

non-negotiable) instrument. They do not constitute 'defects of title' nor 'infirmities' in the instrument, nor do they in any wise discredit the paper." Bigelow, Bills, Notes, and Checks, 3rd ed. p. 445. Under the law merchant the indorsee after maturity of a negotiable instrument took it subject only to equities attaching to or inherent in the instrument itself at the time of the transfer and equities arising out of the instrument which exist at the time of the transfer. *Pusey & Jones Co. v. Hansen*, 279 Fed. 488 (C.C.A., 3rd C., 1922), reversed on other grounds, 261 U.S. 491, 67 L.E. 763, 43 S. Ct. 454 (1922). *Worden v. Gillett*, 275 Fed. 654 (D.C., S.D. Fla. 1921). The opinion in *Stegal v. Union Bank*, 163 Va. 417, 176 S.E. 438 (1934) contains an exhaustive discussion of the problem before and after the passage of the Negotiable Instruments Law. The conclusion reached in that case is that it could not have been the intention of the drafters of the Negotiable Instruments Law that defenses "should mean technical defenses and offsets in one state, and technical defenses, but not offsets in another," *supra*, p. 459. But it is probable that that is just what the drafters did intend. When the Negotiable Instruments Law was submitted to the legislatures of the several states, the following note was appended to section 58: "It is not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various states relating to set-off and counterclaim. On the question whether such equities may be asserted as attach to the bill, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In an act designed to be uniform in the various states, no more can be done than fix the rights of the holders in due course." *Stegal v. Union Bank, supra*, p. 453. Evidently it was not thought important that the law as regards holders not in due course should be uniform. Apart from the question of the meaning of "defense" in section 58, it seems that the decision in this case is correct and that the law as it stands does substantial justice.

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## PROBATE PRACTICE

### RIGHT OF JURY TO FIX THE TIME OF DEATH WHERE A PRESUMPTION ARISES FROM SEVEN YEARS' UNEXPLAINED ABSENCE—POWER OF PROBATE COURT TO APPOINT AN ADMINISTRATOR IN THE ABSENCE OF STATUTE

John W. Phillips, an insurance agent, worked his regular territory in Columbus on June 27, 1922, and was last seen that evening on the street car which ordinarily took him to his home. Four days later, an

insurance policy in his behalf and some other papers used by him in his business were found floating in the Scioto River. He was a man of integrity, had apparently lived a happy, normal life, and no facts of any consequence were known to explain this sudden and complete disappearance. Upon action filed in the Probate Court December 18, 1931, under General Code 10636-1 et seq., Mr. Phillips was declared dead in fact, the date of death being found by the court to be June 27, 1922, and an administratrix was appointed. The administratrix filed an action in the Common Pleas Court to recover on four insurance policies which Mr. Phillips had held in the company which employed him. The jury, finding that Mr. Phillips was dead and that death had occurred on June 27, 1922, returned a verdict for the plaintiff. Judgment was entered accordingly on all four policies, including one which specified that the insured must have been in the employ of the company at the time of his death. In affirming the judgment, the Court of Appeals said that it was within the province of the jury to fix the date of death of the insured, and made the observation that without the aid of a statute the Probate Court could have named an administrator on the strength of the presumption of death arising from seven years' unexplained absence. *Prudential Ins. Co. of America v. Phillips*, 20 Ohio Abs. 228 (1935).

Whenever the fact of death becomes important and direct proof is not obtainable, death must be established by circumstantial evidence. The usual method is to establish facts giving rise to a presumption of death. The common law rule is well established in Ohio and elsewhere, that a person's continued and unexplained absence from home without being heard from for a period exceeding seven years raises a presumption of death. *Rice v. Lumley*, 10 Ohio St. 596 (1857); *Brent v. First*, 41 Ohio St. 436 (1884); *Young v. Young*, 10 Ohio App. 351 (1918); *Ingram v. Metropolitan Life Ins. Co.*, 37 Ga. App. 206, 139 S.E. 363 (1927); *University v. Harrison*, 90 N.C. 398 (1884); *Whiting v. Nicholl*, 46 Ill. 230 (1867); 2 Woerner, Am. Law of Administration (3rd Ed.), 686, sec. 207. This rule was the basis for the Ohio statute providing for the administration of the estate of a presumed decedent. General Code 10509-25 et seq. (formerly 10636-1 et seq.). In the absence of facts tending to establish the time of death, there is an equally important presumption that life continues throughout the seven-year period. *Goodier v. Mutual Life Ins. Co.*, 158 Minn. 1, 196 N.W. 662, 34 A.L.R. 1383 (1924); *Supreme Commandery v. Everding*, 20 O.C.C. 689, 11 C.D. 419 (1893). The generally accepted view seems to be that the presumption of death

