#34 11/4/63

Memorandum 63-53

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article III. Presumptions)

At the October meeting, the Commission discussed the various theories that have been suggested in regard to the operation of presumptions. The Commission made no decision in regard to the various theories, but requested the staff to prepare a memorandum analyzing several presumptions in the light of the various proposed theories of presumptions.

To review briefly: Under all theories a presumption is a conclusion or an assumption that the law requires to be made on the basis of some fact found or otherwise established. The Thayer theory is that a presumption serves no purpose other than to indicate to the judge that a peremptory finding is required unless the adverse party presents sufficient evidence to warrant a finding of the nonexistence of the presumed fact; the introduction of sufficient evidence to sustain a finding of the nonexistence of the presumed fact dispels the presumption and the case is submitted to the trier of fact to decide the matter on the basis of whatever inferences may logically be drawn from the evidence. The Morgan and Traynor theories both require the trier of fact to find the presumed fact to be true unless the adverse party meets the presumed fact with a certain quantum of evidence of its nonexistence. Under the Morgan theory, the adverse party must persuade the trier of fact of the nonexistence of the presumed fact. Under the Traynor theory, the burden of proof does not ordinarily shift, and the adverse party must persuade the trier of fact at least that the nonexistence of the presumed fact is as probable as its existence.

Criminal cases.

Many of the statutory presumptions are operative, for practical purposes, only in criminal cases. For example, Vehicle Code Section 41102 states a presumption applicable only in prosecutions. The Agricultural Code and Business and Professions Code presumptions apply for the most part in criminal prosecutions. Hence, we shall discuss the application of presumptions generally in criminal cases before discussing the specific presumptions.

Under existing California law, the prosecution in a criminal case is entitled to rely on a presumption; and it may rely on common law presumptions as well as statutory presumptions. People v. Agnew, 16 Cal.2d 655 (1940). In criminal cases, a presumption does not entitle the prosecution to a directed verdict in the absence of contrary evidence, but it entitles the prosecution to an instruction that the presumed fact is established by the proven fact unless the defendant produces sufficient evidence to create a reasonable doubt as to the existence of the presumed fact. People v. Agnew, 16 Cal.2d 655, 664-667 (1940); People v. Hardy, 33 Cal.2d 52 (1948).

Thus, the operation of presumptions in criminal cases is, under existing California law, fundamentally at variance with the Thayer theory, for under the Thayer theory a presumption prescribes a rule for application by the judge, never the jury. Under the Thayer theory, a presumption does not affect the weighing of the evidence by the trier of fact. Either the Traynor or the Morgan view can be made readily applicable to criminal cases, for under both theories a presumption affects the fact finding function of the jury.

Vehicle Code Section 41102.

Vehicle Code Section 41102 applies only in prosecutions for illegal parking. Subdivision (a) establishes a presumption that the registered owner parked the car illegally upon proof that the car was in fact parked illegally and the defendant was then the registered owner. Subdivision (b) establishes a similar presumption in prosecutions for failure to display evidence of registration.

The presumption was held valid in People v. Bigman, 38 Cal. App.2d Supp. 773 (1940)(opinion by Schauer, J.). The court said (at p. 778):

> The inference that a parked automobile was parked by its registered owner is not an unreasonable or unnatural one; without other evidence tending with some certainty to exclude the possibility that it was parked by another, that inference would not within the rules of circumstantial evidence support a finding of guilt against the presumption of the owner's innocence; but this is exactly such a situation as manifestly justifies the legislature in artificially adding to that proof by means of the declared presumption, for reasons of convenience, and purely as a tentative basis for further proceedings, the equivalent of prima facie evidence that others did not, and hence that defendant did, park the vehicle at the time involved (proof of its illegal parking by someone being an essential part of the conditions precedent to the arising of the presumption).

Statutory presumptions such as the Vehicle Code presumptions under discussion here, and common law presumptions such as those discussed in People v. Hardy and People v. Agnew, have been held valid, even though they shift the burden of proof (at least to the extent of a reasonable doubt) to the defendant, if it appears that "the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunity for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression". Morrison v. California, 291 U.S. 82, 88-89 (1933).

Under the Thayer theory, it is difficult to see how the presumption would work at all. If a presumption is regarded merely as a rule for the judge in ruling on a directed verdict, it manifestly has no place in a criminal trial. Under the Thayer theory, too, the presumption would be dispelled if the defendant testified merely that he did not park the car at the time and place alleged. The testimony of the defendant being sufficient to sustain a finding, the presumption would be dispelled and the prosecution forced to rely on the underlying inference. As indicated by Justice Schauer, the underlying inference is not in itself sufficient to support a finding, hence, the jury (or the judge as trier of fact) would be required to acquit unless the prosecution introduced additional evidence to connect the defendant with the crime.

It seems likely that the presumption was created so that municipal and county authorities would not have to obtain additional evidence to overcome a defendant's bare denial. It seems likely that the presumption was intended to make out a sufficient case for a conviction unless the defendant creates a reasonable doubt. If this is so, the presumption must (and now does) endure into the fact finding stage after evidence in opposition to the presumption has been introduced; but under the Thayer theory, it cannot do so.

Under the Morgan theory, a presumption shifts the burden of persuasion. Thus, under the stated presumption, the defendant would have the burden of <u>persuading</u> the trier of fact that he was not operating the car at the time it was illegally parked. Hence, if the Morgan theory were applied without modification to this presumption in a criminal case, the

existing California law which requires proof beyond a reasonable doubt as to every element in the case would be substantially changed. Pure Morgan theory would require the defendant here to persuade the jury or the judge that he was not operating the car at the time it was illegally parked.

The Traynor theory does not require a shifting of the burden of persuasion. In Speck v. Sarver, Justice Traynor indicated that a presumption should require a finding unless the adverse party satisfies the jury that the nonexistence of the presumed fact is as probable as its existence. But, of course, he was there speaking in the context of a civil case where the plaintiff's burden normally is merely to persuade the jury that the existence of the fact upon which he is relying is more probable than its nonexistence. In a criminal case, where the prosecution has a burden of persuasion beyond a reasonable doubt, the defendant presumably would not have the burden of producing an equilibrium (for that would entail a change in the burden of proof) but would have the burden of producing a reasonable doubt as to the existence of the presumed fact. If this analysis is correct, a defendant would have the burden under the presumption being discussed of persuading the jury merely that there is a reasonable doubt that he was the operator of the car when it was illegally parked.

