

# MERCER BEASLEY LAW REVIEW

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VOL. V

JANUARY, 1936

No. 1

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## PRESUMPTION OF DEATH IN NEW JERSEY

Every person must at some time end this mundane existence in death. After death, a person's estate becomes susceptible to distribution, either by virtue of the terms of that person's Last Will and Testament or by virtue of our statutes relating to descent and distribution. The surviving spouse of one who dies is relieved of the bonds of matrimony and is free to marry again. The legal effect of death thus becomes one of the important phases of the administration of law and of orderly procedure in social affairs.

Where death occurs as an actual provable fact, the legal incidents of death attach at once and no serious legal questions arise other than perhaps those relating to interpretation of Wills or to determination of the persons taking the estate of the dead person according to our laws and statutes pertaining to descent and distribution.

There are, however, many instances in which death is not a provable fact. One may go on a journey and never return. A man may suddenly disappear from his old haunts and his relatives and friends may never again see or hear from him. A man may be a fugitive from justice, or may have had serious domestic difficulties, or may have brought upon himself some actual or impending disgrace, or may have become hopelessly indebted to others. Because of one of these situations or any other making him desire to avoid contact with others, a man may mysteriously and completely disappear, never again to appear or to be heard from. But at some time in his life, death must come to him.

The first presumption is of course that a person, once alive, continues to live, until the fact of death is proved or until

that presumption is overcome by a contrary presumption.<sup>1</sup> At early civil and canon law, it was presumed that a person would be alive until he might have attained the age of 100 years.<sup>2</sup> Under this presumption one who disappeared might have many years of presumed life before death might be presumed. This resulted in such a ridiculous legal and social predicament that the common law early altered this presumption to the end that a person would be presumed alive until the contrary presumption arises and then fixed the period for presumption of life at seven years after disappearance. At the conclusion of such a seven year period, the presumption of death arose.<sup>3</sup> This at first was considered a presumption of fact but our courts now regard it as a presumption of law.<sup>4</sup> If at any time after the seven year period, the person presumed to be dead reappears or is heard from or is proved to be alive, the presumption of death is of course rebutted.<sup>5</sup>

This common law presumption of death has now become fixed by statute in most, if not all, of the states of the United States. Our first New Jersey statute relating to the subject was enacted in 1797; it was declarative of the common law at that time<sup>6</sup> and is commonly known as the "Death Act". It provided as follows:

Sec. 1 Any person who shall remain beyond sea, or absent himself or herself from this State, or conceal himself or herself in this State, for seven years successively, shall be presumed to be dead, in any case where-

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<sup>1</sup> *Meyer v. Madreperla*, 68 N.J.L. 258; 8 R.C.L. 707; 17 C.J. 1166; 53 Atl. 477 (E. & A. 1902).

<sup>2</sup> *Hoyt v. Newbold*, 45 N.J.L. 219; 96 Am. St. Rep. 536; 46 A.R. 757 (N. J. Sup. Ct. 1883); 8 R.C.L. 708.

<sup>3</sup> *Hoyt v. Newbold*, 45 N.J.L. 219; 8 R.C.L. 708; 96 Am. St. Rep. 536; 46 A.R. 757 (N. J. Sup. Ct. 1883); *Clarke v. Canfield*, 15 N.J.Eq. 119; 8 R.C.L. 708 (Ch. 1862); *Meyer v. Madreperla*, 68 N.J.L. 258; 8 R.C.L. 707; 17 C.J. 1166; 53 Atl. 477 (E. & A. 1902).

<sup>4</sup> *Meyer v. Madreperla*, 68 N.J.L. 258; 8 R.C.L. 707; 17 C.J. 1166; 53 Atl. 477 (E. & A. 1902); *Osborn v. Allen*, 26 N.J.L. 388 (N. J. Sup. Ct. 1857).

<sup>5</sup> *Wambaugh v. Schenck*, 2 N.J.L. 214 (N. J. Sup. Ct. 1807); *Meyer v. Madreperla*, 68 N.J.L. 258; 8 R.C.L. 707; 17 C.J. 1166; 53 Atl. 477 (E. & A. 1902).

