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STATUTORY SOLUTION OF UNCERTAINTY AS TO FACT AND TIME OF DEATH.

Lachowicz v. Lechowicz

Decedent, an unmarried male resident of Baltimore City, died therein intestate in 1941, leaving an estate consisting of $30,000.00 in accumulated War Risk Insurance. The Baltimore National Bank was appointed administrator, and it instituted proper proceedings in the Orphan’s Court of Baltimore City to ascertain who was entitled to distribution. Two cousins, residents of Baltimore, appeared and claimed as next of kin. There was proof that the decedent had a brother, who returned to Poland from the United States in 1914 and who had last been heard from in Poland in 1937. There was doubt whether the brother was still living, and if dead, when he had died. There was also doubt whether there were any children of the brother ever born, and, if so, whether they survived. The Polish Consul General, acting under an applicable treaty, appeared on behalf of the brother and opposed distribution to the cousins.

The Orphan’s Court ordered distribution to the cousins, and the Consul General appealed. The Court of Appeals reversed and ordered the fund paid into court under a statute of 1941 which permits an administrator or executor, where the estate is not susceptible of distribution, to pay the fund into court to be held seven years subject to the proof of claims by any one entitled to it, failing which by the end of seven years the fund goes to the School Board. The Court of Appeals found that, for the cousins to prevail, they would have to prove that the brother in Poland had died, without descendants, prior to the death of the decedent. There was no proof of this, nor any presumption of such facts. Quite the contrary, a presumption of continuance of the brother’s life arose from the proof of his still being alive in 1937. The counter common law presumption of death from seven years absence from home,

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1 30 A. (2d) 793 (Md., 1943). One branch of the family spelled the name Lachowicz, and the other Lechowicz, hence the confusion in the names of the parties to the case.
2 Under Md. Code (1939) Art. 93, Sec. 151.
3 Md. Laws 1941, Ch. 726, to be Md. Code Supp. (1943) Art. 16, Sec. 233A.
unheard of, was held inapplicable for several reasons (not to mention the fact that seven years had not run from 1937 to either 1941 or 1942), i.e., that the presumption would merely show the fact of being dead, not death on a given date prior to the end of the period; even if applicable it would not show death without issue; and the essential foundation in fact for such presumption, i.e., absence from home, had not been shown. Quite to the contrary, the brother had last been heard from at his home in Poland. The common law presumption itself only arises when the foundation fact of absence from normal surroundings, unheard from, is first shown.

The principal case is interesting for several reasons. Aside from the fact that the complications of proof concerning the Polish brother's existence arose from the terrors of the current global war, itself starting in Poland where he was last heard from, it brings into focus several legal propositions, some of considerable antiquity, and several enacted at the 1941 session of the Maryland legislature, specifically calculated to deal with an omni-present legal difficulty, the resolution of uncertainties as to the fact and time of death.

These common law and statutory rules have been variously concerned with the solution of three subsidiary types of uncertainty as to human death, the sequence of which will be followed herein.

There were four enacted in 1941, the one mentioned in the preceding footnote; Ch. 771, to be Md. Code Supp. (1943) Art. 93, Sec. 151A; Ch. 887, to be Md. Code Supp. (1943) Art. 16, Secs. 280A-280M; and Ch. 191, to be Md. Code Supp. (1943) Art. 16, Secs. 89-96.

The last two of the above statutes adopted at the 1941 session were Uniform Acts, the Uniform Absent Persons Act, and the Uniform Simultaneous Death Act. It is interesting to note the handling of these two problems by the Commissioners on Uniform State Laws. Originally, the Commissioners considered the two problems as one, under the heading "Presumption of Death", see 1933 Handbook of the National Conference of Commissioners on Uniform State Laws, 43, 292, mentioning the original recommendation for the Commissioners to take up the matter, found in 1932 Handbook, 174. By 1934, the project had already split up into its two present forms, although both were still being considered together, 1934 Handbook, 47; as they were in 1935 Handbook, 48, 136, 158; 1936 Handbook, 51, 106, 223; and 1937 Handbook, 58, 236. The two are treated, some jointly, some severally, in 1938 Handbook, 59, 184, 204, 276, 281, 286, 294; and 1939 Handbook, 75, 191, 196, 201, 209. The Commissioners approved the Absent Persons Act in 1939, and the Simultaneous Death Act in 1940. Since then the former has been adopted in 3 states, including Maryland; and the latter in 18 states, including Maryland. Further references to the two are found in 1940 Handbook, 90, 92, 96, 131, 267; and 1941 Handbook, 79, 81, 94, 184. The only references in the 1942 Handbook are at pages 334-335, giving the numbers of adoptions indicated above.

The vague presumption against the commission of suicide, which one sees occasionally applied to situations where the cause of death is in doubt, might be mentioned at this point.
One is the matter of determining the fact vel non of a person's being dead at the time of the litigation, or as of some prior time, the exact date of the death being immaterial, where there is suspicion, but not proof of the prior death of the particular person.

