KANSAS JUDICIAL COUNCIL BULLETIN

OCTOBER, 1935 PART 3—NINTH ANNUAL REPORT

TABLE OF CONTENTS

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OTHER ORGANIZATIONS, and leading citizens generally throughout the state,
For the improvement of our Judicial System and its more efficient functioning.

FOREWORD

We present in this BULLETIN a summary of the work of the supreme court for the year ending June 30, 1935, and cases pending on that date; also, in tabulated form, an eight-year summary of the work of the supreme court. As a whole this record disclosed that cases are disposed of in the supreme court with reasonable promptness after they are submitted for a decision. Also, that the court is keeping its work up in good condition. There were fewer cases pending in the supreme court on July 1, 1935, than on the same date in any year these summaries have been compiled. The record disclosed occasional delay by reason of the fact that notices of appeal are not sent to the supreme court promptly by clerks of the district court. In this respect the present report makes a better showing than our previous ones. We trust that unreasonable delay in this respect soon may be entirely eliminated.

Mr. Samuel E. Bartlett, of Ellsworth, has furnished us an article on the administration of absentee's estates. While not purporting to be a complete treatise on the subject, it sets forth very well the need for legislation pertaining to the handling of such estates and what has been done by the legislatures in some of the other states. In view of our study of the law of estates and probate procedure we regard it as an appropriate time to present this question, and would be glad to have suggestions as to what should be embodied in our statute concerning it. It is somewhat allied to the question discussed in an article by Mr. Chester Stevens in our April, 1934, BULLETIN on administration of estates of living persons—presumption of death. Perhaps statutes relating to both of these subjects should be incorporated in our law.

In our study of the law of estates and probate procedure we find a number of questions arising over the administration of partnership estates upon the death of one of the partners. Some of these questions have come to the attention of Mr. Chester Stevens, who has prepared an article on this subject presented in this BULLETIN. Perhaps other questions growing out of that situation have presented themselves to other attorneys. We will be glad to hear about them.

Our December BULLETIN will contain the schedule of "Motion Days" for 1936 for the district court in each county throughout the state. It will also contain summaries and tables compiled from reports made to us by clerks of the district court throughout the state of the work in such courts for the year ending June 30, 1935, and of cases pending on that date. These reports have come to us more promptly than any previous year we have collected such data and most of them have reached us in better condition than such previous reports.

With the aid of the State Bar Association and its special committee on that subject we are continuing our study of a proposed redraft of Article III of our constitution relating to the judiciary, with the view of having the next session of our legislature submit it to a vote of the people. We are also continuing our study of the law of estates and probate procedure. It is possible that we may have this worked out in a concrete form to present in our April, 1936, BULLETIN. We find it to be a subject of major importance, indeed of much greater importance than many of our people realize. We find it difficult to find the time to give it the attention it deserves, but are pushing forward with it the best we can.

JUDICIAL COUNCIL BULLETIN

Summary of the Work of the Supreme Court

The following is a summary of the work of the supreme court for the year ending June 30, 1935, and of cases pending on that date:

There were 506 appealed civil cases disposed of within the year ending June 30, 1935. Of this number 167 were dismissed without having been presented on the merits and 339 were submitted on the merits and written opinions filed therein; of these 205 were affirmed, 116 reversed, and in 12 the judgment of the trial court was modified, and in 6 cases the appeals were dismissed, resulting in affirming the trial court.

The court also disposed of 58 appealed criminal cases. Of this number 26 were dismissed without having been presented on the merits and 32 were submitted on the merits and written opinions filed. Of this number 26 were affirmed and 6 reversed.

The court also disposed of 25 original cases, of which 11 were dismissed before having been presented on the merits, 13 were submitted on the merits and written opinions filed resulting in judgment for plaintiff in 4 cases, for defendant in 8 cases, and 1 case was dismissed; and in one case the writ was issued on defendant's confession.

This makes a grand total of 589 cases disposed of by the supreme court, of which 197 were dismissed without having been presented on the merits, 384 were submitted on the merits and written opinions filed.

The cases pending on July 1, 1935, were as follows: 238 appealed civil cases, 40 appealed criminal cases, and 13 original cases, making a total of 291.

Of the 384 cases submitted to the supreme court on their merits and in which written opinions were filed, in 12 cases the opinions were filed before the first regular opinion day, in 355 cases on the first regular opinion day and in 17 cases on the second opinion day. The regular opinion day ordinarily is a month after the case is submitted; more accurately, it is the Saturday of the week hearings are had the next month after the case is submitted.

In the appealed civil cases disposed of within the year ending June 30, 1935, and pending on that date, the time between the date of judgment appealed from and the date notice of appeal was filed in the trial court is as follows: Within 10 days, 168 cases; 10 to 30 days, 150 cases; in 1 to 2 months, 111 cases; in 2 to 3 months, 78 cases; in 3 to 4 months, 83 cases; in 4 to 5 months, 38 cases; in 5 to 6 months, 79 cases; over 6 months, 25 cases; time not stated, 11 cases.

In the appealed civil cases disposed of within the year ending June 30, 1935, and pending on that date, the time between the date notice of appeal was filed in the trial court and the date notice of appeal was filed in the supreme court is as follows: Within 5 days, 251 cases; in 5 to 10 days, 135 cases; in 10 to 20 days, 141 cases; in 20 to 30 days, 82 cases; in 1 to 2 months, 61 cases; in 2 to 3 months, 14 cases; in 3 to 4 months, 12 cases; in 4 to 5 months, 1 case; over 5 months, 25 cases; time not given, 13 cases.