If this analysis is correct, the Traynor view would entail no change in the existing California law and would appear to carry out the policy underlying the presumption without changing the ultimate burden of persuasion.

Calif. Statutes of 1921, p. lxxxviii (Deering Act 261); Alien Property Act.

The above statute has been held unconstitutional. Fujii v. California, 38 Cal.2d 718 (1952). The statute was found unconstitutionally discriminatory under the equal protection clause of the fourteenth amendment in that the right of an alien to own agricultural land may not be based on his eligibility to citizenship.

Prior to the Fujii decision, the act had been before the appellate courts of this state and of the United States on several occasions for determination of the validity of several presumptions created by the act. At the last meeting, the staff was requested to review these decisions so that we might discover the extent to which a presumption may be utilized in judicial proceedings. The results of our research are below.

Basically, the alien property act prohibited aliens ineligible to citizenship under the naturalization laws of the United States from owning, leasing, occupying or possessing agricultural land. Conspiracy to violate the law was made a crime, but a violation by a person not in furtherance of a conspiracy was not a crime. Any property acquired in fee in violation of the act escheated to the State of California.

Several presumptions were created by statute to facilitate enforcement of the act. Section 9(b) provided that in any proceeding under the act proof that the defendant was a member of a race ineligible to citizenship created a presumption of noncitizenship and ineligibility to citizenship, and thereafter the burden of proving citizenship or eligibility to citizenship as a defense was upon the defendant.

The presumption created by Section 9(b) was held valid in People v. Osaki, 209 Cal. 169 (1930) and People v. Morrison, 125 Cal. App. 282 (1932). Both cases were criminal prosecutions for conspiracy to violate the act.

An appeal in the latter case was dismissed by the United States Supreme Court for want of a substantial federal question. Morrison v. California, 288 U.S. 591 (1933). In a later case, Justice Cardozo explained the basis of the decision as follows:

> We sustained that enactment [Section 9(b)] when challenged as invalid under the Fourteenth Amendment of the Federal Constitution. The state had given evidence with reference to the defendant, the occupant of the land that by reason of his race he was ineligible to be made a citizen. With this evidence present, we held that the burden was his to show that by reason of his birth he was a citizen already, and thus to bring himself within a rule which has the effect of an exception. In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The People, on the other hand, if forced to disprove his claim, would be relatively helpless. In all likelihood his life history would be known only to himself and at times to relatives or intimates unwilling to speak against him.
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> The ruling was not novel. The decisions are manifold that within the limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. [Morrison v. California, 291 U.S. 82, 88-89 (1934).]

In the second Morrison case (from which the above quotation is taken), the court held unconstitutional the presumption created by Section 9(a) of the act. Section 9(a) provided that in any proceeding under the act the allegation that the defendant was an ineligible alien placed the burden upon the defendant to prove citizenship or eligibility to citizenship. All that the state was required to prove was the use of agricultural land. The presumption was defended on the ground that citizenship or eligibility to citizenship is a matter of which the defendant has peculiar knowledge; hence, the presumptions should be sustained

upon the principle that convenience of proof permits placing the burden of proof on the defendant.

The court rejected the argument and held the presumption unconstitutional because it could cause hardship or oppression. The use of agricultural land without more is so unrelated to the wrongdoing involved that it is unreasonable to believe that the user is guilty unless he comes forward with an explanation. "Without proof of race, occupation of the land is not even a suspicious circumstance." 291 U.S. at 91-92. Moreover, as to Morrison, nothing in the evidence indicated that he had any knowledge of his tenant's qualifications or lack thereof that was not equally available to the people. The presumption was unconstitutional therefore as to Morrison, and as the tenant could not be convicted of conspiracy by himself, the conviction of the tenant had to fail, too.

In addition, the court held that the presumption was unconstitutional as applied to the Japanese tenant. The court pointed out that the fact of his oriental origin would ordinarily be apparent, so there would be no practical necessity for shifting the burden of proof in the ordinary case. But the shift in the burden of proof would cause hardship and oppression in cases where racial background is so mixed that the presence of a racial strain other than Caucasian or Negro (the only races eligible for naturalization at that time) is not externally evident. "One whose racial origins are so blended as to be not discoverable at sight will often be unaware of them. If he can state nothing but his ignorance, he has not sustained the burden of proving eligibility, and must stand condemned of crime." 291 U.S. at 94.

That the possibility of such injustice was not remote, the court pointed out that Mexicans had migrated into California in large numbers and were, in large part, descended from Indians and thus ineligible for citizenship. They

as well as other groups ineligible for citizenship, had intermarried with citizens to a considerable extent. "[A]nd family traditions are not always well preserved, especially when the descendants are men and women of humble origin, remote from kith and kin." At p. 95. "The probability is thus apparent that the transfer of the burden may result in grave injustice in the only class of cases in which it will be of any practical importance. . . . There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People." At p. 96.

Another presumption in the Alien Property Act was that if an alien paid the purchase price for agricultural land and title were taken by another, a presumption would arise that the transaction was to evade the law. This presumption was held constitutional in Cockrill v. California, 268 U.S. 258 (1925), a case in which an ineligible alien paid for property and had title put in a stranger's name. In Oyama v. California, 332 U.S. 633 (1948), the presumption was held unconstitutional as applied to a transaction in which title was taken in the name of the alien's citizen-child.

In Oyama, the court reasoned that the citizen-child was discriminated against in violation of the equal protection clause of the fourteenth amendment because in all other cases where a father paid for land and title was taken in the name of his child, the presumption applied was one of a gift from the father to the child. The Cockrill case was distinguished on the ground that a stranger took title there, and insofar as a stranger was concerned, the operation of the statutory presumption was no different than the ordinary presumption that would be applied of a resulting trust.

Although the Alien Property Act is no longer law, this line of cases indicates that the burden of proof (to the extent of creating a reasonable doubt) on an issue may be imposed upon the defendant in a criminal case. This may be done by the creation of a presumption even though the proven facts giving rise to the presumption would not, by themselves and without the presumption, be sufficient to sustain a conviction. (It seems unlikely, for example, that in the first Morrison case the conviction could have been sustained without the presumption for the only evidence was that the defendant was of Japanese descent; there was no evidence as to his citizenship or eligibility to citizenship.) However, there must be some rational connection between the proven fact and the presumed fact, and the presumed fact must lie peculiarly within the knowledge of the defendant. The presumption is invalid, however, if its application will cause hardship or injustice.

