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required to be paid, the measure of damages is the amount necessarily spent to remove them as clouds,[54] plus interest and costs.[55] A mineral lease is slightly different, the measure of damages being the purchase price of the land, less the value of the land as incumbranced by the mineral lease.[56] The injured party is also entitled to recover any reasonable expenses which he may have been subjected to in removing the incumbrance.[57]

It is a matter of common knowledge that titles are generally transferred and incumbered on the faith and credit of certificates furnished by abstractors to the owners of land. It has become the usual concomitant of every instrument evidencing an interest or ownership in land; it vouches for title and defines its character. At common law or in the absence of statute, the courts have been reluctant to extend the liability of persons such as abstractors who furnish statements of purported facts which may be relied upon by large numbers of persons. Extension of liability was a matter of business expediency and since the courts did not feel free to do so, the legislatures enacted statutes which have shown good results. This is a far more equitable view than existed under the common law because in most cases it is the beneficiary of the contract of employment who suffers damage rather than the person who has the abstract made. It is ordinarily the grantor or mortgagor who has the abstract made, and the grantee or mortagee has acted in reliance upon that abstract. The effect of the statutes has been to bring the calibre of abstractors' work to a higher level and to increase confidence in the abstract of persons who are involved in conveyancing transactions.

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THE PRESUMPTION OF DEATH PROBLEM IN TITLE EXAMINATION

The rule very generally adopted in the United States, either by statutory enactment or adjudication following the common law, is that for all legal purposes a presumption of death arsies from the continued absence of a person from his home or place of residence without any intelligence from or concerning him for a period of seven years.[1] This presumption in its present form has long ceased to suffice for dealing with the problems involved. Numerous articles have been written about the important issues of litigation in which the presumption of death becomes material. The majority of these deal with problems affecting life insurance claims by

54. DeVilliers v. Pioneer Abstract & Loan Co., 92 Okl. 80, 218 Pac. 310 (1923).
55. Marcell v. Midland Title Guaranty & Abstract Co., 112 Neb. 420, 199 N.W. 731 (1924).
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57. Marcell v. Midland Title Guaranty & Abstract Co., 112 Neb. 420, 199 N.W. 731 (1924).

1. 16 Am. Jur. 19.

beneficiaries, claims by heirs-at-law or executors for the distribution of the estate of a disappeared person and suits or prosecutions involving the validity of marriage. All of these have distinct relation, both in the use of the presumption if any, and in the legal consequences which depend upon it. This article, however, will attempt to cover the situation involving the purchase of real property from the legal representative of the absentee's estate, or the absentee's heirs-at-law.

The situation where the absentee returns and demands the return of his property or its value from the purchaser is infrequent since the absentee need not pursue such purchaser but may recover from the one administering upon and distributing the property.[2] However, apart from cases under special statutes, the general rule is that where a person acts as administrator of the estate of a supposed decendent, letters being granted to him on the assumption that such a person is dead, everyone dealing with an administrator thus appointed is conclusively presumed to know, if the supposed intestate should subsequently turn up alive, that the grant of administration and all acts done under it would be absolutely void.[3] In such cases those who undertake to act upon the presumption of death must bear the consequences of the failure of that presumption.[4]

To overcome the inadequacy of the common law on this subject, in many jurisdictions statutes have been enacted to provide means for the preservation and disposition of property under such circumstances. Where statutes are reasonable as to the period of absence necessary to create the presumption of death, and create proper safeguards for the protection of his interests in case the absentee returns, such an administration does not violate the due process clause of the Fourteenth Amendment on the ground that it deprives the absentee of his property without notice.[5] Under some of these laws the absentee's claim to the property is barred entirely by failure to return within a designated period.[6] A recent case, *Sevier v. Bank of America National Trust & Savings Association*,[7] upheld the constitutionality of sections 280 to 294 of the California Probate Code which provide a scheme for the administration and ultimate distribution of the estates of missing persons. It was argued that these sections do not satisfy the due process requirement; that unless property is seized before the administration commences, such statutes must provide for the restoration of the property to the missing person whenever he appears after however long a period; based on cases, *Blinn v. Nelson*, 222 U.S. 1, 32 S. Ct. 1, 56 L. Ed.

