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Jeanne Louise Carriere

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INTRODUCTION: THE NEED FOR A REGIME OF ABSENT PERSONS

In common parlance, the word "absent" is used to describe one who is not where he is supposed to be. A professor who does not attend a faculty meeting, a student who misses class, and a soldier who has left base without authorization are all absent in the ordinary sense of the term. Legal theory and legislation employ the word in a narrower sense.[1] One who is absent is not at his legal domicile, but he is not just away from home. He has left no clue to his whereabouts, and it is impossible to ascertain whether he is alive or dead. If he could be located anywhere, he would not be absent; nor would he be so if the circumstances of his disappearance could meet the level of persuasion required to prove that he was dead.[2] Planiol points to this uncertainty

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* Associate Professor, Tulane University School of Law. B.A., St. Mary's Dominican College; M.A., Ph.D., University of California at Los Angeles; J.D., Tulane University School of Law. I would like to express my gratitude to Professors A.N. Yiannopoulos, Cynthia Samuel, Thomas Carbonneau, Katherine Spaht, and Kathryn Lorio for their helpful comments and criticisms.

1. Black's Law Dictionary 8 (5th ed. 1979) does not attribute a special technical meaning to the word in common law, despite its creation, through the presumption of death, of rules governing absence. But see Jalet, Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees, 54 Iowa L. Rev. 177 passim (1968) for the use of the words "absence," "absent," and "absentee" in the technical sense. For similar usage in legislation, see La. Civ. Code arts. 47-85.

2. Both the civil and the common law have long accepted proof of death from circumstantial evidence; see, e.g., Boyd v. New England Life Ins. Co., 34 La. Ann. 848, 849 (1882) (holding that death of insured was proved by his disappearance from vessel in the Gulf of Mexico, because "death, like all other facts, may be established by circumstantial evidence"); C. Civ. art. 88 (France):

> The death of any French person who has disappeared in France or outside of France in circumstances of a nature to put his life in danger, when his body has not been able to be found, may be judicially declared at the request of the public prosecutor or of interested parties.
>
> Under the same conditions, the death of any foreigner or stateless person who disappears, either in a territory under French authority, or on board a French vessel or aircraft, or abroad, may be judicially declared if he had his domicile

as the hallmark of the absentee:[3] "According to an expression of Tronchet, and as extraordinary as it may seem, the absentee 'is neither dead nor alive'; in this uncertainty, it cannot be proven that he is dead nor that he is alive. It is, thus, doubt which ever prevails."[4]

The number of these "living dead" in the United States has been estimated at between 60,000 and 100,000.[5] They create a morass of legal problems. Questions may arise concerning the security of transactions with the missing person's estate, such as the disposition of his land,[6] the right to proceeds of insurance policies on his life[7] and pensions,[8]

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or habitual residence in France.

The procedure for the judicial declaration of death is equally applicable when death is certain but the body has not been able to be found.

In common law jurisdictions, disappearance of an individual in circumstances of special peril enables a party to prove the death of the person who vanished without having to rely on the presumption of death based on absence. See, e.g., Davie v. Briggs, 97 U.S. 628, 636 (1878) (death of individual who vanished while passing through hostile Indian territory held to have occurred at that time); In re Frankel's Estate, 196 Misc. 268, 92 N.Y.S.2d 30 (N.Y. Sur. Ct. 1949) (death of Jewish Lithuanian life tenant of trust held to have occurred during Nazi extermination of Jewish inhabitants of Lithuania, between 1941 and 1944).

3. In this article, "absentee," "missing person," and "person who has disappeared" shall be used as synonyms for "absent person." "Absentee" has been used as the English translation for the French absent in the Louisiana Civil Code; see La. Civ. Code arts. 47-85. It also appears in the translation of the French treatise of M. Planiol, Traite elementaire de droit civil, passim (Louisiana State Law Institute trans. 12th ed. 1959). Although, under the Greek Civil Code, an absentee may only be declared a "missing person" by the court after a lapse of either one year if he disappeared "while his life was in danger" or five years "since news of the absentee was last received," the systems which will be examined in this article do not make such a distinction. See Greek Civ. Code arts. 40-41 (Constantine Taliadoros trans. 1982). Napoléon himself applied "disappearance" to situations in which, though no body could be recovered, death was certain; see 1 M. Planiol, supra, § 612 (2), at 370; the present French system declares those who vanish in such circumstances dead. See infra note 2. The terms are used interchangeably in common law jurisdictions; see Jalet, supra note 1, passim.

4. 1 M. Planiol, supra note 3, § 634, at 379-80. See also his definition of "absentee," id. § 611, at 369.

5. The Federal Bureau of Investigation's computer file on missing persons at the National Crime Information Center lists 60,000 reported cases of "regular Americans as absent without logical explanation." The head of the private missing persons agency, Search, Inc., estimates that 100,000 adult Americans are missing. Dean, Disappearing Acts, Los Angeles Times, Sept. 19, 1989, § 5, at 1, col. 4.

6. See, e.g., Martin v. Phillips, 514 So. 2d 338, 341 (Miss. 1987) (detrimental reliance on decree of death of absentee by vendees could prevent return of property on his reappearance).

7. See, e.g., Lord v. Metropolitan Life Ins. Co., 434 So. 2d 1180, 1182 (La. App. 1st Cir. 1983) (rejecting application of presumption of death to award of benefit under life insurance policy).

8. See, e.g., Pierce v. Gervais, 425 So. 2d 922, 924-25 (La. App. 4th Cir. 1983) (refusing to vacate judgment of divorce granted to spouse of soldier missing in Vietnam,

the right to a cause of action,[9] the necessity of providing for his dependents,[10] the marital status of his spouse,[11] the paternity and legitimacy of children of his spouse's second marriage,[12] the conservation of his property from possible waste,[13] the devolution of succession rights that would pass to him,[14] the release of property from a life tenancy,[15] the requirement of his consent to certain transactions,[16] the merchantability of land titles from his estate,[17] and claims of inheritance from him.[18]

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resulting in denial of military widow's benefits); 20 C.F.R. § 404.721(b) (1989) (governing payment of social security survivors' benefits to spouses of absentees).

9. See, e.g., Ledet v. State Dept. of Health and Human Resources, 465 So. 2d 98, 101 (La. App. 4th Cir.), writ denied, 468 So. 2d 1211 (1985) (plaintiff whose right of action for wrongful death of sister depended on prior death of absentee mother could rely on presumption of death based on absence).

10. See, e.g., Germain v. Germain, 31 Misc. 2d 401, 220 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1961) (sequestering property and income of missing defendant, appointing spouse as receiver to use them for her support).

11. See, e.g., Wells v. Wells, 79 N.J. Super. 388, 191 A.2d 763 (N.J. Super. Ct. App. Div. 1963) (upholding validity of plaintiff's marriage to spouse missing for thirty-three years, and finding second marriage eleven years after spouse disappeared was a nullity); Stewart v. Rogers, 260 N.C. 475, 133 S.E.2d 155 (1963) (upholding validity of second marriage, despite failure of absentee's spouse to wait statutory seven years, because absentee disappeared in life-endangering circumstances); McCaffrey v. Benson, 38 La. Ann. 198 (1886) (finding second marriage a nullity because of pre-existing, undissolved marriage to person who had disappeared); La. Civ. Code art. 80 (repealed by 1938 La. Acts No. 357) (authorizing remarriage of spouse of absentee).

12. See, e.g., Succession of Mitchell, 323 So. 2d 451, 456-57 (La. 1975) (children legitimated by subsequent marriage of their biological parents, despite possibility that first husband, an absentee, was alive at the time of their conception and birth).

13. For an enumeration of the steps which might be required to protect the absentee's property, see *Germain*, 220 N.Y.S.2d at 1017.

14. See, e.g., Succession of Butler, 166 La. 224, 117 So. 127 (1928), on rehearing (succession devolves exclusively on coheirs of absentee); Eagle v. Emmet, 4 Brad. 117 (N.Y. Sur. Ct. 1856) (legacy to absentee did not lapse prior to seven years of absence because facts of disappearance did not suggest death).

15. See, e.g., Hanley v. Wadleigh, 88 N.H. 174, 186 A. 505 (1936) (life tenancy of missing person not terminated by his absence, though remaindermen are entitled to damages or forfeiture for his waste of the property).

16. See, e.g., Smith v. Wilson, 10 La. Ann. 255 (1855) (requiring absent co-owner's express assent for him to be responsible for a share of the cost of substantial, but unnecessary, improvements).

17. See, e.g., Saracino v. Kosower Const. Co., 102 N.J. Eq. 230, 140 A. 458 (1928) (plaintiff's title to real property unmerchantable because absentee ancestor in title, though presumed dead, might return).

18. See, e.g., Heirs of Wilson v. Smith, 14 La. Ann. 368 (1859) (denying succession rights to real property of claimants who were unable to identify the absentee owner thereof as the de cujus); Wachovia Bank & Trust Co. v. Deal, 227 N.C. 691, 44 S.E.2d 73 (1947) (denying claim of collaterals to trust estate of absentee, who on the evidence was neither presumed dead nor proven to be without descendants).

The issues raised by absence thus range over many areas of substantive law. To explain the need for special rules to resolve them, commentators sometimes refer to the rights of the absentee as uncertain.[19] However, without a peculiar regime, the rights of the absentee should remain constant, modified only by rules, such as acquisitive prescription, that govern everyone. The principle that the burden of proof of any change in the missing person's rights rests on the one seeking change has been expressed as a presumption of continued life: one in existence is presumed to continue in that state unless his death is proved.[20] Thus the problems raised by his disappearance would be resolved as if he were alive and present but chose to take no action. The results frequently prove undesirable for the absent person, should he return, as well as for others whose own rights are affected by his. For example, in *Pedlahore v. Pedlahore*, immovable property of the absentees was threatened with seizure for unpaid paving fees.[21] The defendants in *DeSena v. Prudential Ins. Co. of America* resisted paying insurance proceeds, owed to an absent beneficiary, to the guardians of his indigent minor children because of the possibility of double liability should he return.[22] Those who own property with the absentee could find themselves with unmarketable title, as the plaintiff in *Bierhorst v. Kelly* did, because of potential claims of ownership by the absent person.[23]

The deleterious effects that would result from ignoring the absence make a regime necessary; the character of absence makes it unique. Though the absentee has been likened to the minor and the interdict,[24] he differs from them in ways that make the systems for administering their property inapplicable to him. The goal of these regimes is to

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19. See, e.g., Note, Property Law: The Estates of Missing Persons, 1966 Duke L.J. 745; Jalet, supra note 1, at 177.

20. A brief history of the presumption of continued life in common law is given in Stone, The Presumption of Death: A Redundant Concept? 44 Mod. L. Rev. 516 (1981). More detail is supplied by the surrogate's court of New York in *Eagle*, 4 Brad. at 118-20. The presumption is there said to have originated in Justinian; see Dig. 7.1.56. The presumption, according to Swinburne, prevented probate of the will of an absent person:

> If it be unknowen whether the testator be living or dead: For as much as some are of the opinion, that every man is presumed to live till he be an hundred yeares olde: it seemeth by this opinion, that the Judge may not in the meane time proceede to the publication of the testament, unlesse there be lawfull proofe, or sufficient prescription for the testators death.

According to a second school of thought, the presumption was that life lasted seventy years. H. Swinburne, A Briefe Treatise of Testaments and Last Willes 223 (1978) (1st ed. 1590). On the presumption of continued life in Louisiana law, see infra text accompanying notes 161-68.

21. 151 La. 288, 91 So. 738 (1922).

22. 117 N.J. Super. 235, 284 A.2d 363 (N.J. Super. Ct. App. Div. 1971).

23. 225 La. 934, 74 So. 2d 168 (1954).

24. C. Demolombe, Traité de l'absence § 1 (3rd ed. 1865).

protect and further the interests of individuals who are present and able to enjoy their estates, but incapacitated from managing them.[25] No incertitude exists as to who should be protected and why. In contrast, whether the absent person is still able to enjoy the rights he obtained when present, whether he has created unknown claims upon his estate, and whether he will return to profit from the protection given to him are mysteries.[26] Hence, the interests of those with rights contingent upon his death compete for consideration with the interests of those—including the absent person—whose rights depend upon his continued life.[27]

The common law and French-influenced civil law reacted differently to the essential characteristic of the absent person. The common law adopted a presumption of death that marked the point at which pro-

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25. See, e.g., La. Civ. Code arts. 418, 404; La. Code Civ. P. arts. 4261-4263; C. Civ. arts. 450, 500 (France).

26. Planiol regarded all three as unlikely: "[M]ost of the questions discussed by commentators are not found in actual practice; most of them suppose that the person who has disappeared returns at a time when he is no longer expected. Now, this case is very rarely encountered. Almost all absentees are persons who have died, but whose date and place of death are not definitely known." 1 M. Planiol, supra note 3, § 613, at 370. The most notorious case of a returning absentee occurred in sixteenth century France. See N. Davis, The Return of Martin Guerre (1983) (imposter assumed identity of man absent for eight years, until exposed by return of absentee). The returning absentee has haunted the common law from the time of the landmark case of Scott v. McNeal, 154 U.S. 34, 14 S. Ct. 1108 (1894) to the present (Martin v. Phillips, 514 So. 2d 338 (Miss. 1987)), but such a situation occurs more often in fiction than in reported cases. See, e.g., A. Dumas, Père, Le Comte de Monte Cristo (avec A. Maquet) (1844-45) (returning absent person assumes new identity, wreaks vengeance on those responsible for his disappearance); Tennyson, Enoch Arden, Complete Poetical Works (1864; Cambridge ed. 1898) (returning formerly shipwrecked absent person does not reveal himself to remarried spouse); My Favorite Wife, dir. Garson Kanin (1940) (formerly shipwrecked absent person returns as husband is about to remarry); The Search for Peter Kerry, Murder, She Wrote (CBS television broadcast, Feb. 5, 1989) (returning amnesiac absent person is suspected of killing individual who induced him to return).

27. In Cunnius v. Reading School District, 198 U.S. 458, 25 S. Ct. 721 (1905), the Court, translating from the treatise of Demolombe, enumerated the interests which the government has the power to protect in establishing laws governing absent persons:

> Three characters of interest invoke a necessity for legislation concerning this difficult and important subject. First. The interest of the person himself who has disappeared. . . . Second. The duty of the lawmaker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. Third. Finally, the general interest of society which may require that property does not remain abandoned without some one representing it and without an owner. . . .

Id. at 470-71 (quoting C. Demolombe, supra note 24, § 1). Demolombe and the Court did not specify, among the interests of third parties, those which depend upon the continued life of the absentee—those of a spouse or children or obligees acquired by the absent person while he is alive in an unknown location. These interests may be classed, for the purposes of this article, with those of the absentee, since both grow out of his ongoing existence.

tection shifted from the interests of the absentee to those of present individuals. In contrast, the original *Code civil des francais* refused to declare the absent person dead, gradually transferring primary protection from him to his presumptive heirs. The present-day Louisiana regime preserves this system. Its operation chronicles case after case of misapplication and evasion. The original regime suffered from excessive realism. It protected, for a lengthy period, one whose existence was problematic, but whose death could not be established, at the expense of those known to be alive. Once the interests of those present predominated, avoidance of the legal fiction of the presumption of death made the extent of their rights uncertain.

This article examines, in Part I, the nature and usefulness of the presumption of death, which the Louisiana regime lacks, and advocates its incorporation. However, incorporation requires its coordination with the regime. Part II examines the present Louisiana scheme to suggest that, along with adoption of the presumption, other changes in the 182-year-old system are called for. The Louisiana State Law Institute has proposed a thorough revision of the title on absentees that would streamline its unwieldy and protracted stages of protection of the absentee. The proposal combines the advantages of the legal presumption of death at common law with those of a comprehensive regime in order to preserve the rights of both the presumed heirs and the "living dead."

I. The Presumption of Death

A. The Common Law and Common Law Jurisdictions

The salient contribution of the common law to regulation of absent persons' interests, the presumption of death based on absence for a period of years,[28] appears in almost all common law states.[29] While some rely solely on the common law presumption,[30] most have embodied it in a statute, either individual[31] or adapted from the Uniform Probate

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28. In *Cunnius*, while arguing for the right of the state to regulate the estates of absentees, the Court traced the regimes existing under Roman, French, Louisiana and common law. *Cunnius*, 198 U.S. at 469-71, 21 S. Ct. at 724-25. The sole feature of the latter was the presumption of death: "[T]he very fact of the presumption occasioned by absence . . . was a manifestation of the power to give legal effect to the status arising from absence." Id. at 471, 25 S. Ct. at 725.

29. For a discussion of the rejection of the presumption of death, see infra text accompanying notes 79-91.

30. For example, Wisconsin left intact its non-statutory common law presumption. See Comment, Absentee's Property Act, 1942 Wis. L. Rev. 282-83.

31. See, e.g., Ark. Stat. Ann. § 16-40-105 (1987) (5 years); Cal. Evidence Code § 667 (Deering 1986) (5 years); Ind. Code Ann. § 29-2-5-1 (Burns Supp. 1988) (5 years); Miss. Code Ann. § 13-1-23 (1972) (7 years).

Code.[32] The presumption establishes a valuable transition point after which the absent person is treated as legally dead and his personal and property rights ordered accordingly.

1. Elements and Nature of the Presumption

The requirements to establish the presumption of death have been succinctly summarized by Wigmore: "It is generally said to arise from the fact of the person's *continuous absence from home*, traditionally *for seven years*, modernly for five years, *unheard of* by the persons who would naturally have received news from the absentee."[33] The argument has recently been made that, in Great Britain, the legal presumption now signifies merely strong circumstantial evidence of death.[34] In the United States, the category into which the presumption falls varies among the common law states. Some state statutes specify that the presumption is one of law,[35] and some state courts have so interpreted their statutes if the nature of the presumption is unspecified.[36] However, in some jurisdictions the presumption has been regarded as one of fact or as a mixed presumption of fact and law.[37]

Whether the presumption of death is treated as a legal presumption or as something else determines its usefulness in ordering the affairs of

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32. The Uniform Probate Code provides for a presumption of death after five years' absence; Unif. Probate Code § 1-107(3), 8 U.L.A. 28 (1987). However, the time period has been altered in some of the fifteen states that have adopted the code section. Some states have returned to the traditional seven years; see, e.g., N.D. Cent. Code § 30.1-01-04 (1981). Minnesota has shortened the period to four years; see Minn. Stat. Ann. §§ 524.1-107(3) and 576.141 (West Supp. 1988).

33. 9 J. Wigmore, Evidence in Trials at Common Law § 2531a, at 462 (Chadbourn rev. 1981).

34. Stone, supra note 20, at 524.

35. See, e.g., W. Va. Code § 44-9-1 (1982) (person absent and unheard of for seven years is "presumed in law to be dead"); cf. Stump v. New York Life Ins. Co., 114 F.2d 214, 216 (4th Cir. 1940).

36. See, e.g., Va. Code § 64.1-105 (1987) and Metropolitan Life Ins. Co. v. Goodwin, 92 F.2d 274, 276 (1937); Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934).

37. See *Stump*, 114 F.2d at 216 and the cases cited therein. The Uniform Probate Code does not specify whether the presumption in § 1-107 (4) (1987) is a presumption of law or of fact; because § 1-107 declares that "the rules of evidence in courts of general jurisdiction . . . are applicable unless specifically displaced by the Code," each state which has adopted the code would apply its rule concerning the presumption. However, in 1987, § 1-107 was amended to add § 1-107 (3), which provides for establishing the fact of death by clear and convincing evidence, including circumstantial evidence. If absence were merely circumstantial evidence of death, it would have been unnecessary to retain the presumption, which appears as § 1-107 (4), and to which the language was added: "a person whose death is not established under the preceding subparagraphs." The drafters apparently regarded the presumption as a method of establishing death distinct from inference.

absent persons. A legal presumption, according to a number of commentators on evidence, is a rule that dictates that the establishment of the basic fact—in this instance, a set number of years of absence—is sufficient to satisfy the burden of producing evidence of another, presumed fact—in this instance, death of the absent individual.[38] A distinction exists between a presumed fact and an inferred one. As McCormick observed, "Inferences that a trial judge decides may reasonably be drawn from the evidence need no other description, even though the judge relies upon precedent or a statute rather than his own experience in reaching his decision. In most instances, the application of any other label to an inference will only cause confusion."[39] Yet labels such as "permissive presumption" and "presumption of fact" are used to describe such inferences.[40] To add to the confusion, the use of the word presumption alone as a synonym for inference sometimes occurs.[41] But in its origins and in its most useful form, the presumption of death is a legal presumption.

The introduction of the presumption of death on seven years' absence occurred under circumstances indicating that a genuine presumption of law was intended. Lord Ellenborough, in an 1805 case before the King's Bench, traced the origin of the presumption of death to seventeenth-century legislation.[42] The Statute of Bigamy of 1604[43] exempted

> any Person or Persons whose Husband or Wife shall be continually remaining beyond the Seas by the Space of seven Years together, or whose Husband or Wife shall absent him or herself the one from the other by the Space of seven years together, in any Parts within his Majesty's Dominions, the one of them not knowing the other to be living within that Time.[44]

The absentee's marriage was classed with those that had been dissolved

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38. See, e.g., C. McCormick, Evidence § 342, at 965 (Cleary ed. 1984); 9 J. Wigmore, supra note 33, § 2491, at 288; J. Thayer, Preliminary Treatise on Evidence at the Common Law 317, 321, 326 (1898); E. Morgan, Basic Problems of Evidence 32 (1962).

39. C. McCormick, supra note 38, § 342, at 965.

40. For the term "permissive presumption," see C. McCormick, supra note 38, § 342, nn.9, 11, at 966. Wigmore observed, "The distinction between presumptions 'of law' and presumptions 'of fact' is in truth the distinction between things that are in reality presumptions . . . and things that are not presumptions at all." Supra note 33, § 2491.

41. J. Wigmore, supra note 33, § 2491 n.2, at 288 and accompanying text.

42. Doe d. George v. Jesson, 6 East. 80, 102 Eng. Rep. 1217 (1805). Although the first statute does not state the reason why the spouses of absentees are permitted to remarry after seven years of absence, the second statute contains the characteristics of a legal presumption. See infra text accompanying notes 48-52.

43. An Act to restrain all Person from Marriage until their former Wives and former Husbands be dead, 1 Jac., ch. 11 (1604) [hereinafter Statute of Bigamy of 1604].

