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Case Notes

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CASE NOTES

IS A LEGAL REMEDY, AVAILABLE ONLY IN A FOREIGN JURISDICTION, AN ADAQUATE REMEDY WHICH WILL EXCLUDE EQUITY JURISDICTION?—The case of *Beach et al.* v. *Beach Hotel Corporation*[1] answered this question in the negative. In that case, the plaintiff, Beach, had owned a parcel of land in the city of Bridgeport on which he desired to build a hotel. The Development Service Corporation agreed to erect and finance it for him. Pursuant to this agreement, the Beach Hotel Corporation was organized as a Connecticut corporation, and the Development Service Corporation contracted with the Wark Company, a Pennsylvania corporation, to have the latter build the hotel. The contract with the Wark Company also provided that as soon as the contract between the Wark Company and the defendant hotel corporation should be executed, the Wark Company would subscribe to 1750 shares of preferred and a like amount of shares of common stock in the defendant hotel corporation, and that the first payment of 10% on the subscription should be paid then. The payment was made. The balance of the subscription price was to be called and paid as the construction progressed. No calls were in fact made for this balance. The contract also provided that the development company would maintain a sales organization to sell the stock of the defendant and that the first stock to be sold should be the stock subscribed to by the Wark Company and the payments received should be applied against the subscription of the Wark Company. The development company sold about 731 shares each of common and preferred stock of the defendant and turned over the proceeds to the defendant. A first mortgage was made on the property to help finance the project.

The Wark Company was not paid in full on the contract and filed a mechanic's lien against the building. In the meantime plaintiff and the defendant became insolvent. The mortgage was foreclosed and the Wark Company realized nothing from its lien.

A receiver was appointed for the defendant hotel corporation, and the Wark Company filed its mechanic's lien claim against the receiver. The receiver then filed a cross complaint against the Wark Company for the balance due on the latter's subscription to the defendant corporation's stock. The motion of the Wark Company to strike the cross complaint on the ground that the receiver had an adequate remedy at law on the subscription was overruled by the lower court and the ruling was affirmed by the supreme court, which court said in part: "A failure to give the receiver a remedy in the present equity action would force him to resort to the courts of a foreign jurisdiction for relief.

[1] 117 Conn. 445, 168 A. 785 (1933).

A remedy at law, to exclude equity jurisdiction, must be as complete and beneficial as the relief in equity. 'Adequate remedy at law means a remedy vested in the complainant, to which he may at all times resort, at his option, fully and freely, without let or hindrance.' No legal remedy can be considered as adequate which the plaintiff must go into a foreign jurisdiction to avail himself of. It must be a remedy in our own courts."

The court cited as precedent for its holding the case of *Stanton* v. *Embry*,[2] which was a bill in equity to restrain the enforcement of a judgment obtained in the courts of the District of Columbia. The respondent's intestate had performed professional services in prosecuting a claim for the petitioners against the United States. The claim was collected, and the intestate sued the petitioner for his fee in a court of the District of Columbia and recovered. The respondent then brought an action of debt on the judgment in a Connecticut court. Suit was then brought to restrain the collection of more than $2296.25 of the judgment on the ground that said judgment was obtained by fraud and mistake. The respondent demurred on the ground that the petitioners had an adequate remedy at law in the District of Columbia to correct the judgment. The demurrer was overruled, the court saying: "It is claimed by counsel for the respondent that this right to go into the court which rendered the judgment and ask for a new trial, a remedy which it is claimed is open to the petitioners under the laws of the District of Columbia, is an adequate legal remedy, and that this court can not assume equitable jurisdiction over the matter while the petitioners have this remedy. But no legal remedy can be considered adequate which a party is compelled to go into a foreign jurisdiction to avail himself of. It must be a remedy which our own courts can apply."

The Federal courts have consistently followed this rule and have held that an adequate remedy in the state courts not available in the Federal court will not oust Federal equity jurisdiction.[3] In the case of *Borden's Condensed Milk Company* v.

[2] 46 Conn. 595 (1879). Reversed on other grounds.

