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PROBATE LEGISLATION ENACTED BY THE 1955 SESSION OF THE WASHINGTON LEGISLATURE†

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The purpose of this survey is to focus attention on changes in the probate law of the state as a result of the 1955 session of the legislature. Five separate Acts amending or adding to the law of probate were adopted. These Acts are chapters 98, 141, 154 and 205 of the Laws of 1955 and chapter 7 of the Laws of 1955 (Extraordinary Session). In the aggregate they embody a substantial number of changes, most of which are simple procedural amendments. A few of the amendments present secondary questions of some difficulty. It is not the purpose of this survey to attempt elaborate discussion of any such complicated problems. For the most part these questions are peculiar to the Washington statute and not categorically answerable on the basis of existing authorities. Consequently the existence of such questions will be noted leaving their ultimate solution to the future.

Chapters 98, 141 and 154 each deals with a single subject; chapter 98 concerns the operation of decedent's business by his personal representative; chapter 141 the matter of non-inheritance by the decedent's slayer and chapter 154 with the procedure for sales of real property in probate. Chapter 205 on the contrary is a miscellaneous act which amends eleven sections, for the most part unrelated to one another, of the Probate Code of 1917 and adds one new section thereto. Chapter 7 of Laws of the Extraordinary Session of 1955 amends and amplifies the provisions of the probate code concerning distribution to a missing person entitled to share in decedent's estate. The five acts will be considered in the order listed.

OPERATION OF DECEDENT'S BUSINESS BY PERSONAL REPRESENTATIVE

Chapter 98 of the Laws of 1955 (RCW 11.48.025) expressly authorizes the probate court to permit the personal representative to continue operation of the decedent's business. Prior to this amendment the probate code contained a section permitting the personal representative of a deceased partner to make an agreement, subject to court

† Parts of this article were prepared by the authors for the larger article, *Washington Legislation—1955*, which appeared in 30 WASH. L. REV. 195-223. The Article was deemed to be of sufficient interest to justify printing it outside of the special issue for which it was written.

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approval, for the continued operation of the partnership business by the surviving partner.¹ The new legislation does not purport to alter this partnership provision. It does, however, for the first time give express statutory sanction to continuance by the personal representative of a business operated by decedent as sole owner.

The 1955 statute authorizes the court to enter an order concerning continuation of the business. It requires that there be a "showing of advantage to the estate" and that the court's order specify: (1) the extent of the authority of the personal representative to incur liabilities; (2) the period of time during which he may operate the business; (3) any additional provisions or restrictions which the court may, at its discretion, include. Any interested person may require the personal representative to show cause why the authority granted to him should not be limited or terminated.

When the author of this portion of this survey prepared his original comments on this section of the statute in the summer of 1955, he wrote in part:

It is doubtful that the amendment does more than codify the views expressed in *In re Ennis' Estate*. It was stated in that case that even in the absence of statutory authorization the court could authorize at least a temporary continuance of the business with a view to its ultimate effective liquidation or disposition. The virtue of the statute is that it clarifies the scope of the power and the procedure to be followed.

This view of *In re Ennis' Estate*² was derived from the following statement which appears in the decision immediately following the court's review of the authorities:

We think the rule that accords to probate courts discretion to authorize the temporary continuance of the decedent's business by his personal representative a salutary one, and that, under Rem. Code, section 1497, our courts have the power to make an order of that nature which would authorize payment of costs as a part of the expenses of administration. But, as held in some of the cases cited *supra*, an order of sale would not justify the purchase of additional merchandise to the extent of keeping the stock intact, or more than is necessary to enable the administrator to sell the remaining stock to the best advantage.

On September 15, 1955, the Supreme Court handed down its decision in *State ex rel. Carlson v. Superior Court*.³ The court there stated that "prior to June 8, 1955, when chapter 98 of the Laws of 1955

¹ RCW 11.64.040.

² 96 Wash. 352, 165 Pac. 119 (1917).