44. Id. § II.

because of ecclesiastical divorce or nullity, or lack of consent.[45] This exception, according to Lord Ellenborough, occurred because the absent person was presumed to be dead[46]—death being yet another means by which a first marriage was dissolved.[47]

The second seventeenth-century act of parliament relied on by Lord Ellenborough, the *Cestui qui vie* Act of 1667, explicitly established a legal presumption of death after seven years' absence.[48] The statute, like the Statute of Bigamy, attempted to remedy a specific mischief created by absenteeism: the life tenancy held by one whose existence was dubious. The lessors and reversioners claiming the tenement had been required to prove the absentee life tenant's death.[49] The act reversed the burden of proof if two requirements were fulfilled. First, the life tenant must have been absent in the legal sense: "the Lessors and Reversioners cannot find out whether such Person or Persons be alive or dead," and "no sufficient and evident proof be made of the Lives of such Person or Persons respectively."[50] Second, the absence, either "beyond the seas, or elsewhere," must be for "the Space of seven Years together."[51] In that case, the absent life tenant "shall be accounted as naturally dead; . . . and . . . the Judges before whom such Action [to recover the tenement] shall be brought, shall direct the Jury to give their Verdict as if the Person . . . were dead."[52] The absentee's death in the *Cestui que vie* Act of 1667 was a presumption of law, rather than a fact inferred from absence. The statute shifted the burden to the proponent of the absentee's continued life to prove it, and once the basic fact of

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45. A second proviso insured the protection of participants in these marriages. Id. § III.

46. Doe d. George v. Jesson, 102 Eng. Rep. at 1219. The seriousness with which bigamy was regarded is indicated by the language of the statute, which was passed to prevent the "great Dishonour of God, and utter Undoing of divers honest Mens Children, and others" which bigamy caused; it classified the crime as a felony which drew the death penalty. Statute of Bigamy of 1604 § I.

47. Treitel, The Presumption of Death, 17 Mod. L. Rev. 530, 534 (1954). Treitel takes issue with the statement that the Offences against the Person Act of 1861, which contains a proviso similar to that in the 1604 statute, sanctions a presumption of death after seven years; he maintains that the spouse would only require a defense if the absent person proved to be alive. But Lord Ellenborough is pointing to the legislative motive behind providing that defense, however limited the use of the 1604 statute may have been.

48. An Act for Redress of Inconveniencies by Want of Proof of the Deceases of Persons beyond the Seas or absenting themselves, upon whose Lives Estates do depend, 18-19 Car. 2, ch. 11 (1667) [hereinafter Cestui que vie Act of 1667].

49. "[T]he Lessors and Reversioners when they have brought Actions for the Recovery of their Tenements have been put upon it to prove the Death of their Tenants, when it is almost impossible for them to discover the same." Id. § I.

50. Id. §§ I, II.

51. Id.

52. Id.

absence for seven years was established, the outcome—presumed death—was mandated.

Using these two statutes, Lord Ellenborough, in *Doe d. George v. Jesson*, imported into the common law a "presumption of the duration of life, with respect to persons of whom no account can be given," to determine whether the statute of limitations had run on the action before him.[53] The presumption was that life ended "at the expiration of seven years from the time when they were last known to be living."[54] The statutes could thus be used by analogy to raise the presumption of death after seven years' absence in any situation in which rights were contingent upon an absentee's existence. By 1837, the Chief Justice of the Exchequer Chamber could state, "[W]here a person goes abroad, and is not heard of for seven years, the law presumes in fact that such person is dead."[55]

In sum, the original common law presumption had a functional simplicity.[56] It was raised by seven years of legal absence, either in the realm or abroad. No further facts needed to be advanced. It was a presumption of law, rather than an inference of fact, and thus shifted the burden of proof to the party asserting the absentee's existence, who could no longer rely on the presumption of continued life.[57] Initially, the time of death was set at the termination of the seven years, but as early as *Nepean v. Doe*, in 1837, the time of death within that period was set by the court.[58] After that point, rights that depended in some way upon the absent person were allocated as if he were dead. As long as the absent person did not return to disprove the presumed fact, many of the issues raised by his absence could be resolved by the presumption.[59]

2. *Constitutional Requirements*

In the United States, the presumption of death had to withstand a grave challenge. Administration of the estate of an absentee based on the presumption of death faced the obstacle of unconstitutionality in

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53. Id. The action for ejectment, brought by the sister of a life tenant who had last been seen around 1778, was untimely because she did not bring it within ten years of his presumed death in 1785.

54. Doe d. George v. Jesson, 6 East. 80, 102 Eng. Rep. 1217, 1219 (1805). Not only the death of the absentee, but also the time of death were thus established.

55. Nepean v. Doe, 150 Eng. Rep. 1021, 1028 (1837).

56. For later embellishments of the presumption in Great Britain, see Treitel, supra note 47. Stone believes that these have made it non-functional in that country. Stone, supra note 20, at 525.

57. Stone, supra note 20, at 519.

58. *Nepean*, 150 Eng. Rep. at 1028.

59. See supra notes 6-18 for the problems posed by absence. For a discussion of the application of the presumption of death to resolve these issues, see Jalet, supra note 1, at 181-203.

the landmark nineteenth-century case of *Scott v. McNeal*.[60] The Supreme Court did not quarrel with the presumption of death as a means of administering the property of a missing person, provided he never returned.[61] It held, however, that once he proved to be alive, otherwise legitimate acts became unconstitutional because he had been deprived of property without due process.[62] The probate court lacked jurisdiction, and the absentee lacked notice.[63]

The jurisdictional argument was not original to the United States Supreme Court; fourteen states had earlier used jurisdictional grounds to nullify administrations granted on estates of living persons.[64] Such

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60. 154 U.S. 34, 14 S. Ct. 1108 (1894). The probate court in the territory of Washington had granted letters of administration for Scott's estate seven years after his disappearance on the basis of the presumption of death, the elements of which were fulfilled. A year later, the McNeals bought land from Ward, who had purchased it from Scott's estate; two years after that, Scott returned and brought an action for ejectment. Id. at 34-37, 145 S. Ct. at 1108-10. The United States Supreme Court reversed the Supreme Court of Washington's judgment for the defendants. To uphold an administration based on the presumption, when the absentee either returned or was proved to be alive at the time the administrator was appointed, would be to deprive the absentee of his property without due process, in violation of the Fourteenth Amendment of the United States Constitution. Id. at 50, 14 S. Ct. at 1114. The court appointing the administrator lacked jurisdiction, and the taking was without notice to the absentee:

> [T]he jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called . . . does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive . . . .
>
> As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters, assumes that fact, and is addressed not to him, but to those who after his death may be interested in his estate . . . . Notice to them cannot be notice to him, because all their interests are adverse to his.

Id. at 48-49, 14 S. Ct. at 1113-14. For fuller accounts of the challenge to use of the presumption of death in absentee cases and its defeat, see, e.g., F. Fraenkel, Missing Persons: The Law In the United States and Europe 5-8 (1950); Chaffin, Dispensing with Administration, Estates of Absentees, Simultaneous Death, Appointment and Qualification of Domestic and Foreign Personal Representatives: A Critique of Statutory Requirements, 14 Ga. L. Rev. 681, 685-87 (1980); Hanna, Administration Upon Estates of Persons Presumed to be Dead, 62 U. Pa. L. Rev. 605, 610-14 (1914); Jalet, supra note 18, at 203-14; Lees, Property Rights of Persons Who Have Disappeared, 9 Minn. L. Rev. 89, 89-96 (1925); Note, supra note 19, at 745-47.

61. Justice Gray observed:

> The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death, that the probate court may assume him to be dead and appoint an administrator of his estate.

Scott v. McNeal, 154 U.S. 34, 49-50, 14 S. Ct. 1108, 1113-14.

62. Id. at 48, 14 S. Ct. at 1113.

63. Id. at 48-50, 14 S. Ct. at 1113-14.

64. Id. at 43, 14 S. Ct. at 1111.

nullification required the return of property in the estate to a reappearing absentee.[65] Even innocent third parties who relied on the authority of the administrator in transactions with the estate could not be protected without due process violation.[66] The United States Supreme Court, in invoking the fourteenth amendment, prevented other states[67] from seeing the jurisdictional issue otherwise.

The result of the Court's decision, as well as of earlier state court decisions, could have been to render the common law presumption of death useless as a means of solving the problems confronting family, creditors, and the state on the disappearance of an individual.[68] The common law states were left with no means of settling the estate of an individual who vanished. No reliance could be placed on letters of administration granted after the seven years; because it is the essence of absenteeism that one's status as living or dead is indeterminate,[69] any rights derived from the administration of an absentee's estate likewise became indeterminate. The absentee, though presumptively dead, was actually immortal.

In reaction to the chaos engendered by state and federal decisions, many state legislatures enacted statutes that preserved the presumption of death while solving the two due process problems identified by the

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65. See, e.g., Duncan & Hooper v. Stewart, 25 Ala. 408 (1854) (administrator's sale of slave belonging to an absentee who returned was a nullity); Jochumsen v. Suffolk Sav. Bank, 3 Allen 87 (Mass. 1861) (bank was liable to returned absentee for deposit released to administrator); Moore v. Smith, 11 Rich. 569 (S.C. 1858) (transactions by administrator of estate of absentee held null and void).

66. The Supreme Court adopted the view of the Second Circuit Court of the United States for the Southern District of New York that states could not constitutionally make

> 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 an adminstrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him, although it is done by process of law against other people, his next of kin, to whom notice is given.

Scott v. McNeal, 154 U.S. 34, 50, 14 S. Ct. 1108, 1114.

67. Besides the Supreme Court of Washington, courts in New York and New Jersey had likewise departed from what was at least the plurality rule. See Plume v. Howard Savings Institution, 46 N.J.L. 211 (1884) (withdrawal of deposit by administrator of absentee would bar recovery by absentee should he return); Roderigas v. East River Savings Institution, 63 N.Y. 460 (1875), rev'd on other grounds, 76 N.Y. 316 (1879) (letters of administration issued by surrogate's court were conclusive evidence to bank of her authority to draw out bank deposit, barring recovery by second administratrix appointed after his death).

68. For the problems posed by such a disappearance, see supra text accompanying notes 8-15.

69. See supra text accompanying notes 3-4.

courts. In *Scott*, the Supreme Court had declared that, with the exception of Louisiana,[70] the states had not granted jurisdiction over the estate of a living absent person to their courts, not that they could not.[71] In the landmark case of *Cunnius v. Reading School District*,[72] the United States Supreme Court upheld a Pennsylvania statute empowering the orphans' court to issue letters of administration "as valid as if the supposed decedent were really dead" on the estates of living persons who were absent for seven years.[73] Explicit provisions for notice to the absentee, allowing twelve weeks for him or anyone else to prove that he was still alive, remedied the second due process problem.[74] The loyalty to the presumption of death, in its constitutional form, continues in the absentee legislation of most common law states.[75]

The *Cunnius* court suggested in dicta two further limitations on state power. Due process under the fourteenth amendment would be lacking if the state created "an arbitrary and unreasonable presumption of death resulting from absence for a brief period."[76] Moreover, "if a state law, in providing for the administration of the estate of the absentee, contained no adequate safeguards concerning property, and amounted therefore simply to authorizing the transfer of the property of the absentee to others . . . such a law would be repugnant to the Fourteenth Amendment."[77] Pennsylvania's statute, which required security from the supposed decedent's distributees unless an exception was

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70. The Court approvingly summarized the "careful regulations" contained in La. Civ. Code arts. 47-85, "Of Absentees." Scott v. McNeal, 154 U.S. 34, 42, 14 S. Ct. 1108, 1111. Louisiana's supreme court was among those that had declared void for want of jurisdiction the appointment of an administrator of an absentee's estate; however, the nullity resulted from failure to follow the absentee procedure, not from the inability of the state to provide such administration. See Burns v. Van Loan, 29 La. Ann. 560, 563 (1877).

71. In fact, the approval given to the Louisiana law of absentees indicated that granting such power was within the scope of the states' authority. See Cunnius v. Reading School District, 198 U.S. 458, 473, 25 S. Ct. 721 (1904), where the argument is explicitly made.

72. 198 U.S. 458, 25 S. Ct. 721 (1904) (interest arrearages paid to administrator of absentee's estate could not be recovered by returned absentee).

73. Id. at 459, 25 S. Ct. at 722.

74. Id. at 459, 477, 25 S. Ct. at 722, 727.

75. The statutory presumption of death takes two forms in state legislation; it may be a preservation of the common law presumption of death, or it may have been adopted as part of Uniform Probate Code. For examples of each, see supra, notes 31 and 32.

76. Cunnius v. Reading School District, 198 U.S. 458, 476-77, 25 S. Ct. 721, 727. As Wigmore has pointed out, the seven year presumption of death, approved in this case, is necessarily arbitrary; see infra note 80. Thus, the Court's objection must rest with an arbitrary cut off which is excessively short. How short is too short has never been determined.

77. Id. at 477, 25 S. Ct. at 727.

made by the orphans' court, was considered sufficiently careful of the absentee's property rights.[78]

To escape unconstitutionality, therefore, a legislative act, establishing a presumption of death and relying on the opening of a missing person's succession as the means of determining the rights of others to an absent person's property, must have the following features: the court must have jurisdiction over the property of the individual; notice to the absent person must be attempted; the lapse of time before the presumption can be raised must be reasonable; and finally, some safeguard for the absent person must exist should he return.

3. Other Objections

Despite the constitutional challenge, the presumption has, according to Wigmore, met with "universal acceptance,"[79] yet he himself objected to it as "arbitrary, unpractical, anachronistic, and obstructive."[80] His enmity arose from his belief that seven years was "absurdly long"[81] and that a single presumption was inadequate to deal with the variety of circumstances in which absence occurred and the different legal issues that arose from it.[82] The Uniform Absence as Evidence of Death and Absentees' Property Act, which he proposed as a substitute,[83] would abandon the presumption altogether in favor of a finding of death by a jury.[84] If there is insufficient evidence to find death, the missing person's property would be distributed, and a statute of limitations placed on his ability to make claims against the estate.[85] From an insurance fund created with a portion of each estate so distributed, the court would reimburse the absentee in an amount it considered "fair and adequate" should he return.[86]

Wigmore's tirade against the presumption of death has fallen, for the most part, on deaf legislative ears. Only Tennessee and Wisconsin[87] use the Uniform Act. Moreover, Wisconsin, in adopting it, omitted

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78. Id. at 460, 477, 25 S. Ct. at 722, 727.

79. J. Wigmore, supra note 33, § 2531a, at 464. Wigmore is speaking only of common law, as the full title of his work indicates (Evidence in Trials at Common Law). He points out that the presumption has been rejected in Louisiana as inconsistent with article 70 of the state's civil code. Id., n.1.

80. Id. § 2531b. Later, in the same section, he terms it "outworn and inefficient."

81. Id.

82. Id.

83. Id.

84. Uniform Absence as Evidence of Death and Absentees' Property Act [hereinafter Uniform Act], § 1 (1), 8A U.L.A. 5 (1983).

85. Id. § 6 (2), at 10.

86. Id. § 11, at 13.

87. Tenn. Code Ann. §§ 30-3-101 to 30-3-114 (1984 and Supp. 1989); Wis. Stat. Ann. §§ 813.22-813.34 (West 1977).

Section 1, and thus retained the common law presumption of death.[88] Tennessee initially retained the presumption of death for purposes of distributing absentees' funds and personal property.[89] Maryland, which had adopted the act, repealed it in 1973, but continues to reject the presumption of death.[90] North Carolina has also abandoned the presumption in a statute modeled on the Uniform Act.[91]

One reason that the Uniform Act and its imitators may have met with resistance is that they are no more convenient to apply than the common law presumption. The nature of absence dictates that, in most cases, the date of death of an absentee cannot be established by circumstantial evidence.[92] If evidence suggestive of the missing person's death exists, there is no need to wait for the passage of time required by the presumption to prove it.[93] If seven years have passed, evidence can establish an earlier date of death, for the majority of the jurisdictions have modified Lord Ellenborough's original statement so that only death itself, and not the time of death, is presumed.[94] Even in a state that adheres to the original rule that death is presumed to occur at the end of the period, circumstantial evidence of an earlier death makes the presumption unnecessary.[95]

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88. See Uniform Act, supra note 84, § 1, annotation.

89. See Armstrong v. Pilot Life Ins. Co., 656 S.W.2d 18, 26-27 (Tenn. Ct. App. 1983). This decision has been legislatively overruled; see Tenn. Code Ann. § 30-3-102(c) (Supp. 1989).

90. See "General Statutory Note," Uniform Act, supra note 84, § 1, at 4. For the failure of Maryland to reinstate the presumption of death, see Md. Code Ann. § 3-102 (1984).

91. See N.C. Gen. Stat. § 28C-1 to 28C-22 (1984).

92. See supra text accompanying notes 3-4.

93. See, e.g., Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 22 S. Ct. 662 (1901) (affirming finding of death of insured, whose beneficiary sued one year after disappearance, on circumstantial evidence that he had fallen into Pecos River while camping nearby and drowned); In re Bobrow's Estate, 14 Misc. 2d 816, 179 N.Y.S.2d 742 (N.Y. Sur. Ct. 1958) (finding death of missing woman and granting letters of administration to husband six months after disappearance, on circumstantial evidence that she was in her home when it burned to the ground); Will of Conrad, 109 Misc. 2d 756, 440 N.Y.S.2d 991 (N.Y. Sur. Ct. 1981) (finding death one year after missing person headed in yacht from the Bahamas for West Palm Beach, failed to make radio contact after hitting choppy Gulf Stream, and was never seen again despite extensive search); Skele v. Mutual Benefit Life Ins. Co., 20 Ohio App.3d 213, 485 N.E.2d 770 (Ohio Ct. App. 1984) (affirming finding of death less than a year after disappearance of backpacker when circumstantial evidence indicated he had fallen into "savage" river).

94. Jalet, supra note 1, at 189. This is also the English rule, id. For examples of its application, see supra note 2.

95. See, e.g., Commonwealth Life Ins. Co. v. Caudill's Adm'r, 266 Ky. 581, 99 S.W.2d 745 (1936), on rehearing, 276 Ky. 149, 122 S.W.2d 989 (1938). The missing insured, Caudill, had been gambling in a building on the edge of a river, where he had gone after expressing a determination to get his money back; a fight broke out; a witness

Failing establishment of the actual time of death, the Uniform Act and similar statutes rely on a limitations period, to be set by the state, for distributing the property of the absentee to his presumptive heirs. The length of such a period will necessarily be arbitrary. Tennessee has set it at seven years, Wisconsin, Maryland, and North Carolina at five.[96] The difference between a limitations period and a presumption of death after five or seven years of absence, which can be avoided by proving that the absent person disappeared in life-endangering circumstances, appears merely one of terminology.[97]

A more appropriate objection to reliance on the common law presumption of death is that its usefulness has been watered down by multiplication of the basic facts necessary to trigger the presumption. The advantage of the legal presumption is that it provides a means for the court to make a decision concerning rights dependent on the absentee's death when actual evidence of death is lacking.[98] Imposing requirements other than absence for a stated period transforms the presumption; absence becomes merely one more piece of evidence from which death can be inferred. For the presumption to be raised, the absentee must be unheard of by those with whom he would naturally be in contact.[99] The element that the absent person be unheard of has been extended to require diligent search by the party relying on the presumption.[100] As long as a reasonable standard of diligence is estab-

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who attempted to intervene was chased off at gunpoint by one "Big Ed" Spicer, who was subsequently killed; a splash was heard; a search was made for Caudill, who was never seen again. Id. at 583, 99 S.W.2d at 746. Kentucky adheres to the presumption that death occurred at the end of seven years of absence. Id. at 584, 99 S.W.2d 747. Yet a jury decision that the missing person died on the night he vanished was upheld on rehearing. 276 Ky. 149, 122 S.W. 989.

96. Tenn. Code Ann. § 30-3-108 (1984); Wis. Stat. Ann. § 813.26(2) (West 1977); Md. Code Ann. § 3-106(b) (1984); N.C. Gen. Stat. § 28C-11(c) (1984).

97. A further reason for the unpopularity of the Uniform Act may be that through liberative prescription, it bars the absentee from recovering his property. His only restitution upon return is the discretionary amount awarded from the insurance fund established by the state treasury. See Uniform Act, supra note 84, §§ 6, 11. The United States Supreme Court has upheld statutes divesting absent persons from any interest in their property on the basis of a limitation period, provided proper notice is given; see Blinn v. Nelson, 222 U.S. 1, 32 S. Ct. 1 (1911). However, in Louisiana, ownership cannot be lost by nonuse; the petitory action is imprescriptible. See A. Yiannopoulos, Property § 180 n.92, at 482 and § 201, at 541 (2 Louisiana Civil Law Treatise 2d ed. 1980).

98. For a discussion of the nature of a legal presumption, see supra text accompanying notes 34-41.

99. For the elements of the presumption, see supra text accompanying note 33.

100. See, e.g., Lemire v. National Life Ass'n, 194 Iowa 1245, 1247, 191 N.W. 67, 68 (1922) (person invoking the presumption in order to recover under absentee's life insurance policy must make "diligent inquiry" among those likely to know whereabouts of absentee); In re Katz's Estate, 135 Misc. 861, 871, 239 N.Y.S. 722, 736-37 (N.Y. Sur. Ct. 1930) (presumption of death could not arise without demonstration of a "thorough and exhaustive search" for the absentee by the person invoking the presumption).

lished,[101] the requirement serves a beneficial purpose; it forces one who wishes to claim an advantage on the basis of absence to demonstrate it. Some courts, however, have demanded not only that the party be unable to locate the absent person, but also that the search be commenced at the beginning of the absence.[102] Thus, a party unaware of his interest could forfeit the presumption by delay in searching.

