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# ESTATES OF MISSING PERSONS IN NORTH CAROLINA\*

FREDERICK B. McCALL†

A person is missing from his last known domicile or place of residence; his whereabouts are unknown, and he has not been heard from for a long period of time by his relatives or friends or other persons who naturally in due time would have heard from him. He is not known to be actually dead, yet during his unexplained absence it becomes necessary to preserve his property from depreciation or disintegration; his spouse and other dependents must be provided for; his taxes and debts must be paid; and if he never reappears to claim his property, some thought must be given to the distribution of it to those persons who ultimately might by law become entitled to it. And of extreme importance to the absentee is the preservation of his rights in his property against the day when he might possibly return to resume control over it.

It is obvious that a probate court, whose primary concern is the administration of the estates of *dead* persons, could not administer the estate of a missing person under *general* laws governing the settlement of decedents' estates. Death is the vital jurisdictional fact. Both the North Carolina Supreme Court<sup>1</sup> and the Supreme Court of the United States<sup>2</sup> have held that any such attempt on the part of a probate court, *acting under a general law*, to administer the estate of a person who later turns out to be alive is absolutely void, and all acts of an administrator or executor proceeding under the probate court's order are of no effect whatsoever. This, for the simple reason that the probate court has no jurisdiction of the subject matter involved and the live person whose estate has been administered has been deprived of his property without due process of law under the fourteenth amendment of the Constitution of the

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\* Grateful acknowledgment is made to the chairman of the General Statutes Commission and to the other members of the Drafting Committee for permission to incorporate into this paper the substance of comments appended by the Drafting Committee to various sections of the Missing Persons' Property Act in explanation thereof.

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<sup>1</sup> *Holmes v. Wharton*, 194 N.C. 470, 140 S.E. 93 (1927).

<sup>2</sup> *Cunnius v. Reading School Dist.*, 198 U.S. 458 (1905).

United States.<sup>3</sup> However, the Supreme Court of the United States has held that the various states acting in their sovereign capacities not only have the power to control the estates of missing persons but that they also may endow their courts with jurisdiction under proper conditions to administer upon the estates of absentees, even though they might be alive, by *special* and appropriate proceedings applicable to that condition.<sup>4</sup> This power is distinct from the power to administer the estates of deceased persons. In order to come within the purview of fourteenth amendment due process, such special legislation must contain two essential things: (1) it must provide adequate notice to the absentee whose estate is to be administered; and (2) it must provide adequate safeguards for the protection, for a period of time, of the property of such absentee pending his possible return. The lack of either or both of these prerequisites will render the statute unconstitutional and any administration proceedings had thereunder void.<sup>5</sup>

During the eighty-year interval between 1869 and 1949 the legislature of North Carolina attempted to solve the troublesome problem of the missing person's estate by the enactment of no less than six sets of laws<sup>6</sup> which purported to be *special* legislation setting up the procedure for the administration of such an estate. The clerks of the superior court—the probate judges of the state in whom jurisdiction was vested by these statutes—found it difficult to determine precisely under which statute to act in cases concerning missing persons. This for the reason that on the whole the statutes were so ineptly drawn and couched in such loose and ambiguous language as to make their interpretation and application uncertain.<sup>7</sup> In some

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<sup>3</sup> Substantially these same statements were made by this writer in an earlier discussion of the same problem in 25 N.C.L. REV. 423, 425-26 (1947).

<sup>4</sup> *Blinn v. Nelson*, 222 U.S. 1 (1911). See also *Beckwith v. Bates*, 228 Mich. 400, 200 N.W. 151 (1924).

<sup>5</sup> See note 3 *supra*.

<sup>6</sup> N.C. Sess. Laws 1868-9, ch. 113, § 97 [now N.C. GEN. STAT. § 28-166 (Supp. 1965) & N.C. GEN. STAT. § 28-167 (repealed by N.C. Sess. Laws 1965, ch. 815, § 4)]; N.C. Sess. Laws 1868-9, ch. 113, § 115 [now N.C. GEN. STAT. § 28-25 (Supp. 1965)]; N.C. Sess. Laws 1933, ch. 49, §§ 1-6 [N.C. GEN. STAT. §§ 33-56 to -62 (repealed by N.C. Sess. Laws 1965, ch. 815, § 4)]; N.C. Sess. Laws 1945, ch. 469, §§ 1-4 [N.C. GEN. STAT. §§ 33-63 to -66 (repealed by N.C. Sess. Laws 1965, ch. 815, § 4)]; N.C. Sess. Laws 1947, ch. 921 [N.C. GEN. STAT. § 28-2.1 (repealed by N.C. Sess. Laws 1965, ch. 815, § 4)]; N.C. Sess. Laws 1949, ch. 581 [N.C. GEN. STAT. §§ 28-193 to -201 (repealed by N.C. Sess. Laws 1965, ch. 815, § 4)]. [Hereinafter, all repealed statutes will be cited as G.S.]

