It is believed that the provisions of this section, as amended, provide for the payment of the fees of witnesses subpoenaed in the hearing.

The fourth and last step is for the governor to file in the office of the secretary of state a statement of all the charges made against such officer and the result of his findings thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1981.

SENATE BILL NO. 125 RELATIVE TO PRESUMPTION OF DEATH ON ACCOUNT OF ABSENCE, IN ITS PRESENT FORM, UNCONSTITUTIONAL.

Senate Bill No. 125, relative to presumption of death on account of absence, and providing for the administration of the estates of absentees, is, in its present form, unconstitutional.

COLUMBUS, OHIO, April 9, 1921.

HON. A. E. CULBERT, *Secretary, Judiciary Committee of the Senate, Columbus, Ohio.*

DEAR SIR:—Your letter of March 30, 1921, with which you enclosed copy of Senate Bill No. 125, "relative to presumption of death on account of absence, and to administration of estates in such cases," and requesting an opinion as to the constitutionality of the bill should it become a law, was duly received.

Senate Bill No. 125, omitting formal parts, reads as follows:

"Sec. 10636-1. Letters testamentary or letters of administration shall be issued upon the estate of any resident of this state who has been absent from his usual place of residence, in parts unknown, for the period of seven years or more, leaving property, real or personal, owned at the time of disappearance or afterwards acquired by descent or devise. Such letters testamentary or letters of administration shall not be issued until after the giving of thirty days' notice to such absent person by publication in a newspaper published in such county and of general circulation therein, reciting the application for appointment. In any such case such absent person shall be presumed to be dead for all purposes involving the descent and distribution of property, the collection of life insurance and the settlement of the estate, whether it be a case of testacy or intestacy, and the court shall have jurisdiction over the estate of such person in the same manner and to the same extent as if known to be actually dead.

Sec. 10636-2. The property of such departed person, real or personal, and all his rights, obligations, and choses in action, shall be subject to the same liabilities, incidents, rights, management and disposal, in all respect as if such person were known to be deceased, and acts done by such administrator or executor shall be valid, effectual, and binding on such person, should he return, as if they were his own acts, and such person, his heirs or assigns shall be forever barred from asserting claim to any real or personal property formerly owned by him, purchased or acquired from, through or under the administrator or executor appointed pursuant to the provisions hereof, or from, through or under any heirs-at-law or devisee who may have acquired same after the disappearance of such person.

Sec. 10636-3. Whenever it shall be made to appear in any proceeding for

the purpose of closing up the estate of a person who has departed this life pending in any probate court in this state, that any heir-at-law, devisee or legatee of such decedent whose whereabouts for seven years or more next preceding the death of such decedent cannot be ascertained, and the legal representative of such decedent cannot locate such absentee or secure any positive evidence of his death by reasonable effort, the reasonableness of which shall be within the sound judicial discretion of the court having jurisdiction of such estate, the said court may, after one year from the issuing of letters in the estate of such decedent, proceed to close up such estate as follows: The personal representative of such decedent shall cause a notice to be published four consecutive weeks in some newspaper of general circulation published at the capital of this state, and like notice to be published in some newspaper of general circulation published in the county where such estate is pending, giving notice to the missing heir-at-law, devisee or legatee, his heirs-at-law and personal representatives, of the intention to proceed to close the estate. After thirty days from the date of the last publication, the court having jurisdiction of such estate may, upon production of proof of such publication, and default by such absentee presume and order that such absentee is dead and proceed to close the estate. If any bequest or devise is made to such absentee, contingent upon his surviving the testator, with the provision if he shall not so survive the testator that the property so devised or bequeathed shall go to some other person, the property so devised or bequeathed to such absentee, contingently as aforesaid, shall thereupon immediately vest in such other person, as fully and completely as though positive proof of the death of such absentee had been produced to the court."

The appointment of administrators of estates of absent persons presumed to be dead has been the source of much litigation not only in this country but in England. In some cases the appointment was made under general laws governing the administration of the estates of deceased persons, and in others under statutes dealing altogether with the estates of absentees presumed to be dead. The cases pro and con on the subject, and arising under both classes of laws, will be found in the case note in 4 L. R. A. (N. S.), pages 944 et seq., and in 11 Ruling Case Law, pages 88 et seq.

