

FILED

JAN 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30429-9-III
COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

JANET BARNHART, as Personal Representative of the Estate of Reva
Barnhart,

Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY

Respondent,

and

KATHLEEN BARNHART, as Special Administrator of the Estate of
Morris Warren Barnhart,

Defendant.

On appeal from the Superior Court of Spokane County,
the Honorable Salvatore F. Cozza presiding

BRIEF OF RESPONDENT

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Attorneys for Respondent

ORIGINAL

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I. INTRODUCTION

Janet Barnhart filed her lawsuit against Liberty Mutual Insurance Company (“Liberty Mutual”), asserting that Liberty Mutual was required to pay her for a judgment she obtained against the Estate of Morris Barnhart and Kathleen Barnhart, as the personal representative of the Estate. The trial court properly dismissed the lawsuit with prejudice because (1) Janet Barnhart failed to allege any basis for bringing a claim against the bond under California law; and (2) defendant Kathleen Barnhart, as personal representative of the Estate of Morris Barnhart, is immune from suit in Washington. This Court should affirm the dismissal of the lawsuit.

II. STATEMENT OF THE CASE

On July 6, 2006, Kathleen Barnhart filed a Petition for Judicial Proceeding in *In re Estate of Reva G. Barnhart*, Lincoln County Superior Court Cause No. 95-4-00026-4. CP 73-85. In the petition, she sought to set aside a waiver of inheritance signed in 1998 by her deceased husband, Morris Barnhart, and to remove her sister-in-law, Janet Barnhart, as personal representative of the Estate of Reva G. Barnhart. CP 75-76. On or about August 16, 2006, venue in the case was moved to Spokane County Superior

Court under Cause No. 06-4-00962-4, and Janet¹ filed an answer to the petition. CP 87-93.

The trial court concluded that it had jurisdiction over the matter, that Kathleen's petition was not barred by laches, and that Morris Barnhart had not validly disclaimed his inheritance. This Court reversed on April 14, 2009, holding that because Kathleen filed the petition in her personal, rather than representative capacity, she had no standing to assert a claim against the estate. The Court did not address the issues of laches or the validity of the disclaimer. *See In re Estate of Barnhart*, No. 27002-5-III, 2009 Wash. App. LEXIS 857 (April 14, 2009).

On July 7, 2009, Kathleen filed a petition for probate of the estate of her deceased husband Morris in San Diego County Superior Court in California, Case No. 37-2009-00150345-PR-LA-NC. CP 95-103. In the petition, in which she asked to be appointed a "special administrator" under California Probate Code § 8544, she submitted an affidavit from her attorney in Washington, Richard C. Agman. CP 99-101. In the affidavit, Mr. Agman described Kathleen's petition in the Reva Barnhart probate and this Court's decision that Kathleen did not have standing. Mr. Agman stated that "[t]he appropriate party to bring the petition for judicial proceeding would be the

¹ For ease of reference and clarity, first names are used to refer to Kathleen Barnhart and Janet Barnhart. No disrespect to either party is intended.

Personal Representative for the Estate of Morris W. Barnhart,” and that Kathleen “will be filing a motion to substitute herself as the Personal Representative of the Estate of Morris Barnhart, for herself individually, as the Petitioner in the judicial proceeding.” CP 100. Mr. Agman “requested that appropriate Letters be issued to her, with an Order authorizing her to substitute herself as the Personal Representative of the Estate for herself individually, in the judicial proceeding in Spokane County, Washington, in Case Number 064009624 for the purpose of determining the interest of the Estate of Morris W. Barnhart in the Estate of his mother, Reva Barnhart.” CP 101.

On July 8, 2009, the California court issued an Order for Probate in which it appointed Kathleen as special administrator of the Estate of Morris Barnhart. CP 105-106. The order granted her “the following powers under Probate Code § 8544(a): (1) To take possession of all real and personal property of the estate of the decedent and preserve it from damage, waste, and injury. (2) To commence and maintain or defend suits and other legal proceedings.” CP 106. The order further required Kathleen to obtain a bond under California Probate Code § 8480 in the amount of \$205,000. CP 105. Kathleen obtained the bond from Liberty Mutual. The bond incorporates the July 8, 2009 order appointing Kathleen as special administrator and states that if Kathleen “faithfully execute[s] the duties of the trust according to law,

then this obligation shall be void.” CP 21. Letters of special administration in accordance with the Order for Probate were issued on July 9, 2009. CP 108.

On July 21, 2009, Kathleen filed in Spokane County Superior Court a Motion for an Order Substituting Kathleen Barnhart as Personal Representative of the Estate of Morris Barnhart as the Petitioner and Real Party in Interest along with an affidavit in support of the motion. CP 110-112 & 114-118. The following day, July 22, 2009, Janet filed, as personal representative of the Estate of Reva Barnhart, a response to Kathleen’s motion. CP 120-125. The trial court subsequently granted Kathleen’s motion. After a bench trial, the court entered Findings of Fact, Conclusions of Law and a Judgment on April 29, 2011. CP 127-133 & 135-136. In the findings and conclusions, the court ruled against Kathleen both on the merits of her petition and on procedural grounds and dismissed her petition. The court concluded that “the Respondent shall be awarded reasonable attorney’s fees in the amount of \$20,092.50 and costs of \$686.54 against the Estate of Morris Barnhart.” CP 132. The court struck language in the proposed order as follows:

That the Respondent shall be awarded reasonable attorney’s fees in the amount of \$20,092.50 and costs ~~in the amount of~~ \$686.54 against ~~Kathleen Barnhart as Personal Representative of~~ the Estate of Morris Barnhart.

Id. The Judgment, however, is inconsistent with the findings and conclusions, stating that the “judgment debtor” is “THE ESTATE OF MORRIS BARNHART, KATHLEEN BARNHART, Personal Representative of the Estate of Morris Barnhart.” CP 135.

Janet filed this lawsuit on August 12, 2011 in her personal capacity against Liberty Mutual and against Kathleen in her representative capacity. CP 1-8. Although Kathleen is named as a defendant, Janet only requested relief against Liberty Mutual on the bond. *See id.* Janet moved for summary judgment, CP 9-16, which Liberty Mutual opposed on the basis that Janet failed to satisfy the conditions for bringing a claim against the bond, Janet lacked standing to sue, and Kathleen was immune from suit in Washington. CP 53-67. At the summary judgment hearing, the court granted an oral motion to join Janet as plaintiff in her representative capacity, CP 147-148, and denied Janet’s motion for summary judgment. CP 149-150. Finding no facts in dispute, the court dismissed the lawsuit with prejudice. *Id.*

III. ARGUMENT

A. The issues of Kathleen Barnhart's duties as special administrator and Liberty Mutual's liability under the bond are governed by California law.

Janet argues that the trial court erred in applying California law to her claim against the bond.² There can be no question that the issues of whether Kathleen breached her duties as personal representative and whether Liberty Mutual is liable to Janet on the bond are governed by California law. Liberty Mutual issued the bond in *California* on behalf of Kathleen, a *California* resident, for a probate proceeding in *California*. The bond was issued in accordance with the July 8, 2009 order by a *California* court appointing Kathleen as special administrator of the Estate of Morris Barnhart in order to secure the “faithful[] execut[ion] [of] the duties of the trust according to law.” CP 21, 105. *California's* Probate Code establishes and governs Kathleen's duties as special administrator, and the Probate Code and California contract law govern her and Liberty Mutual's obligations under the bond.³

² Ironically, Janet quoted one of the relevant California statutes in her complaint, CP 5-6, showing that she understood that California law applied to her claim against the bond.

³ Whether under Washington or California law, “[a] bond is a contract that governs the surety's liability to the obligee.” *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588 (2007); *Cates Constr., Inc. v. Talbot Partners*, 21 Cal. 4th 28, 47, 980 P.2d 407 (1999).

Janet applies the wrong standard to a choice of law analysis. Both *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577 (1976) and *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137 (2009) involve tort cases. The factors quoted in Janet's brief are from RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971) (not §§ 175-180 as stated by Janet, *see* Opening Br. at 12-13), which according to the Supreme Court in *Johnson*, "appl[ies] to a *tort* choice-of-law problem." 87 Wn.2d at 580 (emphasis added). The factors from RESTATEMENT § 145 simply do not apply to this lawsuit. Likewise, *Schnall v. AT&T Wireless Servs.*, 171 Wn.2d 260 (2011) and RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971) do not apply because they only address contracts with a choice-of-law provision. The bond does not have a choice-of-law provision.

The correct standard is provided by RESTATEMENT (SECOND) CONFLICT OF LAWS § 188. According to the Supreme Court in *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 686 (1978), the applicable law is from "the state with 'the most significant relationship to the transaction.'" (*quoting Baffin Land Corp. v. Monticello Motor Inn*, 70 Wn.2d 893 (1967)):

The determination of which state meets the test is made by evaluating five factors: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

O'Brien, 90 Wn.2d at 686 (citing RESTATEMENT § 188(2)). Applying these factors, there can be no question that the trial court properly applied California law. The bond was negotiated and signed in California. The subject matter of the bond was to secure Kathleen's performance of her duties as special administrator in a California probate proceeding. The parties to the bond, Kathleen, Liberty Mutual, and the State of California all reside or do business in California.

On a practical level, Janet fails to explain how Washington law would be able to provide any guidance as to whether a California special administrator fulfilled her duties in a California probate proceeding, when those duties are imposed by California law. Washington law cannot do so, and the trial court's decision should be affirmed.

B. Liberty Mutual is not liable under the bond because Janet Barnhart did not establish or even plead that Kathleen Barnhart breached her duties as special administrator.

The court properly dismissed Janet's lawsuit because she failed to allege or show that Kathleen breached any conditions of the bond. The bond is not a source for payment of creditor's claims.

Kathleen was appointed as special administrator of the Estate of Morris Barnhart under California Probate Code § 8540 with the specific powers under Probate Code § 8544(a) to "[c]ollect all claims, rents, and other income belonging to the estate" and "[c]ommence and maintain or

defend suits and other legal proceedings.” CP 106. This appointment was in response to her specific request that she be permitted to substitute as the personal representative in the Spokane County probate. CP 99-102.

California Probate Code § 8542(a)(1) provides that a special administrator must provide “any bond that may be required by the court under Section 8480.” Under Probate Code § 8480(b), the bond “shall be conditioned on the personal representative’s faithful execution of the duties of the office according to law.” Under Probate Code § 9600, a “personal representative has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence.” The personal representative is required to “file an acknowledgement of receipt of a statement of duties and liabilities of the office of personal representative . . . in the form prescribed by the Judicial Council.” Probate Code § 8404(a). Kathleen did so. CP 138-139. Under Probate Code § 8488(a), “an action may be brought against the sureties on the bond” only “[i]n case of a breach of a condition of the bond.”

That an “interested person” may bring an action against the surety on the bond if the personal representative breaches a condition of the bond is black letter law. A probate bond is “to protect creditors and next of kin from the default or fraud” of the personal representative. 31 AM. JUR. 2D *Executors & Administrators* § 310 (1989). A breach occurs when the

personal representative fails to perform a duty of his or her office. *See id.*, § 343. In her complaint, Janet failed to allege any breach of Kathleen's statutory duties as special administrator. The findings and conclusions on which Janet apparently relies in this lawsuit contain no findings or conclusions that Kathleen breached any duties under California law. CP 127-133. On this basis alone, Janet failed to state a claim and her complaint was properly dismissed.

Had the trial court addressed the issue in Case No. 06-4-00962-4, it would *not* have been able to find that Kathleen breached any duties in pursuing judicial relief in the probate of the Estate of Reva Barnhart for the simple reason that Kathleen was appointed special administrator for the express purpose of pursuing such judicial relief. CP 99-102 & 105-106.⁴

The surety on the bond issued under California Probate Code § 8480 is not liable for any judgment against the estate. "When a money judgment against a personal representative in a representative capacity becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment shall provide that it is payable out of property in the decedent's estate in the course of administration." Probate Code § 9301.

⁴ Janet asserts that the trial court in Case No. 06-4-00962-4 found that "the action was 'invalid and fraudulent' against the estate of Reva Barnhart." Opening Br. at 21. This misrepresents the court's findings – the court determined that the *revocation* was invalid and fraudulent, not the *lawsuit*. CP 131.

“[T]he claim is only payable ‘in due course of administration.’” *Lewis v. O’Brien*, 248 Cal. App. 2d 628, 631 (1967). “The only advantage of a creditor with a judgment against the personal representative over one who has had his claim simply approved is that no one may challenge either the claim or its amount at the final accounting.” *Id.* at 631 n.2.

The general rules for payment of claim in such “due course of administration” indicate that no obligation to pay arises until the probate court enters an order directing the personal representative to pay. Until that time, the judgment against the personal representative does not have the dignity of an *absolute* judgment.

Id. at 631-32 (emphasis in original). Probate Code § 11420(a) sets forth the priorities of different classes of debts to be paid from the estate, including judgments. “If property in the estate is insufficient to pay all debts of any class in full, each debt in that class shall be paid a proportionate share.” Probate Code § 11420(b). Other than specific expenses of estate administration, “the personal representative is not required to pay a debt until payment has been ordered by the court.” Probate Code § 11422(a). In addition to filing her suit in the wrong state, *see* Part III.C below, Janet’s lawsuit is, at best, premature. She has filed a Notice of Outstanding Unpaid Judgment and Creditor’s Claim in the California probate. CP 34-39. If there are any funds in the estate to pay the judgment, the California court will order Kathleen to pay “in the course of administration” of the estate.

“The personal representative shall pay a debt to the extent of the order for payment of the debt, and is liable personally and on the bond, if any, for failure to make the payment.” Probate Code § 11424. The personal representative cannot be held personally liable for the payment of a creditor’s claim against the estate when the estate has no funds from which to pay the creditor. *See, e.g., Lewis v. O’Brien*, 248 Cal. App. 2d 628, 631 (1967); *Vickerson v. Wehr*, 42 Cal. App. 2d 678, 682, 109 P.2d 743 (1941); *Zagoren v. Superior Court*, 117 Cal. App. 548, 552, 4 P.2d 279 (1931); *see also Mason v. Dep’t of Real Estate*, 102 Cal. App. 4th 1349, 1354 (2002) (“... a judgment against an estate is not paid in full if the estate is insufficient or other claims are entitled to a priority”). The surety is liable on the bond only if the personal representative is found liable for breaching his or her duties. *Belshe v. United States Fid. & Guar. Co.*, 64 Cal. App. 4th 580 (1980) (“We conclude that [the personal representative’s] conduct subjected her and [the surety on the bond] to liability based on her breach of her duties as personal representative”); *Zagoren*, 117 Cal. App. at 552 (“The administrator . . . must refuse to make payment to the creditor after he has funds, or should have funds available for such purpose and after the court has directed him to pay such creditor, before he and his bondsmen are personally liable.”).

Although not applicable, Washington law is similar. “The liability of a bondsman is always measured by the express terms of his covenant, the duties and obligations of his principal, as defined by the state statutes, and the conditions contained in the bond. The surety cannot be held liable unless the principal is liable.” *Tucker v. Brown*, 20 Wn.2d 740, 848 (1944). *Tucker* addressed the issue of whether the surety on the personal representative bond is liable for the proper administration of funds which are not assets of the estate but which are received by the personal representative under color of office. The surety on the bond in *Tucker* was liable because the principal had breached its duty under the terms of the bond. Under RCW 11.32.050, a “special administrator shall not be liable to an action by any creditor of the deceased.” Under RCW 11.76.160, the personal representative is only liable, and the surety on the bond is only liable, to the extent there is property in the estate from which to pay creditors. Although Janet relies on this statute, she omits a key portion. The full statute provides:

Whenever a decree shall have been made by the court for the payment of creditors, the personal representative shall be personally liable to each creditor *for his or her claim or the dividend thereon, except when his or her inability to make the payment thereof from the property of the estate shall result without fault upon his or her part.* The personal representative shall likewise be liable on his or her bond to each creditor.

RCW 11.76.160 (emphasis added to show portion of the statute omitted by Janet – *see* Opening Br. at 20). If the personal representative is unable to pay because there is no property in the estate through no fault of the personal representative, neither the personal representative nor the surety on the bond is liable. In any event, Kathleen is not a personal representative under Chapter 11.76 RCW, and thus its provisions do not apply to her.