<sup>7</sup> See critical comment on G.S. § 28-2.1 (1950) in 25 N.C.L. REV. 423 (1947) and on G.S. §§ 28-193 to -201 (1950) in 27 N.C.L. REV. 410 (1949).

instances they were also overlapping and contradictory in their terms. But, more importantly, the constitutionality of five of the six laws could have been seriously questioned because of their failure as *special* legislation to provide both of the safeguards required by the state and federal constitutions for the administration of a missing person's estate.<sup>8</sup>

In 1961 the General Statutes Commission of North Carolina, cognizant of the inadequacies and shortcomings of the then existing patchwork system of laws governing the estates of missing persons and of the need for a practical statutory procedure by which the property of such absentees might be properly administered and ultimately disposed of in an equitable manner, requested that its Special Drafting Committee for the Revision of the Laws Relating to the Administration of Estates<sup>9</sup> undertake the drafting of such a statute. The work of this committee, supervised and approved by the General Statutes Commission, was, upon the Commission's recommendation, enacted into law by the 1965 General Assembly. This new and comprehensive law occupies its own chapter—28A—of the General Statutes of North Carolina and is entitled "Estates of Missing Persons."

We shall now proceed to explain the operation of the new law—not in too great detail but with sufficient attention to its provisions to provide a working knowledge of the procedure it sets up for the administration of the estate of a missing person. We hope that the constitutionality of its provisions will come to light as the discussion progresses.

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<sup>8</sup> Had the question been raised, apparently the following statutes could have been held to be unconstitutional on the grounds indicated in parentheses: G.S. § 28-166 (1950) and G.S. 28-167 (preservation of property provided for, but adequacy of notice doubtful) [Compare N.C. GEN. STAT. § 28-166 (Supp. 1965) (as amended).]; G.S. § 28-25 (preservation of property provided for, but no notice to missing person); G.S. §§ 33-56 to -62 (property preserved, but no notice to missing person); G.S. §§ 33-63 to -66 (no notice, but conservation of the estate of absentee); G.S. § 28-2.1 (no express provision for notice to absentee, and some doubt as to adequacy of provisions for preservation of his property). Perhaps fortunately, no known suit has been brought to determine the constitutional validity of the foregoing statutes.

G.S. §§ 28-193 to -201, enacted in 1949, although not clear in some provisions, apparently are constitutionally sound in compliance with the two requisites for the validity of *special* legislation. For a discussion of this law see 27 N.C.L. REV. 410 (1949).

<sup>9</sup> This committee is composed of Professors W. Bryan Bolich of Duke University Law School, Frederick B. McCall of the University of North Carolina Law School and Norman A. Wiggins of the Wake Forest School of Law.

The basic legal remedy utilized by the act is an equity receivership administered by the judge of the superior court. Since the clerk of the superior court has, as probate judge, no jurisdiction over matters in equity, jurisdiction over the action is lodged in the judge of the superior court, who has general jurisdiction, rather than in the clerk.

Another salient feature of the new law is that for its purposes it abrogates the common-law presumption of death from seven years' absence<sup>10</sup> and establishes the rule that death shall not be presumed from seven years' absence, or any other period, and that the issue of a person's death in case of unexplained absence shall go to the jury (or judge if there be no jury) as a question of fact to be determined upon the evidence. In addition to the foregoing provisions, section 1 of the new act<sup>11</sup> is intended to direct that each case shall be determined on its merits, with exposure to a specific peril to be taken into consideration in the determination of the issues.<sup>12</sup>

The abandonment of the ancient and dogmatic rule of thumb (the seven-year period) seems highly desirable in view of the impracticality of its application to the many and varied situations under

