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PROPERTY RIGHTS OF PERSONS WHO HAVE DISAPPEARED

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THE books are full of cases dealing with the property rights of persons who have disappeared and had no communication with relatives or friends. Owing to the ease with which a person may travel to distant places, the roving habits of some individuals, and the absence of any system of registration by which identity may be established, it frequently happens that men drop out of sight and are heard of no more. Diligent search for them proves fruitless and in time hope of finding them alive is abandoned and a conviction that they are dead takes its place. Then come questions relative to the care and disposition of their property and the rights of creditors and heirs.

The legal problems to be solved are often difficult and, until quite recently, have not received much attention from legislatures or courts. Aside from the familiar common law rule that a presumption of death arises after an unexplained absence of seven years, there was little to guide a lawyer in advising a client as to his rights, whether the client was an heir, or a creditor or debtor of the absentee. The powers the state could exercise in dealing with the property and the rights the absent owner could assert if he returned were uncertain. There were doubts as to the procedure to establish the rights of claimants of the property and no definite lines to mark the jurisdiction of the courts in dealing with it. Now many of the states have legislation covering some of the ground which was formerly left untouched, and a series of cases in the Supreme Court of the United States and in leading state courts have given body and form to the law on the subject.

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Starting with the presumption of death when a person has not been seen or heard of for seven years, the attempt was sometimes made to dispose of his property in the same manner as though his death had been indisputably established, but, since the presumption was not conclusive and, like Enoch Arden, men long reputed to be dead not infrequently return to their former places of abode, it was inevitable that sooner or later the courts would be called upon to determine the effect of the administration, through the probate court, of the estate of a man presumed to be dead who was in fact alive.

The validity of such a proceeding was determined in *Scott v. McNeal*.[1] Scott was the owner of land in the state of Washington. In March, 1881, he mysteriously disappeared from his place of abode and remained away continuously until July, 1891, with no knowledge as to his existence or whereabouts on the part of those with whom he had been accustomed to associate. Careful inquiry made by relatives and friends failed to reveal facts indicating that he was still alive. In April, 1888, application was made to the probate court for the appointment of an administrator. Notice of the application was given in the manner prescribed by statute and, at the time set for the hearing and upon evidence then presented, the court found that he was dead and appointed an administrator, by whom his land was sold and conveyed to one Ward, who subsequently conveyed it to McNeal, who took possession and made valuable improvements. Thereafter Scott returned and brought an action in ejectment against McNeal and was defeated in the state court, where it was held that the proceedings in the probate court were valid. Asserting that he had been deprived of his property without due process of law, Scott carried the case to the federal Supreme Court. That court held that letters of administration upon the estate of a living person have no validity or effect whatsoever. The reasoning was that it was not within the jurisdiction of the probate court to grant administration of the estate of a person not dead and that its erroneous determination that he was dead did not invest the person appointed as administrator with power to act in that capacity. In brief, the court's conclusion was that the whole proceeding in the probate court was a nullity and might be impeached collaterally. The supreme court of Washington had held that the administra-

[1](1894) 154 U.S. 34, 38 L.Ed. 896, 14 S.C.R. 1108.

tion of the estate of a deceased person is a proceeding in rem in which his property is taken into the custody of the probate court, and that Scott had received constructive notice of the proceeding in the manner prescribed by the local statute. This view was rejected on the ground that the estate was not seized upon the filing of a petition for administration, but only after and under the order granting the petition, and, since jurisdiction to issue letters of administration rests upon the fact of death, the notice given before issuing such letters necessarily assumes that fact and was addressed not to Scott but to those who, after his death, might be interested in his estate.

"Notice to them," said the court, "cannot be notice to him because their interests are adverse to his. The whole thing, so far as he is concerned, is res inter alios acta."

The decision is far-reaching in its effects. All acts of the administrator of the estate of a man whom everybody erroneously supposed to be dead are wholly void as against him if he reappears and claims his property. The administrator's receipt for money will not discharge the debt. His deed passes no title. Those who have dealt with him in the utmost good faith are not protected, although his acts were authorized or approved by the court appointing him.