Second is the question of exactly fixing the date of the death of a person, the fact of his being dead either known or assumed, where there is no sufficient proof of the date. This the law has done the least about.

Third is that of establishing the relative dates or times of two or more deaths, both or all of which are known to have happened in fact, but where there is doubt or uncertainty as to the sequence of the particular deaths. The last named problem typically arises from multiple deaths in a common disaster, although, as will be pointed out, it can equally well arise from the fact of two or more deaths happening around the same time but not resulting from the same incident.

The various specific past and present Maryland case and statutory rules which are to be discussed, in the order of the above three headings, can be enumerated as follows: (A) The common law presumption of continuance of life shown once to have been in existence; (B) The common law presumption of death from seven years absence, unheard from; (C) The 1941 Maryland version of the Uniform Absent Persons Act; (D) the now superseded Maryland procedure for probating the estate of a person absent unheard from for seven years; (E) the now superseded Maryland statute allowing the remaining spouse to convey property acquired during the seven year absence of the other; (F) the 1941 Maryland statute requiring money to be paid into court when the estate is incapable of distribution, and, as well, certain earlier similar Maryland statutes not repealed by the 1941 one; (G) the 1941 Maryland statute allowing money to be paid into court if non-resident beneficiaries would not come into full control of it; (H) the seven years absence saving clause of the bigamy statute, and the problem of mistaken belief in actual death of an absent spouse; (I) the presumption of termination of a first and impediment marriage in order to save the civil validity of a second marriage otherwise void for bigamy; (J) the lack of any general common law provision for settling the exact date of a single death known or assumed to have happened sometime; (K) the common law rule that there is no presumption of survivorship in the case of deaths in a common disaster; (L) the 1920
Maryland statute setting up arbitrary presumptions of such survivorship; that last now replaced by (M) the 1941 Maryland version of the Uniform Simultaneous Death Act.

The law's technique for handling these problems has traditionally been that of presumptions and special burdens of proof, although recent statutes take other steps. Hence a few words as to the theory of presumptions and burdens may be in order. Presumptions, as devices of the law of evidence, seek to aid the cause of the utmost accuracy in jury verdicts by the avoidance of situations wherein the jurors may be confused into rendering inaccurate verdicts. To be sure, most of the rules of evidence are concerned with the problem of trustworthiness, of keeping the jury from being overly impressed with inaccurate and incredible testimony. Still another important group of evidential rules are not concerned with jury verdicts at all, but serve extrinsic social policies, excluding evidence for the other objectives. Thus we have the privileges, and the rules of official secrecy.

But, an important group of rules of evidence exclude or regulate the production of perfectly trustworthy evidence on the theory that the jury may be confused by it, even though trustworthy, and render inaccurate verdicts, nonetheless. Thus the rules restricting the impeachment of witnesses, those as to the order of producing testimony, the character rule, and the rules against remote and prejudicial evidence all attempt to serve the objective of avoidance of jury confusion variously by keeping down the bulk of the case, by avoiding unduly attractive issues and evidence, and by providing for the production of proof in the most orderly and least confusing fashion. Rules of presumption and of burden of proof attempt to serve those policies and, as well seek to avoid a fourth danger particularly rampant in the presently treated issue of death, the jury's being confused by being balked by an issue actually not capable of being solved.

To be sure, many presumptions are concerned with other objectives than the one last stated. Some, based on probabilities, merely seek to keep down the bulk of the case by presuming the obvious and by making it unnecessary to confuse the jury by adding to the bulk. Others seek to avoid thus weighing down the case by presuming a fact to the disadvantage of the party most likely to possess the clearest evidence, thus compelling him to bring it in and so have the issue resolved in the least confusing fashion.
But the rules we are now concerned with really serve the last sub-policy of avoiding jury confusion, that of making an artificial solution of an issue otherwise likely to be incapable of solution in normal fashion by the jury. This is done to the end that they may not waste too much time in speculation about the insoluble issue, to the detriment of their attention to the other issues they are capable of normally solving. These rules principally purport artificially to solve an issue in order that the case may be wound up, it being impossible to know exactly what is the correct answer.

By far the greater number of the legal devices now being discussed are concerned with the solving the first type of uncertainty which was enumerated above, i.e., the question of the death vel non of a given person at the time of the litigation, or at another time, the exact date not itself being material.

With reference to the question, is a certain person already dead at the time of the pending litigation, or as of some earlier time, the common law itself worked out two conflicting presumptions, both discussed in the principal case. One was a presumption of continuance of life from a showing that the person in question was earlier still alive, barring evidence contra or a stronger presumption. Thus, in the principal case, the fact of the brother's having been heard from in 1937 created a presumption, adverse to the cousins' claim, that he was still alive in 1941 when decedent died. Contra this (although properly found inapplicable to this case) is the presumption of death from seven year's absence from home, unheard from when it would be likely that the subject would have been heard from if still alive.