In the appealed civil cases disposed of within the year ending June 30,

1935, and pending on that date, the time between the date the notice of appeal was filed in the supreme court and the date deposit for costs was made is as follows: Within 5 days, 216 cases; in 5 to 15 days, 117 cases; in 15 to 30 days, 175 cases; in 1 to 2 months, 61 cases; in 2 to 3 months, 12 cases; over 3 months, 10 cases; time not stated, 144 cases.

In the appealed civil cases in which opinions were filed within the year ending June 30, 1935, the time between the date the notice of appeal was filed in this court and the date the case was submitted on its merits is as follows: Within 3 months, 12 cases; in 3 to 4 months, 18 cases; in 4 to 5 months, 37 cases; in 5 to 6 months, 39 cases; in 6 to 9 months, 157 cases; in 9 to 12 months, 58 cases; in 12 to 15 months, 17 cases; later than 15 months, 1 case.

In the appealed criminal cases disposed of within the year ending June 30, 1935, and pending on that date, the time between the date of judgment appealed from and the date the notice of appeal was filed in the trial court is as follows: On the same day, 22 cases; not the same day but within 5 days, 11 cases; from 5 to 10 days, 15 cases; from 10 to 20 days, 12 cases; from 20 to 30 days, 6 cases; from 1 to 2 months, 10 cases; from 2 to 3 months, 4 cases; from 3 to 4 months, 5 cases; from 5 to 6 months, 1 case; from 6 to 12 months, 3 cases; from 1 to 2 years, 4 cases; time not given, 5 cases.

In the appealed criminal cases disposed of by the supreme court within the year ending June 30, 1935, and pending on that date, the time between the date the notice of appeal was filed in the trial court and the date it was filed in the supreme court is as follows: Within 5 days, 29 cases; in 5 to 10 days, 11 cases; in 10 to 20 days, 22 cases; in 20 to 30 days, 14 cases; in 1 to 2 months, 7 cases; in 2 to 3 months, 3 cases; in 3 to 4 months, 13 cases; in 5 to 6 months, 2 cases; after 6 months, 3 cases; and in 4 cases the time was not given.

In the appealed criminal cases disposed of within the year ending June 30, 1935, and pending on that date, the time between the date notice of appeal was filed in the supreme court and the date the deposit for costs was made is as follows: Within 5 days, 5 cases; in 5 to 15 days, 9 cases; in 15 to 30 days, 33 cases; in 1 to 2 months, 19 cases; in 2 to 3 months, 3 cases; over 3 months, 1 case; time not stated, 28 cases.

In the appealed criminal cases in which opinions were filed within the year ending June 30, 1935, the time between the date the notice of appeal was filed in the supreme court and the date the case was submitted on its merits, is as follows: Within 3 months, 1 case; in 3 to 4 months, 3 cases; in 4 to 5 months, 4 cases; in 5 to 6 months, 3 cases; in 6 to 9 months, 14 cases; in 9 to 12 months, 3 cases; in 12 to 15 months, 1 case; in 15 to 18 months, 2 cases; and in 1 case the time was not given.

In the appealed civil cases disposed of within the year ending June 30, 1935, the costs in 503 cases reported on is as follows: Mimimum amount, $2.70; maximum, $40; aggregate, $6,009.49; average, $12.06.

In the appealed criminal cases disposed of within the year ending June 30, 1935, the costs in 56 cases reported on is as follows: Mimimum amount, $3.95; maximum, $41.35; aggregate, $840.50; average, $15.

In the original cases disposed of within the year ending June 30, 1935, the costs in 20 cases reported on is as follows: Mimimum, $3.70; maximum, $42.95; aggregate, $319; average, $10.95.

In the year ending June 30, 1935, the court disposed of 803 motions, of which 21 were withdrawn before presented, 569 were allowed, 185 denied, and 28 were pending on July 1, 1935.

There were pending in the supreme court July 1, 1935, a total of 291 cases, compared with 366 on the same date in 1934; 333 in 1933; 357 in 1932; 393 in 1931; 397 in 1930; 376 in 1929; and 341 in 1928.

Supreme Court: Eight-year Summary

In the eight years the clerk of the supreme court has furnished us detailed information of the work of that court, it has disposed of 4,766 cases, of which 1,523 were dismissed before final submission, and 3,242 were submitted on the merits and written opinions filed.

EIGHT-YEAR SUMMARY, KANSAS SUPREME COURT

Year Ending June 30.	Cases.	Disposed of.	Dismissed.	Submitted.
1928	Appealed, civil	529	143	386
	Appealed, criminal	101	44	57
	Original	43	13	33
	Totals	673	200	473
1929	Appealed, civil	475	128	347
	Appealed, criminal	72	29	43
	Original	36	18	18
	Totals	583	175	408
1930	Appealed, civil	504	143	351
	Appealed, criminal	77	37	40
	Original	52	16	36
	Totals	633	196	437
1931	Appealed, civil	490	131	359
	Appealed, criminal	63	29	34
	Original	38	13	25
	Totals	591	173	418
1932	Appealed, civil	522	159	363
	Appealed, criminal	74	45	29
	Original	32	6	26
	Totals	628	210	418
1933	Appealed, civil	459	135	324
	Appealed, criminal	66	35	31
	Original	23	5	18
	Totals	548	175	373
1934	Appealed, civil	427	149	278
	Appealed, criminal	52	30	22
	Original	42	11	31
	Totals	521	190	331
1935	Appealed, civil	506	167	339
	Appealed, criminal	58	26	32
	Original	25	11	13
	Totals	589	204	384
	Grand totals	4,766	1,523	3,242