[3] National Surety Co. v. State Bank, 120 F. 593 (1903); Cable v. United States Life Ins. Co., 24 S. Ct. 74, 191 U. S. 288, 48 L. Ed. 188 (1903); Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 37 L. Ed. 853 (1893); Chicago B. & Q. R. Co. v. Osborne, 44 S. Ct. 431, 265 U. S. 14, 68 L. Ed. 878 (1924); Chicago & N. W. Ry. Co. v. Eveland 285 F. 425 (1922); St. Louis-San Francisco Ry. Co. v. McElvain, 253 F. 123 (1918); Cleveland Cliffs Iron Co. v. Village of Kinney, 262 F. 980 (1919); Franklin v. Nevada-California Power Co., 264 F. 643 (1920); Clarkson Coal Mining Co. v. United Mine Workers, 23 F. (2d) 208 (1927); North Pacific S. S. Co. v. Industrial Accident Commission, 23 F. (2d) 109 (1928); Wrigley Pharmaceutical Co. v. Cameron, 16 F. (2d) 290 (1926); Standard Oil Co. v. Atlantic Coast Line R. Co., 13 F. (2d) 633 (1926); Nevada-California Power Co. v. Hamilton et al, 235 F. 317 (1916); Chicago & N. W. Ry. Co. v. Railroad & W. Comm. et al., 280 F. 387 (1922); Hill City Ry. Co. v. Youngquist, 32 F. (2d) 819 (1929).

Baker,[4] the complainant, a New Jersey corporation, was extensively engaged in producing, distributing, and selling milk and milk products. It supplied the town of Montclair with milk. Under a general New Jersey statute, the local health board passed an ordinance prohibiting the sale of milk other than that from cows inspected by a state official and found healthy and free from tuberculosis or other disease. The complainant brought suit to enjoin the enforcement of this ordinance on the ground that its business would be ruined and that the act was unconstitutional in that it provided for the taking of property without due process of law. The defense to the bill was that the complainant had an adequate remedy at law in the state court by a writ of certiorari. The court held that a legal remedy in the state courts is no defense to equitable jurisdiction in the Federal courts. The legal remedy to be adequate must be available in the Federal courts. The chancery jurisdiction of a Federal court is similar in extent to the jurisdiction that belonged to the English Chancery in 1789. "Among the cases in which the Chancery exercised jurisdiction were certain controversies for which no adequate remedy existed in the English courts of law. The Chancery did not inquire whether the complainant could obtain redress in a foreign court, but whether an English court of law could fully deal with the situation. So a Federal court of equity, following the chancery precedents, does not inquire about the remedies available in a state court (which for this purpose is a foreign tribunal), but whether a Federal court of law offers an adequate remedy; and this inquiry is confined to the remedies in the Federal courts, no matter how ancient may be the remedies offered by the state. Congress may, of course, change the Federal remedies from time to time; the change may be made by original legislation, or by adopting the remedies of the state; but the test is always whether the remedy under examination is available in the Federal courts. If it is not, its existence does not affect the equitable jurisdiction of the Circuit Court."

In another Federal court case, *Risty* v. *Chicago Rock Island and Pacific Railway Company*,[5] the complainants tried to enjoin the assessment of costs of certain repairs of land drainage works against the complainant's property on the ground that the whole proceedings were invalid. In answer to the defense of adequate remedy in the state courts of South Dakota, the court said: "The remedy by appeal to the state court under section 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the Federal courts, and the test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law

[4] 177 F. 906 (1910).

[5] 270 U. S. 378, 46 S. Ct. 236, 70 L. Ed. 641 (1926).

side of that court and not the inadequacy of the remedies afforded by the state courts."

In a recent case in the Federal courts, *Miller* v. *Union Assur. Soc., Ltd. of London, England,*[6] the complainant insurance company had issued policies of fire insurance on the defendant's home. The policies contained the usual mortgage clause and also a provision avoiding the policy if the hazard were increased by the keeping of gasoline or other explosives on the premises. A loss by fire occurred, and the complainant paid the loss to the mortgagee, whose mortgage was larger than the loss paid. The complainant then brought suit to be subrogated to the rights of the mortgagee and to foreclose the mortgage, on the ground that the policy was avoided as to the mortgagor because he had used or allowed the use of a still on the premises and had kept gasoline and alcohol there. This subrogation was provided for in the policy. The defendant's contention that the complainant had an adequate remedy at law in the state courts was held unavailing because "The remedy at law to be adequate must be a remedy at law in the Federal court where jurisdiction in equity is sought."

