PUBLIC ADMINISTRATOR: He may apply for appointment as administrator when a resident of this state has disappeared for a period of over seven years.

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June 13, 1939

Honorable Randall Smart
House of Representatives
Jefferson City, Missouri

Dear Mr. Smart:

We are in receipt of your letter of June 5, 1939, requesting an opinion from this department, which reads as follows:

> "I would appreciate an opinion from you under the following set of given facts:
>
> The Public Administrator of Buchanan County, Missouri, is interested in filing application for letters of administration in a matter involving a few thousand dollars deposited in a local bank by one John Doe, a resident of Missouri, at the time of deposit on March, 1929. The administrator has been informed by the bank that said account has become inactive and unclaimed for a period of more than five years and has so published same under Section 5389, Revised Statutes, 1929.
>
> Said administrator has reason to believe after diligent search and investigation that said depositor or supposed decedent is dead and desires to administrate the estate under the provisions of Section 265, Revised Statutes, 1929, and other sections of the administration laws to a full and final determination and disposition of the estate.
>
> Is the Public Administrator a proper party to administer the estate under these facts in the absence of an application filed by any known heirs in

> said county or state subject to the provisions, of course, under Section 269, Revised Statutes, 1929?
>
> I would appreciate your opinion in this matter at your earliest convenience."

Section 299, R. S. Mo. 1929, partially reads as follows:

> "It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and estate of all insane persons in his county, in the following cases * * *:
>
> When money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same * * *;
>
> Where from any other good cause, said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost."

In the fourth and ninth divisions of Section 299, supra, it will be noticed that both divisions are practically the same in that it is to prevent the loss or damage to any extent. This section also makes it the <u>duty</u> of the public administrator to take into his charge and custody where the estate may be damaged by reason of no person applying for administration.

In the statement of facts set out under your request, I am assuming that no legal administrator has been appointed, nor has any beneficiary or legatee under the estate made application to the probate court for appointment as administrator or administratrix.

Section 265, R. S. Mo. 1929, reads as follows:

"Whenever application shall be made to any probate court, or judge thereof in vacation, for letters of administration upon the estate of any person supposed to be dead, because of the absence of such person for seven consecutive years from the place of his last known domicile within this state, or because, having been a resident of this state, such person has heretofore gone from and has not returned to this state for seven consecutive years, or, because having been such resident of this state, such person shall hereafter go from and shall not return to this state for seven consecutive years, or, because being a resident of this state, such person shall have so concealed or conducted himself within this state that he shall not have been heard of for seven consecutive years by the judge of the probate court having jurisdiction of his estate, or by the persons interested therein, then said probate court, or the judge thereof in vacation, if satisfied that the applicant would be entitled to such letters if the supposed decedent were in fact dead, shall cause a notice to such supposed deceased person to be published in a newspaper, published in the county, once a week for four consecutive weeks, setting forth the fact that such application has been made, together with notice that on a day certain, which shall be at least two weeks after the last publication of such notice, the court will hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof. The persons applying for such letters of administration shall file a petition, verified by affidavit, stating the facts upon which such application is based and the place where such supposed deceased person resided when last heard from by him--by any person within his knowledge."

Under the above section it will be noticed that in order that the presumption of death be presumed after a seven year's absence, the person whose estate must be administered must have had his last known domicile within this state or have been a resident and left and not returned to this state. In other words, this section does not apply to non-residents who have not been residents of this state.

Section 266, R. S. Mo. 1929, reads as follows:

> "At the hearing the court shall receive such legal evidence as shall be offered, for the purpose of ascertaining whether the presumption of death is established; and no person shall be disqualified to testify by reason of his or her relationship as husband or wife to the supposed deceased, or by reason of his or her interest in the estate of the person supposed to be dead."

This section merely sets out the qualification of witnesses who appear before the probate court.

