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IN RE: THE MOURNERS

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THIS fragmentary and casual comment on some of the infirmities and eccentricities of our present statutes is an endeavor to arouse interest in codification of our Probate Law.

In its devious wanderings from Virginia, Thomas Jefferson's codification of the ecclesiastical law has been amended and altered, *via* the common law and the law that never was on sea or land, by legislators whose zeal outran their knowledge.

To illustrate: Section 5154 C. L. 1921 provides for inheritance by children of the half blood, and descendants of children of the half blood. Unexplainable, except by Pope's line as to "The child whom many fathers share."

The legislature of 1927 provided that gifts to charity should continue to be gifts to charity by enacting that no gifts to religious, educational, charitable, or benevolent uses "should be deemed invalid by reason of the *indefiniteness or uncertainty of the persons designated* as the beneficiaries thereunder in the instrument creating or constituting the same." S. L. 1927, page 737, Sec. 1.

Yet long ago, Mr. Pomeroy wrote in his *"Equity Jurisprudence"*; "Charitable trusts are those created for the benefit of an *unascertained, uncertain,* and sometimes fluctuating body of individuals, in which the *cestui que trustent* may be a portion or class of a public community."

Mr. Alexander says: "A trust cannot be charitable where the beneficiaries are *definitely* designated. And again, charitable trusts are further distinguished from private trusts in that the beneficiaries are *uncertain.*" (Alexander on Wills Sec. 1113.)

Colorado's most urgent need is a statute providing for short time settlement of estates of less than $2,000.00 in value. Other commonwealths provide for such settlements in 30 or 60 days from the issuance of letters, requiring the executor or administrator to produce receipts for funeral expenses and expenses of the last illness. Speedy closing statutes are in

force in many states where the husband or widow is the sole surviving heir at law.

Some states provide for surety bond of the value of the estate; said bond to be in force for one year.

Provision should also be made for short time settlement of claims for expenses of the last illness, say, ninety days, or six months at most.

In Virginia, California, and a number of other states holographic wills are valid and sufficient to transfer real and personal property. Under our statutes, Sec. 5210 C. L. 1921, such wills are ineffective, though properly probated in the state of testator's residence. The statute should be amended to provide that when any last will and testament or codicil thereto is effective in law for the giving, granting, devising, and bequeathing of the real and personal estate therein and thereby devised and bequeathed, said will upon its admission to probate by the County Court of the proper county, shall be good and sufficient to transfer and convey all real and personal estate situate in this State.

The legislature of 1921 (S. L. 1921, p. 818, Sec. 1), added a confusing and uncertain amendment to Sec. 5210.

It purports to give authority to foreign executors and trustees to convey or mortgage real estate;

"When a certified copy of the letters testamentary or trusteeship issued under said will, testament or codicil by such foreign court or tribunal have been filed for record with the clerk and recorder of the county wherein are situated the lands to be conveyed or administered under the terms of said will, * * * the executor, trustee or other representative appointed * * * by such foreign court or tribunal, may execute such instruments of conveyance or mortgage, or contracts concerning such lands as are in accordance with the powers conferred by said will * * * upon such executor, trustee or representative and without letters testamentary having been issued in this state and without any order of court for the execution of such powers."

Note that the section does not provide for a certificate that the letters testamentary are still in full force and effect; where land is in more than one county, does not provide for recording a copy of the will and its foreign and domestic orders of probate. It provides for certified copies of letters of trusteeship.

Given power in and by the will, or trust agreement, foreign executors and trustees, always have had power to sell and convey, after the probate and recording of the will, or record-

ing of the trust agreement, in the foreign commonwealth. The provision as to trustees raises the question of the powers of probate courts in Colorado over trustees.

Article VI, Sec. 23, of the State Constitution limits the powers of the County Court;

> *"Provided,* such court shall not have jurisdiction in any case where the debt, damage, or claim, or value of property involved, shall exceed two thousand dollars, except in cases relating to the estates of deceased persons."

When the debts (including taxes), legacies and expenses of administration are paid, the bondsmen are entitled to be released, the executors discharged, and the estate closed. The estate then has ceased. The trust begins to function, as a trust, and the method of its creation, by will or agreement, is immaterial. The limitation on the jurisdiction of the County Court is applicable in either case.

This is emphasized in Colorado by the provision of Section 5204, C. L. 1921, which in terms makes the will a conveyance, passing title to the devisee upon the probate and recording thereof, by providing that it,

> "shall be good and available in law, for the granting, conveying, and assuring the lands, tenements and hereditaments, annuities, rents, goods, and chattels therein and thereby given, granted, devised, and bequeathed."

Has the County Court jurisdiction of testamentary trusts by virtue of the last clause of Section 5364 of the Compiled Laws of 1921? Can the legislature enlarge the constitutional powers of the Court?

In the *Girard* will cases the Supreme Court of Pennsylvania answered in the negative. Until a new constitution enlarged the powers of the Orphans' Court, the Girard Estate was kept open with administrators *d. b. n., c. t. a.,* that reports might be filed with the Orphans' Court of Philadelphia in accordance with the requirements of the will.

The authority of executors to sell real estate under power conferred by will is limited by S. L. 1915, page 490, Sec. 6, (C. L. Sec. 5242), as follows:

> "such executor or administrator shall before making any sale under such authority apply to the court for an order authorizing such sale, and upon obtaining such order shall give bond * * * and no sale by such executor * * * shall be valid unless a bond as aforesaid shall be first given and approved by the court."

Chief Justice Shaw held in *Going v. Emery, 16 Pick (Mass.) 107, 113; 26 Amer. Dec. 645, 647,* as follows:

"And whenever an executor has power under a will to sell real estate, no license of any court is necessary to, or can give any additional validity to any sale and conveyance which he may make. And it is considered a good reason for refusing such license, that the power already exists."

Section 5211, C. L. 1921, Paragraph "Second" provides for the construction of a will before it has been admitted to probate, and the admission to probate;

"in so far as it shall be found valid and binding, and it shall be executed only in so far as its contents may be held valid and binding," etc.

As a scheme for delaying the settlement of estates, and obtaining inadequate construction, this is an unbeatable law.

It is of course important that the will be probated, the executor take charge, file inventory, inheritance tax schedules, pay debts, etc. Questions of construction of trusts frequently require months of careful technical briefing. Our statute provides for appeal to the district court and trial *de novo*. This means duplication of work, more delay, additional expense. The question of construction is purely an equitable matter and the tested method of admitting the will to probate and filing suit for construction as necessity requires should be used.

Section 5198, C. L. 1921, provides that the citation to attend the probate of a will, shall,

"be served upon all persons necessary to be served residing in the State of Colorado in the same manner as summons is served in Civil proceedings under the Code of Civil procedure of the State of Colorado,"

Section 40 of the Code provides:

"*Tenth*—If suit be brought against a minor under the age of fifteen years, the summons shall be served by delivering a copy of the writ to him personally, also a copy to his or her father, mother or guardian, or if there be none such in the state, then by delivering a copy to any person having care or control of such minor, or with whom he or she resides, or in whose service he or she is employed."

But Section 5301, C. L. 1921, requires the appointment of a guardian *ad litem* for such minor, and contains a mandatory provision that the probate shall not be heard unless the guardian *ad litem* shall appear.

Why the necessity, therefore, of serving parents, employers, custodians, etc. of minors?