³ 147 Wash. Dec. 383, 287 P.2d 1012 (1955).

became effective, the court had no authority to authorize an administrator to continue the operation of a decedent's business." The court discussed *In re Ennis' Estate* at some length, not, however, referring to the explicit language above quoted, and then stated among other things that there was in fact no court order in the *Carlson* case and no showing that operation of the business was temporarily necessary. Whether by the latter reference the court meant to qualify its earlier categorical statement that the judge of the lower court had no authority to authorize the administrator to continue the business is not clear. Happily any possible confusion between *In re Ennis' Estate* and the *Carlson* case is resolved, so far as future estates are concerned, by the statute now under consideration. The legislature, which adjourned six months before the decision in the *Carlson* case, not only appears to have been clairvoyant but also to have validated, from a practical standpoint, the interpretation of *In re Ennis' Estate* which the author has peddled to numerous trusting law students in his course in Wills and Administration over a period of years.

Obviously whether the power to operate a decedent's business is based upon a statute or upon court decision, it is one to be exercised with caution. The function of the personal representative is to administer the estate, not to operate it as a business. Continuation of a decedent's business is justified only as an incident to efficient administration. Usually the practical justification is that otherwise the going concern value will be lost or that continuation is necessary to complete decedent's contracts or for purposes of effective distribution. Care must be taken to strike a proper balance between these factors and the primary duty to wind up the estate without prolonged business operations. The potential hazards and legal problems attending operation of a business by a personal representative are so apparent as to require no comment.

The 1955 statute specifically provides that it shall not apply, if decedent left a nonintervention will, or a will specifically authorizing the executor to carry on the business or a will providing that the executor shall liquidate the business. This language may prove unfortunate. It has, for example, become a settled rule that a nonintervention executor may, as to many matters, seek court approval where he is not actually required to do so. A nonintervention executor might well desire to have the support of a court order despite the fact that it is stated in *New York Merchandise Company v. Stout*⁴ that it is unrec-

⁴ 43 Wn.2d 825, 264 P.2d 863 (1953).

essary for him to obtain authorization from the court. Probably he would not be barred from seeking such an order by reason of the statutory statement that it shall not "apply" to such an executor. However, it might have been better to have had the statute expressly give him the option to come under it. Similarly the personal representative specifically authorized to conduct the business may desire to have the scope and nature of his operations defined by court order. Finally the direction in a will that the executor shall liquidate does not mean that it may not be wise to operate the business long enough to sell it as a going concern. Except where the testator has clearly stated that the business shall not be operated at all after his death, it seems best to trust the combined judgment of court and personal representative rather than to exclude the matter from the scope of the statute. If, as the author hopes, there is something left of *In re Ennis Estate*, it might as a last resort be possible to fall back on its language so as to permit temporary operation of the business in cases excluded from the statute, on the theory that such language remains applicable to cases not covered by the statute.

NON-INHERITANCE BY DECEDENT'S SLAYER

(CHAPTER 141 LAWS OF 1955, RCW 11.84.010 TO 11.84.910)

In 1926 the Washington court decided, in *In re Tyler's Estate*,⁵ that one who feloniously slew his spouse was not eligible for an award in lieu of homestead from the spouse's property. The dissenting opinion pointed out that such a decision was contrary to the general rule and amounted to a re-writing of the statute. Consequently, the next legislature amended the statute involved⁶ so as to prohibit the slayer from obtaining the award in lieu of homestead. The statute, however, was aimed at the specific problem raised in *In re Tyler's Estate*, and made no attempt to change the statutes of descent and distribution. When the problem arose again in 1952, this time by a claimant to an intestate share of the estate of his father whose death he had feloniously caused, the court refused to re-write the statute and permitted the convicted slayer to take the intestate share.⁷ This is so obviously an improper result that the legislature was induced to act; and after an unsuccessful attempt in 1953, the 1955 legislature passed the so-called slayer's bill.⁸

⁵ 140 Wash. 679, 250 Pac. 456, 51 A.L.R. 1088 (1926).

⁶ L.1927 c. 185 § 1 amending Rem. Comp. Stat. § 1473, now RCW 11.52.012.

⁷ *In re Duncans' Estates*, 40 Wn.2d 850, 246 P.2d 445 (1952).

⁸ L.1955, c. 141, RCW 11.84.

As finally signed by the Governor, the bill is practically a verbatim copy of a statute proposed twenty years ago by Dean Wade in the *Harvard Law Review*. The statute is very broad in scope, purporting to prevent a slayer as defined in the act from acquiring property from or through the deceased in a wide variety of circumstances. A slayer is defined as "any person who participates either as a principal or as an accessory before the fact, in the wilfull and unlawful killing of any other person."⁹ The statute does not require that the slayer be convicted of the crime in a criminal proceeding, since to do so would eliminate from its coverage the slayer who is for some reason or another never tried—*i.e.*, the suicide.

