased husband's lands essentially different from the estate of dower known at common law, except as therein expressly provided. At common law it was essential that the husband should have been seised and in possession during coverture in order to entitle his widow to dower in his lands. Where there is a life tenant and the husband has only a remainder or reversion in the land, the seisin is in the life tenant; therefore, dower does not attach to realty in which the husband has only an interest in remainder or reversion, unless the particular estate terminates during coverture.

Appellant argued that homestead and dower are not regarded as estates and that her husband took a vested remainder in the lands upon the death of his father and that said vested interest descended to his heirs upon his death. The court answered that the homestead interest involved was of the type that the widow and minor children had in their deceased husband's and father's homestead, or the minor children's interest in the deceased mother's homestead. By the Arkansas Constitution such homestead interest is given to the widow for life without any restrictions, and the Constitution vests in the widow an estate for her life and in the children during their minority. In the case at bar the mother exercised her homestead right in the lands until her death, which occurred after the death of her son; therefore, the son, husband of appellant, never had possession or any present right of possession, and was never seized of an estate of inheritance in the land during coverture.

#### ORAL CONTRACT TO WILL—SUFFICIENCY OF EVIDENCE AND CONSIDERATION

*Arkansas.* In *Offord v. Agnew*<sup>7</sup> the deceased owned three lots and dwelling houses. She resided in one of the houses and rented the others. On the death of the deceased a contest arose between appellant, deceased's half-brother, her only heir at law, and

<sup>7</sup> —Ark.—, 218 S. W. 2d. 370 (1949).

appellee, the sister of her deceased husband, as to who was entitled to the property. Appellant claimed by intestacy, and appellee claimed by virtue of an oral contract with deceased whereby the deceased promised to will the property to appellee. The evidence showed that, after the deceased's husband (brother of appellee) had died, appellee for a time resided with the deceased and from time to time had paid small grocery bills, and in one instance had advanced part of the fire insurance premium on the dwellings at the request of the deceased. There was testimony that the deceased was not on friendly terms with the appellant and that she had made statements that she had talked with several people about willing the property to appellee and that she had done so. There was also testimony that the deceased had said that the appellee had been worrying her about making a will to the property but that she was not going to because she might have to will it to someone to take care of her. The trial court found a valid oral contract to execute a will, that it was fully performed by the appellee, and that title to the three lots should be vested in the appellee.

In reversing the trial court the Supreme Court of Arkansas held that the evidence was insufficient to support the decree. Quoting from a previous decision<sup>8</sup> the court said, "It has long been the rule in this court that a valid oral contract to make a will or a deed to land may be made, but that the testimony to establish such a contract must be clear, cogent, satisfactory and convincing."<sup>9</sup> And quoting from *Kranz v. Kranz*<sup>10</sup> the court stated that a preponderance of the evidence was insufficient and that the contract must be established by evidence so clear, satisfactory and convincing as to be substantially beyond a reasonable doubt. Further, the court said that the consideration required in this situation was prospective in nature, rather than past. In the present case the deceased agreed to devise the property to appellee

---

<sup>8</sup> *Crowell v. Parker*, 209 Ark. 803, 193 S. W. 2d. 483, 484 (1946).

<sup>9</sup> 218 S. W. 2d. at 372.

<sup>10</sup> 203 Ark. 1147, 158 S. W. 2d. 926 (1942).

in consideration of services that had already been performed by appellee, and the latter was under no obligation to render future services.

As the court points out, the principle seems well established in Arkansas that a valid oral contract to will real property may be made, provided the evidence requirement is satisfied. However, the earliest case cited for the foregoing proposition<sup>11</sup> is one which is not exactly in point, although the same underlying principle was involved. In that case the Supreme Court of Arkansas enforced, in part, an oral contract concerning real property between living persons on the now well settled principle that part performance plus improvements takes the contract out of the Statute of Frauds. It was not until 1912 in *Naylor v. Shelton*<sup>12</sup> (which did not cite *Hinkle v. Hinkle*) that the question was more clearly raised, and in that case a will or deed was actually executed before death, although it was later destroyed. However, in *Fred v. Asbury*<sup>13</sup> (where *Hinkle v. Hinkle* was cited) and in *Williams v. Williams*<sup>14</sup> the question was squarely presented, and an exact holding on the point was made. It would seem, therefore, that the Arkansas rule in wills cases is merely an outgrowth of the part performance plus improvement test so prevalent in oral contracts concerning land.

The earlier cases were situations where the deceased promised to will or convey at death in consideration for personal services rendered by the plaintiff, and the later cases seem to have added the strict evidence requirement (greater than a preponderance) to prevent fraud, just as the part performance plus improvements requirement is a safeguard against fraud in contracts between living persons.

*Sam E. Daugherty.*

---

<sup>11</sup> *Hinkle v. Hinkle*, 55 Ark. 583, 18 S. W. 1049 (1892).

<sup>12</sup> 102 Ark. 30, 143 S. W. 117 (1912).

<sup>13</sup> 105 Ark. 494, 152 S. W. 155 (1912).

<sup>14</sup> 128 Ark. 1, 193 S. W. 82 (1917).