Of the 3,242 cases submitted, there were 5 cases decided without written opinions. Written opinions were filed in 64 cases before the first regular opinion day; 2,953 on the first regular opinion day; 197 on the second; 21 on the third; 8 on the fourth; 3 on the fifth and 1 on the sixth regular opinion day after they were submitted. In 10 cases there were rehearings, making two opinions in each of those cases. The regular opinion day ordinarily is a month after the case is submitted; more accurately it is the Saturday of the week hearings are had the next month after the case is submitted.

DISPOSITION OF APPEALED CASES BY WRITTEN OPINIONS

YEAR ENDING JUNE 30.	Cases.	Affirmed.	Per-cent.	Re-versed.	Per-cent.	Modi-fied.	Per-cent.	Total.
1928	Appealed, civil	261	68	104	27	21	5	386
	Appealed, criminal	52	91	5	9	0	0	57
1929	Appealed, civil	238	69	94	27	15	4	347
	Appealed, criminal	39	91	4	9	0	0	43
1930	Appealed, civil	258	72	92	25	11	3	361
	Appealed, criminal	31	78	9	22	0	0	40
1931	Appealed, civil	258	72	73	20	28	5	359
	Appealed, criminal	28	82	6	18	0	0	34
1932	Appealed, civil	267	74	80	22	16	4	363
	Appealed, criminal	24	83	5	17	0	0	29
1933	Appealed, civil	215	66	87	27	22	7	324
	Appealed, criminal	26	84	5	16	0	0	31
1934	Appealed, civil	169	61	91	33	18	6	278
	Appealed, criminal	19	86	3	14	0	0	22
1935	Appealed, civil	211	62	116	34	12	6	339
	Appealed, criminal	26	81	6	19	0	0	32
Totals	Appealed, civil	1,877	68	737	27	143	5	2,737
Totals	Appealed, criminal	245	85	42	15	0	0	287
	Grand totals	2,122	.....	779	.....	143	.....	3,024

Administration of Absentee's Estate

By SAMUEL E. BARTLETT

It is a rule of the common law that a presumption of death arises from the fact of a person's continuous and unexplained absence from his last known place of abode for a period of seven years, unheard of by the persons who would naturally have received information concerning the absentee, after diligent inquiry extending to the places where information is likely to be obtained. (Wigmore on Evidence, 2d ed., vol. 5, sec. 2531; *Woodmen v. Gerdom,* 72 Kan. 391, 77 Kan. 401; *Renard v. Bennett,* 76 Kan. 848; *Thompson v. Millikin,* 93 Kan. 72.)

Holdsworth in his History of English Law has given us an instructive account of the beginning and development of this rule. It evolved, in part, from a statute pertaining to estates. The author says:

"A statute of 1603 had exempted from the punishment of bigamy those marrying again, whose spouses had been seven years beyond the sea, or had not been heard of for seven years. Another statute of 1667 enacted that, if an estate depended on the life of a person who remained beyond the seas, or

elsewhere absented himself within the kingdom for seven years, in an action begun by a lessor or reversioner to recover the estate, such person was to be accounted dead, unless proved to be alive. Thus, for this particular purpose, after absence for seven years without having been heard of a person was presumed to be dead. This statute was probably extensively construed; but there is no suggestion of a general presumption of death from such absence till the case of *George v. Jesson* in 1805. The existence of such a presumption was suggested in that case by Lord Ellenborough, C. J., on the analogy of these two statutes; and he gave effect to this presumption in 1809. These statutes and cases were the foundation of the rule, first stated in 1815 by Phillips, in his book on Evidence, that if the issue is the life or death of a person, the presumption of a continuance of his life 'ceases at the end of seven years from the time when he was last known to be living.' This rule was accepted by succeeding writers on the law of evidence, and was thus stated by Stephen in his Digest in 1876: 'A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.'" (Vol. 9, pp. 141, 142.)

While it is true that the presumption is not conclusive, nevertheless courts have held that the very fact of the presumption occasioned by absence, irrespective of the force of the presumption, is a manifestation of governmental power to give effect to the status arising from such absence. The right to regulate the estates of absentees, based on this common-law principle, has therefore been recognized by the courts as being within the scope of governmental authority. (*Cunnius v. Reading School District,* 198 U. S. 458, 471.) The main object of legislation relating to the status thus arising has been to take possession of and preserve the property for the absent owner, not to deprive him of it upon the assumption that he is dead. (*Scott v. McNeal,* 154 U. S. 34, 42; *Burns v. Van Loan,* 29 La. Ann. 560.)

It should also be noted that, from an early English period, judgments declaratory of status had a more extensive effect than other judgments in that they were binding as against all the world, and that this effect forms the basis of the modern distinction between judgments in personam and judgments in rem, which latter inhere in probate proceedings. (Holdsworth's History of English Law, vol. 9, pp. 151, 152.)

