NOTE

A TIME TO PRESUME, A TIME TO DIE

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INTRODUCTION

Whether or not the law provides for a presumption of death is not a question. Articles 390 and 391 of the Civil Code of the Philippines (hereafter referred to as New Civil Code) provide for the presumption. But at what time should an absentee be considered to have died? Whether at the beginning of his disappearance or at the middle or at the end of the requisite period the Code does not provide.

The Court of Appeals, in the case of Judge Advocate General v. Gonzales,[1] attempted to settle this question. More inclined to Anglo American authorities, the Court ruled that the presumption refers only to a presumption of death but not to the presumption of time of death. What therefore is the presumption of time of death? Does the presumption of death carry with it the presumption of time of death?

These then are the problems which this thesis will attempt to solve, principally by clarifying and bringing into prominence the different views and theories on the presumption of time of death and their application under Philippine law.

PRESUMPTION, DEATH AND TIME

A presumption is a rule of law that attaches definite probative value to specific facts or draws a particular inference as to the existence of one fact, not actually known, arising from its usual connection with other particular facts which are known or proved.[2] An inference which com-

* LL. B., ATENEO DE MANILA (1960).
** LL. B., ATENEO DE MANILA (1959).
[1] (CA) 48 O.G. No. 12, 5329 (1952).
[2] 20 Am. Jur. 161-162.

mon sense, enlightened by human knowledge and experience, draws from the connection, relation and coincidence of facts and circumstances with each other.[3]

Presumptions form an important part of the law of evidence. In the trial of an action, the party having the burden of proof upon an issue may be aided in establishing his claim or defense by the operation of a presumption, or expressed in another way, by the probative value which the law attaches to a specific state of facts. A presumption may operate to relieve him of the duty of presenting evidence until his adversary has introduced proof to rebut the presumption.[4]

In legal contemplation, there are two kinds of death: natural and civil.[5] Civil death has been defined as the state of a person who, though possessing natural life, has lost all his civil rights and as to them considered as dead.[6] In its strict common law sense, it strips the person civilly dead of all legal functions.[7] And it affects both persons, natural and juridical. Thus, it has been held that a bankrupt[8] and an insolvent corporation[9] are for many purposes civilly dead.

Natural death, with which we are here concerned, on the other hand has been defined as the termination of life, the state or condition of being dead. It is the cessation of life, beyond the possibility of resuscitation.[10]

The law presumes that a person alive at a given time remains so until the contrary is proved, or in the absence of such proof until a contrary presumption arises.[11] It has been held that until such contrary is shown or presumed, the continuance of life to the common age of man will be assumed.[12] And following the principle of the Roman law, it has been held under the civil law that a person is presumed to be living at the age of 100 years.[13]

In our jurisdiction, the New Civil Code impliedly gives the life expectancy of an individual to be 80 by requiring an absence of only five years for those who disappear at the age of 75.[14]

Death is not presumed from mere absence. By the English common law, death is presumed at the close of a continuous absence abroad for seven years, if during that period nothing is heard from the absentee. Either by statutes or adjudications following the common law, this same

[3] 22 C J. 8.
[4] Fox v. Lavender, 89 Utah 115, 56 P2d 1049 (1936).
[5] Black's Law Dictionary 333.
[6] Re Donnelly, 125 Cal. 417, 58 P 61 (1899).
[7] Avery v. Everett, 110 NY 317, 18 NE 148 (1888).
[8] International Bank v. Sherman, 101 US (L. ed.) 866 (1879).
[9] Graham v. La Crosse & M. R. Co., 102 US (L. ed.) 106 (1880).
[10] Blackstone's New Gould Medical Dictionary 274.
[11] People v. Niccoli, 102 Cal. App. 2d 814, 228 P2d 827 (1951); Howard v. Equitable Life Assur. Soc., 197 Wash. 230, 85 P2d (1938).
[12] Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300 (1857).
[13] Quaker Realty Co. v. Starkey, 136 La. 28, 66 So. 386 (1857).
[14] Art. 390 CIVIL CODE OF THE PHILIPPINES (hereafter referred to as NEW CIVIL CODE).

rule is adopted in the United States, and it is almost universally held that for all legal purposes a person will be presumed dead after his continued and unexplained absence of seven years from his home or place of residence, where there is no intelligence from or concerning him for that period.[15]

In this country, the New Civil Code provides for a two-fold presumption: a presumption based on "ordinary" absence, and another based on "qualified" absence.

Article 390 which provides for the first states:

"After an absence of seven years, it being unknown whether or not the absentee still lives, he shall be presumed dead for all purposes, except for those of succession.

The absentee shall not be presumed dead for the purpose of opening his succession till after an absence of ten years. If he disappeared after the age of seventy-five years, an absence of five years shall be sufficient in order that his succession may be opened."

Article 391 which provides for the second type of presumption says:

"The following shall be presumed dead for all purposes, including the division of the estate among the heirs:

(1) A person on board a vessel lost during a sea voyage or an aeroplane which is missing, who has not been heard of for four years since the loss of the vessel or aeroplane;

(2) A person in the armed forces who has taken part in war, and has been missing for four years;

(3) A person who has been in danger of death under other circumstances and his existence has not been known for four years."

The presumption arising from ordinary absence is generally applied to one absent from home. Thus, in stating the rule, the courts either speak of absence from home[16] or place of residence[17] or usual place of abode or resort.[18] The presumption does not arise unless the absence is from the absentee's place of residence.[19] Even that a person is absent from where his relatives reside, if that is not his own residence, is not enough to satisfy the rule.[20]

To give rise to this presumption, it is not necessary that the absentee removed himself to a place beyond the seas or even to a distant state.[21]

[15] This rule has been adopted by the United States Supreme Court and the following state jurisdictions: California, Colorado, Connecticut, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington and Wisconsin.

[16] Kennedy v. Modern Woodmen, 243 Ill. 560, 90 NE 1084 (1910).

[17] McLaughlin v. Sovereign Camp, 97 Neb. 71, 149 NW 112 (1914).

[18] White v. Prudential Ins. Co., 193 Minn. 263, 258 NW 519 (1935).