But, as the Court pointed out in the principal case, the use of this presumption requires preliminary proof of being absent from home for those seven years, whereas the person in question was last heard from at his home in Poland, and there was not one whit of evidence that he had ever

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* Shriver and Dwyer v. State, use of Reister, 65 Md. 278, 4 A. 679 (1886); Schaub v. Griffin, 84 Md. 557, 36 A. 443 (1897); Robb v. Horsey, 169 Md. 227, 181 A. 348 (1935). On the other hand, consider also the following cases, mostly of ejectment, where, to entitle claimant to legal title to sue, proof of the death of intermediate heirs from lapse of inordinate time had to be presumed even without proof of disappearance: Kelso v. Stiggar, 75 Md. 376, 24 A. 18 (1892); Sprigg v. Moale, 28 Md. 497 (1868); Hammond v. Inloes, 4 Md. 138 (1853); Peterkin v. Inloes, 4 Md. 175 (1853); Lee v. Hoye, 1 Gill 188 (1840); Stevenson v. Howard, 3 H. & J. 554 (1808); Thomas v. Visitors, 7 G. & J. 369, 385 (1835); and Liquidation of George's Creek Co., 125 Md. 595, 604, 94 A. 209 (1915).
been absent therefrom. Furthermore, his not being heard from in this country since 1939 (only two years after last heard from) is well explained by the fact that the Germans overran Poland in that year and communications with the outside world ceased.\(^7\)

For that matter, even if the presumption were otherwise applicable, all that it would accomplish would be to presume that the subject was dead at the time of trial, or was in fact dead at the end of the seven year period; not that he died at any particular time during the period.\(^8\) This was pointed out in Robb v. Horsey,\(^9\) another recent Maryland case. In the principal case it was necessary (in order that the cousins might prevail) to show that the brother died within two years after he was last heard from and, too, that he was then not survived by descendants who would take ahead of the Baltimore cousins. There is no presumption at all to help solve a question of whether a person is survived by descendants.\(^10\)

The common law presumption of death from seven years' absence, insofar as it can be helpful within the common law limits, still survives in Maryland for litigation generally but, by a statute passed in 1941, it was abolished for purposes of a novel type of proceeding then established, now to be dealt with. This proceeding would have had no application to the absent brother's interests in the principal case, and so the Court's opinion made no reference to it.

The 1941 legislature (by Chapter 857, to be Article 16, Sections 280A-280M) adopted the "Uniform Absence as Evidence of Death and Absentee's Property Act" (alias "Uniform Absent Persons Act") and established for Maryland this complicated (although sensible) technique for handling the problem of the disappearance of persons domiciled in Maryland who have property interests. Inasmuch as the absent brother was not domiciled in Maryland in the principal case, the statute had no application, nor could it have applied until it were first established that an absent person was entitled to the particular property interest.

\(^7\) Another excellent example of one's disappearance being explained on some other basis than his death is found in Robb v. Horsey, supra, n. 6, where a husband disappeared, and two years later was encountered by his wife in another city in the company of another woman who had also disappeared. He was then not heard from for another 13 years. The Court held that his absence was explained on another basis than his death, i. e., his determination to hide from his family.

\(^8\) See text infra, circa n. 30, et seq., for elaboration of this point.

\(^9\) Supra, n. 6.

\(^10\) On which see the following cases, supra, n. 6: Robb v. Horsey; Shriver and Dwyer v. State, use of Reister; Liquidation of George's Creek Co.; Sprigg v. Moale; Hammond v. Inloes; and Peterkin v. Inloes.
which, of course, was at issue in the case, and still is, possibly for seven years.

The newly enacted statute, in addition to setting up the procedure outlined below, specifically supersedes the previous provisions of Article 93, Section 243,11 for probating the estates of persons who have been absent unheard of for seven years. It also repeals that part of Article 45, Section 13,12 which permitted a conveyance, as if unmarried, by a spouse whose other spouse had been absent unheard of for seven years, of any real property acquired since the beginning of such absence. The principal contribution of the new statute is to make provision for the handling of the absentee's property during his absence, in addition to setting up procedure for having him declared "legally dead" in due course if the absence continues long enough for that. In proceedings under this statute, no presumption of death or its date arises from absence, but it is merely a fact issue to go to the jury, although it is provided that exposure to a specific peril shall be sufficient to take the case to the jury, or to be considered by a judge without a jury, on the issue of death in fact. Provision is made that insurance policy clauses concerning absence shall be void. There is another provision fixing limitations for suits on policies on the lives of absent persons.

