

6-1-1947

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Recommended Citation

John G. Stephenson III, *The Probate Jurisdiction of the War Department*, 1 U. Miami L. Rev. 57 (1947)
Available at: <https://repository.law.miami.edu/umlr/vol1/iss2/3>

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MIAMI LAW QUARTERLY

VOL. I

JUNE, 1947

No. 2

THE PROBATE JURISDICTION OF THE WAR DEPARTMENT

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EVERY generation¹ of Americans has been faced with the problem of burying its war dead and settling their estates. To the extent that this involves the disposition of property possessed in garrison or in the field and of pay and other amounts due from the United States, it is accomplished by an administrative procedure which assumes importance in time of war and is all too quickly forgotten with the return of peace. This procedure has received little attention in legal literature; but it is nevertheless an important chapter in Probate Law as well as in Military Law. If better understood, particularly in the

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¹ There have been seven major wars declared by Congress: the Revolutionary War, 1775-1783; the War of 1812, 1812-1815; the Mexican War, 1846-1848; the Civil War, 1861-1865; the Spanish-American War, 1898; the First World War, 1917-1918; and the Second World War, 1941-1945. This amounts to a call upon the full resources of the nation once in each generation, as distinguished from the almost constant employment of the regular forces in Indian warfare until 1898, and along the border and in insular possessions since that time. See Ganoe, *History of the United States Army* (1942); Albion, *Introduction to Military History* (1929).

light of the experiences of the war now ending,² it may be reformed and improved to accomplish what appear to be its principal ends: to safeguard and turn over to widow or next of kin, with due regard for the rights of creditors, the property taken into or acquired during service, and to relieve troops needed for tactical purposes of as much administrative detail as possible. This must be done within the proper scope of governmental power.

The problem is incidental to the concept of dual citizenship peculiar to the federal system established by the Constitution of the United States. Each of the citizen-soldiers who form the bulk of the war time armies of the United States, is at once a citizen of the United States and of one of the several states, territories,³ or the District of Columbia. Military service and full obedience to the orders and discipline thereof are demanded of him as a citizen of the United States;⁴ but his rights of property, including descent and distribution, are in general governed by the laws of the state of his domicile. There are therefore two phases to our inquiry: the first, to discover the extent of the power of the federal government to control the disposition of the property of persons in military

² The writer served as a member of the faculty of the Judge Advocate General's School, U. S. Army, at Ann Arbor, Michigan, from May, 1943, to February, 1946, where he lectured on the administrative procedures discussed in this article. The article is based primarily on research conducted at that time; but the writer has attempted a fresh and independent approach to the subject. It is believed that a challenge of the constitutional foundation of the Army's "probate jurisdiction" may be productive of sound revision if made at this time, particularly when the related punitive and disciplinary measures of military law are being subjected to scrutiny.

³ Within the territories and the District of Columbia, the power of Congress is plenary. See *El Paso Ry. Co. v. Gutierrez*, 215 U. S. 87, 30 S. Ct. 21, 54 L. Ed. 106 (1909). The discussion which follows will be limited accordingly to problems raised where the decedent is a citizen of one of the several states. The question remains, however, whether Congress has intended to supersede territorial law or that otherwise provided for the District of Columbia.

⁴ Compulsory military service may be exacted under a federal draft law or by a call of militia. *Selective Draft Law Cases*, 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349 (1918); *Cox v. Wood*, 247 U. S. 3, 38 S. Ct. 421, 62 L. Ed. 947 (1918). Militiamen called into federal service are subject to federal law from the date of call. *Martin v. Mott*, 12 Wheat. 29, 6 L. Ed. 537 (1827).

service; the second, to determine to what extent this power has been asserted.

Where a person dies in military service, the effects which he has with him in camp or quarters may be collected and turned over to an executor or administrator, appointed by a court in the state of the decedent's domicile.⁵ Likewise, the War Department may make settlement

⁵ Article of War 112; 41 Stat. 809 (1920), 10 U. S. C. §1584 (1940). The full text of this article follows:

"In case of the death of any person subject to military law the commanding officer of the place or command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department (General Accounting Office) for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army."

with the personal representative of the amount due the decedent for pay and allowances or other items.⁶ The personal representative is accountable to the probate court, and administers the estate in accordance with state law. To this extent there is no problem. Statutory authority⁷ exists, however, and is employed in a majority of cases, for the War Department to turn over the effects to, and make settlement of accounts with, the widow or next of kin in the event that letters testamentary or of administration have not been granted. It is not necessary to show that a personal representative cannot be appointed or that the estate is too small to warrant the expense.⁸ In the disposition of effects, use is made of a summary court-

⁶ 34 Stat. 750 (1906) as amended, 58 Stat. 789 (1944), 10 U. S. C. § 868 (Supp. 1946). The full text of this statute follows:

"In the settlement of the accounts of deceased officers or enlisted men of the Army, where the amount due the decedent's estate is less than \$1,000 and no demand is presented by a duly appointed legal representative of the estate, the accounting officers may allow the amount found due to the decedent's widow or legal heirs in the following order of precedence: First, to the widow; second, if decedent left no widow, or the widow be dead at time of settlement, then to the children or their issue, per stirpes; third, if no widow or descendants, then to the father and mother in equal parts, provided the father has not abandoned the support of his family, in which case to the mother alone; fourth, if either the father or mother be dead, then to the one surviving; fifth, if there be no widow, child, father, or mother at the date of settlement, then to the brothers and sisters and children of deceased brothers and sisters, per stirpes. Where the amount due the decedent's estate is \$1,000 or more and no demand is presented by a duly appointed legal representative of the estate, the accounting officers may allow \$1,000 of the amount due to the estate to the widow or legal heirs in the order of precedence hereinabove set forth: *Provided*, That this section shall not be so construed as to prevent payment from the amount due the decedent's estate of funeral expenses, provided a claim therefore is presented by the person or persons who actually paid the same before settlement by the accounting officers."

⁷ See notes 5 and 6, *supra*.

⁸ Cash amounting to more than \$2,000 found among the decedent's effects may be delivered to the widow under the authority of Article of War 112 (note 5, *supra*) without requiring her to obtain letters of administration. 5 Bull. J.A.G. 342 (1946). In recommending that the amount which may be settled under 34 Stat. 750 (1906) (note 6, *supra*) be increased from \$500 to \$1,000, the house committee stated that this would permit settlement without administration of the accounts of almost all persons dying in service who had no other estate. H. Rep. No. 1919, 78th Cong., 2d Sess. (1944).

martial,⁹ which has been given limited power to receive and pay debts due to, or owing by, the deceased, and to sell effects. Statutory authority¹⁰ was obtained during the late war to declare a soldier dead when he had been missing for at least a year, and to proceed with the disposition of his effects and settlement of his accounts on the basis of this administrative determination.

It will be noted that these procedures recognize the superior right of a personal representative, appointed in a state court of probate, to administer the estate of a person dying in military service. In aid thereof, they provide that the effects may be secured and delivered at government expense to the personal representative when he is at a distance. Where no personal representative has been appointed, they provide a system of distribution without administration to the extent that the amount due from the government upon War Department accounts does not exceed one thousand dollars, and without limit as to the value of effects or the cost of shipment. The provisions of the Missing Persons Act authorizing an accelerated settlement of the estates of presumed decedents increase substantially the number of estates which can be settled only under federal procedure, since the period

⁹ A summary court-martial consists of one officer. It may be appointed by the commanding officer of a garrison or regiment and by officers of smaller commands having equivalent responsibility. It may also be appointed by superior authority. Articles of War 7 and 10, 41 Stat. 788, 9 (1920), 10 U.S.C. §§ 1478, 81 (1940). In addition to exercising the probate jurisdiction conferred by Article 112, a summary court acts as coroner when death occurs at a place subject to the exclusive jurisdiction of the United States. Article 113, 41 Stat. 810 (1920), 10 U.S.C. § 1585 (1940).