[19] Policemen's Benev. Asso. v. Ryce, 213 Ill. 9, 72 NE 764 (1906); Renard v. Bennett, 76 Kan. 848, 93 P 261 (1907).

[20] Heath v. Salisbury Home Teleph. Co., 27 SW2d 31 (1930); White v. Prudential Ins. Co., **supra.**

[21] I JONES, EVIDENCE (4th ed.) 110.

It must be shown, however, that no information has been received from[22] or concerning him during his absence,[23] in the community of his residence[24] or by relatives who would naturally hear from him if he were alive.[25] Mere absence for the requisite period is not alone sufficient to raise the presumption. In fact, although there is authority to the contrary,[26] the generally accepted rule is to require diligent search and inquiry, without result, as to the whereabouts of the absentee to raise the presumption.[27] Thus, it is sometimes stated that the presumption arises from the required absence and *undiscoverable* or *unascertainable* whereabouts of the absentee.[28] The necessary search however need not be made by the person seeking to establish the death himself.[29]

The sufficiency of the search and inquiry is one for the courts to decide.[30] Generally, the search should tap all reasonably patent sources of information under the circumstances of the case,[31] including an inquiry made of persons and at the places where news of the absentee, if living, would most probably be had.[32] Inquiry must be made at his last known domicile, and where he has become estranged from his family and has moved to another town, inquiry at the latter place is not sufficient.[33] However, the persons to be approached, places to be visited, and sources of information to be tapped are only those which a man of ordinary reason and prudence would in the same light deem to be sufficient.[34] Thus, it has been held that the mere failure of the absentee's relatives to track down rumors that he had been seen in different places and to launch a diligent inquiry in such places for him does not preclude the presumption of his death from attaching.[35]

Under the cases of qualified absence enumerated under Article 391, because of the danger of death to which the person missing is exposed, the presumption occurs after a shorter period, that is, four years. And the presumption applies to all purposes, including those of succession. Obviously, the reason is the dangers attending his lost or unknown whereabouts lend more to the certainty of his death than to his chances of survival.

In interpreting Article 391, the opinion has been advanced that the terms "vessel" and "aeroplane" are used generically so that the one will

[22] Anno: 104 Am. St. Rep. 201.

[23] Modern Woodmen v. Ghromley, 41 Okla. 532, 139 P 306 (1914).

[24] 13 Ohio Jur. 371 § 16.

[25] Modern Woodmen v. Ghromley, **supra.**

[26] Malay v. Pennsylvania R. Co., 258 Pa. 73, 101 A 911 (1917).

[27] Modern Woodmen v. White, 70 Colo. 207, 199 P 965 (1921); Modern Woodmen v. Michelin, 101 Okla. 217, 225 P 163 (1924).

[28] Kennedy v. Modern Woodmen, **supra** note 16; Ferris v. American Ins. Union, 245 Mich. 548, 222 NW 744 (1929).

[29] Modern Woodmen v. White, **supra** note 27.

[30] Modern Woodmen v. Michelin, **supra** note 27.

[31] Day v. Day, 216 SC 334, 58 SE2d 83; Re Duncan, 190 SC 211, 2 SE2d 388.

[32] Modern Woodmen v. Ghromley, **supra** note 23.

[33] Marquet v. Aetna L. Ins. Co., 128 Tenn. 213, 159 SW 733 (1913)

[34] Modern Woodmen v. Michelin, **supra** note 27.

[35] Kennedy v. Modern Woodmen, **supra** note 16.

include all seacrafts, but not bancas, and the other, all aircrafts; that the word "war" is used in its ordinary meaning as to include any military operation act of some magnitude, it being essential, however, that the missing person be a member of the armed forces and that he must have disappeared while taking part in the war; and that under danger of death under other circumstances, by way of example, if a person is proved to have been inside a church at the time it was destroyed by an earthquake and was missing after that a presumption of his death will arise 4 years afterwards.[36]

It may not be amiss to state here in passing the view entertained by some that indications of disaster destroy the presumption under this article. The presumption lies only where no danger of actual death is indicated. Thus, according to this opinion, when a plane, for instance, crashes or a vessel sinks or a member of the armed forces is mortally wounded, death will be actual, not presumed. Apparently liberal towards the establishment of the fact of death, this theory includes in the terms "armed forces" non-combatants provided they are within the zone of operation where danger lurks.

An interesting query is whether under the circumstances of danger attending qualified absence, a presumption of death may arise within a shorter period than four years. In the United States, it has been held by one of the state jurisdictions that a statute providing for the presumption of death of an absentee under designated circumstances does not necessarily repeal the common law rule raising a presumption after seven years' absence.[37] Thus, it has been accordingly held that the existence of a statute making the absence of a person unheard of for seven years presumptive evidence of death does not preclude the courts from applying the common law presumption.[38] It would seem, therefore that death may be presumed within a shorter period. It may be shown for instance that the missing person encountered some special peril or came within range of some impending or imminent danger which might reasonably be expected to destroy life,[39] such as exposure to drowning,[40] or murder.[41] The extent of civilization at the time and place of the disappearance may also be proved in the appreciation of the inference to be drawn from the absence.[42]

Of course, if we adopt the liberal opinion adverted to in the paragraph next to the preceding, the conclusion would prevent the presumption and the case becomes an actual death. Precisely adopting and implementing such generous intrepretation, however, it is here submitted that the presumption should be delivered from the yolk of the burden of evidence.

[36] I CAGUIOA, CIVIL LAW (1959 rev. ed.) 433.
[37] Cobble v. Royal Neighbors, 291 Mo. 125, 236 SW 306 (1921).
[38] Modern Woodmen v. Hurford, 193 Ky. 50, 235 SW 24 (1921).
[39] Anno: 34 ALR 1394, s. 61 ALR 1330.
[40] Anno: 34 ALR 1395, s. 61 ALR 1330.
[41] Anno: 34 ALR 1394, 1395, s. 61 ALR 1330.
[42] Modern Woodmen v. Gerdom, 72 Kan. 391, 82 P 1100 (1905).

which is decidedly heavier if the disappearance were treated as an actual death.