Janet asserts, for the first time in this appeal, that Kathleen “violated her duty to preserve the estate from any ‘damage, waste, and injury’ when she brought a fraudulent claim against the Estate of Reva Barnhart” and that she “violated her duties as a special administrator.” Opening Br. at 21. Janet asserts that “Liberty Mutual, as Surety, is liable for any false actions brought on behalf of the Estate.” *Id.* Janet did not make *any* allegations of fraud or violation of duties in her complaint, much less meet the heightened pleading standard under CR 9(b). CP 3-8. In her response to Kathleen’s argument that she had failed to meet the conditions of asserting a claim against the bond, Janet claimed that she “was not required to establish or plead that Kathleen Barnhart breached her duties as Special Administrator because the Court entered judgment against her and found that the estate was liable.” CP 142.

Janet has thus waived the argument that Kathleen breached any duties as special administrator in the California probate proceeding. This

Court does not review an issue, theory, argument, or claim of error not properly presented to the trial court. See RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207 (2001). One purpose of the rule is to give the trial court “an opportunity to consider and rule on the relevant authority.” *Bennett v. Hardy*, 113 Wn.2d 912, 917 (1990). Another purpose “is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527 (2001). “[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. The trial court must have an opportunity to consider and rule upon a litigant’s theory of the case before [an appellate] court can consider it on appeal.” *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950 (1967).

C. As a special administrator in a California probate proceeding, Kathleen Barnhart is immune from suit in Washington.

California law is clear that because Kathleen was appointed as special administrator in a California probate, she is immune from suit in that capacity in any other state:

It is clear on authority . . . that as a matter of right a special administrator cannot sue in a jurisdiction other than the one of his appointment, because he is under a *disability* to state a cause of action in himself as special administrator. Also, that he cannot be sued in a jurisdiction other than the one in which he is appointed, because he is *immune* from such suit.

Canfield v. Scripps, 15 Cal. App. 2d 642, 646, 59 P.2d 1040 (1936) (emphasis in original). The California court noted the distinction between a “disability” to sue in another state, which can be removed by statute, and “immunity” from suit in another state, which cannot be removed by statute. Here, although Kathleen petitioned the trial court as personal representative, Janet raised no objection to Kathleen’s right to do so in that capacity. In other words, Kathleen’s *disability* to petition the court was waived by Janet. In this subsequent lawsuit by Janet, however, Kathleen did not waive her *immunity* from suit in any state other than California. Liberty Mutual, which has the right to assert any defense that could be raised by its principal, *see Colo. Structures*, 161 Wn.2d at 628, asserted Kathleen’s immunity in its answer to Janet’s complaint. CP 51.

Janet still has an available remedy in California courts. As stated above, she filed a Notice of Outstanding Unpaid Judgment and Creditor’s Claim in the California probate. CP 34-39. If there are any funds in the estate to pay the judgment, the California court will order Kathleen to pay “in the course of administration” of the estate. She may also, as personal representative of the Estate of Reva G. Barnhart, domesticate her judgment in California and file a lawsuit in California to recover against the Estate of Morris Barnhart, to the extent the Estate has any assets. *See Farmers & Merchants Trust Co. v. Madeira*, 261 Cal. App. 2d 503, 514 (Cal. App.

1968) (“Moreover, an exception is made with regard to lawsuits brought by foreign executors or administrators to recover on judgments which were initially acquired by the decedent or such executors or administrators in the state in which the executor or administrator was appointed.”).

D. The Court should award Liberty Mutual its reasonable attorneys’ fees on appeal under RAP 18.9.

Liberty Mutual is entitled to fees under RAP 18.9 because Janet’s appeal and arguments are frivolous. An appeal is frivolous if it presents no debatable issues upon which reasonable minds might differ and is so totally without merit that there is no reasonable possibility of a reversal. *See State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905 (1998). Reasonable minds cannot differ as to whether California law applies and whether Janet failed to allege any basis for bringing a claim against the bond. Through her argument, brought for the first time on appeal, that Kathleen breached her duties as special administrator, Janet implicitly acknowledges the deficiency of her complaint and her arguments before the trial court. Liberty Mutual has been forced to continue defending against a claim that has no possibility of success and respectfully requests that the Court award reasonable attorneys’ fees under RAP 18.9.

IV. CONCLUSION

The trial court properly applied California law and determined that Janet failed to assert any breach of Kathleen's duties as special administrator. There were no facts in dispute, and the court properly granted summary judgment to Liberty Mutual. *See Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365 (1992) (when facts are not in dispute, a court can order summary judgment in favor of the nonmoving party); *Wash. Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 234 (1983) (same).

DATED this 27th day of January, 2012

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC



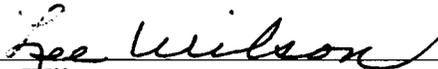
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 27, 2012, I caused service of the foregoing as follows:

<i>Attorney for Appellant:</i> Joseph P. Delay Delay Curran Thompson Pontarolo & Walker, P.S. W. 601 Main Avenue, Suite 1212 Spokane, WA 99201-0684 (509) 455-9500 WSBA No. 02044	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile <input type="checkbox"/> via Overnight Mail
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Dated: January 27, 2012



Lee Wilson

APPENDIX

DEERING'S CALIFORNIA CODE ANNOTATED
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*** This document is current through urgency Chapter 453 & Extra. Sess. Ch. 16 ***
of the 2011 Session

Special Notice: Chapters enacted between October 20, 2009, and November 2, 2010, are subject to repeal by Proposition 22.

PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 2. Opening Estate Administration
Chapter 4. Appointment of Personal Representative
Article 1. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 8404 (2010)

§ 8404. Statement of duties and liabilities

(a) Before letters are issued, the personal representative (other than a trust company or a public administrator) shall file an acknowledgment of receipt of a statement of duties and liabilities of the office of personal representative. The statement shall be in the form prescribed by the Judicial Council.

(b) The court may by local rule require the acknowledgment of receipt to include the personal representative's birth date and driver's license number, if any, provided that the court ensures their confidentiality.

(c) The statement of duties and liabilities prescribed by the Judicial Council does not supersede the law on which the statement is based.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991. Amended Stats 1994 ch 806 § 26 (AB 3686).

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 2. Opening Estate Administration
Chapter 4. Appointment of Personal Representative
Article 5. Bond

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 8480 (2010)

§ 8480. When bond is required; Failure to give bond

(a) Except as otherwise provided by statute, every person appointed as personal representative shall, before letters are issued, give a bond approved by the court. If two or more persons are appointed, the court may require either a separate bond from each or a joint and several bond. If a joint bond is furnished, the liability on the bond is joint and several.

(b) The bond shall be for the benefit of interested persons and shall be conditioned on the personal representative's faithful execution of the duties of the office according to law.

(c) If the person appointed as personal representative fails to give the required bond, letters shall not be issued. If the person appointed as personal representative fails to give a new, additional, or supplemental bond, or to substitute a sufficient surety, under court order, the person may be removed from office.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991. Amended Stats 1998 ch 77 § 3 (SB 1841).

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 2. Opening Estate Administration
Chapter 4. Appointment of Personal Representative
Article 5. Bond

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 8488 (2010)

§ 8488. Statute of limitation for action against sureties on bond

(a) In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the decedent's estate or of any person interested in the estate.

(b) No action may be maintained against the sureties on the bond of the personal representative unless commenced within four years from the discharge or removal of the personal representative or within four years from the date the order surcharging the personal representative becomes final, whichever is later.

(c) In any case, and notwithstanding subdivision (c) of Section 7250, no action may be maintained against the sureties on the bond unless commenced within six years from the date the judgment under Section 7250 or the later of the orders under subdivision (b) of this section becomes final.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991; Stats 1993 ch 794 § 3 (AB 516); Stats 1994 ch 806 § 27 (AB 3686).

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 2. Opening Estate Administration
Chapter 4. Appointment of Personal Representative
Article 8. Special Administrators

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 8540 (2010)

§ 8540. Grounds for appointment; Term of office

(a) If the circumstances of the estate require the immediate appointment of a personal representative, the court may appoint a special administrator to exercise any powers that may be appropriate under the circumstances for the preservation of the estate.

(b) The appointment may be for a specified term, to perform particular acts, or on any other terms specified in the court order.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 2. Opening Estate Administration
Chapter 4. Appointment of Personal Representative
Article 8. Special Administrators

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 8542 (2010)

§ 8542. Issuance of letters

(a) The clerk shall issue letters to the special administrator after both of the following conditions are satisfied:

(1) The special administrator gives any bond that may be required by the court under Section 8480.

(2) The special administrator takes the usual oath attached to or endorsed on the letters.

(b) Subdivision (a) does not apply to the public administrator.

(c) The letters of a special administrator appointed to perform a particular act shall include a notation of the particular act the special administrator was appointed to perform.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 2. Opening Estate Administration
Chapter 4. Appointment of Personal Representative
Article 8. Special Administrators

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 8544 (2010)

§ 8544. Special powers, duties, and obligations

(a) Except to the extent the order appointing a special administrator prescribes terms, the special administrator has the power to do all of the following without further order of the court:

- (1) Take possession of all of the real and personal property of the estate of the decedent and preserve it from damage, waste, and injury.
- (2) Collect all claims, rents, and other income belonging to the estate.
- (3) Commence and maintain or defend suits and other legal proceedings.
- (4) Sell perishable property.

(b) Except to the extent the order prescribes terms, the special administrator has the power to do all of the following on order of the court:

(1) Borrow money, or lease, mortgage, or execute a deed of trust on real property, in the same manner as an administrator.

(2) Pay the interest due or all or any part of an obligation secured by a mortgage, lien, or deed of trust on property in the estate, where there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation. This power may be ordered only on petition of the special administrator or any interested person, with any notice that the court deems proper, and shall remain in effect until appointment of a successor personal representative. The order may also direct that interest not yet accrued be paid as it becomes due, and the order shall remain in effect and cover the future interest unless and until for good cause set aside or modified by the court in the same manner as for the original order.

(3) Exercise other powers that are conferred by order of the court.

Cal Prob Code § 8544

(c) Except where the powers, duties, and obligations of a general personal representative are granted under Section 8545, the special administrator is not a proper party to an action on a claim against the decedent.

(d) A special administrator appointed to perform a particular act has no duty to take any other action to protect the estate.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 4. Creditor Claims
Chapter 7. Claims Established by Judgment

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 9301 (2010)

§ 9301. Money judgment against personal representative

When a money judgment against a personal representative in a representative capacity becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment shall provide that it is payable out of property in the decedent's estate in the course of administration. An abstract of the judgment shall be filed in the administration proceedings.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 5. Estate Management
Chapter 1. General Provisions
Article 1. Duties and Liabilities of Personal Representative

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 9600 (2010)

§ 9600. Duty to manage estate using ordinary care and diligence

(a) The personal representative has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate.

(b) The personal representative:

(1) Shall exercise a power to the extent that ordinary care and diligence require that the power be exercised.

(2) Shall not exercise a power to the extent that ordinary care and diligence require that the power not be exercised.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 9. Payment of Debts
Chapter 2. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 11420 (2010)

§ 11420. Priority for payment

(a) Debts shall be paid in the following order of priority among classes of debts, except that debts owed to the United States or to this state that have preference under the laws of the United States or of this state shall be given the preference required by such laws:

(1) Expenses of administration. With respect to obligations secured by mortgage, deed of trust, or other lien, including, but not limited to, a judgment lien, only those expenses of administration incurred that are reasonably related to the administration of that property by which obligations are secured shall be given priority over these obligations.

(2) Obligations secured by a mortgage, deed of trust, or other lien, including, but not limited to, a judgment lien, in the order of their priority, so far as they may be paid out of the proceeds of the property subject to the lien. If the proceeds are insufficient, the part of the obligation remaining unsatisfied shall be classed with general debts.

(3) Funeral expenses.

(4) Expenses of last illness.

(5) Family allowance.

(6) Wage claims.

(7) General debts, including judgments not secured by a lien and all other debts not included in a prior class.

(b) Except as otherwise provided by statute, the debts of each class are without preference or priority one over another. No debt of any class may be paid until all those of prior classes are paid in full. If property in the estate is insufficient to pay all debts of any class in full, each debt in that class shall be paid a proportionate share.

HISTORY:

Cal Prob Code § 11420

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991. Amended Stats 1996 ch 862 § 33 (AB 2751).

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Division 7. Administration of Estates of Decedents
Part 9. Payment of Debts
Chapter 2. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Prob Code § 11422 (2010)

§ 11422. Payment of debts on court order

(a) Except as provided in Section 11421, the personal representative is not required to pay a debt until payment has been ordered by the court.

(b) On the settlement of any account of the personal representative after the expiration of four months after the date letters are first issued to a general personal representative, the court shall order payment of debts, as the circumstances of the estate permit. If property in the estate is insufficient to pay all of the debts, the order shall specify the amount to be paid to each creditor.

(c) If the estate will be exhausted by the payment ordered, the account of the personal representative constitutes a final account, and notice of hearing shall be the notice given for the hearing of a final account. The personal representative is entitled to a discharge when the personal representative has complied with the terms of the order.

(d) Nothing in this section precludes settlement of an account of a personal representative for payment of a debt made without prior court authorization.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

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PROBATE CODE
Division 7. Administration of Estates of Decedents
Part 9. Payment of Debts
Chapter 2. General Provisions

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

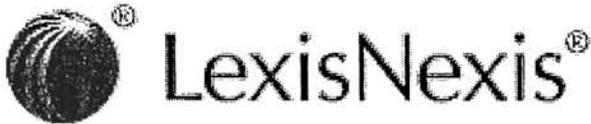
Cal Prob Code § 11424 (2010)

§ 11424. Duty of personal representative to pay debts pursuant to court order

The personal representative shall pay a debt to the extent of the order for payment of the debt, and is liable personally and on the bond, if any, for failure to make the payment.

HISTORY:

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.



GRAFTON MASON, Plaintiff and Appellant, v. DEPARTMENT OF REAL ESTATE, Defendant and Respondent.

No. B154678.

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION EIGHT**

102 Cal. App. 4th 1349; 126 Cal. Rptr. 2d 278; 2002 Cal. App. LEXIS 4838; 2002 Cal. Daily Op. Service 10571; 2002 Daily Journal DAR 12163

October 21, 2002, Decided

October 21, 2002, Filed

PRIOR HISTORY: [***1] Superior Court of Los Angeles County, No. BS 066977, Alban I. Niles, Judge.

DISPOSITION: The judgment is affirmed. The Department of Real Estate is to recover its costs on appeal.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Pursuant to a contract to perform repair work on a house, a contractor deposited funds in escrow, in lieu of a performance bond, with a licensed real estate broker. When the work was complete, the contractor sought return of the deposit. After he obtained a portion of the deposit, the broker died, and the contractor sued the estate for the remainder. The probate court entered a default judgment in his favor, finding that the broker had committed fraud and conversion. More than four years later, the probate court issued an order settling the final account and ordering distribution of the small balance in the estate to the contractor, in partial payment of the contractor's judgment against the estate. The contractor then submitted an application to the Department of Real Estate under *Bus. & Prof. Code, § 10471* (fund for compensation of victims of real estate licensees' fraud or

conversion of trust funds). The application was denied, the contractor filed an application for a court order directing payment from the fund, and the trial court denied the application, finding that it was not timely. (Superior Court of Los Angeles County, No. BS066977, Alban I. Niles, Judge.)

The Court of Appeal affirmed. The court held that *Bus. & Prof. Code, § 10471*, requires the application to be filed within one year after the aggrieved person obtains a final judgment for fraud or conversion of trust funds, and the judgment against the estate was a final judgment for this purpose. Although the contractor filed his application within one year of the probate court's final distribution order, and a distribution order may be construed as a final judgment for some purposes, it is not the final judgment to which *§ 10471* refers. (Boland, J., with Cooper, P.J., and Rubin, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Brokers § 25--Duties and Liabilities--Victim's Reimbursement from Real Estate Fund. --*Bus. & Prof. Code, § 10471* (fund for compensation of victims of real estate licensees' fraud or conversion of trust funds),

is a remedial statute, intended to protect members of the public who are victimized by dishonest licensees. Relief will be granted under § 10471 unless to do so is clearly forbidden by statute, and, when its meaning is doubtful, § 10471 will be construed to advance or extend the remedy provided and to bring within the scope of the law every case that comes clearly within its spirit and policy. However, a plaintiff seeking recovery has the burden of showing compliance with the statute, and courts may not disregard the statute's explicit provisions.