¹⁰ Sec. 5, The Missing Persons Act; 56 Stat. 145 (1942) as amended, 56 Stat. 1093 (1942), 50 U.S.C. App. § 1005 (Supp. 1946). The full text of this section follows:

"When the twelve months' period from date of commencement of absence is about to expire in any case of a person missing or missing in action and no official report of death or of being a prisoner or of being interned has been received, the head of the department concerned shall cause a full review of the case to be made. Following such review and when the twelve months' absence shall have expired, or following any subsequent review of the case which shall be made whenever warranted by information received or other circumstances, the head of the department concerned is authorized to direct the continuance of the

required by state law is generally longer.¹¹

The constitutional power of the federal government to make such provisions has never adequately been examined. Prior to 1906, when these procedures first appeared in statutory form, there was no problem. Settlement was authorized only with the personal representative. Since then, the Judge Advocate General, apparently believing that the statute approached a point exceeding the Constitutional authority of the federal government, instituted a series of administrative interpretations¹² which would avoid conflict with state jurisdiction. The rule was announced that Article 112 was not a statute of descent and distribution.¹³ Accordingly, while the statute authorizes

person's missing status, if the person may reasonably be presumed to be living, or is authorized to make a finding of death. When a finding of death is made it shall include the date upon which death shall be presumed to have occurred for the purposes of termination of crediting pay and allowances, settlements of accounts, and payments of death gratuities and such date shall be the day following the day of expiration of an absence of twelve months, or in cases in which the missing status shall have been continued as hereinbefore authorized, a day to be determined by the head of the department."

¹¹ In general, probate proceedings may not be instituted until a missing person has been absent seven years. This is based upon a common law presumption of death from continued and unexplained absence. For the essential requirements of such proceedings (due process), see *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896, 14 S. Ct. 1108 (1893).

¹² Administrative construction of legislation governing the War Department is found in Army regulations and in opinions of the Judge Advocate General, who acts as counsel to the Secretary of War. Army regulations are of two types: Army Regulations, which are of a more or less permanent character, and War Department Circulars, which deal with temporary wartime conditions. Opinions of the Judge Advocate General appear digested in several series, the latest covering the years 1912-40, and in a pamphlet, the *Bulletin*, published monthly beginning in 1942. Opinions rendered in connection with the formulation or revision of Army Regulations are seldom published, since they are reflected in the regulations adopted. A few unpublished opinions are cited in these notes by file number and date.

¹³ Inasmuch as the matter of the distribution of estates of decedents is and always has been a matter of state regulation, the War Department may not issue instructions to the executor regarding the disposition of decorations. Opinion of June 19, 1922; Dig. Ops. J.A.G. 1912-40, 385 (1942). The summary court is not a personal representative, and therefore may not indorse stock certificates to effect transfer. Opinion of June 25, 1921; Dig. Ops. J.A.G. 1912-40, 386 (1942).

delivery to "the widow or legal representative", the latter will always be preferred.¹⁴ Delivery of effects to a person other than the personal representative discharges the summary court, but vests no title in the distributee.¹⁵ This rule of interpretation is not sufficient to justify all the statutory provisions; for example, those authorizing the summary court to sell effects if the distributees cannot be found. The Comptroller General does not appear to have considered the problem. It is, of course, a moot question whether an administrative officer should question the constitutionality of statutes which he is appointed to enforce.¹⁶

As a general rule, statutes of descent and distribution fall within the field of regulation reserved to the states.¹⁷ The federal government, being one of enumerated powers, is given no specific power to deal with this subject. It has been held, however, that state laws of descent and distribution must yield to federal where regulation is necessary and proper to the exercise of one of the enumerated powers.¹⁸ The power of a state to take by escheat land

¹⁴ Opinion of March 29, 1928; Dig. Ops. J.A.G. 1912-40, 390 (1942).

¹⁵ Where a widow was charged with murder, it was held that it would not be improper to deliver effects to her. "Such delivery would not and could not have (the effect of permitting the widow to make herself an heir in fact), for it could not invest her with any title to the property, nor could the refusal to turn over the effects divest her of any title thereto, this matter being controlled solely by the statutes of descent and the court decisions of the proper state." Opinion of March 29, 1928; Dig. Ops. J.A.G. 1912-40, 390 (1942).

¹⁶ See note, "Raising the Constitutional Question by Officers in Mandamus Proceedings" in Gellhorn, *Administrative Law, Cases and Comments*, 830 (1940).

¹⁷ "As the authority to make wills is derived from the states and the requirement of probate is but a regulation to make the will effective, matters of strict probate are not within the jurisdiction of courts of the United States." Pitney, J., in *Suton v. English*, 246 U. S. 199, 205, 62 L. Ed. 664, 38 S. Ct. 254 (1918). "A citizen of another state may establish a debt against the estate. But the debt thus established must take its place and share of the estate as administered by the probate court." *Byers v. McCauley*, 149 U. S. 608, 620, 37 L. Ed. 867, 13 S. Ct. 906 (1892). See also cases cited in note 18, *infra*.

¹⁸ *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628 (1879), *Fairfax v. Hunter*, 7 Cranch 603, 3 L. Ed. 453 (1813); see *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568 (1796); *Geoffroy v. Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642 (1880).

descending to a foreigner has been superseded by treaties with foreign nations, this being a proper exercise of the treaty power. If it could be said that the proper conduct of war requires a uniform rule of descent and distribution, there would doubtless be power in the federal government, under its general power to wage war,¹⁹ to provide such a law.

Inasmuch as the various statutes preserve to personal representatives appointed under state law a prior right to administer the estates of deceased military personnel, they appear to be predicated upon the view that where state laws do not afford a prompt, inexpensive remedy, it is necessary and proper for the conduct of war to provide one. Otherwise combat troops would be burdened with the property of decedents, and their dependents would suffer hardship.

The proper exercise of the war power has embraced many provisions for the welfare of the "home front". It has justified a system of family allowances²⁰ and com-

¹⁹ In this paragraph and the three which follow, the writer makes a distinction between the specific power of Congress to provide rules for the government and regulation of the land and naval forces (Const., Art. 1, sec. 8, cl. 14) and the general power to provide all laws necessary and proper to carry out the power of the federal government to make war (Const., Art. 1, sec. 10, cl. 3; and *c.f.* Art. 1, sec. 8, cls. 11-16, 18). It may be suggested that federal jurisdiction is being asserted only as to estates which are too small to justify recourse to state probate procedures. This proposition must be denied emphatically. The federal government, being one of expressly enumerated powers and those which are the necessary and proper incidents thereof, cannot derive power under the maxim *de minimis lex non curat*.

