1937

Life Insurance and the Presumption of Death

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Recommended Citation
Life Insurance and the Presumption of Death, 6 Fordham L. Rev. 91 (1937).
Available at: https://ir.lawnet.fordham.edu/flr/vol6/iss1/5

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COMMENTS

LIFE INSURANCE AND THE PRESUMPTION OF DEATH. 1—Taking shape in the main from necessity, 2 the familiar 3 presumption of death from an unexplained absence of seven years is of comparatively recent origin. Not until 1805 4 did the common law accept the doctrine as a fixed rule of evidence, with respect to what may be fairly inferred by a jury in the exercise of its logical

1. This discussion will not be concerned with the civil law presumption of survivorship in a common disaster, although it might be conceivably included under the heading, "Presumption of Death." Suffice it to say that the question occasionally arises where the beneficiary and the insured perish in a common disaster and where the policy provides that in the event of the death of the beneficiary prior to the insured the policy will be payable to the insured's estate upon his death. Common law jurisdictions hold that under such circumstances, actual survivorship is unascertainable; the policy proceeds are payable to the insured's estate, since it cannot be shown the beneficiary survived the insured, a condition precedent to recovery. The policy terms, however, may govern the final disposition of the case. McGowin v. Menken, 223 N. Y. 509, 119 N. E. 877 (1918); see (1935) 4 Fordham L. Rev. 134. Several civil law jurisdictions, however, by statute provide for a presumption of survivorship based on the respective age, strength, and sex of the various victims. Cal. Code Civ. Proc. (Dering, 1933) § 1963, ¶ 40; La. Civ. Code Ann. (Dart, 1932) art. 936-39; Md. Ann. Code (Bagby, 1924) art. 35, ¶ 71; Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 10,606, ¶ 40; Nev. Comp. Laws (Hilley, Supp. 1934) § 947.07, ¶ 40; N. D. Comp. Laws Ann. (1913) § 7936, ¶ 40; Ore. Code Ann. (1930) § 9-807, ¶ 41; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 88-4003. See Legis. (1936) 50 Harv. L. Rev. 344.

Characterized as "the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts" (Lamm, J., in Mockowik v. Kansas City, St. J. & C. B. R. R., 196 Mo. 550, 571, 94 S. W. 256, 262 (1905)), presumptions have been classified into logical inferences, rebuttable presumptions, and conclusive presumptions. Chafee, Progress of the Law, 1919-1921 (1922) 35 Harv. L. Rev. 302, 310. The presumption of death arising from an unexplained absence falls in the second of the above categories. In its practical application, therefore, the presumption operates as a matter of law, and the court will so instruct the jury; but it may be sufficiently rebutted if the jury believe as a matter of fact that the testimony indicates the continued existence of the absentee. 5 WM. Moore, Evidence (2d ed. 1923) § 2490. In other words, the presumption throws upon him against whom it operates (in our present discussion, the insurance company) the duty of meeting the imputation that, in the absence of contradictory testimony, it settles the question involved in a certain way; "he, therefore, who would not have it settled so, must show cause." Thayer, Presumptions and the Law of Evidence (1899) 3 Harv. L. Rev. 141, 165.

2. The need was paramount for a definite limitation to the period, heretofore of variable length, during which the property rights of an absentee remained unsettled. 1 Jones, Evidence (2d ed. 1926) § 285.

3. Familiar in its general outline to lawyers and laymen alike, the presumption holds many pitfalls for the unwary unless its diverse ramifications are considered. Mere absence, for example, does not give rise to the presumption, the absence must be unexplained. Jones, loc. cit. supra note 2.

"It may be said, without fear of successful contradiction, that there are few questions in the law upon which the conceptions of a majority of the Bar are less clear than on that of a presumption of death from absence." Wingate, S., in In re Katz's Estate, 135 Misc. 861, 862, 239 N. Y. Supp. 722, 726 (Surr. Ct. 1930).

Once firmly ensconced in the law of evidence, however, the presumption soon took the form of a positive element of substantive law requiring that death be assumed under certain circumstances. For obvious reasons, in the field of life insurance the presumption of death is of particular moment. It is a highly convenient rule of thumb whereby a beneficiary or other claimant of the insurance proceeds can circumvent policy provisions with respect to furnishing proofs of the death of the insured, and its substantial fairness is unquestionable. Undoubtedly, however, a fertile field for convenient insurance frauds is afforded dishonest policyholders; and the social effects may be conjecturally regarded as no

of seven years as fixed in that case was not, strictly speaking, an arbitrary one; Lord Ellenborough arrived at his conclusion by analogy to the statutes exempting from the criminal penalty for bigamy a second marriage by one whose spouse had been absent or beyond the seas for seven years [1 Jac. I, c. 11 (1604)], and allowing an action to recover by the lessor or reversioner of an estate measured by the life of one absent for seven years, who should then "be accounted naturally dead" if no "sufficient and evident proof of life" were offered [19 Car. II, c. 6 (1667)].

Here the object was to prove the death of the absentee. In Hopewell v. DePinna, 2 Camp. 113, 170 Eng. Reprints 1098 (N. P. 1809) the object was to prove the continued existence of the absentee, and it was held that the presumption of continuance of life ceases at the end of seven years. The rule as so enunciated accordingly appeared in an Evidence textbook soon afterward. 1 Phillips, Evidence (2d ed. 1815) 152. For a general historical study of the growth of the presumption see Thayer, Preliminary Treatise on Evidence (1898) 319 et seq.

5. Thayer, op. cit. supra note 4, at 323.

6. Thayer regards this metamorphosis from a mere declaration of evidentiary reasoning for the guidance of the jury into an affirmative rule of law as a preeminent example of judicial legislation. Loc. cit. supra note 5.