arises at the end of the seven-year period and is a presumption of law relating only to the fact of death, the time of death, whenever it is material, being a subject of distinct proof. *Young v. Young*, ante; *Supreme Commandery v. Everding*, ante; *Nepean v. Doe*, 2 M. & W. 894, 150 Reprint 1021 (Eng., 1837); *Kansas City Life Ins. Co. v. Marshall*, 84 Colo. 71, 268 Pac. 529, 61 A.L.R. 1321 (1928); *Peterson v. Northwestern Mutual Life Ins. Co.*, 134 Wash. 172, 235 Pac. 15 (1925); *Wisconsin Trust Co. v. Wisconsin M. & F. Ins. Co. Bank*, 105 Wis. 464 (1900); *Ingram v. Met. Life Ins. Co.*, ante. Such presumption does not ordinarily relate back to the date of disappearance. *Griffin v. Northwestern Life Ins. Co.*, 250 Mich. 185, 229 N.W. 509 (1930). However, facts which would not have been sufficient to establish the fact of death so as to permit action during the seven-year period, may be sufficient to sustain a finding fixing the date of the decedent's death after the presumption from seven years' absence has sufficed to prove the fact of death. *Linneweber v. Supreme Council, C.K.A.*, 30 Cal. App. 315, 158 Pac. 229 (1916); *Bradley v. Modern Woodmen*, 146 Mo. App. 428, 124 S.W. 69 (1910); *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 121, 128 (1876). Any evidence tending to discredit any other explanation than that of death, is admissible and may warrant the finding of death at a certain time. *Mutual Life Ins. Co. v. Louisville Trust Co.*, 207 Ky. 654, 269 S.W. 1014 (1925). In Ohio, disappearance from shipboard has been held sufficient to warrant a jury in finding that the presumed decedent had died by drowning on the night he was last seen. *Travelers' Ins. Co. v. Rosch*, 3 O.C.C. (N.S.) 156, 13 C.D. 491, affirmed without opinion in 69 Ohio St. 561, 70 N.E. 1133 (1902). Evidence of integrity, steady habits of living, happy family relations, etc., may be of aid in determining when death occurred. *Butler v. Supreme Court, I.O.F.*, 53 Wash. 118, 101 Pac. 481, 26 L.R.A. (N.S.) 294 (1909); *American Nat. Life Ins. Co. v. Hicks*, 35 S.W. (2nd) 128, 75 A.L.R. 623 (Tex., 1931); *Kansas City Life Ins. Co. v. Marshall*, ante. In the principal case, on the basis of Phillips' good reputation and the finding of his papers in the river, the Court of Appeals would seem to be fully supported by authority in its decision upholding the finding by the jury of the date of Phillips' death.

General Code 10636-4 provided for a determination by the Probate Court of the date when the presumption of death arose. It was definitely decided, however, in *Morrissey, Admr. v. Smith*, 17 Ohio Abs. 240, 39 O.L.R. 329 (1933), noted in 1 OHIO ST. L.J. 126, 7 OHIO BAR 680 (1935), that this statute was merely procedural in nature,

that the common law rule of presumption of death was not abrogated thereby, and that the time fixed by the Probate Court in pursuance thereof could not conclude strangers to such judgment. It would seem, therefore, that where some evidence is presented tending to indicate the date of death, the right of a jury to set that date would not be affected by Section 10509-28 of the new Probate Code. That section merely provides that the presumption of death shall be regarded as having arisen as of the date of the Probate Court's decree establishing the fact of death. It does not purport to fix the date of death as of the date of that decree.

