

F. PRESUMPTIONS

1. *Nature and Classification of Presumptions*

The term "presumption" is used in more than one way in the law of evidence. Sometimes the term is simply a method of stating specific rules about the allocation of the burden of proof. In this usage it indicates that a certain conclusion must be drawn or a certain state of affairs must be taken to exist at the beginning of the case, and this conclusion continues to be presumed until the contrary is proved. Thus the "presumption of innocence" is another way of stating the rule that the legal burden of proving guilt rests on the prosecution in criminal proceedings; if the prosecution cannot discharge this burden to the required standard of proof the accused must be acquitted. Conversely, the "presumption of sanity" refers to the rule that a person accused of an offence is taken to be sane until he discharges the burden of proving that he was insane at the time of the offence. The language of presumption adds nothing to the substance of these rules about the allocation of the burden of proof, but the phrases "presumption of innocence" and "presumption of sanity" are convenient shorthand expressions.

Two further points should be made about the presumption of innocence. Sometimes this term is used in a wider sense to denote a major principle of political morality about the relationship between the state and the citizen. In this usage the presumption is a normative principle which can generate or support other rules of evidence, such as the privilege against self-incrimination.⁴

Secondly, it is essential to avoid the misconceptions that the presumption of innocence is an item of evidence in itself, or that it expresses any kind of

⁴ subs. (1).

⁵ Ninth Re-

proposition about the probability of the facts in issue. Suppose that a defendant is charged with robbery, and that eyewitnesses have identified him as the man who held up a post office at gunpoint. When the jury evaluates the evidence in the case they do not include in the evidence as a separate item an assumption that the defendant is in fact innocent.⁹ They take the evidence on its merits to see what conclusions about guilt or innocence can be drawn from it. Only *after* these conclusions have been drawn does the presumption of innocence — the burden of proof of guilt — become relevant in determining whether the defendant should be convicted on those conclusions.

Sometimes rules of substantive law are stated in presumptive form. It was a rule at one time that a boy under 14 was conclusively presumed to be incapable of committing the crime of rape.¹⁰ That rule could equally well have been stated in terms that a boy under 14 could not be guilty of rape as a principal offender. The language of "presumption" added nothing to the rule.

The main and most helpful use of the term "presumption" is in connection with the drawing of inferences from proof of certain facts. A presumption is a conclusion that fact B may or must be presumed to exist once fact A has been proved; for purposes of discussion it is convenient to refer to fact A as the "basic fact" and fact B as the "presumed fact". Presumptions in this sense operate as a means of discharging burdens of proof. By stipulating the weight of certain inferences, presumptions may have the effect of dispensing with the need for further evidence of the presumed fact.

There are numerous presumptions which vary widely in their subject-matter, and it is beyond the scope of this book to describe and discuss them all in detail. Certain common characteristics are worth noting. The rationale of any particular presumption is generally based on one or more factors of logic, convenience and policy. For example, where the paternity of a child is in issue, the common law presumption of legitimacy states that on proof of the basic fact of the birth of the child to a married woman during lawful wedlock the child is presumed to be the legitimate offspring of the parties to the marriage until the contrary is proved.¹¹ This is supported by the logical argument, grounded in general experience, that children born during marriage are usually legitimate, and by the social policy that children should not lightly be found to be illegitimate. Another presumption at common law relates to proof of the death of a person. Where certain basic facts are proved — that there is no acceptable evidence that X was alive at some time during a continuous period of seven years, that there are persons likely to have heard of X if he were alive, that those persons have not heard of X during the period of seven years, and that all due enquiries have been made appropriate to the circumstances — then X will be presumed to have died.¹² There is no particular logic in the figure of seven years' absence.¹³ This presumption is

⁹ For an instructive case where even the Supreme Court of the United States made this elementary error see *Coffin v. U.S.* (1895) 156 U.S. 432.

¹⁰ The rule was abolished by the Sexual Offences Act 1993, s.1.