7. Under an ordinary policy, suit is usually instituted by the beneficiary designated by the policy. Under an industrial policy, however, suit is brought under the "facility of payment" clause—i.e., by a relative of the absentee by blood or marriage, or a person equitably entitled to the proceeds of the policy (usually the person who has paid the premiums and has possession of the policy). For a discussion of this clause, productive of a wealth of insurance litigation, see Comment (1932) 32 Col. L. Rev. 1185. Industrial insurance has its vogue among small wage-earners, and the nomadic tendencies of such policyholders are reflected in the large number of industrial disappearance claims. The same is true of other types of insurance covering small wage-earners and laborers—e.g., fraternal or assessment insurance. See Vance, Insurance (2d ed. 1930) 253.

8. With slight variations in wording, ordinary policies require "due proof" of the death of the insured, usually, but not always, on blanks furnished by the insurer, and which include complete information as to time and mode of death, medical information, etc. Industrial policies invariably require such information as a condition precedent to recovery. For a list of the policy terms used by the various companies, see Handy Guide (Spectator, 1936).

9. Some of the elaborate schemes whereby the presumption was used to a fraudulent advantage have gone amiss and criminal prosecutions have resulted. See, e.g., Goldstein v. New York Life Ins. Co., 225 App. Div. 642, 234 N. Y. Supp. 250 (1st Dep't 1929), and the companion criminal prosecution, People v. Lefkowitz, 248 N. Y. 581, 162 N. E. 533 (1928).

10. The experience of insurance companies has convinced them that many of the "disappearance" claims are fraudulent: the insured conceals himself during the seven-
unmixed blessing. But there can be no doubting the practical necessity for the presumption, and it is difficult to conceive of ethical or sociological considerations of sufficient proportions to outweigh its undeniably beneficent results insofar as the expeditious administration of estates is concerned.

To suppose, however, that the seven-year period strikes a nice balance between the conflicting interests of the claimants and the company, is not quite accurate. An impartial observer cannot but be impressed by the gradual relaxation of the rule in favor of one seeking to establish the death of the absentee, particularly when the interests of a claimant of the insurance monies are dependent upon such a finding. Undoubtedly there is justification in large measure of insurance lawyers' condemnation of the practical workings of the presumption. The precise nature of life insurance, coupled with the

year period, at the end of which the beneficiary collects the policy proceeds. Winn, op. cit. supra note 1, § 2531 (2). Their experience with such claims has caused many fraternal and assessment societies to enact by-laws providing that presumptive death claims shall not be recognized before the absentee has reached his normal life expectancy. The validity of such by-laws is briefly discussed infra, text and footnotes 62, 63, 64.

11. Insurance counsel regard domestic difficulties as the chief cause of disappearance in such cases. They argue that the knowledge that the insurance proceeds will in time be payable to the beneficiary—usually the wife—acts as an incentive and a convenient salve for the conscience of one who might otherwise, perhaps, be able to resist the feeling of wanderlust. Spain, Mysterious Disappearances (1933) Legal Section Proc., A.M. Life Conv. 228. It seems doubtful, however, whether such motives might materially increase the number of disappearances from home.

12. The difficulties presented in the absence of the presumption are manifold. One civil law jurisdiction, Louisiana, has steadfastly turned from the common law presumption of seven years in favor of the civil law, which, in accord with the old Roman law, allows a presumption of death to arise only after 100 years from the date of the absentee's birth. The superiority of the seven-year period is clearly demonstrated by the anomalous situations which develop under the civil law rule. Succession of Herdman, 154 La. 477, 97 So. 664 (1923) (absence of wife for thirty-five years held to create no presumption of her death). "The death of an absentee less than 100 years old is never presumed." Iberia Cypress Co. v. Thorgeson, 116 La. 218, 222, 40 So. 652, 653 (1905). However it would seem that, in the face of "weighty, precise and consistent" evidence, though merely circumstantial, death might be found within a shorter time. Bennett v. Equitable Life Assur. Soc., 156 La. 238, 156 So. 290 (1934) (death of tubercular not presumed after seven years because of his announced intention to seek employment elsewhere). "The ascertained facts on which it [the presumption] is rested must draw with them, as a necessary consequence, the unascertained facts sought to be established, and exclude every other rational conclusion." Martinez v. Succession of Vives, 32 La. Ann. 305, 307 (1878).

13. Subsequent topics in this discussion will exemplify the gradual loosening-up process which has noticeably enhanced the position of the beneficiary—e.g., lessening necessity for due diligent, and unavailing search; lessening amount of proof required for a finding of death within the seven-year period; the broadening of the "specific peril" doctrine, etc. See infra, pp. 95-100.

14. Whether justifiably or not, insurance attorneys feel that, although perhaps but a small proportion of the disappearance cases are fraudulent, in the great majority of cases the beneficiary is singularly unenthusiastic about locating the absent insured. The trail is allowed to die out; and by the time claim is presented to the company, seven
necessity of setting aside an adequate reserve for very policy,\textsuperscript{15} can scarcely be expected to harmonize favorably with a rule of law the effect of which is to foster a highly conjectural relationship between the beneficiary and the company.\textsuperscript{16}

\textit{Seven Years Unexplained Absence}

Most provocative of difficulty is the requirement that the seven\textsuperscript{17} years absence\textsuperscript{8} be unexplained.\textsuperscript{9} The true test would seem to be that offered by or more years later, the company investigators find the scent cold. Spain, \textit{op. cit. supra} note 11, at 241-251; Adams, \textit{Presumptions Arising from Death in Common Disaster, and from Disappearance} (1930) 4 Ass'n Life Ins. Counsel Proc. 623. It is suggested, however, that this objection might in some measure be overcome by requiring that the beneficiary notify the company within a specified time after the disappearance of the insured, \textit{e.g.}, one year. Obviously, the possibility of his discovery by the insurer's investigators would thereby be increased.