The court's statement in the principal case relating to the power of the Probate Court to appoint an administrator on the strength of the common law presumption of death, in the absence of statute, gives rise to more serious difficulty. Statutes similar to the one in Ohio, authorizing the courts to appoint an administrator to take charge of property abandoned by absentees, have been upheld. *Cunnius v. Reading School District*, 198 U.S. 458, 25 S. Ct. 721, 49 L. Ed. 1125 (1905); *Blinn v. Nelson*, 222 U.S. 1, 32 S. Ct. 1, 56 L. Ed. 65, Ann. Cas. 1913 B, 555 (1911); *Chamberlain v. Anderson*, 195 Iowa 855, 190 N.W. 503, 26 A.L.R. 957 (1922); See: MINN. L. REV. 89 (1925). Such statutes, however, make due provision for the protection of the presumed decedent's rights in case he should later prove to be alive. Cases involving situations where the absentee has returned to claim his property distributed under authority of the court have gone far to establish the invalidity of such proceedings when based upon the common law presumption of death alone. The case of *Scott v. McNeal*, 154 U.S. 34, 14 S. Ct. 1108, 38 L. Ed. 896 (1894), established the rule that it is not competent for a state, by statute or by the judgment of its highest court, to make a judicial determination that a man is dead, made in his absence and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property; such action would violate the 14th Amendment by taking property without due process of law. On the basis of this authority, it was held in *Beckwith v. Bates*, 228 Mich. 400, 200 N.W. 151, 37 A.L.R. 819 (1924), that there can be no administration and distribution of the estate of an absentee under the general laws relative to the administration of the estates of deceased persons, and that such void probate proceedings can afford no protection to the administrator as against the absentee. The administration of the estate of a living person, in the absence of a proper statute, is void *ab initio*, for want of jurisdiction, not only as against the supposed decedent himself, but as to all others who may choose to

question it. See: *Scott v. McNeal*, *ante*; *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458 (1883); 62 U. OF PA. L. REV. 605 (1914). Perhaps the least that can be said in the ordinary case is that a court's decree relating to the property of a presumed decedent must make provision for the protection of the property rights of such person in case he should later prove to be living, otherwise it is void. *Eddy v. Eddy*, 302 Ill. 446, 134 N.E. 80 (1922). The contrary view has been expressed in *Hamilton v. Orange Savings Bank*, 99 N.J.L. 503, 124 Atl. 62 (1924), noted in 34 YALE L. J. 97 (1924), where it was held that payment to an administrator, duly appointed by the court, of a person presumed to be dead, was valid and conclusive as to collateral attack whether or not such presumed decedent later proved to be living, on the ground that debtors should not be made to risk paying their debts twice.

The Ohio courts seem to be more nearly in accord with the view of Michigan and Illinois. The common law presumption of death is merely *prima facie* and is wholly rebutted, proceedings thereunder being rendered void, whenever it is shown that the presumed decedent is in fact alive. *Youngs v. Heffner*, 36 Ohio St. 232 (1880); *Nichols v. Clare*, 32 O.C.A. 555, 35 C.D. 846, affirmed without opinion in 75 Ohio St. 600, 80 N.E. 1125 (1906). Recognizing the importance of this rule, the court in the *Nichols* case, as a condition to granting partition of property in which the absentee had an interest, required that a bond be given for repayment of the absentee's interest in the event of his reappearance. The necessity of some such precaution was recognized by the court in *Morrissey, Admr. v. Smith*, *ante*. *Brent v. First*, *ante*, may be distinguished on its facts, since the absentee deserted his wife and four children and the court felt the wife was entitled to his money by reason of her right to a year's support.

In some jurisdictions, where the absentee did not return to complicate matters, the courts have upheld administration granted on the basis of the common law presumption of death. *Matter of Sanford*, 100 N.Y. App. Div. 479 (1905); *Ferrell v. Grigsby*, 51 S.W. 114 (Tenn., 1899).

The statement of the Court of Appeals in the principal case relating to a court's jurisdiction to appoint an administrator based solely upon the common law presumption of death, can hardly be applied to cases where the presumed decedent later reappears. In the absence of statute, re-appearance of the absentee renders the proceedings void *ab initio*.

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