2. Beckworth v. Bates, 228 Mich. 400, 200 N.W. 151, 37 A.L.R. 819 (1924).
3. 21 Am. Jur. 34.
4. 21 Am. Jur. 35.
5. Cunnius v. Reading School District, 198 U.S. 458, 25 S.Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121 (1905); Eddy v. Eddy, 302 Ill. 446, 453, 134 N.E. 801, 804 (1922).
6. Ind. Stat. Ann. (Burns, 1933) 6-406 (3 years after issuance of letters of administration; Iowa Code (1935) c. 506 sec. 11906, 11907 (7 years after disappearance); Mich. Comp. Laws (1929) sec. 15638 (3 years after granting of administration); Wash. D.C. 49 Stat. 111 (1935) (14 years after disappearance).
7. — Cal. — 225 P.(2d) 3 (1950).

65; *Cunnius v. Reading School District,* 198 U.S. 458, 472 et. seq., 25 S. Ct. 721, 49 L. Ed. 1125. The court said, "these statutes combined the features of those in the *Blinn* and *Cunnius* cases. Its time limit is not unreasonable and its provisions for notice are adequate. After a lapse of three years of administration (or of one, if the missing person has been unheard of for ten years prior to commencing the proceedings) it provides for a final distribution and bars the missing person's rights by limitation." This sort of statute also provides for distribution after the seven years absence period, if the distributee or assignee gives to the representative of the estate a surety company bond, in a penal sum not less than value of the property distributed and for such additional amount as the court may prescribe, conditioned for the return of the property or the value thereof to their representative of the estate, in case it be adjudicated that the missing person was living since the commencement of the seven year period and to save th representative from damages or anyone succeeding to his rights. Property purchased in reliance upon this type of statute would not be burdened with the outstanding rights of the absentee.

The Wyoming statute, however, along with the statutes of most other states, does not provide for a final distribution barring the missing person's rights, but provides merely for the administration of the absentee's estate.[8] Assuming that such statutes are valid, administration proceedings thereunder are valid against the absentee and all persons interested, even though such absentee is not in fact dead.[9] The purchaser from an administrator of property of an absentee under these statutes does not take the property subject to the claims of heirs or other persons wholly unknown at the time of the administration and whose existence or whereabouts could not then have been ascertained.[10] However, it is required that necessary safeguards for the restoration of the property to the absentee in event of his return should be made by provisions authorizing the revocation of the administration and recovery of the estate at any time on proof that the absentee is in fact alive.[11] Thus it has been held "that while a state under its police power may provide for administration on the estate of an absentee under proper safeguards for the protection of his interests in case of his return, payment to an administrator of such absentee, who is not in fact dead, is no defense as against him or his legal representatives."[12] Therefore, while a purchaser may acquire a good title against heirs subsequently appearing

8. Wyo. Comp. Stat. 1945 sec. 6-201a, 6-3001; Arizona Code Ann. sec. 29-305 (1939) (same as Wyo. but providing, "if in a subsequent cause the person presumed to be dead shall be proved to be living, the estate shall be restored to him, and he may recover the rents and profits of the estate during such time as he has been deprived therof with interest.") Montana Revised Codes sec. 10606 (1935); New Mexico Stat. Ann. sec. 33-1401 (1941); Oregon Comp. Law Ann. sec. 2-407 (1939).
9. Chamberlain v. Anderson, 195 Iowa 355, 190 N.W. 501, 26 A.L.R. 957 (1922).
10. Ibid.
11. Beckworth v. Bates, 228 Mich. 400, 200 N.W. 151, 37 A.L.R. 819 (1924); Scott v. McNeal; Cunnius v. Reading School District, 198 U.S. 458, 25 S.Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121 (1905).
12. Marks v. Emigrant Industrial Savings Bank, 122 App. Div. 661, 107 N.Y. Supp. 491, (1907).

who were unknown at the time of distribution, he could not take free and clear of the absentee's interest in the estate, the subject of administration.