²⁰ The pay and allowances of enlisted men were generally inadequate to meet the needs of persons with dependents. In order to make it feasible to draft persons with dependents when necessary, family allowances were provided in the Servicemen's Dependents Allowance Act of June 23, 1942, as amended. 56 Stat. 381, 747 (1942), 57 Stat. 577 (1943), 37 USC. § 201 (Supp. 1946). Passage of this act did not entirely remove dependency as a ground for deferment, however. See 56 Stat. 386 (1942), 50 USC. App. § 305 (e) (i) (Supp. 1946).

pulsory allotments²¹ for the wives and dependents of soldiers and officers. The Government provides life insurance on the lives of servicemen for the protection of their dependents.²² Allotments and family allowances for dependents may be continued when an officer or soldier has been reported missing until such time as he returns or is determined to be dead.²³ One who dies in military service is buried at government expense, under the national flag.²⁴ The family may be moved home at public expense.²⁵ A gratuity equal to six months' pay and allowances is granted to the wife or other dependent relatives.²⁶ Posthumous promotions may be made in proper cases.²⁷ While it is true that the measures enumerated constitute no more than a legislative interpretation of the war power, not yet confirmed judicially, they serve to indicate a recognition that modern war entails the support of the whole nation, and may demonstrate the existence of fed-

²¹ Compulsory allotments are distinguished from allowances in that the former are a charge upon pay due military personnel, while the latter are in addition to pay and are granted directly to the dependent. Compulsory allotments were authorized by sec. 7, Missing Persons Act; 56 Stat. 143, 1093 (1942), 58 Stat. 679 (1944), 50 U.S.C. App. § 1007 (Supp. 1946). Compulsory allotments were permitted by the War Department only in extreme cases. (Par. 41, Army Regulations 35-5520, Sept. 30, 1944).

²² 54 Stat. 1009 (1940) with numerous amendments; 38 U.S.C. § 802 (Supp. 1946).

²³ Sec. 3, Missing Persons Act; 56 Stat. 144 as amended, 56 Stat. 1092 (1942), 58 Stat. 680 (1944), 50 U.S.C. App. § 1003 (Supp. 1946). Sec. 110c, d, Servicemen's Dependents Allowance Act, 56 Stat. 384 (1942) as amended, 57 Stat. 580 (1943), 37 U.S.C. § 210 (Supp. 1946).

²⁴ 49 Stat. 1508 (1936), 52 U.S.C. § 164c, 10 U.S.C. § 455d (1940). cf. 52 Stat. 399 (1938), 10 U.S.C. § 916b (1940). Flags to drape the casket are included among authorized funeral expenses by Army Regulations. Persons dying in service are entitled to burial in national cemeteries at government expense. R. S. 4878; 41 Stat. 552 (1920), 24 U.S.C. § 281 (1940).

²⁵ Sec. 12, Missing Persons Act, 56 Stat. 146 (1942), 50 U.S.C. App. § 1012 (Supp. 1946).

²⁶ Provided for members of the Regular Army by 41 Stat. 367 (1919), modified and amended, 42 Stat. 1385 (1923), 57 Stat. 599 (1943), 10 U.S.C. § 903 (Supp. 1946). Extended to all personnel of the reserve components by 53 Stat. 557 (1939) as amended, 53 Stat. 1079 (1939), 55 Stat. 796 (1941), 10 U.S.C. § 456 (Supp. 1946).

²⁷ 56 Stat. 722 (1942), 10 U.S.C. § 491, 612 (Supp. 1946). Posthumous promotions are for the satisfaction of the bereaved only. No increase in pay, death gratuity or other monetary benefit results. § 5, *id.*

eral power to enact the statutes under consideration.

If it had been customary from time immemorial, or at least at the time of the Revolution, for military tribunals to exercise probate jurisdiction and for the articles of war to provide for the distribution of property, there would be little difficulty in finding power to establish such a system in the power of Congress to make rules for the regulation of the military forces. The jurisdiction of military courts is not precisely defined in the Constitution, and usage is therefore an important factor in determining the extent of their authority.²⁸ It appears that in the time of the Tudors and Stewarts such a jurisdiction existed;²⁹ but this had disappeared from the British articles before the Revolution. The British articles which were effective in our own service prior to the outbreak of that war provided that effects should be turned over to the personal representative.³⁰ This continued to be the rule until 1916, when the provisions in the articles of war which permitted effects to be delivered to a widow or to relatives first made their appearance. Usage and contemporary construction do not therefore support so broad a construction of the power to make regulations for the government of the military service.

²⁸ "The general usage of the military service, or what may not unfitly be called the customary military law." Story, J., in *Martin v. Mott*, 12 Wheat. 19, 35; 6 L. Ed. 537, 542 (1827). A resolution of the Continental Congress, adopted by the Congress of the United States in 1806, punishing alien spies with death "according to the law and usage of nations, by sentence of a general court-martial" is a contemporary construction permitting trial of the offense of espionage by court-martial, the provisions of the constitution requiring indictment and trial by jury to the contrary notwithstanding. *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 1, 87 L. Ed. 3 (1942).

²⁹ Winthrop, *Military Law and Precedents* 761 (2d ed., 1920 reprint). The full text of the various British and American codes cited herein may be found in the appendix to this volume.

³⁰ The first American "Articles of War" were enacted by resolution of the Continental Congress on September 20, 1776, and were first enacted by the United States, April 10, 1806 (2 Stat. 371). Provisions relating to decedents' effects are found in Section XV of the first code, and in Articles 94 and 95 of the second. See Winthrop, *Military Law and Precedents*, 969, 989 (2d ed., 1920 reprint).

The articles of war effective from the time of the Revolution until 1916, with minor changes, required the regimental major in the case of an officer, and the company commander in the case of an enlisted man, to secure the effects of a decedent, file an inventory with the War Department, and turn the effects over to the personal representative.³¹ The officer charged with these duties was in no sense an administrator. He had no power to secure assets unless they were voluntarily surrendered, except through the use of military orders where effective.³² Army regulations, interpreting the word "effects" to include intangibles, permitted him to receive debts voluntarily paid.³³ The duties performed were military, not administrative. Colonel William Winthrop, author of the first comprehensive treatise on American military law, was of the opinion that an officer exceeding his powers would become an administrator *de son tort*.³⁴ He also

³¹ See note 30, *supra*. The articles of 1806 required the regimental major to secure the effects of deceased officers, make an inventory thereof before the next regimental court-martial, and transmit the inventory and effects to the Board of War "to the end that his executors may, after payment of his debts in quarters and interment, receive the overplus, if any there be, to his or their use." In the case of enlisted men, the troop or company commander withdrew military equipment, sent the balance to the Board of War "which said effects are to be accounted for and paid to the representative of such deceased soldier." The requirement that an officer's effects be inventoried before a regimental court was dropped in 1806. A requirement that an enlisted man's effects be inventoried before two officers appeared in 1806.

³² Winthrop, *Military Law and Precedents* 762 (2d ed. 1920 reprint).

³³ Note 32, *supra*.