The foregoing would seem to be a sufficient foundation for the administration of an estate of an absentee; but a more substantial one appears in the Roman law. In the case of *Cunnius v. Reading School District,* 198 U. S. 458, Chief Justice White pointed out that "Whilst it may be that under the Roman law there was no complete system provided for the administration of the estate of an absentee, it is nevertheless certain that absence, without being heard from for a given length of time, authorized the appointment of a curator to protect and administer an estate." (p. 470.) The chief justice, expounding the fundamental conceptions from which the power of government on the subject is derived, quoted from Demolombe's commentaries on the Code Napoleon as follows:

"Three characters of interest invoke a necessity for legislation concerning this difficult and important subject. First, the interest of the person himself who had disappeared. If it is true that, generally speaking, every person is held, at his own peril, to watch over his own property, nevertheless the law owes a duty to protect those who, from incapacity, are unable to direct their affairs. It is upon this principle of public order that the appointment of

tutors to minors or curators to the insane rests. It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and which, therefore, places him in the category of an incapable person, whose interest it is the duty of the law to protect. And it is for this reason that the provisions as to absence in the Code are placed in the chapter treating of the status of persons, because the absentee, in the legal sense, is a person occupying a peculiar legal status. Second, the duty of the lawmaker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. Third, finally, the general interest of society which may require that property does not remain abandoned without some one representing it, and without an owner."

Provisions similar to those in the Code Napoleon were incorporated in the Louisiana Code of 1808. The legislature of Pennsylvania, in 1885, adopted a law "relating to the grant of letters of administration upon the estates of persons presumed to be dead by reason of long absence from their domicile." Massachusetts, by act of 1904, also made provision for the administration of the estate of an absentee. The validity of the Pennsylvania act was upheld by the supreme court of the United States in 1905; and that of Massachusetts was likewise sustained in 1911. Following the decision in the Pennsylvania case, Maryland enacted a statute like that of Pennsylvania. (*Savings Bank v. Weeks,* 110 Md. 86, 72 Atl. 475, 22 L. R. A., n.s., 221.) Since these decisions, and perhaps largely as a result of them, state legislation on the subject has become more or less general. (See "Absentees' in 1 Corpus Juris, sec. 4, and Annotations.)

Unanimous decisions of the supreme court of the United States have conclusively established the following propositions as governing in such cases:

First: Under the general authority conferred by statute upon the probate courts of the various states to grant administration upon and to settle estates of deceased persons, those courts are not authorized to decide conclusively against a living person that he is dead.

Second: All proceedings in such courts in the granting of administration under such general power depend upon the fact of death, and are null and void if the person be in fact alive, whether such administration be granted upon a misapprehension of the fact of death, or upon the presumption of death arising from absence.

Third: It is within the power of the state to confer jurisdiction upon the probate court to administer upon estates of absentees, even though they be alive, by special and appropriate proceedings applicable to that condition, and distinct from the general power to administer upon the estates of deceased persons; but such power must be executed in harmony with the requirement of due process of law, guaranteed by the fourteenth amendment to the federal constitution. (*Scott v. McNeal,* 154 U. S. 34, 38 Law. Ed. 896; *Cunnius v. Reading School District,* 198 U. S. 458, 49 Law. Ed. 1125; *Blinn v. Nelson,* 222 U. S. 1, 56 Law. Ed. 65.)

In the decisions dealing with the subject, a distinction is pointed out between those statutes which authorize the settlement of the estate of a deceased person under which the proceedings are void and the whole jurisdiction gone if the person is in fact alive, and statutes in which a state undertakes to deal with property within its jurisdiction when the owner has abandoned it, or for some other reason, cannot be found. (*Nelson v. Blinn,* 197 Mass. 279,

83 N. E. 889, 15 L. R. A., n. s., 651, 14 Ann. Cas. 147, 125 Am. St. Rep. 364; *Blinn v. Nelson,* 222 U. S. 1, 56 Law. Ed. 65, Ann. Cas. 1913B 555; *Cunnius v. Reading School District,* 206 Pa. St. 469, 56 Atl. 16, 98 Am. St. Rep. 790; *Cunnius v. Reading School District,* 198 U. S. 459, 49 Law. Ed. 1125, 3 Ann. Cas. 1121; *Stevenson v. Montgomery,* 263 Ill., 93, 104 N. E. 1075, Ann. Cas. 1915C 112; *Savings Bank v. Weeks,* 110 Md. 86, 72 Atl. 475, 22 L. R. A., n. s., 221; *Chamberlain v. Anderson* (Iowa), 190 N. W. 501, 26 A. L. R. 957; *Barton v. Kimmerley,* 165 Ind. 609, 76 N. E. 250, 112 Am. St. Rep. 252; *State, ex rel., v. Superior Court* (Wash.), 275 Pac. 694; *Walz v. Dawson* (Mich.), 209 N. W. 177.) In the case of *Nelson v. Blinn,* supra, the Massachusetts supreme judicial court said:

"In regard to such a kind of jurisdiction as is exercised under this statute, and the effect of long delay and uncertainty as to the ownership of property in the hands of a receiver (appointed under the statute), we cannot say that the legislature might not properly enact that one's rights of property within our jurisdiction should be lost if he is absent for fourteen years without attempting to exercise them."