Another accretion to the elements of the presumption derives from the basic fact discussed above. If the absentee must be unheard of by those who would naturally hear from him, there must be individuals who would normally remain in touch with the absent person for the presumption to be raised.[103] As one commentator observed, such a requirement would "deprive a party of the benefit of the presumption in cases where most of all it should apply," perhaps because of the unlikelihood of obtaining information about such an absentee.[104]

An additional expansion of the elements of the presumption appears as a requirement that the absence be "unexplained"[105] or "for no apparent reason."[106] For example, the regulations governing social security survivors' insurance benefits incorporate the presumption of death on the unexplained absence of the wage earner for seven years:

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101. But see *Katz*, 135 Misc. at 871-72, 239 N.Y.S. at 737, requiring that the party seeking to establish the presumption be a wealthy mind-reader: It is necessary to examine, "not only . . . the place from which the last information of the absentee came, but also . . . every other locality to which his known inclinations, habits, and associations might reasonably be supposed to have led him." See also, Lemire v. National Life Ass'n, 194 Iowa 1245, 191 N.W. 67, 69 (1922) (search of absentee's destination, and of cities where he had been sighted, insufficient). A major difficulty appears to be that the person left behind has no means of knowing whether the search will be regarded as sufficient until the court rules on it.

102. See, e.g., *Katz*, 135 Misc. at 872, 239 N.Y.S. at 737 ("So far as this court is concerned, its inclination is to view with skepticism any protestations of ardent desire to find the absentee where diligent search has not been made for him as soon as his absence became known, without awaiting the accrual of some pecuniary advantage to be gained by his death or the passage of the period mentioned in the statute. . . ."); Estate of Morrison, 92 Ill. 2d 207, 65 Ill. Dec. 276, 441 N.E.2d 68, 70 (1982) (failure of claimant to search for absent co-heir seven years prior to time when inheritance would have devolved on husband and been transmitted to her prevented her from establishing that he was absent for seven years at that time).

103. The *Stump* court rejected this addition to the requirements to raise the presumption; 114 F.2d 214, 215 (4th Cir. 1940). However, it was utilized in the British case of Chard v. Chard [1955] 3 W. L. R. 954, 963-64 (nullification of marriage on grounds that first wife could not be presumed dead, despite thirty-nine years of absence, because no one had been shown to exist who was likely to have heard from her).

104. Mason, A Matter of Life and Death, 106 Law J. 359, 360 (1956); see also, Nokes, No Presumption of Death, 19 Mod. L. Rev. 208 (1956).

105. See, e.g., Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N.W.2d 185 (Neb. 1943) (though departure of daughter eleven years earlier was explained by tension with her parents, continued absence not explained, giving rise to presumption of death).

106. 20 C.F.R. § 404.721(b) (1989).

> If you cannot prove the person is dead but evidence of death is needed, we will presume he or she died at a certain time if you give us the following evidence:
>
> . . . .
>
> (b) Signed statements by those in a position to know and other records which show that the person has been absent from his or her residence for no apparent reason, and has not been heard from, for at least 7 years. If there is no evidence available that he or she is still alive, we will use as the person's date of death either the date he or she left home, the date ending the 7 year period, or some other date depending upon what the evidence shows is the most likely date of death.[107]

Five of the United States Circuit Courts of Appeals read the regulation to require a claimant to show merely that the wage earner has been absent and unheard of for at least seven years.[108] The Department of Health and Human Services, however, has maintained that the claimant must demonstrate the non-existence of a reason for the absence before the presumption can arise.[109] Thus, where the claimant's spouse was a mobster who might have been a fugitive from justice, the Secretary denied social security survivors' benefits to his wife and two children, despite a twelve-year absence.[110]

Expansions of the requirements for raising the presumption of death based on absence all spring from the tendency to seek greater assurance than absence can give that the missing person is really dead.[111] But by

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107. Id.

108. See, e.g., Autrey v. Harris, 639 F.2d 1233 (5th Cir. 1981); Edwards v. Califano, 619 F.2d 865 (10th Cir. 1980); Johnson v. Califano, 607 F.2d 1178 (6th Cir. 1979); Aubrey v. Richardson, 462 F.2d 782 (3d Cir. 1972); and Secretary of Health, Education and Welfare v. Meza, 368 F.2d 389 (9th Cir. 1966).

109. See Mando v. Secretary of Health and Human Services, 737 F.2d 278, 281 (2d Cir. 1984).

110. Id. at 279. The court, refusing to decide between the conflicting standards, assumed arguendo that the presumption had been raised, and concluded that it had been rebutted. It then remanded the case for a decision as to whether the claimant's evidence that her husband may have been "rubbed out" by his Mafia employers established his death. Id. at 281-282.

111. A logical extension of the quest for certainty is transformation of the presumption of death into an inference of fact; some courts view the presumption as such an inference. See, e.g., Lemire v. National Life Ass'n, 194 Iowa 1245, 1245, 191 N.W. 67, 67 (requiring "facts and circumstances . . . sufficient to end the presumption of life" for the presumption of death to arise); In re Katz's Estate, 239 N.Y.S. 722, 730 (N.Y. Sur. Ct. 1930) (identifying the presumption of death as a mixed presumption of fact and law, "with the factual element the more important"). As Stone points out, if the factual inference is possible, the presumption is redundant, Stone, supra note 20, at 524-25. Moreover, the person is not, in the legal sense, absent. See supra, notes 3-4 and accompanying text.

making the presumption more difficult to raise, they undercut its usefulness; it is precisely because the absentee's fate is uncertain that a presumption of death is needed. Blocking the presumption is unrealistic:[112] the absent person may not have been sought at the outset of his disappearance; he may be so alone that there is no one with whom he would communicate; a reason for his departure may be postulated; but he is not immortal. A rule is needed that determines rights contingent on his death, and his legal relationship to present individuals, without depending on evidence of actual death. The presumption of death is one such rule.

B. The Presumption of Death in the Louisiana Civil Law

1. The French Prototype and Its Present Application

The title "Des absents" in the *Code civil des francais* of 1804[113] created a paradigm for the treatment of absent persons.[114] In contrast to its gradual emergence in common law jurisdictions, the law of absent persons in the Code Napoléon was conceived as a comprehensive unit to deal with the unique problem of absentees.[115] But the Code Napoléon contained no legal presumption of death. Instead it acknowledged that the absent person's existence was unknowable.[116] It determined personal and property rights by balancing the interests of the one whose life was

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112. Conferring immortality upon the absentee does profit life insurance companies (see, e.g., *Lemire*, 191 N.W. at 67; Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 824, 8 N.W.2d 185), and government agencies that would otherwise have to pay out pensions (see supra notes 89 and 91) or succession proceeds which would escheat to the state (see Estate of Morrison, 92 Ill. 2d 707, 65 Ill. Dec. 276, 441 N.E.2d 68).

113. [hereinafter Code Napoléon], C. Civ. arts. 112-143.

114. The Code Napoléon and a similar regime in the Louisiana Civil Code of 1808 were cited by the Supreme Court of the United States as evidence of the power of the state to regulate the rights of absent persons in Cunnius v. Reading School Dist., 198 U.S. 458, 470-71, 25 S. Ct. 721, 724 (1904). In its Louisiana version, its provisions were held up as a model of "careful regulations" by Justice Gray in Scott v. McNeal, 154 U.S. 34, 42, 14 S. Ct. 1108, 1111 (1894).

115. Treatises of the most noted French commentators contain comprehensive analyses of the regime of absent persons in the Code Napoléon. The most detailed and theoretical of these is Demolombe, who devoted an entire volume to the subject; see C. Demolombe, supra note 24. See also, e.g., C. Aubry & C. Rau, Droit Civil Francais §§ 147-161, at 957-1012 (vol. 12); 1 M. Planiol, supra note 3, §§ 612-636, at 369-81; 1 M. Planiol & G. Ripert, Traite pratique de droit civil francais §§ 47-65, at 51-79 (7th ed. 1964); 1 G. Baudry-Lacantinerie & M. Houques-Fourcade, Traite theorique et pratique de droit civil §§ 1055-1325, at 869-1070 (Des personnes vol. 1) (2d ed. 1902); V. Marcadé, Explication Theoretique et Pratique du code civil §§ 335-515 (7th ed. 1873). See also, D. Roughol-Valdeyron, Recherches Sur l'absence en droit francais (1970).

In contrast, there has been no comprehensive examination of the Louisiana regime in its one hundred and eighty-two years of existence.

116. See supra note 4; see also C. Demolombe, supra note 24, § 1.

uncertain against those of individuals indubitably alive, and against those of the state.[117] The original French system still determines the rights affected by absence in Louisiana: Book 1, title 3 of the state's Civil Code in large measure mirrors the original French regime.[118] Of the thirty-seven articles presently in effect, only twelve have neither a direct nor an indirect source in the Code Napoléon; twenty-three parallel the language of the French source.

Because the original French code did not abandon the possibility that the absent person might be alive, the balance of interests in the property that he had amassed before disappearing weighed heavily in his favor. Its imitator, the Louisiana Civil Code, likewise contains an elaborate mechanism for affording great protection to the absentee's rights. Louisiana decisions repeatedly underscore the primacy given to the absentee. In *Sassman v. Aime*,[119] the Supreme Court of Louisiana pointed to the regime of absent persons as a means by which the plaintiffs would have

> preserved [the rights] of the absentee, whose death the law is so far from presuming, that it watches over and protects his property for a number of years, in the hope, and expectation that he may again return. The motives which induced the legislator to thus guard the estate of absent persons, or of those who may have disappeared, are obvious, and this court feels that it is important to society that the law on this subject should be strictly and rigidly inforced (sic).[120]

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117. C. Demolombe, supra note 24, § 1.

118. Whether French or Spanish law was the source of A Digest of the Civil Laws Now in Force in the Territory of Orleans, With Alterations and Amendments Adapted to its Present Form of Government, has long been a matter of debate; see Batiza, The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance, 46 Tul. L. Rev. 4 (1971); Pascal, Sources of the Digest of 1808: A Reply to Professor Batiza, 46 Tul. L. Rev. 603 (1972); and Batiza, Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder, 46 Tul. L. Rev. 628 (1972). The source annotations of Moreau Lislet indicate that, of the thirty-two articles on absent persons in the digest, only three could be traced directly to Spanish sources, while art. 29 was a derogation from the Fuero Real, 11 tit. 1 liv. 3. See L. Moreau Lislet, ed. A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808) Containing Manuscript References to its Sources and Other Civil Laws on the Same Subjects, facing pages 15 and 21 (n.d. & photo. reprint, 1968). It is well established that the Louisiana Civil Code of 1825 relied heavily on the Code Napoléon; see A. Yiannopoulos, Louisiana Civil Law System Coursebook 33 (1977). The absentee provisions of the 1825 code were retained in the revision of 1870, which, with minor changes, remains in force at present.

119. 9 Mart. (o.s.) 257 (La. 1821).

120. Id. at 263-64. Demolombe justifies the state's intervention on behalf of the absentee on the grounds of his possible inability to protect himself:

> If it is true that in general, each person is held to watch out, at his risk and

Later, the court formulated a general policy: "[E]very law that permits our courts to decide on the rights of those who are absent, should be strictly construed; and . . . the formalities which it prescribes exactly followed."[121] Again, in affirming a district court decision refusing to permit seizure by his co-owner of the share of undivided property belonging to a person absent for thirty years to pay for unnecessary improvements made without his consent, the court commended "[t]he vigilance which the District Judge thought proper to exercise for the protection of an absent defendant" as "creditable to the administration of justice."[122] This policy of vigilance is founded, as the *Sassman* court pointed out, on the refusal to regard the missing person as dead.

2. Is There a Presumption of Death in the Louisiana Regime of Absence?

Jalet concludes that Louisiana was one of the states that enacted "legislation setting forth the common law presumption of death" on the basis of articles 60, 61 and 70.[123] Article 60 grants early provisional possession of the absentee's estate where there are "strong presumptions

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> peril, with the care of his affairs, the law must nevertheless afford its protection to the incapacity of those who cannot themselves govern their fortune. . . . [N]ow, it is natural to presume that the person who has disappeared, if he still exists, is held back and prevented by some obstacle much stronger than his will; thus, it is necessary from then on to put him in the number of incapables, of whom the law itself protects the interests.

C. Demolombe, supra note 24, § 1.

121. Hill v. Barlow, 6 Rob. 142, 148 (La. 1843). See also, Collins v. Pease's Heirs, 17 La. 116, 117 (1841) (waiver of objection to improper testimony by curator ad hoc, by compromising interests of absent defendants, resulted in reversal and de novo trial); Edmonson v. Mississippi and Alabama R.R. Co., 13 La. 282, 284 (1839) (curator ad hoc had no capacity to waive production of legal evidence); Stockton v. Hasluck, 10 Mart. (o.s.) 472, 474 (La. 1821) (procedural statute requiring notice at last residence of absent defendant before attaching his property must be "construed strictly, as every law should be, that derogates so much from the general principles of our jurisprudence, and decides on the rights of those who are absent."). In *Hill*, *Edmonson*, and *Stockton*, in contrast to *Sassman*, the defendant "absentees" fit the French term "non-presents"—those not present in the state; see 1 M. Planiol, supra note 3, § 612, at 369-70. The recital of the facts of Collins make it impossible to determine whether the absent heirs were merely out of the state, or if their existence was unknown. The intense concern for the absentee's rights is underscored by the fact that the court was so careful to protect those who could protect themselves, had they been willing to submit to its personal jurisdiction.

For a discussion of the ambiguous use of the term "absentee" in Louisiana law, see infra, text accompanying notes 251-267.

122. Smith v. Wilson, 10 La. Ann. 255, 258 (1855).

123. Jalet, supra note 1, at 198 and n.96.

that the person absent has perished"; article 70 declares that "a presumption of death shall follow" an absence of seven years.[124] The successions regime permits opening of a succession "by presumption of death caused by long absence."[125] The jurisprudence speaks, on occasion, of the presumed death of an individual or of a time after which death may be presumed.[126] One of the revised statutes empowers the state registrar to issue a "presumptive death" certificate.[127] A series of statutes insure that military personnel presumed dead by the armed forces will be so regarded under state law.[128]

Two objections can be made to the contention that Louisiana law contains a presumption of death based on these instances. First, in most of these references, the term "presumption" is used loosely to mean a variety of things, from a suggestive circumstance to an inference to actual proof, but not what is meant by a presumption at law. Second, the judiciary attempted to invoke a presumption of death in a context in which it could not function because its use would have been contrary to the positive law of the absentee regime. Only in one narrow situation, in deference to federal law governing the military, has Louisiana created a genuine legal presumption of death of absent persons.

a. Imprecise Use of the Term "Presumption"

Article 60 of the Louisiana Civil Code allows the absent person's property to be put into the hands of his presumed heirs "when it has been shown that there are strong presumptions that the person absent has perished."[129] First, they are not legal presumptions; the construction of the article indicates that the "presumptions" are the facts, not a legal consequence uniformly attached to certain facts.[130] The Supreme Court of Louisiana, interpreting this passage of article 60 in *Iberia Cypress Co. v. Thorgeson*, read it to mean "that it must first be shown by legal evidence that the absent person was exposed to certain perils to life, and since such exposure has never been heard of. . . ."[131] "Presumptions" here signifies "certain perils to life," circumstances or indications suggestive of death. Second, if established and unrebutted, they do not result in treatment of the absent person as dead. His

124. La. Civ. Code arts. 60, 70.
125. La. Civ. Code art. 934.
126. See infra text accompanying notes 169-79.
127. La. R.S. 40:49(B)(8)(a)-(c) (Supp. 1989).
128. La. R.S. 9:1441-1443 and 9:304 (1965).
129. La. Civ. Code art. 60.
130. See the discussion of the nature of the common law presumption of death, supra notes 34-41 and accompanying text.
131. 116 La. 218, 40 So. 682, 683 (1906).

presumptive heirs do not succeed to his estate, but merely administer it under extremely restrictive conditions.[132]

The Iberia Cypress court misused the rule of article 60 to examine, not whether the absent person's presumptive heirs were entitled to provisional possession, but whether he was dead in the year 1890.[133] The case is one in a long line of Louisiana jurisprudence permitting proof of death by circumstantial evidence.[134] *Iberia Cypress* exemplifies another confusing use of "presumption"; in these cases, it denotes an inference from circumstantial evidence. The demonstration of peril to life was necessary, according to the court, for a "presumption of death"[135] to arise: "Death, like any other fact, may be proved by circumstantial evidence; but the circumstances under which the person disappeared must be proved by competent evidence as the basis for the presumption."[136] But if the evidence were sufficient to prove the death of the absentee, no presumption would be needed.

The *Iberia Cypress* court has not been alone in conflating presumption and proof of death. In *Martinez v. Succession of Vives*, the state supreme court, rejecting the evidence of death, declared, "There are occurrences—as a wreck, a battle, or the like—which would authorize a court in presuming the death of one, known to have been exposed

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132. La. Civ. Code arts. 65-67. For a description of the restraints on provisional possession, see infra text accompanying notes 318-27.

133. *Iberia Cypress Co.*, 116 La. at 219, 40 So. at 683.

134. See supra note 2; see also, e.g., Marrero v. Nelson, 166 La. 122, 124, 116 So. 722 (1928) (the "facts and circumstances . . . suffice for concluding that the person who disappeared is dead," and thus could not participate in a partition of succession property, when the house in which he had resided in San Francisco was destroyed in the 1906 earthquake); Miller v. Hartford Live Stock Ins. Co., 165 La. 777, 116 So. 182 (1928) (Boyd language quoted to support finding that horse which disappeared while being transported in a boxcar which opened directly into Lake Pontchartrain was dead, and the owner entitled to recover on life insurance policy of horse); Sterrett v. Samuel, 108 La. 346, 349, 32 So. 428, 429 (1902) (plaintiff's succession rights established on proof that the deceased's father disappeared, along with the boat on which he served, after it had put in at Mobile during a yellow fever epidemic, and then made for Havana; the "circumstances are sufficient to justify the conclusion in a case like this that the man is dead."); Clay v. District Grand Lodge No. 21, 154 So. 654 (La. App. 1st Cir. 1934) ("the facts and circumstances of the case . . . are of a character to convince the judicial mind that the assured is dead" when the 85-year-old insured, subject to recurrent epileptic fits and heart attacks, missing for two years, was last seen en route to a swamp on the first day of eight days of heavy rainfall and cold weather); Wagner v. Supreme Industrial Life Ins. Co., 17 So. 2d 756, 757 (La. App. Orl. 1944) (plaintiff could recover on life insurance policy of the missing insured, a seaman on a torpedoed vessel).

In the light of these cases, despite the adjective in the code, the "presumptions" called for in article 60 would have to be weak rather than strong for the rule to be of any use.

135. Iberia Cypress Co. v. Thorgeson, 116 La. 218, 222, 40 So. 682, 683 (La. 1906).

136. Id.

to the perils of either; but such a presumption 'must be weighty, precise and consistent.' The ascertained facts on which it rested, must draw with them, as a necessary consequence, the unascertained facts sought to be established, 'and exclude every other rational conclusion.' "[137] The court employed the term "presumption" while rejecting its legal significance; a fact that follows from another by rational necessity is proved, not presumed. In *Jamison v. Smith*, the court adopted a more flexible standard of proof of death and, again, termed it a presumption. At the same time, the lack of a code provision akin to the common law presumption of death was recognized:

> We think the circumstances under which he left [to join the army during the Civil War] and the lapse of time since his disappearance [twenty years] fully justify the presumption of his death. It is true that time sufficient has not elapsed to give rise of itself, apart from attending circumstances, under the Articles of the Code, to the presumption of death. But the Code does not establish any arbitrary rule on the subject. It has been frequently held that the time for the establishment of the presumption of death, on account of absence, is not absolutely fixed and immutable, but is subject to be modified according to the circumstances attending such absence. The lapse of time is but a circumstance to be considered in conjunction with other circumstances.[138]

These cases supply a possible meaning for the "presumption of death caused by long absence, in the cases established by law" that opens a succession.[139] While the Louisiana Civil Code establishes no such "cases," the drafters of article 934 may have used the term, as the state supreme court would do later, to refer to deaths proved by circumstantial evidence.

The Louisiana Revised Statutes provide a further example of the use of "presumption" to refer to death proved by circumstantial evidence. Louisiana Revised Statutes 40:49 provides that if the body of one[140] whose death is presumed to have occurred at a specific date, time

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137. 32 La. Ann. 305, 307 (1880). The court does not provide the source of its quotations.

138. 35 La. Ann. 609, 612-13 (1883).

139. La. Civ. Code art. 934.

140. La. R.S. 40:49(B)(8)(a) (Supp. 1989). The confusing cross references in the statute give the impression that it applies only to death of a newborn after a live-birth abortion. Yet this statute has been applied to issue death certificates for anyone whose death is proved by clear and convincing evidence, even if his body is missing; see, e.g., 20 Op. Att'y Gen. 374 (1918). It was given the general title, "Preparation and filing of death and spontaneous fetal death certificate (stillbirth)." However, Section A empowers the

and place within the state cannot be found, a court can order preparation of a "presumptive death certificate"[141] by the state registrar after a contradictory hearing against the district attorney of the parish where death is presumed to have occurred. Sufficient facts must exist to complete the essential parts[142] of the death certificate. The statute does not delineate the effect of the presumptive death certificate. Because it is recorded in the vital records registry,[143] it should, like other death certificates recorded there, function as prima facie proof of the death of the vanished party.[144]

The presumptive death certificate is not issued on the basis of a legal presumption, but of a conclusion based on evidence. Clear and convincing proof of death is required.[145] A reference in the statute to

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"funeral director or person acting as such" to prepare and file the certificate of "death or spontaneous fetal death or stillbirth provided for in R.S. 49:48." That section provides only for death certificates to be issued on the death of an aborted child who survives the abortion for a period of time, not for certificates of other forms of death, including spontaneous fetal death or stillbirth.

The statute thus appears to be confined to death certificates of certain fetuses. Yet it contains many provisions which are inapplicable to dead fetuses; for example, La. R.S. 40:49(B)(5) (Supp. 1989), which requires a coroner's investigation of cause of death when death occurs more than ten days after the decedent was last treated by a physician. Fetuses are not often treated by physicians, but surely the law was not intended to call for investigation of the cause of death in every miscarriage in the state.

One possibility is that the statute was intended to be general, and that its opening sentence should read, "The funeral director or person acting as such shall prepare and file the certificate of death or spontaneous fetal death or stillbirth provided for in R.S. 40:47"—the statute mandating certificates for every death. Two pieces of evidence stand against this. First, the statute was amended in 1986 to substitute the words "R.S. 40:48" for "the previous Section." The reference to the abortion statute was made more specific. Second, the source statute of R.S. 40:49, former R.S. 40:48, contained the same reference to the death certificates provided for in the "previous section." The previous section, former R.S. 40:47, concerned the same subject matter as present R.S. 40:48. Yet attorney general opinions under the former statute dealt with death certificates of others as noted above. If the statute is intended to fulfill this general role, Section A should be revised to refer to R.S. 40:47.