The salient feature of the act is the one for the appointment of a receiver for the property of a person domiciled in Maryland who has disappeared, upon the petition of a creditor, surety, insurer, or other person having an interest in the absentee's property if deceased. A distinction is made between a temporary and a permanent receiver. The receiver is empowered to manage the property of the absentee broadly, to support dependents, collect obligations, handle property, and so on. The absentee is given notice by publication of the proceedings, and others concerned are also notified. Provision is made for making search for the absentee.13

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11 Md. Code (1939) Art. 93, Sec. 243, had, in the part deleted by Md. Laws 1941, Ch. 857, provided an elaborate procedure for probating in the Orphans' Courts the estates of persons supposed to be dead, on the basis of their seven years absence from their Maryland domiciles, unheard from. See 19 Car. 2, Cap. 6, 2 Alex. Br. Stat. (Coe's Ed., 1912) *499.

12 There still remains in Md. Code (1939) Art. 45, Sec. 13, the provision permitting the spouse of one held lunatic or insane by inquisition to convey as if unmarried any real estate acquired since the finding of such inquisition.

13 It could be suggested that the Uniform Absent Persons Act might provide a useful device for handling the problem whether members of the armed services reported as "missing" are in fact dead, so that their Mary-
If, at any time during the proceedings, the court finds the absentee to be actually dead, this fact is to be certified to the Orphan’s Court, and his estate will thereupon be administered on the basis of death in fact. If no such finding is made within five years after the proceedings are instituted, and the absentee does not appear, the court may then declare the interest of the absentee in the property to have ceased, and that it has devolved upon others, either upon the basis of intestacy if there was no will, or to those who would take under any will left by the absentee, and the receiver so distributes.

The absentee is barred by final finding under the act, 14 except that, where the property shall be distributed after five years for lack of proof of death, he is protected by an Insurance Fund administered by the State, and supported by payments to be deducted from the amounts to be distributed to those who shall take under such distributions. This provision for reimbursing absentees who reappear after distribution of their property without proof of actual death was put in, no doubt, to avoid constitutional objection to any system lacking some such protection. In fact, the Maryland Court of Appeals once held unconstitutional an earlier version of the now superseded Article 93, Section 243, for lack of any protection to the absentee should he reappear. 15 That section had been later changed to provide such protection. 16

With reference to insurance policies on the life of the absentee, the companies may pay off voluntarily in re-
liance on the proceedings for receivership. If they contest, the issue of the absentee's death is to be submitted to a jury. If death be found, the companies then pay off as the policies indicate, otherwise the surrender value of the policies is taken and properly distributed.

The procedure under the Uniform Absent Persons Act, just discussed, is a way of resolving any uncertainty as to the death of a Marylander who is known to own property. A second statute passed at the 1941 session (Chapter 726, to be Article 16, Section 233A), which is the one applied in the principal case, resolves in its way, uncertainty as to the survival of any person entitled, if he survived, to receive under the administration of a Maryland estate. It does this by permitting the executor, administrator, or other fiduciary under Orphan's Court jurisdiction, to pay the money into court and discharge himself; and it gives claimants to the fund seven years to muster their proof, failing which the fund reverts to the State by way of the local School Board.

This statute of 1941 was supplemental of several already on the books and found in Article 16, Sections 231 through 238, which made various provisions for controlling distribution by fiduciaries where the beneficiaries were either unknown, or, in the case of life tenants, had not appeared for seven year periods, or were not certainly known to be residents of the State. The 1941 statute immediately supplements Article 16, Section 233, calling for payment over to the School Board of funds held for a seven year period by a fiduciary, where the beneficiary, or his legal successors, have not been able to be located within seven years. The 1941 statute is an improvement in that it makes it unnecessary for the fiduciary to keep the estate open during the seven year period. But a differ-

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17 Md. Code (1939) Art. 16, Sec. 231. This permits any fiduciary, when he has reason to apprehend that persons living unknown to him may be entitled to share in the property, to apply to a court of equity to assume jurisdiction over the property, and to direct its distribution.
18 Md. Code (1939) Art. 16, Sec. 232. This supplements Section 231, mentioned in the preceding footnote, and provides for a fiduciary's paying to a remainderman where a life tenant has not appeared and claimed his interest for a period of seven years after a court of Equity assumed jurisdiction. As under Section 231, the fiduciary is protected against claims by the life tenant and his representatives if the life tenant later be disclosed to have survived.
20 Md. Code (1939) Art. 16, Sec. 233. Ibid., Sec. 234, provides for repaying the money to claimants if and when they appear.
21 Consider the general provisions for escheated property going to the School Boards, Md. Code (1939) Art. 46, Sec. 47; and Ibid., Art. 93, Secs. 143-144.
ence seems suggested, i. e., that Section 233 applies where it is known that the beneficiary (or some one under him) survived to acquire an interest in the fund, whereas Section 233A is broad enough to cover both that and the Lachowicz situation, i. e., an uncertainty as to who is the beneficiary, due to uncertainty as to fact and time of death of a given person who is the beneficiary only if he lived long enough. Quaere, whether Section 233 may not be partly superseded by the Uniform Absent Persons Act if the known and certain beneficiary, having disappeared, is a domiciled Marylander?  

