ADMINISTRATION UPON ESTATES OF PERSONS PRESUMED TO BE DEAD.

One of the curious subjects associated with the law of decedents' estates is the administration and distribution of estates of supposed decedents. It is almost axiomatic to say that no letters testamentary or letters of administration can be lawfully granted on anyone's estate unless he or she is dead, and the fact of death lawfully ascertained. The general rule is stated to be as follows:

> The power of the court to grant letters of administration exists only when the person whose estate is sought to be administered is dead, and if he is not dead, the authorities are almost unanimous in holding that a grant of administration or probate of a will, and all proceedings thereunder, are void.[1]

The fact of death is generally so notorious that no difficulty attends the proof of it, but if, as occasionally happens, no direct evidence can be had, it may be proved circumstantially by evidence of a long-continued absence or other relevant circumstances like any other fact; or a presumption of death may be created. In other words, it is sometimes necessary to collect, protect and distribute property of a person who is probably dead in fact, but of whose death no direct evidence can be produced before the proper official, so as to secure the grant of letters testamentary or of administration on the estate in the usual way; and therefore the death is proved either circumstantially, or by raising a legal presumption of death.

In such a case, to quote the words of Chief Justice Gibson,[2]

> "Not only convenience but necessity calls for a definite rule to produce certainty of results in the determination of facts which must be passed upon without proof; and such can be obtained only from the doctrine of presumptions, which, however arbitrary, is indispensable, and, when founded in the ordinary course of events, productive of results which usually accord with the truth."

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[1] Amer. and Eng. Enc. of Law, 2nd Edition, Vol. II, p. 759, for a full collection of citations.

[2] Burr v. Sim, 4 Whart. 150 p. 170 (Pa. 1858).

At common law this doctrine was illustrated by the presumption that where a person is once shown to have been living, the law will in general presume that he is still alive.[3] Originally this presumption of continuance in life only ceased after a lapse of time considerably exceeding the ordinary duration of human life;[4] that is to say, the legal presumption that the person continued to live, was overcome by the fact that if living, he would be then much older than human beings ordinarily live to be; and the legal presumption of life then gave way to a stronger presumption, or conclusion, of fact, to the contrary.[5]

After a time, however, the English courts adopted the arbitrary period of seven years as the time, after which, if the person in question had been continuously absent and not heard of, without apparent reason, the presumption of his death will thereupon arise to rebut and replace the previous presumption of his continuance in life. This action of the court was based on the Statute of I. James I. c. 11,[6] which created a similar presumption in certain specified cases, such as prosecutions for bigamy.[7]

It follows logically, and the courts of many jurisdictions have decided, that letters of administration on the estate of a supposed decedent may be granted on such a presumption of death from unexplained absence; though the administration may be afterwards overturned by proof that the party was actually alive at the time of the grant.[8] The jurisdictions in which such admin-

[3] Taylor on Evidence, Vol. I, §198; Chamberlayne on Evidence, Vol. II, §1042; Burr v. Sim, *supra.*

[4] Chamberlayne on Evidence, Vol. II, §§1042, 1090.

[5] Holland v. Vance, 114 S. W. Rep. 346 (Tex. 1908); Staffenback v. Mather, 133 N. Y. S. 482 (1911).

[6] §2, and 19 Car. II, c. 6.

[7] Chamberlayne on Evidence, Vol. II, §1093; Bacon's Abridgment, p. 622. This legal presumption based on seven years' absence has been generally adopted in the United States.

[8] Administration based on the presumption of death has been granted in many jurisdictions in England and the United States, as is illustrated by the following cases: Goods of Johnson, 78 L. T. N. S. 85 (Eng. 1898); Whiting v. Nicholl, 46 Ill. 230 (1867); Lancaster v. Washington L. Ins. Co., 62 Mo. 121 (1876); Morrison's Estate, 183 Pa. 155 (1897); In Matter of Sanford, 100 N. Y. App. Div. 479 (1905); Ferrell v. Grigsby, 51 S. W. Rep. 114 (Tenn. 1899); Wis. Trust Co. v. Wis. M. & F. Ins. Co. Bank, 105 Wis. 464 (1900).

istration has been granted have generally possessed no statute on the subject, and therefore the proceedings were based on the common law presumption of death after an unexplained absence of seven years, or longer period, or on proof that on a certain date the supposed decedent was exposed to a specific peril, since which date, and for a considerable time, he has not been heard of.