(2) Brokers § 25--Duties and Liabilities--Victim's Reimbursement from Real Estate Fund--Timeliness of Application. --A contractor's application under *Bus. & Prof. Code, § 10471* (fund for compensation of victims of real estate licensees' fraud or conversion of trust funds), was not timely filed, and thus the contractor was not entitled to compensation, where the licensee in question died soon after the contractor sought return of his deposit, the contractor obtained a default judgment against the licensee's estate, including a finding of fraud and conversion, and then waited more than four years before filing his application for compensation. The statute requires the application to be filed within one year after the aggrieved person obtains a final judgment for fraud or conversion of trust funds, and the judgment against the estate was a final judgment for this purpose. Although the contractor filed his application within one year of the probate court's final distribution order, and a distribution order may be construed as a final judgment for some purposes, it is not the final judgment to which § 10471 refers.

[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 271.]

COUNSEL: Walter L. Gordon III for Plaintiff and Appellant.

Bill Lockyer, Attorney General, W. Dean Freeman and Diane Spencer Shaw, Deputy Attorneys General, for Defendant and Respondent.

JUDGES: Cooper, P. J., and Rubin, J., concurred. Appellant's petition for review by the Supreme Court was denied January 15, 2003.

OPINION BY: BOLAND

OPINION

[*1351] [**279] **BOLAND, J.**

SUMMARY

The Real Estate Recovery Program permits persons victimized by dishonest real estate licensees to obtain compensation from a Recovery Account funded by real estate license fees. In order to recover, an aggrieved claimant must obtain a final judgment against the licensee based upon the licensee's fraud or conversion of trust funds in connection with licensed activities, and must file an application with the Department of Real Estate no later than one year after the judgment has become final.

Here, we decide that when an aggrieved claimant obtains a final judgment against the estate of [***2] a deceased broker based on the broker's conversion of funds, the claimant must file his application within one year of judgment, and may not delay filing pending the issuance of probate orders settling the broker's estate.

FACTUAL AND PROCEDURAL BACKGROUND

Grafton Mason is a contractor licensed by the State of California. In 1992 he contracted with Wendell Henderson, a licensed real estate broker, to perform repairs on a house. Mason deposited \$ 69,000 in an escrow account maintained by Henderson, in lieu of a performance bond. After the repair work was completed, Mason sought the return of his deposit, but received only \$ 25,000 from the account. Henderson died shortly thereafter.

Mason opened a probate estate for Henderson, became administrator of the estate, and filed a creditor's claim. The probate court permitted Mason to sue the estate, and on February 13, 1996, a default judgment was entered against the estate and Henderson's wife in the amount of \$ 52,434 (\$ 44,000 plus interest of \$ 8,434). The judgment included findings of fact and [**280] conclusions of law, including a finding that Henderson, a licensed broker, committed fraud and conversion of Mason's \$ 44,000 in connection [***3] with licensed activities.

While he was administrator of Henderson's estate, Mason sought recovery of all the assets Henderson might have owned, and eventually recovered \$ 4,000 from the estate. On June 2, 2000, the probate court issued an order settling the final account and ordering distribution of the \$ 4,000 balance in the estate to Mason, in partial payment

of Mason's judgment against the estate.

[*1352] On August 3, 2000, Mason submitted an application to the Department of Real Estate for payment from the Recovery Account. The application was denied on November 2, 2000, by operation of law.¹ On December 19, 2000, Mason filed an application seeking a court order directing payment from the Recovery Account. The department opposed the application.

1 If the commissioner fails to render a final written decision within 90 days of receipt of a completed application, the claim is deemed denied. (*Bus. & Prof. Code, § 10471.3.*)

A trial was held on September 25, 2001. Mason testified, and [***4] the court took judicial notice of the probate file of the Henderson estate and the court file in Mason's civil action against the estate. Mason's application was denied. The court concluded Mason failed to prove the claim was timely filed under *Business and Professions Code section 10471*, failed to prove fraud on the part of Henderson, and failed to prove the matter arose directly out of a transaction involving acts for which a real estate license was required.

Notice of appeal was filed on November 19, 2001, and is deemed filed on November 28, 2001, the date of entry of judgment. (*Cal. Rules of Court, rule 2(d).*)

DISCUSSION

The Recovery Account is a fund administered by the Department of Real Estate. Its purpose is to reimburse certain losses incurred by members of the public as a result of fraudulent conduct by real estate licensees. The program applies to claimants who have obtained a final judgment against a licensee based upon the licensee's fraud or conversion of trust funds, arising from a transaction in which the licensee performed acts requiring a real estate license. (*Bus. & Prof. Code, §§ 10470 et seq.*)² A claimant [***5] must file an application with the Department of Real Estate no later than one year after the judgment becomes final. (*Id., § 10471, subd. (b).*)³

2 "When an aggrieved person obtains . . . a final judgment . . . against a defendant based upon the defendant's fraud, misrepresentation, or deceit, made with intent to defraud, or conversion of trust funds, arising directly out of any transaction in which the defendant, while licensed under this

part, performed acts for which a real estate license was required, the aggrieved person may, upon the judgment becoming final, file an application with the Department of Real Estate for payment from the Recovery Account . . . of the amount unpaid on the judgment that represents an actual and direct loss to the claimant in the transaction." (*Bus. & Prof. Code, § 10471, subd. (a).*)

3 The application must contain numerous items of information and representations from the claimant. (*Bus. & Prof. Code, § 10471, subd. (c).*) These include a description of claimant's searches and inquiries concerning the judgment debtor's assets, an itemized valuation of assets discovered, and the results of claimant's actions to have the assets applied to satisfaction of the judgment. (*Id., § 10471, subd. (c)(7)(D).* [***6])

(1) The courts have consistently held that *Business and Professions Code section 10471* is a remedial statute, intended to protect members of the [*1353] public who are victimized by dishonest licensees. "[R]elief [***281] will be granted under *section 10471* unless to do so is clearly forbidden by statute . . .," and when its meaning is doubtful, *section 10471* will be construed "to advance or extend the remedy provided, and to bring within the scope of the law every case which comes clearly within its spirit and policy. . . ." (*Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 896-897 [36 Cal. Rptr. 2d 193]*, citations omitted.) On the other hand, "a plaintiff seeking recovery has the burden of showing compliance with the statute," and courts "may not disregard the explicit provisions of *section 10471* . . ." (*Stout v. Edmonds (1986) 180 Cal. App. 3d 66, 69 [225 Cal. Rptr. 345].*)

(2) In this case, we conclude Mason failed to timely file his application with the Department of Real Estate. Under *Business and Professions Code section 10471*, an application "shall be delivered . . . to . . . the department not later than [***7] one year after the judgment has become final." (*Bus. & Prof. Code, § 10471, subd. (b).*) The application process after obtaining a judgment is specifically described in the statute: "When an aggrieved person obtains . . . a final judgment . . . against a defendant based upon the defendant's fraud . . . or conversion of trust funds, . . . the aggrieved person may, upon the judgment becoming final, file an application . . . for payment from the Recovery Account . . . of the amount unpaid on the judgment that represents an actual

and direct loss to the claimant" (*Id.*, § 10471, *subd.* (a).)

Mason obtained a judgment on February 13, 1996, but did not file his application until December 19, 2000. He argues the one-year filing requirement was not triggered by the February 13, 1996 judgment, and did not begin to run until entry of the June 2, 2000 probate court order, which settled Henderson's estate and distributed the balance remaining in the estate to Mason "in partial payment of the \$ 52,434 judgment against decedent." Mason contends the 1996 civil judgment was not a "final judgment" of his claim, because the judgment was against Henderson's estate, [***8] and because "the claim itself had to still receive the approval of the probate court before [Mason] had [the] right to the money." Mason's arguments fail for several reasons.

First, Mason's interpretation would require us to reach conclusions that are inconsistent with the unambiguous language of *section 10471*. It would compel us either to find that the February 1996 judgment was not a final judgment or to create an exception to the "final judgment" language in the [*1354] statute. While the statute is remedial and must be construed broadly, we can neither disregard its plain language nor add to its terms. Consequently, we are bound to conclude that the February 1996 judgment was a final judgment as described in the statute, which contains no exceptions. ⁴

⁴ Mason argues the statute did not anticipate claims against a deceased broker. However, the situation would be no different if Henderson had been alive when Mason sued, and had died after Mason obtained a final judgment against him. "[A]fter the death of the decedent all money judgments against the decedent or against the personal representative on a claim against the decedent or estate are payable in the course of administration and are not enforceable against property in the estate of the decedent under the Enforcement of Judgments Law" (*Prob. Code*, § 9300.)

[***9] Second, the Probate Code did not, as Mason argues, require further approval of Mason's claim by the probate court after he obtained a final judgment against Henderson's estate. "When a money judgment against a personal representative in a representative capacity becomes [**282] final, it conclusively establishes the validity of the claim for the amount of the judgment." (

Prob. Code, § 9301.) The only difference between a final judgment against a living person and one against an estate is that the latter is payable out of property in the decedent's estate in the course of administration (*ibid.*), and the former is enforceable under the Enforcement of Judgments Law (*Code Civ. Proc.*, §§ 680.010 *et seq.*). While a judgment against an estate is not paid in full if the estate is insufficient or other claims are entitled to a priority, the same is true for a judgment against any other defendant; recovery is limited by the extent of the judgment debtor's assets. In short, Mason confuses the issue of finality with satisfaction of judgment. Mason had no "right to the money" until the estate was settled and it was determined whether funds were [***10] available to satisfy his judgment. However, his position was indistinguishable analytically from that of any other judgment creditor compelled to locate available assets in order to enforce or satisfy a judgment. It is the finality of the judgment for fraud or conversion, not the finality of subsequent procedures to enforce the judgment, which triggers the limitations period.

Third, the final distribution order of the probate court may be construed as a "final judgment." (*Bacon v. Bacon* (1907) 150 Cal. 477, 486 [89 P. 317] [under predecessor statutes "the decree of distribution should have the same force and effect as other final judgments"].) It is not, however, a "final judgment . . . based upon the defendant's fraud . . ." It is a "final judgment" settling the administrator's final account, approving the administrator's report, and distributing the \$ 4,000 in the estate to Mason as "a creditor of the Decedent with an unpaid judgment . . ." Moreover, the distribution order as a "final judgment" does not comport with the remainder of the statutory language. The statute allows Mason, "upon the judgment [*1355] becoming final, [to] file an application . . . for payment [***11] from the Recovery Account . . . of the amount unpaid on the judgment . . ." (*Bus. & Prof. Code*, § 10471, *subd.* (a).) However, there is no "amount unpaid" on the probate court's order distributing \$ 4,000 to Mason; the only "amount unpaid" is on the February 1996 judgment. Thus, the distribution order does not comport with the statutory description.

In sum, we are not at liberty to interpret the statute other than according to its unambiguous language. Only the February 1996 judgment conforms to the terms of the statute. Accordingly, Mason was required to deliver his application for payment from the Recovery Account to

102 Cal. App. 4th 1349, *1355; 126 Cal. Rptr. 2d 278, **282;
2002 Cal. App. LEXIS 4838, ***11; 2002 Cal. Daily Op. Service 10571

the Department of Real Estate "not later than one year after the judgment [became] final." He failed to do so and, therefore, is not eligible for payment from the Recovery Account.⁵

⁵ In view of our conclusion on this issue, we need not consider Mason's contentions the trial court erred in finding Mason both failed to prove

fraud and failed to prove the transaction involved acts for which a real estate license was required.

[***12] DISPOSITION

The judgment is affirmed. The Department of Real Estate is to recover its costs on appeal.



Estate of LOUELLA STARKWEATHER, Deceased. S. KIMBERLY BELSHE, as Director, etc., Petitioner and Respondent, v. UNITED STATES FIDELITY & GUARANTY COMPANY, Objector and Appellant. S. KIMBERLY BELSHE, as Director, etc., Plaintiff and Appellant, v. UNITED STATES FIDELITY & GUARANTY COMPANY, Defendant and Respondent.

No. A078754., No. A078996.

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION TWO

64 Cal. App. 4th 580; 75 Cal. Rptr. 2d 766; 1998 Cal. App. LEXIS 505; 98 Cal. Daily Op. Service 4334; 98 Daily Journal DAR 5903

June 5, 1998, Decided

PRIOR HISTORY: [***1] Superior Court of Alameda County. Superior Court No. 2452661. William A. McKinstry, Judge; Superior Court of Contra Costa County. Superior Court No. C96-03500. John F. Van De Poel, Judge.

DISPOSITION: The judgment in Estate of Starkweather (A078754) is affirmed. The judgment in Belshe v. Fidelity (A078996) is reversed. Costs to the Department.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a probate proceeding, the personal representative of a decedent's estate falsely represented to the probate court that the decedent had not received Medi-Cal benefits. The estate was then distributed to the personal representative, who became insolvent, and her brother. A subsequent dispute between the State Department of Health Services and the personal representative and her surety took place in the context of the probate proceeding in one county, and in a separate action filed by the department against the personal representative and her

surety to enforce its claim and recover on the personal representative's bond in a second county. In the probate proceeding in the first county, the trial court granted the department's petition to set aside the final accounting and distribution of the estate and surcharge the personal representative and her surety. In the second county, the trial court dismissed the department's action against the personal representative and her surety. (Superior Court of Alameda County, No. 2452661, William A. McKinstry, Judge; Superior Court of Contra Costa County, No. C96-03500, John F. Van De Poel, Judge.)

The Court of Appeal affirmed the judgment in the first county and reversed the second county's judgment, holding that the personal representative's conduct subjected her and her surety to liability based on her breach of her duties as personal representative and under the doctrine of extrinsic fraud. Although *Prob. Code, § 9203, subd. (b)*, which provides for recovery of a public entity's claim against distributees of an estate, provides the exclusive remedy for failure to give notice that does not amount to extrinsic fraud, the statute does not address the problem of fraudulent failure to give notice. The personal representative's willful conduct enabled her to obtain distribution of the estate to her and her brother in derogation of the legitimate claim of the department. Her

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subsequent insolvency was an additional factor in concluding the department's legal remedy under § 9203, *subd. (b)*, was inadequate. (Opinion by Kline, P. J., with Haerle and Lambden, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1a) (1b) (1c) (1d) (1e) (1f) Decedents' Estates § 157--Liability on Administration Bonds--Action by Public Entity Asserting Claim Against Surety of Personal Representative--Extrinsic Fraud: Public Aid and Welfare § 35.2--Medi-Cal. --The State Department of Health Services was entitled to recover its claim for Medi-Cal payments from the surety of a personal representative of a decedent's estate. The personal representative had falsely represented to the probate court that the decedent had not received Medi-Cal benefits. Although *Prob. Code, § 9203, subd. (b)*, which provides for recovery of a public entity's claim against distributees of an estate, provides the exclusive remedy for failure to give notice that does not amount to extrinsic fraud, the statute does not address the problem of fraudulent failure to give notice. The personal representative's willful conduct enabled her to obtain distribution of the estate to her and her brother in derogation of the legitimate claim of the department. The personal representative's subsequent insolvency was an additional factor in concluding that the department's legal remedy under § 9203, *subd. (b)*, was inadequate. Under these facts, the personal representative's conduct subjected her and her surety to liability based on her breach of her duties as personal representative and under the doctrine of extrinsic fraud.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, § 584.]

(2) Statutes § 4--Operation and Effect--Exclusivity of Remedy. --When a statute creates a new right and provides a remedy, that remedy is exclusive.

(3) Equity § 2--Existence of Legal Remedy. --Equitable relief is unavailable when there is an adequate remedy at law.

(4) Criminal Law § 514.2--Punishment--Restitution--Welfare Fraud. --When a person is convicted of welfare fraud, the

government is a victim entitled to restitution under *Pen. Code, § 1202.4, subd. (k)*.

[See 3 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 1325A.]

(5) Statutes § 4--Operation and Effect--Absence of Remedy. --When a new right is created by statute, the party aggrieved by its violation is confined to the statutory remedy if one is provided; otherwise any appropriate common law remedy may be resorted to.

(6) Decedents' Estates § 109--Actions--Based on Extrinsic Fraud: Fraud and Deceit § 2--Extrinsic Fraud. --Extrinsic fraud is a broad concept that tends to encompass almost any set of extrinsic circumstances that deprive a party of a fair adversary hearing. The clearest examples of extrinsic fraud are cases in which the aggrieved party is kept in ignorance of the proceeding or is in some other way induced not to appear. In both situations the party is fraudulently prevented from presenting his or her claim or defense. Extrinsic fraud is present when a decree is procured from the probate court by conduct that prevents those having an interest in the estate from appearing and asserting their rights.

COUNSEL: Ottenweller, Solan & Park, Arthur A. Park and Lisa R. McLean for Objector and Appellant and for Defendant and Respondent.

