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# Presumption of Death

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EVIDENCE—PRESUMPTION OF DEATH—WHEN REBUTTED.—[Massachusetts] The wife of the alleged deceased husband filed a petition for administration on his estate. The proof in support of the petition showed that the husband left his home and family in December, 1915, under circumstances strongly indicating an intention on his part to abandon them. He had been infatuated with another woman, and both left the same day. He left a letter for his son stating that he had been miserable at home and could not live that way any longer, and that he hoped to have his son with him at some future time. Within a day or so after his departure he sent his wife the check for his automobile which had been left at a garage in New York. Neither his family nor friends heard from him after that. The petition for administration was filed in 1924, nearly nine years after the husband was last heard from. The probate court dismissed the petition on the ground that the death of the husband had not been proved. The petitioner appealed, insisting on the usual presumption of death from seven years' absence, unheard of, etc.

The Supreme Court of Massachusetts affirmed the order of dismissal.[1] The basis of this ruling was that under these circumstances the presumption of death did not arise, and in the absence of satisfactory proof of death, the order of dismissal was proper. The case did not involve the question as to whether the evidence was sufficient to warrant a finding of death as a fact.

Until quite modern times the courts do not appear to have recognized any legal presumption of death from absence.

In the earlier cases there are suggestions of a presumption of the continuance of life, but none of a presumption of death.

The party whose case required the fact of death had the burden of proving it, though it was sometimes thought to result from the presumption of the continuance of life. Thus in one of the early cases,[2] where the plaintiff claimed as heir of several deceased persons, and the question as to who had the burden of proof arose, it was said:

> "He who would prove them dead; for when it is shown that they were once alive, it will be intended that they are alive, if the contrary is not proved."

For a time at least, both in England and in some of the American states, the continuance of life was treated as a true presumption, requiring a verdict in favor of life in the absence of rebutting evidence.

When the presumption of death from absence began to develop, first as a permissible inference,[3] and later as a rule of law that death must be presumed from seven years' absence, unheard of, etc.,[4] the life and death rule came to be stated in these terms: that the presumption of life ceased at the end of seven years from the time the

1. (1925) Petition of *Talbot* 146 N. E. (Mass.) 1.
2. (1625) *Throgmorton* v. *Walton* 2 Roll. 461.
3. (1805) *Doe* v. *Jesson* 6 East. 80.
4. (1837) *Doe* v. *Nepean* 2 M. & W. 894.

absent person was last heard of, and a presumption of death then arose.[5]

Accordingly, in 1867, the Supreme Court of Illinois used the two presumptions, seven years' absence to establish death, and the continuance of life during the first seven years, to avoid the statute of limitations.[6]

In one of the early pauper settlement cases,[7] the presumption of life was invoked to invalidate a second marriage.

In 1812, the husband enlisted and went on active foreign service and was never heard of afterwards; about a year after his departure the wife remarried. The second marriage was upheld on the ground of conflicting presumptions, and that the presumption of innocence destroyed the presumption of life.

In a later settlement case[8] the court repudiated the notion of conflicting presumptions, or that there was any legal presumption of the continuance of life, *without reference to the circumstances.* The opinion suggests that the circumstances in the *Twyning* case—service in the army on the continent in 1812, and absence of all information since that time—rebutted the presumption of life and warranted an inference of death.

In two recent cases,[9] which are somewhat suggestive of the *Twyning* case, the Supreme Court of Illinois has gone even further.

In each an administrator sought compensation for the death of his intestate, which occurred in the course of his employment. The right to compensation depended on the survival of certain relatives named in the statute. It was a part of the administrator's case to prove the survival. In the *Keystone* case the deceased was a Serbian who had come to America shortly before the great war. In the *National Zinc Company* case the deceased came from Russian Poland about the same time. Each left relatives in his native country, who were proved to be alive about the time the war began, and no further information had been obtained at the time of the hearing, some two or three years later. The court took judicial notice that both Serbia and Russian Poland were devastated by war, plague, and famine.

Under these conditions the court held that there was not only no presumption of the continuance of the lives of these relatives but no basis to support a finding that these persons were alive.

In short, there could be no presumption of law or fact that life continued in view of the circumstances which made death equally, if not more, probable.

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5. (1840) *Loring* v. *Steinman* 1 Metc. 204.

6. (1867) *Whiting* v. *Nichols* 46 Ill. 230. This combination of the two presumptions has generally been repudiated. If the absent person, is assumed to be alive during the entire seven years, there would be no basis for a presumption of death the next day. (1869) *Phene's* Trust L. R. 5 Ch. 139. (1871) *Lewes'* Trust L. R. 6 Ch. App. Cas. 356.

7. (1819) *Rex* v. *Inhabitants of Twyning* 2 B. & Ald. 386.

8. (1835) *Rex* v. Inhab. *Harborn* 2 Ad. & Ell. 540.

9. (1919) *Keystone Steel Co.* v. *Indust. Comm.* 289 Ill. 587; (1920) *National Zinc Co.* v. *Indust. Com.* 292 Ill. 598.

The presumption of life, whether law or fact, rests on the usual life expectancy under normal conditions, and fails when the conditions do not justify it.

So the presumption of death as a fact, i. e., the inference of death from long absence, unheard of, etc., rests on the probability that the absent person would naturally communicate with his friends and family, if alive.

Where there is no reason for believing that he would communicate if alive, there is no basis for an inference of death from a failure to communicate.

The legal presumption of death from seven years' absence, unheard of, is a rule of convenience based on the natural inference.

Where there is no basis for a natural inference there is no basis for the legal presumption.

"The principle on which the courts presume the death of a person of whom no tidings has been received for a long period of time is this, that if he were living he would probably have communicated with some of his friends and relatives. It is a conclusion which the court draws from the probabilities of the case. It is quite clear, therefore, that where no such probability exists, the presumption can not arise."[10]

In the principal case the court applies the same rule to the presumption of death that the Supreme Court of Illinois applied to the presumption of life.

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PROPERTY—ESTATES—CUTTING DOWN A FEE.—[Maine] The case of *Methodist Church* v. *Fairbanks*[1] may be compared to the Illinois case recently decided[2] where a similar result was reached. The comment recently published in these pages relative to the Illinois case[3] would seem to be applicable to the Maine case. In the Maine case, the limitation was, X, testator, to A, his wife, and B, his daughter, to their free use and benefit forever, and free from the interference and control of anyone, but if, at their death, any of the property shall remain, then over.

The Maine court proceeded apparently from the premise that in that state a fee could not be limited upon a fee, and that the effect of the language was to give a fee absolute in the first taker so that there was nothing left for an executory devise to operate on.

It is interesting to note in that connection the following three somewhat similar limitations that have come before the Illinois court, thus: X, testator, to A, his wife, with full power to convey or dispose of the same in any way she may see fit, and what of property, if any, remains after her death to go over;[4] X, testator, to A, his wife, to be her absolute property during her life, and what

10. (1854) *Bowden* v. *Henderson* 2 Sm. & G. 360.

1. (1924 Me.) 126 Atl. 823.

2. *Melies* v. *Beatty* (1924) 313 Ill. 418.

3. ILL. L. REV. XIX 459.

4. *Bradley* v. *Jenkins* (1916) 276 Ill. 161, 162.