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## Evidence - Presumptions - Continuing Life During Seven-Year Absence

Douglas Peck S.Ed.  
*University of Michigan Law School*

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EVIDENCE—PRESUMPTIONS—CONTINUING LIFE DURING SEVEN-YEAR ABSENCE—Deceased, a wage earner, disappeared on December 28, 1943, and was unreported for more than seven years. Evidence was conflicting as to whether he had suicidal tendencies. He was adjudged dead in December 1950 by probate court, and plaintiff, as administratrix, filed a claim for monthly social security benefits to which deceased would have been entitled for the period from December 1943 to December 1950. The referee made a finding that deceased died in December 1943. On appeal to the United States District Court from a decision of the Appeals Council of the Federal Security Agency affirming the referee's finding and dismissing plaintiff's claim, *held*, affirmed. Though there may be a presumption that the life of an absentee continues for seven years, there is sufficient circumstantial evidence in this case to overcome the presumption. *Nigro v. Hobby*, (D.C. Neb. 1954) 120 F. Supp. 16.

Any discussion of presumptions requires at the outset an understanding of the particular meaning to be attached to the term "presumption."<sup>1</sup> Accordingly,

<sup>1</sup> For a summary of the various meanings attributed, at one time or another, to the term, see Laughlin, "In Support of the Thayer Theory of Presumptions," 52 MICH. L. REV. 195 (1953).

when used herein the term will have reference to a rule of law which operates to shift the burden of producing evidence on a given issue of fact to the party against whom the rule is invoked.<sup>2</sup> Thus, where a party has established the basic facts of the presumption, the judge must direct a verdict based upon the existence of the presumed fact unless his opponent comes forward with evidence which would support a finding of the non-existence of the presumed fact.<sup>3</sup> Particular care must be taken to distinguish presumption from "permissible inference." The latter goes only to the extent of holding that where a party has established certain facts the jury will be permitted to infer the existence of certain further facts.<sup>4</sup> With this distinction in mind, what presumptions should be recognized where, as in the principal case, a person has disappeared and has been continuously absent for a period of seven years without any information having been received of his whereabouts or existence? It is everywhere agreed that under these facts the missing person is presumed to be dead.<sup>5</sup> Frequently, however, it becomes important to know at what particular time within that seven-year period the missing person died. Two situations can be envisioned: (1) where the plaintiff has the burden of proving that the missing person died before a certain date within the period, and (2) where the plaintiff has the burden of proving that the missing person was alive on a certain date within the period. With regard to the first situation, it is clear that plaintiff has no presumption operating in his favor as to the time of death.<sup>6</sup> Nor is it accurate to speak of any presumption of continuing life operating in favor of the defendant.<sup>7</sup> Since the presumption only shifts the burden of producing evidence, it can, by definition, have no effect where the party against whom it is invoked already has that burden.<sup>8</sup> The principal case, however, falls within the second situation described above, and it is that situation which presents the problem of whether a genuine presumption of continuing life should be recognized. Most of the courts refuse to go that far, and instead allow plaintiff the benefit of only a permissible inference

<sup>2</sup> THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 351 (1898); 9 WIGMORE, EVIDENCE, 3d ed., §2490 (1940). Cf. Morgan, "Some Observations Concerning Presumptions," 44 HARV. L. REV. 906 (1931). The Thayer-Wigmore definition has been incorporated in the Model Code of Evidence, American Law Institute, Model Code of Evidence, Rule 704 (1942). See also, Morgan, "Further Observations on Presumptions," 16 SO. CAL. L. REV. 245 (1943).

<sup>3</sup> *Morris v. Minneapolis*, St. Paul, Sault Ste. Marie R. Co., 25 N.D. 136, 141 N.W. 204 (1913).

<sup>4</sup> *Moroni v. Brawders*, 317 Mass. 48, 57 N.E. (2d) 14 (1944).