The obvious difficulty with any such statute is the constitutional prohibition against forfeiture for treason and corruption of the blood.¹⁰ Consequently, the statute purports only to prevent the slayer from acquiring an interest by his crime, and does not attempt to take from the slayer any property interests which he already owns. Thus the slayer is not permitted to acquire interests by descent, distribution or will from the deceased, but as to property held jointly by decedent and slayer, the bill provides only that "one-half of any property held by the slayer and the decedent as joint tenants, joint owners or joint obligees shall pass upon the death of the decedent to his estate, and the other half shall pass to his estate upon the death of the slayer. . . ."¹¹ Other types of interests dealt with in the statute are vested interests subject to be divested, contingent remainders and executory limitations, remainders subject to powers of appointment, and insurance proceeds. For most of these types of property interests, the desired result is reached by the fiction that the slayer is deemed to have predeceased the deceased whose life stands between the slayer and the property.

Clearly some such statute is desirable, and more than half of the states have some statutory provisions preventing the slayer from benefiting from his own wrong. It is not quite so clear, however, that a statute designed as a model primarily for states in which community property does not exist should be copied so literally. The only provision dealing in any way with community property, for instance, is in section 3, which provides:

"The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate

⁹ RCW 11.84.010.

¹⁰ U.S. Const. art. III, § 3; Wash. Const. art. I, § 15.

¹¹ RCW 11.84.050 (1).

to the slayer under the statutes of descent and distribution or have been acquired by statutory right as surviving spouse or under any agreement made with the decedent under the provisions of RCW 26.16.120 (the community property agreement statute) as it now exists or is hereafter amended.”

It is apparent that a considerable amount of litigation must ensue before it can be said that we know just exactly what the statute means. Since the problem is not one that arises with great frequency, many years will pass before all of the problems created by the new statute can be straightened out. It might have been preferable in the long run for the court in 1952 to have followed the lead of the earlier decision and read an exception into the law.

PROCEDURE FOR SALES OF REAL PROPERTY IN PROBATE

Chapter 154 attempts to remove some of the confusion arising from the wording of former RCW 11.56.110, which was concerned with the confirmation of realty sales by executors, administrators and guardians. The specific problem dealt with is raised when a sale had been made but prior to the confirmation required in RCW 11.56.120 a new bid has been submitted which is at least ten per cent higher than the accepted bid. Under the statute as it appeared before the present amendment, the court could fix a period during which the prior bidder whose bid had been accepted by the personal representative would be given an opportunity to make a better bid. If he did so, the statute stated that the sale might be made to him; if he did not, the sale might be made to the subsequent bidder. The statute said nothing about a series of competitive bids made in this fashion, although in some parts of the state the practice seems to have grown up of permitting such a series of bids. Apparently the final bid was still subject to confirmation by the court, thus leaving open the argument that prior to confirmation of the new highest bid, a subsequent new bid of ten percent or more higher than the previous bid would reopen the whole bidding cycle again.

Under the new statute, upon the receipt of a new bid a five-day period is fixed during which the prior bidder is permitted to submit a new bid of his own. The court may then direct a sale to the person making the best bid then on file, or, upon application by the personal representative may direct the reception of sealed bids, following which the court may direct a sale to the bidder whose bid is deemed best. In either event, the direction by the court of a sale to the successful bidder dispenses with the necessity for a confirmation.

It should be noted, however, that the new statute does not expressly prohibit the practice of a series of unsealed bids, should the executor or administrator elect not to apply to the court for a direction for sealed bids.

In addition, the statute, in line with changes made in other parts of the probate code, tightens up the requirements of notice by requiring the personal representative to notify prior bidders by registered mail, when a subsequent bid has been received.