It is the policy of law that all matters affecting the title to land shall be placed on record, and where an intending purchaser finds nothing on record to indicate an adverse claim, having no notice of facts sufficient to put him on inquiry as to matters not of record, he has the right to presume there is no adverse claim.[13] The courts have required that a decree for distribution upon the presumption of death arising from absence should include an adjudication on the effect of such absence and should rest the order of distribution thereon; and that the decree of distribution should be entered on the record in the prescribed manner.[14] If this has been done, the purchaser would be on notice of the outstanding right of the absentee in the property. He would take the property subject to that interest, unless the absentee's claim is entirely barred by a failure to reappear within a designated period, as provided by statutes previously considered.[15] If this has not been done, it can reasonably be surmised that the purchaser would not be put on notice, and meeting the other requirements of a bona-fide purchaser would prevail against the absentee or his legal representatives.

The cases involving marketable title in the presumption of death situation are in conflict. It has been held in some jurisdictions that, where title to real estate is based upon the presumption of death and the vendee refuses to perform, equity will not order specific performance because of this flaw in title, despite thirty-six years absence.[16] While other jurisdictions have said, "If the existence of the alleged fact claimed or supposed to constitute a defect in or cloud upon the title is a mere possibility, or the alleged outstanding right is but a very improbable or remote contingency, which, according to ordinary experience, has no probable basis, the court may, in the exercise of sound discretion, compel the purchaser to complete his purchase."[17] Thus a Montana case refused, in the absence of proof that the absentee was in fact alive at the time of probate proceedings, to hold vendor's title defective.[18] A recent Kentucky case ordered a sale contract carried out where the vendees refused to complete the sale because of an absentee's interest in the real estate and failure of the absentee's heirs-at-law to post an idemnifying bond for his interest.[19] The court said, "If proof of death had been made by direct evidence, of course no bond would have been required, and since a fact may be established by circumstantial evidence as well as by direct evidence, there was no

13. 66 C.J. 1132.
14. In re Morrison, 183 Pa. 155, 38 A. 895 (1897); State v. Henderson, 164 Mo. 347, 64 S.W. 138, 86 Am.St.Rep. 618 (1901).
15. See supra 6.
16. Saracino v. Kosower Const. Co. 102 N.J. Eq. 230, 140 A. 458 (1928).
17. Cambrelleng v. Purton, 125 N.Y. 610, 26 N.E. 907 (1891); Ferry v. Sampson, 112 N.Y. 415, 20 N.E. 387 (1889).
18. William v. Hefner, 89 Mont. 361, 297 Pac. 492 (1931).
19. Bechtold v. Fleflen, 300 Ky. 797, 190 S.W.(2d) 479 (1945).

occasion to require bond in this case." Another Kentucky case ruled that where the absentee was taken from the state at the age of five and unheard of for fifty-four years, the fact that she was not included in a partition suit is not such a defect in title as to entitle the vendee to refuse to take the property.[20]

From the foregoing considerations, it would seem there is much to be desired in determining the position of a purchaser in the Enoch Arden situation. An examiner for a purchaser in most cases is only employed to ascertain if a title is "merchantable" according to the definitions of the courts of what constitutes a merchantable title. Since there have been no cases involving a presumption of death in Wyoming, it would be difficult to ascertain whether or not the title to real estate would be clouded indefinitely or not. Allowing the absentee to recover his property at any time after distribution creates the present confusion and inconvenience. Except for the states who have provided an express limitation period, there has been do definite basis for excluding the absentee from asserting his interest upon his return.

