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ONE YEAR REVIEW OF WILLS, ESTATES AND TRUSTS

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Fewer cases involving new and unsettled problems in the probate and trust field reached the supreme court in 1961 than in the last several years.

An exceptionally interesting and important case arose in the inheritance tax area. *People v. Bejarano*[1] involved inheritance taxes payable in the estate of a deceased employee of the Shell Chemical Corporation. For a substantial portion of his employment and his married life decedent had been domiciled in California, and for a short time he had been domiciled in Texas. He died domiciled in Colorado. At issue was the taxation of funds in a company-administered employees' trust. The widow contended that she owned a vested interest consisting of one-half of the portion of the assets acquired while she and the decedent had been domiciled in the two community property jurisdictions of California and Texas. The commissioner contended that the full value of the decedent's interest should be taxed as a transfer on the ground that there had been a gift or grant intended to take effect in possession or enjoyment at or after the death of the decedent, within the meaning of Colo. Rev. Stat. § 138-4-7 (1953). The supreme court determined that the surviving widow had in fact acquired a vested interest unrelated to decedent's death and that such interest would be recognized in Colorado, so that only the portion of the assets not so vested in the widow could be transferred by the decedent. While the case deals only with the inheritance tax, it establishes an important precedent in an area which will probably grow in importance as the population continues to move in and out of community property states.

Two cases dealt again with the problems caused by dispositive provisions in favor of a beneficiary "and his heirs," and in both cases the words were held to be those of limitation and not of substitution and purchase. In *Estate of Newby*[2] and *Estate of Hubbs*[3] the court followed its earlier rulings[4] which established that the words alone will be treated as words of limitation and that there must be some other form of clearly demonstrated intent in the will if any substitution is to occur.

Two cases demonstrated some of the pitfalls of managing businesses found among estate assets. *United States v. Smith*[5] involved an intricate fact situation concerning a failing roofing business. Decedent's administratrix early determined that the business needed more funds. During the creditor period she obtained *ex parte* authority to loan her own funds to the estate for continuation

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1 358 P.2d 866 (Colo. 1961).
2 361 P.2d 622 (Colo. 1961).
3 365 P.2d 513 (Colo. 1961).
4 Feeney v. Mahoney, 121 Colo. 599, 221 P.2d 357 (1950); Cann v. Richards, 126 Colo. 54, 246 P.2d 906 (1952).
5 359 P.2d 1020 (Colo. 1961).

of the business. After some three years the business failed, and a question of priority of claimants arose. The administratrix claimed the loan from herself to the estate was, in substance, a necessary expense of administration and that because of this it was a second class claim. The claim was allowed and the United States appealed since the classification was prejudicial to payment of its claims for taxes, for unremitted withholding, and for damages for an allegedly faulty or incomplete roofing job at a government installation. It contended that the statute authorizing business continuation required notice before continuation and borrowing, and that any inherent authority in the county court to authorize an *ex parte* loan for business continuation could be only for a short period, and not for an extended administration. The supreme court rejected the contention, and affirmed the classification of the amount of the loan as an expense of administration. It pointed out that notice to creditors who had not filed claims was impossible during the creditor period and that a hardship would be worked if proper steps to conserve assets could not be taken during the creditor period. It also noted that all creditors knew of the loan and that no objection had been made during the period when the administratrix was making every effort to save the business.

Toplitzky v. Schilt[6] involved problems faced by a successor fiduciary in dealing with substantial amounts disbursed by a predecessor administratrix who had conducted her deceased husband's business. The issue that reached the supreme court was whether the successor fiduciary had standing to object on the final report proceeding. The administratrix contended that the successor fiduciary was not an aggrieved person. This issue was not squarely decided, but the case was remanded after the trial court had ordered a restoration of funds; the supreme court determining that the trial court could do nothing more than to require the administratrix to render a full, complete and correct account and report. It would appear that a 1961 amendment, (H. B. 373), to Colo. Rev. Stat. § 152-10-8 (1) (1953), has corrected the problem presented by the case, but it nevertheless indicates that before this amendment a real problem existed in situations in which a successor fiduciary sought judgment against a predecessor by way of objections to a final report.

Adoption matters also received attention in two cases. *Wright v. Wysowatcky*[7] might have been a landmark case had it not been for a statutory amendment[8] of 1961 which has codified the result the court reached on the facts before it. The sole issue was the right of an adoptive parent to inherit from an intestate adopted child. The court held that the parent could so inherit. The court referred to the amendment, even though it did not control the case before it, and pointed out that the legislature's action confirmed what the court held to be the effect of the descent and distribution statute prior to 1961. As a result of the case and the statute, an area of previous ambiguity now appears to be well settled.

6 361 P.2d 970 (Colo. 1961).
7 363 P.2d 1046 (Colo. 1961).
8 Colo. Rev. Stat. § 152-2-4 (1953) as amended by Colo. Sess. Laws 1961, ch. 275, § 2.

Pool v. Harold[9] was the second adoption case. It involved the perplexing problem of decretal provisions preventing the disinheritance of an adopted child.[10] The holding was that the provision in the adoption decree could be enforced, and that the adoptive father's violation of this undertaking, on which the decree was based, could be prevented by impressing a trust on the estate assets. The decision is consistent with prior holdings and serves again as a warning to search the facts carefully, particularly if the adoption antedated the passage of the current Colo. Rev. Stat. § 152-2-4 (1953) in the year 1941, which barred such decretal provisions.

O'Brien v. Wallace[11] involved a procedural issue in a will contest. The caveat had alleged improper execution as well as mental incapacity. The proof of execution was regular and uncontested, but the trial court submitted the issue of execution to the jury along with the issue of capacity. Judgment entered on the jury's verdict for the caveators was reversed and the case was remanded; the supreme court held that a general verdict on distinct issues cannot be sustained if one of the issues should never have been submitted to the jury.

While other cases in the field reached the court, they dealt with matters of narrower interest or matters falling into the pattern of previous holdings.

9 367 P.2d 592 (Colo. 1961).
10 Cf. Quintrall v. Goldsmith, 134 Colo. 410, 306 P.2d 246 (1957), Dillingham v. Schmidt, 85 Colo. 28, 273 Pac. 21 (1928).
11 359 P.2d 1029 (Colo. 1961).