There are three old cases in the state courts that hold contrary to the foregoing cases. They are *Tone* v. *Brace,*[7] *Murray* v. *Toland,*[8] and *Birdsall* v. *Fisher.*[9] In *Tone* v. *Brace,* the defendant had been the owner of a New York farm which was subject to a mortgage. He had leased it to the complainant for a term of five years. In the third year while the complainant still had his crops in the ground, the mortgage was foreclosed and the property sold. The complainant was evicted and lost his crop. He had not paid the rent for that year. The defendant in the meantime had moved to Michigan. Afterwards the defendant commenced a suit in New York against the complainant for the rent. The complainant sued to enjoin the proceedings at law on the ground that he, the complainant, had suffered a greater loss than the amount of rent and that defendant was insolvent. In the answer, the defendant denied liability and insolvency and contended that the complainant had an adequate remedy at law. The court dismissed the bill on the latter contention and held that the remedy at law was no less adequate merely because the complainant had to go into another state to avail himself of it. The court said: "In *Murray* v. *Toland,* one of my predecessors in this court refused to interfere, although the defendant against whom the set off was claimed by the complainant resided in Spain. And if the fact that the party was out of the United

[6] 39 F. (2d) 25 (1930).
[7] 8 Paige (N. Y.) 596 (1841).
[8] 3 Johns. Ch. Rep. (N. Y.) 569 (1818).
[9] 17 Minn. 76 (1871).

States was not a sufficient ground for the interference of this court in that case, the residence of Brace in one of our sister states was not alone sufficient to sustain the injunction, upon this bill and answer."

The decision in *Murray* v. *Toland,* on which the judge relied, was based largely on other grounds, and the holding there on the question here considered was not necessary for the decision there. The facts were that the defendant and one Meade, a resident of Spain, owned some tin in about equal proportions. The tin was shipped to the defendant in New York on account of the owners. The defendant sent the invoice to the complainants to sell the goods for him. The complainants sold the goods and then notified the defendant that they would retain the proceeds in part satisfaction of a separate claim of one of the complainants against Meade. The defendant brought an action at law for the proceeds and the complainants brought suit to stay the action at law. The court dismissed the bill, thus disallowing the set-off, on the grounds that in an action between the factor and buyer, it was no defense that the buyer had a separate claim against the principal; that the evidence showed that the claim against Meade had been satisfied; and that it was a claim on a tort, which was unliquidated and therefore not capable of set-off. The court dismissed the contention of the complainant—that he might have difficulty in obtaining satisfaction from Meade who resided in Spain if the money here were not applied against the claim—saying: "The inconvenience of following a party to his place of residence abroad, does not appear to me to be, of itself, a sufficient ground for departing from the settled doctrine of the court." This ruling was not necessary to a decision of the case.

The third case holding that a legal remedy in a foreign court will oust equity jurisdiction is the case of *Birdsall* v. *Fisher.*[10] It is a suit on a promissory note made jointly by the defendants. In the answer the defendant Fisher claimed that the plaintiffs were indebted to him upon another contract and prayed that the contract claim might be set-off in payment, pro tanto, of the note. He asked the set-off as an equity, because he had no available legal remedy in this state against the plaintiffs, who were non-residents, had no property here, and could not be served here. Was this such an equity that a separate bill could have been brought for it? If so, it could be set-off in this action under the practice act of this state, Minnesota. The court disallowed the set-off on the grounds that a separate debt could not be set-off against a joint debt and that Fisher did not show that he had not an adequate remedy at law. "There is no allegation of plaintiffs' insolvency, and no reason to suppose that Fisher may

[10] 17 Minn. 76 (1871).

not have a remedy at law in the courts of the state of New York, where he alleges that plaintiffs reside. And to constitute an adequate remedy at law, it is not necessary that such remedy should be attainable within the jurisdiction where the defendant resides, or where suit is brought against him." The judge here cited *Murray* v. *Toland* and *Tone* v. *Brace.*

Thus, of these three cases, denying equity jurisdiction where there is an adequate remedy at law in a foreign jurisdiction, two rely altogether on the third, and the other, *Murray* v. *Toland,* in passing on this question, made a ruling not necessary for the decision of the case. Therefore, the three cases are a weak authority on this question.