15. \textit{MacLean, Life Insurance} (3d ed. 1932) 106 \textit{et seq.}

16. As pointed out \textit{infra} p. 99, the modern conception of the presumption allows a finding by the jury that death occurred within the seven-year period, although the presumption of death does not arise until the end. Thus, the cases are numerous in which the jury finds that the death of the insured occurred within the life of the policy, although the policy lapsed shortly after the disappearance. Upon such a lapse, the policy reserve is applied to the purchase of a smaller amount of paid-up insurance, and the reserve on that particular policy is thereby exhausted. But when the beneficiary is allowed to recover the face amount some years later, the paid-up insurance is insufficient to meet the insurer's obligation on the policy, and other reserves must be drawn upon. It is the uncertainty as to the precise amount of the insurer's liability, aggravated by the passage of time before such liability can be finally determined, that is most repugnant to the theory of legal reserve life insurance.

17. Two states by statute have modified the common law rule to five years. \textit{Ark. Dom. Stat.} (Crawford & Moses, 1921) § 4111; \textit{Ind. Stat. Ann.} (Burns, 1933) § 6-402. The effect of the Indiana statute, however, has been nullified by a declaration of its partial unconstitutionality, and the common law presumption of seven years still prevails with reference to life insurance policies. Prudential Ins. Co. v. Moore, 197 Ind. 50, 149 N. E. 718 (1925).

18. In many states the seven-year common law presumption has been enacted in statutory form, and in other states the presumption has been tacitly recognized by statutory provisions authorizing the issuance of letters of administration on the estates of persons absent for seven years. \textit{Conn. Gen. Stat.} (1930) § 4908 (administration granted on estate of one absent from home and unheard of for seven years); \textit{Del. Rev. Code} (1915) § 128 (presumption of death where absent from state for seven years); \textit{Fla. Comp. Gen. Laws Ann.} (Supp. 1936) § 5541 (146) (administration granted on estate of “person believed to be dead, on account of absence for seven years or more from the place of his last domicile . . .”); \textit{Ga. Code} (1933) § 38-118 (life presumed to continue for seven years); \textit{Ill. Rev. Stat. Ann.} (Smith-Hurd, 1935) c. 3, § 21 (administration may be granted on seven years presumption); \textit{Iowa Code} (1935) § 11901 (administration granted on estate of resident absent from usual residence and concealing whereabouts from family); \textit{Ky. Rev. Stat. Ann.} (Carroll, 1936) § 1639 (one who has gone from and not returned to state for seven years presumed dead); \textit{Md. Ann. Code} (Bagby, 1924) art. 93, § 243 (administration on estate of one absent seven years); \textit{Mich. Comp. Laws} (1929) § 15624 (one absent for seven years, whereabouts unknown, unheard of by any most likely to hear, presumed dead); \textit{Miss. Code Ann.} (1930) § 1337 (one remaining
the New York Court of Appeals, that evidence must be produced "to justify the inference that the death of the absentee is the probable reason why nothing is known about him."120

Standing alone, however, mere proof of unexplained absence will not bring the presumption into play. It must be demonstrated by the claimant that the absence was from the absentee's last known place of residence,121 unless statutory provisions allow a lesser showing;122 and a diligent and unavailing search for the absentee must be made before the absentee can be declared legally dead.123 Also required is a showing that the absentee has not been beyond seas, or absenting self from or concealing self in, state for seven years, presumed dead); Mo. Rev. Stat. (1929) § 1709 (one gone from and not returned to state for seven years presumed dead); N. J. Comp. Stat. (1911) tit. Death, § 1 (presumption of death of resident absent from state, beyond seas, or concealed in state for seven years); N. Y. Civ. Prac. Act (1920) § 341 (one remaining without country, or absenting self in state or elsewhere, for seven years presumed dead); Orko Gen. Code (Page, 1926) § 10636-1 (administration on estate of one absent from last domicile for seven years); Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 371 (same as Ohio); S. D. Comp. Laws (1929) § 2729 (person by whose life estate is measured presumed dead after seven years absence); Tex. Stat. (Vernon, 1936) art. 5541 (one absent seven years presumed dead); Va. Pub. Laws (1935) § 2791 (administration on estate of one absent for five years); Va. Code Ann. (Michie, 1936) § 6239 (one gone from and not returned to state for seven years presumed dead); W. Va. Code Ann. (1931) § 44-9-1 (one absent from last domicile, or from state, for seven years presumed dead).


20. Hansen v. Mutual Life Ins. Co., 225 N. Y. 197, 203, 121 N. E. 758, 760 (1919); Litchfield v. Koenig, 78 Ill. App. 398 (1898); Ironton Fire Brick Co. v. Tucker, 26 Ky. L. 532, 82 S. W. 241 (1904) (holding also that statute creating presumption of death of one gone from and not returned to state does not apply to non-residents); Stinchfield v. Emerson, 52 Me. 465 (1864); Heath v. Salisbury Home Tel. Co., 27 S. W. (2d) 31 (Mo. App. 1927).


22. See note 18, supra.

heard from by those with whom he would most naturally communicate if alive.\textsuperscript{24} Having proved these facts, the plaintiff rests; the presumption arises as a matter of law; and the burden of overcoming its force shifts to the insurer.\textsuperscript{25}

The insurer's rebuttal may proceed generally along broad lines, seeking always to establish facts inconsistent with the existence of the presumption of death as a logical conclusion.\textsuperscript{26} Such evidence usually centers upon an attempt to explain the absence—i.e., to probe the motives of the absentee, and to explain to the jury that his was a "departure" from home, in contradistinction to a "disappearance." In its exposition of the motivation behind the absentee's "departure" the insurer may bring to light such considerations as a shrewish wife or other domestic or marital difficulties;\textsuperscript{27} or the fact that criminal prosecution of the absentee was imminent at the time he took