Section 267, R. S. Mo. 1929, reads as follows:

> "If satisfied, upon such hearing, that the legal presumption of death is established, the court shall so declare and it shall forthwith cause notice thereof to be published once a week for four consecutive weeks, in a newspaper published in the county, and also, if the court shall find that such supposed decedent resided in or was possessed of property located in any county in this or any other state at a time subsequent to his residence in the county in which applications are made, the notice of such publication shall be published in like manner in such other county. Such notice shall require the supposed decedent, if alive, or any other person for him, to produce to the court, within twelve weeks from the date of the

> last publication thereof, satisfactory evidence of the fact that he is still living: Provided, that where publication is made in a daily newspaper, publication for each week after the first shall fall on the corresponding day of the week as did the first publication."

This section merely sets out the procedure of publication before the letters of administration are issued to the public administrator.

Section 268, R. S. Mo. 1929, reads as follows:

> "If, within such period of twelve weeks, evidence shall not be offered satisfactory to the probate court that said supposed decedent is in fact still living, then it shall be the duty of the court to issue letters of administration to the party entitled thereto; and said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were in fact dead."

This section merely sets out that the decedent may, if still living, within a period of twelve weeks, appear and ask that letters of administration be revoked, but previous acts of the public administrator are valid.

Section 269, R. S. Mo. 1929, reads as follows:

> "The probate court may revoke said letters of administration at any time, upon satisfactory proof that the supposed decedent is in fact alive. After such revocation all the powers of the administrator shall cease, but all receipts and disbursements of assets, and other acts previously done by him, shall

remain as valid as if said letters were unrevoked; and the administrator shall thereupon make a settlement of his administration to the date of revocation, and shall transfer all assets remaining in his hands to said supposed decedent, or to his duly authorized agent or attorney: Provided, nothing in sections 265 and 272, inclusive, contained shall validate the title of any person to any money or property received as widow, next of kin or heir of such supposed decedent, but the same may be recovered from such parties in all cases in which such recovery could be had if said sections had not been passed."

This section is an additional section to Section 268 as to the validity of acts of the public administrator.

Section 270, R. S. Mo. 1929, reads as follows:

"Before any distribution of the proceeds of the estate of such supposed decedent shall be made, the persons entitled to receive the same, respectively, shall enter into a bond to the state of Missouri, with sufficient security, to be approved by the probate court having jurisdiction of said estate, in such sum and in such form as the court shall direct, conditioned that if said supposed decedent shall in fact be alive at the time of such distribution, then the distributees shall refund the amount received by them on demand, with interest thereon from the date of such demand; but if any person entitled to receive such distribution shall be unable to give the security aforesaid, then the money which he would be entitled to receive shall be paid over to the county treasurer, and by him loaned at the highest rate of interest obtainable, on security approved by said probate court,

> which interest shall be paid annually to the person entitled thereto, and such money shall remain so at interest until the security aforesaid is given, or the court, upon application, shall order it to be paid to the person or persons entitled to receive the same."

This section provides for the procedure of the distribution of the assets of the estate in cases where the estate is administered on the seven years absence of presumption of death.

Section 271, R. S. Mo. 1929, reads as follows:

> "After the revocation of such letters of administration as aforesaid, the person erroneously supposed to be dead may, upon suggestion of said fact, filed of record, be substituted in all actions brought by the administrator of his estate, whether prosecuted to judgment or otherwise. He may in all actions previously brought against his administrator, be substituted as defendant, on proper suggestion, filed by himself or by the plaintiff therein, but he shall not be compelled to go to trial in less than three months from the time of the filing of such suggestion. Judgments recovered against the administrator before the revocation of his letters, as aforesaid, may be opened, upon application by the supposed decedent, if made by affidavit, denying specifically, on the knowledge of the affiant, the cause of action, or specifically alleging the existence of facts which would be a valid defense; but if, within said three months, such application shall not be made, or, being made, the facts exhibited shall be adjudged an insufficient defense, the judgment shall be conclusive to all intents, saving the defendant's right to have the same reviewed, as in other cases, by appeal or by writ of error, as now provided by law. After the

> substitution of the supposed decedent as defendant in any judgment, as aforesaid, such judgment shall become a lien on his real estate situate in the county for which the court is held, and shall have the same force and effect as if said action had been originally instituted against said supposed decedent."

This section describes the procedure in which the presumed decedent may take over all claims or actions brought by or against the public administrator.