In the authority last cited after mentioning the facts that statutes have in many states been enacted in an effort to provide for the administration of the estates of absentees who have been unheard from for years and who are believed to have died, that the constitution of the United States contains limitations as to the taking of property without due process of law, and that such statutes have been frequently called upon to meet the objection that they deprive the absentee of his property in a manner forbidden by the constitution, it is pointed out that the English courts have held that letters of administration may be issued where there is a presumption leaving no reasonable doubt of death; for instance, where the person in question sailed in a vessel of which no information had been received for more than a year after she was due, and which was supposed to have foundered during certain heavy gales in the locality of the voyage. The same courts have also held that there is equally a presumption, in accordance with the provisions of the English statute, that a person who has not been heard of for seven years is dead, but that the time at which he died during that period of seven years is a matter to be deduced from the evidence, and the burden of proof lies on the person who claims a title depending upon the time of death.

The same authority (Ruling Case Law) then proceeds to give a resume of the decisions in substance as follows:

In many states the effect of letters granted by a court of probate under the general law on an estate of a person really alive is determined by a limitation in the jurisdiction of such courts to the effect that their probate courts are given jurisdiction only over the estates of persons actually dead; and hence, administration granted upon the estate of a living person, though he is supposed to be dead, is in such jurisdictions deemed an absolute nullity, and may be collaterally attacked. The death is considered as being a fundamental prerequisite to the exercise of jurisdiction of such courts. All acts done by the executor or administrator, performed by him under letters granted upon the estate of a person supposed to be dead, but who subsequently proved to be alive, are likewise null and void; and this result is reached although every step in the proceedings has been taken with perfect regularity. Hence if the person on whose estate letters of administration are granted is not in fact dead, the court, it has been said, would be acting *ultra vires* in appointing an administrator. Such letters of administration may be attacked anywhere in any proceeding, if the supposed decedent was not actually dead, and the fact that the probate court may have found and that the record may recite that the testator is dead is not conclusive but is wholly immaterial. It has even been held that no estoppel can operate to sustain the grant of letters on an estate of the supposed decedent.

Apart from cases under special statutes the general rule is that where a person acts as administrator of the estate of a supposed decedent under letters granted to him on the assumption that such person is dead, every one 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. In such cases those who undertake to act upon the presumption of death must bear the consequences of the failure of that presumption.

From time to time statutes have been enacted attempting to vest jurisdiction in probate courts over the administration of the estates of absentees under certain circumstances, or at least to empower them to determine the actual fact of death, and on finding such fact to proceed and grant letters of administration. Accordingly it has been decided in some states that, under the forms of their statutes, surrogates or probate courts had authority to issue letters of administration when it was judicially determined that a party was dead, although such party was alive. In such jurisdictions it was necessary, however, in order to sustain the grant of letters, that there should be actual evidence of death produced. The courts have elsewhere held that the legislature cannot vest in the probate courts jurisdiction to grant administration of the estate of a living person whether granted on direct evidence of death, or on the presumption arising from the fact of absence unheard from for seven years.

Coming next to the subject of special statutes providing a special and appropriate proceeding for the administration of the estates of absentees, and the constitutionality of such estates, it is said in the same authority (11 Ruling Case Law, pp. 91-93):

> "It has been held that the due process of law clause of the fourteenth amendment to the constitution of the United States does not wholly deprive a state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by special and appropriate proceedings distinct from the general law for the settlement of the estates of decedents; and that fixing the period of a person's absence from his last domicile within the state at seven years, or more, before his estate could be administered under the special proceedings, is not so unreasonable as to render the statute repugnant to such due process of law clause; and,

furthermore, that the notice required to be given by order of publication before an administrator could be appointed, and the safeguards provided for the protection of the property of the absentee in case of his return, satisfied the requirements of the constitution in this respect. Accordingly, it is a general rule that, where reasonable provision is made for giving notice, the legislature may provide for the administration of the estates of persons who absent themselves from the state and conceal their whereabouts for a certain specified period of years, and that such property may be administered upon in the same form of proceeding as is provided for administration upon the property of a person deceased, and that such administration will be valid as against the absentee and all persons interested although he is in fact not dead. But where a state law does not provide, among other things, for adequate notice as a prerequisite to the proceedings for the administration of the estate of an absentee it would be repugnant to the fourteenth amendment. It has been held, however, that personal notice to the absentee is not a prerequisite to the validity of such proceedings. In the absence of a law providing for the administration of the estate of an absentee as such, it was held that under a law giving jurisdiction to a court to administer estates of deceased persons, the issuance of letters of administration upon the estate of a person who is in fact alive is void and of no effect as against him. Under the rule that a statute is unconstitutional which authorizes administration upon the estate of an absentee notwithstanding the fact that he may not be dead, it is clear that letters of administration issued under such circumstances, if the supposed decedent was in fact alive, would be subject to collateral attack; and this has been held to be the rule even if such laws should provide for public notice to the next of kin and creditors. In addition to provisions for giving such notice as will meet the requirements of the due process clause of the federal constitution, it is required that a reasonable period of time of absence be prescribed before such proceedings may be instituted, and that the necessary safeguards for the restoration of the property to the absentee in the event of his return are provided 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."