An equally salutary type of statute was the third one passed at the 1941 session (Chapter 771, to be Article 93, Section 151A). This, while not concerned with uncertainty as to the fact of death, yet might have been (or may yet be) involved in the Lachowicz case. It also uses the same technique of the second 1941 statute mentioned above. This provides for paying into court any funds to be distributed to non-residents of the United States who would not obtain full benefit and control of the funds because of international or national action (other than that of the United States). The primary objective of this is to avoid funds distributed in Maryland litigation coming into the hands of those subject to Nazi and Fascist domination and confiscation. It also copes with the war-time restrictions on the international transmission of money.  

Uncertainty as to death vel non has also given difficulty in the area of marriage and divorce law, here with reference to the problem, was a person dead in fact prior to a certain date prior to litigation. The Maryland bigamy statute has a saving clause protecting from criminal conviction a married person who marries another when the first spouse has been absent seven years unheard from. Should the absent spouse actually appear, or be proved to have survived the date of the second marriage, however,

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22 Mention should be made in this connection of the problem of unclaimed bank deposits. Md. Code (1939) Art. 11, Secs. 47-48, requires reports from savings institutions to the Bank Commissioner of accounts inactive for more than twenty years of persons not known to be living. Md. Laws 1943, Ch. 8, repealed Md. Code (1939) Art. 19, Sec. 24, which had required the Comptroller to see that the provisions for publication by banks of unclaimed deposits and dividends had been complied with. The 1935 legislature had passed an act for turning over to the State unclaimed bank deposits, but Governor Nice vetoed it.

23 Consider also Md. Laws 1943, Ch. 31, the purpose of which is to provide for notifying the Alien Property Custodian of any proceedings involving property in which notice is required to be made upon a non-resident of Maryland in an enemy country.

the latter is civilly void, even though the re-marrying spouse is not punishable. 25

With reference to criminal guilt, there is conflict among the Anglo-American cases whether the common spouse who re-marries within the seven year period in reliance on a bona fide mistaken belief in the actual death of the absent spouse should be convicted. The well-known English case of Regina v. Tolson26 allowed mistake of fact as a defense in this "Enoch Arden" situation, although the weight of American authority, including a Maryland dictum,27 is contra and allows a conviction despite the mistake.

A different problem arises in civil litigation involving an allegedly bigamous marriage. In the Maryland case of Schaffer v. Richardson,28 a man, once married to a first wife, left her, and years later married a second wife (during the lifetime of the first). The case created a presumption, from the fact of the second marriage ceremony by a person once earlier married, that the first marriage had been terminated, either by a divorce, or by the death of the impediment spouse. While on its facts the Schaffer case directly involved only a presumption that the common spouse had obtained a divorce somewhere in his wanderings,29 yet the other part of the whole presumption represents a well established rule capable of solving uncertainty as to the death vel non of a first (and otherwise impediment) spouse whose survival is in doubt.

The rules set out above have been concerned with resolving uncertainties as to death vel non at the time of the litigation, or of death vel non before a given prior date which may be significant. The law has not been as quick to resolve problems in the second group, the exact date of death of one known or assumed to be dead.

While some jurisdictions have refined the common law presumption of death from seven years absence so as to make it a presumption that the absentee actually died on the terminal day of the period, yet the majority merely make it mean that the absentee is taken for being dead as


26 22 Q. B. D. 168 (1889).


28 125 Md. 88, 93 A. 391, L. R. A. 1915E 186 (1915).

29 The first wife in the Schaffer case actually lived until after the husband's second marriage, in fact she, after that marriage, herself obtained a divorce from the husband, but that divorce was not in time to save the validity of the husband's second marriage of its own force.
of the end of the period if that fact (otherwise proved) would establish whatever claim is asserted.30

It is hard to say how Maryland stands on this matter. The language of some cases,31 including recent ones, would seem to put Maryland in the former group, as holding for a presumption that death occurs on the terminal day of the period, rather than merely that the subject is then dead, the exact date of death being unknown. But, the actual decision in the older case of Schaub v. Griffin32 would seem to refute this and make the presumption, at most, mean that the subject is taken for dead at the end of the seven year period, without deciding whether death occurred then or earlier. Schaub v. Griffin was the only case in which the exact date of death of one presumed to be then dead after seven years was relevant. In all the others, where the presumption could have applied at all, it would have sufficed to hold the subjects merely dead in fact, without reference to the exact date. So it can be said that the language to the effect that death occurs at the very end of the period is but dictum, and, being inconsistent with the decision in the Schaub case, the latter must prevail.32a