<sup>6</sup> *Osborn v. Allen*, 26 N.J.L. 388 (N. J. Sup. Ct. 1857); *Armstrong v. Armstrong*, 99 N.J.Eq. 19; 132 Atl. 237 (Ch. 1926); *Burkhardt v. Burkhardt*, 63 N.J.Eq. 479, 52 Atl. 296 (Ch. 1902).

in his or her death shall come in question, unless proof be made that he or she were alive within that time; but an estate recovered in any such case, if in a subsequent action or suit the person so presumed to be dead shall be proved to be living, shall be restored to him or her who shall have been evicted; and he or she may also demand and recover the rents and profits of the estate, during such time as he or she shall have been deprived thereof, with costs of suit.

This act remained in effect until 1895 when the Legislature amended it by enlarging its provisions to apply to any person "whether a resident of this State or not" who shall remain beyond sea, "absent himself or herself from this state or from the place of his or her last known residence or conceal himself or herself in the state or in the place of his or her last known residence, for seven years successively".<sup>7</sup> It further provided that if an executor or administrator should pay over any legacy or distributive share of an estate to which the presumed dead person would have been entitled, he or she shall be fully discharged of any liability therefor upon filing with the surrogate of the proper County releases and refunding bonds of the persons entitled to take if the presumed dead person were actually dead.

In 1911 the Legislature passed a supplement to the "Death Act," which supplement first provided for a decree declaring a person to be dead.<sup>8</sup> This statute limited its provisions to a person, "*being a resident of this State,*" who shall remain beyond the seas, absent himself or conceal himself for seven years successively. It further provided that the ordinary or the surrogate of the county in which the person had resided at the time of disappearance, shall, upon application "by any next of kin of such person," make an order to show cause, returnable at a definite place and time not less than thirty days or more than three months from the date of the order why a decree should not be made declaring said person to

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<sup>7</sup> 2 N. J. COMP. STAT. (1910), p. 1904; P.L. 1895, p. 751.

<sup>8</sup> P.L. 1911, p. 538.

be dead, or, if there be personal property belonging to such person, why letters of administration should not be granted; such order shall be published in such manner as the ordinary or surrogate may direct and if it be proven to the satisfaction of the ordinary or surrogate that such person has remained beyond the sea, or absented himself from the State or concealed himself within the State "for seven years then last past successively, or has not been heard of or from during said period," the ordinary or surrogate may make a decree declaring the said person to be dead and may grant letters of administration upon the filing of the usual bond of an administrator.

In 1926 the Legislature amended the supplement of 1911,<sup>9</sup> by inserting in the act that the application to the ordinary or surrogate might be made "by the husband, wife or next of kin of such person" instead of "next of kin" alone as in the 1911 Act and that administration might be granted "to the husband, wife or next of kin making the application" or to some other fit and proper person.

In 1927 the Legislature passed another supplement<sup>10</sup> to the "Death Act" which is similar to the Acts of 1911 and 1926, except that it provides that the application to the ordinary or surrogate for the order to show cause may be made "by any next of kin, creditor, executor, administrator, or any beneficiary or beneficiaries under a policy of life insurance" and that the letters of administration may be granted "to the next of kin making the application or to such fit and proper person as the said ordinary or surrogate may deem advisable".

It will be noted that the "Death Act" (Acts of 1797 and 1895) provides that the person who has disappeared shall be presumed to be dead and that its terms apply to any person, whether a resident or not, and further provides for the restoration of his estate to the person presumed dead, if he returns alive. The supplements to the "Death Act" (Acts of 1911, 1926 and 1927) provide for a decree "declaring the said person to be dead" designate the class of persons who may make application for the order to show cause for such decree and provide for the

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<sup>9</sup> P.L. 1926, ch. 37.

<sup>10</sup> P.L. 1927, ch. 275, p. 508.

granting of administration of the personal property of the person so declared to be dead.