\begin{itemize}
  \item This is an obvious requirement, and one which is included in all statements of the rule. See Wigmore, \textit{op. cit. supra} note 1, § 2531 (b); Jones, \textit{op. cit. supra} note 2, § 288; Lawson, \textit{Presumptive Evidence} (2d ed. 1899) 251; Thayer, \textit{loc. cit. supra} note 4. But note statutory provisions \textit{supra} note 18; seemingly the non-receipt of news is not a requisite under many of the statutory presumptions.
  \item The practice is not uniform in defining the precise point, or combination of facts at which the burden of producing evidence is lifted from the claimant, and the insurer is put to his proof in rebuttal. See Wigmore, \textit{op. cit. supra} note 1, § 2531 (b).
  \item See Jones, \textit{op. cit. supra} note 2, § 289. It may be said that no fixed rule exists to limit the testimony offered in rebuttal; considerable latitude is allowed, and the cases indicate that little of the rebutting testimony is challenged by those seeking to establish death. As exemplifying the scope allowed the one challenging the presumption, see Flynn v. Co, 12 Allen 133 (Mass. 1866) (hearsay evidence that insured was living in California admissible); Bradley v. Modern Woodmen, 146 Mo. App. 428, 124 S. W. 69 (1910) (evidence of declaration of absentee that he had reached breaking point with family admissible); Dowd v. Watson, 105 N. C. 476, 11 S. E. 589 (1890) (hearsay evidence admissible); Nehring v. McMurrain, 45 S. W. 1032 (Tex. Civ. App. 1898) (testimony of one who knew person with absentee's name held admissible for description of appearance, conversation, etc.).
\end{itemize}
his leave;\textsuperscript{28} in short, any circumstances which might tend to explain the continued absence.\textsuperscript{29} Of course, the effect of such rebutting evidence may be seriously impaired as a matter of law by a statutory provision that death is conclusively presumed unless \textit{proof} to the contrary is shown.\textsuperscript{30}

\textbf{Fixing Death Within the Period}

Unfortunately for judicial equanimity, attempts to fix the time of death within the seven years next succeeding the disappearance are by no means infrequent.\textsuperscript{31} A disappears; shortly thereafter his policy lapses. Manifestly it is to the advantage of the beneficiary suing at the end of the seven-year


\textsuperscript{29} For example, it may be shown that the insured was in a precarious financial condition, or that he was a speculator, or visionary in his business relations. Sensenderfer v. Pacific Mut. Life Ins. Co., 19 Fed. 68 (C. C. W. D. Mo. 1882).

\textsuperscript{30} In Delaware, Kentucky, Mississippi, Missouri, New Jersey, New York, Virginia, and West Virginia, the statutes in substance provide that the presumption shall operate unless proof that the absentee is alive has been made. See statutory provisions, supra note 18. In the majority of these states it would seem that the requirement for such proof may be satisfied by inferential evidence which convinces the jury of the absentee's continued existence, e.g., that the absentee was a fugitive from justice, or led an unhappy home life, \textit{etc.} Mutual Ben Life Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694 (1900); Butler v. Mutual Life Ins. Co., 225 N. Y. 197, 121 N. E. 758 (1919); Duff v. Duff, 156 Mo. App. 247, 137 S. W. 909 (1911); Simpson v. Simpson, 162 Va. 621, 175 S. E. 320 (1934); \textit{cf.} Parker v. New York Life Ins. Co., 142 Misc. 517, 107 So. 998 (1926) (proof that absentee was fleeing from justice held insufficient proof under statute). Missouri seemingly applies either the statutory or common law presumption, at the will of the plaintiff, on the grounds that the statute has not abrogated the common law presumption. Duff v. Duff, supra; Heath v. Salisbury Home Tel. Co., 27 S. W. (2d) 31 (Mo. App. 1927). In the case of a non-resident the statute is disregarded and the common law presumption applied. Modern Woodmen v. Hurford, 193 Ky. 50, 235 S. W. 24 (1921).

\textsuperscript{31} The first reported instance of such an attempt is Nepean v. Doe d. Knight, 2 M. & W. 894, 150 Eng. Reprints 1021 (Ex. 1837), where Lord Denman decided that the presumption related only to the \textit{fact} of death, and that the \textit{time} of death, whenever material, must be the subject of distinct proof.
period to fix the time of the insured's death within the life of the policy. Such an attempt being dependent upon a question of fact, the good offices of the jury can usually be enlisted to support such a finding.

Under the "specific peril" rule, attempts to fix the time of death within the period are universally successful, when it can be satisfactorily shown that, when last seen, the absentee was confronted with some dangerous, specific peril, calculated presently to destroy his life. In its original form the rule defined the minimum evidentiary requirements under which a finding of death within the period might be justified, but in most courts it has lost much, if not all, of its original harshness.

32. The non-forfeiture provisions which are required in each state to be incorporated in all life insurance policies of course prohibit a forfeiture of all interest in a policy for non-payment of premiums. However, when the policy lapses for such a reason, the reserve, less any outstanding indebtedness, is applied to the purchase of paid-up insurance, which is always less than the face value of the policy. Practical expediency therefore dictates that the beneficiary prove the death of the insured within the life of the policy; failing to do so, recovery will be limited to the paid-up insurance.

33. The specific peril rule was first enunciated in this country in Burr v. Slim, 4 Whart 150, 171 (Pa. 1838), where Chief Justice Gibson, in holding that the perils of the sea were general, and not specific, said: "... to accelerate the presumption from time ... it is necessary to bring the person within the range of a particular and immediate danger."

34. Davie v. Briggs, 97 U. S. 628 (1878) (absentee started overland for California; evidence that the party encountered hostile band of Indians); Continental Life Ins. Co. v. Searing, 240 Fed. 653 (C. C. A. 3d, 1917) (evidence to show drowning held to constitute specific peril, sed quaere under the facts); Ashbury v. Saunders, 8 Cal. 62 (1857) (evidence as to drowning of absentee, passenger on boat overdue for sixteen months, held insufficient to raise jury question as to death: a very harsh interpretation); Coe v. National Council, 96 Neb. 130, 147 N. W. 112 (1914) (insured last seen about to enter treacherous part of Missouri River: dangerous condition of river constitutes the specific peril).