Fridley v. Farmers Bank[2] is in line with *Scott v. McNeal.*[3] It was there said:

"The probate court is given no jurisdiction over the estates of living persons . . . ; and, . . . although evidence be presented justifying the belief that a person is dead and the probate court assumes jurisdiction and administers his estate in the belief that he is dead, yet, if he in fact be living, the entire proceeding is coram non judice and utterly void."

Formal administration in the probate court being utterly ineffective, as held in *Scott v. McNeal,* a number of states, apparently following the lead of Louisiana, enacted statutes authorizing a designated court, to appoint a person to take charge of the property of an owner long absent from his usual place of abode and to dispose of it very much as though he were really dead.

In *Beckwith v. Bates*[4] the court recognized the power of the state to provide by legislation for the preservation for a reasonable time of the estate of a person presumed to be dead, and for

[2](1917) 136 Minn. 333, 162 N.W. 454.
[3](1894) 154 U.S. 34, 38 L.Ed. 896, 14 S.C.R. 1108.
[4](Mich. 1924) 200 N.W. 151.

the designation of a period of limitation within which the owner must appear, after which distribution to his heirs might be made. But, in the absence of such legislation, the court held that the grant of administration of the estate of a person presumed dead but actually living was void ab initio and that, although the estate had been distributed, the owner need not pursue the distributees but might hold the administrator personally liable.

Probably such legislation could not be sustained in Minnesota, if the attempt were made to confer jurisdiction on the probate court, because the constitution limits the jurisdiction of that court to the administration of the estates of deceased persons and persons under guardianship.

A statute of the general character last mentioned was enacted in Pennsylvania and came before the Supreme Court of the United States in *Cunnius v. Reading School District.*[5] Margaret Cunnius had a right of dower in certain land which had been conveyed to the school district. She was domiciled in the city of Reading and left her place of abode in the year 1888 and was not heard of for more than seven years thereafter. In 1897, her son, who resided in Reading, applied for and obtained letters of administration under a statute providing for the administration of the estate of a person presumed to be dead by reason of long absence from his former domicile. The statute provided for the revocation of the letters on proof that the absentee was in fact alive, and further provided that all acts previously done by the administrator should remain as valid as if the letters had not been revoked, but the title to money or property received by the supposed heirs of the absentee should not be good, and such money or property might be recovered from them by the absentee precisely as though the statute had not been enacted. In 1889, Mrs. Cunnius returned to Reading and sued the school district to recover the sum due her by virtue of her dower right. The defense was that the district had paid the amount sued for to the administrator. The supreme court of Pennsylvania sustained this defense and she carried the case to the federal Supreme Court, where she contended that a state has no jurisdiction over the person or property of an absentee and all acts done by the administrator are void and open to collateral attack. The following is an abridged statement of the conclusions reached by the court:

[5](1905) 198 U.S. 458, 49 L.Ed. 1125, 25 S.C.R. 721.

The right of a state to make regulations concerning property within its jurisdiction is an attribute of government essential to the performance of the purposes for which government exists. The right has ever been recognized both in the common and in the civil law. It may be exercised by means of legislation conferring jurisdiction on a state court to entertain a special proceeding for the administration and care of the property of an absentee irrespective of the fact of death, and a statute making provision for such a proceeding will be sustained if it safeguards the interests of the absentee in case he returns. The reasoning of the court is convincing, although it would seem at first blush that there is no great difference between seizing and disposing of a man's property on the erroneous supposition that he is dead and doing the same thing because he has abandoned the property and gone beyond the boundaries of the state where it is situated. The distinction between the two cases supposed is this: In the first, the power of the state over property within its boundaries is being exercised on the assumption that the owner is dead. His death is the only foundation for the jurisdiction of a probate court to distribute his estate in the usual course of administration. The foundation for the proceeding being destroyed, everything that was done goes for naught. In the second case, jurisdiction does not depend upon the fact of death at all, but upon the absence of the owner of the property from the state with no one lawfully in charge of the property. The reason for sustaining the jurisdiction of the courts in such a case is well stated by the supreme court of Pennsylvania in *Cunnius v. School District*,[6] where in substance this was said:

Property without a known owner should be conserved by the state having jurisdiction over it. Hence the state is justified in stepping in and taking charge of it when the owner has abandoned it. If he be really dead, the proceeding under which this is done is unimpeachable. If not dead and his right to re-establish his claim has been protected so far as practicable, a proceeding to conserve the property should not be open to attack on jurisdictional grounds. By abandoning the property the owner exposes it to the danger of loss or destruction and the state is interested in protecting it for the benefit of its citizens and has a duty to perform in that regard.