Daniel E. Lungren, Attorney General, and Charlton G. Holland III, Assistant Attorney General, for Petitioner and Respondent and for Plaintiff and Appellant.

JUDGES: Opinion by Kline, P. J., with Haerle and Lambden, JJ., concurring.

OPINION BY: KLINE

OPINION

[*582] [**768] **KLINE, P. J.**

The appeals in these consolidated cases present the question of what remedy is available to the Director of the Department of Health Services (Department) when the personal representative of a decedent's estate falsely represents to the probate court that the decedent did not receive Medi-Cal benefits and notice to the Department is not required, thereby depriving the Department of its opportunity to file a claim against the estate. The

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Department [***2] contends it is entitled to recover from the personal representative or the surety that posted the bond guaranteeing her faithful performance of her duties to the estate, as her perpetration of extrinsic fraud upon [*583] the court constituted a failure to faithfully discharge her duties. The surety maintains the Department is limited to a statutorily provided remedy of recovery from the distributees of the estate. The two trial courts below reached conflicting results. In *Estate of Starkweather*, Superior Court of Alameda County, 1997, No. 2452661 (A078754), the Alameda County trial court granted the Department's petition to set aside the final accounting and distribution of the estate and surcharge the personal representative, and the surety appeals. In *Belshe v. United States Fidelity & Guaranty Co.*, Superior Court of Contra Costa County, 1997, No. C96-03500 (A078996), the Contra Costa County trial court dismissed the Department's action to enforce its claim and recover on the personal representative's bond, and the Department appealed. We conclude the Alameda court's decision was correct, affirm that judgment and reverse the judgment of the Contra Costa court. ¹

1 The parties do not address the question why these actions proceeded independently in different trial courts. The probate proceeding for the administration of the decedent's estate was conducted in Alameda County, the county of the decedent's residence at the time of her death, and the Department's petition to set aside the final accounting and distribution was filed in this case. The Department's complaint against the personal representative and surety was filed in Contra Costa County, alleged in the complaint to be the residence of the personal representative.

[***3] STATEMENT OF THE CASE AND FACTS

In 1994, Darlene Phillips was appointed the personal representative of the estate of Louella Starkweather in a probate proceeding in Alameda County. Phillips caused to be filed a qualifying bond in the amount of \$ 160,000, with United States Fidelity & Guaranty Company (Fidelity) as surety, guaranteeing her faithful execution of her duties as administrator of the estate.

On April 6, 1995, Phillips filed her first and final account and report of administrator and petition for settlement, allowance of fees and distribution. Phillips stated, [**769] among other things, that the decedent

had not received Medi-Cal and, therefore, notice to the Department under *Probate Code section 9202* was not required. The total value of the estate, as received by Phillips from the decedent's conservator, was reported to be \$ 145,528.21. On May 12, 1995, the court entered its order settling the final account, ordering that the estate (then consisting of approximately \$ 116,300 cash) be distributed in equal shares to Phillips and her brother, the decedent's grandchildren.

On September 12, 1996, the Department filed in the Contra Costa Superior Court a first amended complaint [***4] to enforce a Medi-Cal creditor's claim and recover on the probate guaranty bond. The complaint alleged the Department was entitled under *Welfare and Institutions Code section* [*584] 14009.5 to reimbursement for Medi-Cal benefits received by certain decedents; the personal representative or estate attorney was required by *Probate Code sections 9201 and 9202* to provide notice of the decedent's death to the Department if the personal representative knew or had reason to believe the decedent had received Medi-Cal benefits; Louella Starkweather received Medi-Cal benefits of \$ 137,997.48 between approximately May 2, 1974, and April 30, 1992; Phillips was appointed personal representative and caused to be filed a \$ 160,000 bond; Phillips knew or had reason to know Louella Starkweather had received Medi-Cal benefits but did not give the Department notice of the decedent's death, resulting in the Department's failure to file a claim in the probate proceeding and receive payment as required by law; the estate had been distributed, with Phillips receiving one-half the value of approximately \$ 145,528.21; and the Department was entitled to repayment from Phillips and Fidelity, as surety, [***5] of \$ 137,997.48, plus interest, based on Phillips's failure to faithfully execute the duties of her office and was entitled to repayment from Phillips as a distributee of an amount equal to her distribution, plus interest. ²

2 In addition to Phillips and Fidelity, the complaint named as a defendant the estate's attorney, Michael Jacobowitz. The Department alleged Jacobowitz knew or had reason to know the decedent had received Medi-Cal benefits and did not provide notice to the Department of her death, and sought to recover \$ 137,997.48 from Jacobowitz because of this failure to provide notice. Jacobowitz apparently successfully demurred to the complaint and the Department

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has not appealed the dismissal of the complaint as to him.

Fidelity filed a demurrer, arguing the Department's sole remedy was a claim against the distributees of the estate under *Probate Code section 9203*. The demurrer was sustained with leave to amend, and on January 31, 1997, the Department filed its second amended complaint. This [***6] complaint added allegations that Phillips had fraudulently and falsely represented to the probate court that the decedent had not received Medi-Cal benefits and notice to the Department was not required, in order to keep the Department in ignorance of the proceedings and deceive the court into distributing the estate to Phillips and her brother without notice to the Department. The Department sought repayment from Phillips and Fidelity of \$ 137,997.48 based on Phillips's failure to faithfully execute her duties as personal representative, and repayment from Phillips, as distributee of the estate, of her share of the distribution plus interest.³

³ The second amended complaint also added as a defendant a surety that had issued a \$ 20,000 bond for Phillips's brother, as distributee, to allow him to receive a preliminary distribution of \$ 20,000. The Department sought to recover \$ 20,000 from this surety because Phillips's brother's share of the estate had not been proportionately reduced to pay the Department's claim. According to the Department's brief on appeal in No. A078996, this surety settled with the Department and has been dismissed from the action.

[***7] Fidelity again demurred, urging the Department was limited to a claim against the distributees even with allegations of fraud by the personal [*585] representative.⁴ The trial court sustained the demurrer without leave to amend, agreeing with Fidelity that "*Probate Code section 9205* does not sanction recovery by the Department of Health Services [**770] against Darlene Phillips as administrator of the decedent's estate on the ground of fraud. Rather plaintiffs, remedy is limited to recovery from the distributees pursuant to *Probate Code section 9203(b)*." The court's order of dismissal was filed on May 12, 1997. The Department filed a timely notice of appeal on June 26, 1997.

⁴ The Department's brief on appeal in No. A078996 states (without reference to the record) that Phillips answered the second amended

complaint but later declared bankruptcy, and that the action against her has been stayed pending resolution of the bankruptcy.

Meanwhile, in October 1996, the Department had filed in Alameda County Superior [***8] Court a petition to surcharge the personal representative and vacate the order of final account and distribution. As in the Contra Costa County action, the petition alleged the Department's entitlement to reimbursement under *Welfare and Institutions Code section 14009.5*; the requirement of notice to the Department imposed by *Probate Code sections 9201* and *9202*; and the receipt by Louella Starkweather of Medi-Cal benefits of \$ 137,997.48 between approximately May 2, 1974, and March 1992. The petition alleged Phillips knew or had reason to know Louella Starkweather had received Medi-Cal benefits, yet informed the probate court notice to the Department was not required because the decedent had not received such benefits;⁵ Phillips never gave notice of the decedent's death to the Department during the administration of the estate and had she done so, the Department would have filed a claim for \$ 137,997.48, which Phillips would have paid pursuant to *Welfare and Institutions Code section 14009.5* or the Department would have been able to enforce through an independent action against Phillips before the final accounting and order of distribution; the May 1995 order distributing the estate [***9] was obtained by Phillips's false representation that the decedent had not received Medi-Cal benefits; that because it was not given notice, the Department was unaware of the probate proceeding and therefore unable to participate in it; and Phillips remained subject to the jurisdiction of the court and surcharge for her failure to carry out her statutory duties as administrator because she had not been discharged from her position as personal representative.

⁵ Attached as an exhibit to the Department's petition was a letter to Phillips from the administrator of Care West-Park Central Nursing Center stating that although the decedent was not on Medi-Cal at the time of her death, she was on Medi-Cal from 1988 through April 1, 1992.

The Department also filed the declaration of its collection representative, Keith Parsley. According to this declaration, the Department was notified by the Public Guardian of Alameda County, in a letter dated December 8, 1994, [*586] that Louella Starkweather had died. This

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[**10] letter indicated the probate or "case reference" number was H-18608-9. On March 8, 1995, Parsley filed a creditor's claim for \$ 137,997.48 in Alameda County Superior Court No. H-18608-9. Parsley subsequently learned--after the estate had been distributed--that H-18608-9 was the number of the conservatorship proceeding rather than the probate proceeding.

Fidelity opposed the Department's petition, arguing *Probate Code section 9203* limited the Department's remedy to making a claim against the distributees of the estate, to the exclusion of equitable remedies for extrinsic fraud.

On April 18, 1997, the Alameda County trial court filed its judgment setting aside the final accounting and distribution and surcharging the personal representative. The court found Phillips knew at the time of her appointment as personal representative that the decedent had received care and treatment reimbursed by the Medi-Cal program; the Department had a valid claim against the state for \$ 137,997.48; Phillips did not notify the Department of the decedent's death but willfully represented in the petition for first and final account and request for final distribution that the decedent had not received [**11] Medi-Cal benefits, with the intent to mislead the court into approving the final account and ordering a distribution without requiring Phillips to discharge the Department's claim; and that Phillips had not been discharged as personal representative, having not filed the receipts of distribution as ordered by the court. The court concluded Phillips breached her fiduciary duty towards the estate and was under an obligation to recover for the estate the corpus of the estate in the amount of \$ 137,997.48 to discharge the valid claim of the Department, and therefore it surcharged Phillips in this amount for her failure to [**71] faithfully carry out her duties. The court set aside the order of final distribution and awarded the Department \$ 137,997.48 against Phillips in her capacity as personal representative of the estate. Fidelity filed a timely notice of appeal on May 27, 1997.

DISCUSSION

Welfare and Institutions Code section 14009.5 provides, in pertinent part: "(a) Notwithstanding any other provision of this chapter, the department shall claim against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival in an amount equal [**12] to the payments for

the health care services received or the value of the [*587] property received by any recipient from the decedent by distribution or survival, whichever is less." ⁶

6 *Section 14009.5, subdivision (b)* of the statute lists circumstances in which the Department may not make the claim described in subdivision (a), including during the lifetime of a surviving spouse and where there is a surviving child who is under age 21, blind or permanently and totally disabled. Subdivision (c) directs the Department to waive its claim in whole or in part if enforcement would result in substantial hardship to other dependents, heirs or survivors.

Chapter 5 of part 4 of the Probate Code, "Claims by Public Entities," consists of *sections 9200 through 9205*. *Probate Code section 9201* provides in pertinent part: "(a) Notwithstanding any other statute, if a claim of a public entity arises under a law, act, or code listed in subdivision (b): [P] . . . [P] (2) The claim is barred only after written notice [**13] or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act or code." Subdivision (b) of this statute lists 12 laws, including the Medi-Cal Act, and specifies the "applicable section" for the Medi-Cal Act as *section 9202 of the Probate Code*.

Section 9202 of the Probate Code provides: "Not later than 90 days after the date letters are first issued to a general personal representative, the general personal representative or estate attorney shall give the Director of Health Services notice of the decedent's death in the manner provided in Section 215 if the general personal representative knows or has reason to believe that the decedent received health care under Chapter 7 (commencing with *Section 14000*) or Chapter 8 (commencing with *Section 14200*) of Part 3 of Division 9 of the Welfare and Institutions Code, or was the surviving spouse of a person who received that health care. The director has four months after notice is given in which to file a claim."

Probate Code section 9203 provides in pertinent [**14] part: "(a) Failure of a person to give the written notice or request required by this chapter does not affect the validity of any proceeding under this code concerning the administration of the decedent's estate. [P] (b) *If property in the estate is distributed before expiration of*

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the time allowed a public entity to file a claim, the public entity has a claim against the distributees to the full extent of the public entity's claim, or each distributee's share of the distributed property, whichever is less. The public entity's claim against distributees includes interest at a rate equal to that specified in *Section 19269 of the Revenue and Taxation Code*, from the date of distribution or the date of filing the claim by the public entity, whichever is later, plus other accruing costs as in the case of enforcement of a money judgment." (Italics added.)

[*588] **(1a)** Fidelity takes the position that the italicized language in *Probate Code section 9203, subdivision (b)*, provides the exclusive remedy available to the Department in a situation where it has not been given notice as required by *Probate Code section 9202*, even when the failure to give notice amounts to extrinsic fraud. [***15] Its position is relatively straightforward. *Probate Code section 9203, subdivision (b)*, expressly posits the circumstance of a failure to give notice and establishes a remedy. **(2)** Where a statute creates a new right and provides a remedy, that remedy is exclusive. (*Faria v. San Jacinto Unified School Dist.* (1996) 50 Cal. App. 4th 1939, 1947 [59 Cal. Rptr. 2d 72]; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 Cal. App. 3d 121, 131 [135 Cal. Rptr. 192].) **(1b)** Statutory provisions imposing liability on the personal representative [**772] for bad faith failure to give notice to other types of creditors, coupled with the absence of such provisions for creditors in the Department's position, indicate the Legislature did not intend to allow the Department resort to an action against the personal representative in a case such as this. (*Prob. Code, § 9053*.) **(3)** Finally, the Department is not entitled to assert a claim based on the doctrine of extrinsic fraud because of the existence of the statutory remedy, equitable relief being unavailable where there is an adequate remedy at law. (*Martin v. County of Los Angeles* (1996) 51 Cal. App. 4th 688, 696 [59 Cal. ***16] Rptr. 2d 303].)

(1c) The Department, by contrast, maintains the statutory scheme does not preclude an action against the personal representative for fraud; the statutory remedy against the distributees is inadequate, as Phillips has declared bankruptcy; and it is entitled to recover from Fidelity on the bond guaranteeing the discharge of duties Phillips breached by her fraud. Although we are unpersuaded by several of the Department's specific arguments, we will conclude the Department's remedy on

the facts of this case is not limited to that specified in *Probate Code section 9203, subdivision (b)*.

With respect to the statutory scheme, the Department argues that where a chapter 5 public entity is not provided notice, it is specifically authorized to rely upon generally available remedies--such as an action for extrinsic fraud--by *Probate Code section 9201, subdivision (a)(2)*. The Department misreads this statute. As quoted above, *Probate Code section 9201, subdivision (a)(2)*, provides that if the claim of a public entity "arises under a law, act or code" listed in subdivision (b), the claim is barred "only after written notice or request to the public entity and expiration of the period [***17] provided in the applicable section." The statute then states, "If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, *otherwise provided in the law, act, or code.*" (Italics added.) Contrary to the Department's interpretation, by the plain language of the [*589] statute the other remedies authorized by *Probate Code section 9201, subdivision (a)(2)*, are not *any* remedies, but only such remedies as may exist "in the law, act or code" making the public entity subject to *section 9201*. In the present case, the relevant law is the Medi-Cal Act, *Welfare and Institutions Code section 14000 et seq.* The Department does not suggest any provision of the Medi-Cal Act authorizes an action for extrinsic fraud in failing to give notice under *Probate Code sections 9201 and 9202*. The language of *section 9201, subdivision (a)(2)*, does not suggest all remedies available under the common law are applicable in case of a failure to give notice.

The Department attempts to bolster its interpretation by reference to *Probate Code section 9205*, the last provision in chapter 5. *Probate Code section 9205* provides: "This chapter does not apply [***18] to liability for the restitution of amounts illegally acquired through the means of a fraudulent, false, or incorrect representation, or a forged or unauthorized endorsement." According to the Department, it is in the present case seeking "restitution" of the proceeds of the estate wrongfully obtained by Phillips "through the means of a fraudulent, false, or incorrect representation." The Department views *Probate Code section 9205* as exempting its action from any provision of chapter 5 that might be read to preclude such actions.