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<sup>10</sup> It may be of some interest to point out that this presumption was formulated by the English courts in analogy to two statutes which had been enacted to take care of specific situations: 1 Jac. I, c. 11 (1603), provided that a spouse who remarried after the other spouse had been beyond the seas or not heard from for seven years could not be punished for bigamy (presumably if Enoch Arden should return after that time); 19 Car. II, c. 6 (1667), provided that a lessor or reversioner could recover in possession an estate which depended or was expectant upon the life of a person who remained beyond the seas or elsewhere absented himself within the Kingdom for seven years. Such person was to be accounted as dead unless proved to be alive. There was no *general presumption* of death from seven years' absence until the case of *Doe v. Jesson*, 6 East 80 (1805), wherein Lord Ellenborough, C.J., suggested the existence of such presumption on the analogy of the two statutes just mentioned. He later gave effect to this presumption in the case of *Hopewell v. De Pinna*, 2 Camp. 113 (1809). These statutes and cases were the foundation of the rule. See 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 141-42 (1926). See also *Steele v. Metropolitan Life Ins. Co.*, 196 N.C. 408, 411, 145 S.E. 787, 788-89 (1928). This presumption, formerly recognized as a common-law doctrine in North Carolina, had also found its way into the following sections of the General Statutes, which purported to deal with the problem of missing persons: G.S. §§ 28-2.1, -167, -193.

<sup>11</sup> N.C. GEN. STAT. 28A (Supp. 1965).

<sup>12</sup> See Special Report of the General Statutes Commission On An Act To Add To The General Statutes Chapter 28A To Be Entitled "Estates of Missing Persons" 2 (Feb. 5, 1965) (Comments by the Drafting Committee) [Hereinafter cited as Comments, Special Report.]

which individuals may disappear in these modern times of fast transportation and frenetic living. It applied a single rule to different situations which should require different treatment. The person who disappears may have been a passenger aboard a plane or a ship lost at sea with no survivors; he may have been an embezzler departing in haste with his employer's money; he may have been a husband running from an unhappy domestic situation; he may have been killed or captured by the Viet Cong. Was he a victim of murder? Or was it amnesia? Or suicide? Each case should be determined on its own circumstances and not be measured by a fixed rule of time. In any event, seven years is too long a time to wait before steps can be taken to protect the property of a missing person, to make provision for his dependent family, and to pay his just debts.

Under the new law,

if any person having an interest in any property in this State disappears and is absent from his place of residence and after diligent inquiry his whereabouts remains unknown to those persons most likely to know the same, for a period of thirty days or more, or is a person in the military service of the United States who has been officially reported as missing in action, anyone who would be entitled to administer the estate of such absentee if he were deceased, or any interested person, may commence a civil action and file a duly verified complaint in the superior court of either the county of such absentee's domicile, or the county where any of his property is situated.<sup>18</sup>

Thus the suit is started to ascertain the status of the missing person.

The complaint must show the name, age, occupation and last known residence of the absentee; the date and circumstances of his disappearance; so far as is known, a schedule of all his property within this state, including property in which he is co-owner with others; the names and addresses of persons who would have an interest in the estate of such absentee if he were deceased; and the names and addresses of all known persons who claim an interest in the absentee's property. The complaint must also contain a prayer that, ancillary to the principal action, a receiver be appointed to take custody and control of the absentee's property and to preserve and manage the same pending final disposition of the action as provided by law.

The new law further provides that the absentee, all persons who

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<sup>18</sup> N.C. GEN. STAT. § 28A-2 (Supp. 1965).

would have an interest in his estate if he were deceased, all persons known to claim an interest in the absentee's property, and all known insurers of the life of the absentee shall be made parties to the action. A guardian ad litem must be appointed for the absentee and must file an answer in his behalf.

Upon the filing of the complaint above described, the stage has been set for the utilization of the procedural device of an equity receivership in the superior court for the preservation, management, and disposition of the absentee's property under that court's supervision. The judge may, for cause shown, appoint a temporary receiver to take immediate charge of the property of the absentee to conserve it against loss or deterioration pending a hearing on the complaint. Upon the giving of proper bond set by the judge and, acting upon the judge's orders, the temporary receiver must, within thirty days after his appointment, file an inventory of all of the absentee's property set forth in the original complaint plus any other that may have come into his hands. If the prayer for a permanent receiver is granted, then the temporary receiver turns over to the permanent receiver all the property in his hands, less such only as shall be necessary to cover his expenses and compensation as allowed by the judge. After approval of his final account the temporary receiver is discharged. Should the prayer for the permanent receiver be denied, the temporary receiver must return the property to those from whom it was obtained, again minus expenses and compensation of the receiver.