In that case, a father and son both disappeared, the father being heard from last: Before the seven year period

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30 Jones, Commentaries on Evidence (2nd ed. 1923) Sec. 291.
31 Robb v. Horsey, 169 Md. 227, 235, 181 A. 348 (1935), “presumed that death occurred immediately upon the expiration of the period”; Brotherhood of Locomotive Firemen and Engineers v. Nash, 144 Md. 623, 639-9, 125 A. 441 (1924), “the presumption ... is not that he died within that period, but immediately upon the expiration of it”; Tilly v. Tilly, 2 Bl. 436, 444 (1830), “may be assumed to have happened just seven years after the day on which it is shown by proof that he was last heard of”; the preceding quotation from the Tilly case was quoted in Shriver and Dwyer v. State, use of Reister, 65 Md. 278, 287, 4 A. 679 (1886); English v. U. S., 25 F. (2d) 335 (D. C. Md., 1928), “well established in Maryland that the presumption of death ... is not that he died within that period, but immediately upon the expiration of it.”
32 84 Md. 557, 36 A. 443 (1897). Oddly enough, several of the cases cited in the preceding footnote cite Schaub v. Griffin to the effect that the presumption is that death actually occurred on the terminal day of the period. Neither the decision nor the language justifies this. The opinion specifically says, 84 Md. 564, “... there arises therefrom no presumption of the time thereof, and therefore if it be required to establish the precise period of death, it must be done by evidence.” And see Sprigg v. Moale, 28 Md. 497, 506 (1868) “... we think it clear that it (the fact of death) may be presumed to have happened before the bringing of this suit ... though there is no legal presumption of the period when death occurred, or up to which life endured.” See 2 Alex. Br. Stat. (Coe’s Ed., 1912) *503-504.
32a The opinion in Tilly v. Tilly, supra, n. 31, is obscure, and one possible interpretation of it is that it was material to fix the exact day of the absentee’s death. If so, the case was impliedly overruled by the later Schaub case, where there was a clear need for exactly dating the death.
had run as to either, the death of a third person left property to the father for life, with a vested remainder to the son, but if he died without issue before the father died, then to the father outright. Seven years after the death of the third person, in litigation over the property, the Court awarded it to the estate of the son, both father and son being presumed dead. The Court refused to presume that the son died first merely because the father was heard from the more recently, and decided the case on the basis of both father and son being in fact dead, the exact dates of death being unknown. On this basis, the son's estate being vested, subject to be divested by proof of his dying during the father's lifetime, it was impossible for those claiming under the father to sustain the burden of proving his survival of the son, and so the estate of the son prevailed.

But, if there be a Maryland rule that the seven year presumption determines that the subject's death presumptively occurred at the very end of the period, then a contrary result should have been reached in the Schaub case. Inasmuch as the father was heard from the more recently, the seven year period had not run as to him until after it had as to the son. Therefore, the son should have been presumed to have died in fact at the end of his seven year period, and before the end of the father's, when he would have been presumed to have later died. But that was not the decision in the case. Thus it is submitted that the true Maryland rule is that the subject is merely presumed to be dead at the end of the period, not necessarily to have died on that very day.

The Schaub case poses an interesting question which can arise under the wording of the Uniform Simultaneous Death Act (not then in force) which is next to be discussed on the third problem of simultaneous death. Is that statute broad enough to cover establishing the sequence of two deaths, the exact date of at least one of which is uncertain, where they did not result from a common disaster or other single event? Suppose, for instance, in the Lachowicz case (where the decedent died in August, 1941), proof can later be mustered that the Polish brother died childless "some time in 1941"? Will the Act's provision that the property of "each shall be disposed of as if he had survived" be invoked to entitle the claimant cousins to receive distribution? The statute could not have presently aided the solution of the Lachowicz case for it can, at best, apply only when both deaths are known to have occurred in fact. Proof is yet lacking that the Polish cousin has ever died.
A study of the history of the drafting of the Act by the Uniform Laws Commissioners discloses that, as promulgated, it was intended to apply to any question of the sequence of deaths, whether arising out of a common disaster or otherwise. As first tentatively drafted, it applied only to multiple deaths in a common disaster, and its original title so indicated. But, after a question had been raised by one of the Commissioners as to the desirability of making it apply to any problem of sequence of deaths, the title was changed to the present one, and the key phrase bringing it into operation was fixed as “no sufficient evidence that the persons have died otherwise than simultaneously.”

Even aside from this history of its drafting, the very words themselves should show an intent not to limit it to deaths in common disaster. There is just as much of a need for resolving the mystery of the sequence of two or more disconnected deaths, as for those all of which occur out of the same event. It is but accidental that most issues of this kind happen to involve a common disaster.