Section 272, R. S. Mo. 1929, reads as follows:

> "The costs attending the issue of letters of administration, or their revocation, shall be paid out of the estate of the supposed decedent; and all costs arising upon an application for letters which are refused shall be paid by the applicant."

This section only holds that the cost of the letters of administration by a public administrator are valid even after the person supposed dead is substituted for the public administrator.

All of the above sections must be strictly construed, and it was so held in the case of Vaughn v. Cadwell, 279 S. W. 170, paragraphs 1 and 2, which reads as follows:

> "Learned counsel for respondent argues here that the estate was properly taken from plaintiff, and that the bonding company should be held, rather than the respondent, and insists that the bond shows that its purpose is to hold the administrator and his bondsmen harmless, and that the order of the probate court is final and conclusive and cannot be attacked in this manner. We do not agree with these suggestions of defendant's counsel. It was only by reason of statutory enactment that administration

could be had upon plaintiff's estate due to the presumption of death after an absence of seven years, and the statute must be strictly complied with. In the first place, the probate court had no authority or power to accept any other than the statutory bond required in such cases. Leahy v. Mercantile Trust Co., 296 Mo. 561, 247 S. W. 396. The defendant administrator, saw fit to take a bond indemnifying him, instead of a refunding bond, as the probate court ordered to be taken. The statute gave the probate court the power to fix the form and the sum of the bond, but did not confer upon it the authority to designate such a bond as was given in the instant case. The construction of a very similar statute was before the court in the case of Musser v. Oliver, 21 Pa. 362, loc. cit. 367. The court there said:

'The object of the statute in requiring refunding bonds was to protect claims that might arise through mistaken or fraudulent settlements, as well as such that had not yet come to light. The only safe line of conduct for executors or administrators to follow is to obey all the requisitions of the law. Governed by its directions, they will be protected by its shield. Disobeying its mandates, they must suffer its penalties."

The defendant in the instant case, no doubt, was careful to see that the bond was given to indemnify him. He was extremely anxious to protect himself, and therefore he should not complain if he is held liable. No doubt, if he had taken the bond required by the statute and by order of the probate court, he could not be held liable. But we have no such case before us, and therefore it is unnecessary to determine that question here. See Schaeffer's Appeal, 119 Pa. 640, 13 A. 507. We think, on

account of defendant's failure to take bond according to the statute, he is personally liable. 24 C. J. 481.

The judgment of the circuit court is accordingly reversed, and the cause remanded with directions to enter judgment for plaintiff and against defendant for the amount claimed in the petition."

It was also held that the above sections must be strictly construed in the case of Flynn v. Stoutimore, 226 S. W. 591, paragraph 2, where the court said:

"The action of defendant in applying for an order of distribution of the estate of Mary E. excluding this plaintiff, and the action of the court in granting it, were without authority. If this plaintiff had been absent seven years, without being heard from and without knowledge of where she was, proceedings should have been taken under sections 271-278, R. S. 1909, where it is provided that administration may be had on such person's estate, provided that no satisfactory evidence is given within 12 weeks that the supposed decedent is still living; it being further provided that if no such evidence is brought forward, and letters are granted, distribution may be had of such supposed decedent's estate, upon a sufficient bond being given by those claiming to be entitled to the estate to refund the sums distributed, if the supposed decedent should be alive. These provisions of the law were wholly ignored, and that portion of the estate of Mary E. belonging to this plaintiff as one of her heirs was unlawfully appropriated to the two other heirs by the action of this defendant."

All of the above sections, of course, are to be governed by the Escheats Law as set out in Section 620, R. S. Mo. 1929.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the public administrator is a proper party and may administer the estate of a person who was a resident of this state and has since disappeared, leaving money on deposit in a bank in this state, for a period of at least seven years from the time of the deposit.

It is further the opinion of this department that before the public administrator can be appointed, upon his application to the probate court, conclusive evidence must be presented showing that the decedent was a resident of this state and that competent heirs are unknown, who reside in this state, who have failed to present application to the probate court for appointment as administrator or administratrix of the estate.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:VC