141. La. R.S. 40:49B(8)(b) and (c) (Supp. 1989).

142. These are listed in La. R.S. 40:34(2) (Supp. 1989)

143. La. R.S. 40:49B(8)(c) (Supp. 1989).

144. A certificate of death issued by a funeral director within five days of the discovery of the body, filed with the local registrar of vital records, and forwarded by him to the state registry after ten days, is prima facie evidence of death. See La. R.S. 40:50(A), 40:47, 40:50(A) and (C) (Supp. 1989); see also La. R.S. 40:42(A) (Supp. 1989): "Except for delayed or altered certificates, every original certificate on file with the vital records registry is prima facie evidence of the facts therein stated." See also Succession of Jones, 12 La. Ann. 397, 398 (1857) ("The certificate of the register of Births and Deaths for the parish of Orleans, introduced without objection in evidence, is a legal document, creating of itself a *prima facie* presumption of the death of Harmon Jones.")

145. La. R.S. 40:49B(8)(a) (Supp. 1989).

article 60 of the absentee title[146] suggests that the proof must be of circumstances strongly indicative of death.

b. Non-Functional Presumptions of Death from Absence

Article 70, which sets forth the time period that must pass before the absentee's presumptive heirs can take absolute possession of his estate, appears to echo the common law presumption of death: "If the absence has lasted seven years a presumption of death shall follow and the known heirs of the absentee may petition the court and cause themselves to be put in absolute possession of the property and estate of the absentee by the judge. . . ."[147] In the 1985 court of appeal case *Ledet v. State Department of Health and Human Resources*,[148] the article was read as part of an overall scheme by which the title sanctioned a presumption of death in cases of protracted absence. The court found "some presumption of death from eight years' absence without communication" as the "implicit foundation" of two additional articles:[149] the repealed article allowing authorization of remarriage of the absentee's spouse after ten years, and article 53, ordering sale, after ten years' absence, of the property of an absentee without heirs and payment of the funds into the state treasury.[150]

Article 70 mandates the conclusion that death occurred on the basis of an absence of seven years. It is difficult, however, to determine what its drafters meant by "death" in this context, because the effects of death in Louisiana law do not follow from it. If death were legally presumed on the basis of seven years of absence, the option in the final phrase of article 934 could operate,[151] and succession proceedings would take place. In contrast, the presumption of article 70 results in absolute possession by the presumptive heirs. There would be no need for the latter if the absent person's succession were opened. In fact, the regime of the absent person does not allow for the opening of a succession

146. Id.

147. La. Civ. Code art. 70.

148. 465 So. 2d 98, 100 (La. App. 4th Cir.), writ denied 468 So. 2d 1211 (1985). The plaintiff sought to pursue an action for the wrongful death of his half-sister; under the Louisiana statute, their absentee mother would have had the exclusive right of action, had the court not found her presumptively dead. Id. at 99.

149. Id. at 100. At the time of the action, article 70 required a ten-year absence for putting in absolute possession. See 16 La. Civ. Code at 6 (comp. ed. Supp. 1989).

150. *Ledet*, 465 So. 2d at 100.

151. La. Civ. Code art. 934, which dates back to the Code of 1808, calls for the opening of a succession "by presumption of death caused by long absence, in the cases established by law." No such cases are established by the Louisiana Civil Code, and no corresponding provision exists in the Code Napoléon.

on the basis of absence, but only after a factual determination that death has taken place.[152]

Similarly, the presumption of article 70 fails to provide a time from which the absent person may be regarded as dead for purposes of life insurance. In *Lord v. Metropolitan Life Ins. Co.*,[153] the plaintiff argued that the ten-year prescription on her claim as her absent husband's life insurance beneficiary had not run; because her husband had disappeared in 1969, her cause of action had not matured until 1979, when he would have been presumed dead under the version of article 70 in effect at that time.[154] The court of appeal upheld the dismissal of her suit on the ground that "[t]his article obviously is concerned with the rights of heirs, and not with coverage under life insurance policies."[155] Remarriage without divorce is, furthermore, not possible for the absentee's spouse since the repeal of article 80 in 1938[156]—ten years before the appearance of the term "presumption of death" in article 70.[157] The death that the absent person is presumed in that article to have suffered is thus of a uniquely limited variety.

From 1808 until 1948, the earlier versions of present article 70 did not employ the term "presumption of death." The provision did not permit absolute possession until thirty years had passed from the inception of provisional possession or spousal administration, or until one hundred years from the birth of the absentee.[158] Yet the Louisiana

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152. La. Civ. Code art. 71. See also 3 M. Planiol, supra note 3, § 2463A, at 196:

> State of absence does not open the succession. Art. 130 [of the Code Napoléon, corresponding to art. 71 above] provides expressly that the succession of an absentee is opened only "on the day when his death is proved." However, the statute provides in this case for a special devolution, which resembles the opening of a succession. This devolution benefits the prospective heirs of the absentee, as well as other persons whose rights are contingent on the absentee's death. That makes many people say that the absentee is "considered dead" and that his succession is "tentatively open." This formula is obviously wrong, for the effects are quite different from those attached to the opening of a succession.

153. 434 So. 2d 1179 (La. App. 1st Cir. 1983).

154. Id. at 1182.

155. Id. In contrast, in the common law, "the insurance cases are almost legion and in them the presumption of death has its most frequent application." Jalet, supra note 1, at 183, n.28.

156. Id. See also Kimball, The Time of Presumed Death in Life Insurance Disappearance Cases, 4 Utah L. Rev. 298, 301 (1955); Roca, When Did Ulysses Die? or Mysterious Disappearances and Life Insurance, 23 Geo. Wash. L. Rev. 172, 176 (1954).

157. See Hebert and Lazarus, The Louisiana Legislation of 1938, 1 La. L. Rev. 80, 83-84 (1938).

158. La. Civ. Code art. 70 (1948). The revision made explicit the powers of absolute possessors to deal with the property as owners. It also shortened the time period for going into absolute possession by making the thirty years run from the time of absence, rather than from the time of provisional possession. The time was further shortened to ten years in 1978, and then to the present seven in 1986. La. Civ. Code art. 70.

judiciary repeatedly declared that one hundred years after the birth of an individual, he was legally presumed to be dead.[159] This presumption originated in an illogical interpretation of the presumption of continued life. As applied to absent persons, it was a derogation from the regime established by the civil code, and it was unnecessary in all its applications.

In an early case the Supreme Court of Louisiana traced what has been termed the "century rule" of article 70[160] to the principle, present in French and Spanish law and in French civilian commentary, that an absent person was "presumed to live one hundred years."[161] The presumption had the same Roman heritage as the common law presumption of continued life.[162] The facts of absence plus an age under one hundred years of one known to have begun life required the legal conclusion that his life continued, and evidence of death was required to overcome it.[163] The presumption was used to block attempts to avoid the formalities of the absentee regime by employing succession procedure to transfer the absentee's property immediately to his presumed heirs.[164] To allow such a circumvention would defeat the safeguards constructed for the absent person, as the state supreme court pointed out in *Sassman v. Aime*:

> If then the plaintiff's father is still alive, or presumed by law to be so, and the plaintiff herself has established the fact which creates that presumption in a suit, wherein she claims property, as his heir, it is impossible she can recover; for she disproves that which is the basis for her demand. The law has pointed out a mode, and an easy and a safe one, by which the presumptive heirs of persons who may have disappeared, can be

159. See infra text accompanying notes 169-79.

160. F. Swaim & K. Lorio, Louisiana Successions and Donations: Materials and Cases 111 (1985).

161. Hayes v. Berwick, 2 Mart. (o.s.) 138, 140-41 (La. 1812).

162. Id. at 141; Eagle v. Emmet, 4 Brad. 117, 119 (N.Y. Sur. Ct. 1856), and supra note 19.

163. *Hayes* indicates that the failure to raise the presumption of continued life owing to lack of the basic fact of age under one hundred years does not raise a presumption of death; death must be proved: "Death is never presumed from absence; therefore, he who claims an estate, on account of a man's death, is always held to prove it." *Hayes*, 2 Mart. (o.s.), at 141.

164. Id. at 139 (La. 1812) (denying plaintiff's right of succession to land of her husband, absent for twenty years); see also, Sassman v. Aime, 9 Mart. (o.s.) 257, 262, 264-65 (La. 1821) (presumption of continued life prevented plaintiff from taking title to property of absent father by succession proceeding); Martinez v. Succession of Vives, 32 La. Ann. 305, 307 (1880) (wife of absentee, judgment creditor of the defendant, could not revive the judgment in the role of widow); Willett v. Andrews, 51 La. Ann. 486, 494, 25 So. 391, 394 (1899) (plaintiff's petitory action dismissed since vendor could not have inherited it from absent father, presumed to be still living).

> put in possession of the property they leave behind. This mode the plaintiff and her co-heirs might easily have pursued. In doing so, they would have assured their own rights, and preserved those of the absentee, whose death the law is so far from presuming, that it watches over and protects his property for a number of years, in the hope, and expectation that he may again return. The motives which induced the legislator to thus guard the estate of absent persons, or of those who may have disappeared, are obvious, and this court feels that it is important to society that the law on this subject should be strictly and rigidly inforced (sic).[165]

An article identical to the original article 70 appeared in the Code Napoléon.[166] Planiol declared that "this however is not a presumption of death" and rejected the suggestion that the absentee be considered dead one hundred years after his birth: "It is a sure thing that the death of the absentee will take place one day or another, if it has not already occurred, but the date of death will remain unknown and it will always be impossible to set it."[167] Reliance on the presumption of continued life emphasized the continuing concern for the absent person's interest and resulted in the protection of his estate beyond his probable existence. As Planiol pointed out, "[t]he ordinary longevity of man remains well below a century."[168]

From the presumption that life continued for one hundred years, Louisiana Supreme Court decisions generated an unnecessary presumption of death after one hundred years of life. The result of the failure to raise the presumption of continued life should be that the party relying on the presumption must produce proof of continued life, not that the contrary of the original presumption is presumed. Yet in the cases, courts have viewed the lack of the basic fact of age under one

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165. *Sassman*, 9 Mart. (o.s.) at 263-64. Failure to call upon the presumption of continued life to insure use of the absentee procedure led to the embarrassing situation in Rachel v. Jones, 34 La. Ann. 108, 110 (1882) (returned absentee would be presumed to be alive under century rule, were it not for the successful succession proceeding which her "heirs" had brought).

166. C. Civ. art. 129 (France 1804).

167. 1 M. Planiol, supra note 3, § 634, at 380. Demolombe justifies the sending into definitive possession a century after the absent person's birth by claiming that "the presumption of death has arrived, so to speak, at its apogee." C. Demolombe, supra note 24, § 148. However, he is not speaking of a legal presumption, but of an inference, which gradually strengthens with the passage of time. For another example of this use of "presumption" by Demolombe, see infra note 247. Swaim and Lorio, commenting on succession under the Louisiana regime of absentees, likewise use "presumption of death" to mean "death . . . established by circumstantial evidence." See F. Swaim & K. Lorio, supra note 160, at 102.

168. 1 M. Planiol, supra note 3, § 634, at 380.

hundred years as automatically resulting in a presumption that the party is dead. For example, in *Hooter's Heirs v. Tippet*,[169] the court required those claiming an intestate succession to demonstrate the deaths of known members of a class that primed their claim. That showing could be made either "by giving evidence of their death, or by showing that one hundred years have elapsed since the birth, in which case death is presumed, and not before."[170] Subsequent cases repeated this language.[171]

The courts applied this jurisprudential presumption of death, in *Hooter's Heirs* and the cases which followed it, to absentees.[172] In fact, there was no one else to whom it could apply. If the intervening heirs were alive, and their whereabouts known, they could have claimed the succession; if they could have been proved dead, they could not have. A presumption based on age was needed only to demonstrate their deaths, because their existence was a matter of uncertainty, undeterminable otherwise. But article 77 of the title on absentees has always expressly excluded such individuals from inheriting: "In case a succession shall be opened in favor of a person whose existence is not known, such inheritance shall devolve exclusively on those who would have had a concurrent right with him to the estate, or on those on whom the inheritance should have devolved if such person had not existed."[173] Thus, the presumption was used to derogate from the explicit wording of article 77.[174]

The principal characteristic of this presumption of death is that, when it is not being used in violation of the positive law, it is useless. If an absent person is under one hundred years old, the regime of absent persons applies. If he is over one hundred, his presumptive heirs can pursue succession proceedings by proving his death. The presumption

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169. 12 Mart. (o.s.) 390 (La. 1822).

170. Id. at 392.

171. See, e.g., Owens v. Mitchell, 5 Mart. (n.s.) 667, 668 (La. 1827); Martinez v. Succession of Vives, 32 La. Ann. 305, 307 (1880); Succession of Herdman, 154 La. 477, 479, 97 So. 664, 665 (1923). The Louisiana supreme court attributed this presumption to article 70; see Martinez, 32 La. Ann. at 307: "That maxim [that death is presumed after one hundred years since birth, but not before] was then and is now embodied in our legislation. C.C. 70 (71) . . . ." Cf. F. Swaim & K. Lorio, supra note 160, at 109.

172. Swaim and Lorio argue that a general legal presumption of death cannot apply to absentees, because if the person is presumed to be legally dead, his existence is no longer uncertain and the status of absentee is negated. F. Swaim & K. Lorio, supra note 160, at 109-10. However, until the determination that the presumption applies is made, the missing person's existence would still be questionable.

173. La. Civ. Code art. 77. For the jurisprudence on who inherits in the absentee's stead, see infra note 392.

174. See, e.g., Owens v. Mitchell, 5 Mart. (n.s.) 667, 668 (La. 1827) (denying sister's claim to succession for failure to show death of ascendants); Succession of Herdman, 154 La. 477, 479, 97 So. 664, 665 (1923) (denying state's claim to vacant succession for failure to show death of absent wife and daughters of decedent).

is thus pointless because it merely mandates the conclusion that would follow from evidence: that he is dead.[175]

An equally unnecessary second application of this presumption of death emerged. In *Succession of Kron*,[176] at issue was the possible invalidity, for lack of a certain legal date, of an olographic testament dated "January 11th/27." The testator was not an absent person; the date of his death, January 25, 1927, was certain; yet the challenge to the will was based on the indeterminacy of the century in which it was written.[177] Instead of remanding for evidence of the age of the deceased or relying on the evidence of when he lived to determine that the will had been written in 1927, the state supreme court invoked, as a "legal presumption" and "a maxim consecrated by the best authorities," the century rule as a presumption of death.[178]

> The death of a person being presumed, as a matter of law, after the lapse of one hundred years from the date of his birth, it may likewise be presumed that he was born not more than one hundred years previous to the date of his death. If this will was dated in the month of January, 1827, the testator was more than one hundred years old when he died . . . . Applying this legal presumption, we know therefore as a matter of law, that this will was not made in the twenty-seventh year of the century preceding the present one.[179]

As in the creation of the presumption of death, a legal convention was mistaken for a rational premise, and the existence of another presumption—a presumption of birth—deduced from it. In this case, the presumption of death has no relevance to absent persons because the individuals to whom it is applied must be known to be dead in order

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175. Evidence that an absent individual would be at least one hundred years old makes it extremely likely that he is dead. The current average duration of life for an inhabitant of the U.S. is 74.9 years. Statistical Abstract of the United States 71, table 106 (109th ed. 1989). Only about 24,000 Americans are older than one hundred. Human Life Span May Be Nearing Limit, N. O. Times-Picayune, Dec. 4, 1988, at 2B9.

176. 172 La. 666, 135 So. 19 (1931).

177. Id. at 669, 135 So. 20.

178. Id. Among the "best authorities" cited are article 70, cases which employ the century rule as a presumption of continued life, and cases which misapply the law and view absent persons as possible successors; see infra notes 205, 211, 213.

179. *Kron*, 135 So. at 20; see also, Succession of Caro, 175 La. 402, 403, 143 So. 355, 356 (1932); Succession of Coleman, 177 La. 898, 903-04, 149 So. 513, 514 (1933). Succession of Boyd, 306 So. 2d 687, 690-91 (La. 1975) pointed out that *Kron* was actually a case of permitting extrinsic evidence—the century in which the testator lived—to establish the certainty of a date which was without any significance or relevance, except to fulfill the code requirement that the will be dated by the testator. Thus, a baseless presumption was used to reason nonsensically to an unnecessary one.

for the court to count backwards for one hundred years. Moreover, its legal foundation is extremely shaky, for the court's "best authorities" combined a misconstruction of the law with a derogation from it.

c. The Military Presumption of Death

In one very specialized area of the Louisiana law of absent persons, the state has adopted a true presumption of death that is a useful watershed for determining whose interests are to be protected. Under Louisiana Revised Statutes 9:1441, members of the armed forces who are missing in action are presumed dead when the armed services accept such a presumption.[180]

The decision of the armed service may be based on what would amount to proof of death in Louisiana. Thus, in *Pierce v. Gervais*,[181] the U.S. Army issued a casualty report that stated, "The Adjutant General finds MSG Donald P. Gervais, to be dead. He was officially reported as missing in action 1 May 1968, when he was last seen as a gunner on a military aircraft which was struck by hostile weapons fire, crashed and burned."[182] Section 9:1443 of the Louisiana statute, however, exempts a litigant relying on the MIA's death from presenting the evidence examined by the military. Only the fact that the military considers him dead needs to be shown; this can be achieved by means of a certified copy of an official military certificate or of excerpts from the MIA's service record indicating that the armed service presumes him dead.[183] Thus, the fact of a military presumption of death gives rise to a presumption of death under Louisiana law.

Sections 9:1442 and 9:304 set out a mini-regime governing these missing persons. It differs from that of the civil code because, unlike the presumption of death in article 70, the military presumption has the effects of death under Louisiana law. Section 9:1442 deals with the MIA's property and includes a subsection that preserves his interests should he return.[184] The presumed deceased's succession may be opened "in the same manner as the succession of a deceased person, except as otherwise provided in R.S. 9:1443."[185] The presumption functions as well in "any other action or proceeding whatever in which the presumption of his death is an issue."[186] Section 9:304 permits his spouse

180. La. R.S. 9:1441 (1965).
181. 425 So. 2d 922 (La. App. 4th Cir. 1983).
182. Id. at 924.
183. La. R.S. 9:1443 (1965).
184. La. R.S. 9:1442 (1965).
185. La. R.S. 9:1442A (1965). The final phrase refers to the ability to rely on the military presumption of death.
186. La. R.S. 9:1443 (1965).

to remarry without divorce with court authorization; if he is still alive, his marriage is thereby dissolved.[187]

Like the common law presumption of death, the Louisiana MIA statutes shift property and personal rights without procedural stages from the person missing and presumed dead to those known to be alive: his spouse, his heirs, others with rights contingent upon his death, and third parties who deal with them.[188] But in their scheme for restitution to a returning MIA, they imitate the civil law regime of absent persons:[189] he is entitled to restoration of his property or to the proceeds of its sale; he receives the fruits of the property only if he returns before the expiration of seven years; within that time, he receives a portion that declines as the length of his absence extends.[190] Though mortgages and encumbrances remain valid with regard to third parties, those who thought they were his heirs must repay him the value of these.[191] However, unlike the non-military missing person, the returning MIA's claim for his property is subject to a liberative prescription of thirty years from the judgment of possession.[192] Because his claim is one of ownership, it should not be subject to liberative prescription,[193] but only to an acquisitive prescription of thirty years should his heirs fulfill the requirement of possession. The inconsistency of the rights of the military absentee with those of other returning absentees appears inequitable because the succession may be opened without any delay other than that of the military in making a finding.[194]

3. *The Proposed Presumption of Death*

In its revision of the Louisiana regime of absent persons,[195] the Louisiana State Law Institute has included two proposals that would resolve the confusion that the term "presumption of death" has created

187. La. R.S. 9:304 (1965).

188. La. R.S. 9:1442A (1965).

189. See infra text accompanying notes 346-49.

190. La. R.S. 9:1442B (1965) and La. Civ. Code art. 68.

191. La. R.S. 9:1442B (1965).

192. Id. See La. Civ. Code art. 73, which places no prescription on the returning absentee's claim for his own property.

193. See A. Yiannopoulos, supra note 97, § 201, at 541.

194. This delay can be considerable; in Pierce v. Gerrais, 425 So. 2d 922, 924 (La. App. 4th Cir. 1988), the plaintiff's husband was found dead as of July 25, 1978—over ten years after his plane crashed and burned in Vietnam.

195. Louisiana State Law Institute, Report of the Property Committee: Projet on Absent Persons, Management of Community Property, Presumption of Death, and Proof of Existence of Absentee at Time of Alleged Accrual of Rights (Final Draft As Approved by the Council and the Property Committee) (Aug. 8, 1989) (available from the Louisiana State Law Institute, Baton Rouge, Louisiana) [hereinafter La. Law Institute, Report of the Property Committee].

in Louisiana law. First, the Law Institute suggests inclusion in the articles on natural and juridical persons the principle that the death of an individual can be established though his body cannot be found.[196] This provision, which has parallels in a number of continental civil codes,[197] would remedy an inconsistency in the Louisiana jurisprudence. The late nineteenth century supreme court case of *Martinez v. Succession of Vives* required, when no body could be produced, proof of death that foreclosed "every other rational conclusion."[198] Later decisions forsook this stringent standard for an unarticulated one that, in some instances, hardly seemed to reach a preponderance of the evidence. Thus, in *Marrero v. Nelson*, the plaintiffs sought to establish the death of Nelson, who had been absent for twenty years and who had last corresponded with his family from San Francisco a year before the 1906 earthquake. That quake and the ensuing fire had destroyed the house where Nelson had been living; the disaster had produced 1200 unidentified corpses.[199] Despite the multitude of alternatives to Nelson's death that spring to mind, it was held to be proved.[200] The proposed article requires that the individual "[disappear] under such circumstances that his death seems certain."[201] The requirement of certainty would re-establish a standard higher than that adhered to by the *Marrero* court.[202]

Unfortunately, entitling this article "presumption of death" would perpetuate the multiple and inaccurate usages of that term. If the facts that lead to the conclusion of death point so surely in that direction that it is certain, no presumption mandating this conclusion would be needed. Moreover, no basic facts giving rise to the presumed fact are specified.[203] A more appropriate rubric should be substituted.

