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# Attorneys, Courts, Equity

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void because the "School of Medicine, University of Texas," is not a legal entity capable of taking a gift.

*Appeal*: Judgment affirmed.

*Reasons*: A foreign will if valid in a foreign jurisdiction is valid in Colorado and may be admitted to probate. The filing of a *caveat* although permissible does not effect the validity of a foreign will.

Section 39, Chapter 176, '35 CSA provides that a will must be in writing, signed and acknowledged by the testator in the presence of two witnesses and declared by him to be his last will and testament. Section 62A as amended in 1947 provides, "As used in this section the words 'foreign will' means an instrument in writing which has been or shall be admitted to probate as the last will and testament or codicil of a decedent before any court or tribunal other than a court of this state, such court or tribunal being authorized by the laws of such jurisdiction to admit the same to probate, *whether or not such instrument was executed in accordance with Section 39 of this Chapter.*"

It is further provided in this opinion that the devise to the sister was not ambiguous and, therefore, valid.

It is also further provided that the devise to the Texas School of Medicine was valid as shown by these citations. The School of Medicine was a part of the University of Texas and as such a legal entity.

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# ATTORNEYS, COURTS, EQUITY

By FLOYD K. MURR, *of the Walsenburg Bar*

## ATTORNEYS

Under the classification of attorneys two cases were decided by the Supreme Court during the past year. In *People v. Logan,*[1] the Supreme Court disbarred an attorney who wrongfully spent for his own purpose money received by him from his client for the purchase of property. The attorney had also retained money collected by him for clients, refusing to make settlement until after complaint was made to the Grievance Committee of the Bar Association. The referee had recommended suspension but the Court felt compelled to go beyond because of the gravity of the charges.

In *People v. Woodall,*[2] a layman was fined $200 by the Supreme Court for drafting and causing to be executed a will. The only phase of the case presenting a new element was the defense of respondent, a bank cashier, who alleged he did it because the town's only resident attorney was always away. The Court apparently was not impressed with this unusual defense.

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[1] 1953-54 C. B. A. Adv. Sh. No. 17.
[2] 1953-54 C. B. A. Adv. Sh. No. 7.

In another case to be reported under another topic,[3] the Supreme Court stated that Sec. 9, Ch. 177, '35 CSA, which prohibits an attorney from being examined as to any communication made by a client to him, except with permission of the client, does not apply when the attorney's ethics and professional conduct are questioned.

COURTS

With some exceptions, the cases assigned for review under the heading of "Courts" are more noteworthy for their applicability to other branches of the law.

Two cases dealt with the jurisdiction of County Courts in lunacy matters. In *Rickey v. People*,[4] the complaint in lunacy was filed in the wrong county, the alleged lunatic being a resident of another county. In *Iwerks v. People*,[5] the complaint was filed in the right county, but the process was served by the sheriff in the wrong county. The sheriff of Adams County went into Denver County and attempted to serve notice on the alleged incompetent, where of course he had no authority to act. In both cases, the Supreme Court held that the County Court was without jurisdiction in the matter. In the latter case, the Attorney General, in confessing error stated that "the facade of the building is regular in all respects, but its foundation appears to be builded upon the sands of expediency and not on the rock of legal authority".

A gift taxpayer found himself in a dilemma in the complicated case of *People v. Maytag*,[6] but only a thumb nail sketch will be attempted here. The inheritance tax commissioner, who administers the gift tax law,[7] failed to determine the tax and give notice thereof within the time then required by sections 10 and 11 of the Act. This was held not to affect the duty of the commissioner to compute and collect the gift tax due the state in a previous decision by the Supreme Court involving the same parties.[8] The taxpayer was told by the Supreme Court in that case that if he were dissatisfied with the determination of tax, he should proceed under that part of the Act which in substance provides for a remedy by petition to a Court by an aggrieved taxpayer on the grounds of "erroneous valuation, appraisement, or assessment or otherwise".[9] This action was then filed by taxpayer expressly under the Act asking the Court again to prohibit the commissioner from computing the tax for his failure to determine the tax within the time and give notice as required by the Act. The Supreme Court held that these questions were decided in the original action and that *res judicata* precluded their consideration. The Court then held that

[3] Browning v. Potter, 271 P. 2d 418, 1953-54 C. B. A. Adv. Sh. No. 15.
[4] 267 P. 2d 1021, 1953-54 C. B. A. Adv. Sh. No. 10.
[5] 273 P. 2d 133, 1953-54 C. B. A. Adv. Sh. No. 17.
[6] 270 P. 2d 782, 1953-54 C. B. A. Adv. Sh. No. 13.
[7] COLO. STAT. ANN., c. 25A (1935).
[8] 1953-54 C. B. A. Adv. Sh. No. 13, p. 289.
[9] COLO. STAT. ANN., c. 75A, §15 (1935).

the statutory remedy which provides for review of the tax on grounds of erroneous "valuation, appraisement or assessment, or otherwise", gives a court a limited jurisdiction to review only the appraisement, assessment or valuation concerning a gift tax. The word "otherwise" was held to qualify the words "valuation, appraisement or assessment". The court incidentally remarked that neither the attorney general nor the commissioner has any authority to compromise a gift tax.