Among the States in which there are statutes applying to the subject may be mentioned the following: Pennsylvania,[9] Indiana,[10] Louisiana[11] and Missouri.[12] The Indiana statute applies only to the settlement and distribution of estates of supposed decedents, and for that purpose only creates a presumption of death in case of the continued unexplained absence of a person for five years. The Missouri statute directs that the presumption of death shall arise from an unexplained absence from the State of Missouri, lasting seven years; the absence from the State must in every case be affirmatively proved before the presumption will arise.[13] In all such cases, whether based on the common law presumption, or on a statute, the absence for the prescribed period must be continuous, the absentee must not have communicated during that period with any of the persons who would naturally hear of or from him, if he were alive; and his absence and silence must be unexplained except upon the assumption that he is dead. As was said in *Fuller* v. *New York Life Insurance Company,*[14] by McPherson, J.:

> "The stress is to be put on the word 'unexplained.' This has become the important question, and is always a question of fact."

The most complete system of settling the estates of such persons is found in Pennsylvania. The Act of 1885,[15] provides, that upon application made to the Register of Wills for letters of administration upon the estate of any person supposed to be dead on account of absence for seven or more years from the place of his last domicile within the State, the register shall cer-

[9] Act of June 24, 1885, Pamphlet Laws 155; Act of April 14, 1905, Pamphlet Laws 153.

[10] Burn's Ann. St. 1908, §§ 2747-2748.

[11] Civil Code, T. 3.

[12] Rev. Stat. 1909, §6340.

[13] Bradley v. Mod. Woodm. of Am., 124 S. W. Rep. 69 (1910).

[14] 199 Fed. Rep. 897 (1912).

[15] *Supra,* note 9.

tify the application to the Orphans' Court, and this court, if satisfied that the applicant would be entitled to administration if the absentee were in fact dead, shall cause the fact of the application to be advertised in a newspaper published in the county once a week for four successive weeks, giving notice that on a day stated, which must be two weeks after the last publication, evidence will be heard by the court concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof.

The procedure under this Act is by a petition to the register of the county of the last-known principal residence of the absentee, within the State; which shall set forth, in addition to the usual facts necessary to show the jurisdiction of the register in granting letters of administration, the fact that the supposed decedent has been absent and not heard of for at least seven years continuously, immediately preceding the filing of the petition; that he was last known to reside in the county in which the petition is presented; that no administrator has been appointed for his estate; and concluding with the prayer for the grant of letters of administration to the petitioner.

It is then the duty of the register to certify this application to the Orphans' Court of the same county, and if the court finds the petition to be in proper form, it is referred to an examiner to take the testimony of witnesses concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof. After the appointment of the examiner, he proceeds as in other cases of reference to an examiner, with this addition, that, before holding a meeting for the purposes of his appointment, he should advertise a notice of the date of the meeting once a week for four weeks in a newspaper of general circulation as well as the legal periodical, if any, published in the county, the last advertisement to be at least two weeks before the date fixed for the meeting.

At the meeting before the examiner, the petitioner must produce evidence in support of the averments of his petition; the examiner then files his report of his proceedings, and attaches thereto the testimony taken before him, and proof of publication

of the notice of his meeting. If in the opinion of the court the evidence proves *prima facie* the facts stated in the petition, and makes out the legal presumption of death of the absentee, the court enters a decree that the legal presumption of death is established; and orders further that notice of this decree shall be published for two successive weeks in a daily newspaper and in the legal publication (if any) published in the county. These notices require the supposed decedent, if alive, or any other person for him, to produce to the court, on or before a certain date, which shall be twelve weeks from the last publication of said notice, satisfactory evidence of his continuance in life. The decree as well as the notice published shall state further that upon failure to produce such evidence to the court, a decree will be entered at the expiration of the period named in the decree, directing the Register of Wills of the proper county to issue letters of administration to the petitioner. If no evidence is produced to the court that the supposed decedent is alive, the court at the expiration of twelve weeks after the last publication, makes a decree directing the register to issue the letters of administration as prayed for; and in accordance therewith, the register will then grant the letters to the petitioner.