The principal and leading case sustaining the constitutionality of statutes authorizing courts to administer the estates of absentees by special proceedings distinct from the general law governing the administration of the estates of decedents, is Cunnins vs. Reading School District, 198 U. S. 458, in which the court held:

"1. The due process of law clause of the fourteenth amendment to the constitution of the United States does not wholly deprive a state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by a special and appropriate proceeding distinct from the general law for the settlement of the estates of decedents.

2. Fixing the period of a person's absence from his last domicile within the state which will be sufficient, under Pa. Laws 1885, p. 155, to authorize the administration of his property by the special proceeding provided by that statute at seven or more years, is not so unreasonable as to render the statute repugnant to the due process of law clause of the fourteenth amendment to the constitution of the United States.

3. Notice by publication of the special proceeding provided by Pa. Laws 1885, p. 155, for the administration of the estates of absentees, satisfies the

requirement of the due process of law clause of the fourteenth amendment to the constitution of the United States.

4. The safeguards for the protection of the property of an absentee in case of his return, afforded by Pa. Laws 1885, p. 155, providing a special proceeding for the administration of the estates of absentees, satisfy the requirement of the due process of law clause of the fourteenth amendment to the constitution of the United States, where that statute authorizes the revocation of the administration at any time on proof that the absentee is in fact alive, and in such event permits him to recover the shares of his estate received by the distributees, and provides that until the latter shall give security for refunding their shares with interest in case the supposed decedent shall be alive, no distribution shall be made, and that in case of inability to give such security the money shall be invested under the control of the court, and the interest only paid to the distributees."

The Pennsylvania act involved in the foregoing decision, and which the court sustained as a constitutional enactment, in substance provided that upon application made to the register of wills for letters of administration upon the estate of any person supposed to be dead on account of absence for seven or more years from the place of his last domicile within the state, the register shall certify the application to the orphans' court, and that said court, if satisfied that the applicant would be entitled to administration if the absentee were in fact dead, shall cause the fact of the application to be advertised in a newspaper published in the county once a week for four successive weeks, giving notice that on a day stated, which must be two weeks after the last publication, evidence would be heard by the court concerning "the alleged absence of the supposed decedent and the circumstances and duration thereof." After providing for a hearing in the orphans' court, the statute empowers that court, if satisfied by the proof that the legal presumption of death is made out, to so decree and cause a notice to be inserted for two successive weeks in a newspaper published in the county, and also, when practicable, in a newspaper published at or near the place beyond the state where, when last heard from, the supposed decedent had his residence. This notice requires the absentee, if alive, or any other person for him, to produce to the court, within twelve weeks from the date of the last insertion of the notice, satisfactory evidence of the continuance in life of the absentee. If, within the period of twelve weeks evidence is not produced to the court that the absentee is alive, the statute makes it the duty of the court to order the register of wills to issue letters of administration to the party entitled thereto, and such letters, until revoked, and all acts done in pursuance thereof, and in reliance thereupon, shall be as valid as if the supposed decedent were really dead. Power is further conferred upon the orphans' court to revoke the letters at any time on proof that the absentee is in fact alive, the effect of the revocation being to withdraw all the powers conferred by the grant of administration. But the act also provided that:

"All receipts or disbursements of assets, and other acts previously done by him," (the administrator) "shall remain as valid as if the said letters were unrevoked, and the administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets remaining in his hands to the person as whose administrator he had acted, or to his duly authorized agent or attorney; provided, nothing in this act contained shall validate the title of any person to any money or property received as widow, next of kin, or heir of such supposed decedent, but the same may be recovered from such person in all cases in which such recovery would be had, if this act had not been passed."

