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THE PRESUMPTION OF DEATH FROM ABSENCE AS AFFECTING THE STATUTE OF LIMITATIONS AND THE NON-PAYMENT OF PREMIUMS IN LIFE INSURANCE CASES

The doctrine that seven years' unexplained absence from home will raise a presumption that the missing person is dead has proved a troublesome one to apply in the insurance cases in which, modernly, it is chiefly called into play. As long as it is merely employed to establish the death of a missing spouse, in order to allow remarriage by the survivor, or in order to permit the distribution of the missing person's estate, or in many of the other situations where it is relied upon to establish the fact of death, the courts have little difficulty with the presumption. But when it is used to establish the death of an insured person in order to entitle the beneficiary to the proceeds from the policy of insurance, complications soon appear. The Statute of Limitations (which in many states is shorter than the period necessary for the presumption of death) raises perplexing problems as to the proper time for suit, and the same is true as to the effect of non-payment of premiums during the period of absence.

These problems are strikingly presented in the recent Washington case of Howard v. Equitable Life Assurance Society.¹ The insured, one Charles Navone, was happily married and highly respected in his community, but following financial losses he became depressed and threatened to commit suicide. On March 1, 1930, he boarded a Lake Washington ferry, but was not seen to leave it at its destination. An intensive search was made for him, but he was not afterwards heard of. All premiums on the policy sued on had been paid to that date, and plaintiff, insured's wife and beneficiary, paid the semi-annual premium due on July 24, 1930. The plaintiff filed proof of death on May 4, 1937, and after refusal of her demand, brought this action on October 7, 1937. The defendant denied the insured's death, and claimed that the policy had lapsed for non-payment of the premium due January 24, 1931. Or, alternatively, it claimed that if the insured were dead, he died on March 1, 1930, so that the action was barred by the Statute of Limitations. The court held that since there was not sufficient evidence to prove the death of the insured without the aid of the presumption of death arising from seven years' absence, the plaintiff had no presently enforceable cause of action until the expiration of that period, and that therefore the Statute of Limitations did not start to run until then, giving the plaintiff six years thereafter within which to sue. The court expressly overruled Warner v. Modern Woodmen of America² in so far as it held that the beneficiary has only a reasonable time after the expiration of the seven years within which to sue.

American and English courts universally recognize a genuine presumption of death, arising from a person's unexplained absence from home for seven years without tidings to those who would normally

²124 Wash. 252, 214 Pac. 161, 34 A. L. R. 87 (1923). The court in this case held that four years after the expiration of the seven years was not a reasonable time within which to sue.
hear from him. But the problems incidental to the application of this presumption to life insurance cases have been handled in widely varying ways. These problems center about the determination of the exact time of death, in connection with the two defenses most commonly advanced by the insurer—the bar of the Statute of Limitations, and lapse for non-payment of premiums. Both of these were relied on by the defendant in the Howard case.

Washington, along with the English and a majority of American courts, has consistently followed the rule which is reaffirmed in this case, that the exact time of death is a question for the jury, since the presumption of the fact of death includes no presumption as to the time within the seven years at which death actually occurred. Therefore, these courts place the burden of proving that death occurred at, prior to, or subsequent to a particular time upon the person claiming a right, to the establishment of which that fact is essential.

But a considerable number of courts in this country have held that in the absence of evidence fixing death at some particular time the insured is presumed to have survived during the whole of the seven-year period and to have died at its expiration. On purely logical grounds it seems clear that it is less likely that the insured died at the end of the period than at any other time. However, while arbitrary, such a rule has the advantage of avoiding an occasional procedural impasse, where the plaintiff or moving party is a mere stakeholder and neither of the contending litigants is able to sustain the burden of proof as to the exact time of death. But as applied to insurance cases, the rule has the disadvantage of requiring the beneficiary to pay premiums during the entire seven years, even though he may be certain that death occurred at or near the beginning of the period.

The insurance cases where reliance is placed on the seven years’ presumption fall generally into two groups. In one may be included the cases where there is no evidence at all as to any particular time of death, but in the other group, as in the Howard case, there is often strong evidence of death at the beginning of the period. In the latter type of death, of course, the safest procedure for the beneficiary to

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5 See Notes (1916) 3 Va. L. Rev. 451 and (1932) 17 Cornell L. Q. 274 for contrasting attitudes toward this rule.
follow would be to pay premiums for the seven years, and then sue to recover those paid after the time which the court fixes as the date of death. In *Fordyce v. Modern Woodmen of America* and *Harris v. Security Benefit Association* our court allowed such recovery, and that position is reaffirmed in the *Howard* case, the plaintiff being allowed to recover the premium paid on July 24, 1930.

However, many beneficiaries, like the plaintiff here, neglect to continue paying premiums after they are certain that the insured is dead. But the courts agree that the premiums must have been paid until the date of death, as judicially determined. And so where premiums are not paid after the insured’s disappearance, the beneficiary is placed under the necessity of proving death before the lapse of the policy.

Where the insured was in peril when last heard of the courts are usually willing to find that death occurred at that time, both in cases where the seven-year presumption is relied on and where the suit is brought before the expiration of this period. A few other courts have held that the occurrence of death at the beginning of the period can be inferred merely from evidence that the person who has disappeared was of a cheerful disposition, attached to his family and friends, and in good circumstances. In *Tisdale v. Connecticut Mutual Insurance Co.* the Iowa court held that “any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity and objects in life, which usually control the conduct of men, and are the motives of their action, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence.” This passage was quoted approvingly by the Washington court in the *Butler* case but has never been actually applied in this state. But generally, whenever the missing person was dangerously ill at the time of his disappearance, had embarked on a vessel, not since heard from, or probably committed suicide, the jury is allowed to find that death occurred at the beginning of the period. The courts are very lenient in upholding such findings, perhaps out of a desire to avoid penalizing the beneficiary who has stopped paying premiums.