In apt summation of the considerations given the foregoing two articles, the statement has been said that in these articles the Code proceeds on the presumption, based on the fact of the lapse of time without news from the absentee, of such a space of time that death must necessarily and reasonably be supposed either for having passed beyond the limits of ordinary duration of human life or for the state of uncertainty having deepened and advanced to such an extent as almost to lend certainty to his non-existence.[43]

The presumption of death arising from continuous and unexplained absence is not conclusive.[44] Evidence to rebut the presumption may be introduced by the party denying the death of the absentee.[45] Such rebuttal evidence may consist of testimony that the absentee returned and was seen alive within the period of his supposed absence,[46] or that he was heard of as living within that time,[47] or that tidings were received from him during that period.[48] His financial condition or the fact that he was a speculator or visionary in his business may also be introduced in rebuttal.[49] Motives for disappearance, such as that the domestic relations of the absentee were unhappy,[50] or that he is a fugitive from justice,[51] or that he deserted to avoid an impending indictment[52] or parental restraints,[53] and other circumstances relating to the character, habits, conditions, affections, attachments, prosperity and other objects in life, which normally control and guide man's activities, are likewise competent.[54]

Juridical personality in natural persons being dependent upon the existence of the individual upon whom it attaches, when the individual ceases necessarily his personality must also be extinguished. All juridical relations he had in life, including those of his agents, are terminated. His juridical capacity is also terminated, and with it all legal rights and obligations which are dependent upon him as an individual, or purely personal to him. Those rights and obligations which are not purely personal are preserved and transmitted to his heirs by succession as enunciated in Articles 776[55] and 777 of the New Civil Code.

[43] II MANRESA 152.
[44] Scott v. McNeal, 154 US 34 (1893).
[45] Simpson v. Simpson, 162 Va. 621, 175 SE 320 (1933).
[46] Modern Woodmen v. Hurford, **supra** note 38.
[47] Anno: 104 Am. St. Rep. 201.
[48] Anno: 23 L. ed. 315.
[49] Anno: 104 Am. St. Rep. 206.
[50] Butler v. Sup. Ct. I.O.F., 53 Wash. 118, 101 P 481 (1909); Anno: 64 ALR 1288.
[51] Thetiord v. Modern Woodmen, 273 SW 666 (1925); see also People v. Niccoli, **supra** note 11.
[52] Goodier v. Mutual L. Ins. Co., 158 Minn. 1, 196 NW 662 (1924).
[53] Anno: 64 ALR 1290.
[54] Anno: 34 ALR 1390, s. 61 ALR 1329.
[55] "The inheritance includes all the property, rights and obligations of a person which are not extinguished by his death."

Those rights are transmitted from the moment of the death of the decedent.[56] Succession is opened by the death of the person from whom the inheritance comes, i.e., the decedent, and from that moment on the rights to the succession are transmitted to the heirs or successors. Thus, the moment of death is the determining factor when the heirs acquire the right to the inheritance, whether such right be pure, conditional or with a term.[57] Once death supervenes, the heirs become the absolute owners of the property of the inheritance subject to the rights and obligations of the ancestor. They may alienate the same even though for the time being the property is placed under administration.[58]

Death under Article 777 includes presumption of death. Hence, if the person from whom the property proceeds has disappeared, and the length of his disappearance amounted to the requisite period, the presumption of death arising from such prolonged absence will apply and his estate may be distributed among his heirs as if he were physically dead. In accordance with our present law, the succession of an absent or missing person may be opened ten years after his disappearance, or five years if he was over seventy-five years of age at that time,[59] or four years if he disappeared under circumstances which would endanger his life.[60] The law presumes him dead after the lapse of these periods. The presumption, however, is of death only. There is no presumption as to the time of death.

Now, as already pointed out, the rights to the succession of a person are transmitted from the moment of his death. Upon this event alone, the heirs immediately succeed to the dominion, ownership and possession of the property of their predecessor.[61] They can deal with the property, whether real or personal, in precisely the same way in which the deceased could have dealt, subject only to the limitations which by law or contract may be imposed upon the deceased himself, without the necessity of a previous judicial declaration of heirship.[62] The fact that the transmission is subject to the claims of administration and the property may be taken from the heirs to satisfy debts and expenses does not prevent the immediate passage of title.[63]

In providing for the extent of the inheritance of a person, the New Civil Code includes not only the property and the transmissible rights and obligations existing at the time of his death, but also those which have accrued since the opening of the succession.[64] It includes all the property,

[56] Art. 777 NEW CIVIL CODE.
[57] I CAGUIOA, CIVIL LAW (1955 ed.) 675.
[58] Id., at 676.
[59] Art. 390 NEW CIVIL CODE.
[60] Art. 391, Id.
[61] Fule v. Fule, 46 Phil. 317 (1924); see also Dais v. CFI, 51 Phil. 396 (1928).
[62] Mirabiles v. Quito, 52 O.G. 6507 (1956).
[63] Quison v. Salud, 12 Phil. 109 (1908).
[64] Art. 781 NEW CIVIL CODE.

rights and obligations which are not extinguished by his death.[65] Hence, the importance of determining the exact time of death to know from what time the heirs are entitled to the inheritance so that the fruits of the same may be properly distributed, and the corresponding obligations assigned and less burdensomely liquidated.

Professor Wigmore[66] lends importance to this pinpointing of time by giving an illustration in this wise:

A's husband, H, went on a journey to Panama in 1925. He had a $5000 life insurance policy in F, a fraternal insurance company. But no money came from him and the policy lapsed in 1926 for failure to pay premium. Nothing more was ever heard again from H. In 1932, after waiting for seven years, A claimed payment from F. The policy provided that proof of death must be furnished within one year after death. Here the presumption would only prove that by 1932 H was dead. But if the jury finds that he died in 1926 when the policy had not yet lapsed, then in 1932 it was too late to file the proof of death and to begin action. On the other hand, if the jury finds that he did not die until 1932, the policy had by that time lapsed, thereby making the claim void.

Another:

D in 1927 deserts his wife W and their child, going off with another woman. No news from them is received, and the family despite inquiry cannot trace them. In 1933 W marries P, and in 1935 some hostile person instigates a prosecution of W for bigamy. The prosecution proves the two marriages. We cannot invoke the presumption of death because by 1933 seven years had not elapsed.