35. Originally the specific peril rule was the only basis upon which the jury would be allowed to infer that life ceased before the expiration of the seven years. See Davie v. Briggs, 97 U. S. 628, 634 (1878). Mere disappearance could not justify such a finding, though the only logical conclusion be that the absentee had met death, unless affirmative evidence could be adduced under the specific peril rule. Undoubtedly the doctrine was harsh, and it was repudiated in a leading case, Tisdale v. Connecticut Mutual Life Ins. Co., 26 Iowa 170 (1868), which concluded that death was the only rational inference to be drawn where the absentee was an outstanding citizen, happy in his domestic life, and eminently successful in his business affairs.

36. No longer need a showing be made that the absentee when last seen or heard of was confronted with some dangerous, impelling force threatening his life. The later cases which pay lip service to the specific peril rule are contented with evidence demonstrating that the absentee's last-known circumstances may be reasonably regarded as having worked his destruction, though in themselves they possess no particularly fatal characteristics. Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308 (1902) (equipment and clothing found on bank of river, and footsteps leading to water); Brownlee v. Mutual Ben. Health & Acc. Ass'n, 29 F. (2d) 71 (C. C. A. 9th, 1928), mountain-climbing in blizzard; possibly sound under old interpretation of rule); State Life Ins. Co. v. Sullivan, 58 F. (2d) 741 (C. C. A. 9th, 1932) (suicidal maniac); Lesser v. New York Life Ins. Co., 53 Cal. App. 236, 200 Pac. 22 (1921) (clothing and jewelry found in bath-
Without the convenient logic of the specific peril rule, however, especially in its looser modern interpretation, the courts have found somewhat difficult the task of developing standards to govern other situations where attempts are made to antedate the death of the absentee within the period—usually by means of hazily inferential, rather than direct, proof.

Faced with such a situation, the majority is seemingly dedicated to the English rule of *Nepean v. Doe d. Knight*, that the presumption extends only to the fact of death, and cannot be considered as connoting death either at the end of, or at any particular time within, the period. Therefore he who would seek to overcome the presumption of continuance of life must adduce evidence of sufficient weight to convince "unprejudiced minds, exercising their best judgment" that the absentee's actual demise took place before the law officially pronounced his obituary. Other cases allow similar findings,

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37. 2 M. & W. 894, 150 Eng. Reprints 1021 (Ex. 1837), *supra* note 31. This doctrine was affirmed in *Re Phen's Trusts*, L. R. 5 Eq. 139 (1870) after an elaborate and careful review of the authorities by Lord Justice Giffard, who also concluded that the onus of proving the particular time of death lay on him who sought to establish death within the period. The doctrine since then has never been seriously challenged, and may be regarded as firmly grounded in English law. *Re Leve's Trusts*, L. R. 6 Eq. 356 (1871); *In re Rhodes*, 36 Ch. 586 (1887); Lal Chaud Wariwari v. Mahant Ramrup Gir, 42 T. L. R. 159 (P. C. 1926). At least one Canadian decision is in accord. *Duffield v. Mutual Ins. Co.*, 32 Ont. L. R. 299, 20 D. L. R. 467 (1924).


40. The *quantum* of evidence required to upset the presumption of continued existence is, of course, dependent largely upon the facts at bar; but to such evidence, however meager, the jury may be expected to lend receptive ears. Any attempt to raise the inference of death shortly after disappearance centers about such considerations as the character, habits, affections, financial condition, ambition, etc., of the absentee, arguing that these facts militate against a wilful departure: ergo, death must be fixed within a short time after the disappearance. Although less influenced by such evidence than juries, appellate courts have generally come to recognize the validity of the claimant's contentions, and the finding of death (invariably within the life of the policy) is sus-
but argue that, if nothing to the contrary is shown, the presumption fixes the

time of death at the expiration of the period. Such a distinction is largely

academic; the same practical results are achieved under either viewpoint, since

time of death may be located within the period on the basis of sufficient
evidence.

The Statute of Limitations

But although the insurer is perhaps more justified than the beneficiary in
roundly condemning the presumption, it not infrequently impales even the
latter on the horns of a dilemma, particularly with reference to the Statute
of Limitations, or a provision in the policy that proofs of death must be
filed within a certain time after death. Attempting to fix the time of death
within the effective limits of a policy now lapsed, the beneficiary is frequently
faced with a perplexing question: shall he proceed with his endeavors in that
direction when, if successful, they will fix the time of death at such a time
before the commencement of the action as to outlaw his claim? He should
proceed, by all means; for, impelled, no doubt, by a desire to assist him in
his predicament, courts have reached some rather surprising conclusions.

It is a generally accepted rule that the Statute of Limitations does not begin
to run until proofs of the death of the insured are available—i.e., when his
death is established, not by direct knowledge, but by force of the presum-
tion. However, the Statute does not bar the claim if the premiums or dues

41. Montgomery v. Bevans, 17 Fed. Cas. No. 9,735 (C. C. D. Cal. 1871); United
States v. Robertson 44 F. (2d) 317 (C. C. A. 9th, 1930); Minnis v. Equitable Life
Assur. Soc., 204 Cal. 180, 267 Pac. 538 (1928); Apitz v. Supreme Lodge, K. L. H., 274
Ill. 196, 113 N. E. 63 (1916); Mutual Life Ins. Co. v. Louisville Trust Co., 207 Ky.
654, 269 S. W. 1014 (1925); Brotherhood of Locomotive F. E. v. Nash, 144 Md. 623,
123 Atl. 441 (1924); Bailey v. Bailey, 36 Mich. 181 (1877); In re Freeman's Estate,
227 Pa. 154, 75 Atl. 1063 (1910).