LOST OR DESTROYED WILLS

The first section of chapter 205 enlarges the possibility of obtaining probate of a "lost or destroyed will." Prior to the 1955 amendment, probate could be had only by showing that the will was in existence at the time of the testator's death or, in the alternative, that it had been "fraudulently destroyed in the lifetime of the testator." Under the amendment this alternative has now been substantially enlarged. Probate can now be had if the will "is shown to have been destroyed, cancelled or mutilated in whole or in part as a result of actual or constructive fraud or in the course of an attempt to change the will in whole or in part, which attempt has failed, or as the result of a mistake of fact, . . ." This amendment apparently was prompted by dissatisfaction with the result obtained under the earlier statute in *In re Kerckof's Estate*.¹² There, decedent had made a will containing one specific bequest and leaving the residue of his estate to a brother. The specific legatee received her share during decedent's lifetime. Decedent then informed his attorney that he had no brothers or sisters other than the brother named as residuary legatee in the will. Accordingly the existing will was destroyed on the attorney's advice that the brother would be decedent's sole heir and as such succeed to all of his property in the absence of a will. Later it developed that there were other brothers and sisters of the decedent at the time of his death. The court declined to admit the destroyed will to probate, pointing out that it had not been "fraudulently destroyed" during the testator's lifetime. Clearly the possibility of probate would have been much greater if the broad language of the 1955 amendment had been available.

DEVICES AND BEQUESTS OF ENCUMBERED REAL AND PERSONAL PROPERTY (CHAPTER 205, SECTION 2, RCW 11.12.070)

For many years the probate code has contained a provision that a charge or encumbrance upon any real or personal estate imposed

¹² 13 Wn.2d 469, 125 P.2d 284 (1942).

after the execution of a will does not revoke a testamentary disposition of such property, but the devise or legacy passes to the devisee or legatee subject to the encumbrance. It will be observed that this statute applies only to those situations where there is first a will and later an encumbrance is created on the property. The converse situation, in which property was encumbered at the time the will was executed, was not covered by the statute prior to the 1955 amendment. The question had, however, been dealt with as a common law problem in *In re Cloninger's Estate*.¹³ It was there held that upon a devise of real property, upon which there was a mortgage at the time the will was made, the devisee had the right to insist that the property come to him free and clear of the mortgage. In other words, the devisee could require the personal representative to pay the mortgage out of other assets of the estate. The decision was based on the early New York case of *Cumberland v. Codrington*,¹⁴ decided by Chancellor Kent "after an extensive review of the English cases." These cases are based upon the historical rule that the personal property of a decedent is primarily responsible for his debts and that accordingly it is to be presumed that a devise of real property was intended by the testator to be free and clear of liens unless the will clearly showed a contrary intent.

The second section of chapter 205 of the Laws of 1955 changes this rule so that now unless a contrary intent is indicated by the will, devisees of real property and legatees of personal property take subject to existing encumbrances, whether the encumbrance was created before or after the execution of the will.

POWERS OF ADMINISTRATORS WITH THE WILL ANNEXED (CHAPTER 205, SECTION 3, RCW 11.28.070)

For some time there has been some doubt as to the interpretation of the statute which specifies the powers of administrators with the will annexed.¹⁵ This statute briefly said that such administrators "shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose." It has been argued that the statute should not be construed so as to give to an administrator with the will annexed discretionary powers which the testator conferred upon an executor presumably in reliance on the

¹³ 8 Wn.2d 348, 112 P.2d 139 (1941).

¹⁴ 3 Johns. Ch. (N.Y.) 229 (1817).

¹⁵ Foster, *Powers and Duties of Executors and Administrators, c.t.a. Under Non-Intervention Wills* 16 WASH. L. REV. 196 (1941).

special talents which the testator thought the executor possessed. Also it has been argued that a literal interpretation of the statute would give to the administrator with the will annexed the rather sweeping powers that are supposedly possessed by a nonintervention executor under the nonintervention will statute. The 1955 amendment contained in section 3 of chapter 205 adds a proviso to the statute concerning powers of administrators with the will annexed. This proviso states that such administrators "shall not lease, mortgage, pledge, exchange, sell or convey any real or personal property of the estate except under order of the court and pursuant to procedure under existing laws pertaining to the administration of estates in cases of intestacy, unless the powers expressed in the will are directory and not discretionary." The meaning of this amendment seems entirely clear and certainly it is now definite that as to the matters mentioned in the amendment, an administrator with the will annexed *does not* have the same powers as an executor named in the will.