By the supplementary Act of 1905,[16] above referred to, if the supposed decedent left a will, the initial procedure is the same as that in cases of intestacy. The person entitled to administer the estate must first procure the issuing of letters of administration under the Act of 1885; then the person having possession of the will should produce it before the register and file a petition for its probate, upon which a citation is issued to the persons who would be entitled to the estate if there were no will, and to the administrator so already appointed, directing them to show cause why the will should not be probated. If no cause is then shown, and the will is properly proved according to law, it is admitted to probate and a certified copy of it is attached to the letters of administration, making them in effect letters of administration *cum testamento annexo;* or, if the will names an executor, the previous letters of administration are revoked and letters of

[16] *Supra,* note 9.

administration issued to the executor. These last-named letters are really letters testamentary, although called letters of administration.

The Act of 1885 was attacked in *Cunnius* v. *School District.*[17] This case involved the curious situation of a woman having dower rights in a certain piece of land on which a schoolhouse was built, who moved to the State of California and remained there for eleven years without being heard from by those in her home locality. During the interval, letters of administration were granted upon her estate under the Act of 1885, and the arrears of dower up to that date were paid to her administrator. Then at the end of this period she brought suit in the court of her former domicile in Pennsylvania to recover her dower, and at the trial of her suit, ample evidence was produced that she was still living. Whereupon the Berks County Court held that the Act was unconstitutional and void, and that she was entitled to the arrears of her dower. On appeal from this decision it was affirmed by the Superior Court, but on a further appeal the Supreme Court of the State reversed the decision, held the Act to be constitutional, and this decision was finally affirmed by the Supreme Court of the United States.[18]

This procedure gives rise to a number of puzzling questions. For instance, what is the effect of a payment by the administrator in such case to a creditor, or to the administrator, by a debtor, when the supposed decedent afterwards proves to be alive? Some authorities hold that the administrator, in the first instance, is

[17] 206 Pa. 469 (1903).

[18] 198 U. S. 458 (1904), "Which finally and judicially doomed her to death for the rest of her life." (Drawing Wills and Settlement of Estates, by Hon. John Marshall Gest, p. 80.) She asserted that the proceedings in the state court and the receipt of the administrator furnished no protection to the school district, because, as she was alive when the proceedings for administration were taken in the state court, those proceedings and the law which authorized them were repugnant to the XIV Amendment to the Federal Constitution. The principal authority she relied on in support of her contention was the case of Scott v. McNeal, 154 U. S. 34 (1894), which was strongly in her favor, but arose in the State of Washington in which there was no statute on the subject of granting administration on a presumption of death arising from long absence. The Supreme Court held that the subject was within the police power of a state, and could be regulated by the statute; and therefore the Pennsylvania Act was constitutional and protected the defendant in making its payment to the administrator.

then subrogated to the rights of the creditors whose claims he has paid, and therefore he would be entitled to credits for whatever amounts he had lawfully paid them, so far as they themselves could enforce payment; which gives him some measure of protection.[19]

The Act of 1885 [20] directs that

> "The said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were really dead."

The next Section provides that

> "The Orphans' Court may revoke the said letters at any time on due and satisfactory proof that the supposed decedent is in fact alive; after which revocation all the powers of the administrator shall cease, but all receipts or disbursements of assets, and other acts previously done by him, shall remain as valid, as if the said letters were unrevoked;"

Thereupon the administrator shall settle his account and transfer all assets remaining to the supposed decedent; less the costs of issuing the letters and of revoking them, which shall be first deducted and paid: (Section 7); and it is further provided that the supposed decedent may recover all of his property distributed to those who would have been his widow, heir or next to kin, if he had been dead. As further security for the supposed decedent, the distributees of his estate are required to give sufficient security, approved of by the court, for the return of the amounts received by each of them on demand, with interest, to the supposed decedent, if he is in fact at the time alive; and upon their failing to give such security, the money shall be put at interest and the interest paid annually to the person entitled to it, until the security aforesaid is given, or the court shall order it to be paid to the persons entitled to it.