The Orphans' Court Act,<sup>11</sup> as enacted in 1898, contains three sections relating to the estates of persons presumed to be dead. *Section 30* relates to any person, being a resident of this state, who remains beyond the seas, absents himself from the state or conceals himself within the state for seven years successively and provides for the granting of letters of administration to the next of kin; this section was amended in 1926<sup>12</sup> to provide that letters might be issued "to the husband, wife, or next of kin making the application or to such fit or proper person as the ordinary or surrogate shall deem advisable". This section is very similar in its wording to the supplements of 1911, 1926 and 1927 of the "Death Act," except that it does not provide for the making of a decree declaring such disappeared person to be dead. *Section 31* relates to a person, not a resident of New Jersey, but having goods, chattels, moneys and effects in this state who "shall absent himself or herself from the place of his or her domicile for seven years successively"; it does not provide for a decree declaring such person to be dead but it permits the ordinary or surrogate to grant letters of administration to the next of kin making application therefor if the proof is satisfactory that such person has absented himself or herself from the place of his or her domicile for seven years then last past successively; this section was also amended in 1926<sup>13</sup> so as to permit the application to be made by, and letters granted to, "the husband, wife or next of kin". *Section 32* provides that any administrator appointed under the two preceding sections shall administer the estate as if the presumed dead person had died intestate and after payment of debts, etc., shall make distribution to those persons entitled by law to receive the estate upon "his, her or their giving to the administrator a bond or bonds, with good and sufficient sureties, upon condition to refund and pay back to the administrator the share received by them, respectively, with the accumulations thereof," if the person presumed to be dead shall, at any time afterward, reappear

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<sup>11</sup> P.L. 1898, p. 715; 3 N. J. COMP. STAT. (1910) p. 3809.

<sup>12</sup> P.L. 1926, ch. 38, p. 73.

<sup>13</sup> P.L. 1926, ch. 38, p. 74.

and claim the same, which bond or bonds shall be full protection to the administrator if such person does reappear and claim the estate after distribution made thereof and that such administrator shall assign such bond or bonds to the person so reappearing and claiming the estate, after which the administrator shall not be liable for any act done by him under and by virtue of his office as administrator.

The presumption of death does not arise where the supposed decedent has been heard from or there is reliable information that he was alive within seven years.<sup>14</sup> The primary burden is of course on the person asserting that the absent person has not been seen or heard from for seven years then last past successively to produce evidence to sustain that assertion before the presumption of death will arise.<sup>15</sup> This evidence must disclose that he has been absent from his last known residence for the prescribed period and that all available sources of information as to his whereabouts have been exhausted.<sup>16</sup> Ordinarily the evidence given by his family, relatives, friends and former associates, together with inquiries made by them, will satisfy this requirement as to evidence. But if a person, absenting himself, has not been heard from in seven years last past successively, the presumption of death arises at the end of that period<sup>17</sup> and a person seeking to rebut that presumption must show that the person was alive or heard from within that seven year period. The burden of proof is then upon the person asserting a continuance of life.<sup>18</sup> Thus the case of *Hoyt v. Newbold* was brought to recover possession of an undivided one-seventh of a lot of land. The land had been owned by one Tuers who had seven children and who died intestate. One of his children left home in 1852 to go to California and was never seen or heard from thereafter. By partition suit, this son's interest in the land was set off to his children. Twenty-two years after this son's disappearance, the plaintiff produced a deed signed by a person of

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<sup>14</sup> *Spiltoir v. Spiltoir*, 72 N.J.Eq. 50, 64 Atl. 96 (Ch. 1906).

<sup>15</sup> 17 C.J. 1174.

<sup>16</sup> *Armstrong v. Armstrong*, 99 N.J.Eq. 19; 17 C.J. 1174; 132 Atl. 237 (Ch. 1926).

<sup>17</sup> *Smith v. Smith*, 5 N.J.Eq. 484 (Ch. 1846).

<sup>18</sup> *Hoyt v. Newbold*, 45 N.J.L. 219; 8 R.C.L. 708; 96 Am. St. Rep. 536; 46 A.R. 757 (N. J. Sup. Ct. 1883); *Smith v. Smith*, 5 N.J.Eq. 484 (Ch. 1846).

the same name as the son who had disappeared. The court held that the burden was on the plaintiff to prove that this son was still alive and said:<sup>19</sup>

“The mere fact that deeds were signed in California in 1874 by a person named Abraham A. Tuers, or using that name, does not prove that such person was the son of Abraham A. Tuers, Sr., or that he was then living or that he signed the deed. There should be something more than similarity of name to overcome the presumption of death raised by the statute.”

The court further stated that it would be necessary to prove the identity of the one signing the deed, either by evidence of those who knew him, or evidence giving a definite description of him, or, at least, proof of his handwriting.