³⁴ The opinion expressed by Winthrop, that an officer exceeding his authority to deal with the effects of a decedent would be liable as an administrator *de son tort* is consonant with the view that an officer is liable for acting beyond the scope of his authority. *Sterling v. Constantin*, 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375 (1932). The fact that he is a member of a court-martial does not alter the rule. *Milligan* (*cf. ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866) successfully proceeded against the members of the court-martial which illegally sentenced him to death. *Milligan v. Hovey*, 3 Biss. 13, 17 Fed. Cas. 380 (1871). Administrative settlement of a claim against the government, under 54 Stat. 372 (1943), 31 U.S.C. § 223b, c (Supp. 1946), has been allowed where a summary court failed to transmit effects shown in the inventory. 4 Bull. J.A.G. 62 (1946).

pointed out that a nuncupative will, which is permitted only to the soldier dying on the field, is valid only if accepted for probate in a state court. Inasmuch as the property of a deceased officer of Winthrop's time would likely include one or more horses, the regimental major, charged with the care of effects, had a delicate problem if not authorized to make expenditures for the preservation of the property.³⁵ Army regulations which would appear to be without statutory sanction, authorized the sale of effects if not claimed within two months, the proceeds to be held until claimed.³⁶

In 1916, provision was made for transferring the duties of the commanding officer or regimental major to a summary court in all cases where the widow or personal representative was not present.³⁷ The summary court was authorized to secure effects and to collect debts due locally. If no claim was made by a personal representative within thirty days, the summary court was authorized to sell the effects. The balance was paid in to the auditor for the War Department to be disbursed with other funds due decedent on War Department account. A contemporary interpretation³⁸ to the effect that the widow or personal representative, if not able to come to camp or quarters and receive the effects, could obtain delivery only by purchasing the effects from the summary court, appears to have led to an amendment in 1918,³⁹ authorizing transmittal of effects at government expense. Also by the

³⁵ A statute later provided for transportation at public expense of the authorized mounts of deceased officers to the home of the family or such place as may be designated by the personal representative. Disposal of the mount as directed by the personal representative was also authorized, 40 Stat. 892, 10 U.S.C. § 810 (1940).

³⁶ See Winthrop, 763. The words "or the proceeds thereof" appeared in the Articles of War of 1874. This was construed as giving legislative sanction to regulations existing prior thereto which permitted sale. See opinion dated Sept. 5, 1905, in Dig. Ops. J.A.G. 180 (1912 ed.) Pars. 85, 163, Army Regulations, 1913.

³⁷ 39 Stat. 668 (1916).

³⁸ Ops. J.A.G. 1918, 490. This opinion is reflected in the current digest. Dig. Ops. J.A.G. 1912-40, § 470(4) (1942). If the effects were sold, the government asserted the right to set off indebtedness against the proceeds. See *Sturgeon v. U. S.*, 60 Ct. Cl. 94 (1924).

³⁹ 40 Stat. 883 (1918).

amendment of 1918, it was permitted that effects might be turned over to other relatives or to beneficiaries under the will. Various amendments, doubtless in response to pressure of offended relatives, exempted manuscripts, keepsakes, and other articles from sale.⁴⁰ Power to pay debts out of any cash coming into the hands of the summary court was added in 1920.⁴¹

There is no authority to appoint a summary court-martial when the widow or personal representative is present.⁴² Where both the widow and a personal representative are present, the latter is preferred; but there is no authority to refuse access to the widow if the personal representative is not present and does not see fit to appear.⁴³ A personal representative can prove his authority by presenting the usual certificate.⁴⁴ It would seem that the widow can prove hers by a marriage certificate; and Army personnel records generally confirm her identity. In one case,⁴⁵

⁴⁰ The exemption of manuscripts and keepsakes first appeared in 40 Stat. 883 (1918). The disposition of unsold effects was further controlled by 46 Stat. 1203 (1931), 10 U.S.C. § 1584 (1940). Sale of stocks, bonds, and commercial paper is further limited by par. 30, Army Regulations 600-550, Dec. 23, 1944.

⁴¹ 41 Stat. 807 (1920).

⁴² Army regulations governing the disposition of the effects of persons dying in distant theatres, recognize the statutory right of the widow or personal representative to take if present. Par 1 b, War Dept. Circular No. 85, March 18, 1945; Opinion J.A.G., file 1943/3154, March 3, 1943. The widow or personal representative is present if able to receive delivery of the effects in person. Opinion J.A.G., file 1943/16315, November 13, 1943.

⁴³ "While the Article does not require it, it is believed to be the better practice where an executor or administrator has been appointed, to deliver or transmit the effects to such appointee, except in cases where the widow is present and the executor or administrator is not." Opinion of Sept. 22, 1923, Dig. Ops. J.A.G. 1912-40, 389 (1942). Where the widow's status is in dispute, effects should be delivered to personal representative. 2 Bull. J.A.G. 144 (1943).

⁴⁴ Opinion of May 8, 1922; Dig. Ops. J.A.G. 1912-40, 388 (1942). An affidavit by personal representative that he is the executor, administrator, or legal representative is insufficient. *ibid.*

⁴⁵ This account is based upon a personal interview with the summary court officer, who believed that the deceased officer purposely suppressed the record of his marriage for fear he would be dismissed from flying training. In the end, the court satisfied itself by inquiry among the decedent's friends that the claim was genuine. These facts were not presented in the opinion. (File 210.871, April 22, 1942).

the commanding officer found an alleged widow present who was not disclosed on the deceased officer's personnel record. She had no certificate of marriage, because the justice of the peace had died without mailing the form to the register. The commanding officer referred the matter to a summary court to determine the widow's claim. The Judge Advocate General approved this procedure; but it may be noted that if the summary court found the alleged widow's claim genuine, the finding would be a nullity because there is no authority to appoint a summary court where the widow is present.

If neither the widow nor personal representative is present, the commanding officer should refer the matter to a summary court. It is the duty of the summary court to secure the effects of the decedent in camp or quarters. Where death occurs in the United States, the summary court may not go beyond the limits of the post to secure effects.⁴⁶ It may not, for example, take possession of securities in a safe deposit box or an automobile garaged in a nearby village. In an overseas theatre, however, effects found at any place within the theatre are comprehended.⁴⁷ Effects may include cash in any amount, and articles of any size ordinarily possessed by a person in military service.⁴⁸

The summary court is authorized to collect debts due the decedent by local debtors. This provision is construed as distinguishing between debtors at the decedent's domicile and those residing in the vicinity of his military station.⁴⁹ Prior to the enactment of this provision in 1916,

⁴⁶ 1 Bull. J.A.G. 27 (1942).

⁴⁷ The same distinction is made as to local creditors and debts due locally, the intent being to differentiate between place of duty and domicile. It does not appear to be based upon the possible view that federal jurisdiction is exclusive in the overseas theatre.

⁴⁸ Cash in an amount exceeding \$2,000 may be delivered to the widow without requiring her to apply for letters. 5 Bull. J.A.G. 342 (1946). There is some question whether "effects" can be limited by regulations. Unless so limited, it includes all personal property capable of being packed, crated and transported, in the possession of decedent. Opinion of Oct. 17, 1919, Dig. Ops. J.A.G. 1912-40, 393 (1942).

⁴⁹ Dig. Ops. J.A.G. 1912-40 § 470 (2). Money on deposit in a Paris bank by a member of the American Expeditionary Forces is a "local debt." See note 47, *supra*.

custom permitted the officer charged with the duty of securing a decedent's effects to receive debts paid voluntarily.⁵⁰ The statute as now construed gives no greater authority to the summary court officer. He is not a personal representative, and may therefore not sue to collect debts.⁵¹ Recourse may be had to military orders to compel payment if the debtor is subject to military control.⁵²

During the late war, a different rule was applied in the overseas theatres. The War Department insisted that under principles of international law, the individual soldier is entitled to the protection of the laws of the United States when serving abroad, whether in friendly or occupied enemy territory.⁵³ The British obligingly clothed the summary court with authority to collect debts, by suit if necessary.⁵⁴ It will therefore remain moot whether a summary court in England collected by authority of American law or British. War Department regulations required the summary court in overseas theatres to collect debts.⁵⁵ The question was raised, but not answered, whether this regulation applied in Hawaii.⁵⁶

The summary court is authorized to pay debts due undisputed local creditors out of any money of the decedent coming into his hands. The summary court is not authorized, however, to sell personal effects for the purpose of paying debts.⁵⁷ If there is an encumbrance on the article, the summary court is therefore without authority to sell

⁵⁰ Winthrop, *Military Law and Precedents* 762 (2d ed. 1920 reprint).