The recommendation that would heighten the evidentiary requirements for proving death accompanies the projet on absent persons, which suggests adopting a genuine presumption of death.[204] The elements

196. Id. art. 30, at 37.

197. See, e.g., C. Civ. art. 88 (France); Code civil suisse art. 34 (Switzerland); Greek Civ. Code art. 39.

198. 32 La. Ann. 305, 307 (1880).

199. 166 La. 122, 116 So. 722 (1928).

200. Id.

201. La. Law Institute, Report of the Property Committee, supra note 195, art. 30, at 37.

202. The Reporter's examples set forth the types of circumstances which would create certainty: "[T]he body of a miner has not been recovered after an explosion in the mine; a passenger's body in the mid-air explosion of an airplane has never been found or identified; three astronauts in a space ship that has been lost in space have not been seen or heard of." Id. at 36.

203. For differentiation of a legal presumption from a factual inference, see supra text accompanying notes 34-41.

204. La. Law Institute, Report of the Property Committee, supra note 195, art. 54, at 23.

of a presumption are present; the basic facts to be proven are set forth. Absence, by definition, means that the person whose death is to be established lacks a representative in the state. His whereabouts are unknown and cannot be determined after diligent effort.[205] Five years of absence must be demonstrated for death to be presumed.[206] Unlike the presumption of death in present article 70, the one proposed would have the legal effect of death. A judgment declaring death could be obtained on that basis,[207] thus opening of the succession of the absent person.[208]

The proposed presumption must meet the test of constitutionality that hampered application of its common law counterpart. The United States Supreme Court has twice singled out the absentee provisions of the Louisiana Civil Code as establishing the state's jurisdiction over the estates of absentees.[209] *Cunnius* suggested that a state law might provide too brief a period of absence before death was presumed, or inadequate protection for the interest of the absentee should he return, and thus violate due process.[210] Neither is the case here. A period shorter than five years for divesting an absentee of interest in his property was upheld in *Blinn v. Nelson*.[211] The projet continues the policy of the present law of absent persons in providing for restitution of an absent person's property on his return.[212] However, notice to the absent person of the court action to declare him dead is not included in the projet or in proposed additions to the statutes governing civil procedure.[213] Such an addition is necessary for the presumption to fulfill the requirements of due process.[214]

Institution of a presumption of death, though a change in Louisiana law, would comport with modern civilian practice. France, in 1978, revised its regime of absent persons to include a declaration of absence

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205. Id. art. 47, at 15.

206. Id. art. 54, at 23.

207. Id.

208. Id. art. 55, at 24.

209. Scott v. McNeal, 154 U.S. 34, 41-42, 14 S. Ct. 1108, 1111 (1894); Cunnius v. Reading School District, 198 U.S. 458, 471, 473, 25 S. Ct. 721, 725-26 (1904).

210. *Cunnius*, 198 U.S. at 477, 25 S. Ct. at 727.

211. 222 U.S. 1, 7, 32 S. Ct. 1, 2 (1911).

212. La. Law Institute, Report of the Property Committee, supra note 195, art. 57, at 26.

213. Louisiana State Law Institute, Report of the Committee on Civil Procedure: Curatorship of Absent Persons: Proposed Code of Civil Procedure Articles (Draft as Approved by the Council) (Feb. 17-18, 1989) (available from the Louisiana State Law Institute, Baton Rouge, Louisiana) [hereinafter La. Law Institute, Proposed Procedural Revisions].

214. The notice required must be directed at the absent person. See Scott v. McNeal, 154 U.S. 34, 49-50, 4 S. Ct. 1108, 1114 (1894).

that is, in effect, a presumption of death.[215] Other civilian countries likewise have adopted such a presumption.[216] The refusal to treat the absent person as dead sprang from a desire to balance protection of his interests and protection of interests that depend upon him. But the system under which Louisiana operates does not achieve this goal.

II. The Structure of the Louisiana Regime of Absent Persons

A. Property Rights: The Absent Person's Estate

The policy of vigilance on the absent person's behalf, which the refusal to regard him as dead makes necessary, is evident in the regulation of the property in the absent person's estate. His rights are initially guarded by the delay of the three-part plan set forth in the code—curatorship, provisional possession, and absolute possession—in favor of his desires for the superintendence of his property. Article 47 of the Louisiana Civil Code does not permit a curator to be named to administer the absentee's property if he himself appointed "somebody to take care of his estate," while article 58 postpones provisional possession if the absent person has left a power of attorney.[217] The mandatary of the latter article is one type of person appointed to oversee the absentee's property under article 47. The reasons for delaying curatorship are in both cases the same: reluctance to interfere in the property rights of one who may be alive. As Planiol has pointed out, the appointment indicates that "the interested party himself has anticipated his being away for a long time," and the appointment makes it unnecessary for the court to intervene to administer the absent person's property, for someone is acting for him.[218] In addition, maintaining the absent person's appointee in office respects his judgment concerning that property. The mandatary and the caretaker also appear identical in the effect of termination of their powers. If the power of attorney expires, or if the caretaker dies or resigns, the curatorship is inaugurated.[219]

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215. C. Civ. art. 128 (France); B. Teyssié, l'absence: Loi du 28 décembre 1977 § 52, at 43 (1979).

216. See, e.g., Burgerliches Gesetzbuch (BGB) § 3.1 (West Germany); Codice Civile art. 58 (Italy); Code civil suisse art. 35; Greek Civ. Code art. 40.

217. La. Civ. Code arts. 47, 58.

218. 1 M. Planiol, supra note 3, § 624, at 375. That the representative in article 58 is in the category of caretakers of article 47 is further suggested by the fact that the Code Napoléon uses the cognates "procureur" and "procuration" in the source articles, 112 and 121; the two are synonyms for "mandatary" (mandataire) and "power of attorney" (mandat). Vocabulaire Juridique 618-19 (1re. éd. 1987).

219. La. Civ. Code arts. 47, 59.

1. Curatorship

In the absence of exceptional circumstances,[220] three regulatory stages are required by the Louisiana Civil Code to transfer protection from the interests of the absentee to those of his probable successors. The Code Napoléon also contains a tripartite division.[221] But the two took different approaches to safeguarding the missing person's rights during the first five years of absence. No formal curatorship existed under the Code Napoléon; an individual who had ceased to appear was presumed absent.[222] During this time, the courts would step in upon request, after a discretionary judicial determination of necessity.[223] As Planiol points out, necessity was also the measure of the actions that the court could order taken for the person presumed absent.[224] Two reasons have been advanced to explain why this ad hoc approach furthered the absent person's interest. Both Demolombe and Planiol argue for the privacy it afforded the missing person's "life and . . . business."[225] Yet this privacy would hardly be preserved by a court's repeated intervention and orders over the course of the five years.[226] A more convincing reason is historical: before codification, curators were appointed to represent absent persons in legal actions, but "their interests were too often compromised by the negligence, if not by the disloyalty of these types

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220. The exceptions to the tripartite scheme occur when an absentee either lacks presumptive heirs, in which case no provisional possession is possible, or disappears under circumstances suggestive of death, in which case no curatorship is required. See La. Civ. Code arts. 52, 60.

221. C. Civ. arts. 112-114, 120, 129 (France 1804).

222. Demolombe and Planiol agree that a curator could be appointed, but only in exigent circumstances; see, C. Demolombe, supra note 24, § 36; 1 M. Planiol, supra note 3, § 623, at 374.

223. C. Civ. art. 115 (France 1804).

224. 1 M. Planiol, supra note 3, § 623, at 374.

225. Id. see also, C. Demolombe, supra note 24, § 31: " 'If there is necessity. . . .' That is the first condition, without which, in effect, no motive could justify the violation of the business secrets of a person who may still come back any day."

226. Demolombe vividly portrays the decisions that the court might have to make:

> The fields are uncultivated; the leases have expired? One will make, [or] one will renew the leases. The presumed absent person has formed a company, and the contract does not give his associate the power to act alone . . . ? One will authorize it. A repair of the buildings is necessary? It will be made. Some foodstuffs may be lost? One will sell them. A prescription is going to be completed, an inscription lapse . . . ? A debtor becomes insolvent? One will interrupt the prescription; one will renew the hypothecary inscription; one will pursue the debtor, etc., etc. . . .
>
> It may be necessary, for all that, to look into the papers of the one presumed absent; so it is quite necessary that the tribunal has the right to do so.

C. Demolombe, supra note 24, §§ 34-35.

of agents."[227] As a result, an Ordinance of 1667 prohibited their use.[228] To establish a curator of the absent person's estate would have appeared to be an expansion of a system that had been rejected as ineffectual at best and corrupt at worst.

The Code Napoléon did not explicitly prohibit the appointment of a curator, which could be made if, for example, the absentee's interests were at stake in a legal dispute[229] or if a series of actions had to be taken to preserve his estate.[230] Such appointments, however, occurred not as a general rule, but only out of necessity,[231] and the curator's acts were limited to those of administration, according to Demolombe.[232]

a. The Louisiana System

In contrast, the Louisiana Civil Code mandates, without requiring a showing of necessity or of a lapse of time to attain absentee status,[233] the appointment of a curator who is a fiduciary[234] of the absent person who left property in the state. Even the interests of an absentee who left no property behind to be administered are defended by a curator ad hoc.[235]

In its most extensive departure from the French title, the Louisiana Code imposes procedural requirements on the curator:[236] an oath, inventory and appraisal of the property, and security given for its value;[237]

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227. Id. § 36.

228. Id.

229. Id.

230. 1 M. Planiol, supra note 3, § 623, at 374.

231. See supra note 128.

232. C. Demolombe, supra note 24, § 38.

233. La. Civ. Code art. 47. Though no time frame is specified by the article, it does not apply to one temporarily absent. Whitney Central Trust & Savings Bank v. Alfred, 11 Teiss. 223, 225 (Orleans App. 1914), aff'd, 136 La. 230, 66 So. 855 (1914) (defendant whose whereabouts were unknown, but who had left on a bridal trip to Denver some time before, was not an absentee in the sense of article 47).

234. La. R.S. 9:3801(2) (1983).

235. La. Civ. Code art. 56 (1952); repealed by 1960 La. Acts No. 30, § 2. The provision for a curator ad hoc was moved to the La. Code Civ. P. art. 5091, and amended to bring it into conformity with constitutional requirements for personal jurisdiction; see infra note 260.

236. Moreau Lislet attributed the curatorship, which also appeared in the Digest of 1808, to Spanish sources and to the treatise of the seventeenth-century French jurist Domat; see L. Moreau Lislet, Ed., note 6, facing page 15; 1 R. Batiza, The Verbatim and Almost Verbatim Sources of the Louisiana Civil Codes of 1808, 1825, and 1870: The Original Texts 8 (1973). However, these sources account for only three articles in chapter 1 of the title: articles 47, 51 and the now-repealed article 56. The bulk of the chapter is original to the Louisiana code.

237. La. Civ. Code art. 49.

a final accounting;[238] and a legal mortgage on his immovable property in favor of the absent person.[239] In addition, article 49 appears to require accounting on demand, distinct from that required by law at the termination of curatorship.[240] Although the curator receives compensation,[241] he is prevented from completely draining the estate of an absent person who has no presumptive heirs to demand an end to curatorship. Article 53 requires the curator in such a case to terminate his own position after ten years by selling the absentee's property and entrusting the proceeds to the state treasury.[242] These regulations attempt to protect against the inefficiency and dishonesty that led the French to reject the curatorship.

Further protection is achieved by narrowly confining the powers of the curator. The curator represents the absent person's interests in suits;[243] he administers the absentee's property "without having a right to alienate or mortgage the same, under any pretense whatsoever."[244] Thus, his role is the same as that of the curator appointed in extraordinary circumstances under the original French system; the difference lies in the fact that, in Louisiana, such curators represent the legal norm.

During this stage, the goal of both civil law systems is that stated by Demolombe: "It is not a matter of changing, of innovating, or even of improving, but solely of conserving and of waiting!"[245] The order of selection of a curator, which prefers the spouse over the presumptive heirs,[246] confirms the policy of maintaining the status quo during the first period of absence. This order is based on the unprovable supposition that at that point, the absent person is likely to be alive.[247] He may

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238. La. Civ. Code arts. 49, 55. The periodic accounting of Article 54 would operate to protect the curator rather than the absentee, since it is at the curator's option, and the judgment of homologation would be prima facie evidence that his accounts are correct.

239. La. Civ. Code arts. 50, 3314.

240. La. Civ. Code art. 49. The article may simply be an identification of those to whom the final accounting is given—"those who have a right to demand it"—but in that case, Article 49 overlaps with Article 55.

241. La. Civ. Code art. 50.

242. La. Civ. Code art. 53.

243. La. Civ. Code art. 51; see also La. Civ. Code art. 57 (1825) for a now repealed provision creating curators ad hoc to defend absentees for whom no curator has been appointed. For a discussion of the use to which this article was put, see infra note 259.

244. La. Civ. Code art. 50.

245. C. Demolombe, supra note 24, § 34.

246. La. Civ. Code art. 48.

247. Demolombe declares:

> It is customary to say that, during the first period, the presumption of life is that which dominates; that, in the second, the presumption of death begins to gain the upper hand; and that finally this last presumption prevails and triumphs completely during the third period.
>
> Well, these different propositions are only true with regard to the rights which

return at any time and should find his property in the condition that he left it, insofar as that is possible. Even improvements, if unnecessary, may be a violation of his property rights.[248] The absentee does profit through accession of fruits and products to his estate.[249] Moreover, because absence does not end the marriage, no provision permits the spouse of an absent person in a community property regime to dissolve the community at this time. Any increase in the community would inure to the absent person's benefit.[250]

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already appertained to the absent person at the time of his disappearance or of his last news; but it would not be necessary to extend them nor to generalize them.

C. Demolombe, supra note 24, § 11. No legal presumption of death exists in the Code Napoléon. Id. Demolombe is here using "presumption" in the sense of "presumption of fact" or "inference." For this use in French law, see Vocabulaire Juridique 607 (1re éd. 1987).

The same inference that the passage of time increases the likelihood that the missing person has died is found in Louisiana cases where no body has been found, but some indications of death accompany a disappearance. Thus, in Boyd v. New England Mutual Life Ins. Co., 34 La. Ann. 848, 850 (1882), the Louisiana Supreme Court, affirming the district court's finding of the death of a man who disappeared from a ship, declared that "[t]he four years that have rolled by since the date of that decision, serve strongly to confirm the correctness of that conclusion." In Marrero v. Nelson, 166 La. 122, 116 So. 722 (1928), the absence for more than twenty years of one who had lived in San Francisco and was last heard from a year before the earthquake of 1906 supported the probate judge's finding of death. On the other hand, an absence of fifteen months was not sufficient to support a finding of death, despite a suicide note and witnesses who had seen the missing person heading toward the river. Levy v. Simon, 152 La. 857, 863, 94 So. 421, 424 (1922).

248. See Smith v. Wilson, 10 La. Ann. 255 (1855). The plaintiff was co-owner in indivision with Wilson, whose "whereabouts, and even existence, for a long time past, remains under the evidence, unknown." Id. at 257. He turned their property, which had been wasteland, into a plantation, and then sued Wilson for the increased value of the property through a curator ad hoc. The Louisiana Supreme Court affirmed the district court's rejection of the demand, congratulating the lower court on its protection of the absent defendant's rights and maintaining Wilson's "right to repudiate such [improvements] as were unnecessary." Id. at 258.

249. Id. at 257; the fact that Wilson was an absent person did not change his rights as co-owner. La. Civ. Code arts. 483-516 set forth the owner's rights to accessions to his property.

250. Formerly, the Louisiana Civil Code community property article 2334 classified the wife's earnings while living "separate and apart" from her husband as her separate property, provided her means of earning them was not connected with her husband. This provision may, in some situations, have protected wives of absentees, but not husbands of absentees. The article was repealed, along with the entire title, in 1979, when the revision of the matrimonial regimes law was enacted. See La. Civ. Code art. 2334 (see also preface to Title VI Matrimonial Regimes in 1972 West comp. ed., Supp. 1989, at 5).

Of course, the continuation of the community also means that the absent person shares in its losses; see infra, note 314. The spouse of the absentee shares in the risks and benefits to the community which result from his activities.

Ideally, under Louisiana's curatorship, the absent person's property rights are unchanged. His property is subject to oversight, yet it is safeguarded by the restrictions on the overseer's power and by the procedural requirements of security and accounting. Thus the property and privacy interests of the absent person are protected, while the danger that the French feared in an institutional curatorship is averted.

b. Difficulties and Solutions

Despite its benefits, the curatorship of the absentee in Louisiana incorporates a theoretical inconsistency and can cause practical difficulties. The theoretical problem is apparent in the article that creates the office of curator:[251] it applies to those who simply are not present within the state, but about whose existence there is no doubt. Initially, the fact that two concepts rather than one are being dealt with is acknowledged. Article 47 distinguishes between one who is "absent" and one who "shall reside out of the State, without having appointed somebody to take care of his estate . . . ."[252] Article 52 preserves the distinction between the "absentee" and a "person residing out of the State."[253] Yet the differentiation disappears: in listing the preferences in appointing a curator, article 48 terms both types of individuals "absentees,"[254] and the definitional article added to the Louisiana Civil Code in 1825 likewise compresses the two concepts into one word.[255] The regime of the "curator of the absentee" appears to apply to both.[256] Within one chapter of one title, the redactors attempted to regulate not only the legally absent, but those who were, in Planiol's words, " '[a]bsentees' . . . in the vulgar sense"[257] of those not present.[258] The

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251. La. Civ. Code art. 47.

252. La. Civ. Code art. 47. The digest of 1808 and the 1825 Code employ virtually identical language, except for the metamorphosis of the "territory" of 1808 into a "state" by 1825.

253. La. Civ. Code art. 52.

254. La. Civ. Code art. 48.

255. The article reduces the meaning of "absentee", except in the case of heirs, to one not present in the state:

> Absentee—An absentee is a person who has resided in the State, and has departed without leaving any one to represent him. It means also the person, who never was domiciliated in the State and resides abroad. In matters of succession, the heir whose residence is not known is deemed an absentee.

La. Civ. Code art. 3556(3).

256. La. Civ. Code arts. 49-55.

257. 1 M. Planiol, supra note 3, § 612, at 370.

258. Under the new French law of absent persons, certain non-presents now receive the same treatment as absent persons: those who "by consequence of their remoteness, find themselves, without wanting to be, without the power to make known their will." C. Civ. art. 120 (France). These individuals suffer an incapacity in protecting their property,

disposition of these persons' property raised a legal question different from that at issue in the case of genuine absentees—the question of personal jurisdiction.[259]

Using the absentee regime to obtain personal jurisdiction over nonresidents not present in Louisiana was not only inappropriate, but became outmoded under United States Supreme Court and state supreme court due process cases.[260] The minimum contacts standard,[261] the advent of the long-arm statute,[262] and the adoption of a new Code of Civil Procedure[263] offered other solutions to the problem.[264] Article 56 was repealed in 1960.[265] Yet the absentee regime still expresses the substantive confusion of absentees with those not present by retaining the curatorship for both. The revision of the Louisiana title concerning absentees proposed by the Louisiana State Law Institute would rid the code of this anachronism by restricting the curatorship to absent persons[266] and deleting the definitional article.[267]

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as does the absentee, and their situation, it has been suggested, may occur more frequently than absence. See B. Teyssié, supra note 215, § 10, at 8-9. The Louisiana regime did not limit the non-present persons to whom its curatorship applied.

259. The principal issue raised by the inclusion of the non-present individual in the regime of absentees was one of personal jurisdiction. The Code of 1808 had provided for the appointment of a "proper person to defend the rights of the absentee" who has no estate to be administered by a curator, but an interest in a lawsuit, by the judge before whom the suit was pending. La. Civ. Code art. 8 (1808). The state supreme court rejected efforts to use this article as a means of instituting a personal action against an absentee; see, e.g., Astor v. Winter, 8 Mart. (o.s.) 171, 205 (1820); Holliday v. McCulloch, 3 Mart. (n.s.) 176, 178 (1824). The 1825 Code revised the article to allow appointment of a curator ad hoc to defend an unrepresented absentee in personal actions instituted against him. La. Civ. Code art. 57 (1825). The appointment of a curator ad hoc was used to obtain personal jurisdiction over nonresidents who were not served without attachment of any property; see, e.g., Field & Co. v. New Orleans Delta Newspaper Co., 19 La. Ann. 36, 38 (1867).

260. In the wake of Pennoyer v. Neff, 95 U. S. 714 (1877), the Louisiana Supreme Court ruled that use of the absentee articles to obtain personal jurisdiction violated due process; see Laughlin v. Louisiana and New Orleans Ice Co., 35 La. Ann. 1184, 1185-86 (1883).

261. International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945).

262. La. R.S. 13:3201 (Supp. 1989).

263. The Louisiana Code of Civil Procedure was adopted by Act No. 15 of 1960, effective January 1, 1961; it attempted to bring together, in revised form, the rules of civil procedure contained in the Code of Practice, the Revised Statutes, and the Civil Code. La. Code. Civ. P. preface (1960).

264. La. Code Civ. P. art. 5091.

265. See supra note 235.

266. La. Law Institute, Report of the Property Committee, supra note 195, art. 47, at 15.

267. Id. art. 47, comment (e), at 16.

Curatorship is by law mandatory,[268] yet the jurisprudence indicates that in some cases no action to establish one was taken though many years of absence had passed. For example, in *Wilson v. Smith*, the absentee had last been heard of in 1832, but it was not until 1855 that a curator of his property was appointed.[269] In *Rachel v. Jones*, Rachel had allegedly left the state in 1853, but her presumptive heirs took no action until 1879, when, instead of a curatorship, they began succession proceedings.[270] More recently, in *Fried v. Edmiston*, no curator was ever appointed for the property of Edmiston, who had purchased it in 1926 and disappeared many years before the action before the court. A curator ad hoc represented him at trial.[271] The proposed revision recognizes that unless someone brings the absence to the attention of the court, it is unlikely that a curator will be appointed. Therefore, creation of the position is to be made discretionary upon request by an interested party.[272]

Regardless of whether there is a curator during the first five years under the present system, the spouse in community of an absent person cannot terminate the community except through a judgment of separation or divorce.[273] The former has no way of knowing what measures the absentee is taking, such as selling property or incurring debts, that may affect the community, and therefore could never be certain of the extent of the community's liabilities and assets. Moreover, the absentee's actions may amount to grounds for a judgment of separation of property—fraud, fault, neglect, or incompetence[274]—without the spouse's knowledge. To allow the spouse to escape this uncertainty, the Law Institute proposal includes an amendment to the matrimonial regimes law making absence an additional cause for a judgment of separation of property.[275]

The chief practical problem of curatorship under the present regime is that, in the effort to preserve the status quo out of concern for the absent person, it takes his separate property, or community property of which he is the exclusive manager, out of commerce for seven years. For example, suppose an individual were to purchase a lot in an undeveloped area of New Orleans, and then, after moving abroad, dis-

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268. La. Civ. Code art. 47 declares that "the judge . . . shall appoint a curator to administer the same." (emphasis added).