Aside from those in the Federal courts, there are not many decisions that pass on the point of this review. Yet the doctrine that a legal remedy to be adequate must be available in the same jurisdiction was recognized as far back as Lord Hardwicke's time, who in the case of *Shish* v. *Foster,*[11] in 1747, mentions, without citing, the case of *Jacobson* v. *Hans Towns (or Merchants of Almaign)* wherein, he says, the lessor brought an action of ejectment against Jacobson, the lessee. The lessee had no defense to the ejectment but brought a bill in equity to stay the ejectment until he, the lessee, could get satisfaction against the lessor on another claim. The relief was granted, "Not that he had any real lien on the estate; but from the difficulty of his getting satisfaction if his estate was taken from him, as they were a corporation residing beyond the sea."

From the cases herein reviewed, by the weight of authority, a legal remedy available to the plaintiff only in a foreign jurisdiction is not an adequate remedy which will exclude equity jurisdiction in the forum.[12] Such a doctrine is sound—how can a remedy be as certain, clear, complete, prompt and efficient as the remedy in equity if the complainant is forced to go into a foreign jurisdiction to obtain it!

J. BOUCEK

PRESUMPTION OF DEATH AFTER SEVEN YEARS' ABSENCE AS FULFILLING THE CONDITION OF DEATH IN LIFE INSURANCE POLICY.—Where the insured has been absent and unheard from for more than seven years under such circumstances that his death cannot be inferred, will the insurance company be liable in a

[11] 1 Ves. Sr. 88, 27 Eng. Rep. 909.

[12] Vicksburg S. & P. Ry. Co. v. Schaff, 5 F. (2d) 610 (1925); City Ry. Co. v. Beard, 283 F. 313 (1922); Schwab v. City of St. Louis, 310 Mo. 116, 274 S. W. 1058 (1925); J. P. Duffy Co. v. Todebush, 173 App. Div. 205, 159 N.Y.S. 299 (1916); Pearson v. Richards, 106 Or. 78, 211 P. 167 (1922); Blackstone Hall Co. v. Rhode Island Hospital Trust Co., 39 R. I. 69, 97 A. 484 (1916); Jones v. Stearns, 97 Vt. 37, 122 A. 116 (1923); People v. Bordeaux, 242 Ill. 327, 89 N. E. 971 (1909); Sumner v. Staton, 151 N. C. 198, 65 S. E. 902 (1909).

suit brought on a life insurance policy? This question arose in *Wilson* v. *Prudential Insurance Company of America.*[1] Wilson, a man of thirty-eight years of age, left his wife and his home town of Pownal, Maine, and departed with another woman. At Lynn, Massachusetts, he sold his mortgaged car. Later, the deserted wife received a letter from the other woman from Los Angeles, saying she had not seen the husband since leaving Lynn, but that he had said he was going to Canada. The wife investigated, but without success, and, after seven years, brought suit on the policies insuring Wilson's life. The court held that no presumption arose—the leaving was explained.

In most jurisdictions in this country the common law rule, or a statute declaratory of and embodying the principle stated by such rule is in effect. Those states having such a statute have liberally construed it, so that it may be considered on the same basis as the common law rule. The rule is said to be that a presumption of death arises from an unexplained absence of seven years if reasonable efforts to learn the person's whereabouts are made.[2] The presumption of death from unexplained absence is not, however, a presumption of law, but a mixed presumption of law and fact, which may be rebutted, and it will not be indulged when the circumstances of the case are such as to account for the absence of the person without assuming his death.[3]

To this latter rule there are many exceptions. Two hypothetical cases at opposite ends of the rule will help to illustrate. A man has committed a crime and leaves his home physically well, and is never again heard from. A man with no troubles, a good home, loving wife and family, and a satisfactory income suddenly disappears and is never again heard from.