⁵¹ Opinion of Mar. 12, 1919, Dig. Ops. J.A.G. 1912-40, 386 (1942).

⁵² Winthrop, *Military Law and Precedents* 762 (2d ed., 1920 reprint).

⁵³ Opinion J.A.G., file 1943/2360, February 3, 1943.

⁵⁴ British Statutory Rules and Orders, No. 2562 (1942).

⁵⁵ Par. 18, War Dept. Circular No. 85, March 16, 1945.

⁵⁶ The territorial law of Hawaii was amended in 1945 to provide that where non-resident military or naval personnel die leaving property not exceeding \$1500 and there is no administration within the territory, the clerk of the circuit court may be appointed administrator or ancillary administrator. The question presented is whether Article 112 precludes territorial legislation on the subject. Opinion J.A.G., file 1945/6879, July 11, 1945.

⁵⁷ This prohibition is restated in par. 34, War Dept. Circular No. 85, March 16, 1945. See also opinions of Oct. 6, 1931, and Aug. 24, 1927; Dig. Ops. J.A.G. 1912-40, 381, 3 (1942).

to discharge the lien. If the lien is large, the court may abandon the property;⁵⁸ otherwise, the court must ship it, having first notified the lienor.⁵⁹ While there is no statutory authority therefor, Army regulations permit sale to be made by the summary court if authorized by the distributee,⁶⁰ and in such case to disburse the proceeds of the sale as the distributee directs; for example, to discharge liens. In this event, the summary court does not act under the authority of Article 112, but as the agent of the distributee. There appears to be an inconsistency in the opinions of the Judge Advocate General on this point. If Article 112 is not a statute of descent and distribution, and if the distributor takes no title by virtue thereof as the Judge Advocate General has held, the summary court is being advised to sell as agent for one who may have no title, and thus to risk personal liability. It should also be noted that while sale of personal effects may be made where the distributee cannot be found, the proceeds may not be used to discharge debts other than funeral expenses.⁶¹

After the assets of the decedent have been collected, it becomes the duty of the summary court to determine whether any of the distributees designated in the Article 112 can be found. If this can be done, the assets are turned over to the unit quartermaster for delivery to that one of the persons designated in Article 112 who is considered to have the primary right. In determining who has the primary right, the War Department is guided to some extent by considerations of state law, but is not bound

⁵⁸ Where an automobile was sold to decedent a year before his death for \$467, of which amount decedent had paid only \$37, held, that the summary court may surrender to dealer. Opinion of Aug. 2, 1934, Dig. Ops. J.A.G. 1912-40, 391 (1942).

⁵⁹ The lienor would thus be able to apply for letters of administration to protect his interest. Opinion of August 24, 1927, Dig. Ops. J.A.G. 1912-40, 393 (1942).

⁶⁰ Par. 34, War Dept. Circular No. 85, March 16, 1945. The Effects Quartermaster of an overseas theatre may not sell bulky or perishable effects unless authorized by distributee. Opinion J.A.G., file 1944/8066, August 28, 1944.

⁶¹ Funeral expenses are authorized to be paid under the act authorizing the settlement of War Department accounts. See note 6, *supra*.

thereby.⁶² This follows the settled rule of administrative interpretation that Article 112 is not a statute of descent and distribution, and that the right to receive the effects is not to be considered as vesting title in the distributee.⁶³

Pursuant to this rule, it has been held that assets may be delivered either to the widow or to a personal representative at the option of the court, but the personal representative will be preferred.⁶⁴ Where there is no personal representative, the summary court may deliver effects and cash to a widow charged with the murder of her husband; but notice should be given the decedent's next of kin, and reasonable time in which to move for the appointment of an administrator pendente lite.⁶⁵ The summary court may not question the claim of an administrator appointed by a state court of probate although it appears that decedent neither resided in the state nor had assets there.⁶⁶ In a recent case, where two administrators appointed in different states claimed the assets, the summary court was held free to choose between them.⁶⁷

⁶² Where the summary court has notice of a will which directs a disposition at variance with Article 112, it should notify the beneficiary and allow a reasonable time in which to probate the will. Opinion of March 21, 1932, Dig. Ops. J.A.G. 1912-40, 391 (1942).

⁶³ "Article 112 is not a statute of distribution. It simply provides a list of the persons to whom the effects of a deceased soldier may be sent, and the War Department is relieved of responsibility therefor." Opinion of August 12, 1918, Dig. Ops. J.A.G. 1912-40, 388 (1942).

⁶⁴ "Be this as it may, certainly the use of the alternative expression 'the legal representative or widow' and again 'to the widow or legal representative', makes it optional with the commanding officer or summary court where both . . . are present or both are absent." Opinion of Sept. 22, 1923, Dig. Ops. J.A.G. 1912-40, 389 (1942).

⁶⁵ Where a widow was held in custody of civil authorities, charged with murder, it was held proper to hold distribution pending outcome of the trial unless a personal representative should be appointed meanwhile; but *quaere*, whether if the widow were convicted, delivery could be made to her. Opinion J.A.G., file 1943/3153, March 3, 1943.

⁶⁶ "Letters of administration are prima facie evidence of all they purport to show (18 Cyc. 140); and the jurisdiction of the court is not subject to collateral attack." Opinion of Sept. 22, 1923, Dig. Ops. J.A.G. 1912-40, 389 (1942).

⁶⁷ While the usual rule is, that the court which has first taken jurisdiction will be preferred, one of the two administrators being also the widow, it was thought better to select that one. 5 Bull. J.A.G. 342 (1946).

Effects may not be delivered to the executor unless the will has been probated and letters testamentary have been issued,⁶⁸ but the effects may be delivered to the beneficiary under a will, fair on its face, which has not actually been probated.⁶⁹ In a recent case, a large sum of money found among decedent's effects were directed to be delivered to the widow without requiring her to obtain letters of administration.⁷⁰ A cognate statute⁷¹ requires any will found among the decedent's effects to be delivered promptly to a proper court of record; but it does not appear to require the military authorities to offer it for probate. Even where there is a beneficiary named in a will, the property cannot be delivered to the beneficiary if there is a widow or other relative having a primary right to distribution.⁷² The beneficiary can protect himself by applying for probate of the will, and a reasonable time will be allowed for that purpose.

The appearance of additional female components during the late war made it necessary to determine the rights of a surviving husband, for whom there is no provision in Article 112. The Judge Advocate General interpreted the word "widow" to include the widower.⁷³ Where several persons of a class would be entitled, delivery is made to one only, as to the older brother, and if no brothers, the

⁶⁸ See note 44, *supra*.

⁶⁹ Otherwise the provisions of Article 112 would be meaningless; for if the will has been probated, then the personal representative would be preferred to the beneficiary. Opinion J.A.G., file 1914, 10284, Sept. 19, 1944.

⁷⁰ 5 Bull. J.A.G. 342 (1946).

⁷¹ 46 Stat. 1203 (1931), U.S.C. § 1584 a (1940).