In the case of *Oliver v. Harper*,[10] the Supreme Court was asked to determine the disposition of $19 which had been paid into the registry of Court by the sureties on a bond under the mistaken impression that they were to pay the costs in addition to the judgment for the maximum liability on their bond. The Supreme Court held that the overpayment of a judgment by $19 could not be considered an appeal and that a statement of the trial court that the $19 should be returned to the sureties did not amount to a valid judgment and that further litigation would be required to dispose of the money.

In *Calvin v. Fitzsimmons*,[11] a judgment of the trial court in a boundary line dispute which determined that the boundary line between the land of the plaintiff and the land of the defendant is "that line along which a fence was constructed by the plaintiff between said lands in the year 1940, as shown by the evidence and testimony herein", was held to be invalid because of uncertainty where the fence had been completely destroyed in 1949, and its former location could be ascertained only from those familiar with its location. The Supreme Court said:

> . . . assuming that there was evidence before the Court which would enable it to definitely and specifically describe the boundaries between these two quarter sections, nevertheless, it was not incorporated in the judgment and decree.

*Browning v. Potter* [12] is a case in which both the executor and the heirs of a decedent were validly served with summons in a suit to adjudicate interests in certain mining claims under Rule 105, R.C.P. Colorado. Neither the executor nor the heirs filed answers or appeared in the suit within the time required by the rules of procedure and default was entered against them. The heirs sought to have the defaults vacated on the grounds of excusable neglect, setting forth that the executor suffered a mental aberration which prevented his taking action to protect their interests and alleging also that an attorney failed to perform properly his professional duty to them. The Supreme Court sustained the lower court in refusing to vacate the defaults pointing out that the executor, who had suffered a stroke in 1949, was not incapacitated in 1952 when

[10] 267 P. 2d 1114, 1953-54 C. B. A. Adv. Sh. No. 10.
[11] 270 P. 2d 748, 1953-54 C. B. A. Adv. Sh. No. 14.
[12] 271 P. 2d 420, 1953-54 C. B. A. Adv. Sh. No. 15.

the action was commenced; that during the period involved he discussed matters intelligently, and furnished counsel with addresses of non-resident defendants; that he was not confined to his room and took his meals at restaurants and had discussed the case with others. The Court dismissed the contention of the heirs that their default was due to an attorney where the record showed that the attorney advised the heirs orally and in writing that he did not represent them in this case.

> . . . the burden is upon a defendant to establish the grounds on which he relies, by clear and convincing proof; the granting or denial of an application to vacate a default, based on excusable neglect, rests in the sound judicial discretion of the trial court . . .

The functions of judge and jury in a tort case are demonstrated in *Eberle v. Hungerford,*[13] in which plaintiff was a guest. The Supreme Court held that plaintiff was no less a guest because she had given the driver of the automobile $2.00 to "help on gas" and the Court sustained the trial judge in directing a verdict in favor of the driver where the evidence did not show more than ordinary negligence on his part. But the trial judge was held to be in error in directing a verdict in favor of the driver of the other automobile where there was a dispute in the testimony as to which, if any, driver went through a red light at the intersection where the collision occurred. This presented an issue of fact for the jury to decide, for if the driver of the other vehicle was negligent, plaintiff could recover against him.

In *Woodruff v. Clarke,*[14] a wife purchased a home with funds given to her by her husband's mother and took title to the property in her own name. In an action by a judgment creditor of the husband, whose judgment was obtained before the wife purchased the property, the trial court determined that the husband had an interest in the home which the wife held as trustee, and referred the matter to a referee to determine the amount of this interest. The Supreme Court reversed the trial court and said that the husband had no interest in the property which could be reached by his judgment creditor. The fact that the husband had paid some interest on the indebtedness which was outstanding on the property did not warrant the trial court's determination that he owned an interest in the home.

Finally, in *State Highway Department v. Swift,*[15] a stipulation in condemnation proceedings which required the highway department to construct access roads from the highway across certain described parcels of land owned by landowner was construed by the Supreme Court as not requiring the Highway Department to construct bridges to connect the access roads to the highway.

