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John T. Loughran

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The True Presumption of Death in New York

"It is a rule of presumption, that, in the absence of evidence to the contrary, a person shall be taken to be dead, when he has been absent seven years and not heard from."[1]

Recent New York cases seem fairly to put the inquiry, to what extent has this rule of the substantive law of persons been adopted in this state? [2] In *Matter of Benjamin*,[3] the Surrogate refused to find the death of a person absent thirty-seven years and not heard from, and, upon an elaborate consideration of authorities, concluded that "The presumption of the continuation of human life and the presumption of death are not presumptions of law but of fact."[4] The decree of the Surrogate was reversed.[5] "This court," the Appellate Division wrote, "has so recently laid down rules as to the presumption of death arising from long-continued and unexplained absence that no further discussion of that question is now required. (See *Matter of Wagener*, 143

1. Thayer, Prelim. Treat. on Ev., page 319: "A rule of presumption does not merely say that such and such a thing is a permissible and usual inference from other facts, but it goes on to say that this significance shall always, in the absence of other circumstances, be imputed to them. * * *" id., page 317.

2. "The so-called presumption of death from uncontroverted proofs of disappearance, or unaccountable absence, of a person for seven or more years, is a very modern presumption." Per Fowler, S., in Matter of Benjamin, 77 Misc., 434, 438. It had no place in the common law when New York became a sovereign state.

3. Supra.

4. "Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction." Per Mason, J., in O'Gara v. Eisenlohr, 38 N. Y., 296, 303. The distinction is taken in Matter of Kindberg, 207 N. Y., 220, 227-228, per Cullen, Ch. J.

5. 155 App. Div., 233.

App. Div., 286; *Cerf v. Diener*, 148 *id.*, 150)."[6] The judgment in *Cerf v. Diener* has since been reversed by the Court of Appeals.[7]

This rule of presumption has found frequent announcement in the New York cases. Thus in *Eagle v. Emmet*[8] its scope and historical evolution were stated:

> "The common law is in accordance with the civil law, in the adoption of the principle, that the continuation of life is presumed until the contrary is shown. The statutes relative to bigamy, and to leases for life (1 *Jac.*, I, c. 11, §2; 19 *Car.*, 2, c. 6),[9] made an inroad upon this doctrine, and established a rule which was ultimately adopted by way of analogy, in cases beyond the purview of the statutes. Accordingly, when a party has been absent seven years since any intelligence of him, he is in contemplation of law presumed to be dead. * * * When there are no facts material to the solution of the question, except simply, absence without being heard of, then at the end of seven years the law presumes death. But still the point remains open, when the death occurred,[10] whether at the beginning or at the end of the seven years, or at what other time."[11]

No purpose would now be served by detailed comment upon the earlier cases stating the rule.[12] The Appellate Division deems

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6. Per Dowling, J.

7. 210 N. Y., 156.

8. 4 Bradf., 117; 3 Abb. Pr., 218.

9. There are similar statutes in New York. Penal Law, Secs. 340, 341; Code Civ. Pro., Sec. 841.

10. "The presumption or inference of death in any event relates only to the fact of death, and whenever it is material, the exact time of death must be established by distinct proof." Per Fowler, S., in Matter of Benjamin, 77 Misc., supra., page 443.

11. Per Bradford, S.

12. These are cited in the briefs of counsel in 210 N. Y., supra; upon any consideration of them the sententious observation of the Surrogate in Eagle v. Emmet, supra, that "There can be no doubt that under certain circumstances this is to be treated as a question of fact," should be remembered. When the basis to an inference of the time of actual death has been supplied, the rule of presumption has fulfilled its function and disappears; the matter is then one of evidential values only.

the rule to have been so sufficiently considered in *Matter of Wagener, supra,* "That it is unnecessary to indulge in a rediscussion of the general subject."[13]

The facts in *Matter of Benjamin, supra,* are thus stated by the Appellate Division:

> "* * * It appears that Bridget Shannon (the absentee) arrived in America in 1863, being then about twenty-four years of age. She obtained employment at Belleville, N. J., in the home of Dr. Ward, where Margaret Fitzpatrick, another sister, was also employed. She remained with this family for ten years, or until 1873, when, without a word to anyone as to her purpose or intention, with no known or assignable cause, and with no suggestion of any reason therefor, she suddenly disappeared from the place of her employment, leaving behind her a trunk containing her clothes, and taking with her nothing save her then wearing apparel. She was then unmarried, and there is no suggestion that she married thereafter. From that time until the making of the application herein, no letter or message of any kind has ever been received from her; she has not been seen by any member of her family; they had never received any information as to any other person having seen or heard from her, and she disappeared effectually and completely from human vision. Were she living she would now be about seventy-three years of age. At the time of her disappearance her sister, Mary Benjamin, who came to this country with her, was employed and living in the City of Newark, N. J., and she has been in that vicinity ever since. Her sister, Margaret Fitzpatrick, with whom she worked at Dr. Ward's, visited the Ward household after leaving their employment, and at the time of Bridget's disappearance was living in Orange, N. J., where she lived until 1901, and where her family have ever since resided. Mrs. Ward, who is still living, has never heard of Bridget since. Effort has been made by search through the various bureaus of vital statistics, and in insane asylums, as well as by calls upon persons likely to know of her continued existence, to ascertain whether any trace of Bridget Shannon could be found, but in every instance without success."

13. Per Scott, J., in Cerf v. Diener, 148 App. Div., supra. And so Dowling, J., in Matter of Benjamin, 155 App. Div., supra.

The decision was:

> "* * * It seems clear that under the facts in this case Bridget Shannon must be presumed to have been dead at the expiration of seven years from the date of her disappearance, and at the latest by December 31, 1882, which is seven years from the latest date, by the most liberal calculation, that can be deemed to have been the time of her disappearance."

In *Matter of the Board of Education of New York,*[14] the facts, substantially, were that an award made for real property in condemnation proceedings had been deposited with the city chamberlain and the widow and heirs-at-law of the owner of the property petitioned to have the fund paid over to them upon the ground that more than seven years had elapsed since the owner had last been seen or heard from by members of his family.

The petition was denied.

> "* * * Death must be proved," said the Court of Appeals, "but it may be established by presumption as well as by direct evidence. But the facts must be disclosed which would raise such presumption. * * * It is the duty of the Court to proceed with care and insist upon there being produced before it all the evidence there is upon the subject. This it properly should exact. * * *

14. 173 N. Y., 322.

The ratio decidendi of this case has not been the same thing to its reviewers. It has been cited for the proposition, "In general a person is presumed to be alive until after such time as he would die of old age," 26 Harvard Law Review, 378; and its effect has thus been stated: "The result in New York, therefore, is that with the exception of these two cases (provided for by Sec. 841, Code Civ. Pro.), there is no presumption of death as affecting rights in real property." 9 Columbia Law Review, 437.

Co .usion has resulted, perhaps, from the Court's quotation from Best on Ev., a writer whose treatment of the general subject of presumptions has been criticized by high authority. Thayer, Cases on Ev., page 42, note 4. The language of Best is hardly clearer because we are not without a definition of "presumptive evidence." Justice v. Lang, 52 N. Y., 323, 329. And see Merkley v. Cline, 145 App. Div., 629.

The phrase "by satisfactory evidence" in Code Civ. Pro., Sec. 2656, emphasized in Matter of the Board of Education of New York, supra, page 325, is now omitted. Code Civ. Pro., Sec. 2766.

> The Appellate Division, in denying the appellant's motion in this proceeding, gave the petitioners the right to renew the motion upon further proof. The petitioners should have adopted this course and exhausted all the evidence that they were capable of producing upon the subject."[15]

An analysis of these cases, it is submitted, indicates that the difficulty is the definition of "unexplained absence" in the varied statements of the rule.

The absence may be explained by its intrinsic circumstances—by the situation during the seven years.[16] It may be explained by its antecedent circumstances, that is to say, by the situation *of the absentee* before disappearance. It may be explained by facts after the expiration of the seven years.