Fidelity urges *Probate Code section 9205* deals not with fraud in the course of a probate proceeding, such as

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involved here, but with fraud in obtaining or providing benefits. For example, *Welfare and Institutions Code section 14014* provides that a person who receives health care for which he or she was not eligible on the basis of false declarations, or who makes false representations on behalf of another person who is not eligible, is liable for repayment and guilty of a misdemeanor or felony (depending on the amount paid). *Welfare and Institutions Code section 10980* establishes criminal penalties, including incarceration and fines, for conduct such as [***19] willfully and knowingly, with intent to deceive, making false representations or material omissions, in attempting to obtain welfare benefits, using a false or fictitious identity in applying for benefits, and obtaining benefits by means of false representations [**773] or other fraudulent devices. (4) When a person is convicted of welfare fraud, the government is a "victim" entitled to restitution. (*People v. Crow (1993) 6 Cal. 4th 952, 957 [26 Cal. Rptr. 2d 1, 864 P.2d 80]*; *Pen. Code, § 1202.4, subd. (k).*)

(1d) Fidelity's interpretation is the more tenable. The phrase "restitution of amounts illegally acquired" in *Probate Code section 9205* suggests reference to restitution under statutes such as those just described. *Probate Code section 9200* provides that "[e]xcept as provided in this chapter, a claim by a public entity shall be filed within the time otherwise provided in this part" [*590] and claims not so filed are barred. *Probate Code section 9201*, as we have discussed, establishes that claims of a public entity arising under 12 enumerated laws, acts or codes are barred only after written notice or request to the public entity and expiration of the period provided in the applicable [***20] section. A review of each of the laws and "applicable section[s]" listed in *Probate Code section 9201* reveals that each involves a public entity's claim for deficiencies arising during the lifetime of a decedent,⁷ for contributions, penalties and interest based on wages paid by a deceased "employing unit"⁸ or for repayment of costs associated with care of the decedent during his or her lifetime.⁹ Thus, under *Probate Code sections 9200* and *9201*, only specific types of claims by enumerated public entities are subject to the provisions of chapter 5. *Probate Code section 9205* simply clarifies that the provisions of chapter 5 do not apply to claims by these public entities for amounts fraudulently obtained by the decedent.

⁷ *Revenue and Taxation Code section 6487.1* (Sales and Use Tax Law, *Rev. & Tax. Code* §

6001 et seq.; Bradley-Burns Uniform Local Sales and Use Tax Law, *Rev. & Tax. Code, § 7200 et seq.*; Transactions and Use Tax Law, *Rev. & Tax. Code, § 7251 et seq.*); section 7675.1 (Motor Vehicle Fuel License Tax Law, *Rev. & Tax. Code § 7301 et seq.*); section 8782.1 (Use Fuel Tax Law, *Rev. & Tax. Code § 8601 et seq.*); section 30207.1 (Cigarette Tax Law, *Rev. & Tax. Code § 30001 et seq.*); section 32272.1 (Alcoholic Beverage Tax Law, *Rev. & Tax. Code § 32001 et seq.*). (*Prob. Code, § 9201, subd. (b).*)

[***21]

⁸ *Unemployment Insurance Code section 1090.* (*Prob. Code, § 9201, subd. (b).*)

⁹ *Welfare and Institutions Code section 7277.1* (State Hospitals for the Mentally Disordered, *Welf. & Inst. Code, § 7200 et seq.*); *Probate Code section 9202* (Medi-Cal Act, *Welf. & Inst. Code, § 14000 et seq.*; Waxman-Duffy Prepaid Health Plan Act, *Welf. & Inst. Code, § 14200 et seq.*). (*Prob. Code, § 9201, subd. (b).*)

Probate Code section 9201, subdivision (b), also lists the Personal Income Tax Law (*Rev. & Tax. Code, § 17001 et seq.*), designating the "applicable section" as *Revenue and Taxation Code section 19266*. This latter section has been repealed (Stats. 1993, ch. 31, § 22); Historical Notes in 61 West's Annotated Codes (1994 ed.) sections 19264 to 19270, page 532 refer to *Revenue and Taxation Code section 19517*, which is concerned with tax assessments against a decedent's estate. The inaccuracy in statutory reference is not relevant to our discussion.

The Department also contends the remedy stated in subdivision (b) of *Probate Code section 9203* applies only if notice is given to the public [***22] entity but the estate is distributed before the public entity files its claim. Clearly, *Probate Code section 9203, subdivision (b)*, applies in this situation. We see no basis, however, for finding the statute applies *only* in cases where notice has been given. Under the statutes at issue, a claim by the Department is not barred unless the Department has been given written notice. (*Prob. Code, § 9201, subd. (a)(2).*) When a personal representative fails to give notice, therefore, the time for the Department to file its claim does not expire. It follows that an estate distributed without notice having been given to the Department has necessarily been distributed "before expiration of the time

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allowed a public entity to file a claim." (*Prob. Code*, § 9203, *subd. (b)*.) [*591] Consequently, *Probate Code section 9203, subdivision (b)*, generally prescribes the remedy for the Department in the event an estate is distributed without notice to the Department.

Despite our rejection of the above arguments by the Department, however, we cannot agree with Fidelity that *Probate Code section 9203, subdivision (b)*, provides the *exclusive* remedy for the Department even in the case of [***23] *fraudulent* failure to give notice. This subject is not expressly addressed in chapter 5. A similar subject *is* addressed in chapter 2, which deals with notice to creditors not subject to chapter 5. Subdivision (b) [***774] of *Probate Code section 9053*, in chapter 2, provides that the personal representative is not liable to any person for the failure to give notice *unless* the creditor establishes the failure was in bad faith, neither the creditor nor the creditor's attorney had actual knowledge of the administration of the estate before expiration of the time for filing a claim, payment would have been made on the claim if it had been properly filed, and the creditor sought an order determining the personal representative's liability within 16 months after letters were first issued to the personal representative.

Fidelity takes the express provision of a remedy against the personal representative in case of a bad faith failure to give notice in chapter 2 to indicate the absence of a similar provision in chapter 5 means the Legislature did not intend such a remedy to be available to the public entities addressed there. The original versions of what are now *Probate Code sections 9053* [***24] and *9203* were enacted at different times, the former in 1987 (Stats. 1987, ch. 923, § 93, pp. 3014-3017) and the latter in 1981 (Stats. 1981, ch. 102, § 74, p. 730 [then *Prob. Code*, § 700.1]). *Probate Code section 700.1*, the predecessor to *Probate Code section 9203*, was enacted as part of legislation dealing with fiscal matters related to Medi-Cal and various other programs. As originally enacted, the statute included provisions requiring notice to the Department of the death of a Medi-Cal recipient, setting forth the time for the Department to file a claim, allowing for a claim against heirs if an estate has already been distributed and stating the Department would be entitled to interest and accrued costs. (Stats. 1981, ch. 102, § 74, p. 730.) Subsequent amendments to the statute have dealt with procedural aspects of the required notice and the Department's entitlement. ¹⁰ No mention appears in the legislative history of the issue of fraud in failing to give

notice. The language of the statute, throughout its history, suggests simply that (as applied to the [*592] Department) it was intended to establish the mechanics for collection of amounts to which the Department [***25] is entitled under *Welfare and Institutions Code section 14009.5*, enacted as part of the same legislation that originally enacted *Probate Code section 700.1* (Stats. 1981, ch. 102, § 101, p. 738), not that it was meant to foreclose remedies against a personal representative who committed fraud. We see no reason to assume the Legislature consciously chose not to afford the chapter 5 governmental entities a means of redress against the fraud of a personal representative; it is far more likely the issue was simply not considered.

10 Amendments to *Probate Code section 700.1* in 1981 altered the language defining the parties required to provide notice to the Department, lengthened the time in which notice was required to be given, specified procedural requisites for the notice, changed references from "heirs" to "distributees," clarified that the Department's entitlement was limited to each distributee's share of the distributed assets, further defined the rate of interest to which the Department would be entitled, and added that "[f]ailure to comply with the provisions of this section shall not affect the validity of any proceeding under this division." (Stats. 1981, ch. 1163, § 2, p. 4654.)

In 1987, section 700.1 was repealed (Stats. 1987, ch. 923, § 37, p. 2983) and its substance enacted as *Probate Code sections 9202* and *9203* (Stats. 1987, ch. 923, § 93, p. 3021.) The provisions requiring notice to the Department and establishing the time in which the Department's claim had to be filed were contained in *Probate Code section 9202*. *Probate Code section 9203* assumed its present form, with subdivision (a) providing that "[f]ailure of a person to give the written notice or request required by this chapter does not affect the validity of any proceeding under this division" and subdivision (b) describing the Department's right to claim against the distributees and specifying the applicable rate of interest. *Probate Code section 9203* was repealed and reenacted, along with the rest of the *Probate Code*, in 1990. (Stats. 1990, ch. 79, § 13, p. 790.)

64 Cal. App. 4th 580, *592; 75 Cal. Rptr. 2d 766, **774;
1998 Cal. App. LEXIS 505, ***25; 98 Cal. Daily Op. Service 4334

[***26]

In general, the Probate Code is clear in allowing for liability of the personal representative in case of fraud. *Probate Code section 8480, subdivision (b)*, explains that the bond a personal representative is required to give as a condition of appointment "shall be for the benefit of interested persons and shall be conditioned on the personal representative's faithful execution of the duties of the office according to law." *Probate Code section 8488, subdivision (a)*, provides: "In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the decedent's estate or of any person interested in the estate." *Probate [**775] Code section 7250, subdivision (a)*, provides that the personal representative and sureties are released from liability when a judgment or order in the administration of the estate becomes final, but subdivision (c) of this section states that the section does not apply "where the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment as to any material fact." With respect to management of the estate, *Probate Code section 9603* provides [***27] that "[t]he provisions of Sections 9601 and 9602 for liability of a personal representative for breach of a fiduciary duty do not prevent resort to any other remedy against the personal representative under the statutory or common law." We can imagine no reason why the Legislature would wish to preclude the governmental entities asserting claims under chapter 5 from recovering against a personal representative who breached her statutory duties by fraudulently failing to give notice and obtaining distribution of the [*593] estate and the surety who guaranteed her faithful performance of her duties. Certainly nothing in chapter 5 expressly immunizes a personal representative from liability for fraudulently failing to give notice to the Department.

(5) We recognize the rule, relied on by Fidelity, that "[w]here a new right is created by statute, the party aggrieved by its violation is confined to the statutory remedy if one is provided [citation]; otherwise any appropriate common law remedy may be resorted to. [Citation.]" (*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.*, *supra*, 65 Cal. App. 3d 121, 131; *Faria v. San Jacinto Unified School Dist.*, [***28] *supra*, 50 Cal. App. 4th 1939, 1947.) (1e) As previously noted, the Department's right to recoup payments made under the Medi-Cal program from a

decedent's estate (*Welf. & Inst. Code, § 14009.5*) and the remedy of a claim against the distributees (*Prob. Code, § 9203, subd. (b)*), were enacted as part of the same legislation. (Stats. 1981, ch. 102, § 101, p. 738, § 74, p. 730.) As to the remedy for a negligent or other failure to give notice that would not amount to extrinsic fraud, we have no doubt *Probate Code section 9203, subdivision (b)*, provides the exclusive remedy. As explained above, however, this statute simply does not address the problem of *fraudulent* failure to give notice. Accordingly, it is the latter part of the *Palo Alto* rule that applies here: "[O]therwise, any appropriate common law remedy may be resorted to." (65 Cal. App. 3d at p. 131.)

The Department's claims for relief in these two cases are based on the proposition that Phillips's conduct amounted to extrinsic fraud. (6) "[E]xtrinsic fraud is a broad concept that "tend[s] to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing." ' [Citations.] The [***29] clearest examples of extrinsic fraud are cases in which the aggrieved party is kept in ignorance of the proceeding or is in some other way induced not to appear. [Citation.] In both situations the party is 'fraudulently prevented from presenting his claim or defense.' [Citations.]" (*Estate of Sanders (1985) 40 Cal. 3d 607, 614-615 [221 Cal. Rptr. 432, 710 P.2d 232]*.) "Extrinsic fraud is present where, as here, a decree is procured from the probate court by conduct which prevents those having an interest in the estate from appearing and asserting their rights. [Citations.]" (*State of California v. Broderon (1967) 247 Cal. App. 2d 797, 804 [56 Cal. Rptr. 58]*.)

(1f) The cases relied upon by the Department, while not concerning the claim of a governmental entity such as in the present cases, illustrate the point. In *State of California v. Broderon, supra*, 247 Cal. App. 2d 797, the decedent, whose estate consisted of former community property of the decedent and her predeceased husband, died without heirs. The husband's [*594] heirs represented to the probate court that they were entitled to all of the estate although they knew they were in fact entitled only [***30] to a one-half interest in the estate, the other half-interest belonging to the state by escheat. No notice was given to the state and the estate was distributed. The heirs' conduct was determined to constitute extrinsic fraud and the state prevailed in its equitable action to set aside the probate decree. In *Alexandrou v. Alexander (1974) 37 Cal. App. 3d 306 [112 Cal. Rptr. 307]*, the administrator represented

64 Cal. App. 4th 580, *594; 75 Cal. Rptr. 2d 766, **776;
1998 Cal. App. LEXIS 505, ***30; 98 Cal. Daily Op. Service 4334

[**776] to the court that he was the sole heir of the decedent when in fact he was a stepson not entitled to any of the estate under the laws of intestate succession. After the estate was distributed and the surety exonerated, suits were filed by parties claiming to be heirs, seeking imposition of a trust on the property distributed to the administrator. Rather than imposing a trust, the trial court entered judgments against the administrator and surety. These judgments were upheld on appeal. *Estate of Sanders, supra*, 40 Cal. 3d 607, held that a court exercising equitable jurisdiction may set aside orders of the probate court in case of fraud. In that case, the decedent's conservator had committed extrinsic fraud in inducing the decedent to change her will to leave the bulk [***31] of her estate to him instead of to her son and in obtaining distribution of the estate under the new will. The Supreme Court reversed the trial court's order denying the son's heirs' motion to set aside the orders admitting the will to probate and ordering final distribution of the estate.

The trial court in *Estate of Starkweather* (A078754) found that Phillips willfully represented to the court a fact she knew to be false--that the decedent had not received Medi-Cal benefits--with the intent to mislead the court into ordering a final distribution of the estate without requiring Phillips to give notice to the Department and discharge the Department's valid claim. The court concluded this conduct constituted a breach of Phillips's fiduciary duty to the estate. These findings and conclusion are not challenged in either of the present appeals. As in *Broderson, Alexandrou* and *Sanders*, Phillips's conduct here kept the Department in ignorance of the proceedings and enabled her to obtain distribution of the estate to her and her brother in derogation of the legitimate claim of the Department.

Fidelity, as we have said, attempts to avoid the application of these cases by reliance [***32] on the rule that equitable relief is unavailable where there is an adequate remedy at law. (*Martin v. County of Los Angeles, supra*, 51 Cal. App. 4th 688, 696.) According to Fidelity, unlike the situations in *Broderson, Alexandrou* and *Sanders*, where there was no remedy available at law, here *Probate Code section 9203* prescribes the remedy, a claim against the distributees. The Department urges, in contrast, that the statutory remedy is inadequate in the present case because Phillips has filed for bankruptcy and listed assets insufficient to pay "any significant portion" of her share of the [*595] estate.¹¹ Although the

Department has offered no authority in support of her position on this point (and Fidelity has not even addressed the issue of adequacy--as opposed to existence--of the statutory remedy), we are aware of case law indicating insolvency of a party may be a factor in concluding a legal remedy to be inadequate. (*Hicks v. Clayton* (1977) 67 Cal. App. 3d 251, 264-265 [136 Cal. Rptr. 512].) Additionally, we have determined the statutory remedy does not necessarily apply to a case of fraudulent failure to give notice. We conclude that Phillips's conduct [***33] subjected her and Fidelity to liability based on her breach of her duties as personal representative and under the doctrine of extrinsic fraud. As the Department stresses, any other resolution of this issue in this case would enable personal representatives (and their sureties) to commit fraud such as occurred here with impunity. We share the Department's view that it (as the other governmental entities affected by chapter 5 of the Probate Code) should be able to rely upon the integrity of the probate system in presenting their claims against estates.

11 The Department also notes the unfairness of a remedy that requires the Department to claim against the other heir, Phillips's brother, who is innocent of any wrongdoing. *Probate Code section 9203, subdivision (b)*, however, allows the Department to make a claim against the distributees even in the absence of any wrongdoing by anyone where the estate has been distributed before expiration of the time for the Department to make a claim.