Common law presumption of false imprisonment.

People v. Agnew, 16 Cal.2d 655 (1940), has been cited in this memo to such an extent that some discussion of the presumption there involved seems appropriate.

The defendant was charged with false imprisonment by violence, menace, fraud and deceit in violation of Penal Code Sections 236 and 237, a felony, but was convicted of misdemeanor false imprisonment only. The prosecution grew out of a citizen's arrest made by the defendant on the ground that the victim had committed perjury in a prior civil action between the defendant and the victim.

The fact of the imprisonment itself was admitted. The trial judge instructed the jury that the defendant, then, had the burden of proving that the victim committed perjury. The instruction was based on a common law presumption in false imprisonment cases that the imprisonment, when proven, is unlawful. The

burden is on the defendant to show the lawful character of the imprisonment. The defendant, on appeal, attacked the presumption on the ground that the presumption of innocence is so strong that the arrest should be presumed lawful, not unlawful, and the prosecution should prove the victim innocent of perjury.

The Supreme Court first held that the common law presumption is applicable in criminal cases. But, the court held the instruction in error because it imposed on the defendant the burden of proving the perjury. This, the court said, was equivalent to an instruction requiring persusasion by a preponderance of the evidence. The trial court should have instructed the jury that the defendant's burden was to create a reasonable doubt as to the unlawfulness of the arrest.

People v. Agnew indicates that the shift in the burden of proof that arises from the presumption is no different from the shift in the burden of proof that arises under Penal Code Section 1105 in murder prosecutions. Penal Code Section 1105 provides that in a murder prosecution, the prosecution need only prove that defendant committed the homicide, and the burden of proof is then on the defendant to show that it was not murder. In fact, some cases applying Penal Code Section 1105 have characterized it as creating a presumption. For example, see People v. Howard, 211 Cal. 322, 329 (1930) ("When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree.") A similar shift in the burden of proof occurs in narcotics cases after proof of possession. The prosecution does not have to prove that the defendant's acquisition was not under a prescription; the burden is on the defendant to show lawfulness of his possession. People v. Harmon, 89 Cal. App.2d 55 (1948); People v. Bill, 140 Cal. App. 389 (1934).

How would this presumption of unlawful imprisonment fare under the various presumption theories?

Under the Thayer theory, if the defendant testified that the victim committed perjury, the presumption would be dispelled. The only evidence left of the victim's innocence of perjury, and hence of the unlawfulness of the arrest, would be the fact that defendant arrested him. It seems unlikely that this would sustain a verdict of guilt even if the jury disbelieved the defendant. But even if sufficient to support a verdict, the evidence would be submitted under the circumstantial evidence instruction requiring the jury to find it "irreconcilable with the theory of innocence in order to furnish a sound basis for conviction" (Witkin, Evidence, § 122) instead of the presumption instruction requiring a finding of guilt unless the defendant persuades the jury that there is a reasonable doubt as to such guilt. As the existence of a theory of innocence is manifest (the victim did commit perjury, the narcotics were purchased on prescription, the victim was killed accidentally), it seems likely that the circumstantial evidence instruction would result in acquittals unless the prosecution actually introduced evidence to rebut all potential theories of innocence. In any event, it is difficult to understand how the presumption would operate in the first place, for under the Thayer theory the presumption merely prescribes a rule for the judge on motions of directed verdicts--which we don't have in criminal cases in favor of the prosecution.

Under the Morgan theory, the defendant would have the burden of proving that the victim committed perjury by a preponderance of the evidence. This would substantially change California law, for this view was rejected in the Agnew case.

Under the Traynor theory, the presumption would not alter the ultimate burden of proof placed upon the prosecution to prove the defendant's guilt beyond

a reasonable doubt; but the prosecution would be entitled to an instruction that the imprisonment is to be considered unlawful unless the defendant persuades the jury that there is a reasonable doubt as to its unlawfulness. It seems likely that the presumption was created for just this purpose.

Other criminal presumptions.

The foregoing is adequate to indicate the problems that would be created by applying the various theories of presumptions to criminal cases. Several of the statutes in the blue pages will be applicable mainly in criminal cases. For example, the Penal Code presumptions and the Agricultural Code presumptions are likely to arise principally in criminal cases.

In addition to the statutory presumptions, there are common law presumptions applicable in criminal cases. For example, see People v. Hardy, 33 Cal.2d 52 (1948). The settled rule now is that the presumptions apply to the fact finding stage of the trial and impose a burden of proof upon the defendant to the extent that he must persuade the jury that a reasonable doubt exists as to the presumed fact. If the defendant does not carry this burden, if the jury does not believe his explanatory evidence, a conviction is proper.

The question for the Commission is whether the policies underlying these presumptions require their continued recognition at the fact finding stage of criminal prosecutions.

Civil cases.

Revenue & Taxation Code Section 9652.

This section provides that the gross receipts of all operators who are subject to the motor vehicle transportation tax are presumed to be subject to the tax. The tax is imposed on persons transporting persons or property for hire by motor vehicle upon public highways outside the corporate limits of any city.

A similar provision appears in Section 6091 of the Revenue & Taxation Code, which provides a presumption that the gross receipts of retail sellers are subject to sales tax.

In regard to Section 9652, operators are exempt from the tax if they run an intracity business. Moreover, they are exempt from the tax as to the intracity portion of their business if they run both an intracity and intercity business and the intracity operation is completely separate and distinct from the intercity business. Santa Fe Transp. v. State Board of Equal., 51 Cal.2d 531 (1959). If the intracity business, however, is an integral part of the intercity business, all gross receipts are subject to tax. Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135 (1942).

Of course, the presumption would not be of too great significance in a suit for refund, for the taxpayer there would normally have the burden of proof anyway. But if the state sues for a deficiency, the presumption and the theory applied to the presumption would have great significance. Suppose the following facts: An operator runs both an intracity and intercity business. The local business is not operated as a feeder for the intercity business, but is operated as a completely distinct transit operation. However, the revenues are commingled, and the bookkeeping is tangled, and the exact amount of revenue attributable to each business is not determinable. The state determines that there is tax due and sues to collect.

Under the Thayer theory, all of the gross receipts are presumed to be from the intercity business until the defendant takes the stand and, without contradiction, testifies that not all of the receipts are from the intercity business. Under the Thayer theory, the presumption is now gone, and the extent of the revenues from the intercity operation are to be determined by the trier

of fact unaided by any presumption. Indeed, in view of the fact that it is conceded by the State that not all revenues are from the intercity business, there is no inference the State can rely on either. Since the State has the burden of proof, it would seem to follow that the State must lose for failure to carry that burden.