There are also other rights of action transmissible to the heirs which are limited by a period of time and which, if no presumption of time of death is provided therefor, would be practically useless because then there would be no specific point of departure from which to count the prescriptive period. It is doubly important therefore to have a presumptive date of death, not only for purposes of succession but for all other legal purposes, especially where property is involved.

Presumption of Time and Death

Authorities are not agreed as to whether the presumption of death from absence raises any presumption as to the precise time of death of the absentee. There is still another conflict and that is brewed among those who claim the affirmative. Some hold that a person cannot be presumed dead before the expiration of the requisite period and that in the absence of any evidence to the contrary, it will be presumed that he

[65] Art. 776 NEW CIVIL CODE.
[66] STUDENT TEXT, 465.

lived during the entire period.[67] However, at the end of the period the presumption will refer not only to the fact of death, but also to the time of death which, in the absence of any fact, except that of absence without news or having been heard of, is the last day of the period,[68] There being nothing to show the contrary, he will be assumed to be living, and although at the expiration of the required period of absence he will be presumed to be dead, in the absence of evidence upon the subject, such presumption of death will not relate back to the date of his disappearance.[69] This is on the authority that a person once shown to be alive presumptively continues to live until the contrary is proved. Hence, unless it is shown that death occurred prior to the expiration of the number of years required, or some conflicting presumption of continuance of life, the presumption of life would obtain until the full expiration of the period when the contrary presumption of death from the continued absence would arise. While it is true that there is no presumption that death occurred at any time within the duration of the period, equally true is the holding that in the absence of a contravening or controlling presumption, it will be presumed that life continued during the entire period.[70]

According to another authority, the presumption of death carries with it the presumption that death occurred at the beginning of the period.[71] The reason advanced is when a person leaves his home and family and goes abroad, the natural and general presumption is that his family and friends will be from time to time advised of his situation and movements. If this be omitted it naturally raises a suspicion that it is owing to some casualty, which may be death or some minor casualty, as sickness, imprisonment or shipwreck. When the period has elapsed, however, the law presumes that it was occasioned by death, that the ignorance of his existence during the whole period was the consequence of his death. This seems naturally to have relation to the earliest period when his existence became uncertain.[72]

The other theory, which is the majority view, followed both in England and the United States, denies presumption as to the precise time of death. Whether death occurred at the beginning or end of or at any particular time within the period is a matter to be determined from the facts and circumstances of each particular case, the burden of proof resting upon him whose interest it is to fix the time of death.[73] The evidence need not be direct nor positive; it may be indirect or inferential, so long as it makes the fact of death more probable than that of survival at the particular time indicated.[74] That death so happened may be presumed or inferred where it would be contrary to the ordinary course of nature that the absentee should be living at such time.[75] For instance, such a presumption may be warranted by the age, occupation, or prospective journey of the individual,[76] or by circumstances indicating suicide,[77] or by proof of extreme illness,[78] or by a showing that he became exposed to some special peril reasonably expected to destroy life,[79] such as a forest fire,[80] hostile savages,[81] or a fall into a crevasse.[82] In the appreciation of the evidence, it has been declared improper to take into consideration the presumption of death arising at the close of the period.[83] As to the sufficiency of the evidence adduced, the rule is for each case to stand on its own facts.[84]

Students of this school of thought therefore contend that when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what period of time in those years he died. And of all the points of time the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. Here is a rerun of their argument: the presumption that death happened at the last day arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has lapsed. Assume that he was alive on the last day of the seven years and there is nothing extraordinary about his not being heard of on the last day, and then the previous extraordinary lapse of time during which he was not heard of becomes immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems therefore to lead to the conclusion that the death took place some considerable time before the expiration of the period.[85]

Now to the theory of non-presumption of time. Adherents of this view hold that where a party has been absent for seven years without having been heard of, the only presumption then arising is that he is dead; there is no presumption as to the time when death took place, as to whether he died at the beginning or at the middle or at the end of those years. If it is important to anyone to establish the precise time of the absentee's

[67] Ferris v. American Ins. Union, **supra** note 23.
[68] Meyer v. Madreperla, 68 N.J.L. 258, 53 A 477 (1902).
[69] Note 67.
[70] 17 C.J. 1174.
[71] Lord Denman, C.J. in Nepean v. Doe 2 M&W 894.
[72] Naisor v. Brockaway, Rich. Eq. Cas. 449 (SC) (1830).
[73] Howard v. Equitable Life Assur. Soc., **supra** note 11; Anno: 119 ALR 1308.
[74] **Id.**
[75] Sprigg v. Moale, 28 Md. 497, 92 Am. Dec. 698 (1868).
[76] Turner v. Williams, 202 Mass. 500, 89 NE 110 (1909).
[77] Anno: 34 ALR 1398, s. 61 ALR 1332.
[78] Turner v. Williams, **supra** note 76; Anno: 75 ALR 634.
[79] Anno: 34 ALR 1394, s. 61 ALR 1330; 75 ALR 635.
[80] Anno: 34 ALR 1396, s. 61 ALR 1330.
[81] Davie v. Briggs, 97 US (L.ed.) 1086 (1878).
[82] Anno: 61 ALR 1330.
[83] Tyrell v. Prudential Ins. Co., 109 Vt. 6, 192 A 184 (1937).
[84] Kansas City L. Ins. Co. v. Marshall, 84 Colo. 71, 268 P 529 (1928).
[85] Note 71.

death, it is his burden to do so by evidence of some sort beyond the mere lapse of the requisite time.[86] The presumption is only that the person is dead at the end of the seven years; but such presumption does not extend to the death having occurred at the end of, or at any particular time within, that period and leaves it to be judged as a matter of fact according to circumstances which may tend to satisfy the mind that it was at an earlier or later day.[87] This is known as the Anglo-American rule and actually is just another expression of the theory which we have already adverted to as the majority view obtaining in the United States and England.

Passing now upon the different theories discussed, it seems that the Anglo-American rule is most consistent and strongly supported by reason.