CLOSING OF ESTATE BY A NONINTERVENTION EXECUTOR

(CHAPTER 205, SECTIONS 4, 5, 6 AND 7; RCW 11.68.010 TO 11.68.040)

Although the nonintervention will statute permits the executor to make what is in essence a final report and to obtain from the court the decree which is essentially a decree of distribution, it has been said that it is not necessary for him to do so.¹⁶ Practice has varied, but it is undoubtedly true that in a good many nonintervention estates no final decree is obtained. Laying aside any question of the constitutionality of this practice or of the practical wisdom thereof, there has remained some dissatisfaction with the uncertainty which results from the failure to obtain a final decree. Unless some concrete action is taken, it is difficult, if not impossible, to ascertain when probate of the estate is complete. Accordingly, in section 5¹⁷ of chapter 205, a single sentence was added to the nonintervention will statute. This reads as follows: "If no application for a final decree is filed, the executor shall, when the administration of the estate has been completed, file a written declaration to that effect, and thereupon his powers shall cease." This language clearly and categorically imposes a new statutory duty on the non-intervention executor.

¹⁶ *Schirmer v. Nethercutt*, 157 Wash. 172, 180, 286 Pac. 265 (1930).

¹⁷ Sections 4, 6 and 7 are verbatim copies of preceding and following parts of the statute in its earlier form.

APPOINTMENT OF ADMINISTRATORS DE BONIS NON

Section 8 of chapter 205 simply adds a proviso to the existing law concerning the appointment of the administrator de bonis non, appointed if the original executor dies, resigns or is removed. The proviso briefly says that "notice of the hearing on the petition for such appointment shall not be necessary unless the court otherwise directs." No further comment is indicated.

RIGHTS OF PURCHASERS FROM NONINTERVENTION EXECUTORS
(CHAPTER 205, SECTION 9; RCW 11.68.040)

The nonintervention will statute has long provided that nonintervention executors may "mortgage, lease, sell, and convey the real and personal property of the testator without an order of the court for that purpose and without notice, approval, or confirmation, . . ." Nevertheless, it has been stated (and on principle the statement seems quite correct) that the power of a nonintervention executor to do these things is limited to transactions necessary for the administration of the estate.¹⁸ Thus the nonintervention executor could not sell property of the estate for no reason whatsoever. It must have appeared that there was some reason connected with effective administration which made the sale necessary or advisable.

The result of such a rule has been to impose upon the purchaser some duty to inquire concerning the necessity of the sale, except perhaps in those cases where there were no creditors and the executor himself is the sole beneficiary of the estate so that there was no one who could attack the sale. Section 9 of chapter 205 is designed to remove this burden from the person dealing with the executor. It adds to the existing statute the following: "The other party to any such transaction and his successors in interest shall be entitled to have it conclusively presumed that such transaction is necessary for the administration of the estate."

The language of the amendment seems clear and emphatic. However, a word of caution as to its application seems indicated. Certainly the statute should protect the great majority of purchasers who have no information one way or the other as to whether the sale is necessary for purposes of probate. Such purchasers are relieved from the duty of making an inquiry. The question may become somewhat more doubtful as to the purchaser who actually knows that the sale is not necessary. To assume an even more extreme case, it is most improbable

¹⁸ *Hutchings v. Fanshier*, 132 Wash. 5, 213 Pac. 14 (1924); see Foster, note 4 *supra*.

that a court would hold that one who fraudulently induced the executor to sell property knowing that there was no probate necessity of so doing, would get the benefit of "conclusive" presumption. It is, of course, not probable that many cases in the questionable categories will ever arise, and the amendment should prove most useful in the more normal type of case.

It should be remembered that this amendment operates only in favor of third persons who deal with the executor. It in no way affects the rights of persons interested in the estate against the executor.

AWARDS IN LIEU OF HOMESTEAD
(CHAPTER 205, SECTION 10; RCW 11.52.010)

Section 10 of chapter 205 adds another amendment to the statutory section concerning awards in lieu of homestead. It has almost become standard practice for the legislature to amend this section of the statute. Amendment has occurred in four of the last six legislative sessions. The present amendment consists of a proviso stating "the court shall have no jurisdiction to make such award unless the petition therefor is filed with the clerk within six years from the date of the death of the person whose estate is being administered."