[6](1903) 206 Pa. St. 469, 56 Atl. 16.

The *Cunnius Case* has been cited repeatedly in sustaining statutes authorizing courts to appoint some one, variously designated as administrator, receiver, curator, or agent, to take charge of property abandoned by absentees. Such statutes usually provide for published notice of the time and place of hearing the application for the appointment of a custodian of the property, authorize the person appointed to sell it and pay the debts of the absentee and then distribute the residue of the funds in his hands among those who would take as heirs of the absent owner if he were dead. This is but little different from the usual administration and distribution of the estate of a deceased person, but in cases of that sort the court proceeds on the assumption of death and not on the assumption that there is a living owner of the property who has abandoned it.

Blinn v. Nelson[7] deals with a statute of Massachusetts providing for the appointment by the probate court, after due notice, of a receiver of the property of a person who has disappeared, leaving no agent in the state. If the absentee does not appear and claim his property within a certain time, his next of kin may apply to the probate court for distribution by the receiver in whose hands the property is, and the decree of distribution becomes a bar to any claim the absentee may assert in case he reappears. The state court found no difficulty in sustaining the statute by applying the doctrine of the *Cunnius Case* and its ruling was upheld. One feature of the Massachusetts statute is a limitation as to the time within which the absentee may assert his claim as against one to whom the receiver has delivered the property. Unless the owner lays claim to the property within fourteen years after the receiver's appointment, his claim is barred. If the receiver is not appointed within thirteen years after the date of the owner's disappearance, as found by the court, the bar of the statute may be interposed by the person who received the property at the expiration of one year from the date of the appointment of the receiver. The court held that such a statute of limitation was not too short and that, if the legislature thinks a year is long enough to allow the owner to recover his property from a third person, when the owner has not been heard of for fourteen years and is presumably dead, it acts within its constitutional discretion.

Manifestly there is nothing unfair about a statute which bars

[7](1911) 222 U.S. 1, 56 L.Ed. 65, 32 S.C.R. 1.

an absentee's claim to his property when it is not asserted within a reasonable time. The principles underlying statutes of limitations are fully as applicable to an absent owner as they are to an owner having a known place of abode within the state. Everyone who has property knows that he may lose it by failing to pay taxes assessed upon it, or through a proceeding to enforce the payment of his debts, or by long continued possession by a disseizor. If he chooses to go away, leaving his property with no one in charge of it, he necessarily runs the risk of being deprived of it without his consent and has little cause to complain if he suffers the probable consequences of his voluntary act. Men usually take enough interest in their property to safeguard it themselves. Those who neglect to do so have no right to expect the state to protect it for them indefinitely or until they see fit to return and take charge of it.

Massachusetts, Pennsylvania and California are not the only states having statutes relative to the disposition of property owned by persons who have disappeared. Following the Cunnius and the other federal cases, statutes similar in some respects to those there considered have been sustained by the state courts in at last six other states.[8]

Germantown Trust Co. v. Powell[9] is a typical case. It was there held that a statute providing for the escheat to the state of unclaimed bank deposits was not open to attack on the ground that it contemplated the escheat of property of living persons or deprived them of their property without due process of law and that the fact of death was established presumptively by the depositor's failure to appear after published notice, it being practically impossible to establish by affirmative proof the death of a person whose whereabouts is unknown.

Massachusetts has a statute relating to unclaimed bank deposits. Deposits remaining unclaimed for more than thirty years, if the depositor cannot be found, may be transferred from the bank to the state treasurer and receiver general on obtaining the order of

[8]See Bickford v. Stewart, (1909) 55 Wash. 278, 104 Pac. 263, 34 L.R.A. (N.S.) 623; State v. First Nat. Bank, (1912) 61 Ore. 551, 123 Pac. 712, Ann. Cas. 1914B 153; Stevenson v. Montgomery, (1914) 263 Ill. 93, 104 N.E. 1075, Ann. Cas. 1915C 112; Barton v. Kimmerly, (1905) 165 Ind. 609, 76 N.E. 250, 112 A.S.R. 252; Savings Bank v. Weeks, (1909) 110 Md. 78, 72 Atl. 475, 22 L.R.A. (N.S.) 221; Chamberlain v. Anderson, (1923) 195 Ia. 855, 190 N.W. 501.