In our jurisdiction, the presumption of death arises by virtue of law. Therefore, where the law does not provide for a presumption, courts should neither presume. It is clear that Article 390, as is Article 391, of the New Civil Code provides only for a presumption of death. It does not provide for a presumption of time of death. The law-making body could have easily provided for a presumption of time of death but it did not. It is quite apparent therefore that the legislature did not intend that the presumption of death should include a presumption of time of death.

American decisions are generally agreed that a presumption must rest upon facts proved by direct evidence. It cannot be based upon or inferred from another presumption. Thus it has been declared that whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved; they cannot be presumed. As has been pointedly said, to hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a basis for a further inference or presumption, would be to spin out the chain of presumption into the regions of the barest conjecture. Indeed, statutory provisions in some States require inferences to be founded upon facts legally proved, which requirement necessarily excludes the predicating of an inference on another inference.[88]

Recapitulating then a presumption must be based on facts actually known. To give rise to a presumption it is essential that there be some known fact. An inference or presumption has but one generation; it does not beget its kind but springs from a more solid ancestry. Inevitably, the presumption of time of death some authorities speak of cannot be properly based on the presumption of death. Or on the presumption of continuance of life. In our law the only exception to this rule of non-presumption from presumption is that of a letter duly directed and mailed. The law presumes it to have been received in the regular course of the mail.[89] This

[86] Hancock v. American L. Ins. Co., 62 Mo. 26 (1876).
[87] Anno: 119 ALR 1308.
[88] 20 Am. Jur. 169.
[89] Sec. 69(v) RULE 123.

presumption is an exception because it is based on another presumption, which is that official duty has been regularly performed.[90]

It is not only in England and in the United States that authorities are divided. In this country, the views are likewise divergent.

Mr. Justice J. B. L. Reyes of the Supreme Court is of the opinion that the presumption of death carries with it a presumption of time of death, drawing, however, a distinction between "ordinary" absence and "extraordinary" absence in fixing the time of death. In his view ordinary absence as provided in Article 390 of the New Civil Code, the disappearance being under normal conditions without the idea of danger of death, death is presumed to have occurred at the expiration of the period therein specified. In extraordinary absence as expressed in Article 391, there being circumstances involving great probability of death, the presumption is that the death took place at the time of disappearance.[91] The reason for the latter, it is claimed by supporters of this view, is that the four-year period provided by law is only to confirm the probability of death.

Former Chief Justice Manuel V. Moran, holding the contrary opinion, states that there is no presumption of time of death. If anyone has to establish the precise period during those seven years at which a person died, he must do so by evidence. He can neither rely, on one hand, upon the presumption of death, nor, on the other, upon the presumption of continuance of life.[92] In other words, the presumption relates only to the fact of death. The time of death, whenever it is material, must be subject of a distinct proof. From the circumstances surrounding the absentee's disappearance it might be inferred that his death occurred at the time his life was imperilled or at the time of his disappearance. In either case, proof must be adduced from which to presume, which must be clear and convincing.

On his part, Dr. Arturo M. Tolentino advances the opinion that death is presumed to have taken place on the last day of the period of absence required by law. As to the missing persons mentioned in Article 391, he believes that the presumptive date of death is fixed on the very day of the occurrence of the event from which death is presumed. However, if such date cannot be fixed, the obligation of the court is to determine the middle of the period in which the event could have happened.[93]

Professor Eduardo P. Caguioa follows the Anglo-American rule. He stands on the theory that the presumption of law refers only to the presumption of death but not to the time of death. Hence, after the lapse of the period required by law, the fact of death will be presumed but at what time said person died, there will be no presumption, so that he

[90] Sec. 69(m) RULE 123.
[91] III REYES & PUNO, CIVIL LAW 6.
[92] III MORAN, RULES OF COURT 540.
[93] I TOLENTINO, CIVIL CODE OF THE PHILIPPINES 673-674.

who asserts the time when the person died has the burden of proof. To this rule, however, he makes an exception that when the person disappeared under circumstances of danger to life, as in the case of "qualified" absence, the absentee will be presumed dead at the time of disappearance.[94] As already pointed out in this paper, the Anglo-American rule has been adopted by the Court of Appeals.

Quantum of Evidence

Portions of the topic about to be discussed have already been touched in the earlier pages of this work. But, certainly, the relative importance of essaying the quantum of evidence to be presented, either to rebut the presumption of death or to establish the presumption of life, cannot be over-emphasized. Therefore, if in the course of the succeeding discussion, any repetition occurs it can only be attributed to a tendency to give significance to the matter repeated.

Even in those jurisdictions where the time of death of a person, absent and cannot be found, is presumed to be seven years from the date on which he was last seen or heard of, the person to whose interest it is essential to show death of the absentee before that time may rebut the presumption by showing from facts and circumstances that his death in all probability happened before that day or any particular day between that time and the day he was last heard from.[94a] Evidence to that effect must be clear and convincing and pointing to the time on which it is indicated that death took place.

To raise he presumption of death at any particular time, special facts and circumstances should be shown, reasonably conducing to that end. The evidence need not be direct nor positive, but it must be of such character as to make it more probable that the absentee died at that particular time than that he survived.[95] The court may infer that the absent or missing person died before the expiration of the seven years if it appears that within that period he encountered some special peril or some impending or imminent danger which might reasonably be expected to destroy life.[96] It may be shown that he was last seen in a forest fire,[97] or captured by hostile savages,[98] or that he fell into a crevice,[99] or that he was in a state of extreme illness when last seen or heard of,[100] or exposed to drowning or murder.[101] The age, occupation or prospective journey of the given individual may also warrant the inference that he died within a briefer time.[102] Of course, the probative value to be accorded these particular circumstances will be considered with reference to other facts and circumstances of the case, including those that make for, as well as those which make against, an earlier death.[103] Accordingly, an inference or presumption that the absentee died before the expiration of seven years from his disappearance may be rendered unjustifiable by the circumstances of the particular case, such as the financial condition of the absentee, an impending indictment,[104] or the desertion of his home to avoid parental restraints.[105] In all cases, the burden of showing facts sufficient for an abridgment of the period necessary to raise the presumption of death is on the person claiming a right for the establishment of which the death is essential.[106]