In the first hypothetical case the best written opinions recognize that not only is the presumption of death from seven years' unexplained absence rebuttable, but also in certain cases sufficient evidence is not adduced to cause the presumption to arise. That seems to be the view of the Federal Circuit Court of Appeals for the District of Nebraska, where it was held that where a man who commits a heinous crime flees in full vigor of health and is not heard from, the presumption of life's ceasing within seven years is absent, and, on the contrary there is an inference of life after that period.[4] Now, by that expression is not meant that under those circumstances the presumption of death is rebutted, but rather that sufficient facts and circumstances have not been adduced even to raise the presumption. By a reference

[1] 166 A. 57 (Me., 1933).

[2] Thetford v. Modern Woodmen of America, 273 S. W. 666 (Tex. Civ. App., 1925); 17 C. J. 1167; 8 R. C. L. 708.

[3] 17 C. J. 1167.

[4] Northwestern Mut. Life Ins. Co. v. Stevens, 71 F. 258 (1895).

to the common law rule we note the word "unexplained," which is always included in the rule. Bouvier states the rule to be: "Persons who have been once shown to have been in life are always presumed thus to continue, until the contrary is shown; . . . But proof of long continued absence unheard from and unexplained will lay a foundation for a presumption of death."[5]

In the hypothetical question first referred to, the crime was committed by a man, who was healthy when he disappeared. In this case we see that there are two facts which are adverse to allowing a presumption of death to arise. First, the fact that a crime was committed explains the initial departure, as the man is a fugitive from justice. Second, the fact that he was in good health makes a situation harmonious only with a presumption of life. So, on principle, where a man disappears for good cause, in good health, no presumption of death in any length of time should arise from these bare facts.

In a well written opinion, Circuit Judge Hickenlooper, in the case of *Equitable Life Assurance Society of the United States* v. *Sieg*,[6] concurs in the foregoing principle. The facts in that case are briefly that the assured was short in his accounts with his employer in a large sum of money; when he left hurriedly, he was in good health, except for a little ear trouble, and was not seen or heard from in seven years. These facts, as will be seen, are squarely in point with the hypothetical case. Judge Hickenlooper thus states the law: "In the present case the presumption is that of death of the insured. It is created or arises only when unexplained absence of seven years, without tidings, has been 'established.' This fact may be taken as established where it is conceded by the defendant, where no reasonable juror could conclude otherwise, or where the evidence offered by the plaintiff to sustain the contention is credited by the jury; but, clearly, the burden of proving such fundamental facts remains always with the party in whose favor the presumption operates. If substantial evidence be offered tending to rebut the facts upon which the presumption is founded, the issue 'is at large on the proofs,' and if the party in whose favor the presumption is claimed does not sustain the burden of proof resting upon him, to prove these facts by a preponderance of the evidence, the presumption is not overcome or rebutted—it simply has never been created." Hence plaintiff had the burden of proving all elements to sustain the presumption, and as the reason for leaving was apparent, some other facts were needed to offset this, or no presumption arose.

Similar is the case of *Petition of Talbot*,[7] where a married man, who after nineteen years of married life, not all blissful, but

[5] Law Dictionary (8th ed.), p. 776.
[6] 53 F. (2d) 318 (1931).
[7] 250 Mass. 517, 146 N. E. 1 (1925).

with no open breach, left with another woman, and gave his wife a power of attorney, all his property including a good business, with the exception of some ready cash, saying he was going to start anew. The court stated that here no circumstances were shown to raise a presumption of death, but plenty of evidence to further the presumption of life.

Again in *Thetford* v. *Modern Woodmen of America*,[8] we have a case where an explained disappearance barred recovery. Thetford, a young man of twenty-one years of age and in excellent health, was indicted for forgery and disappeared. Some evidence was adduced to show that a private in the army had recognized him because of a slight limp, but this was not considered as controlling. The presumption of death under these facts was rejected.

The foregoing cases have been examples of explained absences. In the case of unexplained absence for seven years, the courts have almost without exception held a presumption of death to arise. But the evidence of unexplained absence is not always as conclusive as that in our second hypothetical case.

