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Insurance: Presumption of Death After Seven Years' Absence Diligent Search

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unhampered power to convert? In the instant case the court declares that were the federal act construed to give state building and loan associations unrestricted power to convert it would result in a violation of the rights of stockholders and an unauthorized invasion of state rights. However the court, by construing the federal act as permissive only was not required to answer this question.

It is suggested that this act confers power of conversion as does the national banking act. State banks may convert without the consent of the state. *Casey* v. *Galli,* 94 U.S. 673, 24 L.Ed. 168 (1876). The court holds that this federal power applies only to banks; that building and loan associations are not banks. Can it be said that the functions of these two types of corporations are so different, or the control of the state so absolute, as to deny application of this federal power? Is the conversion a sufficiently radical change in the functions and purposes of the corporation to constitute a violation of the rights of stockholders? The building and loan associations are seeking a review of the case before the United States Supreme Court.

RICHARD B. JOHNS.

INSURANCE—PRESUMPTION OF DEATH AFTER SEVEN YEARS ABSENCE—DILIGENT SEARCH.—Plaintiff beneficiary brought an action on three insurance policies issued by the defendant and showed that the insured, her husband, disappeared on his way to work and has not been heard from for over seven years prior to the commencement of this action. The insured had lived in domestic tranquility with his wife, was not a wanderer, and followed an almost invariable daily routine. After ascertaining that the insured did not appear for work on the day of his disappearance, the plaintiff made no inquiry at police headquarters but wrote letters to the insured's mother and sister and received no reply. The defendant appeals from a judgment awarding the plaintiff the face value of the policies and also the premiums paid since the day of the insured's disappearance on the ground that there was no showing of diligent search to discover the death or whereabouts of the insured. *Held,* the evidence is sufficient to establish the inference that the insured died on the day of his disappearance; death will be presumed without a showing of a diligent search. *Delaney* v. *Metropolitan Life Ins. Co.,* (Wis. 1934) 257 N.W. 140.

The first case in Wisconsin on this point involved the presumption of death of one absent for twenty-one years, *Cowan* v. *Lindsay,* 30 Wis. 586 (1872), and Greenleaf's rule that seven years absence without tidings shifts the burden of proof to the party contesting the presumption was regarded as sufficient authority. The inference in the Cowan case, *supra,* that diligent search by the party seeking to establish the presumption is not necessary was followed for some time. *Miller* v. *Sovereign Camp Woodmen of the World,* 140 Wis. 505, 122 N.W. 1126, 133 Am. St. Rep. 1095, 28 L.R.A. (N.S.) 178, (1909); *Page* v. *Modern Woodmen of America,* 162 Wis. 259, 156 N.W. 137, L.R.A. 1916F 438 (1916); *Ewing* v. *Metropolitan Life Ins. Co.,* 191 Wis. 299, 210 N.W. 819 (1926). Following Greenleaf's broad statement of the rule led the court into error in the Ewing case, *supra,* where seven years absence without tidings established death even though the insured left under circumstances indicating that the plaintiff would never hear from her again. The unreasonableness of the holding was recognized in *Hansen* v. *Central Verein, etc.,* 198 Wis. 140, 223 N.W. 571, 64 A.L.R. 1284 (1929) and the rule was qualified by holding that the circumstances attending the absentee's

departure should be considered. This modification was affirmed in *Egger* v. *Northwestern Mutual Life Ins. Co.,* 203 Wis. 329, 234 N.W. 328 (1931), but but neither case mentioned the necessity for diligent search. *Cf. Gardner* v. *Northwestern Mutual Life Insurance Company,* 152 Misc. Rep. 873, 274 N.Y. Supp. 256 (1934).

In the instant case the court admits that the presence of diligent search strengthens the inference but holds that because the presumption is one based on fact the obligation to institute such search can only be imposed upon some ground of policy. It being true that diligent search is but one measuring stick used to determine the sufficiency of the evidence submitted to substantiate the inference, it follows that the omission of the requirement will work no great harm if other standards are used to maintain sufficiently rigid requirements. It is submitted, however, that in the later Wisconsin cases the fact of death has been based on evidence which would not be regarded as sufficient in jurisdictions requiring diligent search. In *White* v. *Brotherhood of Locomotive Firemen,* 165 Wis. 419, 162 N.W. 441 (1917), cessation of correspondence on the part of the insured was held sufficient [*contra*: *Armstrong* v. *Armstrong,* 99 N.J. Eq. 19, 132 Atl. 237 (1926)] and in *Egger* v. *Northwestern Mutual Life Ins. Co., supra,* death was found after seven years absence even though the insured deserted his family and told them he was going to England [*contra*: *Jessie M. Talbot, petitioner,* 250 Mass. 517, 146 N.E. 1 (1925)].

In jurisdictions requiring diligent search the proponent of the inference usually puts forth evidence of soliciting the aid of the police and visiting the morgues, *Wiley* v. *Western and Southern Life Ins. Co., et al.,* 246 Mich. 573, 250 N.W. 313 (1933); or making exhaustive inquiries of those likely to hear of the absentee, *Rodskier* v. *Northwestern Mutual Life Insurance Co.,* 216 Iowa 121, 248 N.W. 295 (1933); and even in some instances, of broadcasting inquiries over the radio, *Fredrickson* v. *Massachusetts Mut. Life Ins. Co.,* 126 Neb. 240, 252 N.W. 802 (1934). None of these means of investigation was employed by the plaintiff in the instant case.

It seems to be decidedly against the weight of reason to go the step further and find the death to have occurred shortly after the time of disappearance on the evidence submitted in the instant case. While there are cases involving practically the same facts and arriving at the same conclusion, generally, they can be distinguished. In *Johnson* v. *Sovereign Camp Woodmen of the World,* 163 Mo. App. 728, 147 S.W. 510 (1912) there was a very diligent search justifying the finding that the insured died shortly after his disappearance. In *Sovereign Camp Woodmen of the World* v. *Piper,* (Tex. Civ. App. 1920) 222 S.W. 649, a statutory provision eliminated the necessity for diligent search.

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MORTGAGES—UPSET PRICE—CONFIRMATION OF SALE.—The defendants, mortgagors of certain real estate purchased for speculation in 1927, defaulted upon an appreciable portion of the interest and all of the taxes after the purchase date, though circumstances indicated an ability to pay. The plaintiff, in meager circumstances and unable to support herself, foreclosed the mortgage, bid the property in at $65 per front foot, moved for confirmation of the sale and a deficiency judgment of $631.56. The trial court, denying the motion, confirmed a sale at an upset price of $75 per front foot and a deficiency of $175. Plaintiff appeals, asserting a wrongful application of equitable powers by the court. On