On the evidence of prospective journey, it has been held that where a vessel sets out on a voyage and neither the vessel nor those who went with her are afterwards heard of, the presumption arises, after the utmost limit of time for her to have completed the voyage and for news of her arrival at any commercial port of the world to have been received, that the vessel has been lost and that all on board her have perished.[107] The presumption of death in such case does not rest on the fact alone that the person in question has been absent and unheard from for a specified length of time, but also on the fact that the vessel has not been heard from. And the question is not whether it is impossible that the person may be alive, but whether the circumstances do not present so strong a probability of his death that a court should act thereon.[108] The presumption is strengthened by proof of a storm to which the vessel probably was exposed, and it becomes stronger where it appears affirmatively that the vessel was lost at sea, that nothing has been heard of a particular person who sailed thereon, and that a sufficient time has elapsed to permit the receipt of news of any possible survivors of the disaster.[109]

But there is authority to the effect that the mere fact of going to sea is not, in itself, sufficient to abridge the time necessary to raise a presumption of death. The reason is the dangers of the sea are general, not specific, and that consequently, mere evidence that a person was a passenger upon a vessel, that nothing had been heard of him, the vessel, or the crew for sixteen months, and that the master and the vessel had been given up for lost is not enough.[110] The same conclusion has been

[94] I CAGUIOA, **op. cit. supra** note 36, at 431-2.
[94a] Anno: 34 ALR 1930, s. 61 ALR 1328.
[95] Ligon v. Metropolitan L. Ins. Co., 219 SC 143, 64 SE2d 258.
[96] Note 79.
[97] Note 80.
[98] Note 81.
[99] Note 82.
[100] Anno: 75 ALR 634.
[101] Notes 40 and 41.
[102] Turner v. Williams, **supra** note 76.
[103] Anno: 34 ALR 1397, s. 61 ALR 1331.
[104] Anno: 34 ALR 1397, s. 61 ALR 1331.
[105] Anno: 64 ALR 1290.
[106] Anno: 104 Am. St. Rep. 205.
[107] **Id.**, at 206.
[108] **Id.**, at 207.
[109] Anno: Ann. Cas. 1916B, 71.
[110] Ashbury v. Sanders, **supra** note 12.

reached where the absentee left the vessel at the port where the vessel was stopping, and never returned.[111]

The death of an absent person may also be presumed to have taken place in less than seven years from other facts and circumstances than exposure to a probably fatal danger, where the facts show the improbability or lack of motive of abandoning his home. Such circumstances include the character, habits, conditions, affections, attachments, prosperity, and objects in life of the absentee, which usually control the conduct of men, and in view of which no reasonable explanation can be given for his absence.[112] Again, all these must be connected with the person absent as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period. The time of death cannot be left to conjecture, speculation or guess on the part of the court. It is only where the evidence is sufficient that the court determines the time of death.[113]

To have a better understanding of the above principles as held by the courts of the United States, it may be worthwhile to reproduce below some of the leading cases on the fixing of time of death based on the strength of the facts of each particular case. In the following illustrations the American courts held that the facts and proofs were not sufficient to warrant the fixing of the time of death of an absentee:

(1) Where a person left home and was never seen or heard from afterwards, evidence that he was 53 years of age and in broken health and spirit at the time of his disappearance, that he was destitute and dependent on remittances from his friends for support and had been in the habit of writing frequently before his disappearance and discontinued doing so at the time, these facts were held not sufficient to rebut the legal presumption that he did not die until the last day of the seven years.[114]

(2) A man who was absent for seven years had been suffering from dyspepsia when he went away. He had no children and was not in good terms with his wife. He was insolvent and was being pressed by his creditors. He had been twice poisoned but had apparently recovered therefrom. At the time of his disappearance, he said he was going to leave the country and that he did not know if he would ever return. These facts did not rebut the presumption that he remained alive for seven years after his departure.[115]

(3) One S went away from his home to seek work, leaving his wife and children. Letters were received from him by his wife during the next three weeks, but from that time on nothing was received nor heard from him. His wife wrote to him at his latest address, made inquiries

[111] Anno: 34 ALR 1938, s. 61 ALR 1332.
[112] Anno: 34 ALR 1390, s. 61 ALR 1329.
[113] 25 C.J. 1074.
[114] Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248 (1867).
[115] Reedy v. Millizen, 155 Ill. 636, 40 NE 1028 (1895).

from the postmaster of the place and other persons who have gone from home with him, and search was made also by his brother. The court ruled that there was a presumption of the fact of death, though open to rebuttal, that in that year S was dead.[116]

In the following cases the United States courts held that the facts proved were sufficient to justify the fixing of the date of death of the absentee:

(1) Where one steady in habits, attentive to business, having a fixed and permanent residence and pleasant domestic relations, suddenly disappeared, the circumstances may warrant a finding that his death happened at the time of his disappearance.[117]

(2) Where a person sailed from New York for Liverfool on a steamship in March, and neither he nor the vessel was heard from afterwards, it will be presumed that he died before May.[118]

(3) Where a person sailed on a voyage which at the longest should only require 18 days, and he was never heard from afterwards, it will be presumed that he died within the 18 days.[119]

(4) Where a person has been absent for eight years and it is proved that he frequently declared his intention to commit suicide, a conclusion that his death occurred about the time of his disappearance is warranted.[120]

(5) Where a person, 66 years of age, who has been accustomed to call an executor regularly and frequently for an annuity upon which he was dependent for support, left his home in May, without indicating an intent to be absent, and was never heard from, his physician testifying that when he disappeared he was suffering from an incurable disease from which he could not have survived more than three months, the facts were held sufficient to raise a presumption of his death during the year.[121]

(6) A decedent attempted suicide by jumping from a ferry boat but was arrested. He offered the deck-hand who made the arrest a reward if the latter would allow him to jump overboard. The next day he disappeared and was never heard of thereafter. The court ruled that he will be presumed to have died on or about the day of his disappearance.[122]

As to the sufficiency of the facts from which to presume the fact of death, we have the following:

(1) A youth left his home without giving any intimation of his destination. He was not heard of for more than seven years. It was held that that was adequate proof to presume him dead. No attempt to locate him is necessary.[123]

[116] Stockbridge v. Stockbridge Estate, 145 Mass. 517, 14 NE 928 (1888).
[117] Hancock v. American L. Ins. Co., **supra** note 86.
[118] Oppenheim v. Wolf, 3 Sandf. Ch. 571 (1846).
[119] Gerry v. Post, 13 How. Prac. 118 (1855).
[120] Sheldon v. Ferris, 45 Barb. 124 (NY) 1865).
[121] In re Ackerman, 2 Redf. Sur. 521 (1877).
[122] In re Ketcham's Estate (Sur.) 5 NY Supp. 566 (1889).
[123] McLaughlin v. Sovereign Camp. W. W., **supra** note 17.

