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Probate—Administration of an Estate Under Absentee Statute

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modifying. She contended that Superior Court jurisdiction to modify cannot be invoked by a motion and affidavit. *Held:* Writ granted. RCW 26.08.170 [REM. SUPP. 1949 § 997-17] (formerly RRS § 995-3; PPC § 7511-3) provides that "upon filing of a properly verified petition . . . the Superior Court . . . shall have full and complete jurisdiction of the cause." *State* ex rel. *Edwards v. Superior Court,* 37 Wn. 2d 8, 221 P. 2d 518 (1950). The decision apparently implies that filing a petition is the *only* effective procedure.

This is a surprising result. The usual modern view is that there is no substantial difference between a petition and a written motion. In the language of *Gibbs v. Ewing,* 94 Fla. 236, 113 So. 730 (1927), "There are no precise boundaries between motions and petitions. The latter merely amount to motions in writing." In Washington it was early recognized that the substance and not the form of a pleading determines its character and effect. In *Baer v. LeBeck,* 126 Wash. 576, 219 Pac. 22 (1923), the court said, "It is true that the portion of the application was at the heading termed a motion but it contains allegations which make it in substance a petition." In re *Force,* 113 Wash. 151, 193 Pac. 698 (1920) is to the same effect. The court in the *Force* case found "no merit" in a contention that a motion was improper procedure when a statute called for a petition, and later remarked in *Harju v. Anderson,* 125 Wash. 161, 215 Pac. 327 (1923), that the pleading in the *Force* case was titled a motion but "in substance and fact was a petition." More recently the court held that a pleading, though titled a motion, would be treated as a petition to insure a hearing on the merits. *Valley Iron Works Inc. v. Independent Bakery Inc.,* 171 Wash. 349, 17 P. 2d 898 (1933). One court has reached a result exactly contrary to that of the instant case. In *Bishop v. Bishop,* 238 Ky. 702, 38 S.W. 2d 657 (1931), it was held that a motion to modify the custody provisions of a divorce decree satisfies a statute requiring that a petition be filed.

The instant case is also difficult to reconcile with *McClelland v. McClelland,* 163 Wash. 59, 299 Pac. 984 (1931), in which the Court observed in another context that the procedural requirements of REM. REV. STAT. § 995-3, *supra,* do not apply where the application for modification is filed in the same county in which the divorce decree was rendered. The instant case relies on this statute even though all the litigation took place in the same county.

The decision becomes more confusing when it is noted that a writ of prohibition is an extraordinary remedy which should not lie unless the trial court is wholly without jurisdiction. See *State* ex rel. *New York Casualty Co. v. Superior Court,* 31 Wn. 2d 834, 199 P. 2d 581 (1948).

The instant case, of course, makes little impression on Washington law, but reflects an unusually strict view of procedure.

RAYMOND H. SIDERIUS

Probate—Administration of an Estate Under Absentee Statute. A bank was appointed guardian of *N*'s estate in 1941, *N* having been adjudged incompetent. In 1942, *N* disappeared, and was not heard from for over seven years. *P,* on behalf of *N*'s heirs, petitioned the probate court for appointment as administrator of *N*'s estate. The appointment was made, and the bank appealed. *Held:* Reversed. Where there is neither allegation nor evidence sufficient to give the probate court jurisdiction to determine that the missing man is dead, his heirs are relegated to the absentee statutes for provisional distribution. In re *Nelson's Estate,* 37 Wn. 2d 397, 224 P. 2d 347 (1951).

The Washington absentee statute, RCW 11.80.010 *et seq.* [RRS § 1715-1 *et seq.,* PPC § 191-1 *et seq.*], provides for provisional distribution of an absentee's estate after

seven years have elapsed from the time of disappearance. The distributees must give bonds equal to twice the amount which they are to receive in order to protect the absentee should he return, and due notice by publication of the distribution must be given. Final distribution and exoneration of the bonds may be had after fifteen years have elapsed from the time of the absentee's disappearance.

Probate of an estate on the presumption of death alone, which arises when a person has been absent and has not been heard from for a period of seven years, has been held valid so long as the presumption of death remains unrebutted. *Payne v. Home Savings Bank,* 193 Ga. 406, 18 S.E. 2d 770 (1942). However, if the absentee returns, the probate proceedings are void *ab initio,* because jurisdiction of the probate court is dependent upon the fact of death. A distribution of the property in such a case would be a taking of the absentee's property without due process of law. *Scott v. McNeal,* 154 U.S. 34 (1894), reversing *Scott v. McNeal,* 5 Wash. 309, 31 Pac. 873 (1892). On the other hand, distribution under absentee statutes, as contrasted with probate statutes, has been held valid even though the absentee is alive. A Pennsylvania absentee statute which provides for proper notice of distribution and requires the distributees to give security conditioned that they will return the property distributed to them if the absentee reappears, was held to meet the requirements of due process of law. *Cunius v. Reading School District,* 198 U.S. 458 (1905). A similar result was reached on a somewhat different basis under a Massachusetts statute providing for final distribution 14 years after the absentee's disappearance. Since 14 years was considered a reasonable period of time, this statute was upheld as a statute of limitations which absolutely divested the absentee of all right to the property. *Nelson v. Blinn,* 197 Mass. 279, 83 N.E. 889 (1908), affirmed, 222 U.S. 1 (1911). However, in contrast to the above-mentioned statutes, a Maryland statute which allowed the court to hold a hearing, *if it saw fit,* and to determine the absentee to be dead if no evidence to the contrary was forthcoming, was held unconstitutional as contrary to due process of law. *Bank v. Weeks,* 103 Md. 601, 64 Atl. 295 (1906). The court in that case said that the statute provided no protection for the absentee if he were alive, and, in effect, it converted a rebuttable presumption of death into a conclusive presumption.