Under the Traynor theory, the trier of fact is required to assume that the gross receipts are from the intercity business until the defendant has introduced sufficient evidence to persuade the trier of fact that the probability that they are not all from the intercity business is as great as the probability that they are. In the supposed case, it seems that the defendant has rather clearly established that the nonexistence of the presumed fact is as probable as its existence. Hence, again the State must lose for failure to carry its burden of proof.

Under the Morgan theory, the entire gross receipts are assumed to be from the intercity business until the defendant persuades the trier of fact that a certain amount is not attributable to the intercity business. The burden of proof is on the taxpayer, not the state.

The Morgan view seems most consistent with the purpose underlying the presumption. In Rathjen Bros. v. Collins, 50 Cal. App.2d 774, 779 (1942), Justice Peters explained why the burden of proof is on the taxpayer to prove which transactions were taxable and which were not. He was there speaking of the alcoholic beverage tax, but the rationale is applicable to other similar taxes:

> [The respondent taxpayer] contended that before the tax could be lawfully collected from it the state had to show that the unaccounted for gallonage had been disposed of in taxable transactions. If this were the proper interpretation of the act, it would make the collection of a large portion of the tax very difficult, if not impossible. Obviously,

> in interpreting the act, we must assume that the Legislature intended that the tax be paid. To interpret the statute as claimed by respondent would mean that the state would have to prove a fact that rests solely within the knowledge of the taxpayer. This respondent admittedly had on hand a certain quantity of distilled spirits. Some of those spirits were sold in nontaxable transactions. Some were broken, and allowances were made for all claimed breakage. Some were disposed of and stamps accompanied the sales. But there was a large quantity unaccounted for. Obviously, the owner of those spirits has the only facilities for knowing where those spirits went. It is for these many reasons that in every case interpreting statutes imposing a tax on sales, with exemptions, the courts have held that necessarily the tax is imposed on total sales unless the taxpayer shows the sales that are exempt.

Revenue and Taxation Code Section 6714.

Section 6714 provides that a certificate of sales tax deficiency is prima facie evidence of the amount of the tax, the delinquency in the amount stated, and of the compliance by the board with the provisions of law governing computation and determination of the amounts. Many similar sections are scattered through the Revenue and Taxation Code. In some the term "presumed" or "presumptive evidence" is used (see Section 18647), but in many the term "prima facie evidence" is used. See Sections 7730, 8973, and 10075.

In People v. Mahoney, 13 Cal.2d 729, 733-34 (1939), the Supreme Court explained the effect of this language as follows:

> Section 49 of the "California Irrigation District Act" . . . provides that the assessment-book or delinquent list, certified by the collector, "showing unpaid assessments against any person, or property, is prima facie evidence of the assessments, the property assessed, the delinquency, the amount of assessment due and unpaid, and that all the forms of the law in relation to the assessment and levy of such assessments have been complied with". . . . This court said in Miller & Lux, Inc. v. Secara, 193 Cal. 755, at page 771, with reference to the effect of the introduction of an irrigation district assessment-book in evidence on behalf of the defendants: "By so doing the defendants established a prima facie case of the validity of the assessment and of the fact that all forms of law in relation to the assessment and levy had been complied with. This showing would not only justify but would compel a finding to this effect unless it was both contradicted and overcome by other evidence in the case".

Thus, as construed by the Supreme Court, it appears that this language creates a presumption--a compelled conclusion. See also People v. Schwartz, 31 Cal.2d 59, 63 (1947): "The certificate of delinquency carries with it the presumption that the assessment of the board is correct." In the Schwartz case, the court also pointed out that the taxpayer "has the burden of proving not only that the board's determination, based upon his records, is incorrect, but also of producing evidence from which another and proper determination may be made." 31 Cal.2d at 64.

In the Schwartz case, the state had determined that Schwartz was delinquent in the payment of sales taxes. The deficiency was noted because Schwartz' bank deposits totalled substantially more than the gross receipts recorded in his sales journal. Schwartz testified that he obtained merchandise principally from governmental agencies on a competitive bid basis. Deposits were required on these bids, and when he was the unsuccessful bidder, the deposits were returned and redeposited in the bank. In addition, he frequently withdrew cash to purchase goods and redeposited the amount not needed. The state's auditor, called by Schwartz, testified that the audit revealed disbursements in an amount greater than the reported receipts from sales. The difference between the amount reported as the amount of sales and the amounts disbursed and deposited in Schwartz' savings account was regarded as the amount of the deficiency.

How would the presumption fare under the various theories?

Under the Thayer theory, the taxpayer's testimony that the difference was the result of redeposits would dispel the presumption. The burden would then be on the state to prove that taxable sales were made. Of course, the inference, if any, arising from the certificate would remain, and the testimony

of the state's auditor as to the facts found in the audit would remain. These would support a finding that a deficiency existed.

Under the Traynor theory, the burden of proof would remain with the state, but the finding of a deficiency would be required unless the taxpayer introduced sufficient evidence to persuade the trier of fact that the nonexistence of the deficiency was as probable as the existence of the deficiency. Under the facts of the case, it seems unlikely that the taxpayer met this burden. He had evidence of some refunds, but no record that any of the refunds were redeposited. And he had no records to support his testimony that he redeposited cash not needed on buying trips.

Under the Morgan theory, the taxpayer's burden would be to persuade the trier of fact that the apparent deficiency was caused by redeposits.

The different theories would apparently require the giving of different instructions to the jury.

Under the Thayer theory the jury would be instructed to return a verdict for the defendant taxpayer unless the state has persuaded it that the inference that the deficiency resulted from unreported sales is more reasonable than the inference that the deficiency resulted from redeposits or from any other cause consistent with nonliability.

Under the Traynor theory, the jury would be instructed to assume that the deficiency arose from unreported sales unless the defendant has persuaded it that the likelihood that the deficiency arose from redeposits or some other legal cause is as great as the likelihood that it arose from unreported sales.

Under the Morgan theory, the jury would be instructed to find the deficiency taxable unless the defendant taxpayer has persuaded them that it is nontaxable. This seems to be the view most consistent with the purpose of the presumption.