(2) A's wife, B, who is searching for him, is on friendly terms with his relatives and keeps in touch with them. They informed her that they have received no tidings from him. Held: B is not bound, in order to establish his death by proof of seven years' absence, to make specific inquiry of his relatives. The information she received from them is sufficient.[124]

(3) Evidence of one witness to the effect that the absentee was a single man who had no near relations in the state and that he had joined the Army and left with it, and evidence of another witness that the general report among the missing person's friends was that he was living and was in the Army were introduced. Ruling: admissible for the purpose of rebutting the presumption arising from the absence.[125]

Presumption of Survivorship

An interesting aspect in the law of presumption of death, bearing on the problem involving the presumption of time of such death, is the presumption of survivorship.

Under the Roman law, there was no presumption that persons who perished in the same disaster all died at once. As between father and son, it was presumed that the latter, if above the age of puberty, outlived the father, and that he died first, if below such age. If all were over sixty-years, it was presumed that the youngest survived, and if under fifteen, then the eldest to have lived the longest. As between the sexes in the same class the presumption was in favor of the male.[126] The Code Napoleon substantially adopted the rule of the civil law.[127] Some jurisdictions in Northern Europe have declared by statute that when two or more persons perish in a common disaster the presumption is that they all died at the same moment. The same rule is said to prevail according to the Mahometan law of India. In Southern Europe the states have followed the rules of the Roman law.[128]

In England and in the United States, excepting those states embodying certain presumptions of survivorship in their codes, the common law doctrine of non-presumption of survivorship is observed.[129] It is generally held that no presumption can be inferred from consideration of age, sex, or physical strength.[130] The case is to be established by evidence, the burden of proof being placed on him who claims survivorship.[131] But it is incorrect to say that at common law there is no presumption at all,

[124] Modern Woodmen v. White, **supra** note 27.
[125] Dowd v. Watson, 105 NC 476, 11 SE 589 (1890).
[126] Anno: 51 LRA 864.
[127] **Ibid.**
[128] **Ibid.**
[129] Re Cruson, 189 Or. 537, 221 P2d (1950).
[130] Colovos v. Gouvas, 269 Ky. 752, 108 SW2d 820 (1937).
[131] Note 129.

for while there is no presumption of survivorship, there is a presumption, recognized for certain purposes, that the persons perishing together died simultaneously.[132]

As to the amount of proof necessary to establish survivorship, the degree is no higher than is required in a civil case.[133] A preponderance of evidence, competent and sufficient under the general rules of evidence in civil cases, meets the requirement.[134]

In the Philippines, the rules on survivorship are found in the New Civil Code and in the Rules of Court.

Under the Civil Code, Article 43 provides.

> If there is a doubt, as between two or more persons who are called to succeed each other, as to which of them died first, whoever alleges the death of one prior to the other, shall prove the same; in the absence of proof, it is presumed that they died at the same time and there shall be no transmission of rights from one to the other.

Section 69(ii) of Rule 123 of the Rules of Court provides:

> When two persons perish in the same calamity, such as wreck, battle, or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, the survivorship is presumed from the probabilities resulting from the strength and age of the sexes, according to the following rules:
>
> (1) If both were under the age of fifteen years, the older is presumed to have survived;
>
> (2) If both were above the age of sixty, the younger is presumed to have survived;
>
> (3) If one be under fifteen and the other above sixty, the former is presumed to have survived;
>
> (4) If both be over fifteen and under sixty, and the sexes be the same, then the older;
>
> (5) If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

Does Article 43 repeal the rule of survivorship under Section 69(ii), Rule 123 of the Rules of Court? asks Professor Caguioa in his text in Civil Law.[135] Answering himself he proceeds: Dean Capistrano categorically states that this article repeals the presumption under the Rules of Court because the presumption is illogical and not true to life. It is submitted, however, that there is no repeal inasmuch as there is no incompatibility between this article and the rules of survivorship in the Rules of Court, and the Rules of Court are not expressly repealed by the Civil Code. In the first place Article 43 is applicable to any cause of death while the Rules of Court are only applicable to calamities such as wreck, battle or conflagration. Secondly, Article 43 is only applicable

[132] Anno: 43 ALR 1348.
[133] Anno: 104 Am. St. Rep. 211
[134] Re Loucks, 160 Cal. 551, 117 P 673 (1911).
[135] I CAGUIOA, **op. cit. supra** note 36, at 70.

when one of two persons who died succeeds the other and is not applicable where there is no question of succession; whereas, the Rules of Court are applicable regardless of whether the dead persons succeed one another or not. Hence, both provisions may stand together.

In any case, neither applies where there are facts known or knowable from which a rational conclusion may be inferred.[136]

There being no repeal as between the two rules obtaining in this country, it seems that we adopted both the Roman law rules and the common law rule, the one expressed in our Civil Code, the other, in our Rules of Court.

But that is not the question. It is, assuming that the missing person comes within the provisions of the two rules of survivorship, or of either, as that itself is sufficient, may such rules be applied in relation to the rules on presumption of death in Articles 390 and 391 of the New Civil Code so as to create a presumption of time of death at an earlier date than as provided in said Articles 390 and 391. The problem may be illustrated in this wise:

(1) Under the Civil Code rule: A and B, father and son, have been missing for seven years. Question: when did they die and who died first?

The same persons sailed for abroad. The ship has been missing for four years. Question: the same:

(2) Under the Rules of Court rule: the same persons disappeared in battle. Question: the same.

A and B, who are not related, are 14 and 61 years old respectively. They disappear in a shipwreck. No news about them is received in four years. Question: the same.