The general scheme of the Massachusetts law is that, in case a person having property in Massachusetts has disappeared or absconded from the place where he was last known to be, and has no agent in the state, and it is not known where he is, or if such person has so disappeared without providing for his wife or minor children dependent upon him for support and it is not known where he is, or if it is known that he is without the state, anyone who would be entitled to administer upon his estate if he were deceased or, if there are none such, any suitable person may file a petition in the probate court of the county where such property is, stating the facts of disappearance and a schedule of the property, real and personal, and asking for a receiver. A warrant is issued directing the sheriff or his deputy to take possession of the property named in the schedule. After due notice and the issuance and return of a warrant a receiver may be appointed of the property scheduled in the sheriff's return; and the court is to find and record the date of the disappearance. If the absentee does not appear and claim the property within fourteen years after the recorded date, his title is barred. If, after fourteen years, the property has not been accounted for or paid over, it is to be distributed to those who would have taken it on the day fourteen years after the said date. If the receiver is not appointed within thirteen years after said date, the time for distribution and for barring actions relative to the property shall be one year after the date of the appointment, instead of the fourteen years above provided.

The case of *Blinn v. Nelson,* 222 U. S. 1, arose under the Massachusetts law. The plaintiff in error was appointed receiver of the property of the absentee on July 20, 1905, and the date of the disappearance of the latter was found and recorded as "within or prior to the year 1892." The petition was filed on March 18, 1907. The probate court made a decree of distribution, which was affirmed by the supreme judicial court of Massachusetts. The case was taken to the supreme court of the United States. Mr. Justice Holmes, in delivering the opinion of the court, said:

"So the question, put in the way most favorable for the plaintiff in error, is whether a statute of limitations that possibly may allow little more than one year is too short when the property is held in the quasi adverse hand of the

receiver for that time. We cannot doubt as to the answer. If the legislature thinks that a year is long enough to allow a party to recover his property from a third hand, and establishes that time in cases where he has not been heard of for fourteen years, and presumably is dead, it acts within its constitutional direction. Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done."

The validity of the Pennsylvania statute was upheld in the case of *Cunnius v. Reading School District,* 198 U. S. 458, above cited. The difference between the two statutes should be noted. It is well pointed out in the case of *Nelson v. Blinn,* 197 Mass. 279, above cited. The court said:

"The statute in Pennsylvania provides that a distribution of the estate of the absentee may be made in proceedings commenced after he has been absent and his whereabouts have been unknown for seven years, and it would seem that the estate might be settled and the distribution ordered within a comparatively short time after the expiration of the seven years. Upon such distribution, the distributees must give security, to be approved by the court, that they will refund the amounts received, with interest, should the absentee in fact be alive; but if they are not able to give such security, the money is to be put at interest, and the interest paid only to the distributees until security has been given, or until 'the court, on application shall order it to be paid to the person or persons entitled to it.' Under this statute there is nothing to prevent the court from ordering the whole estate paid over to the distributees, without security, long before the expiration of fourteen years from the time of the absentee's disappearance. The principal difference between the two statutes is that, under this in Pennsylvania, the whole property might be distributed without security, if the court should order it, within a period that might not be more than nine or ten years from the disappearance of the absentee, while, under our statute, no distribution can be made before the expiration of fourteen years from his disappearance, at which time all his rights to the property are barred by the statute. This last is, of coure, a statute of limitations."

The Iowa law was enacted in 1913. In the case of *Chamberlain v. Anderson* (Iowa), 190 N. W. 501, 26 A. L. R. 957, the Iowa supreme court, after observing that "there is much contrariety in the statutes of the various states," held:

"Proceedings for the administration of the estate of an absentee having property in this state are based neither upon the fact nor the presumption of the death of such absentee. . . . Although the absentee may in fact be alive adjudication in probate, if authorized by the statute and the proceedings are regular, is binding and conclusive upon him."

The majority, if not all, of the later enactments proceed upon the assumption that the owner of the property is alive. (*State, ex rel., v. Superior Court* (Wash.), 275 Pac. 694; *Walz v. Dawson* (Mich.), 209 N. W. 177.)

The Michigan case of *Beckwith v. Bates,* 228 Mich. 400, 200 N. W. 151, 37 A. L. R. 819, was an action by a returned absentee against the administrator of his estate to recover the money received and distributed by the administrator. The case presented this question: "Has the probate court jurisdiction to administer the estate of one presumed by long-time absence to be dead, but in fact alive?" The court, after an extended discussion for the authorities, declared: "The proceedings in the probate court must be held to be wholly void and to afford defendant no protection against plaintiff's demand." This case was decided October 6, 1924. The following year the Michigan legis-

lature gave that state a statute on the subject, which is a model of completeness and excellence. Undoubtedly, much research was done in its preparation and its draftsmen were skilled in the art. It is "An act to provide for the disposition of the property in the state of Michigan of persons who have been absent from their last known place of abode for the continuous period of seven years with their whereabouts also unknown to those persons most likely to know thereof, and who have not been heard from by such persons during said period; and to repeal all acts and parts and acts contravening the provisions of this act." (Public Acts of Michigan, 1925, No. 205.)

If Kansas adopts a code of probate procedure, the procedural provisions may well be included in such code of procedure. As above stated, the act is complete in itself as to both procedural and substantive law. To indicate its general plan, some of the more important substantive provisions are quoted:

"SECTION 1. The property, both real and personal, in the state of Michigan, of any person who has left for any reason whatsoever his or her last place of abode, as known by those persons most likely to know the same, shall be subject to the provisions of this act: *Provided,* The absence has the following characteristics: (*a*) The absence shall be for the continuous period of seven years. (*b*) The whereabouts of the person shall have been for the same period unknown by those persons most likely to know the same. (*c*) The person shall for the like period have not been heard from by means of any message, oral or written, or by means of any token, received by those persons most likely to hear from the person. (*d*) Those person most likely to know the last place of abode and the whereabouts of the absent person, and most likely to hear from the absent person, shall be the spouse left in the last place of abode and the parents of the absent person; and if there be neither such spouse nor parent, such persons as the court shall determine upon proofs in each particular case.