We are also unpersuaded [***34] by Fidelity's argument that the remedy of setting aside the final order of distribution is precluded by *Probate Code section 9203, subdivision (a)*. This statute reads: "Failure of a person to give the written notice or request required by this chapter does not affect the validity of any proceeding under this code concerning the administration of the decedent's [**777] estate." As explained above, *Probate Code section 9203* appears to have been enacted in order to specify the means by which a governmental entity such as the Department may collect sums to which it is statutorily entitled. Subdivision (a), consistent with subdivision (b), makes clear that in the ordinary case a final order of distribution will not be disturbed when the estate has been distributed before the expiration of the time for the Department's claim and the Department will be limited to recovery from the distributees. As with

64 Cal. App. 4th 580, *595; 75 Cal. Rptr. 2d 766, **777;
1998 Cal. App. LEXIS 505, ***34; 98 Cal. Daily Op. Service 4334

subdivision (b), however, subdivision (a) of *Probate Code section 9203* reflects no legislative determination to so limit the Department's remedy where the Department has been prevented from filing its claim before distribution of the estate by the fraud of the personal representative. We construe subdivision [***35] (a), like subdivision (b), as applying to the ordinary case of inadvertent or negligent failure to give notice but not to a failure to give notice that amounts to extrinsic fraud. ¹² [*596]

¹² At oral argument, counsel for Fidelity made statements suggesting that the Department could

not properly sue Fidelity until after the liability of the personal representative had been finally established. To the extent Fidelity was arguing it should not have been joined in this litigation, the argument has been waived by failure to raise it earlier.

The judgment in *Estate of Starkweather* (A078754) is affirmed. The judgment in *Belshe v. Fidelity* (A078996) is reversed. Costs to the Department.

Haerle, J., and Lambden, J., concurred.



**RUBIN LEWIS, Individually and as Trustee, etc., Cross-complainant and Appellant,
v. TILLIE O'BRIEN, Individually and as Administratrix, etc., Cross-defendant and
Respondent**

Civ. No. 23377

Court of Appeal of California, First Appellate District, Division Two

248 Cal. App. 2d 628; 56 Cal. Rptr. 749; 1967 Cal. App. LEXIS 1670

February 20, 1967

PRIOR HISTORY: [***1] APPEAL from an order of the Superior Court of Alameda County, granting a motion to compel trustee to execute an acknowledgment of satisfaction of the judgment against her individually. Lyle E. Cook, Judge.

DISPOSITION: Affirmed.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1a) (1b) Payment--Application--By Creditor: Decedents' Estates--Claims--Actions--Judgment. --A deposit of a sum of money in a bank for the purpose of satisfaction of a judgment, without specific instructions as to what judgment was to be satisfied, could only be applied to the satisfaction of the personal judgment against the depositor and not to the judgment against an estate for which the depositor was administrator, where there was no showing that any court had ordered the payment of the claim against the estate of the depositor's intestate, without which the debt of the depositor as administratrix had not arisen.

(2) Decedents' Estates--Claims--Actions--Judgment. --On the death of a party during the pendency of an action, if the personal representative is substituted as a party to the action, the requirements of Prob. Code, §

709, concerning the presentation of claims is satisfied; however, the substitution of the personal representative is solely to allow the claimant to proceed against the estate of the deceased defendant. The relief sought is against the decedent's estate and any judgment obtained as the result of the action can go no further than to direct that the claim be paid in the course of administration out of the assets of the estate (*Prob. Code, § 730*); no judgment can be rendered against the representative in personam.

(3) Id.--Claims--Actions--Judgment. --Under *Prob. Code, § 730*, requiring that a judgment against a personal representative on any claim for money against the decedent's estate must be that the personal representative pay, in due course of administration, the amount ascertained to be due, no obligation to pay arises until the probate court enters an order directing the personal representative to pay (*Prob. Code, §§ 951, 952*). Until an order is entered, the judgment against the personal representative is not absolute and he is not personally liable (*Prob. Code, § 954*).

COUNSEL: Howell, Elson & Grogan, Fred K. Howell, Jr., and Michael E. C. Moss for Cross-complainant and Appellant.

Stuhr & Martin and Michael R. Farrah for Cross-defendant and Respondent.

JUDGES: Agee, Acting P. J. Taylor, J., and Bray, J., *

concurring.

* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

OPINION BY: AGEE

OPINION

[*629] [**750] On March 4, 1965 judgment was entered in favor of Rubin Lewis, as trustee, and against Tillie O'Brien, *individually*, for \$ 4,000 and against her, *as administratrix* of her father's estate, for \$ 2,000.

Tillie's father had died during the pendency of the action and Tillie was appointed administratrix of his estate on the morning of trial, solely for the purpose of presenting a defense on his behalf. Actually, he left no estate.

On April 29, 1965 Tillie deposited \$ 4,689.47 of her own funds in the Hibernia Bank to the credit of Rubin, her purpose [***2] being to satisfy the judgment rendered against her individually, plus costs and interest.

The amount required to satisfy the judgment against Tillie individually was only 4 4,431.34 but her attorney explained that the overpayment was due to a miscalculation of the interest.

Rubin applied the amount deposited as follows: \$ 2,409.40 was used to satisfy the judgment against the *estate* of Tillie's father, plus interest thereon of \$ 21.95, plus joint costs of suit of \$ 387.45. The balance of the deposit was applied to the principal and interest due on the individual judgment against Tillie, leaving a balance due thereon, according to Rubin's contention, of \$ 1,763.53 as of April 30, 1965.

On May 19, 1965 Tillie filed a motion to compel Ruben to execute an acknowledgement of satisfaction of the judgment against her individually. On August 16, 1965 an order was made granting the motion. This appeal is by Ruben from that order. ¹

1 The facts before the court were presented by the declarations of Tillie, Ruben, and Ruben's attorney; any conflicts therein are resolved by us in support of the order appealed from.

[***3] Appellant's position is as follows: when

respondent made the bank deposit on April 29, 1965 she gave no instructions to the bank as to how the funds were to be applied; appellant's attorney received notice of the deposit from the bank of April [*630] 30 and on that same day allocated the funds as stated above; appellant's attorney notified respondent's attorney by letter mailed April 30 of this allocation; a letter [**751] from respondent to appellant's attorney, although dated April 29, was mailed on April 30 and received in the attorney's office on May 1; this letter stated that the deposit was for the payment of the judgment, costs and interest on "the judgment against me individually" and that "I have made this deposit because of your refusal to accept the amount of judgment against me individually as satisfaction of the judgment against me individually"; on May 6, in response to a letter from respondent's attorney requesting return of the overpayment due to "a bank error" and the application of the balance in accordance with respondent's letter of April 29, appellant's attorney replied that he refused such request because "Mrs. O'Brien's letter was not sent simultaneously [***4] with the payment of the moneys represented by the bank account."

Appellant relies upon *Civil Code section 1479*, which provides in pertinent part: "Where a debtor under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

"One. -- If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

"Two. -- If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; . . ."

The disposition of this controversy depends upon the applicability of the words, "under several obligations to another." As appellant frankly acknowledges, "If Tillie O'Brien as administratrix of a decedent's estate was not the 'debtor' of Ruben Lewis, then she was not 'a debtor under several obligations to another,' and *Civil Code Section 1479* does [***5] not apply."

(1a) As will be seen hereafter, the debt of respondent *as administratrix* has not as yet arisen. She

248 Cal. App. 2d 628, *630; 56 Cal. Rptr. 749, **751;
1967 Cal. App. LEXIS 1670, ***5

has not yet become "a debtor under several obligations" to respondent.

(2) Upon the death of respondent's father during the pendency of the action, Probate Code section 709 became applicable. It provides in part: "If an action is pending against the decedent at the time of his death, the plaintiff must in like [*631] manner file his claim with the clerk or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had against decedent's estate in the action unless proof is made of such filing or presentation; . . ."

If the personal representative is substituted as a party to the action, as was done in the instant case, the requirements of section 709 concerning presentation of claims is satisfied. (*Pelser v. Pelsler* (1960) 177 Cal.App.2d 228, 231 [2 Cal.Rptr. 259].)

However, substitution of the personal representative is solely to allow the claimant to proceed against the estate of the deceased defendant; for "the action does not involve any personal liability of the party sued. [***6] The relief is sought against the decedent's estate; and any judgment [obtained] . . . as the result of the action can go no further than to direct that the claim be paid in the course of administration, out of the assets of the estate (*Prob. Code, § 730*); no judgment can be rendered against the representative *in personam* (11B Cal.Jur. p. 342)." (*Vickerson v. Wehr* (1941) 42 Cal.App.2d 678, 681-682 [109 P.2d 743].)

(3) *Section 730 of the Probate Code* provides: "A judgment rendered against an executor or administrator, upon any claim for money, against the estate of his testator or intestate, when it comes final, conclusively establishes the validity of the [**752] claim for the amount of the judgment; *and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. . . .* No execution shall issue upon the judgment, nor shall it create any lien upon the property of the estate, or give the judgment creditor any priority of payment." (Italics supplied.)

This section appears to place all claims on a parity, regardless of whether the personal representative and the court acknowledge the claim without [***7] objection or whether they reject it and force the claimant to institute suit. In either case, the claim is only payable "in due

course of administration." ²

2 The only advantage of a creditor with a judgment against the personal representative over one who has had his claim simply approved is that no one may challenge either the claim or its amount at the final accounting. (*Prob. Code, § 713*; see *Grisinger v. Shaeffer* (1938) 25 Cal.App.2d 5, 8-9 [76 P.2d 149]; Perry Evans, *Comments on the Probate Code of California* (1931) 19 Cal.L.Rev. 602, 604.)

Also, of course, all claims, whether by acknowledgment or judgment, are still subject to section 950 of the Probate Code concerning order of payment.

The general rules for payment of claims in such "due course of administration" indicate that no obligation to pay arises until the probate court enters an order directing the personal representative to pay. Until that time, the judgment [*632] against the personal representative does not have [***8] the dignity of an *absolute* judgment. (*Hilton v. McNitt* (1957) 49 Cal.2d 79, 83 [315 P.2d 1].) It has happened that a claim has been allowed, yet erroneously omitted from the final accounting and order to pay creditors. Thereupon, absent an appeal from such order, the claim is lost. (*Federal Farm Mortg. Corp. v. Sandberg* (1950) 35 Cal.2d 1 [215 P.2d 721].)

Section 951 of the Probate Code provides: "As soon as he has sufficient funds in his hands, after retaining sufficient to pay the expenses of administration, the executor or administrator must pay the funeral expenses, the expenses of the last illness, the family allowance, and wage claims to the extent of nine hundred dollars (\$ 900) of each employee of decedent for work done or personal services rendered within 90 days prior to the death of the employer; *but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.*" (Italics supplied.)

Section 952 of the Probate Code provides: "Upon the settlement of any account of the executor or administrator after the time to file or present claims has expired, *the court shall order [***9] the payment of the debts, as the circumstances of the estate permit. . . .*" (Italics supplied.)

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1967 Cal. App. LEXIS 1670, ***9

Not until the time of the order to pay does the *personal* liability of the executor or administrator arise under section 954 of the Probate Code, allowing execution against him as in any civil proceeding. (See *Levy v. National Auto. & Cas. Ins. Co. (1948) 86 Cal.App.2d 632 [195 P.2d 51].*)

(1b) In the instant case, the record does not indicate that any court has ordered payment of this claim against the estate of respondent's intestate. As seen above, under

the Probate Code, the judgment alone does not impose any obligation on respondent as administratrix. Thus, at the time respondent deposited the \$ 4,689.47 with the Hibernia Bank, only her obligation as an individual existed. Appellant had no legal alternative but to apply the money towards its satisfaction.

The order appealed from is affirmed.



JULIA VICKERSON, Appellant, v. ALICIA WEHR, as Special Administratrix, etc.,
Respondent

Civ. No. 11471

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION ONE

42 Cal. App. 2d 678; 109 P.2d 743; 1941 Cal. App. LEXIS 1315

January 29, 1941, Decided

PRIOR HISTORY: [***1] APPEAL from an order of the Superior Court of the City and County of San Francisco granting motion for change of venue. C. J. Goodell, Judge.

DISPOSITION: Reversed.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) **Decedents' Estates--Actions--Jurisdiction, Venue and Process--Jurisdiction and Venue--Actions on Claims.** --The proper county in which to institute an action on a rejected claim is the county in which the executor or administrator resides, regardless of where the estate is pending settlement or where the decedent might have been sued.

(2) **Venue--Change of Venue--Proceedings--General Considerations--Who may Make Application--Substituted Defendant.** --A special administrator who is substituted as sole defendant on his voluntary application following the resignation of the defendant administrator with will annexed, and who does not come into the case as the real party in interest because the action does not concern his personal liability, is not entitled to move for an order that the place of trial of an action properly brought in the county of the residence of

his predecessor be changed to the county of the residence of the movant.

(3) **Id.--Change of Venue--Proceedings--Hearing and Determination--Pleadings as Determining Right--Condition at Time of Motion.** --Statements in cases to the effect that the right of a moving party to a change of venue to the place of his residence is to be determined by the condition of things at the time he first appeared in the action as those conditions are revealed by the pleadings at the time the demand for change of venue is made, do not apply to a motion by a special administrator who, on his voluntary application, is substituted as sole defendant in place of the administrator.

COUNSEL: Leo R. Friedman for Appellant.

Clark & Heafey for Respondent.

JUDGES: KNIGHT, J. Peters, P. J., and Ward, J., concurred.

OPINION BY: KNIGHT

OPINION

[*679] [**744] KNIGHT, J. -- This is an appeal from an order granting respondent's motion for a change of venue. The question involved concerns the right of a

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1941 Cal. App. LEXIS 1315, ***1

party substituted as sole defendant to a change of place of trial upon the ground of residence.

The action was filed in the Superior Court in and for the City and County of San Francisco by the appellant, Julia Vickerson, against A. Terkel, as administrator with the will annexed of the estate of Charles D. Wehr, deceased, on a rejected claim for money which appellant alleges she furnished and loaned to the decedent at various times during the two years preceding his death. The decedent was a resident of Alameda County, and his estate is pending settlement therein; but Terkel at all times mentioned in the complaint and at the time of the filing thereof was a resident of San Francisco; and summons was served on him therein on [***2] January 15, 1940. By written stipulation his time to appear in the action was extended to February 25, 1940; but prior to the expiration of the extended time and without having appeared in the action, to wit, on February 15, 1940, he resigned as such administrator and his letters were revoked; whereupon and on the same day the respondent, Alicia Wehr, widow of the decedent and a resident of Alameda County, was appointed special administratrix with full power of a general administrator. Thereafter and on February 21, 1940, pursuant to a motion made by her in that behalf and after notice to appellant, the court in which the action was pending made an order substituting respondent as sole defendant in the place and stead of Terkel; and two days later she filed notice of motion, supported by the necessary demand and affidavit, for change of venue to the county of Alameda. The grounds of the motion were: "That at the time of the commencement of this action defendant was, and since that time has continued to be and still is, a resident of the County of Alameda, State of California, and [*680] that said Superior Court in and for the County of Alameda, State of California, is the proper [***3] court for the trial of the above entitled cause." The motion was contested by appellant, and after a hearing the same was granted.

(1) In some states the venue of actions against executors and administrators is specially declared to be where it would have been necessary to sue the deceased, but in this state it has been definitely held, in conformity with the common law rule, that the proper county in which to institute an action on a rejected claim is in the county in which the executor or administrator resides, regardless of where the estate is pending settlement or where the decedent might have been sued (*Thompson v. Wood*, 115 Cal. 301 [47 P. 50], *Chiapella v. County*

National Bank & Tr. Co., 217 Cal. 503 [19 P.2d 983]), and section 395 of the Code of Civil Procedure declares in part that except as noted therein "and subject to the power of the court to transfer actions or proceedings as provided in this title [Title 4, Part 2, Code Civ. Proc.], the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action."

(2) It is appellant's contention that the wording of the foregoing code [***4] provision is plain, explicit, and unambiguous; and that since it is expressly declared therein that the county in which the defendant resides at the commencement of the action is the proper county for the trial of the action, the trial court's ruling granting the change clearly contravenes the mandate of the statute. Appellant concedes, however, that the statutory rule embodied in said section is not absolute, nor in all cases controlling as against a party substituted as sole defendant; that two of the well recognized exceptions thereto are where a party "is substituted involuntarily as sole defendant, or . . . comes in as the real party in interest", and that under those circumstances he may apply for a change of venue (67 Cor. Jur., p. 140). The case of [**745] *Howell v. Stetefeldt Furnace Co.*, 69 Cal. 153 [10 P. 390], has been cited by both sides as showing that such is the rule in this state.