In some states the presence of a motive for disappearance has some effect upon the presumption of death after seven years absence. In New Jersey, our statutes make no reference to motive for disappearance. It would therefore seem that the only necessary proof is that the resident of the state has remained beyond the seas, or absented himself from the state or concealed himself within the state for seven years then last past successively. The fact that he is a fugitive from justice, or has had family or domestic difficulties, or has fled from the stigma of some disgrace has no effect upon the presumption of death if he has disappeared and not been heard from for the statutory period of seven years.<sup>20</sup>

Our statute reads that there shall be a presumption of death where a person, a resident of this state, “shall remain beyond the seas, or absent himself or herself from this state or conceal himself or herself in this state for seven years successively”. The disjunctive wording of this statute was discussed in the case of *Osborn v. Allen*,<sup>21</sup> where it was claimed that the statute had altered the common law rule and made it necessary

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<sup>19</sup> 45 N.J.L. 219, at p. 223.

<sup>20</sup> Meckert v. Prudential Ins. Co., 114 N.J.L. 320, 176 Atl. 587 (E. & A. 1934).

<sup>21</sup> *Osborn v. Allen*, 26 N.J.L. 388, 389.

to prove one of the alternatives specified in the statute. Chief Justice Green comments on this argument as follows:

“It is obvious that this construction of the statute would totally defeat its object. Evidence that the party was actually absenting himself from the state or was concealing himself within the state, would necessarily prove that he was living, and would, consequently, rebut the very presumption that the statute was designed to create. All the proof that can be required or expected is, that the party has been absent from the state or from his family at home and has not been heard from within the period prescribed by the statute.”

There is a contrariety of opinion as to the time when death is fixed under the presumption of death theory.<sup>22</sup> In some jurisdictions, it is held that there is a presumption that death occurred on the date of disappearance, especially where circumstances indicated the probability.<sup>23</sup> The apparent weight of authority, including the English decisions, is that the presumption is only as to the death and does not fix the time of death, which is left to be determined by all the facts and circumstances of a particular case.<sup>24</sup> The rule in New Jersey, however, has been established that it will be presumed that death occurred at the expiration of the seven year period.<sup>25</sup> In *Clarke v. Canfield*, Chancellor Green says:

“The legal presumption, independent of the statute, is that life continues until the contrary is shown, or until a different presumption is raised. In the absence of the statute the presumption would be that the legatee is still alive. The design of the statute, was, by an arbitrary rule, to fix a definite limit to that presumption of the continuance of life by a contrary presumption that life had ceased. But

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<sup>22</sup> 17 C.J. 1174.

<sup>23</sup> 17 C.J. 1175.

<sup>24</sup> 17 C.J. 1175.

<sup>25</sup> *Clarke v. Canfield*, 15 N.J.Eq. 119; 8 R.C.L. 708 (Ch. 1862); *Osborn v. Allen*, 26 N.J.L. 388 (N. J. Sup. Ct. 1857); *Hoyt v. Newbold*, 45 N.J.L. 219, 8 R.C.L. 708; 96 Am. St. Rep. 536 (N. J. Sup. Ct. 1883); *Meyer v. Madreperla*, 68 N.J.L. 258, 8 R.C.L. 707; 17 C.J. 1166, 53 Atl. 477 (E. & A. 1902).

the presumption of life ceases only when it is overcome by the countervailing presumption of death. And the real question is not whether the statute furnishes any evidence of the precise time of the death, but whether it furnishes any evidence of the occurrence of death before the end of the seven years. If it does not, the presumption of life continues, by well settled rules of evidence, independent of the statute. The presumption of death which arises upon the expiration of seven years cannot operate retrospectively. \* \* \* It is no answer to say that the probabilities are that the death did not occur at the expiration of seven years but at some other time within that period. The time of death, as well as the fact of death, are presumptuous not of fact but of law. The law regards neither as certain. It simply declares that the party shall be presumed to be dead at the expiration of seven years, whenever his death shall come in question."

And in *Meyer v. Madreperla*,<sup>26</sup> Chancellor Green, speaking for the Court of Errors and Appeals, says :

"The presumption raised by the statute, upon such proof, is not mere presumption of death, but is also a presumption fixing the time of death at the expiration of the seven successive years of absence unheard from."