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*129 Wash. 384, 225 Pac. 434 (1924).*  
*185 Wash. 25, 52 P. (2d) 329 (1935).*  
*Fidelity Mutual Life Assn. v. Mettler, 185 U. S. 308 (1902); Bradley v. Modern Woodmen of America, 146 Mo. App. 428, 124 S. W. 69 (1910); Cox v. Ellsworth, 18 Neb. 664, 26 N. W. 460 (1886); Greenleaf, Evidence (16th ed. 1899) § 41.*  
*26 Iowa 170, 98 Am. Dec. 136 (1869).*  
*Butler v. Supreme Court of the Independent Order of Foresters, 53 Wash. 118, 101 Pac. 481, 26 L. R. A. (N. S.) 293 (1909).*  
*Sovereign Camp Woodmen of the World v. Boden, 117 Tex. 229, 1 S. W. (2d) 256 (1921); Butler v. Supreme Court of the Independent Order of Foresters, 60 Wash. 171, 110 Pac. 1007 (1910); Harris v. Security Benefit
Although this leniency of the courts allows recovery by a good many beneficiaries when premium payments were discontinued immediately after the disappearance of the insured, it results in a rather anomalous situation as far as the Statute of Limitations is concerned. The plaintiff is forced to argue, and the courts tend to find, that the insured died at the beginning of the seven-year period. The insurer then argues that if this is true the action is barred by the running of the Statute of Limitations. The courts have developed various devices for avoiding this result. One commentator has recognized three possible views in this connection.\(^{16}\) According to one of these, the Statute of Limitations is suspended until the termination of the seven-year period, and then begins to run.\(^{17}\) Another holds that the cause of action arises at the end of the seven-year period and that it is intended that the beneficiary have a reasonable time after the end of the period in which to sue.\(^{18}\) The third view is that the cause of action does not accrue until after the seven-year period, and that the Statute of Limitations runs from that time.\(^{19}\) The *Howard* case clearly comes under the latter view. Perhaps the *Warner* case, supra, represents a fourth, and rather hybrid point of view. It held that the cause of action arose at the death of the insured but that the Statute was suspended until the end of the seven years necessary to establish death, and that a reasonable time should be allowed thereafter in which to sue. It will be noted that the Washington court has at various times adhered to three of these four views, though it has now expressly overruled its holding in the *Warner* case, supra. The two which remain unimpaired have the same net effect, though based on different rationales. The one set forth in the *Howard* case is probably intended to be set up as a definitive rule for the future. It has the advantage, from the standpoint of consistent logic, of being in accord with the general rule that the statute starts to run when the cause of action accrues, i.e., when suit may be brought.\(^{20}\) It thus avoids the necessity, which arises under the view advanced in the *Fordyce* case, supra, of relying on a "suspension" of the statute which is not specifically sanctioned by the statute on that point.\(^{21}\) It has the additional advantages of being definite, and of allowing the longest possible period within which to sue, to protect beneficiaries who delay in bringing suit.


\(^{16}\) Note (1932) 17 CORN. L. Q. 274.


\(^{19}\) Benjamin v. District Grand Lodge, Independent Order of B’nai B’rith, 171 Cal. 269, 152 Pac. 731 (1915); 7 COUCH, CYCLOPEDIA OF INSURANCE LAW (1930) § 1640.


\(^{21}\) REM. REV. STAT. § 157.
supra, as to the abridgement of the period necessary to give rise to the presumption of death from absence. That is, the courts should relax the rule sufficiently to allow evidence which is now held adequate to establish the time of death, when the fact of death has been established by the presumption, to establish the fact of death as well, independently of the presumption. In view of the greater ease of communication today, it seems but logical that where, as in the Howard case, the insured's character and habits are such as to indicate that he would not voluntarily refrain from communicating with his family, and where he disappears under circumstances logically suggesting suicide or accidental death at that time, the courts should be willing to presume death after a much shorter period of time than seven years. This would eliminate many of the difficulties which usually arise in relation to premium payments and the Statute of Limitations. It would also allow earlier recovery by beneficiaries in need of the money. Of course this is open to the objection that it might make for an increase in fraud, but since this rule will be of limited application, based upon the insured's character and the circumstances of his disappearance, careful trying of such cases should be a sufficient protection. And under the proposed Uniform Absence as Evidence of Death and Abentee's Property Act approximately this approach would be adopted.22

Where it is still necessary to rely upon the seven-year presumption to establish the fact of death, the problem of lapse for non-payment of premiums might be solved by shifting the burden on this issue to the insurer, to prove that the insured died subsequent to the lapsing of the policy. This is in the nature of an affirmative defense and might well be shifted to the insurer as the party who normally first injects it into the case, and to whose interest it is to establish this fact. The rule in Washington that the burden of proof on this issue is on the insured rests solely on the Warner23 and Peterson24 cases, and it was simply announced and applied in the decisions there, without any discussion or citation of authority. The Howard case cites the Peterson case and reaffirms the rule without discussion. So in this way, without any apparent reason, the often insurmountable burden of proof as to payment of premiums until the date of death is cast upon the beneficiary. Aside from this fact, the rule in the Howard case seems a fair and sensible one. But if it were supplemented as suggested above by the infusion of modifications along the line of the Tisdale case, supra, it would seem that a more balanced and comprehensive rule could be formulated.

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22See Note (1938) 38 Col. L. Rev. 322, 330, for an expression of this view. And for the Uniform Act (in its Fourth Tentative Draft) see the Handbook of the National Conference of Commissioners on Uniform State Laws, §§ 1(1) and 10(2) (1938).