The California Supreme Court, in reliance upon the statutory requirement that records be kept, held that only testimony of the taxpayer supported by his records could overcome the presumption. The court reversed a judgment for the taxpayer on the ground that the judgment was not supported by the evidence, as the only evidence in support of the judgment was the taxpayer's testimony. "The state [and, apparently, the court] is not bound to accept the statements of the taxpayer, unsupported by any record, which are contrary to entries in his books of transactions pointing to a larger sum as the true total." 31 Cal.2d at 64. "If Schwartz had records to show that there were redeposits, other than those which he mentioned, which were not entered in his books, it was his duty to present that evidence. If he had no such records, he has failed to overcome the presumption created by the statute in favor of the state. . . . His testimony is not a substiute for the records required by statute and does not overcome the presumptively correct assessment of the state which is based upon the taxpayer's records." 31 Cal.2d at 65-66.

If the presumption is one that can only be overcome with documentary evidence, then the state would be entitled to a directed verdict under any of the presumption theories.

Labor Code Section 3708.

This section applies in an action by an employee for damages against his employer when the employer has failed to secure payment of workmen's compensation as required by law. Labor Code § 3706. Section 3708 provides that, in such an action, "it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence."

It has been held that the "burden of proof" referred to in the section is the burden of persuasion by a preponderance of the evidence. Greitz v. Sivachenko, 143 Cal. App.2d 146 (1956).

Mowrey v. Marina Corporation, 137 Cal. App.2d 786 (1955), provides a good example of the operation of the section. P, a waitress, sued her uninsured employer for burns received while waiting on customers. Her story was that another waitress, M, called P for assistance because a tray M was carrying was too heavy and beginning to tip; that M negligently tipped the tray after P had provided assistance; that scalding liquid from a heavy tureen of lobster was thereby caused to spill upon P and burn her hands.

M testified that she had called P for assistance; that P provided the assistance requested and the tray was successfully lowered to the serving stand; that no food spilled; that the lobster tureen had no liquid except the melted butter; that prior to this incident P had a bad looking burn on her hand that P said she received at home; that subsequent to the incident she believed P touched a silver serving dish that had been heated in the oven.

Judgment was first given for the defendant and a new trial was then granted the plaintiff. The order granting a new trial was affirmed.

How would this case fare under the various presumption theories?

Under the Thayer theory, the contradictory testimony of the defendant's witness would dispel the presumption and the case would be submitted to the jury exactly as if no presumption existed. Thus, the jury would be instructed that the plaintiff has the burden of persuading them that it is more probable that the injury was caused by the defendant's negligence than that the injury resulted from some other cause.

Under the Traynor theory, the case would be submitted to the jury with an instruction that the negligence of the defendant is to be assumed unless the defendant has persuaded them that it is as reasonable to believe that the injury was not caused by the defendant's negligence as it is to believe that it was. (Actually, Justice Traynor believes that this statute places the burden of proof on the employer and that the burden remains upon him throughout the case. See concurring opinion, Chakmakjian v. Lowe, 33 Cal.2d 308, 314 (1949).)

Under the Morgan theory, the case would be submitted to the jury with an instruction that it is the employer's burden to persuade them that the probability is that the injury resulted from some cause other than his negligence.

It seems likely that the Morgan theory is the one that the Legislature intended to be applied here.

Commercial Code Sections 3307 and 8105.

Several sections from the Commercial Code are attached as Exhibit I. Section 3307 relates to the validity of signatures on negotiable instruments. Section 8105 relates to signatures on negotiable securities. Both provide that if the validity of a signature is in issue, the burden of establishing it is on the party claiming under the signature; but, the signature is presumed to be genuine.

The "burden of establishing" is defined in Section 1201 as the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence. In the original Uniform Commercial Code, "presumption" was defined in Section 1201 in accordance with the Thayer definition. The definition of "presumption" was deleted from the California version of the Commercial Code. § 1201(31).

How would the various theories apply here?

The Morgan theory seems impossible to apply. The Morgan theory is that a presumption shifts the burden of persuasion to the adverse party. But these sections provide that the burden is on the person entitled to the presumption. Hence, if the Morgan theory were to be made applicable here, some adjustment of these sections would appear to be necessary. The adjustment might take two forms: The provision placing the burden of persuasion on the party claiming under the signature might be deleted; this would make the normal requirement of authentication applicable (Rule 67) and would permit the party to rely on the presumption to comply with the authentication requirement. Or, the provisions relating to presumption and burden of proof might be deleted and another provision substituted that specifically places the burden of establishing the lack of genuineness on the party asserting such.

The Traynor and Thayer views are both consistent with the present language of these sections. Under these views, the burden of persuasion does not shift.

Under the Thayer view, after evidence of the lack of genuineness is presented (for example, the purported maker's denial that the signature is his), the question is submitted to the jury under an instruction that the claimant may win only if he persuades the jury that the genuineness of the signature is more probable than its falsity.

Under the Traynor view, the evidence is submitted to the trier of fact under an instruction that they must assume the genuineness of the signature unless the adverse party has persuaded them that the falsity of the signature is as probable as its genuineness.

There seems to be little difference between the Traynor and Thayer views, but there is some. That difference appears to be that under the Thayer view, even if the jury does not believe the evidence produced by the defendant, they may still find against the plaintiff because they don't think his evidence is strong enough to prove anything either. Under the Traynor view, they must find in favor of the presumed fact unless they give some credence to the opposing evidence.

Civil Code Section 2235.

This section provides that a transaction entered into between a trustee and his beneficiary by which the trustee obtains any advantage is presumed to be without sufficient consideration and under undue influence. Although the section is worded in terms of a trust, the presumption is applied to fiduciaries generally, including attorneys. Rader v. Thrasher, 57 Cal.2d 244 (1962).

Whether this presumption shifts the burden of persuasion is somewhat uncertain. In Estate of Witt, 198 Cal. 407 (1926), the Supreme Court said that the presumption could be overcome "only by the clearest and most satisfactory evidence." At 419. But in Magee v. State Bar, 58 Cal.2d 423 (1962), the court held that the "petitioner [an attorney held to have used undue influence on the will of an aged client in Estate of Rohde, 158 Cal. App.2d 19 (1958)] rebutted the presumption and raised reasonable doubts that he committed the offense." Hence, "we are of the opinion that the board failed to sustain its ultimate burden of proof." 58 Cal.2d at 430, 431. Thus, at least in State Bar disciplinary proceedings, it appears that the ultimate burden of proof on the Bar does not shift despite the presumption.