[9](1919) 265 Pa. St. 71, 108 Atl. 441.

the probate court, made upon the application of the attorney general after published notice. The statute was sustained in *Provident Institution v. Malone.*[10] The court said the statute related to a fund over which the owner has failed to exercise any act of ownership for so long a time as to raise a presumption that he has abandoned it, and that abandoned property should be preserved until the owner or his representative appears to claim it, or until it is escheated to the state. In a later case, *Security Savings Bank v. State of California,*[11] a statute quite similar to that of Massachusetts was also sustained. The court expressed the opinion that in view of the relation of debtor and creditor between a bank and a depositor, the deposit is intangible property within the state where the bank is located; that when, pursuant to a statute, the state brings suit to have an unclaimed deposit transferred as an escheat, the service of process on the bank effects a seizure of the deposit; that, as to the bank, the proceeding may be considered as one in personam; as to the depositor, as one quasi in rem; and as to other claimants, as one strictly in rem. The essentials of jurisdiction are the seizure of the res at the commencement of the suit, reasonable notice and an opportunity to be heard, and it was held that all these requirements were satisfied by the statute, which gave the court jurisdiction to discharge by its judgment the bank's obligation to the depositor.

First National Bank v. California[12] deals with a statute providing for the escheat to the state of bank deposits which have remained intact and unclaimed for twenty years. It was held that, as applied to National banks, the statute could not be sustained because Congressional legislation in respect of National banks has erected a system extending throughout the country independent, so far as powers conferred are concerned, of state legislation.

The legislation in Minnesota relative to the subject under discussion is far less comprehensive than it is in the states above mentioned. Section 6370[13] makes provision for the disposition of unclaimed deposits in a bank liquidated by the public examiner. Section 6391 declares that the provisions of the statute of limitations shall not apply to actions against savings banks brought by depositors. Section 6074 provides for the escheat of money depos-

[10](1911) 221 U.S. 660, 55 L.Ed. 899, 31 S.C.R. 661.
[11](1924) 263 U.S. 282, 44 S.C.R. 108.
[12](1923) 262 U.S. 366, 67 L.Ed. 1030, 43 S.C.R. 602.
[13]Minn., G.S. 1913.

ited in court and not claimed within twenty years; and Section 6066, et seq., for the disposition of unclaimed property in the hands of a bailee. Sections 7401 and 7402 relate to the disposition of money in the hands of an executor, administrator or guardian, belonging to a legatee, heir or ward who cannot be found. These and possibly other statutes which have escaped the writer's attention cover some of the contingencies which arise when the owner of property fails to claim it, but they leave a broad field untouched by legislation, which other states have found expedient to adopt. It is for the legislature to decide whether there is need for additional legislation patterned after that of Massachusetts, which seems to cover the ground as completely and satisfactorily as is possible under existing constitutional provisions.

At this point it may not be amiss to suggest some of the embarrassments of attempting, in the present state of our statutory law, to deal with the property rights of an absentee. If there are creditors, how may they enforce their demands? If the absentee be alive, they may sue and attach his property and thus subject it to the payment of his debts. They cannot recover a personal judgment against him without personal service of process, for, although he may have had a fixed place of abode at the time of his disappearance, after he has abandoned it, service by leaving a copy of the summons at that place with a person who resides there does not give the court jurisdiction.[14]

The validity of a judgment recovered in an action brought against an absentee, dead when the action was commenced and his property attached, is doubtful.[15] In the *Poupore Case,* after laying down the rule that a judgment against a party who is dead at the time suit is commenced is void, the court went on to say that the question of the applicability of the rule to a proceeding in rem or quasi in rem was not presented. Moreover, whether an attachment proceeding is one in rem, as was intimated in *Lewis v. Bush,*[16] is a question open to debate. Under our statute attachment is merely a provisional remedy in aid of the main action to which it is ancillary, and not an independent proceeding. It may become a proceeding in rem when the debtor cannot be found and personal service of the summons cannot be made. Whatever the rule may be in other jurisdictions, in Min-