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[13] 1953-54 C. B. A. Adv. Sh. No. 18.
[14] 262 P. 2d 738, 1953-54 C. B. A. Adv. Sh. No. 4.
[15] 270 P. 2d 750, 1953-54 C. B. A. Adv. Sh. No. 14.

EQUITY

Among the cases assigned to be reported under the heading of "Equity", two involved laches. Plaintiff was not barred by laches in *Prosser v. Schmidt* [16] where during a period of approximately four years the defendants had failed to execute and deliver a deed and obtain releases of certain mortgages in accordance with their written agreement to convey certain lands to plaintiff and the evidence showed plaintiff was at all times ready and able to perform his part of the agreement. There was evidence that defendants were away much of the time and that plaintiff tried unsuccessfully to contact them. The Court held that "delay that might be chargeable to plaintiff did not start to run against him until there was full tender or performance on the part of defendants". An interesting aspect of this case is the finding by the Supreme Court that defendants' counsel in his brief on appeal had re-arranged the facts to create a favorable impression. The Court said: "Voluntary enlargement of the facts shown by the testimony in an attempt to augment defendants' defensive position does not enhance their standing before a Court of equity".

Laches did bar the remedy in *McDermott v. Bent County, Colorado Irr. Dist.*[17] where petitioners sought to require an irrigation district to pay for services rendered some 19 to 30 years prior to filing suit. A bond issue had been approved by a decree of the District Court in 1932 to pay the district's indebtedness, and apparently, the petitioners proposed at that time to accept bonds of the district in lieu of cash in settlement of their claims against the district. The bonds were never issued and the decree was not recorded in the office of the County Clerk until 2 months before this action. In the meantime, more than 14,000 acres of land in the district went to tax sale, tax deeds were issued, titles were quieted and intervening purchases of the land were made by persons having no notice of petitioners' claims. In addition to denying petitioners' claims because of their laches, the Supreme Court seemed to hold, re-stating a well settled doctrine, that the tax titles extinguished any prior liens and initiated new titles to the lands embraced within the district.

In *Howard v. Beavers*,[18] a contract for the sale and exchange of real estate was not sufficiently definite to authorize the remedy of specific performance. The contract provided as follows: . . . and said party of the first part will . . . convey back unto the party of the second part a mortgage on the property hereinabove described . . . for $14,800, being the balance due to the party of the second part . . ." No other provisions relating to the mortgage appeared in the contract. Because the time and terms of payment of the mortgage were not set forth, the degree of certainty re-

[16] 262 P. 2d 272, 1953-54 C. B. A. Adv. Sh. No. 2.
[17] 272 P. 2d 995, 1953-54 C. B. A. Adv. Sh. No. 16.
[18] 264 P. 2d 858, 1953-54 C. B. A. Adv. Sh. No. 6.

quired for specific performance was absent. The Court refused to hold that the parties intended the execution of a demand mortgage. The Court held however, that the contract was sufficiently certain to sustain an action for damages for breach of contract.

The novel part of this case was that plaintiff, after suit was begun, executed a deed to the real estate he was to exchange and sent it by registered mail to the defendant. Because the defendant received and retained the deed, plaintiff argued that defendant ratified the contract or in some way was put in constructive possession of the real estate described in the deed. The Court summarily disposed of this contention saying there was no delivery or acceptance of the deed and that the self serving act of the plaintiff did not ripen into an estoppel as against defendant.

In another case, an octogenarian sold and conveyed his homestead on a day when by his own testimony he was as "healthy as a ground hog"; but he did not feel well the next day and sometime later brought an action to set aside his deed on grounds of fraud and undue influence. This, in a nutshell, is the case of *Bivens v. Van Matre*,[19] in which the trial court was sustained in holding that the evidence was not sufficiently clear and convincing to authorize the setting aside of the deed. The facts also showed that the transaction was reviewed for plaintiff by an attorney selected by plaintiff before the deed was executed and that the price paid plaintiff for the land was comparable to prices received for other lands recently sold in the vicinity.

*Merth v. Hobart*,[20] involved an action for partition in which the Supreme Court stated that there is no difference in a partition suit as to property held by tenants in common and property held by joint tenants. The case is a factual one in which the trial court was sustained in its findings that plaintiff's $10,000 which was used to purchase a home in her name and in the names of the defendants, husband and wife, as joint tenants, should be returned to the plaintiff, there being no agreement obligating the parties in any manner.

[19] 270 P. 2d 761, 1953-54 C. B. A. Adv. Sh. No. 14.
[20] 272 P. 2d 273, 1953-54 C. B. A. Adv. Sh. No. 16.

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