As above stated, the burden primarily rests with the person seeking to establish the presumption of death of another.<sup>27</sup> Evidence should be adduced from the relatives and friends of the absentee.<sup>28</sup> Inquiries should be made at the places where people might logically have heard of or from him. The court should seek to obtain evidence from all who might reasonably, naturally and logically have knowledge of the absentee or his whereabouts. Evidence as to the health, habits, character, affections, domestic difficulties should be presented as an indication to the court of the probability of life or death; such information might also

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<sup>26</sup> *Meyer v. Madreperla*, 68 N.J.L. 258, 8 R.C.L. 707; 17 C.J. 1166, 53 Atl. 477 (E. & A. 1902).

<sup>27</sup> *Armstrong v. Armstrong*, 99 N.J.Eq. 19, 132 Atl. 237 (Ch. 1926); 17 C.J. 1174.

<sup>28</sup> *Smith v. Combs*, 49 N.J.Eq. 420, 24 Atl. 9 (Ch. 1892).

lead to other evidence showing the absentee was alive within the seven year period or even at the time of the hearing. The nature of the inquiry to determine the existence of the presumption makes it necessary to admit into evidence a certain amount of hearsay evidence,<sup>29</sup> such as the result of personal inquiries made, letters from third parties relating to having seen or heard of or from the absentee and declarations of the missing person made at or about the time of his disappearance,<sup>30</sup> but efforts should be made to confine the testimony as nearly as possible within the rules of evidence relating to hearsay testimony.

Under our statutes, if the presumption of death be established, the ordinary or the surrogate may appoint an administrator of the estate of the one presumed to be dead. The duties of such an administrator are similar to those of any general administrator of an estate, except that in making distribution to those entitled by law to receive the estate of the presumed dead person, he must take from each such beneficiary a refunding bond, with good and sufficient sureties, conditioned to refund to the administrator the share of the estate received, plus accumulations thereof, in case the presumed dead person reappears and claims the same. Such a bond gives to the administrator full and complete protection but he shall assign such bond to the returned absentee who claims his estate. If the person presumed to be dead left a last will and testament at the time of his disappearance, his will may be probated<sup>31</sup> and his estate distributed in accordance therewith but the executor should also obtain the refunding bond which may be assigned to the presumed dead person if he returns and claims the estate.

In a considerable number of proceedings brought to establish the presumption of death, the purpose is to collect life insurance upon the life of the absentee or presumed dead person. A practice has developed in Essex County and a few other counties to provide in the rule to show cause that a copy of the order be served upon the insurance company which issued the policy or policies in question. This practice has resulted, upon

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<sup>29</sup> 17 C.J. 1176.

<sup>30</sup> *State v. Hunter*, 40 N.J.L. 495 (E. & A. 1878).

<sup>31</sup> *In re Sternkopf's Will*, 72 N.J.Eq. 356, 65 Atl. 177 (Prerog. 1906).

a number of occasions, in having the insurance company produce evidence that the person in question is either then alive or has been seen or heard from within the seven year period. In such cases the insurance company is not a party to the proceeding; it acts as an *amicus curiae* and is not necessarily bound by the determination of the court that the person is presumed or declared to be dead.<sup>32</sup> But life insurance policies have been held to be subject to statutory provisions giving rise to a presumption of death, and payment of the policies may be ordered as a result of that presumption.<sup>33</sup> If the insurer has knowledge of the claim based on the presumption of death and denies liability, it is held to dispense with the ordinary proof of death.<sup>34</sup>

Under the provisions of our statutes permitting a decree declaring the absentee to be dead, it is necessary that the person be a resident of this state at the time of disappearance and that his disappearance be from his home or last known abode.<sup>35</sup> Where a person formerly lived in New Jersey but moved to Brooklyn and disappeared from the latter jurisdiction, it was held that the Surrogate in New Jersey lacked authority to declare death.<sup>36</sup> Other sections of the statutes provide for the presumption of death in cases where a non-resident disappears from his residence in the other jurisdiction, owning personal property in New Jersey.<sup>37</sup> In these cases the evidence is available only in the non-resident jurisdiction and it is the practice to obtain and present as conclusive evidence as may be obtainable as to the disappearance and continued, unexplained absence from the foreign jurisdiction.

While the presumption of death after seven years absence is one of law, there are situations, nevertheless, in which it is not conclusive. Thus a marriage is not definitely dissolved by this presumption, even though the surrogate or ordinary enter a decree declaring the absent spouse to be dead. If the absent spouse returns, the marriage relation continues, unless an actual

<sup>32</sup> *Apfelbaum v. Prudential Ins. Co.*, 10 N.J.Misc. 874 (1932).