269. 14 La. Ann. 368, 369-70 (1859).

270. 34 La. Ann. 108, 110 (1882).

271. 40 So. 2d 489, 491-92 (La. App. Orl. 1949).

272. La. Law Institute, Report of the Property Committee, supra note 195, art. 47, at 15.

273. See La. Civ. Code arts. 155(A), 159.

274. See La. Civ. Code art. 2374.

275. La. Law Institute, Report of the Property Committee, supra note 195, art. 2374, at 34.

appear. Her nearest relative is a brother, who has been appointed curator of her property. The area is developed; property values skyrocket; her lot is now worth over $11,000. However, the city seeks payment of $1,600 for paving charges, money that her brother, an unskilled worker making minimum wage, cannot pay.[276] Under the present system, he cannot mortgage the property in order to pay the paving charges and preserve it for his absent sister. Nor can he sell it privately, a move that would increase his chances of receiving its full value. The prohibitions to protect the absent person's interests result in a situation that favors only the purchaser at a forced sale. Moreover, because movable as well as immovable property cannot be alienated, a prescient curator could not, in late September of 1987, have sold stocks owned by the absent person.

The solution suggested by the projet is to widen the curator's powers to include those of mortgage and alienation.[277] Only separate property of the absentee would be under the curator's management. The spouse who is present now has, as a general rule, management rights over community property. If concurrence is required, it can be judicially authorized when a spouse is absent.[278] The projet proposes to maintain the community property as a unit by allowing court authorization of the present spouse to manage community property that had been under the exclusive management of the spouse who has vanished.[279]

To counteract the danger that the absent person's property might be dissipated by the curator,[280] the Louisiana Law Institute has included safety measures, not only in the substantive provisions, but also in a proposed revision of the procedural rules on curatorship of absent persons.[281] Some are familiar: the requirements of oath, descriptive list,

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276. The facts in this hypothetical case are adapted from Pedlahore v. Pedlahore, 151 La. 288, 91 So. 738 (1922).

277. La. Law Institute, Report of the Property Committee, supra note 195, arts. 47, 48, at 15-17.

278. La. Civ. Code arts. 2346, 2355. The projet recommends revision of article 2355 to make it clear that "absence of the other spouse" refers both to those temporarily not present and to absent persons. La. Law Institute, Report of the Property Committee, supra note 195, art. 2355, at 31. The absent spouse is protected against fraud or bad faith in the management of the community by La. Civ. Code art. 2354, which imposes liability for such conduct on the present spouse who manages the property.

279. La. Law Institute, Report of the Property Committee, supra note 195, art. 2355.1, at 32.

280. See supra text accompanying notes 227-28, discussing the rejection of curatorship by the drafters of the Code Napoléon.

281. The report recommends suppressing articles 48-51, 54-55 of the present Civil Code and dealing with the procedure for curatorship elsewhere. La. Law Institute, Report of the Property Committee, supra note 195, at 8. See Louisiana State Law Institute, Minutes of the Meeting of the Council, February 17-18, 1989, at 9 (available from the Louisiana

security, and a final accounting,[282] and that, if there are no presumptive heirs, the curator must terminate his own position.[283] But changing the power of the curator also calls for increasing the safeguards. Hence, a showing of necessity would be a prerequisite for appointing a curator,[284] who must have court approval to "[e]xercise all functions and activities with respect to the administration and disposition of the absent person's property."[285]

Because, under the proposed revision, the curator does not merely maintain the practices of the absentee with respect to his property, but actively pursues his interests by managing it, the office should be filled by one whose interests are closest to the absent person's. The proposed procedural revisions[286] give the spouse who is not judicially separated from the absent person priority over his other presumptive heirs, who are then ranked in order of intestate succession rights.[287] However, though they are still married, the interests of the spouses diverge if one disappears. If the spouse who is present, and not the heir of the absent person, can be said to have an interest in preserving his separate property, this interest is short term; in five years, under the proposal for a declaration of his death and the opening of his succession, the property will pass to the absent person's heirs.[288] The absent person's interest in his separate property is long term: should he return at some uncertain

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State Law Institute, Baton Rouge, Louisiana) [hereinafter La. Law Institute, Minutes]. For the procedural proposals, see La. Law Institute, Proposed Procedural Revisions, supra note 213. Though the procedural proposals have received article numbers in draft, the Committee on Civil Procedure has proposed their inclusion in Title 13 of the Revised Statutes.

282. La. Law Institute, Proposed Procedural Revisions, supra note 213, arts. 7, 12, 13, at 17, 25-26; Report of the Property Committee, supra note 195, art. 52, at 21.

283. La. Law Institute, Report of the Property Committee, supra note 195, art. 51, at 20. The time period is shortened to five years. Because the termination takes place through a declaration of death and opening of the succession, the estate would be a vacant succession; see La. Civ. Code art. 1095.

284. La. Law Institute, Report of the Property Committee, supra note 195, art. 47, at 15.

285. La. Law Institute, Proposed Procedural Revisions, supra note 213, art. 16(A), at 30-31, and art. 17, at 34-35 for the procedure by which approval is secured.

286. It is not clear why the priority in appointment to curatorship is considered a procedural matter to be relegated to the Revised Statutes. The preference does not raise a question of how the curator is appointed, but a substantive issue: who is to manage the absent person's property? Other regimes include preferences among the substantive provisions in the Civil Code; see, e.g., La. Civ. Code arts. 146 (preference in award of custody of children pending litigation for separation), 256 (priority in appointment of tutor of illegitimate child).

287. La. Law Institute, Proposed Procedural Revisions, supra note 213, art. 11, at 24.

288. La. Law Institute, Report of the Property Committee, supra note 195, arts. 54-55, at 23-24.

future date, he will enjoy its ownership for the rest of his life. Once he is discovered to be or declared to be dead, his heirs will likewise enjoy the property as owners for an indefinite period of time in the future. Before that time, they have an interest in preserving and maximizing its value that corresponds more closely to the absentee's interest than that of his spouse. The order of appointment should therefore follow the order of succession; only a spouse who is the presumptive heir of the separate property should be preferred as curator.

Putting the absentee's assets back in commerce, while solving one problem, has the potential for creating others, because two people may be acting independently in the absentee's interest: the curator, and the absentee himself. In his unknown location, the absentee may be exercising his powers to alienate and encumber his property. The projet affirms his continued capacity to do so.[289] Any attempt to deprive him of these property rights would overstep the boundary of constitutionality described in *Cunnius*: it would amount "simply to authorizing the transfer of the property of the absentee to others."[290] But he and the curator may engage in incompatible transactions with regard to the same piece of property. Conflicting claims regarding immovable property would be resolved by the Louisiana public records doctrine, under which the first claimant to file his instrument of transfer or mortgage prevails.[291] Those dealing with the curator are even protected if his curatorship has terminated of right, provided no notice of the termination has been filed in the curatorship proceeding.[292]

Because termination of right may occur by the death or reappearance of the absent person or by his appointment of a representative in the state,[293] without notice to the curator, the latter may be in good faith in these transactions. No provision in the projet protects him against the claims of the returning absentee or his successors for actions taken once his authorization has evaporated. The principle of negotiorum gestio, however, would measure his liability for his actions in the unauthorized management of the affairs of another by the standard of a prudent administrator.[294]

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289. Id. art. 49, at 18.

290. Cunnius v. Reading School District, 198 U.S. 458, 477, 25 S. Ct. 721, 727 (1905).

291. A. Garro, The Louisiana Public Records Doctrine and The Civil Law Tradition § 82 (1989). The doctrine is repeated in La. Law Institute, Report of the Property Committee, supra note 195, art. 49, at 18. It is unlikely that either the absentee or the curator would engage in a transaction involving movable property not in his possession.

292. La. Law Institute, Report of the Property Committee, supra note 195, art. 53, at 22.

293. Id. art. 50, at 19.

294. La. Civ. Code art. 2298. I am indebted to Professor A. N. Yiannopoulos for this suggestion in a private communication on September 5, 1989.

The curatorship of the absentee's property under the present Louisiana law is antiquated and ignored. Yet in France, where curators as the norm were originally rejected, their advantages have been recognized. The revised French title on absence has adopted a system of legal administration and representation of the absent person during the presumption of absence[295] that is comparable to curatorship.[296] The legal administrator is charged with acting "en bon père de famille"; performing this function may require acts of disposition, made under the watchful eye of the court.[297] The experience of other civil law jurisdictions and of Louisiana itself indicates that the Louisiana State Law Institute's proposed changes will revitalize the office.

2. *Provisional Possession*

a. *The System*

The second stage of the Louisiana regime of absentees, provisional possession, typically occurs after five years of absence. Under the Code Napoléon, this stage was initiated by a judgment of declaration of absence, which required an inquiry, public notice, and a delay of one year before it could be handed down.[298] In Louisiana, a judicial proceeding is required for the delivery of provisional possession.[299] This requirement shifts administration of the property that the absent person has left behind from the curator to those most likely to inherit if the absent person is dead. These may be the presumptive heirs of an intestate absentee or the universal heir under a will; others with claims deriving from the death of the absentee may provisionally exercise their rights.[300] The duty to represent the absentee in lawsuits falls to those in provisional possession.[301] The change of hands is justified on Demolombe's sliding scale of the absentee's probable existence.[302] Those who would inherit have the greatest interest in the property if the absent person does not return or proves to be dead, and that outcome appears more likely after

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295. C. Civ. arts. 113-115 (France). It has been suggested that the French title is here recognizing and organizing what was, in fact, the practice under the former version; Breton, L'absence selon la loi du 28 decembre 1977: Variations sur le thème de l'incertitude, D.S. Chronique 241, 243 (1978).

296. Teyssié notes that in the Swiss and Italian codes, the administrators with similar powers are termed curators. B. Teyssié, supra note 215, § 35, at 28.

297. Id. § 38, at 31; for the delineation of powers in the Code Civil, see C. Civ. arts. 113, 389-6, 456, 457 (France).

298. C. Civ. arts. 115-119 (France).

299. La. Civ. Code art. 57 (France 1804).

300. La. Civ. Code arts. 57, 62, 63.

301. La. Civ. Code art. 75.

302. See supra note 247.

five years with no word. But evidence that the absent person is still alive gives priority to maintaining the status quo: a power of attorney, which can block curatorship, delays provisional possession an additional two years.[303] Even if it has expired, a curator, rather than the presumptive heirs, administers the absent person's estate until seven years have passed since his disappearance.[304]

Moreover, provisional possession can be blocked altogether in the case of a married absentee under a community property regime. The absent person's spouse may continue that regime and "claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife,"[305] and may represent the absent person's interests in lawsuits.[306] This option benefits the absent person in several ways. First, as Demolombe points out, the most obvious benefit is that it is "[i]n the interest of the absent person himself . . . to concentrate in only one hand the governance of his fortune."[307] This reasoning may account for the fact that, according to the express terms of article 64, the spouse administers the whole of the absent person's estate, not merely the community portion.[308] The requirements of inventory and appraisal protect all of the property administered by the spouse.[309]

Demolombe offers other, more cogent justifications for permitting the community to continue. Absence alone does not dissolve the marriage; there is no reason to end the community, disrupting, perhaps, business affairs that depend upon it, when only provisional measures are still being taken.[310] Demolombe is thinking in terms of benefit to the spouse left behind, but the absent person may also benefit from continuation of the community enterprise. In *Pedlahore v. Pedlahore*[311] the Supreme Court of Louisiana indicated that the spouse who continues

303. See supra text accompanying note 217.

304. La. Civ. Code art. 59.

305. La. Civ. Code art. 64.

306. La. Civ. Code art. 75.

307. C. Demolombe, supra note 24, § 272.

308. Despite the reference to the "husband or wife who shall have been continued in the administration of the community" in article 66, article 64 allows the spouse to administer the entire estate of the absentee. Exercising this option "prevent[s]" provisional possession, according to the article; the separate property cannot remain to be administered, or provisional possession would still be possible with respect to it.

309. La. Civ. Code arts. 66, 67. The "legal administration" spoken of in the latter article and in Article 75 must refer to the administration of the spouse who is present. The only other possibility would be reference to the curator's administration. Such references would be redundant and out of place, since these duties are already incumbent on the curator under articles 49 and 51.

310. C. Demolombe, supra note 24, at § 272.

311. 151 La. 288, 91 So. 738 (1922).

the community does so with all the powers granted by the matrimonial regimes law. Had the husband whose wife and child had been absent for thirteen years chosen the first alternative available under article 64, he would have preserved

> the same rights and privileges as if the wife were present, including the right to administer the community property and to alienate it if he should deem it proper. . . . Sirey in his Codes Annotés (3d Ed.) vol. 1, p. 87, note 9 says: "The husband who, in the absence of his wife, has chosen to continue the community, preserves, after as before the absence, the right to alienate and mortgage the property of the community." He quotes in support of this doctrine Persil, Reg. hyp. on article 124 (C.N.) No. 7; Talandier, p. 134; Toullier, vol. 4, p. 360; Delvincourt, vol. 1, p. 94; Plasman, p. 279; Demolombe, No. 285; Aubrey and Rau, vol. 1, par. 155, note 6; Laurent, No. 206.[312]

Thus, the continuation of the community includes the right to mortgage the property, rather than to sell it. If Pedlahore had followed that course, and the land had increased in value, his missing wife, if she had returned, would have benefited.[313] Although continuing the community subjects the absent person to the risks[314] of the regime, it also makes him a sharer in its rewards: for example, he would be entitled to a one-half undivided interest in the present spouse's earnings and in the value of a growing business begun with community funds.[315]

The presumptive heirs are said to receive provisional possession of "the estate which belonged to the absentee at the time of his departure, or at the time he was heard of last."[316] The term "estate" includes not only the things left behind, but also any rights appertaining to them.[317] Thus, increases that have accrued by right to the absentee during the years before provisional possession, such as natural and civil fruits, and

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312. Id. at 291-92, 91 So. at 739-40. The court was not done with its authorities at this point; Proudhon was the single exception to this rule. Id. at 292, 91 So. at 740.

313. The husband in *Pedlahore* chose, however, to dissolve the community, and to partition the property under the principles of co-ownership. Id. at 292, 91 So. at 740.

314. See, e.g., La. Civ. Code art. 2346; good faith poor management of the community property could result in a loss to the absent person.

315. La. Civ. Code arts. 2336, 2338. For past provisions limiting an absent husband's rights in this respect, see supra note 113.

316. La. Civ. Code art. 57.

317. Black's Law Dictionary 490-91 (5th ed. 1979). The term is used to translate the French word *biens*, which includes all the elements of a person's patrimony, including his property and other rights; see A. Yiannopoulos, supra note 97, § 1, at 1-5; Vocabulaire Juridique (1re éd. 1987), at 100.

the contributions to the community by the remaining spouse, form part of this estate.

Despite the strong interest that the likelihood of inheritance gives provisional possessors in the property, their freedom to deal with it is almost as circumscribed as the curator's. Although the presumptive heirs may have been awarded provisional possession immediately after the disappearance because it occurred in circumstances strongly suggestive of the absent person's death,[318] provisional possession merely shortens the time that they must wait for absolute possession. It does not give them greater rights while waiting. Provisional possession is defined as "but a deposit, which invests those who have obtained it, with the administration of the estate of the absentee, and for which they remain accountable to him, in case he reappears or is heard of again."[319] Inventory, appraisal, and security are, as under the curatorship, required.[320] Even the spouse who dissolves the community and claims his share must give security for "such things as may be liable to be restored."[321] The provisional possessors cannot alienate or mortgage the immovables of the absentee. Unlike the curator, they may obtain a court order to dispose of the movables, but in order to profit the absentee, not themselves. The purpose behind the sale is

> to assure for the absent person the conservation of the same substance of his belongings, of the business, of the capital; and, as a consequence, it is suitable, as a general rule, to order the sale not only of commodities which could not be preserved at all, but also of movables, which deteriorate with usage and with just the passage of time, horses, coaches, etc. The provisional possessors, in effect, are not usufructuaries. . . .[322]

Thus, even if the provisional possessors have a use for these items, they must instead sell them. The amount obtained must be reinvested in immovables—which the possessors cannot alienate or mortgage—or safely at interest for the absent person.[323]

Provisions for the returning absent person also safeguard his interest. The reappearance of the absentee after a judgment of provisional possession causes all its effects to cease;[324] the former absentee, even if he

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318. La. Civ. Code arts. 60-61.

319. La. Civ. Code art. 65.

320. La. Civ. Code arts. 57, 62-67.

321. La. Civ. Code art. 64. For a discussion of the possible meanings of the phrase, see K. Spaht, Matrimonial Regimes § 7.7 in 16 Louisiana Civil Law Treatise 1989.

322. C. Demolombe, supra note 24, § 95.

323. La. Civ. Code art. 66.

324. La. Civ. Code art. 72.

is not present,[325] regains control of his property.[326] Because the provisional possessors were not, as Demolombe pointed out, usufructuaries, he also receives a portion, the amount determined by length of absence, of the annual revenues of his estate.[327]

b. Difficulties and Solutions

Provisional possession forces the problems of curatorship to drag on for two additional years. Some concessions are made to the interests of presumptive heirs. They may administer the property. They retain some of the revenues of the estate on the absentee's return. Movables that may deteriorate can be converted to more lasting investments. But because the spouse can use article 64 to take on or to continue, if he was curator, administration of the estate of the absentee, that individual's separate property may spend two more years in the hands of someone with no interest in its preservation. Moreover, except for community property, the absentee's estate is still in limbo. The state supreme court in *Pedlahore* remarked, "It is hardly conceivable that our law is powerless to rescue the plaintiff from a situation where he must permit the property to be sold at public auction and probably sacrificed at a loss to himself and to the absentee."[328] But if he had been neither a spouse in community nor a co-owner, that result would have been inescapable.

The projet on absent persons of the Louisiana State Law Institute makes provisional possession unnecessary. After five years of absence—the usual time for provisional possession to begin—the missing person would be presumed dead and an interested party could obtain a declaration of death.[329] Because the declaration would produce the legal effects of death, the absent person's succession would devolve upon his heirs.[330] The property that had been managed by the curator for the absentee would now be managed by the heirs for themselves.

The projet would retain the policy of unity and consistency in the administration of the community embodied in Article 64 by confining curatorship to the separate property of the absent person.[331] The spouse

325. See F. Swaim & K. Lorio, supra note 160, at 101: "The law carefully uses the term 'reappear' because it wishes to make clear that what is intended is the reappearance of the person in the sense that his existence ceases to be questionable. He 'reappears' into certainty—he is alive. Thus any reliable communication from or about the absent person would be perfectly sufficient for this purpose. He does not have to show up physically; he merely has to have his existence become known."

326. La. Civ. Code art. 72.

327. La. Civ. Code art. 68.

328. 151 La. Ann. 288, 290, 91 So. 738, 739 (La. 1922).

329. La. Law Institute, Report of the Property Committee, supra note 195, art. 54, at 23.

330. Id. art. 55, at 24.

331. Id. art. 48, at 17.

who is present would still have the option of continuing or terminating the community during the first five years.[332] The proposal that succession follow curatorship strengthens the reasons for allowing the spouse left behind to continue the community if he chooses. Despite the fact that he would not be able to forestall the declaration of death and its consequences,[333] he has a strong interest in the preservation of community property of his absent spouse. As the surviving spouse, he would have a usufruct over it if community property is not otherwise disposed of by testament.[334] Moreover, the spouse is second in line for succession to the presumptive decedent's community property.[335] Unfortunately, by placing the spouse still present first in line for appointment as curator, the proposed procedure would aggravate the negative features of article 64 with respect to separate property by allowing one with no long-term interest in that property not only to administer, but also to manage it.[336]

3. Absolute Possession and the Return of the Living Dead

a. The System

The final stage of the regime, absolute possession, corresponds to "definitive possession" in the Code Napoléon.[337] Unlike that code and earlier versions of the Louisiana Civil Code, the language of present article 70 speaks of a "presumption of death" following from seven years of absence.[338] The possessors' interests, which have been increasing steadily, at this point finally outweigh those of the absent person. Once a judgment of absolute possession is handed down, they may "thereafter deal with such property as the absolute and unconditional owners."[339] For the first time, no security is required. The expanded rights of the possessors allow them, at this stage, to mortgage and even to dispose of the property.

Protections for the absent person remain. The first, which precedes this stage of the regime, is the lapse of time required for absolute

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332. See supra text accompanying notes 305-09.

333. La. Law Institute, Report of the Property Committee, supra note 195, art. 2356, at 33.

334. La. Civ. Code art. 890.

335. La. Civ. Code art. 889.

336. See supra text accompanying notes 286-89.

337. C. Civ. art. 129 (France 1804).

338. La. Civ. Code art. 70. For the earlier versions, see La. Civ. Code art. 70 and references thereafter to history and text of former codes (West 1952 and Supp. 1989). For the meaning of "presumption of death" in this article, see supra text accompanying notes 151-57.

339. La. Civ. Code art. 70.

possession to occur. The delay for putting the presumed heirs into absolute possession has been a formidable safeguard of the absent person's property rights. From 1808 until 1946, echoing the words of the Code Napoléon, the relevant article had required a lapse of thirty years from putting into provisional possession, or one hundred years from the birth of the absentee, before absolute possession could be granted.[340] For thirty to thirty-seven years from the time of the disappearance, or until the missing person had reached an age that made his death almost certain, his property sat awaiting his return. The protection afforded by this time period made the restitution article virtually superfluous; Planiol observed that there was no jurisprudence in France dealing with the issues that arise when an absent person returned after absolute possession.[341] No such cases arose in Louisiana.[342]

In a series of amendments to article 70, the legislature has whittled away at the delay: it became thirty years of absence in 1946, ten years of absence in 1978, and seven years of absence in 1986.[343] The time during which the state is willing to allow the absent person's interest in his estate to dominate has decreased dramatically.