⁷² The summary court should notify the beneficiary in such a case, and allow a reasonable time in which to probate the will. Opinion of March 21, 1932, Dig. Ops. J.A.G. 1912-40, 391 (1942). An earlier opinion of June 9, 1924, indicates that the beneficiary named in a will will be preferred to all other persons, including the widow and personal representative. Dig. Ops. J.A.G. 1912-40, 388 (1942).

⁷³ He also took the view that where an interlocutory decree of divorce had been entered, but was not yet absolute, and according to state law this did not dissolve the marital bonds, the widower was entitled to distribution. 3 Bull. J.A.G. 192 (1944).

older sister.⁷⁴ Presumably the same rule would be applied in a distribution to "next of kin". If the summary court delivers to the wrong person, the United States is not liable to the designated distributee and has no means to force the summary court to make good the loss; but this would not preclude an action in a proper court against the officer who constituted the summary court.⁷⁵

If the proper distributees cannot be found within thirty days, the summary court is directed to sell the effects and deposit the proceeds with a disbursing officer of the War Department.⁷⁶ Many classes of property are exempted from sale, particularly manuscripts and articles valued chiefly as keepsakes.⁷⁷ These are turned over to the Soldiers' Home and held intact for three years, during which time they may be claimed by the person entitled to distribution under Article 112.⁷⁸ The proceeds of effects which have been sold may be paid out under the act regulating settlement of War Department accounts⁷⁹ if claimed within six years.⁸⁰

⁷⁴ Opinion of August 12, 1918, Dig. Ops. J.A.G. 1912-40, 388 (1942). Under the act regulating settlement of accounts (note 6, *supra*), brothers and sisters would share equally.

⁷⁵ "The matter is one for adjustment between the parties claiming the property." Opinion of June 9, 1924; Dig. Ops. J.A.G. 1912-40, 389 (1942). For a discussion of the personal liability of officers constituting a court-martial who exceed their authority, see note 34, *supra*.

⁷⁶ Par. 31, Army Regulations 600-550, Dec. 1944; War Dept. Technical Manual 12-240, p. 30, Jan. 1945.

⁷⁷ See Article of War 112, note 5, *supra*. In addition to the articles enumerated in the statute, Army regulations prohibit sale of stocks, bonds, bank deposits, and commercial paper. Par. 30, Army Regulations 600-550, 24 December 1944.

⁷⁸ Disposition of effects exempted from sale and the proceeds of sale, is regulated by 46 Stat. 1203 (1931), 10 U.S.C. § 1584a (1940). If not claimed within three years, all property except decorations, medals and citations may be sold.

⁷⁹ 34 Stat. 750 (1906), 10 U.S.C. § 868 (1940), *supra*, note 6.

⁸⁰ This latter provision amounts in effect to a federal escheat law. State courts recognize the power of the federal government to provide for the escheat of pension funds, even after they have been paid to a guardian accountable to a state court; but this is the extent of the power. See *Coakley v. Attorney-General*, 318 Mass. 508, 62 N.E. 2d 659 (1945).

It has been noted above⁸¹ that there is no authority to pay debts other than funeral expenses out of the proceeds of articles sold when the distributee cannot be found. There is some question whether the summary court can resort to this procedure where he cannot decide between claimants. Where a soldier left three widows, all supporting their claims with competent evidence, the summary court was advised to sell the articles;⁸² but where the summary court was forced to decide between an alleged widow whose proof was unsatisfactory, and the father, the summary court was advised to recognize the father if convinced that the alleged widow did not meet the burden of proof, but first to give both an opportunity to apply to a state probate court for grant of letters.⁸³ Where it was ascertained that the relatives resided in Holland, then under enemy occupation, the summary court was instructed to proceed as if the distributees could not be ascertained.⁸⁴

In explaining that Article of War 112 is not a statute of descent and distribution, it is frequently said that the purpose of the statute is to protect the effects from loss, and to provide a means by which the War Department can be discharged of responsibility therefor.⁸⁵ If it were not for the protection of this article, effects would disappear; in fact, effects do disappear, Article 112 to the contrary notwithstanding.⁸⁶ This is not an indictment of the

⁸¹ See note 61, *supra*.

⁸² Opinion of March 29, 1928, Dig. Ops. J.A.G. 1912-40, 390 (1942).

⁸³ Opinion J.A.G., file 210.871, April 22, 1942. In both cases, there were other persons who would be entitled to delivery of the effects if there were no widow. The cases may possibly be distinguished on the basis that in the first, it was certain that there was a widow, the problem being to determine which of several claimants was she; while in the second case, the existence of a widow was in dispute.

⁸⁴ 1 Bull. J.A.G. 27 (1942). The writer of this opinion evidently did not expect the war to last longer than six years, and therefore did not contemplate loss of the beneficiary's right to claim as provided in 46 Stat. 1203 (1931), 10 U.S.C. § 1584a (1940).

⁸⁵ See note 63, *supra*.

⁸⁶ One combat pilot, shot down over Yugoslavia and returned to military control through the underground, told the writer that his effects could not be found, but that he managed to locate several items through

American soldier. Men who share each others lives closely as they do in Army life tend to regard the property of one as the property of all. It may be true that it is "understood" in the company that survivors are to divide the effects. This is recognized to some extent wherever there is authority to probate the nuncupative wills of soldiers. Many complaints were received from relatives that effects were missing: a large sum of money known to have been carried in a belt, a gift watch, the receipt of which had just been acknowledged, a fine camera purchased from a refugee for a few bars of chocolate. These claims were promptly and thoroughly investigated,⁸⁷ but due to delay before losses were discovered, rapid movement of troops in the field and turnover of personnel through casualties and replacement, little could be expected to result. As to liability of the government, it was held that the War Department could not make settlement of a claim for articles stolen.⁸⁸ If items shown in the inventory of effects prepared by the summary court were not accounted for, a claim would be allowed against the government.⁸⁹

Occasionally the problem arose of identifying the owner of effects. The wreckage of an airplane might be found to contain a large amount of cash, but it might be impossible to determine which of several persons killed in

correspondence with members of his unit. Loss of effects, even from a guarded warehouse, was regarded as an incident of service, and the claim of the missing person could not be settled administratively. 3 Bull. J.A.G. 477 (1944).

⁸⁷ See the following unpublished opinions of the J.A.G.: 1944/3498, April 12, 1944; 1944/4034, April 24, 1944.

⁸⁸ A claim lies by the owner of property included by mistake among the effects of decedent by a summary court. 3 Bull. J.A.G. 66 (1944). There is no basis for charging the government where the taking by military personnel is criminal. Dig. Ops. J.A.G. 1912-40 § 463(3). For claim by widow for effects of decedent negligently lost, see 4 Bull. J.A.G. 19 (1945).

⁸⁹ The summary court, having sold effects, sent a money order to the mother, which was never received. The summary court officer was subsequently killed. *Held*, that the officer being legally required to secure the effects under Article 112, the government became a bailee. Claim was settled administratively. 4 Bull. J.A.G. 62 (1945).

the crash was the owner. In such cases, the summary court was directed to proceed as if the distributees could not be ascertained.⁹⁰ In effect, this puts the burden of proof upon the claimant.