¹¹ Phipson, para. 5-06 and n.16, where the authorities are collected.

¹² *Chard v. Chard* [1956] P. 259.

¹³ The absence of X for a period of less than seven years may give rise to an inference of fact that X is dead. The point about seven years' absence is that the law then gives what might otherwise be an inference of fact artificial weight by inflating the inference into a presumption of law. See further, Law of Property Act 1925, s.184(1) for the statutory presumption regarding the order in which deaths are presumed to occur where this is uncertain on the facts, but needs to be resolved for the purposes of settling title to property.

based largely on convenience. It enables legal affairs, such as the status of a marriage or the distribution of property, to be settled within a reasonable time-scale; this is further supported by the need to minimise the continuing anxiety and insecurity likely to be caused to the person's family if it is not clear whether the person is alive or dead.

The common law traditionally classified presumptions into presumptions of fact and presumptions of law, with a further subdivision of the latter into rebuttable and irrebuttable presumptions. A more useful classification is one that aims to explain more precisely the effect of presumptions on legal and evidential burdens in civil and criminal proceedings. This classification is as follows.

- (a) *Provisional presumptions* — these correspond to the common law's category of presumptions of fact. They denote a conclusion which *may* be drawn from proof of the basic fact of the presumption, but the factfinder is under no obligation to draw the conclusion, even in the absence of any rebutting evidence. However, the factfinder is likely to draw the relevant conclusion and accept the presumed fact as true if its existence is not challenged by the party disputing the presumption. In this way the presumption imposes a "provisional" or "tactical" burden on the party against whom it is operating. That party will generally need to respond by adducing some form of evidence to rebut the presumed fact. An example of this type of presumption is the presumption of intention: once the basic fact is proved that a certain event was the natural and probable consequence of the defendant's act, the defendant may be presumed to have intended or foreseen that consequence, but section 8 of the Criminal Justice Act 1967 states expressly that a court or jury is not bound in law to draw this inference.
- (b) *Evidential presumptions* — these are a subdivision of the common law's category of rebuttable presumptions of law. They denote a conclusion which *must* be drawn by the factfinder on proof of the basic fact of the presumption in the absence of any evidence to the contrary. An illustrative example is the presumption of testamentary capacity. Once the basic fact has been proved that the testator duly executed an apparently rational will, it will be presumed as a fact that the testator was sane when he executed it. This is a conclusion which the factfinder is obliged to draw unless the party disputing the will discharges an evidential burden of adducing sufficient evidence to raise the issue of whether the presumed fact is true. In accordance with the normal rules, this means that there must be enough evidence to the contrary to justify a finding in favour of the party bearing the evidential burden if the case stopped at that point. In civil cases this amounts to saying that the party disputing the will would have to show that the probabilities were equal that the testator was sane or insane when he made the will. If this evidential burden is discharged, then the legal burden resting on the party relying on the will to prove the testator's testamentary capacity will come back into play. Further evidence of the testator's rationality at the time is likely to be necessary, and eventually the factfinder will

have to decide the issue of capacity without the aid of presumptions.¹⁴

- (c) *Persuasive presumptions* — these are a second subdivision of the common law's rebuttable presumptions of law. They denote a conclusion which *must* be drawn by the factfinder on proof of the basic fact of the presumption unless and until the conclusion is disproved by the party disputing it. These presumptions accordingly operate to place a legal, as opposed to an evidential, burden on the party challenging the presumed fact. If the factfinder is left in doubt at the conclusion of all the evidence this legal burden will be decisive. An example of a persuasive presumption is the presumption of legitimacy referred to above. At common law this was one of the strongest presumptions which required rebuttal to a very high standard of proof,¹⁵ but section 26 of the Family Law Reform Act 1969 now provides:

"Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that the person is illegitimate or legitimate as the case may be and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption."