There is, however, a sharp disagreement between the parties as to whether the present case falls within either of the exceptions noted. Respondent argues that it is in all material respects similar to *Howell v. Stetefeldt Furnace Co.*, *supra*, and that therefore the decision [***5] therein is here controlling. [*681] A comparison of the cases demonstrates, however, that they are essentially different. In that case the furnace company, whose place of business was in San Francisco, was in possession of a certain sum of money which was claimed respectively by John Howell, a resident of Santa Clara County, and James Thompson, a resident of San Francisco; and Howell brought suit in Santa Clara County against the furnace company to recover the money. The furnace company made no defense, but pursuant to the provisions of section 386 of the Code of Civil Procedure and after notice to Howell and Thompson, paid the money into court, obtained an order substituting Thompson in its place as party defendant, and ceased to have any further connection with the action. Thereupon Thompson filed a demand for a change of venue to San Francisco, where he resided; and the motion was denied. He appealed, and the

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order was reversed, the ground of the reversal being that he was brought into the action *in invitum* under *section 386*; that he had not come in as a voluntary intervenor; that the appearance of the corporation was not his appearance, and that not until he became a party [***6] to the action did he have the opportunity nor was he entitled to move for a change of venue. In the present case respondent was not brought in as an interpleader under the provisions of said *section 386*, nor as the result of any move whatever on the part of the appellant. She came in voluntarily. At her request she was appointed special administratrix, and upon her motion she was substituted as sole defendant. Respondent points out that having been appointed special administratrix with full power of a general administrator, it was her legal duty to defend the action, and that if she had not obtained the order of substitution it would have been necessary for appellant to have done so, before proceeding with the case. Conceding that to be true, the undisputed facts show, nevertheless, that she came into the action voluntarily. Whether a different conclusion would be reached if the order of substitution had been obtained by appellant rather than by respondent involves a situation not here present; consequently whatever might be said in this regard would amount to nothing more than *dictum*.

Nor can it be successfully maintained that respondent came into the case as the real party in [***7] interest, for the reason that the action does not involve any personal liability [*682] of the party sued. The relief is sought against the decedent's estate; and any judgment which appellant might obtain as the result of the action can go no further than to direct that the claim be paid in the course of administration, out of the assets of the estate (*Prob. Code, sec. 730*); no judgment can be rendered against the representative *in personam* (11B Cal. Jur., p. 342). It follows, therefore, that since from the beginning the estate and not the legal representative has been the real party in interest, no new or different interest was brought into the case by respondent's substitution.

(3) In further support of the order of transfer respondent relies on certain language used in deciding the cases of *McClung v. Watt*, 190 Cal. 155 [211 P. 17], *Kallen v. Serretto*, 126 Cal. App. 548 [14 P.2d 917], and *Ah Fong v. Sternes*, 79 Cal. 30 [21 P. 381], to the effect that the right of a moving party to a change of venue to the place of his residence is to be determined by the condition of things existing at the time the moving party first appeared in the action, [***8] as those conditions

are revealed by the pleadings at the time the demand for change of venue is made. In this connection respondent contends that upon the revocation of Terkel's letters of administration he ceased to be a party to the action as absolutely as if he had died (*More v. More*, 127 Cal. 460 [59 P. 823]), and that since his relation to the case terminated and she was substituted before he appeared in the case, she was entitled as a matter of right to have the place of trial of the action removed to the county of her residence. An examination of the three cases respondent relies upon discloses, however, that in none of them was the court, as here, dealing with the situation of a substituted defendant, and it is apparent that the language there employed has no application to such a case. To be more specific, [**746] in *McClung v. Watt*, *supra*, the action was filed in San Francisco against a corporate defendant and the appellant Watt. The corporation maintained its place of business in San Francisco; but Watt was a resident of Sacramento, and he moved for a change of place of trial to Sacramento County on two grounds: that he was a resident of that county, [***9] and that the corporation was joined as a party defendant solely for the purpose of having the action tried in San Francisco. The motion was denied, and in affirming the order the court stated that a motion for a [*683] change of place of trial to the county of the party's residence must be made by the moving party and determined by the court in advance of any other judicial action in the case; hence that the right to a change of place of trial to the residence of the defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleadings existing at the time the party claiming the right first appeared in the action. The court then went on to hold that the complaint therein, in apparent good faith, attempted to state a cause of action against the parties so joined as defendants, and that therefore the moving defendant had not the right to have the place of trial changed to the county of his residence. Obviously, in so holding there was no intention to deviate from the statutory rule embodied in said *section 395*, because, referring especially thereto the court said: "*Section 395 of the Code of Civil Procedure*, under which [***10] defendant here claims the right to have the action transferred, provides that 'the action must be tried in the county in which the defendants, or some of them reside'. If under this section an action is commenced in the county of the residence of one of the defendants, another defendant resident of a different county does not have the right to have the action changed to the county of his

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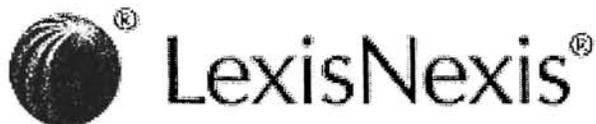
residence, and this is so even though it may happen that all of the defendants join in the demand." In the second case, *Kallen v. Serretto*, *supra*, an action for damages growing out of an automobile collision was instituted in San Francisco wherein the appellants Serretto and two fictitious persons were joined as parties defendant. The accident happened in San Mateo County, and the Serrettos were residents thereof. They filed a demand and motion for change of venue to that county, and thereafter the plaintiff was permitted to file an amended complaint wherein she changed the allegations relating to the operation of defendants' car and in an affidavit filed in opposition to appellants' motion averred that "First Doe" was one Irani, a resident of San Francisco. Apparently, so the decision [***11] states, Irani was never substituted as a party defendant. The trial court denied appellants' motion, and on appeal the order was reversed, mainly on the authority of *McClung v. Watt*, *supra*, the court holding in conformity therewith that the right of a moving party to a change depended upon the conditions existing at the time the demand [*684] was made, as those conditions were then revealed by the pleadings. In the third case, *Ah Fong v. Sternes*, *supra*, an action for damages was filed in Nevada County against a resident of Sutter County, who moved for a change of venue on the ground of residence, and the motion was denied. On appeal the court pointed out that if the action were to be regarded as one for false imprisonment, appellant was entitled to a change of venue; and that if it were to be regarded as one for the recovery of a penalty under *section 1505 of the Penal Code*, for having disobeyed a writ of *habeas corpus*, appellant was not entitled to a change of venue. With respect to that matter the court said that it believed the complaint stated a good cause of action for false imprisonment, and that it doubted whether it stated a cause of action for a penalty [***12] under *section 1505 of the Penal Code*. It was held, however, that the plaintiff in thus framing the complaint with the double aspect could not deprive the defendant of

his right to have the cause tried in the county of his residence; and furthermore that for the reasons set forth in the opinion the result would be the same even though the complaint be regarded as stating two causes of action upon one of which the defendant was entitled to a change of venue, and not upon the other. It will be seen, therefore, that in each of the foregoing cases the factual situation was entirely different from the one here presented, and that the language there used has no application to a case involving the status of a substituted defendant.

Finally, in support of the order appealed from, respondent cites and quotes from the cases of *Smith v. Smith*, 88 Cal. 572 [**747] [26 P. 356], and *Brown v. Happy Valley Fruit Growers, Inc.*, 206 Cal. 515 [274 P. 977], to the effect that the general spirit and policy of said *section 395* is to give a defendant the right of having all personal actions tried in the county of his residence, and that such right has always been safeguarded by a long [***13] line of judicial decisions. The soundness of that doctrine is, of course, not questioned; and beyond doubt it is applicable in cases such as the two cited, wherein a personal judgment was sought against a sole defendant who had been sued in a county other than the one in which he resided. Here it is conceded that the action was properly brought in the county in which the sole defendant resided at the time of the commencement of the action; therefore, by virtue of the express provisions of said [*685] *section 395*, such is the proper county for the trial thereof, subject, of course, to the power of the court to transfer the same as provided in title 4, part 2, of said code.

It follows that since no legal ground has been shown upon which the order appealed from may be sustained, it must be reversed; and it is so ordered.

Peters, P. J., and Ward, J., concurred.



ALICE L. CANFIELD, as Executrix, etc., Appellant, v. E. W. SCRIPPS, Trustee, et al., Respondents

Civ. No. 10621

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

15 Cal. App. 2d 642; 59 P.2d 1040; 1936 Cal. App. LEXIS 113

July 27, 1936, Decided

SUBSEQUENT HISTORY: [***1] A Petition by Appellant to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on September 21, 1936.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County. Walter S. Gates, Judge.

DISPOSITION: Affirmed.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) **Executors and Administrators--Foreign Jurisdiction--Actions.** --As a matter of right, a special administrator cannot sue in a jurisdiction other than the one of his appointment because he is under a disability to state a cause of action in himself as special administrator, and he cannot be sued in a jurisdiction other than the one in which he is appointed, because he is immune from such suit.

(2) **Id.--Pledge--Conversion--Parties--Issues--Foreign Judgment--Res Judicata.** --In this action by the executrix of an estate for damages for conversion of pledged securities upon the ground that the pledgee's sale thereof in a foreign state was illegal, where a special

administrator of said estate, appointed by a local court, had sought to enjoin said sale on the same ground by action in the foreign state and no objection was raised therein as to his capacity to sue, and comity thereby permitted the bringing of such a suit, and, excepting the nominal plaintiff and relief prayed, the parties, the sale, the securities, the debt, the estate, the subject matter, and the issues were the same in both actions, a final judgment of the court of said foreign state denying relief to the special administrator was *res judicata* and binding upon the plaintiff in this action.

COUNSEL: McAdoo, Neblett & Warner, William H. Neblett, John Sobieski and LeRoy P. Lorenz for Appellant.

S. S. Hahn and W. O. Graf for Respondents.

JUDGES: ROTH, J., *pro tem.* Houser, P. J., and Doran, J., concurred.

OPINION BY: ROTH

OPINION

[*642] [**1040] The facts are stated in the opinion of the court.

ROTH, J., *pro tem.* -- Alice L. Canfield, plaintiff and appellant herein, is the executrix of the estate of Byron

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Hilton Canfield, deceased, and was appointed as such by the superior [*643] court of this state, in and for the County of Santa Barbara. She was preceded as the legal and official representative of said estate by E. G. Dodge, special administrator, who had been previously appointed by the same court. This action is one whereby plaintiff seeks damages for conversion of stock belonging to the testate, for which conversion she alleges the defendants are responsible.

During his lifetime, [***2] deceased pledged the stock in question with E. W. Scripps, trustee, as security for the payment of certain notes in favor of certain of the other defendants. The notes were not paid and approximately eight months after the death of the plaintiff's testate, notice having been given of such purpose to Dodge, special administrator, and others, E. W. Scripps, as trustee, commenced proceedings to sell the stock as a pledge in the state of Washington, which was the domicile of Scripps and the *situs* of the stock. Prior to the sale, so noticed, Dodge, special administrator, together with others (including a special administrator appointed by the state of Washington), filed an action in the state of Washington seeking to enjoin the sale of said stock. The sale was temporarily enjoined, pending the disposition of the Washington action. Thereafter, the Washington action was tried, judgment went against Dodge and his coplaintiffs, and the temporary injunction was dissolved. An appeal was taken to the Supreme Court of Washington and the judgment of the trial court was affirmed. Thereafter, [**1041] *certiorari* was sought from the Supreme Court of the United States and denied. The Washington [***3] judgment is now final. Within a few days after the judgment against Dodge, special administrator, and his coplaintiffs in the Washington trial court, the instant action was commenced by Dodge, special administrator, in the superior court of this state. The trial of this action was temporarily suspended pending the outcome of the appeal from the Washington judgment. (*Dodge v. Superior Court*, 139 Cal. App. 178 [33 P.2d 695, 34 P.2d 501].) During the pendency of the Washington appeal, the special administration of the instant estate was completed, and Alice L. Canfield, the present plaintiff and appellant, was substituted in the action for Dodge, special administrator. The Washington appeal having been finally disposed of, the instant action went to trial before a jury. Defendants immediately called the Washington judgment [*644] to the trial court's attention, but plaintiff insisted, to which insistence the trial court capitulated, that she be permitted to put on a

prima facie case, in the business of which some eight weeks were consumed. Defendants then introduced the Washington judgment in evidence, whereupon the court, on motion duly made therefor by defendants, [***4] instructed the jury to bring in a verdict for defendants. This the jury did, and judgment was entered on the verdict. From that judgment this appeal is before us.

The nature of the primary question involved which, in our opinion, is decisive of this lawsuit, makes it unnecessary to detail anything more of the rather elaborate factual background or to allude to any of the other questions raised. The pivotal question on this appeal is whether the Washington judgment rendered against a special administrator appointed by a California court, whose authority to act would not in the ordinary situation extend outside of the state of California, is *res judicata* and binding upon the special administrator in California, and his successors in interest. We think the Washington judgment is *res judicata* and does bind the present plaintiff.

The general rule applicable to such situations was admirably stated by Mr. Justice Story in *Vaughan v. Northup*, 40 U.S. 1, 5, 6 [10 L. Ed. 639, 640, 641]: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other [***5] countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state; and *whatever operation is allowed to it beyond the original grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and interests of its own citizens.* On the other hand, the administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of these assets, according to the *lex loci*. Hence, it has become an established doctrine that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due [*645] to his intestate in the courts of another state; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceedingly numerous, both in England and America; [***6] but it seems to us unnecessary, in the present state of the law, to do more

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than to refer to the leading principle as recognized by this court in *Fenwick v. Sears*, 5 U.S. 259, 1 Cranch 259 [2 L. Ed. 101], *Dixon's Exrs. v. Ramsay's Exrs.*, 7 U.S. 319, 3 Cranch 319 [2 L. Ed. 453], and *Kerr v. Moon*, 22 U.S. 565, 9 Wheat. 565 [6 L. Ed. 161]." (Italics ours.)

It is also settled that there is a distinction between the right of a foreign administrator to sue and his *immunity* from suit in a jurisdiction beyond the limits of his domiciliary state. (*Helme v. Buckelew*, 229 N.Y. 363 [128 N.E. 216].) In the Helme case, the court, per Cardozo, J., says (p. 217): "I have little doubt that it was part of the *purpose of the statute to remove the disability* which formerly attached to foreign executors and administrators when suing in our courts as plaintiffs. I shall assume, even though it may be unnecessary to decide, that the purpose was to this extent effective. *The removal of a disability, as distinguished from an immunity, comes properly within the field of comity.* (*Vaughan v. Northup*, *supra.*) It is when we [**1042] pass to that [***7] part of the statute which deals with the liability of foreign representatives as defendants that difficulties begin." (Italics ours.)

The statute referred to in the Helme case is section 1836 (a) of the Code of Civil Procedure of the state of New York, enacted in 1911. By its terms an executor or administrator of a foreign country or another state was permitted to sue and made liable to suit (if personally served) in the state of New York. Commenting further on said statute, the New York court said, at page 219: "I think the true view must therefore be that the statute *removes disabilities, but does not terminate immunities.* These are what they always were. Foreign administrators and executors may sue in the same manner as nonresidents, *for comity may enlarge the measure of their rights as plaintiffs without encroaching upon the jurisdiction of other courts, or overstepping the limits of our own.* Foreign administrators and executors may be sued in the same manner as nonresidents, but only when the subject-matter subjects them to the jurisdiction; for comity, [*646] though it may enlarge their rights, cannot unless it is also the comity of the domicile, enlarge their [***8] liabilities, and there is nothing in the statute that unmistakably reveals a purpose to assume, in disregard of comity, a jurisdiction which the accepted principles and usages prevailing between different sovereignties have heretofore condemned." (Italics ours.)

(1) It is clear on authority, from what has been thus

far said, that as a matter of right a special administrator cannot sue in a jurisdiction other than the one of his appointment, because he is under a *disability* to state a cause of action in himself as special administrator. Also, that he cannot be sued in a jurisdiction other than the one in which he is appointed, because he is *immune* from such suit.

The Helme case points out, however, that on principles of comity, the *disability* may be removed by statute. It goes on to say that except within those narrow limits already defined by existing rules in equity, *immunity against* suit cannot be toyed with by the kind of statute there in question.