The amendment was no doubt designed to repeal the rule announced in *In re Pol's Estate*.¹⁹ The court there held that there was no statute of limitations applicable to awards in lieu of homestead. It specifically held that section 1473 of Remington's Revised Statutes (now RCW 11.04.270) exempting real estate from liability for decedent's debts, if letters testamentary or of administration are not granted within six years, was inapplicable because the right to an award in lieu of homestead is not a claim based upon a debt. It should be noted that the 1955 amendment does not prescribe the same six year period as that prescribed by RCW 11.04.270 with respect to debts. The amendment requires the petition for award in lieu of homestead to be filed within six years of the date of death whereas the debt statute merely requires letters testamentary or of administration to issue within the six year period. Consequently if probate is commenced within the six year period, a creditor's rights would extend over the full period of probate even though the proceeding should not be completed until after the expiration of the six year period. As to an award in lieu of homestead, however, the petition itself must be filed within six years *from the date of death*.

¹⁹ 27 Wn.2d 670, 179 P.2d 704 (1947).

PROCEDURAL CHANGES AS TO AWARDS OF HOMESTEAD
(CHAPTER 205, SECTION 11; RCW 11.52.020)

Section 11 of chapter 205 (RCW 11.52.020) appears to have been designed to eliminate some procedural differences between applications for awards *in lieu* of homestead and awards of homestead where a formal homestead has been claimed.

The probate code has long contained separate statutory sections dealing with these closely related matters. Patchwork amendment of some of these sections produced the two procedural differences which are dealt with in the recent amending statute.

The first change concerns the character and length of notice to be given. Originally both applications required "such notice as the court may determine." A subsequent amendment now embodied in RCW 11.52.014 changed the notice requirements for awards *in lieu* of homestead, but *not* for awards of homestead, by providing for *posting* of notice in three public places in the county for a period of ten days prior to the hearing. Section 11 now provides that the award of homestead may be made "upon notice as provided in RCW 11.52.014 or upon longer notice if the court so orders." Thus the same procedure as to notice is authorized as to both types of awards except that the court *may* require some *longer* notice as to awards of homestead than for awards *in lieu* of homestead. The statute contains no internal evidence of the reason for giving the court discretion to lengthen the ten day notice. Obviously complete uniformity of procedure is prevented by this discretionary power in the amending statute.

The second procedural change in section 11 does accomplish uniformity. This consists of a repetition in section 11 (RCW 11.52.020) of the language of RCW 11.52.014 which requires representation of a minor child or incompetent heir of the decedent by a guardian ad litem. As a result of this amendment such a guardian ad litem must be appointed to represent such a child or incompetent in both classes of applications, *i.e.* awards *in lieu* of homestead and awards of homestead.

In connection with the amendment of the statutes on both types of awards, it may be in order to suggest that the time may have arrived for a rewriting of these sections in their entirety. While the problem is perhaps not a serious one, the repeated engrafting of amendments upon the original language of the Probate Code of 1917 tends to obscure the pattern of the original statute and make the language

increasingly complex. Clarification might be helped by a revision of the statute in form without causing any loss in substance.

VENDORS INTEREST UNDER A CONTRACT FOR THE SALE OF
REAL ESTATE SALABLE AS PERSONAL PROPERTY
(CHAPTER 205, SECTION 12; RCW 11.56.025)

Section 12 of chapter 205 introduces new material into the probate statute. In substance, it provides that the court may, upon application by the personal representative, authorize and direct him to sell decedent's interest as vendor in a contract for a sale of real estate. Thus far the statute adds nothing because it has long been a rule that the court could authorize the personal representative to sell any kind of property. The 1955 statute, however, goes on to say that the sale of a vendor's interest shall be in accordance with RCW 11.56.020 "relating to sales of personal property." Thus it is made clear that so far as the probate code is concerned, such an interest is treated as personal property and is not subject to the more cumbersome procedure required for the sale of real estate in probate.

The legislature specified that this new provision should be added as a new section to chapter 11.28 RCW. This placing of the statute in the code appears inappropriate. Chapter 11.28 is captioned "letters testamentary and of administration." Actually, it appears that the new section should be added to chapter 11.56 captioned "sales and mortgages of estates." The publishers of RCW have scorned the legislative direction and designated the section as 11.56.025.