"SEC. 2. Whenever any person leaving property in the state of Michigan shall have been absent from his or her last known place of abode for the continuous period of seven years with his or her whereabouts also for such period unknown to those persons most likely to know thereof, and such person has for the like period not been heard from by those persons most likely to hear from such person, the property of such person in the state of Michigan may be administered as though such person were dead, subject to the conditions, restrictions and limitations hereinafter described."

"SEC. 9. Except for the purposes of paying taxes, special assessments, liens, insurance premiums, allowed claims for debts contracted by the absent person before his or her disappearance, or to prevent great depreciation on account of neglect, or to specifically fulfill contracts made by the absent person before his or her disappearance, no sale, mortgage, or other disposition of the property of the absent person shall be had until the lapse of one year after the appointment and qualification of the representative of his or her estate.

"SEC. 10. No distribution nor assignment to beneficiaries of the property or the proceeds thereof of the absent person shall be made in any event until after the lapse of one year after the appointment and qualification of the representative of his or her estate; nor shall such distribution or assignment be made until after the lapse of three years after the appointment and qualification of the representative of his or her estate, unless the distributee or assignee execute and deliver to the representative a surety company bond in a penal sum not less than the value of the property distributed or assigned and for such additional amount as the court may prescribe, to be approved by the probate judge conditioned to return the property or the value thereof to the representative in case the absent person be adjudicated in the manner hereinafter set forth to have been still living since the commencement of said period of seven years, and also conditioned to save the representative harmless

from the damages and expenses of all suits or proceedings brought by the absent person or anyone succeeding to his or her rights by reason of such distribution or assignment having been made during said period of three years."

"SEC. 15. In case no person makes claim during said period of three years after the appointment and qualification of the representative either to be the absent person, or to have succeeded to the rights of the absent person since the commencement of said period of seven years by reason of the death of the absent person, then a conclusive presumption shall arise that the absent person died prior to the filing of the petition for administration or the probate of his or her will; and the estate shall be distributed accordingly, so far as the same has not already been accomplished; and by order of court the estate shall be closed and the liability of the representative to claimants ended, and the liability of distributees ended, and all bonds given to them canceled: *Provided,* That, if in any case such period of absence as set forth in section one of this act shall have exceeded fifteen years at the time of the filing of the petition for the appointment of an administrator, then said estate may be distributed and closed at the end of one year, without a bond being given, with like effect as hereinbefore provided for at the end of three years."

The act has been before the supreme court of Michigan for consideration. In the case of *Walz v. Dawson,* 209 N. W. 177, that court recited that in the recent case of *Beckwith v. Bates,* supra, the court held: First, "that the probate court has no power, under its general authority, to administer the property of a person who is alive, for to do so would violate the fourteenth amendment to the federal constitution." Second, "that the state had the power by proper legislation to provide for the administration of the estates of persons who are absent for an unreasonable time." After reviewing the act, the court then said: "We think the law, as a whole, contains reasonable and ample provisions for the protection (of the rights of the absentee) should he be alive. It is not therefore void as violating the fourteenth amendment to the federal constitution."

One other matter should be considered. What about the property during the seven-year period of absence? Should it be permitted to remain idle, waste away, or be sold for taxes? The "three characters of interest" stressed by Chief Justice White may become mainfest long before the seven-year period has expired. The state of North Dakota provided for the appointment of a trustee in such cases to take charge of the property and preserve it until death or survival is established, very much as we now appoint an administrator for a decedent's estate. No provision was made for notice of hearing. The act was declared unconstitutional, as it was clearly an attempt to deprive the owner of his property without due process of law. (*Clapp v. Houg,* 12 N. D. 600, 98 N. W. 710, 65 L. R. A. 757, 102 Am. St. Rep. 589.) "The absence of notice," the court said, "renders the proceedings void, and the statute is of no validity as against the property of a living person, because it does not provide for notice to him. In no case, under state procedure, is the mere taking of possession of property equivalent to notice of action to be taken in reference to such property."

The Michigan law, which was more carefully drawn, provides in substance: When any person is absent from his usual place of residence and his whereabouts are unknown for three months or more and shall leave property which is going to waste or is in danger of being destroyed or lost for the want of a property custodian, the probate court of the county in which he was last

known to reside may, on petition of the absentee's wife, next of kin, or creditors, and at a hearing, notice of which must be published once each week for three consecutive weeks in some newspaper in said county, appoint, for the purpose of preserving the absentee's estate, a temporary administrator to act until the fact of his death or survival is established. Said temporary administrator must, before entering upon his trust, give a bond as prescribed by law for administrators. (Compiled Laws of Michigan, 1915, sec. 138 40.) This statute has been construed by the supreme court of Michigan. (*Leahy v. Command,* 198 N. W. 432.) Several other states have similar laws. (Cal. Code Civ. Proc., sec. 1822 *et seq.;* Oregon, Laws of 1917, ch. 249; Arizona, Revised Statutes of 1913, par. 3850; Washington, Rem. Comp. Stat. secs. 1715-1 to 1715-10.)