The section of the law just discussed<sup>14</sup> is essential to the successful operation of the new law because it allows the judge to take immediate steps to preserve and manage the property of the person who has disappeared—this even though the absentee should return before a final determination of his absence is made.<sup>15</sup>

Sections 4 and 5 of the Estates of Missing Persons Act constitute perhaps the most critical provisions in the entire act in that they purport to meet the constitutional test of giving adequate *notice* to the missing person (and other interested persons) to come into court and show cause why the management and distribution of his property should not take place. Without adequate notice and an oppor-

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<sup>14</sup> N.C. GEN. STAT. § 28A-3 (Supp. 1965).

<sup>15</sup> Comments, Special Report 6.

tunity to be heard the absentee may be unconstitutionally deprived of his property without due process of law, and all proceedings with reference to his estate will be void.

Section 4 provides that upon the filing of the inventory by the temporary receiver the judge shall issue a notice reciting the substance of the complaint and the appointment and action of the temporary receiver. This notice must be addressed to the absentee and to all other persons who might have or claim an interest in the absentee's estate or property. It directs them to file in the court within a time fixed by the judge a written statement of the nature and extent of the interest claimed in the property and to appear at a time and place named and show cause why a permanent receiver of the absentee's property should not be appointed to hold and dispose of the same according to provisions of the new law. The return date of the notice shall not be less than thirty nor more than sixty days after its date unless otherwise ordered by the judge.

Section 5 expressly provides that all parties to the action shall be served with notice in the manner prescribed by sections 1-585 through 1-592 of the General Statutes. In addition thereto, the absentee must be served by publication of the notice once in each of four successive weeks in a newspaper circulated in the county where the action is pending. One copy of the notice must be posted in a conspicuous place on each parcel of land shown in the temporary receiver's inventory, and one copy must be sent by registered mail with return receipt requested to the last known address of the absentee. Further, the judge may in his discretion cause other and further notice to be given within or without the county.

Sections 4 and 5 should definitely satisfy the constitutional requirement of adequate notice.

After adequate notice is given, the absentee or any person entitled to notice may appear before the judge and show cause why a permanent receiver of the absentee's property should not be appointed. The judge, who hitherto has been acting upon the verified complaint alone, may now conduct a hearing of the complaint on its merits and, with all interested parties properly before him, either dismiss the action if satisfied that the complaint is without merit or grant the prayer of the complaint and make a judicial finding that the person named in the complaint as the absentee did in fact disappear



as of a stated date. If the latter finding is made, the judge appoints a permanent receiver of the absentee's property.<sup>16</sup>

Upon his appointment the permanent receiver gives bond, files a schedule of the absentee's property received from the temporary receiver and records the judge's order under which he acts in the register of deeds office in each county wherein is located any real property of the absentee, which might be involved.<sup>17</sup> The bond required is obviously for the protection of all persons having an interest in the property. The schedule informs the court and all interested persons exactly what property is in the hands of the receiver. The recordation of the court order as it might affect real property will assure the stability and clarification of the title thereto.

The permanent receiver is now ready to administer the absentee's property as an equity receivership under the supervision of the judge. Section 28A-8 sets forth in detail the powers and duties of such receiver. These are broad and comprehensive and include just about everything the absentee himself could do in the management of his property if he were still around to do it. In general, the receiver is authorized to take custody and control of the absentee's property; to collect and pay debts due to the absentee or owed by him; to continue the operation of any business or farming operation and make provision for the financing thereof; to sell, lease, mortgage, or partition the absentee's property or that owned jointly by him with another; and most importantly, to make provision out of the property or the income therefrom for the support and maintenance of the absentee's dependents. The section also lends flexibility to the administration of such an equity receivership by giving the judge discretionary authority to add to, subtract from, or modify the powers of the receiver specifically set forth in the section.