To illustrate the operation of the presumption, suppose the following facts: A, an attorney, draws a will for an elderly lady, L. A is given the bulk of the estate by the will. L has no surviving descendants or other close relatives, and when the will is offered for probate a contest is filed by a relative of her deceased husband. The evidence shows that A's acquaintance with L was slight, but that L knew A's parents fairly well. L was weak and infirm. There is no evidence that her mind was deteriorated. The only evidence as to the circumstances attending the making of the will

comes from A. He testifies that L was alert and strong-minded; that she said she wanted to leave him the residue of her estate because A's mother had been kind to her and she had no relatives.

Under the Thayer theory, the presumption would disappear from the case. The evidence would be submitted to the jury with an instruction that the contestant prevails only if the jury is persuaded that the probability of undue influence is greater than the probability that the will did not result from undue influence. The judge might instruct the jury that undue influence may be inferred from the fiduciary relationship and the profiting therefrom by the attorney; but the jury must find that the inference of undue influence is the more reasonable or probable inference to be drawn if the contestant is to prevail.

Under the Traynor theory, the jury would be instructed to assume that the will resulted from undue influence unless A has persuaded them that the likelihood that the will did not result from undue influence is as great as the likelihood that it did.

Under the Morgan theory, the jury would be told to find for the contestant unless A has persuaded them that the will did not result from undue influence.

Summary

From the foregoing, it is apparent that the most desirable duration of a persumption depends upon its particular function. Some presumptions seem to be designed to place the burden of persuasion on the other party and some are not.

The difference between the actual operation of the Thayer and Traynor views is not great when the inference underlying the presumption is strong. The Traynor view, however, seems more

reasonable when the inference in favor of the presumed conclusion is not strong. For example, the inference that a bailee negligently damaged or lost goods in his custody is not based on any strong likelihood that he did so--but the presumption that a mailed letter was received is based on a strong likelihood of receipt. The fact that the goods were damaged seems just as consistent with a theory of accident or wrongdoing by a third party as it does with negligence.

Under the Thayer theory, the bailee's denial of negligence is sufficient to dispel the presumption, and even if the denial or explanatory evidence is not believed by the jury, the jury is instructed that it must find for the bailee unless the obviously equivocal evidence of negligence persuades the jury that the loss probably occurred as a result of the bailee's negligence. Under the Traynor theory, the jury instruction focuses on the bailee's evidence, not the bailor's. The jury is told that it must assume the loss was caused by the bailee's negligence unless he has persuaded them that the likelihood that it resulted from some other cause is as great as the likelihood that it was caused by negligence. This instruction probably would result in findings against the bailee where his explanation is weak and is not believed.

Actually, under California law, this presumption appears to be a Morgan presumption in that it shifts the burden of persuasion. See dictum in Redfoot v. J. T. Jenkins Co., 138 Cal. App.2d 108, 112 (1955)(" . . . it is the law of California that proof of delivery of a vehicle to a bailee and his return of same in a damaged condition imposes upon the bailee the burden of proving that the damage occurred without any fault on his part--the burden of proof, not merely the burden of going forward with the evidence").

In 1948, the Missouri Bar undertook a revision of the law of evidence and published a proposed Missouri Evidence Code. The committee finally concluded there that one uniform theory could not be applied to all presumptions. The scheme proposed by the Missouri Bar committee on evidence is attached as Exhibit II.

The Missouri proposal classifies presumptions as Thayer presumptions or Morgan presumptions. It excludes from presumptions those previously recognized presumptions based on coextensive fact inferences. It states a general principle for classifying a presumption as a Thayer presumption and a general principle for classifying a presumption as a Morgan presumption. Then, to eliminate as much uncertainty as possible, it classifies a large number of specific matters as inferences, Thayer presumptions or Morgan presumptions.

Although some of the specific classifications recommended by the Missouri committee might seem inappropriate--for example, the statutory presumptions in the Revenue and Taxation Code appear to be Morgan presumptions, but Missouri classifies all statutory presumptions as Thayer presumptions--some scheme of this sort appears desirable.

When one thinks of presumptions like the negligence presumption for uninsured employers, the Morgan theory seems the only appropriate one. When one thinks of the receipt of a mailed letter presumption, one thinks the Traynor or Thayer view should be applied or that there should be no presumption at all.

If some scheme such as this is approved, the Commission must decide what classifications to use and some working definitions of the kinds of presumptions that will be placed in each classification. Among the factors

that seem to be relevant in determining the precise effect of a presumption on the burden of proof would seem to be:

(1) The strength of the underlying inference (the stronger the inference, the less need for a presumption).

(2) The public policy if any served by the presumption (such as the policy in favor of legitimacy, the policy in favor of winding up missing person's estates after some period of time, the policy in favor of workmen's compensation insurance, etc.).

(3) The extent to which a shift in the burden of proof will tend to fragment the ultimate burden of proof in the case (whether a letter was or was not received would seem to be an evidentiary issue usually, not an ultimate issue, whereas death, legitimacy or the negligence of a bailee would seem to be ultimate issues almost invariably; shifting the burden on ultimate issues would not, of course, fragment the burden of proof as would a shift in the burden on evidentiary issues).

(4) The extent to which the party against whom the presumption operates has control over the rebutting facts, and hence, the fairness of imposing liability on him for failure to satisfactorily explain the event in question.

There may be other factors, but these seem to be the principal ones.

For the Commission's consideration, the staff suggests the scheme set forth below. If it or some other classification scheme is approved by the Commission, the staff will go through the statutes we have gathered and through the common law presumptions of which we are aware and attempt

to classify these presumptions under the approved classification scheme. We will then submit this to the Commission for modification and approval. The suggested classification scheme is as follows:

1. A presumption that shifts the burden of persuasion. Unless the presumption specifically requires more proof to overcome it, the burden of persuasion necessary to overcome such a presumption is proof that the nonexistence of the presumed fact is more probable than its existence.

Presumptions of this sort should be applied where there is a strong public policy in favor of the presumed fact (as in the case of legitimacy); and the shift in the burden of persuasion will not tend to fragment the ultimate burden of persuasion in particular cases.

Illustrative are: Presumption of legitimacy, presumption of innocence, presumption of sanity, presumption of negligence of uninsured employer, taxation presumptions having to do with the amount of tax due (as opposed to residence and other factors), presumption of due care (this merely means the person seeking to prove negligence has the burden of persuasion).