The second protection afforded the absent person contemplates the termination of absence by return after absolute possession.[344] Although no cases of absentees returning after absolute possession have yet arisen in Louisiana, they have become more probable. Reappearance after seven

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340. C. Civ. art. 129 (France 1804); see supra note 338.

341. 3 M. Planiol, supra note 3, § 2495 (2), at 206. Because provisional possession, under the Code Napoléon, would not take place until ten years after the disappearance if the absent person left a power of attorney, Planiol here speaks of an absent person who returns after forty years as a rarity. See C. Civ. art. 121 (France 1804).

342. Although the plaintiff reappeared after a protracted absence in Rachel v. Jones, 34 La. Ann. 108 (1882), the issue in the case was not restitution to an absentee, but nullification of a succession proceeding in which she had been represented as dead by her "heirs." Id. at 110. Rachel had not been absent for even thirty years at the time of the succession proceeding. Id. The state supreme court observed that, if the plaintiff were Rachel, her disappearance "indeed appears strange," and "singular," but found her to be Rachel nonetheless. Id. at 110, 112. These observations, and Rachel's rapid reappearance once her alleged heirs were put in possession of the property—she filed suit in a little over one year—suggest that the justices smelled fraud on the part of the overeager heirs-to-be. Id. at 110.

343. See La. Civ. Code art. 70 and the references thereafter on the history and text of former articles (West 1952 and Supp. 1989).

344. Absence could also be terminated at any stage of the proceedings by the discovery that the person thought to be absent is, in fact, dead. Under article 71, during provisional or absolute possession, the true heirs are substituted for the presumptive heirs when the date of the absentee's death differing from that of his disappearance has been discovered. The presumptive heirs may keep the revenues that they have already collected. La. Civ. Code art. 71. The proposed revision preserves this rule. La. Law Institute, Report of the Property Committee, supra note 195, art. 56, at 25.

years' absence has occurred in other states.[345] The regime provides for restitution of the estate.[346] The protection of property interests of the formerly absent person is, however, minimal. First, under article 68, he has forfeited the revenues earned by the estate during his absence.[347] Second, third party purchasers, and those who have acquired rights that encumber the property, are protected from his claims, an important feature if the property is to remain in commerce.[348] The absent person is confined to claims against the absolute possessors.[349]

b. Difficulties and Solutions

The extent of the returning absentee's claims against those in absolute possession is open to question. He "recovers his estate, such as it may happen to be;"[350] the latter phrase has been viewed as denying him any claim against the possessors for diminution in value caused by deterioration of the property. As Planiol points out, "The deliverees were entitled to consider themselves the definite owners, not responsible to him."[351] Whether he has an action against the possessors for the diminution in value caused by legal encumbrances is not specified. Discussing the mandate to restore "the price of such part of it as has been sold,"[352] Demolombe asks whether the absent person is only entitled to the particular monies received in payment or whether the possessors become the absentee's personal debtors from the time that they receive the

345. See, e.g., Martin v. Phillips, 514 So. 2d 338, 339 (Miss. 1987). Martin disappeared from his home in Grenada County, Mississippi in 1969; his car was found parked near the Grenada Reservoir spillway. In 1976, his wife had him declared dead, and sold the 340 acres she received as his heir for $95,000. In August, 1983, after over fifteen years of absence, Martin reappeared in Grenada County and sued for restitution of his property. The lower courts dismissed the case; the state supreme court remanded the case for investigation of the possibility of fraud on Martin's part, or detrimental reliance by the purchasers. Id. at 341.

In 1981, Ed Greer of El Segundo, California vanished, leaving behind a wife, two sons, a father, and a high-pressure job. After living as a beach bum and then in Houston as an engineer, he was located by the Federal Bureau of Investigation seven years and one month after his disappearance. Cult Figure at Hughes: Ed Greer Resurfaces to Some Relief, Some Regret, L.A. Times, Feb. 3, 1989, part 1, at 1, col. 5.

346. La. Civ. Code art. 73. The grant of owner's rights to the presumptive heirs could not have impliedly repealed this article without risking unconstitutionality. See Oppenheim, Recent Developments in Louisiana Succession Law, 24 Tul. L. Rev. 419, 425 (1950).

347. La. Civ. Code art. 68.

348. 3 M. Planiol, supra note 3, § 2495(2), at 206. Cf. C. Demolombe, supra note 24, § 156.

349. La. Civ. Code art. 73.

350. Id.

351. 3 M. Planiol, supra note 3, § 2495(2), at 206. Cf. C. Demolombe, supra note 24, § 165.

352. La. Civ. Code art. 73.

price.[353] Even the restitution of "such property as has been bought with the proceeds of his estate which may have been sold"[354] raises the question whether net proceeds or gross proceeds are referred to.

The proposed revision answers some of these questions. It specifies that the formerly absent person may recover "the diminution of the value of things that has resulted from their encumbrance."[355] If the rule were otherwise, the possessors could avoid restitution by mortgaging the property and consuming the proceeds. Under the projet, when things have been alienated, the returning absentee will receive only the net proceeds of the alienation.[356] But Demolombe's question remains unanswered: if the heirs consume the price received, or alienate the property in which they invested it before the absent person reappears, are they accountable to him for the value of the property sold? To answer no, as Demolombe does,[357] would have the effect of encouraging the absolute possessors to spend the money on something other than property—cruises of the Greek Isles, for example, though not the souvenirs—stripping the returned absentee of all protection while creating a complex problem of proof as to how the money received as price was used.

Because provisional possession is eliminated by the proposal, it contains nothing comparable to article 68, under which the possessors retain all the annual revenues that they have received from the property if the absentee returns more than seven years after his disappearance.[358] Moreover, neither the present code nor the proposed revision explicitly states whether the possessors have a claim against the absent person for reimbursement for improvements to the property.[359] Thus, these issues would be decided on the basis of the rules governing accession by good and bad faith possessors.[360] Commenting on the present regime, both

353. C. Demolombe, supra note 24, § 171.

354. La. Civ. Code art. 73.

355. Id. This provision coincides with the restitution to returning MIA's presumed dead under Louisiana Revised Statutes 9:1442(B) (1965).

356. La. Law Institute, Report of the Property Committee, supra note 195, art. 57, at 26. "Proceeds" can include property in which the payment has been invested as well as the cash received. See Black's Law Dictionary 1084 (5th ed. 1979).

357. C. Demolombe, supra note 24, § 171.

358. La. Civ. Code art. 68. The elimination of this article will necessitate a rewording of La. R.S. 9:1442(B) (1965), which relies on it.

359. In Smith v. Wilson, 10 La. Ann. 255, 257, the property regime protected the absent person against expenses for unnecessary improvements, but the Louisiana Supreme Court there invoked the rules of co-ownership to determine whether to reimburse the plaintiff, for "the law implied certain mutual rights and duties" as a result of their relationship. However, the absolute possessors, unlike the co-owner in *Smith*, do not share the rights and duties of ownership with the absent person; they succeed him until his return.

360. Comment (c) of proposed article 57 makes this point. La. Law Institute, Report of the Property Committee, supra note 195, art. 57, at 26.

Demolombe and Planiol point out the unjust enrichment that would result from failing to reimburse the absolute possessors. Demolombe hypothesized an absolute possessor who received wasteland and has since made considerable construction on the property. "Do you then give to the [absent person] who reappears, these buildings, this hotel, which represents perhaps all the capital of the [absolute possessor]? But that would be a manifest inequity, which would enrich one at the expense of the other, without motive and without reason!"[361] Planiol less emotionally asserts, "[T]he returned absentee is not entitled to be enriched at [the absolute possessor's] expense."[362] Finally, both treatise writers agree that the article was drafted to protect the interest of the deliverees, not of the absent person.[363] To use it to deprive them of reimbursement would be to misapply it.

These arguments apply with equal force to those who would succeed to the property of one declared dead. But the general rules of accession require an act translative of ownership for a possessor to be in good faith.[364] Without it, they would owe the returning absentee the fruits and products they had gathered, with only a claim for reimbursement of expenses for fruits.[365] Furthermore, the returning owner would have a right to demand demolition and removal of improvements and damages for injury resulting therefrom.[366] If the proposed regime is going to rely on the general rules of accession, it should insure that all presumptive successors are classified as good faith possessors; but the declaration of death, which is a judgment,[367] is an act declarative of rights, rather than

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361. C. Demolombe, supra note 24, § 166.

362. 3 M. Planiol, supra note 3, § 2495(2), at 206.

363. C. Demolombe, supra note 24, § 166; 3 M. Planiol, supra note 3, § 2495(2). Planiol would even require an accounting of the absentee to repay the absolute possessors for what they have expended on his obligations.

364. For the definition of a possessor in good faith for purposes of accession, see La. Civ. Code art. 487. Article 487 does not contain the exclusive definition of good faith in the Civil Code; thus, one who acquires a corporeal moveable by means of transfer is in good faith unless he knew or should have known that the transferor was not the owner; La. Civ. Code art. 523. The standard of good faith for purposes of acquisitive prescription is the reasonable belief, in light of objective considerations, that one is the owner of the thing he possesses. La. Civ. Code art 3480. However, ownership of and reimbursement for fruits and products of the property, and improvements to it, raise issues of rights of accession; without a definition of good faith possession specific to successors of absent persons, the general law of accession would apply, resulting in the inequities described by Demolombe and Planiol.

365. See La. Civ. Code arts. 485, 488. Revenues are by definition civil fruits. See La. Civ. Code art. 551.

366. See La. Civ. Code art. 497.

367. La. Law Institute, Report of the Property Committee, supra note 195, art. 54, at 23.

one translative of ownership.[368] To prevent those who have cared for the property from being deprived of any compensation for their efforts, it would be preferable to state explicitly that they are entitled to revenues and reimbursement.

An additional puzzling feature of the present Louisiana regime remains unsolved by the projet: whether the returning absentee's claims for restitution are subject to prescription. Because his action is petitory, it is not subject to liberative prescription.[369] But it would be without object if, as a result of acquisitive prescription, the presumptive heirs acquired ownership.[370] Planiol attributes to these presumptive heirs the power to prescribe against the absentee: "[T]hey prescribe against him . . ., the delay of this prescription being thirty years, because it is not supported by a title."[371] Although the presumptive heirs could not acquire the entire patrimony[372] of the absentee by prescription, nothing bars them from prescribing with regard to individual assets in the estate. The policy reasons underlying acquisitive prescription of the property of those who are present also justify it in the case of absent persons. First, the possessor, who may have "thirty uninterrupted years of work, activity and, perhaps, worry," who may be budgeting on resources that include the long-possessed estate, is favored over the owner "guilty of gross negligence," whose silence has indicated that he has renounced his right[373]—perhaps, in the case of an absentee, by dying. Second, the "public interest in assuring the tranquility of possessors" justifies it "in

368. The act described as translative of ownership is usually a juridical act, such as a sale, an exchange, or a donation. A. Yiannopoulos, supra note 97, § 195, at 525. A judgment is not translative, but rather declarative of rights, and therefore cannot be such an act. See La. Civ. Code art. 3483, revision comment (b) (West Supp. 1989). Under the present regime, succession jurisprudence has not identified death as an act translative of ownership *vis a vis* the de cujus because, since he was dead, he could not return and demand restoration of fruits or deny a claim for reimbursement by his successor. With regard to third parties, as Yiannopoulos points out, a universal successor's position is that of his ancestor; he may possess by an act translative of title to his immediate ancestor from a more distant one. If his ancestor did not possess by such an act, neither does he. A particular successor would possess by such an act. A. Yiannopoulos, supra note 97, § 195, at 525.

369. See 1 C. Aubry & C. Rau, supra note 115, § 157.616, at 992; C. Demolombe, supra note 24, § 179; La. Law Institute, Report of the Property Committee, supra note 195, at 7.

370. La. Law Institute, Report of the Property Committee, supra note 195, at 7; cf. A. Yiannopoulos, supra note 97, § 201, at 541.

371. 1 M. Planiol & G. Ripert, Traité pratique, supra note 115, § 63, at 74. Planiol reaches this conclusion on the basis of article 133 of the Code Napoléon.

372. A patrimony cannot be alienated, and can only be transferred by succession; see P. Malaurie, Cours de droit civil: les successions, les liberalites (1989), at 14.

373. 22 Baudry-Lacantinerie & Tissier, Traité théorique et pratique de droit civil: prescription (Louisiana State Law Institute trans. 1972), § 28, at 17-18.

order to prevent a continuing uncertainty about ownership of things."[374] The presumptive heirs' possession is not precarious. They possess neither with the absentee's permission, nor, at this stage, on his behalf, but for themselves.[375] The absolute possessors or successors under the projet fulfill the requirements for acquisitive prescription: possession as owners for thirty years.[376] Thus the absent person's interests not only reach a nadir at the point of absolute possession, they remain less compelling than those of the possessors on his return.

The "undead" status of the absent person can give rise to interests unknown to his presumed successors. Restitution after absolute possession can also be claimed against absolute possessors by previously unknown presumptive heirs who are the absentee's descendants. Their claim does not depend upon their proving the existence or decease of their ancestor, who remains absent, but on their superior standing as presumed heirs under succession law.[377] Because their action is not petitory, it is prescriptible; it is subject to a liberative prescription of thirty years running from the date of absolute possession.[378] The prescription has never been relied upon in recorded Louisiana jurisprudence,[379] possibly because, in thirty years, the absolute possessors would have acquisitively prescribed against these individuals.[380]

The projet on absent persons recommends deleting the article that provides this prescription.[381] Because succession proceedings would take the place of absolute possession, the provisions under that regime would delineate the claims of an unrecognized successor and the prescription on his action; he would have thirty years from the opening of the succession to make his claim against his co-heirs or those whose rights he primes.[382] Because the interests of unknown descendants of the absent person are provided for, article 74 is no longer necessary.

The application of the succession regime in this situation, however, expands the rights of these previously unrecognized presumptive heirs

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374. Id. § 29, at 18-19.

375. For the meaning of precarious possession in Louisiana law, see La. Civ. Code art. 3437.

376. La. Civ. Code arts. 3486, 3488, 3474. Former article 3478 suggested that at one point, in Louisiana, acquisitive prescription of ten years did not run against absent persons, and that that exemption had been abrogated. However, no legislation establishing the exemption exists. See La. Civ. Code art. 3478 (1972).

377. C. Demolombe, supra note 24, at §§ 181, 182.

378. La. Civ. Code art. 74.

379. La. Law Institute, Report of the Property Committee, supra note 195, at 7.

380. "[T]hey [the absolute possessors] prescribe against his children and descendants who might make themselves known, the time for this prescription being thirty years, because it does not depend on a title (art. 133)." 1 M. Planiol & G. Ripert, supra note 115, § 63, at 74.

381. La. Law Institute, Report of the Property Committee, supra note 195, at 6-7.

382. La. Civ. Code art. 3502.

and is inconsistent with the rights of those who are substituted as genuine heirs if the absence terminates because the actual date of death of the absent person becomes known. Present Article 74 limits the claims to descendants, whose rights are no greater than the returning absent person's under Article 73;[383] therefore, claims against third parties cannot be asserted. But under the proposed regime, the formerly unknown presumptive heir could be classified as an unrecognized successor; for two years after the judgment of possession, he could make a claim against third parties for his interest in an immovable transferred by the other heirs by onerous title.[384]

Under the present regime, if the date on which the formerly absent person actually died comes to light and his presumptive heirs differed from his genuine ones, the latter have only rights of restoration from those previously awarded possession.[385] The proposed regime likewise replaces the presumptive successors with the actual ones and limits their claims in the same way.[386] It is anomalous to allow recourse against third parties to newly found presumptive heirs and not to allow it to newly recognized genuine heirs of the absent person. It is equally anomalous to adopt a procedure for dealing with absence that relies on a declaration of death and then to limit the application of succession law. The projet could avoid this inconsistency if, in retaining the possibility of changing the date of death and installing new successors, it did not attempt to restrict these successors' rights against third parties.

4. Eventual Rights

a. The System

The regime of absentees in the Louisiana Civil Code treats the property rights of the absent person at the time of his disappearance differently from those rights that would have accrued to him had he not been gone, such as rights of succession. While the property that the absent person left behind is hedged about with protection for seven years, his eventual rights are, from the moment of his absence, as limited as if the possibility of his death were at its height on Demolombe's scale.

So hostile is the law to allowing absent persons to acquire succession rights during their absence that the presumption of continued life is

383. La. Civ. Code art. 74.

384. La. R.S. 9:5630 (1983 and Supp. 1989).

385. La. Civ. Code art. 71.

386. La. Law Institute, Report of the Property Committee, supra note 195, art. 56, at 25.

abrogated by article 76;[387] anyone claiming a right accruing to an absent person must prove that he existed at the time that the right accrued. In both *Dolhonde v. Lemoine*[388] and *Fields v. McAdams*,[389] the wives as curators of their absent husbands sought to recover on the absentees' behalf property that would have fallen to them by succession. The success of the curator in *Dolhonde* resulted from the presence of a witness who had seen her husband, who had disappeared from an insane asylum in 1860, in October, 1863—two months after the death of the de cujus, his uncle.[390] The curator in *Fields*, in contrast, could not demonstrate that her husband, who disappeared in 1916, was alive at the time of his parents' deaths in 1929 and 1934; hence, the succession property passed to the decedent's grandson.[391]

If the absentee vanishes before the opening of the succession that would normally fall to him, he is excluded under article 77.[392] Moreover, although the absentee, should he reappear within thirty years, is entitled to a share in the inheritance, his interest receives little protection. At any stage of the absence, those who inherit in his place can take what would have been his share. No security is required of them, and no prohibition in the code has ever prevented them from alienating the property inherited.

On the other hand, on the basis of article 78, which provides for the returning absentee or his representatives or assigns to claim his succession rights within a prescriptive period,[393] Louisiana jurisprudence had effectively transformed the alternative heirs into provisional possessors, without power to alienate.[394] In *Bierhorst v. Kelly*,[395] the plaintiff

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387. La. Civ. Code art. 76.

388. 32 La. Ann. 251 (1880).

389. 15 So. 2d 246 (La. App. 1st Cir. 1943).

390. *Delhonde*, 32 La. Ann. at 257.

391. *Fields*, 15 So. 2d at 248-49.

392. La. Civ. Code art. 77. The wording of the article, which gave the inheritance to "those who would have had a concurrent right with him to the estate, or . . . those on whom the inheritance should have devolved if such person had not existed," created confusion as to whether the descendants of the absent person were also precluded from inheriting as his representatives. For a comprehensive discussion of the problem, see Comment, Heirs of an Absentee, 4 Tul. L. Rev. 273 (1930). The author there points out that the state supreme court's dictum favored the right of the absentee's descendants to represent in Babin v. Phillipon's Executors, 3 La. 374, 377 (1832). When confronted with the issue in Succession of Williams, 149 La. 197, 88 So. 791 (1921), the court decided in favor of the absentee's descendants, but erroneously based its conclusion on article 57; see Comment, Heirs of an Absentee, supra at 278-79. See also, Comment, Intestate Successions, 22 Loy. L. Rev. 798, 814-15 (1976).

393. La. Civ. Code art. 78.

394. Daggett, Successions and Donations, The Work of the Supreme Court for the 1953-54 Term, 15 La. L. Rev. 277, 278 (1955).

395. 225 La. 934, 74 So. 2d 168 (1954).

had acquired all the rights of her deceased mother's present heirs in real property in the succession. Two absent brothers, missing since 1919 and 1931, would have been co-heirs. The Supreme Court of Louisiana reasoned that their right to claim a share upon reappearance indicated that they had interests in the succession that "were not transmitted (on the death of decedent) in complete ownership to plaintiff and her two sisters; and, hence, that plaintiff's title to the property involved herein is not absolute, unconditional and merchantable."[396] However, the exclusivity of article 77 indicates that the absentees had no interest in the property. As Planiol observed, "Those who receive the succession in lieu of the absentee take it on basis of their own inheritance right, not as temporary holders of the absentee's estate."[397] Moreover, as another commentator observed, "Heirs who choose to relieve themselves of the duties of ownership and payment of the succession's debts should not be permitted to exercise rights of inheritance to the injury of others."[398] The state legislature responded in the next year[399] by amending articles 78 and 79 to make the right of the present heirs to sell the property explicit.

Thus the co-heirs of a returning absentee, however brief his disappearance, are under no greater obligation than absolute possessors of the property he left behind, because their position as owners is analogous. They need only restore his share of the inheritance or of the net proceeds of its sale, and after thirty years, even his right to this much has prescribed.[400] They retain all the fruits that the property has produced during his absence.[401]

The lesser protection accorded to the absent person's eventual rights is theoretically and practically justified. These rights did not exist when he was certainly alive; the rules are not taking away something that was his.[402] A major practical consideration stands in the way of allowing

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396. Id. at 942, 74 So. 2d at 171.

397. 3 M. Planiol, supra note 3, § 1721, at 510. See also, Succession of Chism, 180 So. 2d 103, 105 (La. App. 2d Cir. 1965) (awarding ownership of estate to second cousin of decedent, whose half-siblings were absent persons). But see Succession of Butler, 166 La. 224, 229, 117 So. 127, 129 (1928) (placing heirs in absolute possession of decedent's estate, including share administered by curator for absentee); Succession of Williams, 149 La. 197, 211, 88 So. 791, 795 (1921) (giving children of absentee provisional possession of latter's interest in his father's estate). Both cases antedate the revision of articles 78 and 79.