Accordingly, *Cunnius* v. *School District*,[21] holds that the payment made to an administrator or executor appointed under the Act or its supplement is a satisfaction of the debt and exposes

[19] Beam v. Copeland, 54 Ark. 70 (1890).

[20] §4.

[21] *Supra*, note 17.

the debtor to no further liability in case the supposed decedent is in fact alive. The latter has only the remedy of securing from his administrator any assets remaining in his hands undistributed; and of recovering from the distributees whatever has been paid to them in the capacity of widow, heirs, next of kin or legatees, and his rights in this respect are fully secured by the refunding bonds required by the Act or by the investment of the assets in case such bonds are not given. It seems to follow also that all payments by the administrator to creditors of the supposed decedent are equally valid, if the latter is in fact alive.

Another doubtful question that may arise under this Statute is as to the final disposition of this fund, supposing it to be invested as required by the Act on account of failure of the distributees to give refunding bonds. How long then will the Orphans' Court require the fund to remain invested and postpone its payment to the widow, heirs, next of kin or legatees? We presume such payment would be authorized by the court, either upon proof afterwards made that the supposed decedent was in fact dead either at the time letters were granted on his estate, or subsequently; or when such additional period of years elapsed as according to the old common law rule already mentioned would exceed the probable period of human life, so as to convert the presumption of the person's death into an incontrovertible fact. It is possible, however, that in the meantime a great hardship might result to the persons presumptively entitled to the estate; and it would have been well to provide in the Act more particularly for the final distribution in such cases.

The Act of 1905 [22] provides that upon compliance with its terms all property of the "decedent" shall be vested as provided by his will; and all acts done thereunder shall be valid, even if the letters are afterwards revoked upon proof of the supposed decedent being in fact alive; but makes no provision for requiring refunding bonds from the legatees, so that protection to the absentee testator is lacking.

The importance of regulating this subject by statute instead of trusting to common law principles as is done in most jurisdic-

[22] *Supra*, note 9.

tions, is shown by the case of *Scott* v. *McNeal*,[23] holding that in any such case the letters of administration are void if the supposed decedent is in fact alive at the time they are granted; no matter how long afterwards the fact of his existence becomes known and no matter what has been done with his estate in the meantime. The unfortunate and sometimes unjust results that might follow from this decision caused the court to reach the different conclusion embodied in *Cunnius* v. *School District*,[24] but an examination of that decision shows that it is expressly limited to cases arising under state statutes, and in all other cases the decision of *Scott* v. *McNeal* remains a binding authority.

In such cases, not regulated by statute, the grant of administration is void not only against the supposed decedent himself but as to all others besides who may choose to question it. It is not a case of a judgment by a court having apparent jurisdiction, which therefore cannot be set aside collaterally; but upon showing the fact of the supposed decedent being alive at the time the court assumed jurisdiction over his estate, the foundation of its jurisdiction is removed and its decision left open to collateral attack. The hardships that may follow from leaving the subject to be governed solely by common law principles may be serious, although not of frequent occurrence. The supposed decedent may return after an absence brought about by no fault of his own, and find a large estate dissipated by persons who are not financially able to make good his loss; or the debtors who have paid their claims to his administrator or executor may be compelled, at great hardship to themselves, to pay them a second time to the creditor, upon his appearing and proving his identity and claiming the money which they owe him. Lastly, the persons to whom his estate may have been distributed under the forms of law, and who have received it in good faith, believing in his death, may be caused great hardship if they have used the money or other property, by being called on to restore it to the supposedly defunct owner.

Therefore a statutory system of regulation similar to that

[23] 154 U. S. 34 (1894).

embodied in the Pennsylvania statutes above mentioned, is desirable, not only to protect the property of the supposed decedent during his absence and secure its return to him as far as possible upon his appearing to be alive; but also for the protection of innocent creditors, debtors, and heirs and next of kin of the supposed decedent. The risk which the absentee runs, of being deprived of his property without his consent by proceedings under such a statute, is usually caused by his own voluntary act and therefore he has little cause to complain of the result; while in the absence of any statute the law which secures him the return of his property will often do so at a loss to debtors or others who had nothing to do with causing his absence and no reason to believe him to be alive at the time when his death was legally presumed and his estate administered.

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