[14]Berryhill v. Sepp, (1909) 106 Minn. 458, 119 N. W. 404.
[15]Poupore v. Stone-Ordean-Wells Co., (1916) 132 Minn. 409, 157 N. W. 648.
[16](1883) 30 Minn. 244, 15 N.W. 113.

nesota the security of titles founded upon attachment of property of an absent debtor, dead when the action was commenced, cannot be guaranteed. *Heffner v. Gunz.*[17] Accordingly the creditor of a person who has disappeared finds himself in this dilemma: If his debtor is alive, the creditor may safely sue and attach. If dead, he may have an administrator appointed and present his claim to the probate court. Whichever course he adopts he runs an even chance of discovering later that he proceeded on an erroneous assumption of fact. Everything depends on an uncertain factor which cannot be ascertained—the life or death of the debtor. These difficulties are avoided when there are statutes such as there are in other states.

Another class of persons whose standing is uncertain is composed of those who are the potential heirs of the absentee. If he is in fact dead, they are legally entitled to his property and should not be kept out of their inheritance for an interminable length of time. A statute which provides for the distribution of his property after it has been abandoned for a considerable time and bars his claim to restitution after the distributees have had possession for a certain length of time, would seem to be necessary and proper. If an administrator of the estate is appointed and the property is offered for sale, the purchaser should have some assurance that his title will be good. A time should come when the property may be so dealt with as to protect those who acquire it in good faith, no matter whether the absent owner be alive or dead. His rights should be guarded within reason, but they should not be allowed to outweigh those of everyone else if he sees fit to come back and claim property he has abandoned for many years.

In discussing the statutory law of this state, no reference has been made to legislation affecting undivided interest in or adverse claims to real property. By section 8056[18] partition may be had at the suit of one or more co-owners and the interest of an absent or unknown part owner may be sold, and, if a sale is made, his share of the proceeds may be invested for his benefit by the clerk of the district court.

Adverse claims to land may be determined and cleared away whether the claimant can or cannot be found and whether he be

[17]Heffner v. Gunz, (1882) 29 Minn. 108, 12 N. W. 342.
[18]Minn., G.S. 1913.

alive or dead.[19] They may also be extinguished by proceeding under the Torrens Law to register the title to land.

Legislation on the subject of the rights of unknown owners of land is common and is generally sustained. *American Land Co. v. Zeiss*[20] dealt with a statute of California providing for the re-establishment of titles where all public records had been destroyed. It was enacted to take care of the situation created by the San Francisco earthquake. The court remarked that undisclosed and unknown claimants of land are dangerous to the stability of titles; the state has power to provide for the determination of titles and may exercise the power to its fullest extent; and the very purpose of a proceeding to clear a title is to get rid of claimants who cannot be ascertained. It is reasonable to infer from the court's language that when a statute satisfies the essential requirement that unknown claimants, or those who are known but cannot be found, be given reasonable notice and an opportunity to be heard before their property is taken, the objection that it is taken without due process of law will be unavailing.

The last class of cases which should be mentioned are those involving life insurance. The contract of the insurer to pay upon proof of the death of the insured gives rise to a question as to what is sufficient proof of death, where the insured has disappeared under circumstances equally consistent with an inference of life or death. The supreme court of Minnesota has steadily adhered to the rule of the common law that an unexplained absence from one's usual place of abode for more than seven years raises a rebuttable presumption that the absentee is dead but no presumption as to the particular time when death occurred. In the application of the rule, there has been some confusion and possibly it may be difficult to reconcile all that has been said in all the cases. *Goodier v. Mutual Life Ins. Co.*,[21] is the last case in which the question was considered. It reviews the earlier decisions and makes clear the underlying principles which the court applied in each of them.

In taking leave of the subject, the writer makes bold to suggest that a bill embodying the best features of the statutes of other states might be received with favor by the legislature at its coming session and that, if enacted into a law, it would go far to simplify the solution of problems which most lawyers in active practice have encountered or will encounter sooner or later. The sug-

[19]Minn., G.S. 1913, secs. 8060, 8061.
[20](1911) 219 U.S. 47, 55 L.Ed. 82, 31 S.C.R. 200.
[21](Minn. 1924) 196 N.W. 662.

gestion is made with a consciousness that the public demand is for the repeal of some of the laws we have rather than the enactment of new ones unless the necessity for them is clear and urgent.