A search for the absentee by modern methods is provided for in section 28A-9. The section reads in part as follows:

The judge shall by order direct the receiver to make a search for the absentee. The order shall specify the manner in which the search is to be conducted in order to insure that, in the light of the circumstances of the particular case, a diligent and reasonable effort be made to locate the absentee.

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<sup>16</sup> N.C. GEN. STAT. § 28A-6 (Supp. 1965). See also Comments, Special Report 10.

<sup>17</sup> N.C. GEN. STAT. § 28A-7 (Supp. 1965).

The judge's order may prescribe any methods of search deemed advisable by him, but it must require as a minimum (1) inquiry of persons at the absentee's home, his last known residence, the place where he was last known to have been and at other places where the absentee would likely have gone; (2) inquiry of relatives and other persons who should be most likely to hear from or of him; (3) publication of notice in newspapers or other news media, requesting information from any person who might have knowledge of his whereabouts; and (4) notification of local, state and national offices which would be most likely to know or learn of the absentee's whereabouts. Such a search not only operates in fairness to the absentee whose estate is about to be managed and administered under special legislation, but it also provides a means by which evidence of his whereabouts may be obtained for presentation at a subsequent hearing in the cause to determine his status—as to whether he is actually dead, or is known to be alive, or is still missing.<sup>18</sup>

Immediately upon his appointment the permanent receiver is required to publish a notice addressed to all persons having claims against the absentee. This notice informs them of the action taken and requires them to file their claims under oath with the permanent receiver. Such claims must be filed within six months from the date of the first publication of such notice or they may be barred by the receiver. Such notice must be published in the same manner as is now required by General Statutes section 28-47 for the presentation of claims against the estate of a dead person.<sup>19</sup>

So far, the proceedings have been directed toward the preservation and management of the property and a search for the absentee. Now, under section 28A-11, at any time during the receivership proceedings any interested party may apply to the judge for a final hearing and determination of the status of the absentee. This, in effect, is a motion that the case be docketed for trial on this issue.

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<sup>18</sup> It might be of some interest to note here that many jurisdictions, including North Carolina, that operated under the common-law rule of presumption of death from seven years' absence required for the raising of the presumption that diligent search and inquiry must have been made to ascertain the whereabouts of the absentee. See *Steele v. Metropolitan Life Ins. Co.*, 196 N.C. 408, 145 S.E. 787 (1928); *Sizer v. Severs*, 165 N.C. 500, 81 S.E. 685 (1914); *University of North Carolina v. Harrison*, 90 N.C. 385 (1884); and *Annot.*, 99 A.L.R.2d 307 (1965).

<sup>19</sup> N.C. GEN. STAT. § 28A-10 (Supp. 1965).

At the hearing evidence will be presented and the issues will be decided as in other civil cases. This section provides for three alternative decrees by the judge of the superior court. He may decree (1) that the absentee is dead; (2) that the absentee is alive; or (3) that the absentee has lost all rights in his property because of his prolonged absence.<sup>20</sup>

If the jury, or the judge sitting without a jury, makes, upon the presentation of satisfactory evidence, a finding that the absentee *is dead*, and such decree is entered, a transcript of the entire proceedings is certified to the clerk of the superior court—the probate judge—who then administers the estate of the absentee as if he were a decedent. Thereafter the receivership may be terminated. Of course if it is determined that the evidence is insufficient to establish a finding of death, the receivership continues to operate.<sup>21</sup>

Subsection (b) of section 28A-11 provides that at any time during the receivership proceedings, upon the application to the judge by any interested party and presentation of satisfactory evidence of the absentee's *existence and whereabouts*, the judge or jury after a hearing may find as a matter of fact that the absentee is living and his whereabouts are known. Under such circumstances the judge may render his decree establishing such findings and revoke his past decree that such person was an absentee. The receivership in such case is terminated after the receiver satisfies out of the property of the formerly missing person all outstanding expenses and costs of the receivership, returns to such person his remaining property and renders an accounting for the property not returned.

Subsection (c) of section 28A-11 is of utmost importance to the absentee. It provides that after a lapse of five years from the date of the finding of disappearance as provided for in section 28A-6, if the absentee has not appeared and no finding and decree have been made either that he is dead or that he is alive and his whereabouts known, the judge may proceed to take further evidence and thereafter make a *final* finding of such absence and enter a decree declaring that all interest of the absentee in his property, including that owned jointly by him with another, has ceased and devolved upon others by reason of his failure to appear and make claim. It is obvious that the judge in rendering such decree will

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<sup>20</sup> Comments, Special Report at 14.