42. Travelers' Ins. Co. v. Bancroft, 65 F. (2d) 963 (C. C. A. 10th, 1933); Benjamin
v. Independent Order of B'Nai B'Rith, 171 Cal. 260, 152 Pac. 731 (1915); Potter v.
Prudential Ins. Co., 108 Conn. 271, 142 Atl. 891 (1928); Griffin v. Northwestern Mutual
Life Ins. Co., 250 Mich. 185, 229 N. W. 509 (1930); Behlmer v. Grand Lodge, A. O. U. W.,
109 Minn. 305, 123 N. W. 1071 (1909); Sovereign Camp, W. O. W. v. Piper, 222 S. W.
D. L. R. 467 (1914). But it has been held that the action must be brought within
are paid up to the commencement of suit, although the insured had presum-
tively died some time previously.\textsuperscript{43} 

The really anomalous situation results when the policy is allowed to lapse. The courts hold that the Statute takes effect not from the time of the insured’s
death, as determined by the trier of the facts, but at the expiration of the
period.\textsuperscript{44} Although such reasoning may be justified on the basis of the results achieved thereby, especially where the insurer seeks to take advantage
of the statute to the exclusion of the beneficiary’s interests, it is difficult to
commend its logic as sound legal reasoning.\textsuperscript{45}

a reasonable time after the expiration of the seven-year period. Warner v. Modern
Woodmen, 124 Wash. 252, 214 Pac. 161 (1923), 34 A. L. R. 91 (1925) (apparently
theory of plaintiff’s action based not on Statute, but on reasonable time, and four years
held unreasonable).

A policy provision or fraternal benefit society by-law that proofs of death must be
submitted within a specified period after death is governed by the same conditions
regarding the applicability of the Statute of Limitations. Consequently, proofs of death
may be submitted within the period allowed in the policy, dating from the time the
434 (1920).

\textsuperscript{43} Bennett v. Modern Woodmen, 52 Cal. App. 581, 199 Pac. 343 (1921); Roblin v.
Supreme Tent, K. M., 269 Pa. 139, 112 Atl. 70 (1920); White v. Brotherhood of
Locomotive F. E., 167 Wis. 323, 167 N. W. 457 (1918).

\textsuperscript{44} Thus, where the jury determines that the insured died shortly after his disappearance,
and, incidentally, while the policy was in effect, it has been held that the Statute does
not go into operation at the time of the death of the insured, when a cause of action
on a life insurance policy comes into existence, but at the expiration of the period.
Benjamin v. Independent Order of B’nai B’rith, 171 Cal. 260, 152 Pac. 731 (1915);
New York Life Ins. Co. v. Brame, 112 Miss. 828, 73 So. 806 (1917); American Nat.
App. 341 (1883).

\textsuperscript{45} An interesting example of the illogical results of this type of reasoning is afforded
in the saga of Archie Hicks, who disappeared in Texas in 1921. Suit was brought in 1923
against one insurer of his life, and the beneficiary was successful in inducing the trial court
to find that Hicks died on or about the date of his disappearance, since the policy lapsed
shortly thereafter. Judgment was accordingly directed for the plaintiff, and, on appeal,
affirmed on this point by the Court of Civil Appeals. Jefferson Standard Life Ins.
Co. v. Hicks, 264 S. W. 1033 (1924). For some unexplained reason, suit on a similar policy with
another insurer was delayed until the presumption had taken effect. This policy, too,
had lapsed shortly subsequent to his disappearance. Judgment was again given for the
beneficiary on the finding that Hicks died within the life of the policy, and finally affirmed
by the Texas Commission of Appeals. American Nat. Ins. Co. v. Hicks, 35 S. W. (2d) 128
(1931). Throughout the trial and appellate proceedings the defendant had pleaded
the Statute of Limitations, and had introduced the finding in the previous suit; but the
court rejected these contentions, and, in the face of the successful action against the
Jefferson Standard Life Insurance Company, maintained that there could be \textit{no cause of action}
on such a policy until the presumption took effect.

A somewhat similar finding has been made recently in New York. Gardner v. North-
272 N. Y. (mem) 186 (1936). Although the evidence showed that the insured had dis-
Admissibility of Prior Adjudications as to Death

The issuance of letters of administration on the estate of the absentee is generally held to be \textit{prima facie} evidence of death admissible in actions collateral to the grant.\textsuperscript{46} But the United States Supreme Court has concluded otherwise,\textsuperscript{47} and the New York courts, after some indecision,\textsuperscript{48} have aligned themselves with that viewpoint.\textsuperscript{49} For obvious reasons such a holding as this is infinitely more to the insurer's liking. Because of the largely \textit{ex parte} nature of the probate proceedings, the insurance companies feel that they should in no wise be bound thereby, and it may be assumed that they argue strenuously against the admissibility of such evidence.

The Absentee Returns

The practical fallibility of the presumption is in some measure demonstrated by the fact that in many instances the "dead" person has miraculously reappeared over fourteen years before the finding of his body and the institution of the action, the claim was held not barred by the Statute. A possible distinction exists, in that the insured's departure was shown to have been in company with a woman not his wife, which might have been regarded on a trial at the end of seven years as precluding the presumption from arising. See note 27, supra.


\textsuperscript{48} It was at first held that the letters were \textit{prima facie} evidence of death. Carroll v. Carroll, 2 Hun 609 (1875). This judgment was reversed in 60 N. Y. 121 (1875); but see 12 Amert's N. Y. Dig. tit. "Death," \S 3, where the reversal of the finding of the General Term by the Court of Appeals is not made clear. Possibly this was responsible for inducing the subsequent confusion, resulting in such statements as: "... letters of administration are in and of themselves \textit{prima facie} evidence of death. Carroll v. Carroll, 60 N. Y. 121. ..." [Rufoff v. Greenpoint Savings Bank, 40 Misc. 549, 550, 82 N. Y. Supp. 881 (Sup. Ct. 1903)], and "Proof of the probate of a will or the granting of letters of administration do not establish, even \textit{prima facie}, the fact of death. Carroll v. Carroll, 60 N. Y. 121. ..." [Marks v. Emigrant Ind. Savings Bank, 122 App. Div. 661, 664, 107 N. Y. Supp. 491, 493 (1st Dep't 1907)]. The latter view of the Carroll case was correct, and the quotation correctly states the present New York law. See note 49, infra.


