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Real Property and Probate

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vested rights of others, reversed the judgment of the trial Court and remanded the case with directions to the trial Court to determine, upon the evidence already taken, together with any additional evidence the parties may see fit to introduce, whether the change of the point of diversion as prayed would injuriously affect the vested rights of protestants, and, if so, whether such effect may be prevented by the imposition of terms and conditions, and to enter the Decree accordingly. The Supreme Court also stated that the burden of proof on the petitioner in such a proceeding requires him to meet only the grounds of injury to protestants asserted by them, and that the evidence presented by the petitioner constituted *prima facie* evidence to satisfy the burden of proof resting on the petitioner.

Oil and Gas

The only cases having to do with Oil and Gas are the cases of *Mitchell v. Espinosa* [10] and *Johnson v. McLaughlin*,[11] and cover the manner of creating mineral reservations and the effect thereof, and I believe have been reported upon by Mr. Rubright.

Damages For Subsidence Account Removal of Coal

Colorado Fuel and Iron Corporation v. Salardino:[12] Action for alleged damages to plaintiff's land and buildings caused by the removal by the defendant, who owned the same, of coal deposits underlying plaintiff's land and adjacent land in a careless, wrongful and negligent manner. Defendant alleged that plaintiff's improvements were placed upon the surface property with full knowledge of defendant's right to mine and remove the coal adjacent to or underlying the same, and by so doing plaintiff assumed the risk of damage to his property. Plaintiff recovered judgment in the trial Court. The Supreme Court, in reversing the case, and ordering a new trial, held that a mine operator must leave support sufficient to maintain the surface in its natural state, but that negligence on the part of the mine operator must be proved to recover for damages to buildings erected upon the surface of the land.

REAL PROPERTY AND PROBATE

ROYAL C. RUBRIGHT

Mitchell v. Espinosa [1] is significant. A grantor reserved mineral rights in a deed. The mineral interest and the surface interest were not thereafter separately assessed, but continued to be assessed as a unit. A later Treasurer's Deed for unpaid taxes subsequent to the severance was held not to convey a tax title to the mineral interest. This case was commented upon in DICTA.[2] The case also caused the Real Estate Title Standards Committee to pub-

[10] 243 P. 2d 412, 1951-2 C. B. A. Adv. Sh. 243 (March 22, 1952).
[11] 243 P. 2d 812, 1951-2 C. B. A. Adv. Sh. 259 (March 22, 1952).
[12] 245 P. 2d 461, 1951-2 C. B. A. Adv. Sh. 367 (June 7, 1952).
[1] 243 P. 2d 412, 1951-2 C. B. A. Adv. Sh. 243 (March 17, 1952).
[2] 29 DICTA 225 (June, 1952).

lish a special note to Real Estate Title Standard No. 47.[3] The effect of this note is that Title Standard No. 47 may not be applicable to a mineral estate which was severed prior to the tax sale upon which the Treasurer's Deed was based. Another significant point determined in this case was that a tax deed is not void even though executed and issued later than the date fixed in the notice for the issuance of the Treasurer's Deed. The court overruled the former case of *Tewell v. Galbraith.*[4] Attention is called to the provisions of the 1951 Session Laws, Chap. 258, p. 726 which permits a delay in the acknowledgment of the Treasurer's Deed and which liberalizes the form by not requiring a statement when the redemption period expires. The statute requires that the Treasurer's Deed shall be signed within five months from service of the notice.

Hoff v. Armbruster[5] is a case where husband and wife executed identical wills at the same time. The husband died first and his will was still in existence, although it was not probated. The wife died later and the will was not found. Her estate was being administered as an intestate estate and a legatee under her will contended that the wills were mutual, reciprocal and irrevocable. The plaintiffs were the beneficiaries under the will, and sought to impose a trust upon the assets of the decedent which otherwise would have passed to her heirs-at-law under the intestacy statutes. The court upheld the position of the beneficiaries under the will and held that wills executed under circumstances existing in this case were mutual, reciprocal and irrevocable. There was no express agreement that the wills were irrevocable but the court found an implied agreement to that effect. Because of the common practice of drawing identical wills in order to provide against a common disaster, this case indicates that extra precautions should be taken to prescribe the conditions under which the survivor could change the testamentary plan used in his own will. Some lawyers have even suggested that in order to avoid an implied contract, which the court found here, it would be well to have a contract in writing prescribing exactly under what conditions the survivor could modify his will.