<sup>21</sup> N.C. GEN. STAT. § 28A-11(a) (Supp. 1965).

proceed upon the assumption that the absentee has been properly notified and that diligent search for him has been made as is required by other provisions of the law. As will be explained later, the absentee, should he return, may have resort to the insurance fund provided in section 28A-19 for the recovery, in part, of his property.

The five-year statute of limitations barring the property rights of the absentee seems reasonable in the light of other statutes of limitation in North Carolina involving, for instance, escheats, sale of one's property for non-payment of taxes, and acquisition of title to real property by adverse possession. The five-year period also compares favorably with the periods of limitation provided for in missing persons' property acts of other states. Oregon and Connecticut, for example, have five-year statutes,<sup>22</sup> while Indiana uses a three-year period.<sup>23</sup>

Section 28A-12 provides for the winding up of the receivership upon the entry of any final finding and decree under any one of the situations set forth in the preceding section. As has already been indicated, if the absentee is found to be dead, the receiver may be discharged after paying expenses and costs of the receivership, deducting for the insurance fund five per cent of the total value of the decedent's estate remaining for distribution, and transferring the balance of the property to the clerk of the superior court for administration as a decedent's estate. Or if the absentee is found to be alive and his whereabouts known, the receiver again deducts expenses and costs of the receivership and turns over to the absentee the balance of the latter's property. In case a decree is entered that after five years' absence—with no final decree that he is either living or dead—the absentee has lost all interest in his property, and the receiver may be discharged after paying the costs of the receivership, paying taxes, debts and other charges, deducting for the insurance fund the five per cent of the remaining property as indicated above in case of the finding of the absentee's death, and then transferring the remaining property for distribution to those entitled by law to take. In all three cases the permanent receiver renders his final account, and he and his bondsmen are discharged upon its

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<sup>22</sup> CONN. GEN. STAT. REV. § 45-199 (1958); ORE. REV. STAT. § 120.370 (1963).

<sup>23</sup> IND. ANN. STAT. § 7-2306 (1953).

approval—whereupon the judge enters a final decree terminating the receivership.

In case of a final decree declaring that all interest of the absentee in his property has ceased, the property remaining for distribution must be transferred or distributed by the receiver as per the judge's decree to those persons who would be entitled thereto under the applicable laws of intestate succession as though the absentee died intestate on the day five years after the date of his disappearance as determined by the judge in his final finding and decree. Or, if the absentee should leave a document which, if he were dead, might have been admissible to probate as his will, and if, after proper notification of all interested persons, it shall be determined to be such a document, the remainder of the absentee's property must be distributed according to the provisions of the document. However, the spouse of the absentee is in effect given the right to dissent from the so-called "will" of the absentee and take, in derogation of the terms of the will, whatever property he or she would have been legally entitled to had the absentee *actually died testate* on the date five years after the date of his disappearance as found by the judge.<sup>24</sup>

If at the time of the hearing for the appointment of a permanent receiver the date of the absentee's disappearance found by the judge is more than four years prior to the date of such hearing, the time limited for accounting for or fixed for the distribution of the absentee's property and the barring of actions by him therefor is set at two years after the date of the appointment of the permanent receiver instead of the five years otherwise provided. If any other property of the absentee comes into the hands of the receiver during this two years, an additional year is added to the two-year period for the accounting for and distribution of this additional property.<sup>25</sup> The purport of this modification should be obvious. It is possible that longer periods of search and other circumstances may cause the matter of the management of the missing person's estate not to get before the court for several years. This section of the law foresees such cases and makes the necessary adjustments to meet them.

Suppose the absentee has been missing for five years, a final

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<sup>24</sup> N.C. GEN. STAT. § 28A-13 (Supp. 1965).