In *Policemen's Benevolent Association of Chicago* v. *Ryce*,[9] a policeman, one of five hundred, was discharged for political reasons, and the evidence shows that he had previously been discharged and rehired. He disappeared in good health and without any apparent reason. He had relatives in four parts of Chicago, in Wisconsin and in Ireland. Inquiry was directed by these relatives everywhere without result, and after seven years of absence he was presumed dead, and his heirs recovered. Here one might say his discharge made him despondent, and hence he might have committed suicide, but his previous discharge, his good health and spirits combine to overcome this possibility.

Another Illinois case[10] is still stronger. Kennedy, a farmer living in Tuscola, Illinois, happily married and the father of six children, left his home to go to Champaign to pay the rent on the farm. He had two hundred dollars with him for that purpose. He was never again heard from, although the defense offered evidence that he was seen in Salt Lake City, but such evidence was sufficiently rebutted by evidence showing the lack of reputation for truth and veracity of the person claiming to have seen him in the West. The case went to the jury, who allowed a recovery.

In *Prudential Insurance Company of America* v. *Gatz*,[11] Gatz and his wife, residents of Kentucky, bought a saloon in Indianapolis, Indiana, where they moved. Shortly afterward, while

[8] 273 S. W. 666 (Tex. Civ. App., 1925).
[9] 213 Ill. 9 (1904).
[10] Kennedy v. Modern Woodmen of America, 243 Ill. 560 (1910).
[11] 188 Ky. 218, 206 S. W. 299 (1918).

things were going satisfactorily, Gatz said to a friend, "Goodbye, Studor, you will never see me any more." Studor went and told the wife of the occurrence within an hour, and although the police and others searched everywhere, no trace of him was ever discovered. The wife removed to Kentucky and after seven years brought a successful action against the insurance company. The absence here was unexplained, yet possibly Gatz intended to desert or feared death or foul play, but in the eyes of the law the absence was sufficiently unexplained to raise a presumption of death where there was no evidence rebutting these facts.

The case of *Metropolitan Life Insurance Company* v. *Fry*[12] states even less facts to support a presumption. Fry, soon after being married and while he was apparently happy, at twenty-one years of age, disappeared while out selling insurance. His father investigated thoroughly, but no trace of him was found. The premiums were kept up on the policy and after five years (the common law period was changed by statute) the father recovered. The wife, meanwhile, had divorced the lad on grounds of desertion.

In *Ledger* v. *Northwestern Mutual Life Insurance Company*,[13] the plaintiff was the wife of a man who left his home in Detroit by bus to go to Cincinnati on business, and after arriving there wrote a postcard as follows: "Dear Mary: I will not be home until Saturday morning. I am getting two more machines to sell. Regard to all. Jos." No further trace of him was found, yet his relatives, his wife and the insurance company searched diligently. Two years after the disappearance, the wife secured a divorce on the grounds of cruelty, and the defendant sought to set this up as an estoppel, but the court held that it only went to the credibility of her testimony, and where this was supported by her son, whom the jury believed, it was not sufficient to rebut the presumption of death under the circumstances.

In the last five cases mentioned, the absence in each was unexplained; in some it might have been suicide, in others accidental death or desertion, but nothing was shown by way of motive or otherwise to prove directly circumstances from which death could be immediately inferred. These cases all fall within the general common law rule, and in each, sufficient was shown to sustain an unexplained absence without tidings for seven years.

It may now be said that if a person is absent from his home for seven years, without tidings, and the absence is unexplained, he can be presumed to be dead, but that if a plausible reason for his disappearance is presented, the presumption of death either will not arise or will be sufficiently rebutted. The state-

[12] 184 Ark. 23, 41 S. W. (2d) 766 (1931).
[13] 258 Mich. 26, 241 N. W. 803 (1932).

ment appears satisfactory enough, but cases may be found where a sufficient explanation can be given for a disappearance, and yet a recovery is allowed.

In the case of *Donovan, Adm.* v. *Major,*[14] the court allowed recovery for a novel reason. A fifteen year old boy left home because he was dissatisfied, and wanted to go west. Hence, there is an explanation for his disappearance. He and his brother were both heirs of their grandfather, and they both were aware of the fact, because the grandfather bought them clothes, sent them to school, and had told them that whatever he left they were to divide, provided they were twenty-one years of age at the time. After the grandfather's death, suit by the brother was instituted for the disappeared boy's share. The court said that as the boy's death could only be established after seven years, he would then be over twenty-one, and so would get his share, but held that the presumption of death arose, because the lad had knowledge that he was the heir of a rather ample estate, and if alive would have returned to claim it.