<sup>33</sup> *Apfelbaum v. Prudential Ins. Co.*, 12 N.J.Misc. 62.

<sup>34</sup> *Apfelbaum v. Prudential Ins. Co.*, 12 N.J.Misc. 62.

<sup>35</sup> *Armstrong v. Armstrong*, 99 N.J.Eq. 19, 132 Atl. 237 (Ch. 1926).

<sup>36</sup> *In re Curran*, 94 N.J.Eq. 723, 120 Atl. 786 (Prerog. 1923); *In re Van Pelt*, 11 N.J.Misc. 214, 164 Atl. 574 (1931).

<sup>37</sup> Orphan's Court Act, sec. 31, 3 N. J. COMP. STAT. (1910), p 3824.

divorce has been obtained by either party to the marriage during the interval.<sup>38</sup> However, under the bigamy section of the Crimes Act,<sup>39</sup> a husband or wife is not guilty of that crime where the other spouse remains without the United States or absents himself or herself within New Jersey or the United States for five years, "the party marrying again being ignorant that the other was living within that time". This section of the act merely absolves the person from criminal punishment;<sup>40</sup> it does not validate the second marriage. Although a marriage by the remaining spouse after a seven year disappearance of the other spouse may be voided by the reappearance of the person presumed dead, nevertheless a marriage by the surviving spouse will be considered valid in the absence of the reappearance of the first spouse or lack of knowledge of his continued life.<sup>41</sup> Indeed, our courts, having regard for the necessity or desirability of upholding the marriage relationship, will sometimes sustain the validity of a second marriage, upon the theory of presumed death of the first spouse, where the disappearance is for less than the seven year period.<sup>42</sup> Another instance in which the presumption is not conclusive arises when an action is brought in equity for specific performance of a contract to sell real estate and the title rests upon reliance on the presumption of death.<sup>43</sup> In these cases, the courts have held that a buyer will not be compelled to perform under these circumstances, because if the one presumed to be dead should return, the buyer might be compelled to defend his title against the returned absentee. It is however possible to foreclose the rights, as to real estate, of one presumed to be dead if the provisions of Section 2 of the Death Act be followed.<sup>44</sup> It provides that the heirs or devisees of a person presumed to be dead may present a petition to the Court of Chancery, which court, after being satisfied

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<sup>38</sup> *Wambaugh v. Schenck*, 2 N.J.L. 214 (N. J. Sup. Ct. 1807); *Spiltoir v. Spiltoir*, 72 N.J.Eq. 50, 64 Atl. 96 (Ch. 1906).

<sup>39</sup> 2 N. J. COMP. STAT. (1910), sec. 52, p. 1762.

<sup>40</sup> *Spiltoir v. Spiltoir*, 72 N.J.Eq. 50, 64 Atl. 96 (Ch. 1906); *State v. Reilly*, 88 N.J.L. 104, 95 Atl. 1005 (N. J. Sup. Ct. 1915).

<sup>41</sup> *Burkhardt v. Burkhardt*, 63 N.J.Eq. 479, 52 Atl. 296 (Ch. 1902).

<sup>42</sup> *Burkhardt v. Burkhardt*, 63 N.J.Eq. 479, 52 Atl. 296 (Ch. 1902).

<sup>43</sup> *Potter v. Ogden*, 68 N.J.Eq. 409, 59 Atl. 673 (Ch. 1905).f

<sup>44</sup> 2 N. J. COMP. STAT. (1910), p. 1905.

as to the facts and upon bond to the State for double the value of the land conditioned that the proceeds, with interest, shall be paid, upon demand, to the person presumed to be dead in case he or she shall appear and claim it, may order the sale of such lands and that thereafter the person presumed to be dead shall be forever barred from any claim or title to the real estate and entitled only to the proceeds thereof.

Sections 4 and 5<sup>45</sup> of the Death Act provide for the sale of lands devised to or inherited by persons presumed to be dead, the procedure for such a sale being specified. Likewise Section 6 of the Death Act<sup>46</sup> and the supplement thereto enacted in 1927<sup>47</sup> provides for the sale of lands free from the rights of dower or curtesy of one who is presumed to be dead. Distribution of personal property given or bequeathed to one presumed to be dead may be made in accordance with the provisions and procedure specifically outlined in Section 3 of the Death Act;<sup>48</sup> under this section those entitled to take in the case of actual death may receive the gift to the one presumed to be dead, upon giving to the executor, administrator or trustee a refunding bond or bonds, without sureties.