NOTICE OF (1) APPOINTMENT OF PERSONAL REPRESENTATIVE
AND PENDENCY OF PROCEEDING; (2) HEARING UPON FINAL
REPORT AND PETITION FOR DISTRIBUTION
(CHAPTER 205, SECTION 13; RCW 11.76.040)

Section 13 of chapter 205 contains three separate amendments. The section in terms amends the existing section of the probate code which prescribes the procedure and particularly the notice to be given with respect to a hearing upon the final report and petition for distribution. As will be seen the provisions of the existing statute concerning notice of such hearing are changed somewhat. Of greater significance, however, is the introduction into this section of a new and quite revolutionary provision concerning notice but having nothing to do with notice on the final report and petition for distribution. This point is emphasized because it appears probable that lawyers may overlook

this revolutionary change owing to its unusual location in the code.²⁰

The provision referred to as revolutionary is one which requires a personal representative *within twenty days after his appointment*, to give written notice of his appointment and of the pendency of the probate of the proceeding by mail to each heir and distributee of the estate whose name and address is known to him. The personal representative is also required to file an affidavit in proof of such mailing.

Heretofore it has not been necessary to give any notice whatsoever to heirs or distributees except (1) notice of the type specified in RCW 11.28.240 to persons who have filed a written request for the personal representative with the clerk of the court for such notice, and (2) notice required in connection with the hearing on the final report and petition for distribution. For many years jurisdiction to enter a final decree binding upon persons interested in the estate was regarded as supported by the published and posted notice given in connection with the final decree. Where such notice had been given in accordance with the statute, the decree became *res judicata* and could be attacked only if obtained by what was rather vaguely defined as "extrinsic fraud."²¹

Confidence in the finality of final decrees based solely on published and posted notice was somewhat shaken by the decision of the Supreme Court of the United States in *Mullane v. Central Hanover Bank*.²² In substance, it was held in that case that published notice under the New York statute concerning administration of trust estates might not be adequate if the person giving the notice knew the whereabouts of the interested parties and failed to give them direct notice of some sort. Shortly following this decision, and no doubt prompted thereby, the Supreme Court of the State of Washington adopted Rule 41 of the Rules of Pleading, Practice and Procedure reading as follows: "Whenever a final report and petition for distribution, or either, shall have been filed in the estate of a decedent and a day fixed for the hearing of the same, the executor or administrator of such estate shall, not less than twenty (20) days before the hearing, cause to be mailed a copy of the notice of the time and place fixed for hearing to each

²⁰ Since this text statement was prepared, the publishers of RCW have providently inserted section 11.28.237 which appears under the 11.28 Chapter heading entitled "*Letters Testamentary and of Administration*." This section is itself captioned "*Notice of Appointment of Executor or Administrator*" and refers the reader to section 11.76.040 where the new statutory requirement is to be found.

²¹ *Farley v. Davis*, 10 Wn.2d 62, 116 P.2d 263, 155 A.L.R. 1302 (1941); *Francon v. Cox*, 38 Wn.2d 530, 231 P.2d 265 (1951).

²² 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

heir or distributee whose name and address is known to him, and proof of such mailing shall be made by affidavit and filed at or before the hearing.”

The amendment presently under discussion incorporates the language of this rule into the statute. At the same time, Rule 41 also became the model for the new statutory requirement of notice by mail to heirs and distributees at the inception of the proceeding. There are thus now within the statute two separate requirements for mailing notices direct to heirs and distributees, that is, (1) a notice of the appointment of the personal representative and of the pendency of the proceeding *within twenty days after the appointment* and (2) notice of the hearing upon the final report *not less than twenty days before the hearing*. The latter notice is in addition to further requirements of published notice of the hearing on the final report. Before the 1955 amendment, the statute required a published and posted notice. The requirement of posting has now been removed. A slight change has been introduced concerning publication. Formerly publication was to be in such paper as the court might order. The new statute specifies simply “a legal newspaper published in the county.”

Recurring to the new requirement for notice by mail to the heirs and distributees at the inception of the proceeding, it should be observed that the statute does not attempt to state the significance of the new procedural step or the consequences of non-compliance. As already observed, notice with respect to the hearing on the final report has been regarded as having great jurisdictional significance. Whether any jurisdictional significance is involved in the new requirement remains for the supreme court to determine. Until the matter has been decided, there is bound to be some uncertainty in estates in which the notice has not been given at all or given tardily.