A similar case from the standpoint of facts, yet decided for a different reason, is that of *Maley* v. *The Pennsylvania Railroad Company.*[15] Here a father made provision for the division of a savings account among his three children when he should die. His two sons left home within three years of each other and before their father's death. Their destination was unknown except that the elder son had expressed an intention to go west. Their departure from the small Pennsylvania town was probably known to every one in the town. After the father's death, the daughter claimed the entire fund. Neither of the boys had been heard from since his departure. In the case of the elder that was twenty years. A recovery was allowed and the presumption of death indulged in. The fact that the absence was explained in its origin was apparently considered unimportant in view of the long absence without tidings, and the uncertainty of their whereabouts overcame the necessity for making search or inquiry.

Even where more cogent reasons than voluntary desire to leave are shown to explain the absence, a few cases indulge in the presumption of death. Illustrative is the case of *Konieczny* v. *J. Kresse Company.*[16] This is a workmen's compensation case, where a woman claims compensation for her husband's death. The insurance company's defense was that she was not his wife as she had previously been married and never divorced. She replied that such was the case, but that her first husband had been absent for over seven years without tidings. The proof showed that the man was an habitual drunkard, abused his wife,

[14] 253 Ill. 179 (1911).
[15] 258 Pa. 73, 101 A. 911 (1917).
[16] 256 N. Y. S. 275 (1932).

was constantly in trouble, was arrested numerous times for breaches of the peace, and would not work, that he deserted his wife (this is the explanation of his departure) and had never again been heard from. These facts might be sufficient to rebut a presumption of death, but because the husband did not even see or write to his own blood relatives, who also could not find him, the court held he was to be presumed dead. The court apparently considers that a reason for deserting a wife would not be an equally good explanation of an absence without news from his own blood kin. Although we might not be willing to approve the case on this ground, the result was undoubtedly correct and the court might have based its decision on the rule that the presumption of the validity of a ceremonial marriage is stronger than the presumption of the continuation of life.[17]

Probably the largest group of cases where the presumption of death is accepted although the absence be explained is that where tidings are abruptly terminated. The leading case of this group is *Whiting* v. *Nicholl*.[18] The husband left New York in 1842 in disgrace as a trust company defaulter. He carried on a continuous correspondence with his wife for ten years, and during that time had risked his liberty in seeing her three times. On March 21, 1852, she received the last letter from him. From that he did not appear discouraged nor morose, but stated that he was working at hard labor, near Pittstown, Pennsylvania. The wife tried to trace him, but never after saw nor heard from him. The court held that after seven years from the last letter he was presumed dead. This is undoubtedly sound law, as the receiving of the last letter began an unexplained absence equivalent to that under the general rule.

In *Mutual Benefit Life Insurance Company* v. *Martin*,[19] the Whiting case is followed. James Tate, father of the plaintiff was fifty-seven years of age, and treasurer of the State of Kentucky. He had embezzled state funds and left the state a fugitive from justice in March, 1888, and his wife had received letters from him from China, Japan, and later from the State of Washington, until December, 1888, when the last letter was received. All his letters had been optimistic and affectionate, and in his last letter he stated he had a very bad cold. The court held that the presumption of death was a jury question, that the facts were such that it could be implied. The jury found for the plaintiff, but the case was reversed on other grounds.