<sup>25</sup> N.C. GEN. STAT. § 28A-14 (Supp. 1965).

decree has been rendered for the distribution of his property and termination of the receivership, and insurance on the life of the missing person is one of the assets of his estate. What should be done about its payment if the insured is not definitely known to be dead? Section 28A-18 attempts to make some answer to this troublesome problem. Subsection (a) of this section authorizes the judge to order payment of any then-payable proceeds under any life insurance policies on the life of the absentee to the proper parties as their interest may appear. In anticipation of the probable refusal of the insurer to pay, subsection (b) vests jurisdiction in the judge upon the filing of supplemental proceedings in the pending action to determine all issues arising under the pleadings, subject to the proviso that all issues of fact shall be tried by a jury, unless trial by jury is waived. If the insured's death is established and all other issues are resolved in favor of the beneficiary, the proceeds of the policy shall be paid according to the judgment.<sup>26</sup> If the insured's death is not established, the payment of the full amount of the policy cannot be decreed. When the full amount of the policy cannot be paid to the absentee's estate or to a beneficiary, it is provided by subsection (d) that the receiver or a beneficiary acting through the receiver may demand the payment of the surrender value or obtain a policy loan. The receiver's written receipt for such payment of the surrender value constitutes a release to the insurer of all claims under the policy.<sup>27</sup>

As has already been intimated, the receiver is required upon the termination of the receivership in either of two cases to deduct from the property of the absentee five per cent of the total value of his property remaining for distribution and pay it over for the absentee's benefit to the treasurer of North Carolina to be incorporated into what is known as the Absentee Insurance Fund. Such action is required of the receiver (1) where there is a final decree that the absentee is dead, or (2) where after five years' absence the absentee is

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<sup>26</sup> Cf. *Steele v. Metropolitan Life Ins. Co.*, 196 N.C. 408, 145 S.E. 787 (1928), in which the North Carolina Supreme Court held that the common-law doctrine of presumption of death from seven years' absence becomes a part of the contract of insurance as if written therein; that if upon evidence of proper search and diligent inquiry, the jury should find that after seven years' absence the insured was dead, the policy on his life would become payable to the beneficiary named therein.

<sup>27</sup> N.C. GEN. STAT. § 28A-18 (Supp. 1965). See also Comments, Special Report 23.

deemed to have lost his property and the same is ordered distributed to those entitled by law to take.

Section 28A-19 makes provision for the setting up of the Absentee Insurance Fund as an added constitutional safeguard against the management and ultimate taking of the property of an absentee. In the rare case where the absentee may turn up alive after his property has been distributed, he may have resort to the Absentee Insurance Fund, administered by the state treasurer, for restitution of the equivalent of a portion of his property. If the absentee returns and personally makes claim to the treasurer for reimbursement from the fund and brings suit in the Wake County Superior Court within three years after his return, the superior court may enter a judgment against the treasurer

ordering payment to the claimant of such part of the accumulated fund from all sources as in its opinion is found to be fair, adequate and reasonable under the circumstances, taking into account the disposition made of his property, the reason for his absence, and any other relevant matters.<sup>28</sup>

The state treasurer is given authority to prescribe from time to time the rate to be charged for the Absentee Insurance Fund on the basis for actuarial experience.<sup>29</sup>

Additionally, the new law provides for its flexible application to the affairs of a person who is known to be held incommunicado in a foreign country.<sup>30</sup> Proceedings for setting up the receivership as to such a person (sections 28A-1 through -8) and for presentation of claims against him (section 28A-10) may be utilized as though he were an absentee within the meaning of chapter 28A. If his whereabouts actually become unknown, the other provisions of chapter 28A may be made applicable by suitable amendments to the pending proceeding. This could be especially pertinent with reference to the members of the armed forces now fighting in Viet Nam.

And finally, to insure some uniformity with regard to certain administrative details—the amount of bond, inventories, reports, priority of creditors, court costs, etc.—the same laws which govern the administration of decedents' estates are made applicable to the equity receivership created by the new law.<sup>31</sup>

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<sup>28</sup> N.C. GEN. STAT. § 28A-19(c)-(d) (Supp. 1965).

<sup>29</sup> N.C. GEN. STAT. § 28A-19(e) (Supp. 1965).

<sup>30</sup> N.C. GEN. STAT. § 28A-20 (Supp. 1965).

<sup>31</sup> N.C. GEN. STAT. § 28A-16 (Supp. 1965).

Although the practical workability of the new law is yet to be tested, it is believed that because of its conciseness, its specificity as to procedures to be followed, and especially because of its meticulous adherence to the constitutional requirements of notice to the absentee and the preservation of his property, it should meet all tests with flying colors and prove to be a valuable and welcome addition to the law of North Carolina.