<sup>5</sup> 9 WIGMORE, EVIDENCE, 3d ed., §2531(a) (1940), citing cases. The presumption is said to be based on the logical probabilities of the situation and on the procedural expediency of relieving a party from the degree of proof of death which would otherwise be required. Lane, "Presumptions," 22 MICH. L. REV. 207 at 208 (1924). The choice of an arbitrary seven-year period is justified by the necessity of having a definite date when the estate and affairs of the missing person can be wound up and when others can safely act upon the assumption that he is dead. See Morgan, "Some Observations Concerning Presumptions," 44 HARV. L. REV. 906 at 925 (1931).

<sup>6</sup> *Griffin v. Northwestern Mutual Life Ins. Co.*, 250 Mich. 185, 229 N.W. 509 (1930).

<sup>7</sup> See *Lachowicz v. Lechowicz*, 181 Md. 478, 30 A. (2d) 793 (1943), where the term "presumption" is used merely to describe the initial location of the burden of proving death.

<sup>8</sup> 19 MINN. L. REV. 777 (1935).

of continuing life.<sup>9</sup> The principal case, however, seems to give recognition to a genuine presumption that life continues throughout the seven-year period,<sup>10</sup> and there is authority for that position.<sup>11</sup> It is difficult, however, to find any basis upon which the recognition of such a presumption can be justified. It cannot be justified on the ground that it is necessary to avoid any procedural impasse.<sup>12</sup> Nor can it be said that any important social policy is served by the presumption, or that the person relying upon the fact of death within the seven-year period has any greater access to the evidence and therefore should always bear the burden of producing evidence. The most serious objection to such a presumption, however, is that it contradicts what would be the normal balance of probabilities.<sup>13</sup> The presumption of continuing life throughout a seven-year absence, coupled with the presumption of death after that seven-year period, amounts to a presumption that death occurred on the last day of the period. And yet it is highly improbable that death did in fact occur on that particular day. Indeed, the fact of sudden disappearance followed by a seven-year absence without any information would, absent anything more in the case, be far more likely to occur where death came either on the day of disappearance or shortly thereafter.<sup>14</sup> The result which the principal case suggests, then, comes down to this: it is impossible, on the basis of normal probabilities, to presume any particular date within the seven-year period as the date of death. And if the plaintiff has the burden of proving death, no such presumption will be available. But if the plaintiff has the burden of proving life, then he will be aided by a presumption that life continued until the last day. An approach more likely to reach a result in accordance with what actually took place would be to allow each case to turn on its particular facts, giving to the "presumption" of continuing life only the effect of a "permissible inference." Thus, plaintiff in the principal case, having shown life at a previous date within seven years, would get to the jury unless, as would be true in any case, the defendant produced evidence of death sufficient to justify the judge in taking the case from the jury. However, the plaintiff would not receive a favorable directed verdict solely on the basis of his having established that "basic fact" of life at a previous

<sup>9</sup> *State v. Plym*, 43 Minn. 385, 45 N.W. 848 (1890); *Keystone Steel and Wire Co. v. The Industrial Commission*, 289 Ill. 587, 124 N.E. 542 (1919); 19 MINN. L. REV. 777 (1935); 9 WIGMORE, EVIDENCE, 3d ed., §2531 (1940).

<sup>10</sup> The court held the presumption had been rebutted by evidence of the missing person's suicidal tendencies, the indication being that if such evidence had not been present a verdict would have been directed for the plaintiff. Principal case at 19.

<sup>11</sup> *In re Chicago & N.W. Ry. Co.*, (7th Cir. 1943) 138 F. (2d) 753; *Bartley v. Boston and Northern Street Railway Co.*, 198 Mass. 163, 83 N.E. 1093 (1908).

<sup>12</sup> See note 5 *supra*.

<sup>13</sup> 19 MINN. L. REV. 777 (1935); see note 14 *infra*.

<sup>14</sup> In the *Chicago & N.W. Ry. Co.* case, note 11 *supra*, a presumption that the missing person lived throughout the seven years was applied, and defendant was held not to have sustained the burden of proving death within that time even though evidence revealed the deceased was 72 years of age at the time of his disappearance, hard of hearing and in a state of melancholy, and had disappeared after having mistakenly gotten off a train at a small desert town near mountains and canyons.

date. He would have to produce—again, as would be true in any other case—a quantum of evidence that life continued sufficient to justify the judge in taking the case away from the jury.

*Douglas Peck, S.Ed.*