The case of *Goodier* v. *Mutual Life Insurance Company of New York*,[20] illustrates cases where a recovery is allowed because

[17] See Johnson v. Johnson, 114 Ill. 611 (1885).
[18] 46 Ill. 230 (1867).
[19] 108 Ky. 11, 55 S. W. 694 (1900).
[20] 158 Minn. 1, 196 N. W. 662 (1924).

of the physical condition of the disappeared at the time of the disappearance. An attorney of Utica, New York, had an affectionate and devoted wife and three children; he was highly respected in the community, but became financially involved. He had used his client's trust funds for his own purposes and this was about to be discovered. He was sent to a sanitarium for his health, having suffered from heart and intestinal troubles, and disappeared from the sanitarium. Here the court held that the physical condition of the man made the presumption of death arise in seven years, despite the fact that he left because of his peculations. This doctrine is also followed in *Equitable Life Assurance Society of the United States* v. *James*,[21] and *Axen* v. *Missouri State Life Insurance Company*.[22]

An Iowa case[23] embodies all three reasons for the presumption as given in the foregoing cases. The recovery in this case can be placed on the theory of letters received and correspondence terminated, or on the theory that the man's physical condition at the time of his disappearance was not such as to justify long life, or on the theory that he would continue to write his mother, his own flesh and blood, if alive. Rodskier, the insured, was very happily married and had two children, he was forty-two years of age and had been married eight years. He was the cashier of a bank and was short in his accounts about ten thousand dollars. He admitted his peculations in a letter written the bank from New Orleans, La., in which he said he lost the money in speculation. His wife received the last letter from him on February 14, 1921, and his mother living abroad received a letter also about the same time, stating that he was going to South America, and would write when he arrived there. His health was bad at the time of his departure and just previous thereto he had lost twenty-five pounds in weight. Great effort was exerted to learn of his whereabouts, but it was unavailable. After seven years recovery from the insurance company was allowed. The court stated, "The rule is that a continued and unexplained absence of a person for seven years, notwithstanding efforts of relatives to locate him, creates a jury question on the issue of death even though the original disappearance occurred when the insured was a defaulter to a large amount. The presumption of death from the unexplained absence for over seven years may, of course, be rebutted, and the fact of his being a defaulter may be considered as rebutting evidence." This case most clearly shows that facts and circumstances of an individual case may warrant a recovery even though the person who disappears was a defaulter,

[21] 73 Ind. App. 187, 127 N. E. 11 (1920).

[22] 203 Iowa 555, 213 N. W. 247 (1927).

[23] Rodskier v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., 216 Iowa 121, 248 N. W. 295 (1933).

when friendly but despondent letters received by the family soon after his departure are followed by seven years without tidings, especially where the man was ill at the time of his departure.

The general rule is stated that life is presumed to end at the end of seven years, but there is a long line of cases, known as peril cases, which modify this rule. The modification is made on the theory that the presumption of death is a negative one; that at the end of seven years he is not alive, and at some time during the period he died.[24] Under the rule of the peril cases, a person who goes down with the ship is presumed dead at the time the ship was last seen or would have reached port if still afloat. In *United States* v. *Hayman*,[25] the assured was subjected to epilepsy when he disappeared, and, in an action on a life insurance policy ten years later, this was held sufficient from which to presume death on the day of the disappearance.

In *Brownlee* v. *Mutual Benefit Health and Accident Association*,[26] two men went mountain climbing, and one returned after going through violent storms. It was shown that if a person fell down a crevasse he could never be found dead or alive. The presumption of death arises at once. In *State Life Insurance Company* v. *Sullivan*,[27] a man suffering from hallucinations, whom the doctors said would live about six months, got out of custody and was seen going down to the bay. It was here held that sufficient peril was shown to make the presumption arise on the first day of his disappearance. The rule of the peril cases is simply that if the peril is in fact great enough death can be presumed on the first day of the disappearance.

The conclusion to be drawn is that each case must of necessity be decided upon its own facts. If the disappearance is explained, it must be decided in each case whether there are sufficient facts to sustain the presumption of death despite the strong rebutting force of the explanation. It must be remembered that despite the fact of the explanation, if, in fact, seven years' absence without tidings is shown and due inquiry is made, the case will be a jury question, and recovery generally will be had if any fact or circumstance can be shown from which the probability of death may be inferred. In the principal case, therefore, the court was justified in saying that since the absence was explained in its inception, and since no evidence was given which could be said to give rise to the inference of death, the presumption was rather one of continuation of life than one of death.

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[24] Simon Greenleaf, A Treatise on the Law of Evidence (16th ed.), I, 138.
[25] 62 F. (2d) 118 (1932).
[26] 29 F. (2d) 71 (1928).
[27] 58 F. (2d) 741 (1932).