

file

Second Supplement to Memorandum 64-2

C.C.P. § 1963

25. Identity of person from identity of name.

Class: Thayer presumption.

In the absence of controverting evidence, the identity of a person is presumed from identity of name. People v. Little, 41 Cal. App.2d 797, 799, 107 P.2d 634 (1940)(" . . . as there was no evidence offered to the contrary we must presume . . ." identity of two persons from identity of names). But, "the presumption of identity of person from identity of name can be invoked only in a case where such name can be applied to a particular person involved. If such name be a common one in the vicinity, or if it be shown that there is more than one person to whom the name may be applied, there can be no presumption that either of such persons is the one to whom the jury should apply it." People v. Wong Sang Lung, 3 Cal. App. 221, 224, 84 Pac. 843 (1906)(murder conviction reversed because court erred in giving instruction in statutory language without qualifying same as above quoted since many Chinese in San Francisco fit victim's dying declaration, " . . . Wong Lung shot me"); see People v. Durham, 62 Cal. App. 649, 217 Pac. 558 (1923). Cf. Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960) ("In civil cases there is no such rule." Where adversary evidence creates a conflict with the presumption, the above instruction would be erroneous because it would take from the jury "the possibility of weighing the presumption and of determining the credibility of adversary evidence."). If the Nidever case states the present law--hearing was denied by the Supreme Court-- a clear distinction is drawn between civil and criminal cases in regard to the type of rebutting evidence available to an opponent. It is clear, however,

that the presumption is dispelled by uncontroverted facts to the contrary. Overton v. Harband, 6 Cal. App.2d 455, 44 P.2d 434 (1935) (reversible error to find in accord with presumption where uncontroverted facts clearly establish fact contrary to the presumption). It has been said that this presumption " . . . is sufficient to shift the burden of proof to the other side." Estate of Williams, 128 Cal. 552, 61 Pac. 670 (1900). It seems clear, however, that this does not mean the burden of persuasion; hence, nothing is "shifted" because the party against whom the presumption operates always has the burden of producing rebutting evidence to avoid the effect of the presumption. The presumption is "a form of prima facie evidence and will support findings in accordance therewith in the absence of evidence to the contrary. When there is evidence that conflicts with [the presumption] it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption to determine which, if either, preponderates." Estate of Nidever, supra. Removing the "presumption is evidence" rule and relying upon the underlying inference to be drawn from identity of names, it seems clear that the present law is in substantial accord with treating this presumption in the same manner as it is suggested a Thayer presumption be treated.

The effect of this presumption is most appealing in conveyancing situations (e.g., an identified grantor presumed to be the same person as a previously recorded grantee). See Knight v. Berger, 57 Cal. App.2d 763, 135 P.2d 389 (1943). In addition to this type of situation, it is most frequently invoked in cases involving estates (e.g., tracing common ancestors to establish heirship), in criminal cases (usually in regard to proof of prior convictions, though occasionally for other purposes), and in situations involving multiple

litigation (particularly in actions on foreign judgments). In the multiple litigation and probate situations, the presumption most frequently will bear strongly on the ultimate issue. It seems most reasonable, for the reasons indicated, to classify this as a Thayer presumption.

C C.C.P. § 1963

26. That a person not heard from in seven years is dead.

Class: Thayer presumption.

It seems reasonably clear that this presumption is treated under the present California law the same as a Thayer presumption would be treated under the proposed classifications. Thus, the party against whom the presumption operates has the burden of producing evidence sufficient to offset, equalize, or balance it; there is no obligation to overcome the presumption by a preponderance of evidence. Valentine v. Provident Mutual Life Insurance Co., 12 Cal. App.2d 616, 55 P.2d 1243 (1933).

C This presumption operates only to establish the fact of death; it has no bearing on other circumstances attending death, such as the time thereof. However, because of another presumption stated in subdivision 32--i.e., "that a thing once proved to exist continues as long as is usual with things of that nature"--the practical effect is that an absent person is assumed to be alive until the expiration of the full seven years unless other circumstances, such as imminent peril, quicken the time of the presumed death. Estate of Christin, 128 Cal. App. 625, 17 P.2d 1068 (1933). Such other circumstances may be proved like any other fact.

C This presumption has been sharply criticized by Wigmore, particularly in regard to the inflexible time period of seven years. Wigmore denounces the entire presumption as "arbitrary, unpractical, anachronistic, and obstructive," stating that "the circumstances of each case should be the basis for decision, and there should be no fixed or uniform rule." McCormick traces the seven-year time period to the Bigamy Act of 1604, and Wigmore characterizes the period as "an ancient rule-of-thumb which has no relation

to the facts of human experience in modern conditions."

