

SOLDIERS' BONUS: Deceased soldiers' bonus is payable to widow, when.

February 17, 1938

Hon. Lewis M. Means
The Adjutant General
Jefferson City, Missouri



Dear Sir:

We acknowledge receipt of your request for an opinion dated January 24, 1938, which reads as follows:

Re: Harry Breen (Presumably dead)
Missouri Claim #54,236.

It is requested an opinion be furnished this office in the following case:

"The above named veteran served honorably in the United States Army from August 15, 1917 to August 26, 1919. In 1922 he perpetrated an insurance fraud, after he disappeared. His wife returned to Germany where she now resides. Breen was, and is, a fugitive from justice, yet the German courts have ruled that he is legally dead. The widow is now trying to collect his Missouri Soldiers' Bonus.

"If the Veteran proved to be a resident of Missouri from April 6, 1916 to April 6, 1917 and to the date of his enlistment in the Army, would his presumptive widow have a legal claim for the Veteran's State Bonus?"

Article IV, Section 44b of the Missouri Constitution provides for the distribution of soldiers' bonus money, and reads in part as follows:

* * * * The Legislature shall enact such laws as may be necessary to carry into effect this amendment. The wife or husband, child, mother or father, in the order named and none other, of any deceased resident who served honorably in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder if such deceased resident had lived; * * *."

Pursuant to this constitutional amendment, the Legislature has provided in the Laws of Missouri, 1937, page 479, Section 9, as follows:

"It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the adjutant-general on or before December 31, 1938, and at such place or places as the adjutant-general may designate and upon blanks furnished by the adjutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town therein are hereby directed to furnish free of charge, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act, whenever such information is required by the adjutant-general of any

person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the adjutant-general and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

Section 1709, R.S. Missouri, 1929, provides:

"If any person who shall have resided in this state go from and do not return to this state for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

The first question which presents itself is whether or not the State of Missouri is forced to recognize the judgment of the German court that the absentee in question is legally dead, and cannot of its own accord and right, determine this question. The only reason why a state recognizes a decision of a court of a foreign nation as determining a matter is because of comity.

"Comity" has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to the international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws". *Hilton v. Guyot*, 159 U.S. 113; 40 L. Ed. 95.

However, as was pointed out in *Augusta Bank v. Earle*, 13 Peters 519; 10 L. Ed. 274:

"Comity . . . extended to other nations, is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests."

Whether the State of Missouri shall make a voluntary and gratuitous payment of money to an individual is a question in which the state has an interest, so the judgment of the German court is not binding, and the fact of death may be determined from the laws of this state.

In the case of Carter v. Life Insurance Co., 158 Mo. App. 368; 138 S.W. 49, the court construed Section 1709, supra, and said:

"But the presumption of death, which is the one on which the statute operates, only arises when these facts are present: first, residence of the person in this state; second, departure of that person from this state; third, the continued absence of that person from this state for seven successive years, no proof being made that he was alive within that time."

It will be noted one of the facts that must be present before a person is presumed to be dead is that he has departed from this state. Under the facts which you present in your request, the person in question is said to have disappeared, but there is no showing that he has departed from this state. This prerequisite must be shown before the statute, Section 1709, supra, will operate.

It is further pointed out that the person is a fugitive from justice. The question, therefore, presents itself just how the fact that a person is a fugitive from justice affects the presumption of death from absence. In Winter v. Supreme Lodge, K.P., 96 Mo. App. 1; 69 S.W. 662, it appeared that the absentee was a defaulting lodge treasurer. The court held that an instruction that the jury could draw an inference adverse to the presumption of death from the facts surrounding his disappearance was proper.

This seems to be uniform rule, that, the fact that the absentee is a fugitive from justice, although it does not prevent the presumption of death from absence from arising, is admissible in evidence to rebut the presumption of death and it thereupon becomes a question for the jury, taking into consideration all the circumstances. *Ashberry v. Sanders*, 8 Cal. 62; *Kelly v. Felgar*, 71 Ga. 775; *Equitable Life Ins. Co. v. James*, 127 N.E. 11; *Mutual Benefit Life Ins. Co. v. Morton*, 108 Ky. 11; *Van Buren v. Syracuse*, 131 N.Y.S. 345.

Therefore, if the person in question is presumed to be dead under authority of Section 1709, supra, still if he is a fugitive from justice, then the adjutant-general, in determining the persons entitled to payment under the act, may take such fact into consideration in order to rebut such presumption.

However, we point out certain difficulties which might arise if the adjutant-general determines that the absentee is dead, and thereupon pays the bonus to the supposedly deceased's widow. Under Section 44b, Article IV of the Constitution of Missouri, which provides for the soldiers' bonus and which is quoted in part above, the payment of the bonus is to the soldier himself. If such person is deceased, then it is to be given to the "wife or husband, child, mother or father, in the order named". It will be seen that the soldier is the person who is to receive the bonus and it is only when he is dead that any other person has a right to claim this money. If the adjutant-general, in his discretion, determines that the absentee is dead and pays the money to the widow, then if such absentee were to later return, this would abrogate such determination. The soldier's right to the money is primary and takes precedence over the claim of any other person.

This view is brought out in *Grimes v. Miller*, 221 Mo. 636, in which the court said:

"But proof, under proper pleadings, even in a collateral suit, that he was living at the time of the appointment of the administrator, controls and overthrows the prima-facie evidence of his death and establishes that the court had no jurisdiction, and the administrator no authority; and he is not

bound, either by the order appointing the administrator, or by the judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either."

The court said further:

"That it is not competent for a State by a law declaring a judicial determination that a man is dead, made in his absence and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in * * * * * next of kin."

Therefore, the returned soldier could demand his bonus, even though it had been paid to his supposed widow.

CONCLUSION

It is, therefore, the opinion of this department that before the presumption of death of a person because of absence from the state for seven years will arise one of the facts that must be shown is that such person has departed from the state. It is further the opinion of this department that if such a person is a fugitive from justice, then this fact may be taken into consideration in order to rebut the presumption that the absentee is dead because of not being heard of for seven years. It is also the opinion of this department that if the adjutant-general pays the widow of a person who is entitled to a bonus because such person has been absent for seven years and is, therefore, presumed to be dead, if the absentee appears and demands his bonus, then any payment by the adjutant-general to any other person would have been null and void and the absentee would be entitled to payment.

Respectfully submitted,

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APPROVED By:

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