Gehm v. Brown[6] contains a caution to attorneys who have been trusted friends or advisors of the testator and to whom the testator is making a bequest. The case held that a presumption of undue influence is raised where a real estate agent drew a will in which he was made a beneficiary and the executor. It would appear that many lawyers, because of close and confidential relationship with clients might be caught in the same trap and the case indicates that extreme care should be used by an attorney drawing a will under those circumstances where he takes any interest under it.

For years lawyers have wondered whether or not a widow, in

[3] 29 DICTA 331 (Sept., 1952).
[4] 119 Colo. 412, 205 P. 2d 229 (1949).
[5] 242 P. 2d 604, 1951-2 C. B. A. Adv. Sh. (Feb. 11, 1952).
[6] 245 P. 2d 865, 1951-2 C. B. A. Adv. Sh. (June 2, 1952).

addition to her statutory widow's allowance of $2000, might be allowed a homestead exemption on real estate which was occupied by her as a home. The case of *Wallace v. First National Bank,*[7] decides that a widow may have both a widow's allowance and a homestead exemption. The court also held that the widow could occupy the home under her homestead during the period of administration. Attention is called to 1951 Session Laws, ch. 214, p. 522, where the exemption is raised from $2,000 to $5,000.

Although the court, in *Mitchell v. Espinosa supra,* and in the case of *Johnson v. McLaughlin,*[8] evidenced a continuation of a reasonable interpretation of the validity of tax deeds, *Siler v. Investment Securities Co.*[9] indicates that a Treasurer's Deed may be attacked where the Treasurer did not send notices to the proper address of the fee title owner even though there was a current address in his office to which tax notices on other property had been sent.

In *Rochester v. Richards,*[10] the court discusses at some length whether the word "and" or the word "or" will be supplied in place of a comma between the name of the legatee and the following words which were descriptive of the interest the legatee took. The case would seem to indicate that a comma should never be used where words of limitation are intended as in the following phrase: "to Joe Doakes, his heirs and assigns," but rather the phrase should read: Joe Doakes and his heirs and assigns." Likewise, if a substitution is intended, the phrase should substitute the word "or" instead of a comma—"to Joe Doakes *or* his heirs or assigns."

SURETYSHIP, INSURANCE AND TORTS

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SURETYSHIP

Our Court has considered three cases on this subject, two of them, *Massachusetts Bonding Co. v. Central Finance* [1] and *Mass. Bonding Co. v. Bank of Aurora,*[2] involving the relatively new motor vehicle bonds. In the first of these cases, the attorneys who had entered an appearance for both the bonding company and the defaulting dealer permitted a judgment by default to be entered against the dealer, and thereafter attempted to defend as to the bonding company by showing that there was no evidence of fraud. The Court held that the default judgment against the dealer resulted in an automatic judgment against the bonding company, being conclusive proof of the fraud necessary to recover on the bond.

In the second case, where the fraudulent transactions occurred prior to the effective date of the bond but renewal notes and chattel mortgages were taken thereafter, the Court denied recovery, hold-

[7] 246 P. 2d 894, 1951-2 C. B. A. Adv. Sh. (June 16, 1952).
[8] 242 P. 2d 812, 1951-2 C. B. A. Adv. Sh. (March 17, 1952).
[9] 244 P. 2d 877, 1951-2 C. B. A. Adv. Sh. (May 5, 1952).
[10] 246 P. 2d 906, 1951-2 C. B. A. Adv. Sh. (July 7, 1952).
[1] 237 P. 2d 1079, 1951-2 C. B. A. Adv. Sh. (Oct. 15, 1951).
[2] 238 P. 2d 872, 1951-2 C. B. A. Adv. Sh. (Nov. 26, 1951).