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Evidence--Seven Years Absence--Presumption of Time of Death

Elizabeth H. Simonton

West Virginia University College of Law

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EVIDENCE — SEVEN YEARS ABSENCE — PRESUMPTION OF TIME OF DEATH. — A beneficiary of an insurance policy sued to recover the amount of the proceeds on the ground that the insured disappeared and had not been heard of for seven years and thus was presumed to be dead. A clause in the policy provided that suit must be brought for recovery of the proceeds within one year from date of death of the insured. Upon a judgment for defendant plaintiff obtained *certiorari*. It was held that in the absence of facts or circumstances tending to establish the date of death, death is presumed to have occurred at the expiration of the seven year period.¹

This principle is based by the court on the proposition that when a thing is shown to exist, its continuance is presumed until the contrary is shown or until a contrary presumption arises. In the absence of facts tending to prove the fact of death before the end of the seven year period, the court says that life will be presumed to have continued during the entire period when the contrary presumption of death from continued absence will arise. Under a code provision for a legal presumption "of continuance of life for seven years", the decision is plausible at least. It represents one American view. The lower court had followed the English rule as laid down in *Nepean v. Doe d. Knight*,² that the presumption of law relates only to the fact of death and the time of death whenever it is material must be the subject of distinct proof. That rule, which is followed by the United States Supreme Court and many state courts,³ was approved in the dissenting opinion.

Courts seem to use the word presumption in two senses, one meaning, a logically permissible inference of fact which the judge or jury may draw, but is not legally bound to draw, and the other, a deduction which the law requires the court to draw. This latter view is based on the ground that common experience shows the fact presumed to be so generally true that courts may start with the proposition that it is true. Its legal effect stands until appreciable evidence is introduced to rebut it, that is, it throws upon the party against whom it operates the burden of going forward with the evidence. In this sense alone is the word presumption correctly used.⁴

¹ *Gantt v. American National Insurance Co.*, 160 S. E. 345 (Ga. (1932)).

² *M & W*, 894, 150 Eng. Reprint 1021 (1837).

³ See collection of cases in note (1910) 26 L. B. A. (N. S.) 294.

⁴ WIGMORE, EVIDENCE (1905) § 2487.

It is not common experience that persons absent for seven years without tidings have lived for seven years and died at the end of that period. Such a deduction is not, therefore, a true presumption. And it cannot be wholly justified on the ground that it is an artificial rather than a natural presumption based on reasons of convenience and necessity rather than the probabilities of truth.⁵ The period is arbitrary but the fact of death itself is presumed from general experience.⁶ A legal presumption of the continuance of life for seven years is inconsistent with the ground for presuming the fact of death at the end of seven years. Moreover, it does not follow that because there are no circumstances from which the precise time of death may be inferred that the existence of life for seven years with death at the end should be a mandatory deduction. The conclusion arrived at is still an inference of fact. Courts are confusing terms when they call it a presumption.

It is to be regretted that the distinction between the terms is not more generally observed. Insurance companies in particular have suffered from the operation of the presumption of death from absence for seven years without tidings.⁷ That claims have been frequently allowed while the insured was still alive is evidenced by attempts of the companies to evade the presumption by enacting by-laws providing that absence, however long continued, shall not alone be evidence of death or that the company shall not be liable upon proof of absence of the insured unless the absence shall have extended for a period equal to his life expectancy. In states where this presumption is statutory these

⁵ *Burr v. Sim*, 4 Whart. 150, 33 Am. Dec. 50 (1838).

⁶ In *Nepean v. Doe d. Knight*, *supra* n. 2, at 150 Eng. Reprint 1029, Lord Denman said: "Now, when nothing is heard of a person for seven years it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all points of time the last day is the most improbable and inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary if he was alive that he should not be heard of. In other words it is presumed that his not being heard of has been occasioned by his death which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of the last day; and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems to lead to the conclusion that death took place some considerable time before the expiration of the seven years."

⁷ VANCE, *INSURANCE* (2d ed. 1930) 74.

by-laws have been held invalid.⁸ In view of these facts the requirement that suit on a policy must be brought within twelve months after date of death of the insured seems warranted. At any rate it is legal.⁹ Because of the breadth of our country, the migratory habits of our people, the facility and cheapness of transportation, the ease with which one can disappear in large cities and the comparative safeness and convenience of life in remote places fraudulent claims may be easily put forth. It does not seem too severe that the claimant rather than the company should have the burden of proof of time of death. For this reason the decision of the lower court in accord with the English rule — that the time of death whenever it is material must be established without the aid of a presumption — seems the better view.

—ELIZABETH H. SIMONTON.

⁸ Under W. VA. REV. CODE (1931) c. 44, art. 9, § 31, probably invalid in West Virginia.

⁹ Metropolitan Life Insurance Co. v. Caudle, 122 Ga. 608, 50 S. E. 337 (1905).