The United States Supreme Court, in reversing the Washington Court in *Scott v. McNeal, supra,* held that probate of an estate on the seven year presumption was void if the absentee returned. Nevertheless, a later Washington case held that the probate court has jurisdiction to determine the absentee to be dead when, together with the presumption of death, there is also an allegation and circumstantial evidence of death. *State ex rel. Kempf v. Superior Court,* 151 Wash. 289, 275 Pac. 694 (1929). However, until the principal case, it had not been decided in this state whether probate could be had on the seven year presumption alone, the absentee not having reappeared.

In view of the holding in the *Kempf* case, it would appear that the Washington Court in the principal case has gone further than the holding of *Scott v. McNeal* requires. There was no holding in the latter case that such probate would be void if the absentee did not return. In the principal case it might have been held that probate could be had at the risk of the interested parties, but the holding is that the absentee statute is exclusive in the absence of further allegations and proof of death. The court seems to have gone into the legislative field in refusing to probate the estate on the presumption of death arising from seven years' absence. There is no legislative mandate that the presumption is not adequate for this purpose. On the contrary, it is considered adequate for other purposes; e.g., when a person remarries upon the presumption of death of an absent spouse, this is a defense to a charge of bigamy. RCW 9.15.010 [R.R.S. § 2453 (1), P.P.C. § 113-63 (1)]. Neither direct or circumstantial evidence of death nor a presumption of death are infallible, and any combination of them will not necessarily be

complete proof of death.

However, since the court has chosen to refer the parties to the absentee statute, it must be pointed out that the provisions of the Washington act appear to be a combination of the better features of the Pennsylvania and Massachusetts statutes; i.e., notice of distribution, the giving of security by the distributees, and final distribution only after a reasonable period of years has elapsed. It is likely that it would survive any attack upon its constitutionality, particularly as a statute of limitations. It has provided a program which is in accord with established practices in other jurisdictions, and can be administered under statutes already existing for the purpose of handling this type of problem.

JAMES B. MITCHELL

Sales—Waiver of Right to Rescind. *P* installed a heating system in *Ds'* house, removing and keeping the old furnace as part of the purchase price. On discovering faulty installation, *Ds* notified *P* of their desire to rescind and demanded reinstallation of the old furnace. *P* refused and filed a lien for the purchase price on *Ds'* house, which he now seeks to foreclose. These events took place in winter, and *Ds,* aged and in poor health, continued to use the new heating system, there being no other adequate means of heating the house. The trial court refused to foreclose the lien and held for *Ds* on their counterclaim for rescission based on breach of warranty of proper installation. Appeal. *Held:* Reversed. If *Ds* had a right to rescind, they waived it by continuing to use the furnace. *Coovert v. Ingwerson,* 37 Wn. 2d 797, 226 P. 2d 187 (1951).

It is suggested that the court may have been unduly harsh in holding that continued use constituted a waiver. This may be demonstrated by a consideration of the alternative courses of conduct open to *Ds* once they decided to rescind. These were: (1) redelivery of the furnace to *P;* (2) installation of another furnace with *P*'s furnace being removed and held in storage by *Ds;* (3) discontinuance of use; (4) notice to *P* to remove his furnace. To require *Ds* to follow the first alternative in order to retain their right to rescind would present an inconsistency with the lien that a rescinding buyer has on goods received under a sale contract in favor of payments made on the purchase price. REM. REV. STAT. § 5836-69 [P.P.C. § 852-7] (Uniform Sales Act § 69(5)). The second alternative would put *Ds* to the expense of paying a third party to remedy a situation caused by *P*'s breach, since *Ds* undoubtedly lack the technical ability to remove the old furnace and install a new one themselves. Further, there is authority for placing the duty of removal on the seller who has notice of his buyer's election to rescind in cases where the latter's residence was the place of delivery. *Noll v. Baida,* 202 Cal. 98, 259 Pac. 433 (1927); *White v. Miller,* 43 Pa. Super. Ct. 572 (1910); *Schaefer v. Lange,* 37 Pa. Super. Ct. 617 (1907). The third alternative is the most unreasonable of the four in view of *Ds'* age and health, the time of year in which the breach was discovered, and the fact that the new furnace was the sole adequate method of heating the house. Thus the fourth course of action—that adopted by *Ds*—appears to be the most equitable. As the Washington Court has previously said, the remedy of rescission is equitable in nature, and the circumstances of each case determine what the party seeking it must do to restore the other to his status quo. *Erkenbrack v. Jenkins,* 33 Wn. 2d 126, 204 P. 2d 831 (1949); *Hopper v. Williams,* 27 Wn. 2d 579, 179 P. 2d 283 (1947).

Foreign courts have frequently reached results contrary to that of the instant case. *Hartman v. Smyth Sales Inc.,* 11 N.J. Misc. 168, 11 A. 2d 716 (1939), passing on a virtually identical fact pattern, held that the buyer was required neither to discontinue using the furnace nor to have it removed and a new one installed. Similar conclusions