It was further provided in the act that before any distribution of the estate of such supposed decedent shall be made to the persons entitled to receive it, they shall give security, to be approved by the orphans' court, in such sum as the court shall direct, conditioned that if the absentee

> "shall, in fact, be at the time alive, they will, respectively, refund the amounts received by each on demand with interest thereon, but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest on security approved by said court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the orphans' court, on application, shall order it to be paid to the person or persons entitled to it."

After affording remedies in favor of the absentee in case the issue of letters should be subsequently revoked, the statute provided that the costs attending the issue of letters or their revocation shall be paid out of the estate of the supposed decedent, and that the costs arising upon the application for letters which shall not be granted shall be paid by the applicant.

In the opinion, the court, after saying that "it connot be denied that in substance the Pennsylvania statute is a special proceeding for the administration of the estates of absentees distinct from the general law of that state providing for the settlement of the estates of deceased persons," and hence within the right to regulate concerning the estate or property of absentees which the court held in its very essence to belong to all government, etc., further said (pp. 476-477):

> "It remains only to consider the contention that even although there was power to enact the statute, it is nevertheless repugnant to the fourteenth amendment, because it fails to provide notice as a prerequisite to the administration which the statute authorizes and because of the absence from the statute of essential safeguards for the protection of the property of the absentee which is to be administered. Let it be conceded, as we think it must be, that the creation by a state law of an arbitrary and unreasonable presumption of death resulting from absence for a brief period, would be a want of due process of law, and therefore repugnant to the fourteenth amendment. Let it be further conceded, as we also think is essential, that a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee would also be repugnant to the fourteenth amendment. Again, let it be conceded that if a state law, in providing for the administration of the estate of an absentee, contained no adequate safeguards concerning property, and amounted therefore simply to authorizing the transfer of the property of the absentee to others, that such a law would be repugnant to the fourteenth amendment. We think none of these concessions are controlling in this case. So far as the period of absence provided by the statute in question, it certainly cannot be said to be unreasonable. So far as the notices which it directs to be issued, we think they were reasonable. As concerns the safeguards which the statute creates for the protection of the interest of the absentee in case he should return, we content ourselves with saying that we think, as construed by the supreme court of Pennsylvania, the provisions of the statute do not conflict with the fourteenth amendment."

While the authority of the general assembly to legislate on the subject of the estates of absentees, and to provide a special and appropriate proceeding for their

administration within constitutional limitations, must be sustained on the authority of Cunnius vs. Reading School District, supra, such legislation, to be valid, should meet the requirements of that decision by providing safeguards for the protection of the interest of the absentee in case he should return, and since the bill under consideration fails to do so, you are advised that if the bill is enacted in its present form it would be unconstitutional.

In case it is desired to go forward with this legislation, it is respectfully suggested that the bill be amended so as to provide, as did the Pennsylvania statute, that notice to the absentees be also published in a newspaper published and of general circulation in the county at or near the place where the absentee resided when last heard from, etc., in addition to providing safeguards for the protection of the absentee's interests in case of his return.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1982.

JUSTICE OF PEACE AND CONSTABLE—NO PROVISION FOR PAYMENT FROM COUNTY TREASURY OF COSTS OF SAID OFFICERS IN CASES TRIED UNDER SECTION 13423 G. C. WHERE DEFENDANT IS ACQUITTED—SEE 108 O. L., 1221—EXCEPTION.

As a result of the amendment of 13439 *in* 108 *O. L., Part II, page* 1221, *there is no provision for payment from the county treasurer of the costs of justices of the peace and constables in cases tried under* 13423, *where the defendant is acquitted, except under* 3016, *where recognizances are taken, forfeited and collected.*

COLUMBUS, OHIO, April 9, 1921.

Department of Agriculture, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your recent letter, reading as follows:

> "In reply to your communication of March 29, relative to the amendment of section 13439, regarding payment of costs in cases filed by this department when the defendant was found not guilty, or for other reason not required to pay costs in the case, please favor me with an official opinion as to what shall be our procedure in such cases."

In the communication of March 29, referred to, you were advised of the amendment of section 13439, in 108 O. L., Part 2, page 1221. The result of that amendment, as pointed out, is that it no longer provides for the payment of costs from the county treasury, where the defendant is acquitted or otherwise discharged, as it did before the amendment.

Section 3016 provides for the payment of costs from the county treasury, where the defendant is convicted in case of felony and that in all cases where recognizances are taken, forfeited and collected, and no conviction is had, such costs shall be paid from the county treasury.

Section 3017 provides that in no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, constable or other officers named therein.