398. Note, Sales—Merchantable Title—Absentee's Rights, 30 Tul. L. Rev. 151, 152 (1955).

399. Pascal, Legislation Affecting the Civil Code and Related Subjects, 17 La. L. Rev. 22 (1956).

400. La. Civ. Code art. 78.

401. La. Civ. Code art. 79.

402. See C. Demolombe, note 24, at § 200.

the absent person to inherit. If time reveals that he had, in fact, died before the de cujus, the rights of the genuine heirs may have been hopelessly impaired. A share of the de cujus' estate may have gone to satisfy claimants against someone who was not its owner. The uncertainty about his existence at the time of the opening of the succession would render title to the property received from it unmarketable. It is more practicable to give the succession and the right to dispose of it to present heirs, and to repay the absentee, in the unlikely event of his return, than to impair the merchantability of property and to make restitution to the real heirs.

b. Difficulties and Solutions

Although the question of who inherits in an absent person's stead has been clarified by the courts, the code retains its original confusing language.[403] The projet on absent persons retains the prohibition on succession rights for those presumed or declared dead; it would, however, change the law by removing the prohibition on the succession of absent persons during the first five years of absence.[404] At the same time, the projet retains article 76 of the present absentee regime, which requires claimants of succession rights by transmission via the absent person's estate to prove that he was alive at the time of the de cujus' death.[405] The retention of this article is inconsistent with the proposal that absentees inherit. By definition, absence means that whether the missing person is alive or dead after his disappearance cannot be demonstrated, unless, as in *Dolhonde*, the absence is interrupted. Thus his existence at the time of the de cujus' death is incapable of proof. The proposal would thus allow a share of the de cujus' estate to pass into the absent person's, yet prevent its distribution, once his death was declared, to his successors. Moreover, to transform the rule of article 76 from a special provision regarding eventual rights of absentees to a general principle regarding persons, as the projet would do by moving it to title 1 of Book 1, would change the law by abrogating the presumption of continued life.[406] Rights other than succession rights would be affected; for example, the ownership of the fruits of his property is a right accruing to the absentee during his absence. His heirs should not be barred from receiving these because they cannot prove his existence during that time.

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403. Revision of article 77 to eliminate the confusion was suggested sixty years ago, but no action has been taken. See Comment, supra note 392, at 281.

404. La. Law Institute, Report of the Property Committee, supra note 195, art. 58, at 27.

405. La. Civ. Code art. 76; La. Law Institute, Report of the Property Committee, art. 31, at 39.

406. See supra text accompanying notes 161-68.

Modifying the law to allow the absent person to succeed is consistent with the fact that he is not regarded as dead and, hence, should not be deprived of succession rights during this period. France adopted this change in its revision of the regime of absent persons for the same reason.[407] But in the Louisiana system, allowing the absent person to inherit will raise all the doubts about his right to the succession devolving to him that the present system avoids,[408] and even increase them. Not only is there a possibility that the date of his death would be discovered to precede the de cujus', the court could also set the date at a time preceding the death of the de cujus.[409] A more practical course would be to retain the prohibition on his succession and on transmission without proof of his existence.

5. *Personal Rights Part 1: The Brides of the Living Dead*

a. *The System*

The principle characteristic of the Louisiana system for accommodating the personal rights of the absent person to those of other interested individuals—his spouse and children—is that what little guidance exists is largely non-functional. Personal rights pertaining to the absent person are treated very briefly in both the original Louisiana regime and the Code Napoléon. In each, the marital status of the missing person formerly merited one article, but the protected interests differed. The Code Napoléon protected the deserted spouse who remarried from everyone but the absent person; only he or one with his power of attorney could attack a second marriage of his spouse.[410] It provides neither a procedure to be followed to insure a valid marriage nor a lapse of time that must occur. Article 80 more closely resembles "Enoch Arden" statutes in the common law states, which in their most protective form conferred validity on a second marriage of a missing person's spouse after a lapse of

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407. The law of 28 December 1977 added a paragraph to Article 725 of the Code civil, stating that one whose absence is presumed under article 112 can succeed. C. Civ. art. 725 (France). Teyssié observes, "This solution was necessary since the period of the presumption of absence was accompanied by a presumption of existence." B. Teyssié, supra note 215, § 39, at 32-35.

408. See supra note 402 and text following. The French avoid this problem in their new regime by preventing recourse against third parties who obtain, without fraud, rights based on the presumption of absence, whatever date of decease is established or judicially declared. C. Civ. art. 119 (France).

409. La. Law Institute, Report of the Property Committee, supra note 195, arts. 54, 56, at 23, 25.

410. C. Civ. art. 139 (France 1804).

time.[411] It differed from many other state statutes in requiring a court order authorizing the remarriage and in allowing absence alone to be its basis.[412]

The Louisiana code article appeared to protect the deserted spouse, who could contract an unassailable second marriage with court authorization after ten years of the other party's absence.[413] The absentee's status as spouse was protected only by the requirement that the deserted spouse strictly comply with the provisions of the article.[414] The advantage to the absentee was that, should he return, he was equally free to contract a valid second marriage, though the wording of the code article implied that he was unable to do so during his absence.[415]

b. Difficulties and Solutions

The Louisiana rule, in failing to limit the right to challenge the validity of the second marriage to the absent person, left his spouse open to attack from all quarters. For example, in *McCaffrey v. Benson*, the second husband of the absentee's wife secured dismissal of her action for divorce on grounds that no marriage existed between them because they had waited only three years after her first husband's disappearance before marrying.[416] His exception was sustained, despite his awareness of her first husband's status and his participation in an attempt to regularize the union.[417] The children of an attempted second marriage were likewise at risk. Their inheritance rights from their father and his relatives could be challenged on the grounds that the presumption that the husband of the mother is the father of the children born during the marriage would make them the legitimate offspring of the absent spouse.[418]

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411. They are so titled after the absentee hero of Tennyson's poem. See, Abrahams, Two Score and Three of Enoch Arden in New York, 5 J. of Family L. 159 (1965), and Feit, The Enoch Arden: A Problem in Family Law, 6 Brooklyn L. Rev. 423 (1937).

412. See Hebert and Lazarus, The Louisiana Legislation of 1938, 1 La. L. Rev. 80, 83-84 (1938); see also, McCaffrey v. Benson, 38 La. Ann. 198, 200 (1886) (distinguishing dissolution of first marriage by advancing circumstantial evidence of death from dissolution based on absence). See also, Feit, supra note 411, at 425-26 and 442. According to Feit, in most states, only a belief in the death of the missing spouse and/or a search for him were required; New York, however, required that the first marriage be dissolved.

413. La. Civ. Code art. 80, repealed by 1938 La. Acts No. 357.

414. *McCaffrey*, 38 La. Ann. at 199-200 (holding deserted wife's second marriage invalid for failure to comply with the provisons of Article 80).

415. La. Civ. Code art. 80, repealed by 1938 La. Acts No. 357.

416. *McCaffery*, 38 La. Ann. at 201-02. The court took note of the "disastrous results" of a ruling of nullity, but still ruled in the defendant's favor.

417. Id. at 199.

418. In Succession of Mitchell, the inheritance rights of the children of a man who had married an absentee's spouse were threatened by their aunts. They challenged the

The repeal of article 80 in 1938 was motivated by the amendment of Louisiana Revised Statutes 9:301, which allowed divorce when the two parties had lived separate and apart continuously for at least two years, a period now reduced to one year.[419] The repeal recognized the fact that expecting the spouse to wait ten years before remarriage was unreasonable. But at the time of repeal, the action was criticized because jurisprudential requirements had been added to 9:301: the separation had to be voluntary by mutual consent or an abandonment based on the intolerable incompatibility of the spouses.[420] Thus, the spouse of an absentee who disappeared after departing involuntarily for military service would not have had the option of divorce, but would also have been without other means of dissolving the marriage.[421]

Developments in the jurisprudence now permit the spouse of an absentee to use 9:301 as a means to remarry in these circumstances. The statute allows divorce even if the separation is voluntary on the part of only one of the parties.[422] Moreover, even if the separation was initially involuntary, it can be transformed into voluntary separation by evidence that one of the parties wishes to end the marriage.[423] Thus, one whose husband or wife disappeared during involuntary separation could commence the year required for the divorce by briefly leaving the matrimonial domicile and announcing an intent to sever the relationship with the absent spouse.[424] Once the statutory period is fulfilled, the court is without discretion to deny the divorce.[425] The practical need for article 80 has finally passed.

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validity of his marriage to the wife of the absentee, and claimed that his children were, according to the legal presumption of paternity, the legitimate offspring of the absentee. In order to avoid barring the children from representing their late father in his sister's succession, the court had to import tacitly the restriction of the Napoleonic code into Louisiana law; it pronounced the children to be legitimated by the second marriage without determining whether the marriage itself was valid. 323 So. 2d 451, 454-57 (La. 1975). By this time, the provision for remarriage on court authorization had been repealed; Mrs. Connors would have had to seek a divorce from her absentee husband before marrying Mr. Morrison.

419. La. R.S. 9:301 (Supp. 1989).

420. Hebert and Lazarus, supra note 412, at 84.

421. Id. At the time, La. R.S. 9:304 did not exist. Moreover, that statute only permits court-authorized remarriage if the military absentee is missing in action and presumed dead by the armed forces.

422. Otis v. Bahan, 209 La. 1082, 1088, 26 So. 2d 146, 148 (La. 1946).

423. Id, 26 So. 2d at 148. The parties were physically separated when the husband was inducted into the U.S. Navy; separation for the purpose of divorce did not begin until the wife left the matrimonial domicile. However, the divorce action failed because the statutory two years had not passed. Id. at 1091-92, 26 So. 2d at 149.

424. Cf. Adams v. Adams, 408 So. 2d 1322, 1327-28 (La. 1982) (assertions that she intended to separate permanently from her husband by wife of man committed to mental institution were evidence enough to commence the separation period).

425. *Otis*, 209 La. at 1088, 26 So. 2d at 148.

Whether Louisiana Revised Statutes 9:301 is a theoretically appropriate substitute is questionable. The spouse left behind does not necessarily wish to end his first marriage. He has lost his spouse. His situation is analogous to that of a widower who wishes to remarry, not to that of one who actively wants to end an ongoing relationship. The court authorization of remarriage on grounds of absence was a more fitting means of dissolution. Under the proposed revision, which provides for a presumption and declaration of death, the deserted spouse would be treated in the appropriate fashion as a widow five years after the disappearance. However, four points are left unclear. First, if the spouse of an absentee remarries once the presumption of death attaches, without relying on a judicial proceeding declaring death, is the second marriage valid?[426] States with a presumption of death but no requirement of judicial procedure have required, in addition to absence for the statutory period, proof that the remaining spouse believed that the absent person was dead.[427] Second, is the right to challenge the validity of the second marriage restricted? Third, if the second marriage is invalid, does the existence of the presumption of death give the remarried spouse the protection of the good faith putative spouse?[428] Finally, an Enoch Arden provision is required to clarify the status of the remarried spouse if the absent person returns alive, or if a new date after that of the marriage is established for his death.[429]

6. *Personal Rights, Part 2: Children*

a. *The System*

Of the five articles providing for the children of an absentee, only two are functional. Article 84 remains relevant, although it literally

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426. The *McCaffrey* court would have presumed the validity of the plaintiff's second marriage had her first husband been absent for the statutory period when it took place, but the court implied that this presumption would have been rebuttable. Mrs. McCaffrey did not, however, have a presumption of her husband's death to justify her actions. 38 La. Ann. at 200.

427. Feit, supra note 411, at 425-26.

428. For a discussion of the role of good faith in the putative marriage doctrine, see Blakesley, The Putative Marriage Doctrine, 60 Tul. L. Rev. 2, 18-23 (1985).

429. La. R.S. 9:304 (1965) contains an "Enoch Arden" proviso for remarried spouses of MIA's presumed dead. France has adopted such an article in its revision of the title on absent persons: "The marriage of the absent person remains dissolved, even if the judgment declaring the absence has been annulled." C. Civ. art. 132.

protects only children of absent fathers. It calls for a "provisional tutor"[430] to be appointed in two situations: if the wife of the absentee is dead when the disappearance occurs or if the wife dies after it occurs.[431] A similar article appears in the Code Napoléon,[432] but in two ways the Louisiana regime intensifies the protection of the interests of the children of the absent person. The tutor is to be selected according to the title on tutorship.[433] The drafters probably intended legal tutorship.[434] At the time that the absentee regime originated, legal tutorship would have resulted in the appointment of the nearest ascendant in the direct line as tutor of the minor.[435] The Code Napoléon entrusted the children to the same individuals, but did so by order of the family meeting, not through tutorship.[436] As Demolombe points out, "[A]s a consequence, there is neither the nomination of an undertutor nor the legal mortgage on the immovables of the ascendant" that characterizes the legal tutorship of ascendants.[437] By requiring tutorship, the Louisiana regime insures that its safeguards will be extended to the children of absent fathers.

Additionally, the French regime required a delay of six months after the disappearance of the father, the mother either having already died

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430. The use of the word "provisional" in this context is confusing. It does not appear in the tutorship articles; although the term appears in the Louisiana Code of Civil Procedure, it refers to temporary tutors appointed pending a permanent appointment, or successors appointed in cases of vacancy. See La. Code Civ. P. art. 4070 and comments thereto.

431. La. Civ. Code art. 84.

432. C. Civ. art. 142 (France 1804).

433. Article 84 declares that the tutor is to be appointed "in the manner herein directed." The only directions given in the chapter are those in the preceding article, calling for appointment of a provisional tutor "in the manner prescribed in the title: *Of Minors, their Tutorship and Emancipation.*" La. Civ. Code art. 83. If the absent father is still alive, he is of right the natural tutor of his children, but he is not present to qualify for the office, or even to indicate that he is alive and entitled to it. See La. Civ. Code arts. 250, 248. Tutorship by testament of the dying mother would not have been appropriate; the regime of tutorship gave this right of appointment to the parent dying last. La. Civ. Code art. 257. The nature of absence makes it impossible to know the order of the parents' death.

434. Demolombe, while denying that any tutorship is established by the corresponding French article, indicates that other commentators believed legal tutorship to have been intended. C. Demolombe, supra note 24, § 321.

435. La. Civ. Code art. 263 (1972). The article has since been revised to allow a choice by the judge among ascendants in the direct line, collaterals by blood within the third degree, and a surviving stepparent, based on the best interests of the children. See La. Civ. Code art. 263.

436. See supra note 176.

437. C. Demolombe, supra note 24, § 321.

or dying during that period,[438] before the ascendants could be given the care of the children. Demolombe attributes the delay to concern for the interests of the absent father; it is "based on the danger . . . in delving too soon into the affairs of the one presumed absent, whom one can still hope to see reappear at any moment."[439] The Louisiana regime completely disregards this interest of the absent father in favor of providing guardians immediately for the children he left behind.

Article 85 applies to all absent parents, not merely fathers. When a remarried individual vanishes leaving children of a previous marriage, provisional tutorship again is called for.[440] This tutorship would normally not apply if the remarriage was subsequent to divorce, and the other parent were still alive; he would be the tutor of his children.[441] However, if the disappearing spouse were a remarried widow, the stepparent can only obtain tutorship if it appears to be in the best interests of the children.[442] The basis of the article is, as in article 82, the suspicion that the second spouse "is not, héLas! always paternal!"[443] in guarding the interests of the children of his spouse's previous marriage.

b. Difficulties and Solutions

Article 81 indicates the lopsided view that makes much of this section of the code unworkable; it empowers the mother of children whose father has disappeared to "exercise all the rights of her husband with respect to their education, and the administration of their estate."[444] The article parrots the Code Napoléon.[445] To the extent that it implies that the mother is deprived of these powers while the father is present, it may be unconstitutional.[446] No important state objective appears to be served. It is also, in Louisiana, unnecessary. Although, according to the original French code, the father was the sole repository of parental authority,[447] in Louisiana the parents always shared this dominion. Une-

438. Id. § 324. As Demolombe indicates, if the mother survived after the father vanished by more than six months, the ascendants would not be given the care of her children.

439. Id. § 320.

440. La. Civ. Code art. 85.

441. La. Civ. Code art. 250.

442. La. Civ. Code art. 263.

443. C. Demolombe, supra note 24, § 326.

444. La Civ. Code art. 81.

445. C. Civ. art. 141 (France 1804).

446. The equal protection clause of the constitution of the United States has been interpreted to require an important governmental objective to which a gender classification is closely related for it to withstand constitutional challenge. See Craig v. Boren, 429 U.S. 190, 97 S. Ct. 1161 (1976).

447. See, e.g., C. Civ. art. 373 (France 1804), providing that the father alone exercises

mancipated minors are under the authority of both parents.[448] Although in cases of disagreement between the parents, "the authority of the father prevails," if he is missing it is impossible for such disagreement to occur.[449] The administration of the minor's estate, ordinarily in the father's hands while the parents are married, is in the mother's hands if the father is absent.[450] Although the civil code provides that the parents together represent their children in lawsuits and receive donations for them,[451] the Louisiana Code of Civil Procedure now indicates that these powers reside in the mother in the absence of the father.[452] Its predecessor, the Code of Practice, did not explicitly treat the representation of minors when their situation did not require a tutor;[453] the Louisiana Supreme Court reasoned from Civil Code article 235 that "[t]hat authority is conferred upon the father and mother jointly when they are both present; and it stands to reason that the mother should be authorized to act separately and alone in case the 'father has disappeared.'"[454]

The mother who remarries can continue to wield these powers only with the consent of a family meeting composed of the father's relations and friends; without it, a "provisional tutor" is appointed in her stead.[455] Articles 82 and 83, which place these restrictions on the mother, have no source in the Code Napoléon. The drafters of the Louisiana Civil Code of 1825 justified them as follows in its projet: "The utility of these additional dispositions need not be explained."[456] Since the series of Married Women's Emancipation Acts went into effect, an explanation is in order. Before the passage of those acts between 1916 and 1928,[457]

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the paternal authority described in article 372 of the same code during marriage; and at article 389, providing that the father is the administrator of the property of minor children during marriage.

448. La. Civ. Code art. 216.

449. Id.

450. La. Civ. Code art. 221. The Louisiana Code of Civil Procedure, in its article providing for the administration of the estate of a minor, does not consider this eventuality, and so omits mention of the mother's power. La. Code Civ. P. art. 4501.

451. La. Civ. Code art. 235.

452. See La. Code Civ. P. arts. 683, 732 and 4502.

453. Code of Practice in Civil Cases for the State of Louisiana art. 115 (New Orleans 1839).

454. Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 1444, 27 So. 851, 862 (1900), quoting La. Civ. Code art. 81. Article 81 was relied on by the plaintiff. Id. at 1443, 27 So. at 862. It was unnecessary for the court's holding, which is based on article 235. See also Payton v. Ideal Savings and Homestead Ass'n, 160 So. 648, 649 (La. App. Orl. 1935) (relying on *Williams* to find that mother of minor had capacity to bring personal injury suit where father had disappeared).

455. La. Civ. Code arts. 82, 83.

456. A Republication of the Projet of the Civil Code of Louisiana of 1825, at 7 (Louisiana Legal Archives vol. 1, 1937).

457. La. R.S. 9:101-105 (1965).

the absentee's wife who remarried would have been subject not only to the great influence, but also to the legal control of her new husband. He could not be expected as a matter of course to share her feelings for the children of her previous marriage; hence, the protection of an evaluation by a family meeting and the appointment of a tutor if necessary was devised. Articles 82 and 83 are not only likely to prove unconstitutional,[458] they are obsolete, for the emancipation acts ended their policy rationale. In addition, family meetings to determine the appointment of a tutor have been dispensed with.[459]

Except in article 85, in protecting the interests of children left behind, the Louisiana title on absentees, for historical reasons,[460] focuses on children of absent fathers. Despite the strength of the children's interests, gaps exist that must be filled by analogy. The children of an absent mother may lose their father, or both parents may disappear. Demolombe believed that the rules governing the case when the wife is dead and the husband an absentee cover these situations as well. In the first instance, "reason and principles would not permit, in effect, any difference between these two cases."[461] In the second instance, the rules apply in default of any other provision for the care of the children.[462]

If the projet on absent persons were adopted, once the absent person is declared dead, the title on tutorship would govern.[463] But before such a declaration, the issue of who shall be tutor is left open, along with the issue whether a tutor is required should the absent person return. The projet retains article 84, but relegates it to the revised statutes, and deletes the remainder of the articles in this chapter. Articles 84 and 85 should be revised and expanded to fill the gaps that now require reliance on analogy.

CONCLUSION

The intricate shield that Louisiana raised to protect the rights of the absent person elicited the admiration of the United States Supreme Court in the late nineteenth century, when it confronted an alternative that did not provide for those rights. But it was not the presumption of death itself, but the lack of a regime to safeguard the one presumed dead that met with the disapproval of the Court. The usefulness of this presumption has led to its incorporation in modern civilian systems. The revision of the regime of absent persons proposed by the Louisiana

458. See supra note 446.
459. La. R.S. 9:602 (1965).
460. See supra text accompanying notes 445 and 447.
461. C. Demolombe, supra note 24, § 328.
462. Id. § 329.
463. See La. Civ. Code art. 250.

State Law Institute would follow suit. Yet, as Mary Ann Glendon observed, "In using comparative law as an aid to law reform, it is even sometimes hard to tell whether a particular foreign example should be regarded as a beacon or as a warning."[464] The presumption of death serves as both. It carries with it two dangers that have manifested themselves in common law. The first is to the constitutionality of the regime; but the rules there are simple, and errors can easily be remedied. The second is the threat that the legal presumption will accumulate so many requirements to raise it that it will be transformed into an inference of fact. A factual determination of the death of an absent person is a contradiction in terms; that transformation would prevent the presumption from being raised and the regime from being useful.

On the other hand, incorporation of the presumption makes the regime that accompanies it less cumbersome, because once the absent person is presumed dead, his relations with those known to be alive can be defined by other regimes, such as succession law. The elaborate nature of the current Louisiana regime has proved to be self-defeating. The jurisprudence reveals that the regime of absence has never been fully understood or consistently applied in Louisiana; its inadequacies were extensively explored and remedied only in the realm of eventual rights. The regime of absence can obstruct interests it was designed to protect, because both the absent person and his presumptive heirs may be the losers if his property is out of commerce. And its protection of the absent person's family, always scant, is now virtually meaningless. Although the proposed revision does not answer every question raised by absence, it does attempt to use a presumption of death as part of a viable regime to govern the rights of those affected by absence.

Author's Postscript: In the 1990 legislative session, the Louisiana State Legislature adopted La. Act No. 989, containing a revision of Book I, Title III of the Louisiana Civil Code and a revised procedure for the curatorship of absent persons. Governor Roemer signed the act on July 26, 1990; it takes effect on January 1, 1991. 1990 La. Acts No. 989 contained, unchanged, the revision proposed by the Louisiana State Law Institute. The procedural revisions, on the recommendation of the Institute, will be incorporated into the Revised Statutes as sections 13:3421-3445. The weaknesses of that proposal remain, but in the adoption of the presumption of death and the clarification of procedure, the new title and statutes offer the hope that the inconsistencies which characterized the Louisiana law of absent persons will now end.

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464. Glendon, Irish Family Law in Comparative Perspective: Can There Be Comparative Family Law? 9 Dublin U.L.J. 1, 2 (1987).