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Appeal and Error: Death; Insurance

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NOTES AND COMMENT

Appeal and Error; Death; Insurance

Hansen vs. *Central-Verein Der Gegenseitigen Unterstultzungs Germania.*[1]

This was an action to recover on a certificate of life insurance, where the plaintiff based his action on the presumption of the insured's death, arising from seven years' absence unheard of. It appeared from the evidence presented in the case that the insured previously had had trouble with his wife and children, and finally left home. He subsequently was arrested and convicted for abandonment, and placed on probation. Shortly after, he disappeared, and had not been heard of for more than seven years. It was held that because of these facts, the presumption of the insured's death did not arise, and the question as to whether the insured was in fact deceased was held for the jury.

In regard to the presumption of death arising from seven years' absence unheard of, the question is presented as to whether that presumption arises where the person, whose continuance in life is in question, left home under such circumstances that he would not be expected to communicate with his family.

The presumption of death from long continued absence is of ancient origin, but the rule which began the presumption after seven years' absence is comparatively modern. The period of seven years was adopted because that was the time fixed by acts of the British Parliament relating to bigamy and the termination of life estates and leases. Accordingly, in conformity with these acts, the courts adopted the rule that "a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of, without assuming his death."[2]

As a rule the burden of proof is upon the person denying the death, although the presumption of death from absence will not be indulged where the circumstances are such as to account for the absent person without assuming his death. In such cases the burden of proof will rest upon the party claiming the benefit of the presumption.

Consequently there may be a number of circumstances which will prevent the inference of death from mere unexplained absence, such as the desire to conceal his identity.[3] The improbability that the

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[1] 223 N.W. 571, —Wis.—

[2] *1 Jones, Commentaries on Evidence,* 302, 303.

[3] *Matter of Matthews,* 75 Misc. 449.

absent person would have communicated with his home will also rebut the presumption of death[4], as will the fact that he was a fugitive from justice[5], although it has been held that the fact that a person is a fugitive from justice does not as a matter of law prevent the presumption of his death after seven years' absence, although admissible in evidence to rebut the presumption.[6] "The fact that the absent person is a fugitive from justice does not prevent the presumption from arising, but is admissible to rebut the presumption of death."[7]

The cases in which the rule as to the presumption of death arising from seven years' absence has been applied in Wisconsin were all cases where the absent person was upon friendly or affectionate terms with his family at the time with the single exception of *Ewing* vs. *Metropolitan Life Ins. Co.*,[8] where there seems to have been some dissatisfaction with home conditions. Furthermore, it has been held in Wisconsin that although a person who has not been heard of for seven years is presumed to be dead, such mere absence, unaccounted for, raises no presumption as to the time of his death.[9]

Hence where the case under discussion showed that before the disappearance of the deceased he was on unfriendly terms with his family and was also a fugitive from justice as there was an abandonment charge against him, because of these facts the presumption of death did not arise, and the question as to whether the insured was in fact deceased, was held for the jury.

In this case the question arose: Can the Supreme Court review the action of the trial court in directing a verdict in the absence of an exception to such direction?

Sec. 274.34, Stats. 1927, provides: "Upon an appeal from a judgment . . . . the Supreme Court may review any intermediate order or determination of the court below which involves the merits and necessarily affects the judgment, appearing upon the record transmitted or returned from the circuit court, whether the same were excepted or not."

This direction of the court may therefore be reviewed without an exception. *Rosenthal* vs. *Vernon*.[10]

The cases which hold that an exception is necessary to review an

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[4] *Van Buren* v. *Syracuse*, 72 Misc. 463.

[5] *Ashbury* v. *Sanders*, 8 Cal. 62; *Van Buren* v. *Syracuse*, 72 Misc. 463, *O'Kelly* v. *Felker*, 71 Ga. 775.

[6] *Mut. Ben. L. Ins. Co.* v. *Martin*, 108 Ky. 11, 55 S.W. 694.

[7] 8 R.C.L. 708, 709.

[8] 191 W. 299; 210 N.W. 819.

[9] *Whitely* v. *Equitable Life Assur. Soc.*, 72 Wis. 170, 39 N.W. 369.

[10] 79 Wis. 245, 250, 251; 48 N.W. 485.

order directing a verdict are all cases in which it did not appear upon the face of the verdict that it was rendered by direction of the court, with the single exception of *Holum* vs. *Chicago, M., and St. P. R. Co.*[11]

It is apparent that the court there had no thought of overruling *Rosenthal* vs. *Vernon,* because that case was not mentioned, although it was decided in the same year and by the same judges who participated in the decision of *Rosenthal* vs. *Vernon.*

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Constitutional Law; Statute Taxing Foreign Corporation; Invalid

Cudahy Packing Co. v. *Hinkle, Secy. of State of Washington, et al,* 49 Sup. Ct. Rep., 204.

The Supreme Court of the United States in an opinion written by Mr. Justice McReynolds (Justices Brandeis and Holmes dissenting) declares statutes of the State of Washington providing that a *filing fee* and a *license fee* be levied on the authorized capital stock of domestic and foreign corporations is invalid insofar as it relates to foreign corporations. The gist of the case is this:

The legislature of the State of Washington levied a tax in the nature of a *filing fee*[1] and a *license fee*[2] upon all corporations, both domestic and foreign, as a necessary condition to the carrying on of business within that state. Both the filing and the license fees were based upon the total amount of the authorized capital stock and were graded upon a scale ranging from a twenty-five dollar ($25) minimum filing fee, and a fifteen dollar ($15) minimum license fee to a maximum fee of three thousand dollars ($3,000) in both cases. The reasons for declaring the said statutes invalid were that such fees, or taxes, place a direct burden upon interstate commerce, and attempt to tax property not within the jurisdiction of the state, which amounts to a taking of property *without due process of law* under Art. 14, Sec. 1 of the federal constitution.

In Wisconsin we have a statutory provision requiring foreign corporations to pay a filing fee[3] and an annual license fee[4] but such fees are levied only on the capital stock *employed or to be employed in this state.*

The Washington statutes provided that the tax should be based on the whole amount of the authorized capital stock. When it is consid-

[11] 80 Wis. 299, 303; 50 N.W. 99.

[1] Sec. 3836 Remington's Compiled Statutes of Washington.

[2] Sec. 3841 Id.

[3] Sec. 226.02 subsection 4, Wis. Stat. of 1927.

[4] Sec. 226.02 subsection 7, Wis. Stat. of 1927.