In order to handle the removal of effects from distant theatres at a time when transportation was difficult to obtain and to relieve troops in the field of as much administration detail as possible, a system of depots for disposing of effects was established during the late war.⁹¹ These were placed in charge of effects quartermasters. Depots were located in each theatre and a central depot, at Kansas City, Missouri. In all cases where there was no widow present in the theatre, the commanding officer inventoried the effects and sent them to the theatre effects quartermaster. The latter was appointed a summary court by competent authority. The theatre effects quartermaster was given the option of shipping effects directly to the distributee or to the Kansas City Quartermaster Depot, where the effects quartermaster had also been appointed a summary court.⁹² In effect, the theatre summary court operated as an ancillary administrator to the central depot court.

One phase of this operation involved the institution of procedures whereby objectionable material could be withdrawn from the effects before shipment home:⁹³ blood-stained clothing, contraband and gruesome souvenirs, and the like. Government issue equipment was withdrawn,⁹⁴

⁹⁰ 2 Bull. J.A.G. 145 (1943), Opinion of Aug. 31, 1920, Dig. Ops. J.A.G. 1912-40, 392 (1942).

⁹¹ The Effects Quartermaster, Kansas City, was designated in War Dept. Circular No. 195 of 1943. Theatre effects quartermasters were appointed by orders of the theatre commander. The theatre effects quartermaster was appointed a summary court in accord with opinion J.A.G., file 1943/16315, Nov. 13, 1943.

⁹² Handling of effects overseas governed by a series of circulars, culminating in War Dept. Circular No. 85, March 16, 1945.

⁹³ Par 16b(4)b, War Dept. Circular 373, September 14, 1944. Circular No. 85, March, 1945. Material not suitable for release for security reasons was temporarily impounded by censorship authorities. *Ibid.*

⁹⁴ Par. 16a(2), War Dept. Circular 373, September 14, 1944. Par. 27, Army Regulations 600-550, Dec. 1944.

as this constitutes no part of the decedent's effects. Other items entitled to shipment at public expense caused problems. British automobiles depreciated greatly in value if shipped to this country. Radios designed for British voltage were useless. The quartermaster was without authority to sell these effects unless the distributee authorized sale or could not be found.⁹⁵ The Judge Advocate General approved the procedure of distributing candy and food among service organizations and hospitals, a sensible if extralegal solution.⁹⁶

Bulky effects also caused trouble. There is no limitation in Article 112 as to size or amount. During the First World War, the Judge Advocate General ruled that effects entitled to shipment at public expense did not include articles not normally brought into camp or quarters: a motor boat or a private airplane; but an automobile was considered to be a proper article.⁹⁷ The War Department considered issuing an order prohibiting military personnel from acquiring bulky property; but the Judge Advocate General expressed the opinion that this would not warrant confiscation of an article purchased in violation of the order, nor could such property be denied shipment without amendment of Article 112.⁹⁸

As noted above, amounts under one thousand dollars due the decedent by the government on account of pay and allowances may be paid to the widow or next of kin without administration.⁹⁹ Accounts will be settled with

⁹⁵ Opinion J.A.G., file 1944/8066, Aug. 28, 1944.

⁹⁶ *Ibid.*

⁹⁷ Opinions J.A.G. file 524, April 17, 1930, June 2, 1930, March 24, 1931.

⁹⁸ "Although under certain conditions it is within the authority of the War Department to limit administratively the amount and kind of personal property which may be in the possession of persons subject to military law, there is no authority in the War Department to enforce such limitations by confiscation, and the violation of such administratively imposed limitations would not destroy the rights created by Article of War 112 and section 12 of the Missing Persons Act to transportation and incidental storage." Opinion J.A.G., file 1945/3927, April 21, 1945.

⁹⁹ 34 Stat. 750 (1906) as amended, 58 Stat. 795 (1944), 10 U.S.C. § 868 (1946). See note 6, *supra*. Claims are settled by the Claims Division, General Accounting office. For procedure, see Army Regulations 35-1545, April 19, 1945.

the personal representative, if there is one, upon presentation of a duly authenticated copy of letters testamentary or of administration.¹⁰⁰ It would seem that a reasonable time should be allowed in which to make certain that letters will not be applied for; but this does not appear to be the practice.¹⁰¹ In addition to amounts due on account of pay and allowances, soldiers' deposits and claims for loss of property which accrued prior to death may be settled under this act.¹⁰² It has been noted above that the proceeds of the sale of effects and cash, when turned over to a disbursing officer because the distributees cannot be found, may be disbursed under this act.¹⁰³ Cash found among decedent's effects is usually paid out under Article 112.¹⁰⁴ It should be noted that the death gratuity, equal to six month's pay and allowances, paid to the widow or dependent relative,¹⁰⁵ is an amount due the beneficiary directly, and is not settled under this act.

At the beginning of the war, the amount which could be disbursed under this statute was limited to five hundred dollars. If the estate exceeded that amount, no part could be paid without administration.¹⁰⁶ Increases in pay schedules and amounts credited to the accounts of missing persons swelled the accounts of decedents to the point where

¹⁰⁰ Compare notes 44 and 66, *supra*. The War Department claims the right to set off indebtedness due by decedent. *Sturgeon v. U. S.*, 60 Ct. Cl. 94 (1924).

¹⁰¹ In the report of the house committee, it is stated that the purpose of the act and the amendments is to authorize immediate payment of amounts up to one thousand dollars to the widow without waiting for or requiring the grant of letters. H. Rep. 1919, 78 Cong., 2d Sess. (1944).

¹⁰² Soldier's deposits constitute a debt due the decedent. Opinion J.A.G., file 1945/1333, February 2, 1945. A claim which accrued prior to death is likewise an amount due decedent. 1 Bull. J.A.G. 19 (1942). Where decedent's effects have been negligently lost, the claim is not one due decedent, but to the personal representative or persons entitled under state law to distribution. 4 Bull. J.A.G. 19 (1945).

¹⁰³ 46 Stat. 1203 (1931); 10 U.S.C. § 1584a (1940).

¹⁰⁴ 5 Bull. J.A.G. 342 (1946).

¹⁰⁵ 41 Stat. 367 (1919) as amended; 10 U.S.C. § 903 (Supp. 1946). See note 26, *supra*.

¹⁰⁶ 3 Comp. Gen. 409 (1924).

administration was required in a great majority of cases.¹⁰⁷ In asking authority for the increase, it was represented that it would make possible the settlement of most accounts without administration.¹⁰⁸ Authorization to pay one thousand dollars without administration where the estate was larger, although contingent upon no claim being presented by a duly appointed personal representative, was said to be for the purpose of giving the widow one thousand dollars immediately without waiting for administration to be complete. As a practical matter, where the total amount exceeds one thousand dollars by a trifling amount, the widow now appears to have an election either to take one thousand dollars under the act and waive the balance, or to pay the expenses of administration and take the entire amount.

A problem cognate to that of disposing of the effects and settlement of the accounts of deceased persons is raised when military personnel are reported missing. The acts of Congress permit the effects to be sent to the home of the missing person at public expense.¹⁰⁹ The same system of depots used in the handling of decedents' effects took care of the property of missing persons.¹¹⁰ The effects quartermaster could not pay debts or sell the effects of a missing person prior to the time the latter was declared dead. The device of securing a power of attorney to dispose of effects was suggested; but it was pointed out that the power might be void if the donor were actually dead.¹¹¹

¹⁰⁷ The Pay Readjustment Act of 1942 (56 Stat. 359) virtually doubled the pay of enlisted men. Under the Missing Persons Act of 1942 (56 Stat. 143) pay was credited during periods of absence. See note 118, *infra*.

¹⁰⁸ H. Rep. 1919, 78th Cong., 2d Sess. (1944). It is the view of the writer, however, that the language of the statute is inconsistent with the construction placed upon it by the committee.