While it is true that probate courts in this state have no constitutional authority to administer estates of absentees, it is equally certain that jurisdiction to do so may be conferred upon them by the legislature as has been done in other states. (Const., art. 3, sec. 8; *In re Johnson,* 12 Kan. 102; *Young v. Ledrick,* 14 Kan. 92; *State, ex rel., v. Anderson,* 114 Kan. 297.) The desirability, if not the necessity, of such legislation is apparent. It would solve many difficulties that now confront Kansas lawyers and their clients, especially as those difficulties arise in connection with titles to real property, and in its particular field it would materially aid in the administration of justice.

Winding Up of Partnership Estate on Death of a Partner

By CHESTER STEVENS

Article 4 of chapter 22, R. S. 1923, prescribes the method of handling and winding up the affairs of an ordinary partnership when the same is dissolved by the death of one of the partners. Some interesting questions arise in the interpretation of the provisions of this article. Possibly the conception prevails among some that upon the death of a partner, administration of the partnership affairs should be had in the probate court of the proper county by proceeding with an administration of the same in like manner as applies to the estates of decedents. A study of the article discloses that such is not the case.

Probate courts are created by section 8 of article 3 of the constitution of the state of Kansas, and provides:

"That there shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction and care of the estates of deceased persons, minors, and person of unsound minds, as may be prescribed by law, and shall have jurisdiction in cases of habeas corpus. . . ."

It is clear that the jurisdiction of the probate courts is by the constitution limited to the estates of "deceased persons, minors, and persons of unsound minds." This is the extent of the jurisdiction of these courts. That jurisdiction may be enlarged or diminished by the legislature except in cases of habeas corpus, as no limitation is prescribed for this clause. It follows that the jurisdiction of the probate court cannot extend to any other class of persons or to the rights of persons arising outside of the subjects expressly

described in the constitution. Neither can this jurisdiction be extended by implication.

"It is a well-known rule that the powers of a court of limited jurisdiction are to be found only in the statute which confers them; that such a court takes nothing by intendment or construction."

Carr v. Catlin, 13 Kan. 394.

As the jurisdiction of the probate court is expressly limited by the constitution to deceased persons, minors and persons of unsound minds, such jurisdiction could not attach to living persons or to their property. The death of a partner simply dissolves the partnership and the partnership is ended. The probate court cannot take jurisdiction of the property of the partnership because the surviving partners' interest in the partnership property remains intact, and as they are living persons, the probate court must be held to be without jurisdiction.

When the partners cannot agree upon the procedure for winding up the partnership affairs, or when one of the partners dies, and relief in the courts is sought in either case, the jurisdiction rests upon equitable grounds.

It has been expressly held that a probate court in Kansas has no equitable jurisdiction. (*Ross v. Woolard,* 75 Kan. 383). Therefore, resort must be to a court of equity.

An analysis of article 4 relating to partnership estates upon the death of a partner, seems inevitably to lead to the following conclusions:

Second 22-401 directs the executor or administrator of the estate of the deceased partner to make a separate inventory and have a separate appraisement of the whole of the partnership property. This does not conflict with any of the rights of the surviving partners. It is unquestionably proper that upon the death of a member of the partnership, his heirs or beneficiaries should be informed of what the partnership property consists and an estimate of the value thereof made. This is as far as this section goes.

The language of section 22-402 is unhappily phrased. It is susceptible of the interpretation that the executor or administrator of the deceased partner takes possession of all of the partnership property. It also appears to be in the alternative. It is ambiguous for the reason that the section does not prescribe when, how or upon what conditions the property shall be left with the executor or administrator or turned over to the surviving partner. In other words, the claims of each are equal, with no guide to determine which one shall have the preference.

In the case of *Shattuck v. Chandler,* 40 Kan. 516, the supreme court ruled that this law, which was article 2 of chapter 37 of the Comp. Laws of 1885, provides for the winding up and settlement of partnership estates, and

"That the property shall remain in the possession of the surviving partner, and if he sees fit to continue its management, and the disposing of the partnership assets, and the payment of the partnership debts, he may do so upon condition that he give a bond for the faithful performance of the duties imposed."

Under the general principles of law, the surviving partner retains the possession, custody and control of all of the partnership property for the sole purpose of winding up the partnership affairs. This principle was recognized in *Shattuck v. Chandler,* supra, when the Kansas supreme court followed the

decision of the United States supreme court in *Emerson v. Senter,* 118 U. S. 3, wherein it was held that the surviving partner could make a general assignment of the partnership property. Thus, it appears that the surviving partner never loses possession, custody or control of the partnership property merely by reason of the death of the other partner.

Under section 22-402 and the interpretation in *Shattuck v. Chandler,* the surviving partner retains sole possession and control, and the continuance thereof only depends upon his giving a bond to the state of Kansas in such sum and with such securities as is required of administrators of estates of deceased persons.

In section 22-403 the conditions of the bond are set forth, and upon the giving of the bond, the surviving partner is then obliged to use due diligence and fidelity in closing up the affairs of the partnership, apply the property to the payment of the partnership debts, render an account upon oath to the probate court when required, and pay over to the administrator or executor of the deceased partner's estate such proportion of the net assets as such deceased partner would have been entitled to had he been living and dissolution had.