2. A presumption that does not shift the burden of persuasion, but will require a finding of the existence of the presumed fact unless the trier of fact is persuaded by the adverse party that the nonexistence of the presumed fact is as probable as its existence.

Presumptions of this sort should be applied where the underlying inference is not strong and either where the rebutting facts are uniquely known to the party against whom the presumption operates or where the underlying policy is merely to provide a rule with some certainty so that affairs can go on. Whether the issue is an ultimate issue is irrelevant.

Illustrative are: Res ipsa loquitur, presumption of negligence of a bailee, presumption of death from 7 years' absence, that the property of a person dying more than four years after divorce is separate property, that writings are truly dated.

3. A presumption--or an inference--that is sufficient to require a finding where there is no adverse evidence, but that disappears upon introduction of sufficient evidence to warrant a finding of the nonexistence of the fact.

A presumption of this nature might more properly be called a mandatory inference. It should be applied where the underlying inference is strong, there is no strong public policy in favor of a particular conclusion, the issue is usually an evidentiary issue--not an ultimate issue.

Illustrative are: Inference of receipt of mailed letter, inference of delivery of deed from recording, natural possession, etc., inference that ancient document is genuine when acted on as such for 30 years, identity of person from identity of name, inference of intent to accomplish ordinary consequence of voluntary act, inference that money paid was due.

4. A fourth category might be permissive inferences--an inference that the law will permit to be made from a specified fact but which is not required. Such a category might not be necessary, but a statutory declaration that an inference of fact A is permitted to be drawn from proof of fact B might be helpful in some cases.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

1202. Prima Facie Evidence by Third Party Documents. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

3114. Date, Antedating, Postdating. (1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

(3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

3201. Transfer: Right to Indorsement. (1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

(2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

(3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

3304. Notice to Purchaser.

* * *

(3) The purchaser has notice that an instrument is overdue if he has reason to know

* * *

(c) That he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be 30 days.

* * *

3307. Burden of Establishing Signatures, Defenses and Due Course.

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue

(a) The burden of establishing it is on the party claiming under the signature; but

(b) The signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

3414. Contract of Indorser; Order of Liability. (1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

(2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

3416. Contract of Guarantor. (1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.

(2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

(3) Words of guaranty which do not otherwise specify guarantee payment.

(4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accomodation of the others.

(5) When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.

(6) Any guaranty written on the instrument is enforceable notwithstanding any statute of frauds.

3419. Conversion of Instrument; Innocent Representative. (1) An instrument is converted when

(a) A drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) Any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) It is paid on a forged indorsement.

(2) In any action under subdivision (1), the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this code concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3205 and 3206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

3503. Time of Presentment.

* * *

(2) A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

(a) With respect to the liability of the drawer, 30 days after date or issue whichever is later; and

(b) With respect to the liability of an indorser, seven days after his indorsement.

(3) Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.

(4) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

3510. Evidence of Dishonor and Notice of Dishonor. The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

(a) A document regular in form as provided in the preceding section which purports to be a protest;

(b) The purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

(c) Any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

4201. Presumption and Duration of Agency Status of Collecting Banks and Provisional Status of Credits; Applicability of Article; Item Indorsed "Pay Any Bank". (1) Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final (subdivision (3) of Section 4211 and Sections 4212 and 4213) the bank is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank such as those resulting from outstanding advances on the item and valid rights of setoff. When an item is handled by banks for purposes of presentment, payment and collection, the relevant provisions of this division apply even though action of parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(2) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder

(a) Until the item has been returned to the customer initiating collection; or

(b) Until the item has been specially endorsed by a bank to a person who is not a bank.

8105. Securities Negotiable; Presumptions. [(1) Reserved.]

(2) In any action on a security.

(a) Unless specifically denied in the pleadings, each signature on the security or in a necessary indorsement is admitted;

(b) When the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under the signature but the signature is presumed to be genuine or authorized;

(c) When signatures are admitted or established production of the instrument entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security; and

(d) After it is shown that a defense or defect exists the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective (Section 8202).

EXHIBIT II

ARTICLE IV.

PRESUMPTIONS.

SECTION 4.01. PRESUMPTIONS—DEFINITION AND NATURE.

A presumption is a rule of law by which, for the purpose of some given inquiry, the existence of an otherwise unknown fact is assumed from its usual connection with other facts or circumstances which are known or admitted or of which there is direct evidence.

SOURCE NOTES

Wigmore on Evidence, 3rd Edition, Vol. IX:
Sections 2490-2491, pages 286-291 (rule of law);
Section 2494, pages 293-300 ("prima facie" case, distinguished and explained);
Section 2498a, pages 349-350 (many presumptions should be treated as mere prima facie evidence, "presumption with a logical core").

Wigmore on Evidence, Students' Textbook, Section 451, pages 452-454 (defined and explained).

Greenleaf on Evidence, 16th Edition, Vol. I, Chapter VI:
Section 14w, pages 93-103 (presumptions in general);
Sections 14y and 15, pages 107-111 (presumptions of law and of fact).

American Jurisprudence, Vol. 20, Evidence:
Section 158, pages 161-163 (definition, rule of law);
Section 159, pages 163-164 (rational connection between fact proved and fact presumed);
Section 162, pages 165-166 (distinction between presumption and inference);
Section 164, pages 168-169 (presumption must rest on facts proved by direct evidence).

Corpus Juris Secundum, Vol. 31, Evidence, Sections 114-115, pages 722-726 (presumption defined and explained; based on some necessity).

Borrson v. Missouri-Kansas-Texas R. Co., 161 S. W. (2d) (Mo. Div. 2) 227, l. c. 229-231 (presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry; presumptions may be grounded on general experience or probability, or merely on policy or convenience; presumptions cast on person against whom they operate the duty of meeting the adverse imputation).

Basham v. Prudential Ins. Co. of America, 113 S. W. (2d) (K. C. App.) 126, l. c. 131; 232 Mo. App. 782 (presumptions are rules of law; presumptions of law and inferences of fact distinguished).

Rose v. Missouri District Telegraph Co. 43 S. W. (2d) 562, l. c. 569; 328 Mo. 1009 (presumption is a mandatory deduction which law directs; inference of fact being a mere permissive deduction).

Merkel v. Railway Mail Assn., 226 S. W. (St. L. App.) 299, l. c. 300-301; 205 Mo. App. 484 (presumption of law is a mandatory deduction; inference of fact is a permissive deduction; presumption against suicide).