¹⁰⁹ Sec. 12, Missing Persons Act, 56 Stat. 146 (1942), 50 U.S.C. App. § 1012 (1946 Supp.).

¹¹⁰ War Dept. Circular 85, March 16, 1945.

¹¹¹ Opinion J.A.G., file 1944/8066, August 28, 1944. See par. 16b (4) of War Dept. Circular 195 (Sept. 1, 1943). The subject of powers of attorney is treated in a note on current legislation in this issue of the Quarterly.

Under the rule applicable in most states, it is impossible to administer the estate of a missing person before seven years have passed, unless it can be found with reasonable certainty that he is dead.¹¹² If a man known to have been aboard a ship torpedoed in the North Atlantic in January, 1918, was not heard from for several months, it might reasonably have been concluded that he perished in the disaster; but there are numerous islands in the South Pacific and rescue equipment has been greatly improved in recent years.¹¹³ During the First World War, casualty reports were exchanged promptly by the belligerents; but during the present war, the Japanese government, which quickly overran our outposts in Asia and the Philippines, refused to render casualty reports.¹¹⁴ The fate of many who were taken prisoners and many who died in the fighting, was not known until the surrender of Japan.

In order to cope with this situation, an act of Congress made it possible during the present war¹¹⁵ for the Secretary of War to declare a person dead who had been reported missing after an absence of one year.¹¹⁶ If the facts, however, were consistent with survival, the the secretary might continue that person in a missing status until a later date.¹¹⁷ So long as a person remained in a missing

¹¹² See note 11, *supra*.

¹¹³ An enlisted man, member of the crew of a Navy plane shot down over the Pacific, lived a Robinson Crusoe existence on a desert island from August, 1942, to April, 1943. On being rescued, he filed a claim for subsistence and quarters allowances. Denied. 23 Comp. Gen. 207 (1943).

¹¹⁴ H. Rep. 1680, 77th Cong., 2d Sess. (1942); S. Rep. 1060, 77th Cong., 2d Sess. (1942); H. Rep. 1832, 77th Cong., 2d Sess. (1942).

¹¹⁵ The act is effective from September 8, 1939, until twelve months after the termination of the war with Germany, Italy or Japan, or such earlier time as may be designated by concurrent resolution of the Congress or by proclamation of the President. Sec. 15; 56 Stat. 147 (1942) amended by 56 Stat. 1093 (1942); 50 U.S.C. App. § 1015 (Supp. 1946).

¹¹⁶ Sec. 5, Missing Persons Act; 56 Stat. 145 (1942) as amended; 56 Stat. 1093 (1942); 50 U.S.C. App § 1005 (Supp. 1946). For full text, see note 10, *supra*.

¹¹⁷ Lapse of time without information is deemed to establish a reasonable presumption that a missing person is no longer alive. Added to sec. 9, Missing Persons Act, by 58 Stat. 680 (1944); 50 U.S.C. App. § 1009 (Supp. 1946). The presumptive date of death is fixed by the finding. Sec. 5, *supra*. It will be superseded by an actual finding of death, whenever the facts warrant. *Ibid*.

status, pay and allowances were credited to his account¹¹⁸ and family allowances and allotments were continued. The Secretary of War was also given power to institute or increase family allowances and allotments when he deemed the family needs to require it.¹¹⁹ No person was declared dead without a careful investigation of all the circumstances by a board of general officers, assisted by a staff judge advocate.¹²⁰ Nevertheless, a few persons who had been declared dead, returned from Japanese prison camps to claim wives who had remarried.

Acting upon the administrative determination of death, the Army disposed of effects, settled accounts, and paid gratuities.¹²¹ The Veterans' Administration paid government life insurance and other benefits.¹²² Adhering to the views expressed in interpreting Article 112, the department construed the act as effective only for War Department purposes, and refused to pass upon its effect under state law.¹²³ A commercial life insurance company would be furnished a certificate of death showing the circum-

¹¹⁸ Sec. 2, Missing Persons Act; 56 Stat. 144 (1942) as amended by 58 Stat. 679; 50 U.S.C. App. § 1002 (Supp. 1946).

¹¹⁹ Secs. 3, 4, Missing Persons Act; 56 Stat. 144 (1942) as amended by 56 Stat. 1092, 58 Stat. 680 (1944); 50 U.S.C. App. §§ 1003, 4 (Supp. 1946).

¹²⁰ The War Department Dependency Board, reporting to the Chief, Casualty Branch, Adjutant General's Office. The identity of the officers composing the board was classified. Par. 46, Army Regulations 35-5520, Sept. 30, 1944.

¹²¹ Opinion J.A.G., file 1943/13125, September 13, 1943; 2 Bull. J.A.G. 247 (1943).

¹²² 58 Stat. 728 (1944); 38 U.S.C. § 733 (Supp. 1946).

¹²³ A member of the house of representatives asked the opinion of General Cramer, the Judge Advocate General, whether it would be desirable to enact legislation making a certificate of the administrative determination of death recordable in county offices of the several states and admissible in court as evidence of death. General Cramer expressed grave doubts as to the power of the federal government to require courts or other instrumentalities of the several states to accept such a certificate as bending with respect to the fact and time of death. File 1944/3866, April 25, 1944. A refusal to recognize the War Department's finding of death is found in state statutes, such as that in Pennsylvania authorizing a trusteeship *durante absentia*. Act June 3, 1943, P.L. 839; 20 P.S. § 1090 and that in Florida dealing with powers of attorney, discussed in a comment in this issue of the Quarterly.

stances under which it was issued, but would not be advised that it was bound by federal law to accept the certificate as proof of death.¹²⁴ Likewise probate proceedings could be instituted only when state law provided.¹²⁵ To the inquiries of a wife whose husband had been missing eleven months, General Cramer replied that the impending settlement of her husband's accounts by the army would not necessarily constitute a release from the bonds of matrimony, and that the state alone could determine whether her remarriage would constitute bigamy.¹²⁶

In conclusion, we note that the war now ending has seen the introduction of new federal administrative procedures and the enlargement of old to a point where they appear to transgress what was formerly considered the boundary between state and federal jurisdiction. To the extent that they have become reasonably necessary for the proper conduct of the war, these measures may be justifiable as necessary and proper extensions of the war power. To the extent that they merely offer shortcuts to state procedures deemed cumbersome and costly, they appear to formulate policy with respect to the administration of estates which the state alone has power to formulate.

It may be true that a party who would otherwise be injured by this process has recourse to a probate court. It must be remembered, however, that state probate procedures rest upon notice to all parties. This element of notice is wholly absent from the federal procedure, and a meritorious claimant may be entirely unaware of the need of applying for probate until after the assets have been dissipated. Furthermore, in the case of presumed decedents, the state courts are not always open to the claimant. The state may protect its jurisdiction by providing a public administrator at public expense and it

¹²⁴ Par. 37, Army Regulations 600-550, Dec. 23, 1944. Opinion J.A.G., file 1944/3866, April 25, 1944.

¹²⁵ See note 123, *supra*.

¹²⁶ Opinions J.A.G., file 1943/16045, Oct. 25, 1943; 1944/2842, March 20, 1944.

may accept the federal determination of death; but in so doing, it is being required to accept a policy formulated for it by the federal government. Where boundaries so long accepted have been crossed under the stress of emergency, one may wish for a more careful re-examination of the question now that the emergency has passed.