Notwithstanding these worthy criticisms, a fixed period of time does serve to maintain certainty in the law--to establish a definite time at which the affairs of the living may be appropriately adjusted. However, consideration should be given to shortening the present seven-year period to a lapse of time more in keeping with modern conditions.

In California, the presumption recurs most often in cases involving (1) recovery of life insurance proceeds, (2) settlement of estates, and (3) remarriage situations. Death bears strongly on the ultimate issue in each of these situations and, where the circumstances surrounding a person's disappearance are equivocal, the passage of time has some bearing upon the strength of the inference of death. However, the passage of seven years or more in the case of a healthy, robust, 23-year-old male does not seem as significant in this regard as the passage of five, three, or even one year in the case of a seriously ill person who already has exceeded his life expectancy by 25 years. Based on the inference alone, the probabilities of survival necessarily differ in each case; hence, any fixed period of time is an arbitrary one. When the element of certainty is added to the logical inference, however, a fixed period of time seems desirable. In light of modern communication and transportation systems and the numerous persons and agencies available to trace missing persons, however, the time ought to be shortened at least to five years.

The suggested five-year period coincides with both the civil and criminal law in California respecting bigamous marriages. Civil Code Section 61; Penal Code Section 282. The probate law regarding the administration of estates of missing persons provides a seven-year period equivalent to the

present presumption. Probate Code Section 280 et seq. It would seem desirable to fix a definite period applicable evenly to the situations that arise by reason of the unexplained absence of a person, since the present difference between five- and seven-year periods is illogical.

32. That a thing once proved to exist continues as long as is usual with things of that nature.

Class: Thayer presumption.

This presumption covers a multitude of situations ranging from a determination of existing law in a given locality to various factual conditions. In California today, its effect is much the same as would be the effect of a Thayer presumption under the proposed classifications. Thus, in the absence of controverting evidence, it is conclusively presumed that a person once shown to be alive continues alive until either his death is proved or the presumption of death applies. Estate of Newman, 34 Cal. App.2d 706, 94 P.2d 356 (1939). See also San Francisco Breweries v. Superior Court, 80 Cal. App. 433, 251 Pac. 935 (1927) (presumed continuance of corporation's business in absence of contrary evidence). Hence, the party against whom the presumption operates has the burden of producing evidence to rebut it. In re Kennedy's Estate, 106 Cal. App.2d 621, 235 P.2d 837 (1951).

The variety of situations in which the presumption presently operates is of significance in determining whether to continue the existing law in this regard. Hence, there follows a summary of these situations.

Where a party produces sufficient evidence to prove the existence of a particular statute or ordinance, its continued existence is presumed and the opponent has the burden of producing evidence showing its repeal. In re Kennedy's Estate, supra (presumed continuance of Romanian law of inheritance); People v. Zimmerman, 11 Cal. App. 115, 104 Pac. 590 (1909) (ordinance passed in 1899 presumed to be effect in 1908; burden is on opponent to show its repeal, not on prosecution to show that it has not been repealed).

Where a principal-agent relationship is established, it is presumed to continue during the time in question--i.e., burden is on opponent to show its termination. E.g., Walter v. Libby, 72 Cal. App.2d 21 (1946). Foreign corporation once shown to have been "doing business" in this State is presumed to have been "doing business" at time cause of action arose and process served--i.e., burden on defendant corporation to show the contrary. Thew Shovel Co. v. Superior Court, 35 Cal. App.2d 183, 95 P.2d 149 (1939). Thus, the presumption of continuance has been applied to cases involving easements, negotiable instruments (e.g., obligation evidenced by note continues until contrary shown, Eckstrom v. Brooks, 115 Cal. App. 727, 2 P.2d 207 (1931)), ownership of property (Metteer v. Smith, 156 Cal. 572, 105 Pac. 735 (1909) (once ownership is shown, owner need not also prove that he has not parted with title); Kidder v. Stevens, 60 Cal. 414 (1882)), personal and business status (e.g., continuance of cotenancies, etc.), state of mind (presumed insanity following commitment--thus, commitment gives rise to presumed insanity from time of commitment only, In re Peterkin's Estate, 23 Cal. App.2d 597, 73 P.2d 897 (1937)), and many other facts, conditions, abilities, and inabilities on a variety of issues.

Because of the logic of the presumption, the fact that it frequently bears strongly on the ultimate issue involved, and because it would continue the existing law, it seems reasonable to classify this as a Thayer presumption.

Respectfully submitted,

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