- (d) *Conclusive presumptions* — these can be mentioned briefly for the sake of convenience. They correspond to the common law's irrebuttable presumptions of law, and denote conclusions which must be drawn by the factfinder on proof of the basic fact of the presumption. Since no evidence is admissible to rebut them they function in the same way as rules of law which are not stated in the language of presumptions.

This classification is only a guide to the operation of different types of presumption. It is based on formal concepts, and it is necessary to make two important qualifications about its practical application. The first is that in its pure form it is applicable only to presumptions operating in civil proceedings. In criminal cases the *Woolmington*¹⁶ rule states that the burden of proving guilt is always on the prosecution. The only exceptions where the onus is reversed are the common law defence of insanity, and express and implied statutory exceptions. It is generally agreed therefore that presumptions in criminal cases can never operate to place more than an evidential burden on the accused. If the defendant is charged with incest with his daughter, and claims that she is his wife's child by another man, he will not bear a legal burden of proof of that fact. If the presumption of legitimacy applies at all, it can only have the effect that the defendant will need to discharge only an evidential burden of adducing sufficient evidence to raise a reasonable doubt about legitimacy in order to displace the presumption. In *Dillon v. R.*¹⁷ the Privy Council went further and held that the prosecution cannot rely on presumptions to prove

¹⁴ See *Sutton v. Sadler* (1857) 3 C.B.N.S. 87

facts central to an offence. That case concerned a charge against a police officer of negligently permitting the escape of two persons in lawful custody. The prosecution failed to adduce any evidence of the lawfulness of the custody, and the Privy Council held that the prosecution could not rely on the presumption of regularity — *praesumuntur rite esse acta* — to make good the deficiency. If the presumption did not apply it followed that the defendant had to be acquitted since there was no evidence capable of proving beyond reasonable doubt that the custody was lawful. The mere fact that the persons in question were in custody was insufficient. In other cases, even if no presumptions of law can apply, proof of the basic facts of a presumption may be sufficient to support an inference of fact. In the hypothetical example of the legitimacy of the defendant's daughter, her legitimacy could be logically inferred as a fact from proof of her birth during her mother's marriage to the defendant, even if that conclusion could not be presumed.

This leads on to the second qualification. The strength of any conclusion of fact, whether inferred or presumed from a basic fact, varies considerably from case to case depending on the circumstances. The inference in some examples of provisional presumptions may be very strong and virtually impossible to displace. Suppose that D is filmed by a hidden security camera fixing a bomb under P's car shortly before P is due to drive off. The bomb explodes five minutes after P drives off, reducing the car to fragments and killing P. If the jury believe on the basis of expert evidence that the bomb was virtually guaranteed to kill the occupant of the car, the inference that D intended to kill P is overwhelming. On the other hand, the strength of the presumed fact in some examples of persuasive presumptions may in the circumstances be extremely weak and easily displaced. Consider the issue of the legitimacy of a child born to W while she was still married to H, but in circumstances where she had left him 12 months earlier to begin living with X in Australia. The legal presumption that H is the father is decisively rebutted by the evidence of W's cohabitation with X at the time of conception.

2. Particular Presumptions and Proof of Frequently Recurring Facts

Many common law presumptions are designed to help proof of facts which frequently recur in litigation, in circumstances where other evidence of those facts may be lacking, or difficult to obtain, or unduly time-consuming and expensive, or essentially a formality. For example, two of the best-known rebuttable presumptions of law, those relating to proof of marriage and of death, were developed at a time before the introduction of statutory systems of registration, when parish records might be incomplete or missing or simply hard to get hold of. With the advent of statutory registration, and its accompanying provisions for proof of marriage and death by production of the relevant certificates, these presumptions are now very much less important in practice than they used to be. Hence further details of them are not discussed in this book. Other important presumptions of fact relate to the proof of such common issues as a person's intention,¹⁸ and the continuance of a state of affairs.¹⁹

¹⁸ See above p. 280