Legal solution of this third type of problem, that of determining the sequence of multiple known deaths, has had an interesting history in Maryland, culminating in the adoption of the Uniform Act in 1941 (by Chapter 191, adding Article 35, Sections 89 to 96, and repealing the old Section 89).

The well known Maryland case of *Cowman v. Rogers* arose out of the Johnstown flood of 1889. In that case there was an insurance policy on the life of the husband payable to the wife, but if she pre-deceased the husband, then to certain others under the regulations of the society, the first class being his children. The husband, the wife, and their children all perished in the flood, but there was no proof of the sequence of the deaths. The fund was

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33 At the 1936 stage of its drafting it was called the “Uniform Death in Common Disaster Act”, see 1936 Handbook of the National Conference of Commissioners on Uniform State Laws, 228, as it was still called in 1937 Handbook, 245. In the 1938 Handbook, 294, it was called by a lengthy name emphasizing that “…there is no evidence of the relative times of their deaths” without mention of common disaster, as it was called in the 1939 Handbook, 191. Finally, in 1940 Handbook, 267, it was given its present name.

34 1938 Handbook, 276-277, notes that: “The gentleman from Wisconsin [Commissioner Brossard] very pertinently suggested that there might be more than two persons perish in a common disaster, and that they might have died in disasters which were not common and under circumstances which were not disasters.”

35 73 Md. 493, 21 A. 64, 10 L. R. A. 550 (1891).
claimed by an heir of the husband, by the administrator of the wife, and by the administrator of the children. The trial court awarded it to the administrator of the children, but the Court of Appeals reversed and awarded it to the administrator of the wife.

It was held that there was no common law presumption of survivorship when there were deaths in a common disaster, and that the wife had a prima facie title to the fund under the terms of the policy, to be divested only by a showing that she died in the life-time of the husband. Thus other claimants than the wife's estate had the burden (impossible of being sustained) of showing the necessary deaths prior to the husband's, failing which their claims had to be rejected.

The advent (temporary or otherwise) of the automobile brought more sharply into focus this question of the sequence of multiple deaths in a common disaster. In McComas v. Wiley,\(^{36}\) decided in 1919, the problem was that of the sequence of deaths of husband and wife, both fatally injured in a collision between an auto and an express train. The Court followed Cowman v. Rogers, and placed the burden on the person asserting a claim based on a certain sequence of events.\(^{37}\) From conflicting evidence, the Court found that the wife had survived the husband.

The Legislature of 1920 attempted the first statutory solution of this question of the sequence of deaths in a common disaster, and enacted provisions which greatly resembled those of the Code Napoleon, mentioned in the opinion in Cowman v. Rogers. These were found in Article 35, Section 89 of the 1939 Code. Under it, differences as to age and sex were determinative of the artificial solutions of the questions of sequence of death.\(^{38}\)

\(^{36}\) 134 Md. 572, 108 A. 196 (1919).
\(^{37}\) Somewhat the same technique was used in Schaub v. Griffin, 84 Md. 557, 36 A. 443 (1895), which involved both a problem of the sequence of two deaths and the use of the presumption of death from seven years absence as to both persons. Both a father and a son had disappeared. Thereafter, but before the seven year period had run as to either, the death of a third person left property so that the father became entitled to a life interest if he then survived, with the son entitled to a vested remainder in the same, but if he died without issue before his father, then the father took all. Litigation developed seven years after the death of the third person. It was held that both were presumed dead, the life interest of the father terminated, and the money should be distributed to the next of kin of the son, after an administrator should be appointed to receive it for them. The Court said that the remainder never passed to the father for absence of proof of his surviving the son, and the life interest in the father terminated with his (presumed) death, and, the son being presumed dead, his interest passed to next of kin.

\(^{38}\) The ages of 15 and 60 were fixed as demarcating children and aged persons from persons of normal adult age. The elder of children and the
One case went to the Court of Appeals under this statute, Sporrer v. Addy, and it held that the statute applied only if there was a complete lack of evidence as to which died first, and of circumstances from which that could be inferred. The Court affirmed the finding of the Chancellor, on conflicting evidence, that the wife had died first, where both husband and wife were fatally injured in the same automobile accident, were taken to different hospitals, and were both dead upon arrival. No doubt a similar interpretation will be made of the Maryland version of the Uniform Act, which applies only if there is "no sufficient evidence that the persons have died otherwise than simultaneously."

Where the 1920 statute resolved uncertainties as to the sequence of deaths in terms of presumptions, the recently adopted Uniform Act, which repeals the 1920 statute, uses different terminology, although in some instances it does accomplish the effect of a presumption one way or the other.

The statutory solutions are stated to be applicable only where the particular will, trust, deed, or insurance policy itself has no provision to handle the problem of uncertainty as to sequence of deaths. There is a general clause providing, as to situations not otherwise dealt with in the Act, that where title to property depends on priority of death, each person's property shall be disposed of as if he had survived the others whose deaths are in the picture. Where two or more are to take successively under another's disposition of property, the property is to be divided younger of aged persons were presumed to have survived; a child was presumed to have survived an aged person; persons of normal adult age were presumed to have survived either children or aged persons; between fifteen and sixty, the male was presumed to survive the female; and if of the same sex, the younger to have survived the older.