Must the proponent of the presumption show the absentee to have been so situated before disappearance that the absence during the seven years is not explained on some reasonable and fair hypothesis other than that of death? *Matter of the Board of Education of New York, supra,* would seem to answer this question in the affirmative. He who asserts the presumption must, in the first instance, tender whatever proof he can, upon all these phases of the disappearance, and the Court is to derive therefrom an inference of unexplained absence; he cannot by silence, or upon incomplete details regarding these phases, fairly claim a finding that the absence is unexplained.

Whether or not the situation of the absentee previously to his disappearance explains his absence during the seven years is, of course, a question of fact, and the inference drawn as an answer to that question in the particular case is a so-called presumption of fact; and, considered from a negative viewpoint, such inference is not at all concerned with the question of death, and is to be drawn, or not, before the point is reached for applying the true presumption of death. If the inference drawn from such antecedent situation is that the seven years' absence is unex-

15. Per Haight, J.

16. According to all statements of the rule the absence must be, to use the stock phrase, "without tidings." In New York it is required that a fruitless inquiry must have been directed to the place where the absentee was last known to be. Dunn v. Travis 56 App. Div., 317.

plained, a case is presented requiring the application of such true presumption, but, if the contrary inference is drawn, the rule of presumption has never been in the case.

It would seem that the Surrogate in *Matter of Benjamin, supra,* was of opinion that the situation of the absentee before disappearance fairly explained the absence during the seven years.

> "Here Bridget Shannon was shown to be young and in health when she left her service abruptly. She had then no family other than collaterals, to whom she was under no moral obligations. She was then as free as the wind to go and come where she wished without explanation to anyone. She then had no fixed home of her own. She had no usual place of resort which even might be assumed to take the place of a home. Not until she married could she be said to have even a domicile. In her case there is no presumption, from mere change of habitat, that after seven years she is dead."

The Surrogate's statement of the rule may well be thought not to be at variance with that of the Appellate Division.

> "While it is undoubtedly now true that in some cases of absence or disappearance, where there are no rebutting circumstances, after a continuous seven years' absence without tidings, the burden of proof [17] will be shifted to those who assert continuous life, yet very slight circumstances will alter such rule, and then the burden of proof will not be shifted."

The apparent inconsistencies in the cases are probably reconcilable when it is considered that the differences have been in decisions of the question of fact: Did the situation of the absentee before disappearance fairly explain his absence during the seven years? Such is the import of the remark in *Matter of Wagener, supra,* that "Each case must necessarily depend upon its own facts," and of the dismissal of the appeal in *Matter of the Board of Education of New York, supra,* upon the ground that "The question involved in this case is purely one of fact."

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17. In the sense of going forward with evidence to repel the presumption. Thayer, Cases on Evidence, page 43.

No decision in this state has been discovered in which, after it had been found that the complete circumstances of the disappearance left the absence unexplained, the Court refused to apply the rule of presumption. *Matter of Benjamin,* 155 App. Div., supra, did apply that rule.[18]

JOHN T. LOUGHRAN.

FORDHAM LAW SCHOOL.

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18. Cf. Jackson v. Claw, 18 Johns., 347; Matter of Sullivan, 51 Hun, 378; Matter of Wagener, supra.

Cerf v. Diener, 148 App. Div., supra, reversed, 210 N. Y., supra, decides nothing to the contrary. Whether or not the facts of the absentee's disappearance in that case were such that the rule of presumption would annex to them its prima facie consequence, the true presumption, being rebuttable, would be overriden by the rule of the substantive law of real property applied in the case. "It is well settled that such a purchaser of real estate as the defendant is entitled to a marketable title and that he will not be compelled to take property the possession of which he may be obliged to defend by litigation, or to receive a title that is subject to probable claims by another, so that it will not be reasonably free from any doubt which would interfere with its market value." Per Hiscock, J., 210 N. Y., supra, page 161. And see, Vought v. Williams, 120 N. Y., 253