Since we have not been advised of any statute in the state of Washington similar to the New York statute, construed in the Helme case, and since we know of none, the sole remaining point to decide is whether the disability [***9] of plaintiff's predecessor in interest to sue as a party plaintiff in Washington on principles of comity is recognized in the law, even in the absence of such statute. (2) There is considerable persuasive authority that there is a well-known and frequently applied principle of comity which, in the absence of demurrer or other suitable objection to the capacity of a foreign administrator to bring suit, will permit the bringing of suit. It should be first mentioned, however, that it has been held quite generally that the right of a foreign administrator to maintain an action involves only the question of capacity to sue. The objection, therefore, to such suit by a foreign administrator must be raised by demurrer, answer or in some other suitable manner. (*Anthes v. Anthes*, 21 Idaho 305 [121 P. 553]; *McGrath v. West End etc. Land Co.*, 43 Idaho 255 [251 P. 623]; *Gregory v. McCormick*, 120 Mo. 657 [25 S.W. 565]; *Wilson v. Wilson*, 26 Ore. 251 [38 P. 185]; *Farmers Trust Co. v. Bradshaw*, 137 Misc. 203 [242 N.Y. Supp. 598]; *Dearborn v. [*647] Mathes*, 128 Mass. 194; *Dahlstrom v. Walker*, 33 Idaho 374 [194 P. 847]; *Pope v. [***10] Waugh*, 94 Minn. 502 [103 N.W. 500]; *Berlin v. Sheffield etc. Co.*, 124 Ala. 322 [26 So. 933]; *Hodges v. Kimball*, 91 F. 845.)

The general rule is stated in Pomeroy's Code Remedies, fifth edition, page 109, to be as follows:

"Although in general a foreign executor or administrator cannot sue as such in the courts of another state or country than that in which he was appointed, yet if the objection is not raised by answer or demurrer, it is

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waived under the codes of procedure; that is, the objection goes simply to the parties' capacity to sue and not to the cause of action set up in the complaint or petition."

Defendants in the Washington case raised no objection whatsoever to the right of Dodge, special administrator, to maintain the Washington action.

It has been specifically held that, in the absence of statutory authority, where there is no objection, a foreign administrator may maintain a suit in a jurisdiction other than the one of his appointment. (*Palm's Admr. v. Howard*, 31 Ky. Law Rep. 316 [102 S.W. 267]; *Lackner v. McKechney*, 252 F. 403; *Davis v. Connelly's Exrs.*, 43 Ky. 136; *Newark Savings Inst. v. David Jones' Exrs.* [***11] , 35 N.J. Eq. 406.)

[**1043] In principle there is little distinction between a special administrator, a receiver in equity, and a trustee, with respect to the capacity of any of such representative parties to bring suits in states other than the state in which they receive appointment, and from which they derive authority. It has been held in a number of cases involving receivers and trustees that the principle of comity applies. (*Iowa & California Land Co. v. Hoag*, 132 Cal. 627 [64 P. 1073]; *Wright v. Phillips*, 60 Cal. App. 578 [213 P. 288]; *Smith v. Shepler*, 8 Cal. App. 2d 717 [48 P.2d 999]; *Converse v. Hamilton*, 224 U.S. 243 [32 S. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292]; *Continental Oil Co. v. American Cooperative Assn.*, 31 Wyo. 433 [228 P. 503]; *Denver City Water Works Co. v. American Water Works Co.*, 81 N. J. Eq. 139 [85 A. 826].)

In the case of *Smith v. Shepler*, *supra*, the court says at page 570: "Receivers appointed under another jurisdiction may be permitted to sue in California as a matter of comity, [*648] wherever the rights of local creditors are not prejudiced." In the *Hoag* case, [***12] *supra*, the court says at page 629: "The questions upon this appeal may be thus stated: -- 1. May a trustee, as such, commence and maintain an action in a foreign jurisdiction? or is his power and authority so to do coterminous with the jurisdiction or law to which he owes his appointment? . . .

"The early rule denied to such officers any standing in a foreign court, but the courts, of late, influenced by a spirit of comity, have inclined to much more liberal views, and it may fairly be said that the prevailing

doctrine permits the maintenance of such actions by foreign receivers and like officers, where the rights of domestic creditors are not interfered with. (*Toronto etc. Trust Co. v. Chicago etc. R. R. Co.*, 123 N.Y. 37 [25 N.E. 198]; *Comstock v. Frederickson*, 51 Minn. 350 [53 N.W. 713]; *Boulware v. Davis*, 90 Ala. 207 [8 So. 84, 9 L. R. A. 601]; *Winans v. Gibbs etc. Mfg. Co.*, 48 Kan. 777 [30 P. 163]; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Wilson v. Keels*, 54 S. C. 545 [32 S.E. 702, 71 Am. St. Rep. 816]; *Gilman v. Ketcham*, 84 Wis. 60 [54 N.W. 395, 36 Am. St. Rep. 899, 23 L. R. A. 52]; *Sands v. Greeley & Co.* [***13] , (2 C. C. A.) 88 F. 130 [31 C. C. A. 424]; *Parker v. Stoughton Mill Co.*, 91 Wis. 174 [64 N.W. 751, 51 Am. St. Rep. 881]; *Alderson's Beach on Receivers*, sec. 665; *Smith on Receiverships*, 165; *High on Receivers*, sec. 241.) The modification of the rule, as has been said, rests upon the principle of comity, -- a principle which the court was reluctant to apply in this particular case, by reason of the fact that the supreme court of Iowa, in *Ayres v. Siebel*, 82 Iowa 347 [47 N.W. 989], had refused to recognize the principle, and denied to a foreign trustee the right to maintain an action in its courts.

"Mutuality of operation is of the essence of comity, and therefore, since a California trustee would not be permitted to maintain his action in the courts of Iowa, little reason could be perceived for the invocation of the principle of comity to permit an Iowa trustee to maintain a like action in the courts of this state. In the later case of *Hale v. Harris*, 112 Iowa 372 [83 N.W. 1046], the Supreme Court of Iowa evinces a disposition to modify its views in this regard. But, apart from that, we think that the rule permitting the maintenance of such actions [***14] in our courts, where [*649] the rights of domestic creditors are not interfered with, is both just and reasonable, and should be enforced without distinction; and therefore, regardless of the rule which may prevail in Iowa, and of the fact that the trustee in this case is a trustee under the laws of Iowa as we are not hampered by the principle of *stare decisis*, and as the rights of domestic creditors are not involved, we hold that he may, as a matter of comity, maintain this action."

The conversion alleged in the instant action is bottomed upon an alleged illegal sale of certain securities in the state of Washington. The injunction suit in the state of Washington was predicated upon the illegality incident to the same projected sale of the same securities. Both actions involve the same sale, the same securities, the same debt, the same estate, the same subject-matter, the

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same parties and the same issues. The only differences are in the nature of the relief prayed for and the designation of the nominal plaintiff.

The judgment is affirmed.

Houser, P. J., and Doran, J., concurred.



H. W. ZAGOREN, Petitioner, v. THE SUPERIOR COURT OF SACRAMENTO
COUNTY et al., Respondents

Civ. No. 4501

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

117 Cal. App. 548; 4 P.2d 279; 1931 Cal. App. LEXIS 514

October 19, 1931, Decided

SUBSEQUENT HISTORY: [***1] A Petition for a Rehearing of this Cause was Denied by the District Court of Appeal on November 18, 1931, and an Application by Petitioner to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on December 17, 1931.

PRIOR HISTORY: PROCEEDING in Mandamus to compel the Superior Court of Sacramento County, Malcolm C. Glenn, Judge thereof, and Harry W. Hall, County Clerk, to issue a writ of execution.

DISPOSITION: Writ denied.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) **Executors and Administrators--Attorney's Fees--Expenses of Administration.** --Since the amendments of *sections 1616* and *1619* of the Code of Civil Procedure in 1905 and 1909, an executor or administrator is not personally liable for the payment of attorney's fees in probate matters, but such fees are now proper expenses of administration, payable like other expenses of administration.

(2) **Id.--Orders--Claims--Nonpayment--Liability of Administrator--Statutory Construction.** --An administrator was not personally liable under section

1649 of the Code of Civil Procedure upon refusal to pay attorney's fees where the order for payment was made under *section 1616* of said code, which provides that the payment shall be made out of the estate, and the order provided that the payment should be so made out of the estate, and it appears that said administrator did not have in its possession any moneys of said estate out of which such payment could be made.

(3) **Id.--Payment of Creditors--Duty of Administrator--Wilful Refusal--Statutory Construction.** -- Section 1649 of the Code of Civil Procedure (now section 954 of the Probate Code), must be considered with the other sections of the same code with reference to the payment of creditors of an estate, and when so considered the section presupposes that there are funds available for the payment of creditors; and when such funds are available, and the court orders payment, but the administrator either deliberately refuses to pay or dissipates the estate's money, then the administrator is personally liable to the creditors and execution may issue.

SYLLABUS

The facts are stated in the opinion of the court.

COUNSEL: H. W. Zagoren, in pro. per., and James F. Gaffney for Petitioner.

Devlin, Devlin & Diepenbrock for Respondents.

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JUDGES: PRESTON, P. J. Thompson (R. L.), J., concurred. Plummer, J., deeming himself disqualified, did not participate in this decision.

OPINION BY: PRESTON

OPINION

[**280] [*549] PRESTON, P. J. This is an original proceeding in *mandamus*. The facts are briefly these: On the second day of May, 1922, Henrietta de Bach Myers was, by an order of the Superior Court in and for the County of Sacramento, appointed administratrix of the estate of her deceased husband, L. W. Myers. Mrs. Myers duly qualified and continued to act as administratrix of her husband's estate [***2] until June 19, 1925, when she was permitted by the court to resign. The California Trust and Savings Bank, a corporation, was appointed by the court administrator of said estate in her place and stead.

The California Trust and Savings Bank immediately qualified and took over the administration of said estate and continued to act as administrator until on or about January 20, 1931, when it resigned. Louis J. Myers was thereafter appointed administrator of said estate and is now the duly appointed, qualified and acting administrator of said estate.

From the fourth day of November, 1923, to June 4, 1929, George L. Popert and petitioner, H. W. Zagoren, were the regularly employed attorneys for Mrs. Myers and the California Trust and Savings Bank in all matters connected with the administration of said estate. Said estate consisted largely of real property valued at more than \$ 1,000,000, but heavily encumbered. Petitioner and Mr. Popert performed the ordinary legal services connected with the administration of said estate, and also performed extraordinary services in connection therewith during the time that they were attorneys for the above-named two administrators. They were paid on [***3] account of their commissions during this time the sum of \$ 5,250.

On or about the said fourth day of June, 1929, said Superior Court, upon the petition of the California Trust [*550] and Savings Bank, discharged said petitioner and Popert as attorneys of record for California Trust and Savings Bank as such administrator and substituted the firm of Devlin, Devlin & Diepenbrock, as attorneys of record for said administrator. Thereafter, and on the

twentieth day of January, 1931, the petitioner, H. W. Zagoren, petitioned said Superior Court for a further allowance of attorney's fees for services rendered, under the provisions of *section 1616 of the Code of Civil Procedure*. This petition, the application of California Trust and Savings Bank for permission to resign as administrator of said estate and the petition of Louis J. Myers to be appointed administrator of said estate in the place and stead of California Trust and Savings Bank all came on for hearing before the court at the same time.

The application of petitioner for further attorney's fees was contested by the California Trust and Savings Bank, but during the hearing of these three petitions it was stipulated by all the [***4] parties concerned in open court that the application for attorney's fees should be deemed to have been made *prior to the acceptance of the resignation of the California Trust and Savings Bank* as administrator and the appointment of Louis J. Myers as administrator to continue the administration of said estate. The court allowed petitioner herein the sum of \$ 4,000 as additional attorney's fees, \$ 2,000 for ordinary services and \$ 2,000 for extraordinary services, a portion of said order reading as follows:

"Let an order be entered allowing petitioner, against and out of said estate and in payment of legal services rendered therein, the sum of \$ 2,000.00 for ordinary services, and the sum of \$ 2,000.00 for extraordinary services."

No appeal was taken from this order and it has become final.

The California Trust and Savings Bank was permitted to resign, its accounts were settled and approved by the court and Louis J. Myers was appointed administrator and qualified in its place and stead, and all property belonging to said estate was turned over to Louis J. Myers, the last administrator.

Petitioner's attorney's fees so allowed were not paid. He applied to the county clerk of the [***5] county of Sacramento for a writ of execution to be issued against the California Trust and Savings Bank, which was denied, and thereupon [*551] this proceeding was instituted to compel the county clerk and *ex-officio* clerk of the Superior Court of Sacramento County to issue a writ of execution in favor of petitioner Zagoren and against the California Trust and Savings Bank, a corporation, to enforce payment of said sum of \$ 4,000,

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together with interest, under the provisions of section 1649 of the Code of Civil Procedure.

(1) The personal liability of the California Trust and Savings Bank for the payments of this \$ 4,000 due petitioner is the only question that need be determined in this proceeding.

We are satisfied that since the amendment of sections 1616 and 1619 of the Code of Civil Procedure, in 1905 and 1909 (Stats. 1905, pp. 727 and 776; Stats. 1909, p. 987), an executor or administrator is not personally liable for the payment of attorney's fees in probate [**281] matters, but such fees are now proper expenses of administration, payable like other expenses of administration. This conclusion is not only irresistible from a reading of the statutes as amended, but also by the following [***6] authorities: *Estate of Kelleher*, 205 Cal. 757 [272 P. 1060, 1063]; *Chapman v. Pitcher*, 207 Cal. 63 [276 P. 1008, 1010]. In the last-mentioned case the court said:

"The earlier cases of this court cited by appellant to the effect that an administrator or executor of an estate is personally liable for the payment of attorneys' fees in probate matters were decided before the change was brought about by the adoption of the amendment and the enactment of statutes which revised the whole system of claims against estates and more particularly placed attorneys in their relation to estates on a basis similar to that of executor or administrator."

In *Estate of Kelleher*, *supra*, the court said: "The fees for attorneys' services, being a proper expense of administration are payable like the other expenses of administration, and are *not a personal charge against the executor*."

(2) Petitioner argues that the court's order allowing him \$ 4,000 additional compensation made him a creditor of said estate and also constituted an order on the administrator for its payment, and payment having been refused by California Trust and Savings Bank, the then administrator, said bank, [***7] became personally liable under section 1649 of the Code of [*552] Civil Procedure, and he was entitled to have execution issued against the bank to enforce payment.

This argument is ingenious, but we believe unsound, in view of the provisions of the court's order and the undisputed facts as to the condition of said estate of L. J.

Myers, deceased. In the first place, *section 1616 of the Code of Civil Procedure*, under which the court made the order provides that the administrator "pay such attorney out of the estate", etc. In the second place, the order of the court specifically provides that payment and allowance to petitioner of said \$ 4,000 be paid "out of said estate".

Furthermore, the California Trust and Savings Bank did not have in its possession any money belonging to said estate with which payment to petitioner could have been made. In fact, the estate being administered consisted almost entirely of real estate heavily encumbered and there was no money belonging to said estate to pay any of the creditors, and the same condition apparently prevails at the present time.

(3) We think section 1649 of the Code of Civil Procedure (now section 954 of the Probate Code) must be [***8] considered with the other sections of the same code with reference to the payment of creditors of an estate, and when so considered, it (sec. 1649, Code Civ. Proc.) presupposes that there are funds available for the payment of the creditors. Where the funds are available and the court orders the administrator to pay them, and he either deliberately refuses to pay the creditors or dissipates the estate's money, then and under such circumstances, he is personally liable to the creditors and execution may issue. But we think said section has no application under the unusual circumstances here presented.

Certainly an administrator of an estate cannot be held *personally liable* for the payment of a creditor's claim against the estate, simply because such creditor has an order for its payment from the court, when said administrator or executor has no funds belonging to the estate with which to pay the creditors. The administrator or executor must refuse to make payment to the creditor after he has funds, or should have funds available for such purpose and after the court has directed him to pay such creditor, before he and his bondsmen are personally liable. Otherwise, an administrator [***9] or executor could be compelled, without fault [*553] on his part, to advance his own personal funds to pay creditors of the estate he was administering, and sometimes, perhaps, when such estate was insolvent. This was certainly not the construction intended by the legislature to be placed on said section 1649 of the Code of Civil Procedure. Petitioner herein will have to look to the assets of the

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estate for the payment of his claim, and he is not without remedy to enforce payment if the estate is not insolvent. This conclusion on our part makes it unnecessary to give consideration to the other points raised by respective counsel in this proceeding.

We think the petition should be denied and the alternative writ discharged, and it is so ordered.

Thompson (R. L.), J., concurred.

Plummer, J., deeming himself disqualified, did not participate in this decision.

A petition for a rehearing of this cause was denied by the District Court of Appeal on November 18, 1931, and an application by petitioner to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on December 17, 1931.