This presumption of death from the fact of absence has been criticized by Wigmore as impracticable, because it applies a single rule to different situations requiring different treatment and to basic fact situations which may make the decision as to death or non-death difficult or easy, doubtful or clear. He thinks such a period as seven years is absurdly long because of present conditions of travel, communication and investigations. He believes the circumstances of each case should be the basis for decision, and there should be no fixed or uniform rule. As such he recommends the adoption of the *Uniform Absence v. Evidence of Death and Absentee's Property Act,* promulgated by the National Conference of Commissioners on Uniform State Laws.[21] This Act provides for each case to go to the jury if there is sufficient evidence of death regardless of the period of absence. Provision for distribution of the absentee's estate are provided for and an insurance compensation fund set up to protect against the possibility of the return of the absentee alive. This Act would protect a purchaser by removing the doubtful question of fact relating to the outstanding right of the absentee. If, after a reasonable period, the fact of death is found, the case is transferred to the Probate Court for distribution of the estate. If the fact of death remains undeterminable, the estate is distributed by the original court, the absentee's interest in his property is barred by a limitation-period running from the time of filing of claims against the estate.

Some states, including Wyoming, provide for proceedings for administration of absentees' property within a shorter period of absence.[22] They

20. Ducan v. Glore, 189 Ky. 132, 224 S.W. 678 (1920).
21. Wigmore, Evidence sec. 2531b.
22. Wyo. Comp. Stat. 1945 secs. 8-401 to 8-406; Nebraska Revised Stat. sec. 30-2012; Washington Revised Stat. (Remington's) secs. 1915-1 to 1915-10 (1931); Oregon Comp. Law secs. 70-801 to 70-820 (1939).

provide generally for administration after an absence of ninety days, or such period as the statute may set, whenever it appears that the property is suffering from want of proper care, or that the family of the owner is in need, or that sale is necessary to pay the owner's debts. With the exception of the Wyoming statutes, the others provide for an express sale by a trustee who is appointed whenever it appears to be in the best interests of the absentee. All of the stautes provide for notice to interested persons, hearing, evidence and determination, bond of trustee, and the powers and duties of trustee. An early Indiana case held a statute of this type to be valid, and not depriving the absentee of his property without due process.[23] A purchaser from the trustee under this type of statute would be protected. However, since the Wyoming statute does not provide for an express sale by the trustee, there is no certainty of the purchaser's position. It seems reasonable to infer from the section outlining the powers and duties of the trustee that he would be protected.

In addition to the problems discussed, the purchaser is also confronted with the situation which may arise where a property interest depends upon a person having been alive at a particular time. In purchasing property from one whose interest arises, as the result of a reversion, remainder, devise or bequest, and the time of termination of a particular person's life become material, the purchaser should have an idea of his position. If the person is known to have departed from home and disappeared at a certain time, the inference from disappearance applies, and the question and the solution are the same as in the usual case.[24] However, in the event nothing is known but the mere fact of existence at a prior period, the question is that of the presumption of continued life for a certain period. In the latter case, Wigmore suggests explicit legislation to deal with this situation.

There is great need of helping the marketability of title in the presumption of death situation. Our present Wyoming statutes fail to provide the necessary proceedings to clearly and definitely determine the missing person's property rights in event he should return subjecting persons dealing with his heirs-at-law or the representatives of his estate to the various legal problems or questions herein discussed. Further comprehensive legislation enactments are necessary, providing for final distribution barring the absentee's interest.

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23. Barton v. Kemmerly, 165 Ind. 609, 76 N.E. 250, 112 Am. St. Rep. 252 (1905).
24. Langrich v. Rowe, In re Wilson, In re Philectos Bros. Realty Corporation, 212 App. Div. 410, 209 N.Y. Supp. 22 (1925); Wigmore, Evidence sec. 2531c.
25. Wigmore, Evidence sec. 2531c.