1 See Note, Comatoriums Act, 1939—An Act Respecting Survivorship in Common Disaster (1943) 1 Vancouver Advocate 27, mentioning the application of a Canadian statute to a situation of death of two persons by asphyxiation. The note mentions that "great care must be exercised in ascertaining that 'doubt exists'."

4 There apparently had been dissatisfaction with the 1920 Maryland statute, antedating its repeal by the Uniform Act. See 1939 Handbook of the National Conference of Commissioners on Uniform State Laws, 76, where the late Alexander Armstrong, Esq., Commissioner from Maryland, protested delay in promulgating the Uniform Simultaneous Death Act on the ground that the Maryland State Bar Association's Committee on Laws had postponed its own action in the matter, awaiting the promulgation of the Uniform Act. On this, see 44 Transactions Maryland State Bar Association (1939) 14, 15-16.
into as many portions as there are successive beneficiaries, and each share is to be distributed as if that beneficiary survived. In the case of joint tenancies and tenancies by the entirety, the property is to be distributed in two or more shares, each to go as if the one concerned had survived.

If the deaths of both insured and beneficiary of an insurance policy are in question, the proceeds are to be distributed as if the insured had survived the beneficiary. This last rule, of course, is exactly contra the result achieved by Cowman v. Rogers. It, in effect, creates a presumption of the beneficiary’s dying first, as does the general clause first set out above, of the owner’s surviving all his heirs.

The principal technique which we have seen the law to have adopted in its various and sundry attempts to resolve uncertainties as to the fact and time of death has been that of the presumption. In fact, the Maryland Court, in Cowman v. Rogers, after stating that there was no common law presumption of survivorship in common disaster, in effect resolved the problem substantially that way through a special burden of proof, by holding the named beneficiary’s interest to be quasi-vested, so that the special burden was placed on those claiming through non-survivorship to prove it. This achieved the same substantial result as if it had been presumed that the named beneficiary survived the insured, contra the present rule under the Uniform Act.

The more recent statutory changes have been in the direction away from presumptions to either (1) the setting up of procedures to handle the question, or (2) a sharing of the proceeds among those respectively, who might have taken exclusive interests if the uncertainty as to the fact of death were capable of normal resolution in their favors, respectively. The principal contribution of the Uniform Absent Persons Act is to provide a technique for handling the absentee’s property during his absence, from the very start, without having to wait some lengthy period before anything can be done about it. It may be that the general common law presumption of death from seven years absence, still extant as to other proceedings than those under the Uniform Act, will largely fall into disuse for the reason that specific handling has been made of the problem with reference to the two issues (property, marriage) where that directly arises. Special rules handle the problem in
both civil and criminal aspects of bigamy law; and the Uniform Act is probably meant to be exclusive as a way of resolving property claims where one once established to be owner disappears. The statute which was applied in the principal case affords the technique for resolving doubts as to whether an absentee lived long enough to inherit property subject to Maryland administration. For that matter, the other 1941 statute, aimed at keeping such property from Nazi confiscation, itself can handle the problem whether a foreign beneficiary who did survive a Maryland decedent is still alive in order personally to enjoy the proceeds. It is not likely that there will be much remaining litigation in which the common law presumption of death from seven years' absence can have application. 43

The Uniform Act handling of the simultaneous death problem is superior to either the common law one or that of the 1920 Maryland statute. It should be interpreted so that it applies to resolve doubt as to the sequence of any two known deaths, regardless whether arising out of the same transaction. Thus it will partially fill a gap the common law had and still has, that of fixing the exact date of death of a person known or assumed to be dead. For it would solve that latter problem as to the date of an uncertain death by relation to a certainly dated one, at least as to sequence.

Whether it is desirable to work out any specific rule for exactly dating a single death, known to have happened at some time, and without reference to any other death is a debatable matter. It could be argued, of course, that it is as desirable to resolve the problem of the exact date of a single death as it is to fix the sequence of two deaths or to determine the fact of being dead.

Be that as it may, the Lachowicz case, in the light of the recent statutory changes and the current world conditions, affords an interesting opportunity herein to set into a pattern the dozen or so legal propositions that have arisen out of a groping for devices to solve uncertainty as to the fact and time of death.

43 At first glance it might be thought possible to use the Uniform Declaratory Judgments Act, Md. Code (1939) Art. 31A, to settle uncertainty as to whether an absent person is dead. But, both because of its possible conflict in this regard with the Uniform Absent Persons Act, and because of the impossibility of obtaining service of process on the absentee, this seems unlikely.