Attorney and Client--Negligence of an Attorney in Preparation of a Will

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be brought or sued out from any court of equity hereafter obtained, granting a divorce from the marriage contract. "Thornberry v. Thornberry, 4 Litt. (Ky.) 251 (1832), Maguire v. Maguire, 7 Dana (Ky.) 181 (1838), Pence v. Pence, 6 B. Monroe (Ky.) 496 (1846). Perhaps the reason for the enactment of 1816 was the inconvenience that might result from annulling a valid divorce upon a writ of error which might be prosecuted after one of the divorced parties had contracted another marriage; but that reason does not apply to a void divorce, which could never legalize a subsequent marriage of either of the parties.

Kentucky Statutes, Section 950-1, provides " but no appeal shall be taken to the Court of Appeals as a matter of right from a judgment for the recovery of nor to reverse a judgment granting a divorce. " This statute expressly forbids the Court of Appeals to reverse a judgment granting a divorce, although it may review the judgment in a divorce case in other respects. Shehan v. Shehan, 152 Ky. 191, 153 S. W 243 (1913). According to the prevailing Kentucky view, it is not only the right, but the duty of the court to review the evidence where the mind is left in doubt on issues of fact involving alimony, or the custody and maintenance of children. Evans v. Evans, 229 Ky. 20, 16 S. W (2d) 485 (1929), or to determine whether the property rights of the parties have been properly adjusted. Pleasnck v. Pleasnck, 215 Ky. 281, 284 S. W 1070 (1926).

ATTORNEY AND CLIENT—NEGLECT OF AN ATTORNEY IN PREPARATION OF A WILL.—In the recent case of Schrmer v. Nethercutt, 157 Wash. 172, 238 Pac. 265, decided in 1930, the plaintiff employed the defendant attorney to draw a will for the grandmother of the plaintiff. The will was duly prepared in accordance with the instructions given by the grandmother. By the terms of the will plaintiff was a legatee and was to receive one-half of the residue of her estate. The defendant carelessly allowed plaintiff to witness the will thereby causing plaintiff to lose his one-half residuary share of the estate. Held, that since plaintiff was not permitted to take under the will he was entitled to recover the value thereof from the person responsible for its loss through his negligent breach of trust.

The word "attorney" is derived from the Latin word *attornare* which means proxy or agent. And an attorney is essentially an agent of and for his client, the general principles which control in matters of agency also being applicable to attorneys. The special undertaking of an attorney is to establish or protect the rights of his client, whether relating to life, liberty, person, reputation or property. This necessarily creates a relation of trust and confidence between them which measures and defines the extent of the attorney's duty. The very fact of employment is sufficient to raise between the parties a contractual relation. Then, any controversy between them must be adjudicated upon the basis of this contract, unless the wrong complained of is some tortious act, actionable per se. That actions for malpractice against an attorney are based on breach of contract has been generally recog-
nized. See Isham v. Parker, 3 Wash. 755, 29 Pac. 835 (Liability of client for services not contemplated by contract.), Dundee Mortg., etc., Co. v. Hughes, 20 Fed. 39 (Attorney not liable to assignee of mortgagee for error in certificate of title, the attorney having been employed by the mortgagee.).

The court in Schirmer v. Nethercutt, supra, recognized the contractual element when it said, "it is a closed question in this state, for we have consistently held that such actions are based on breach of contract and controlled by statutes relating to breach of contract relation, governed by the three-year statute of limitations".

The necessity of some contractual relation between the parties was brought out in the case of Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, decided in 1895. In that case an attorney was employed by a mother to draw a will leaving the residue of her estate, after certain specific legacies, to her son. The attorney negligently failed to exclude certain grandchildren and also caused the son to become a subscribing witness to the will. As a consequence the son was deprived of any share in the estate and the son sought to hold the attorney for an amount equal to the approximate amount that the son would otherwise have gotten. Held, that even though the son suffered great pecuniary loss, he could not recover from the attorney, there having been no privity of contract between them.

The propriety of the decision in Schirmer v. Nethercutt, supra, can hardly be questioned. It was the desire of the grandmother that the plaintiff receive a portion of the estate and an attempt was made to do so. And except for the error of the defendant the desire would have been carried into effect. His act in causing plaintiff to witness the will was an omission to exercise that degree of care and skill which, for one in such a position of trust, could be characterized as reasonable care under the circumstances.

It cannot be contended that an attorney must know all the law. But on the contrary, as said by Lord Tenterden, "God forbid that it should be imagined that an attorney or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair remuneration on account of an error, being such an error as a cautious man might fall into" Montrou v. Jefferys, 2 C. & P 113. The court then, in considering the Schirmer case, could have asked the question: Would a reasonably cautious attorney allow a legatee to become one of the subscribing witnesses to a will? Surely this question could have been answered but one way. Would anyone say that the reason for the plaintiff's failure to receive his legacy was to be found anywhere except in the carelessness and negligence of the attorney? It would be extremely difficult to trace precisely the dividing line between that reasonable skill and diligence which an attorney undertakes to furnish, and in the exercise of which he is exonerated from liability, and that gross negligence or failure to exercise reasonable care for which he is undoubtedly responsible. But without attempting to make a classification, it would seem that the Washington court was correct when it
characterized the action of the attorney in *Schurmer v. Nethercutt* as falling in the latter class.

The law, in fixing liability on attorneys, must recognize that human judgment is fallible. Courts, as well as lawyers, disagree concerning the many matters about which each may have a fairly fixed opinion. The law is truly a science, but an imperfect one, because it depends for exemplification and application upon the imperfect judgments and consciences of men. Therefore when a attorney has used ordinary care in acquainting himself with the law his misjudgment as to the application thereof should not render him liable. But where he has carelessly failed to acquaint himself with those elementary legal principles that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession, then the law must say that he is liable to those for whom he has engaged to exercise his knowledge and skill in a professional capacity.

It is extremely difficult, if not utterly impossible, to lay down any general rule which should control the measure of liability in all cases. Each case must be decided in the light of its own peculiar circumstances. The rule in England seems to have been that an attorney is liable to his client only in cases of gross neglect or gross incompetence. From an examination of the malpractice cases in this country, a juster rule seems to exist, that the attorney is liable for the want of such skill, care and diligence as men of the legal profession commonly possess and exercise in matters of professional employment. The general rules governing the execution of testamentary instruments have been fairly well established by a line of cases running back past the passage of the Statute of Wills in 1540. There seems to be no reasonable excuse for exempting from liability an attorney who has failed to follow those fundamental rules, with which it seems imperative that every lawyer should, to a certain extent, become familiar.

The legal profession cannot reasonably find fault with the rules which are generally accepted concerning liability for malpractice. These rules are necessary, as well for the protection of the legal profession as for the client for whom the attorney seeks to act.

*Walter D. Vest.*

**Jurisdiction—Situs of the Crime.**—A recent newspaper clipping contained an account of the murder of A in Kentucky by B who was standing in West Virginia when he fired the fatal shot.

The man was apprehended in West Virginia and brought up for trial in the West Virginia court on the charge of murder. The judge released the prisoner because the courts in West Virginia did not have jurisdiction to try the prisoner for the murder committed in another state.

The murderer will go unpunished unless he is brought to trial in a court of Kentucky where the murder occurred. Kentucky cannot