Massachusetts seemingly agrees that such decrees are inadmissible against a stranger to the proceeding from which they have issued. See Day v. Floyd, 130 Mass. 486, 489 (1881).
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turned to life, although the insurer, because of its failure to discover any trace of his whereabouts, had paid the beneficiary's claim in full. In such a situation an action instituted by the insurer against the beneficiary is successful, even in the absence of fraud,\(^{50}\) predicated generally upon the theory that money paid under a mistake of fact may be recovered.\(^{51}\) And, *a fortiori*, fraud by the beneficiary in obtaining the payment of such a claim will undoubtedly justify recovery by the insurer.\(^{52}\) However, where the claim has been litigated, and judgment has resulted for the beneficiary, the subsequent discovery of the insured, and clear evidence of fraud, will not permit recovery from the beneficiary's attorneys, if they acted in good faith and were wholly ignorant of their client's fraud.\(^{53}\)

But when the beneficiary's claim has not been recognized by the insurer as completely valid, and a final settlement has been reached between the parties in the nature of a partial payment to the beneficiary, no recovery will be allowed because of the subsequent reappearance of the insured.\(^{54}\) The reason generally assigned for such a holding is that the compromise has created a new and separate contract between the parties dependent upon a *doubtful* fact, the existence or non-existence of the insured.

Where a bond conditioned upon reappearance has been given by the beneficiary in accordance with an agreement compromising a claim for less than the full amount, recovery will be allowed the insurer upon the bond.\(^{55}\) As

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51. *3 Williston, Contracts* (1920) § 1574.


53. *Fidelity Mut. Life Ins. Co. v. Clark*, 203 U. S. 64 (1905). It is interesting to note that the original litigation between the beneficiary and the insurer reached the Supreme Court [*Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 303 (1902)], where it was generally considered to repudiate the specific peril rule of *Davie v. Briggs* [97 U. S. 628 (1878)]. See *supra*, notes 35, 36. Subsequent disclosures revealed that the purported disappearance was a conspiracy between the insured and the beneficiary to defraud the insurer. The Supreme Court affirmed a dismissal of the bill as against all but the beneficiary, by result implying that the claim paid could be recovered from the beneficiary, although the claim was litigated, and the insured declared dead.

54. *Sears v. Grand Lodge*, 163 N. Y. 374, 57 N. E. 618 (1900); *2 Pomeroy, Equity Jurisprudence* (3d ed. 1905) § 849. But in *New York Life Ins. Co. v. Chittenden*, 134 Iowa 613, 112 N. W. 96 (1907), the court, quoting Pomeroy, held that payment of the *full* death benefit by the insurer to the administrator of the absentee's estate for the purposes of avoiding suit operated as a compromise of the debt, and that therefore no recovery would be allowed. The decision has been sharply criticized in a thorough paper on this subject. *Wozenraft, Right of an Insurance Company to Recover Benefits Paid in a Disappearance Case Upon the Reappearance of the Insured* (1929) *Legal Section Proc., Am. Life Conv. 99*. But see *1 Williston, Contracts* (Rev. ed. 1936) § 135. Forbearance from the suit, with the attendant expenses to the insurer, should provide good consideration, though the claim was not "compromised," in the sense that a lesser amount was paid.

a practical matter, life insurance counsel have suggested that all claims, with
the validity of which the companies are not impressed, be paid under such
bond, although theoretically recovery may always be had from the beneficiary
in the absence of a compromise. But the practice of exacting a bond is
impossible where the claim is litigated and judgment results for the ben-
eficiary.

Conclusion

Viewed in the large, the presumption cannot be regarded as formulative
of satisfactory guiding lines for the determination of the correlative rights
of the insurer and the beneficiary when the insured has disappeared. On the
insurer’s side it may justifiably be contended that the presumption had its
birth under conditions largely dissimilar from those under which it has its
modern application; that it is conducive to fraudulent claims; that the
showing of a mere absence from a certain locality, permissible by statute in
some jurisdictions, raises a presumption of death not logically warranted;
that the jury will lend receptive ears to the most meagre evidence of death
within the period; in short, the insurer is convinced, and resentful of the
fact, that it is compelled to pay claims not legally matured, although to this
answer might be made in some degree, that the mortality tables upon which
it bases its premium rates include presumptive death cases.

And while he may be said to profit from the presumption more generally
than the insurer, the beneficiary can be said to regard it as no unmixed
blessing. Recalling his predicament with relation to the Statute of Limita-
tions, there is the further hardship which he is at times compelled to endure,
of waiting for seven long years for the insurance monies to become available
through the force of the presumption, when death may be the only inference
to be drawn from the continued absence, long before the expiration of the
period.

Nor does a solution easily present itself. A policy or other contractual
provision excluding presumptive death from the risk assumed by the insurer

57. In one case counsel for the insurer was successful in inducing the trial court to
incorporate in the judgment a provision for the giving of bond by the successful ben-
eficiary. On appeal it was pointed out that the lower court had no power to impose such
an obligation, since the jury had found the insured legally dead, and the relationship of
the parties was thereby established. Steele v. Metropolitan Life Ins. Co., 196 N. C. 408,
145 S. E. 787 (1928).
58. The Supreme Court of Alabama struck such a note of warning over sixty years
ago, and, it is submitted, its forcefulness should still be heeded: “Considering the great
length and breadth of this country, and the migratory character of the people, the
presumption has less force here than in the country where the law on this subject originated;
and in a majority of cases, there is little doubt such presumptions are, in fact, contrary to
the truth.” Smith v. Smith, 49 Ala. 156, 159 (1873).
59. See supra, notes 18, 30.
60. Adams, op. cit. supra note 14, at 643.
61. Id. at 645.
is manifestly unreasonable, and generally held invalid.\textsuperscript{62} Nor can a clause permitting recovery only upon the completion of the absentee's life expectancy be deemed as a fair limitation,\textsuperscript{63} although it has been sustained by the courts.\textsuperscript{64}

Undoubtedly the only satisfactory approach to a solution of the problem is by affirmative statutory definition. Pointing out that the seven-year rule is "arbitrary, impractical, anachronistic, and obstructive,"\textsuperscript{65} Professor Wigmore has proposed such a statute\textsuperscript{66} the essential element of which is to abrogate the common law seven-year period and substitute therefor a cause of action based on logical inference rather than any fixed, invariable passage of time. The proposal may be heartily commended to the attention of legislators in the vain hope that future disappearance claims on life insurance policies may be handled by the courts in a manner more commensurate with contemporary conditions.