Answering illustrative question (1), first part, applying the rule in the Civil Code, he who asserts the survivorship of A or B must prove so, otherwise both will be presumed to have died simultaneously. Therefore, the presumption under Article 390 will apply, and therefore the answer to the question is A and B are presumed dead simultaneously. Obviously, the same conclusion will be reached as to the second part of question (1). To the main question posed, therefore, the answer is the rule of survivorship under the Civil Code, whether connected with the presumption under Article 390 or with that under Article 391, cannot create an earlier date of death than the periods contemplated therein. Here, therefore, we derive no significance even if the rules of survivorship, on the one hand, and those of presumption of death, on the other, are correlated.

But observe these possibilities if such correlation be granted:

The Rules of Court raise a presumption of survivorship based on age, sex and physical strength. And they apply whether the dead persons succeed one another or not. Parts one and two of question (2) may accordingly be resolved jointly. Relating the rule of survivorship in the

[136] Joaquin v. Navarro, G. R. Nos. L-5426-28, May 29, 1953.

Rules of Court with the various interpretation of the presumption of death, we will have the following possibilities:

(i) Under the opinion advanced by Mr. Justice J. B. L. Reyes, that in ordinary absence the time of death is presumed to be at the end of seven years, and in extraordinary absence, at the time of disappearance, the ages of A and B being placed at 14 and 61 years, respectively, if at the close of seven years A is presumed dead, B will be presumed to have died earlier, and in extraordinary absence, if A is presumed dead upon disappearance, then B would have died even before he disappeared.

(ii) Adopting Chief Justice Manuel V. Moran's view, that there is no legal presumption of time of death, at whatever time A's death is proved to have taken place, B will always be presumed to have died earlier.

(iii) Passing to Dr. Arturo Tolentino's, that in ordinary absence death is presumed to have taken place at the close of seven years, and in extraordinary absence, on the very day of the occurrence of the event from which death is presumed which, if it cannot be fixed, is the middle of the period in which the event could have happened, at whatever time A's death took place, B would alike always presumed to have died earlier.

(iv) Similar conclusions, it is believed, will be arrived at under Professor Edwardo Caguioa's theory.

It is absurd to uphold the conclusion that when the younger person who disappeared is proved or presumed to have died at the time of disappearance, the older is presumed to have died even before he disappeared. Therefore, in the problem whether the rule of survivorship envisioned in the Rules of Court may abridge the presumption of time of death, we shall consider only the portions more consistent with reason. In that light, it is submitted here that certainly correlating the rules of presumption of death under Articles 390 and 391 of the New Civil Code with the rules of survivorship under the Rules of Court, the time of death may be abridged.

There is no more need of digressing here on foreign jurisprudence, for as already pointed out both universal rules, Roman law and Common Law, of survivorship obtain in this country, and foreign holdings parallel ours.

Conclusion

It would seem from the study made that absence or disappearance, characterized by danger reasonably calculated to destroy life, as in those cases enthroned in Article 391 of the New Civil Code, presumes a time of death, which is at the occurrence of such absence or disappearance. Textwriters in this country, as we have seen, are most vocal in their proclamation of the doctrine. Foreign courts are not as outspoken but their holdings definitely move along the same line. When the absence or dis-

appearance is attended by dangerous circumstances, an earlier presumption of time of death takes place. As is the claim of some authorities in this jurisdiction, the lapse of the requisite period merely confirms the probability of death. Consequently, whoever asserts death at any other period has the burden of proof.

We gather from the same authorities that on the presumption of time of death based on ordinary absence, there is a disparity of opinion. In this jurisdiction, however, the Anglo-American rule of non-presumption, espoused by former Chief Justice Moran, and to some extent by Professor Caguioa, and adopted by the Court of Appeals, seems to be the rule.

But for the purpose of this thesis, and consistent with the theory of correlation between the rules of presumption of death, on the one hand, and the rules of survivorship, on the other, which this thesis has advanced, it is submitted here that even the presumption of death based on ordinary absence carries a presumption of time of death which may be earlier than the expiration of the period therein provided by law.

The queries, subject of this thesis, are accordingly answered.

REFERENCE DIGEST

CRIMINAL LAW: "SHOOT TO KILL": ITS MORAL AND LEGAL ASPECTS. — The Fifth of the Ten Commandments of God enjoins man: *"Thou shalt not kill."* The injunction is absolute and imperative. For, *"Vengeance is mine, I will repay, saith the Lord."* Yet, biblical passages may be cited sustaining the morality of taking human life. Thus God said to Noah: *"Whosoever shall shed man's blood, his blood shall be shed; for man was made to the image of God."* And this was the code of justice that the Lord gave to the Israelites when freed under Moses from Egyptian bondage.

Human positive law prohibits the taking of human life. It punishes it as homicide. But it has due regard for the weakness of human nature that it does not oblige a person without fault to fly from an assault by another who by violence or surprise maliciously seeks to take his life or do him great bodily harm. Applied to overcoming resistance to arrest for felony, an officer or a private person may employ such force as may be necessary, even to the extent of taking the life of the felon. The killing, to be justified, however, must be necessary, not merely reasonably necessary. Distinction must also be drawn as to the person making arrest, for a peace officer enjoys wider latitude in overcoming resistance than a civilian.

The superior who issues the "shoot to kill" order answers for all acts within the scope of his order, and his only defense is the legality of said order. The subordinate who executes the order incurs no liability, unless he transcends the bounds of the order or, though acting within its confines, such order shows on its face illegality or want of authority.

The article cites a good amount of illustrative cases, foreign as well as domestic. (Andres T. Quiaoit, *"Shoot to Kill": Its Moral and Legal Aspects*, X THE LAW REVIEW NO. 2, at 125-133 (1959). ₱2.00 at the University of Santo Tomas, Manila. This issue also contains: Bautista Angelo, *The Supreme Court in Relation to Workmen's Compensation Cases;* Andrada, *Amenability of Persons to the Jurisdiction of Courts-Martial.*)

POLITICAL LAW:* AMENABILITY OF PERSONS TO THE JURISDICTION OF COURTS-MARTIAL. — The Jurisdiction of a court-martial is its power to try and determine cases legally referred to it and to impose the punishment within the limits prescribed by law. It

* By the Section Editor.