Section 22-404 gives the probate court authority to cite the survivor to account and to adjudicate upon such accounting, but the extent of the adjudication is not prescribed by the statute.

Section 22-405 requires that the surviving partner must be cited for the purpose of giving a bond unless he voluntarily appears and gives a bond. Without such a citation, and the neglect or refusal of a surviving partner to give a bond, the administrator or executor of the deceased partner's estate is without any right or authority to take possession of the partnership property. This construction was expressly sustained in the case of *Teney v. Laing,* 47 Kan. 297, where it was said:

"The administratrix of the estate of a deceased member of a copartnership consisting of two persons has no legal right to take the possession of the property of the partnership from the surviving partner until such surviving partner has been cited for that purpose and neglects or refuses to give the bond required by section 2817, General Statutes of 1889, and until the administratrix of the undivided estate of the deceased partner has given the further bond required by section 2820, General Statutes of 1889."

It was further held in the above case that an action by the administratrix against the surviving partner for possession and control of the partnership property, without first citing the surviving partner, and without executing the further bond required of such administratrix, should be dismissed. This construction of the statute is in harmony with the language of the statute itself.

If the surviving partner shall not voluntarily appear and give the bond, the administrator or executor of the deceased partner's estate has the right to move for a citation, and after the issuance and service of such citation, the surviving partner refuses or neglects to give the bond required, the administrator or executor is entitled to administer the partnership property by giving the bond required by section 22-406 of article 4.

Upon the giving of such bond by the surviving partner, either voluntarily or upon citation, his only duties are: First, exercise due diligence and fidelity in closing the affairs of the partnership; second, apply the property thereof to the payment of the partnership debts; third, render an account upon oath

to the probate court when required of all of the partnership affairs, including an inventory of the property owned by the partnership and the debts due thereto, together with what may have been paid by the survivor upon the partnership debts and what still may be due and owing therefor; and fourth, pay over within two years unless a longer time be allowed by the probate court, to the executor or administrator, the excess, if any, which, of course, must be construed to relate only to that part to which the deceased partner would have been entitled had he not died, after a distribution had been had.

Unquestionably, the requirements of the statute as to the duties of the surviving partner are within the powers of the legislature as the winding up of the affairs of a partnership upon the death of one of the partners is to some extent the closing of the estate of the deceased partner. It is likewise necessary, for the information of the probate court and the heirs or beneficiaries of the deceased partner to know of what the partnership estate consists, the amount of its debts and the general status of its affairs, that a true accounting, under oath, be rendered by the surviving partner from time to time.

The bond required of the surviving partner is to insure the faithful handling of the property of the partnership and the winding up of its affairs, the application of the proceeds thereof to the payment of the debts and the payment over to the estate of the deceased partner of his part or portion of the assets. The bond also functions as the foundation of the right of the survivor to manage the partnership property and to liquidate its affairs. Under the statute, he has no right to continue in the management of the partnership business for the purpose of winding up or to retain the possession and control of the same unless he gives the bond, although this right can only be terminated by citation. However, he is precluded from maintaining an action in regard to the partnership affairs, and it was held in the case of *Burris v. Burris,* 137 Kan. 831, that a surviving partner has no right to commence, maintain or prosecute an action with reference to any of the partnership property without first having given the bond required by the statute.

In brief, article 4 prescribes a simple, direct and expeditious method of winding up the affairs of such a partnership and compels and secures an honest settlement of its affairs and distribution of its assets. It gives to the creditors of the partnership preference to payment out of the partnership property. It is declaratory of the general rule of the law that the surviving partner has the exclusive right and is under the duty to liquidate the affairs of the partnership; that this duty must be performed as expeditiously as possible, with due diligence and an honest accounting made. It does not destroy or impair the right of the surviving partner to use his best judgment to deal with the partnership property for the purpose of winding it up so as to yield the largest return. He may maintain actions against the debtors of the firm and recover property belonging to the firm. In the exercise of good and honest judgment, he may continue the business, may enter into new contracts or obligations, without, however, binding the private or personal estate of the deceased partner, if by such action he helps the affairs of the partnership and increases its value. Under what seems to be the weight of authority, he may pledge or mortgage the firm's personalty. However, he must use good judgment and the utmost good faith.

He retains the power to dispose of the real estate of the firm when necessary for the payment of its debts, and according to respectable authority, he may also dispose of such real estate for the settlement or liquidation generally of the affairs of the partnership. He may execute a valid deed to the equitable title of the firm and either he or the purchaser may compel the heirs of the deceased partner to join in a conveyance of the legal title.

In Kansas, the surviving partner is rightly entitled to reasonable attorney's fees, to necessary expenses, and to just compensation for his services in winding up the affairs of the partnership. (*Trout v. Thrall,* 107 Kan. 509).

Before closing this discussion, it may be well to refer to section 22-409, 1933 Supplement to R. S. This section was passed in 1927. It must be considered in connection with article 4, chapter 22, R. S. 1923. It was evidently the intent of the legislature in section 22-409 to give specific authority for the sale of the partnership property when the surviving partner has refused or neglected, after citation, to give the bond required and the administrator or executor of the deceased partner's estate has taken charge of the partnership property under article 4. Unquestionably the legislature possessed the power under the constitutional provision creating the probate court, to direct the administration of the partnership estate when it come wholly under the control of the probate court through the failure or neglect of the surviving partner to give the bond required. Surely it was not meant to apply to the partnership property legally in the hands of the surviving partner.

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