Professor Wigmore's statute contains five sections, requiring (1) that notwithstanding what length of time has expired since the disappearance of the absentee, no presumption of death shall arise as a matter of law; (2) submission of the issue of death is discretionary with the court, provided that the issue shall be submitted in all cases where the disappearance has been for a period of more than two years; (3) that a specific peril, when reasonably shown to have existed, shall in all cases justify submission; (4) that no clause inserted by, or by-law enacted by, the insurer concerning the effect to be given evidence of the absence shall be valid; (5) that no policy provision shall bar the right of the beneficiary to bring suit within the period of statutory limitation upon such actions, dating from the time of the disappearance, provided that notice of the disappearance be given the insurer within one year of the same.

In the light of the criticisms of the common law rule, it will be noted that the proposed statute can fairly be regarded as the only adequate solution so far offered. The rights of all are safeguarded: the beneficiary should have little difficulty in prosecuting a valid claim to a successful conclusion, in the


\textsuperscript{63} Such a proposal was made by the National Conference of Commissioners on Uniform State Laws, Committee on Uniform Presumption of Death Act. \textit{Proceedings} (1933) 292, 308. But Professor Wigmore believes that such conclusion was reached too readily under the misleading statements of life insurance counsel, and he rejects it completely, pointing out that mortality tables are based upon information about masses of people of whom we know nothing but that they \textit{lived}, while of these absentees we have the additional information that they \textit{disappeared} from life among their fellows. \textit{Evidence} (Supp. 1934) § 2531 n. la.

\textsuperscript{64} Steen v. Modern Woodmen, 296 Ill. 104, 129 N. E. 546 (1920), 17 A. L. R. 418 (1922); cf. Boynton v. Modern Woodmen, 148 Minn. 150, 181 N. W. 327 (1921) (fraternal by-law to this effect enacted subsequent to issuance of certificate under which disappearance claim is brought held void); Cobble v. Royal Neighbors, 291 Mo. 125, 236 S. W. 365 (1921) (by-law unreasonable where beneficiary's life expectancy less than insured).

\textsuperscript{65} \textit{Op. cit. supra} note 62, § 2531b.

\textsuperscript{66} Id. § 2531c.
absence of any unreasonable delay; and no longer need the insurer look upon
the jury with trepidation: he is not shouldered with the burden of proof to
refute the plaintiff's contentions, and an adverse jury verdict will thereby
be the more easily reversible as a matter of law. Its enactment can be
regarded as the only measure that will be effective to alleviate the burden cast
by the presumption upon insurer, beneficiary, and court.

RELAXATION OF THE REQUIREMENT OF DELIVERY IN GIFTS OF PERSONAL
PROPERTY.—There is a current tendency in our law to minimize the importance
of certain formalities and requirements which have heretofore been deemed
integral parts of the common law. Legislative zeal, unhampered by precedent,
has dissipated the aura of magic which pervaded the seal. Written releases,
not under seal, are now effective without consideration, and the seal no longer
shields the undisclosed principal. The abolition of the doctrine of consideration
has recently been advocated. As if in consonance with this position, and
to fill a gap left by the dethroned seal, certain states have adopted legislation
making gratuitous promises enforceable when the signer of the written instru-
ment asserts therein an intention to be legally bound. A stone's throw from

67. Id. § 2494.

1. For a consideration of the various state statutes, affecting the common law force
of the seal, and citations thereof, see 1 WELLS, CONTRACTS (rev'd ed. 1936) § 218.
Some twenty years ago the attention of the Bar and the Legislature of New York was
called to the fact that the rules with regard to the seal in that state had been so riddled
with exceptions, as to cause a condition of confusion which required statutory remedy.
The classification of documents according to their nature and importance was suggested
as a substitute for the seal. Crane, The Magic of the Private Seal (1915) 15 COLO. L. REV.
24. "In the early days of the common law, where people could not read and write, the
presence of the seal was all-important. . . . Today, however, when people in general can read
and write, and when, therefore, courts are face to face with different social and economic
conditions, the importance of the signature is magnified, and the significance of the seal
has waned, illustrating that our feet must keep to Mother Earth though our thoughts
may soar into the clouds." Wormser, The Development of the Law (1923) 23 COLO. L. REV.
701, 706-707.

2. The New York Legislature, in recent years, has passed statutes concerning releases
under seal, modification of sealed instruments, the seal as evidence of consideration, and
the seal as protector of the undisclosed principal. N. Y. DEBTOR AND CREDITOR LAW
(Supp. 1936) § 243 reads as follows: RELEASE IN WRITING WITHOUT CONSIDERATION OR
SEAL. A written instrument, hereafter executed, which purports to be a total or partial
release of all claims, debts, demands or obligations, or a total or partial release of any
particular claim, debt, demand or obligation, or a release or discharge in whole or in part
of a mortgage, lien or charge upon personal or real property, shall not be invalid because
of the absence of consideration or of a seal.

3. N. Y. CIV. PRAC. ACT (1936) § 342 reads:
   2. The rights and liabilities of an undisclosed principal under any sealed instrument
      hereafter executed shall be the same as if the instrument had not been sealed.

4. Wright, Ought the Doctrine of Consideration to be Abolished from the Common