#### PRESUMPTION AS TO SURVIVORSHIP

There are instances where two or more persons are lost as the result of a common accident or catastrophe, and no evidence is available as to which of them survived the other. In these cases, it may be important to try to ascertain which died first, in order to determine the rights of descent or distribution. In a few jurisdictions, and at civil law, presumptions of survivorship arose, based upon the sex, age and strength of those who perished.<sup>49</sup> Thus far there has been no reported case in New Jersey relative to a presumption in such cases nor is there any statute pertinent to this situation. However, the general rule is that, where there is no evidence as to which person survived, no presumption of survivorship arises and the situation is consid-

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<sup>45</sup> 2 N. J. COMP. STAT. (1910), pp. 1906-1907.

<sup>46</sup> 2 N. J. COMP. STAT. (1910), p. 1907.

<sup>47</sup> P.L. 1926, ch. 24, p. 47.

<sup>48</sup> 2 N. J. COMP. STAT. (1910), p. 1905.

<sup>49</sup> 17 C.J. 1179; 8 R.C.L. 716.

ered as if the perished persons had died simultaneously and their respective estates or property rights are administered accordingly.<sup>50</sup> Thus if a husband and wife or a father and son are lost in a disaster at sea and no evidence can be adduced as to which died first, no presumption of survivorship arises and they are presumed to have died at the same moment.

#### PROCEDURE

Usually, proceedings relating to the presumption of death are now instituted under the supplements to the Death Act and ordinarily are brought before the surrogate of the proper county, this being one of the few instances in New Jersey where the surrogate presides as a judge in a hearing. A petition is filed with the surrogate by any next of kin, creditor, executor, administrator or beneficiary under a policy of life insurance. The petition should set forth the name and last residence of the person presumed to be dead, his next of kin, the nature and extent of his property and the facts relating to his disappearance, and it should pray for an order or decree declaring such person to be dead; it may also pray for the appointment of an administrator of his estate or for the probate of his last Will and Testament. The surrogate then issues an order to show cause why the decree should not be made and letters of administration should not be granted, which order is served upon the next of kin and other interested parties and is published in such manner as the surrogate may direct. It must be returnable at a certain time and place not less than thirty days nor more than three months from the date of its making. On the return day, or on any date to which the matter may be adjourned, the surrogate hears the testimony of the various sworn witnesses. It has been said that in some counties of the state, this evidence is presented in affidavit form; but it is submitted that in a matter involving the declaration of death of a person and the possible distribution of his property, the evidence should be adduced orally from witnesses sworn before the court, in order that the court might have the advantage of seeing the witnesses, observing their demeanor and the probability of the truth of their

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<sup>50</sup> 17 C.J. 1179; 8 R.C.L. 717.

evidence and of further examination by the court, or by an *amicus curiae*, to bring out all of the facts connected with the case. After the hearing is completed, the surrogate, being satisfied as to the proof of the requisite facts, jurisdictional and otherwise, may make an order declaring the person to be dead and providing that letters of administration be issued for the personal estate of such person. The administrator then appointed administers the estate, pays debts, etc., and makes distribution, in accordance with the statutes relating thereto. If the order of the surrogate merely declares the person to be dead, an appeal from his order would lie directly to the prerogative Court but if his order includes the issuance of letters of administration, an appeal would lie to the County Orphans' Court, there then being involved a question of administration of an estate.<sup>51</sup>

Under the provisions of the Death Act and of the pertinent sections of the Orphans' Court Act, the surrogate or ordinary, after having satisfactory proofs to establish in law the presumption of death, may issue letters of administration without holding the hearing (with its attendant order declaring death) as set forth in the supplements to the Death Act; this procedure is however rare at this time, and usually the procedure follows the provisions of the supplements of 1911, 1926 and 1927. The responsibility of presuming one dead and acting upon that presumption justifies as complete and satisfactory an investigation as may be possible and for that reason the latter procedure is preferable because it permits a more searching investigation into the facts relating to the disappearance.

ANDREW J. WHINERY.

NEWARK, N. J.

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<sup>51</sup> *Mogna v. Prudential Ins. Co.*, 96 N.J.Eq. 293, 125 Atl. 99 (E. & A. 1924).