One other thought occurs with respect to this new requirement. *For the first time there appears to be in our statute an absolute requirement of notice to heirs and distributees where probate is based upon a nonintervention will.* Heretofore it has been possible (though no doubt unwise) for a nonintervention executor to conduct an entire probate proceeding, assuming that he files no final report, without notice of any kind published, posted, by mail or actual, to the beneficiaries of the estate. If the *Mullane* case was sufficient to cast doubt on the finality of a decree entered upon a published and posted notice, obviously a much greater doubt might be cast upon such a nonintervention proceeding based on no notice whatsoever. The present statute

requiring notice at the inception of the proceeding may therefore strengthen the jurisdictional status of such a nonintervention probate. It is true that the 1955 statute does not in express terms state that the new requirement is applicable to nonintervention wills, but it seems probable that the courts will so hold.

CHANGES IN PROCEDURE IN GUARDIANSHIP PROCEEDINGS

Sections 14 and 15 of chapter 205 are directed to procedural changes in guardianship matters. The first change permits notice of the application for the appointment of a guardian to be served upon the person having custody of a non-resident minor, insane, or mentally incompetent person. Formerly the statute required publication of the notice where such a non-resident was involved. Thus there are now two choices under the statute: actual service of the notice on the custodian, or publication. The second change concerns the duties of the guardian. Formerly the statute provided that if a guardian did not report once in every two years or whenever asked to do so, he should receive no allowance for his services and be liable to the ward on his bond for the cost and disbursements and attorney's fees in any proceeding brought against him to enforce the rights of the ward, not exceeding however 10% of the estate. These specific provisions have now been replaced by a more flexible provision requiring the clerk to notify each guardian to file an account, whenever he shall have failed to do so for a period of two years, and in event of failure, leaving it for the court to determine what action may be proper.

DISTRIBUTION OF SHARE OF MISSING DISTRIBUTEE (CHAPTER 7, LAWS OF THE EXTRAORDINARY SESSION OF 1955, RCW 11.76.200 to 11.76.245)

The probate code adopted in 1917 contained five sections (RCW 11.76.200, 11.76.210, 11.76.220, 11.76.230 and 11.76.240) dealing with distribution of the share of a nonresident "absentee" to an agent to be appointed by the court where such distribution is "necessary." Normally there is no reason why distribution cannot be made to a non-resident directly. There are exceptional cases in which owing to war or suspended diplomatic relations it is not possible to make distribution to residents of foreign countries. Such matters, however, are often dealt with by special statutes and probably were not primarily responsible for the inclusion of these statutory sections. Rather, the statutes appear to have been designed largely to handle

the problem of the missing beneficiary of an estate. Unfortunately the statute spoke in terms of non-residence absence which literally were not quite descriptive of all persons whom a personal representative might be unable to locate.

The 1955 amendment abandons such terminology and applies in terms only to a distributee "who has not been located." It has thus made it clear that the statute applies to missing persons. By completely abandoning the former language, however, it may have destroyed the possibility of invoking the statute in cases in which the missing person has beyond doubt been "located" but where there is some legal barrier to making effective distribution to him. While such statutes as those providing for an alien property custodian may cover a large percentage of cases, there might be situations in which it would be useful to have the old, as well as the new, language in the statute.

The 1955 amendment has also expanded and changed the 1917 sections as to the ultimate disposition of the property. The powers and duties of the agent are stated with some greater particularity. Provision is made for payment by the agent to the county treasurer of the proceeds after three years and payment by the county treasurer to the state tax commission for deposit in the state treasury four years and ninety days after receipt by the county treasurer. Specific provision is made for claims by the missing persons, their personal representatives or, upon proof that the missing person predeceased the decedent whose estate is in probate, for the claims of his lineal descendants. Also specific provision is made for the probate of the estate of the missing person by his heirs after the lapse of the combined • seven year period of retention by agent and county treasurer. To that end probate may be commenced within ninety days after the expiration of such period. As a further step provision is made for reclaiming the proceeds from the state, upon appropriation by the legislature, if the missing person shows up even after the seven year plus ninety day period. In effect, there thus appears to be only a sort of conditional escheat which can be defeated by the appearance of the missing person. Finally, the amending statute specifically provides that the court's jurisdiction shall continue after distribution for the purpose of acting on the various matters which may arise in connection with the procedures contained in the statute.

On the whole, this amending statute appears to be a substantial improvement over the prior law.