Sanderson v. New York Life Ins. Co., 194

S. W. (2d) (K. C. App.) 221, l. c. 227-228 (presumptions, defined and explained; continuance of condition, status or person).

Dove v. Atchison, T. & S. F. Ry. Co., 163 S. W. (2d) 548, l. c. 550-551; 349 Mo. 798.

Lampe v. Franklin American Trust Co., 96 S. W. (2d) 710, l. c. 719-720; 339 Mo. 361; (presumptions affecting burden of evidence are for the trial court rather than the jury, jury should be told what facts they must find to reach a verdict rather than what is presumed).

State ex. rel. Strohfeld v. Cox, 30 S. W. (2d) (Mo. en banc) 462, l. c. 464-465; 325 Mo. 901 (a presumption is not evidence; presumption of knowledge by holder of note from proof of defective title to note—disappearance in face of contrary proof of no knowledge; directed verdict for plaintiff note holder).

Rodan v. St. Louis Transit Co., 105 S. W. 1061, l. c. 1066-1067; 207 Mo. 392 (nature of presumption; rebutted by proof of unassailed circumstances).

Compare American Law Institute, Model Code of Evidence, Rule 702.

See also Section 4.02, infra, Presumptions —Classifications,
Exclusions from Presumptions, including Source Notes and Comments.

COMMENTS

The sections of the Code with respect to "Presumptions" are, in the main, a codification of the existing laws of this state in regard to the nature of presumptions and the functions they are designed to serve in the conduct of a given inquiry.

It will be observed that Section 4.01 distinctly emphasizes the essential characteristic of a presumption, that is, that it is a rule of law. The presumption is not the fact presumed, but the rule of law which, for one purpose or another, assumes the existence of the unkown fact from such fact's usual connection with the basic facts. It is a rule which in effect declares the legal consequence of the basic facts. Regarded in its true light, it necessarily follows that a presumption is not evidence. State ex rel. Strohfeld v. Cox, 325 Mo. 901, 30 S.W. 2d 462. As a rule of law, presumptions generally (other than those presumptions concerned only with burden of persuasion—example, innocence of crime in a criminal case) are addressed to the court and, being for the court and not for the jury, such presumptions are not to be stated in the instructions. Lampe v. Franklin American Trust Co., 339 Mo. 361, 96 S.W. 2d 710; Dove v. Atchison T. & S. F. Ry. Co., 349 Mo. 798, 163 S.W. 2d 548. In other words, where a presumption (other than a presumption affecting burden of persuasion) is to be indulged, the jury is not to be given the legal rule, but is merely to be told what facts it must find in order to return a verdict. Lampe v. Franklin American Trust Co., 339 Mo. 361, 96 S.W. 2d 710.

In order to insure the proper presumptive concept, the definition adopted is regarded as preferable to the one so frequently employed by which a presumption is defined to be a mandatory deduction which the law expressly directs to be made. Rose v. Missouri District Telegraph Co., 328 Mo. 1009, 43 S.W. 2d 562; Merkel v. Railway Mail Ass'n., 205 Mo. App. 484, 226 S.W. 299. A presumption, whenever properly arising, is of course mandatory upon the court, just as any other rule of law is mandatory upon the court whenever a situation is presented which warrants its application. The inaptness of such definition is that it is calculated to support the view that all presumptions are mandatory upon the jury in the sense that the jury should be told of the existence of the presumption as such, and be peremptorily charged that they must

give it effect unless they find that it has been overcome.

It will also be observed that the language of the section is broad enough to permit the basic facts to be established, not only by direct evidence as is usually the case, but also by admissions in the pleadings or otherwise, by stipulation of the parties, or by judicial notice. Compare Rule 702, Model Code of Evidence, American Law Institute. See also Section 4.02, infra.

SECTION 4.02. PRESUMPTIONS — CLASSIFICATION. EXCLUSIONS FROM PRESUMPTIONS.

a. Presumptions are classified as:
1. Conclusive presumptions of law; and
2. Rebuttable presumptions of law, subdivided into two classes, (a). Presumptions affecting burden of producing evidence, and (b). Presumptions affecting burden of persuasion.

b. The following are not recognized as presumptions:
1. Inferences of fact (sometimes erroneously termed "Presumptions of Fact"), they having no mandatory rule of law connected therewith and being mere circumstantial evidence;
2. Rebuttable presumptions of law (so called) based on co-extensive logical fact inferences (formerly recognized as presumptions in Missouri), there being no necessity therefor; and
3. Prima facie cases based entirely on evidence (a presumption not being evidence) and logical fact inferences connected therewith.

c. Included in fact inferences and prima facie cases, referred to in paragraph b. of this section, and excluded from "presumptions," are (but not exclusively) the following:
1. Res ipsa loquitur inferences of negligence;
2. Inference of receipt of mail upon proof of proper (a) addressing, (b) stamping and (c) mailing;
3. Inference of guilt from proof of possession of recently stolen property;
4. ~~Inference of knowledge that property was stolen from proof of possession of recently stolen property;~~
4. Inference of guilt from proof of flight or concealment of person or property;
5. Adverse inferences from destruction, alteration, suppression, spoilation, fabrication or non-production of evidence;
6. Inference of undue influence from proof of fiduciary relationship, benefit to fiduciary, and opportunity for undue influence;
7. Inference against truthfulness of testimony of accomplice;
8. Inference of identity of persons from proof of identity of names;
9. Inference of continuance of a fact, status or condition from proof of existence thereof when such fact, status or condition is of a continuous nature and gives rise to logical fact inferences of continuance.

tions; trend to eliminate instructions re comments on evidence).

State v. Hogan, 252 S. W. (Mo. Div. 2) 387, l. c. 389 (instructions condemned that flight of accused raises a presumption of guilt; mere inference of fact).

Spoliation, fabrication or non-production of evidence.

Polk v. M. K. & T. R. Co., 142 S. W. (2d) (Mo. Div. 2) 1061, l. c. 1063 (adverse inference—failure to produce evidence, attempt to suppress evidence).

Culbert v. Holmes, 14 S. W. (2d) (Mo. Div. 2) 444, l. c. 446 (adverse inference from unexplained refusal of party to testify).

Vanausdol v. Bank of Odessa, 5 S. W. (2d) (K. C. App.) 109, l. c. 118 (adverse inference, from mutilation of evidence).

Undue influence of fiduciary.

Loehr v. Starke, 56 S. W. (2d) (Mo. en banc) 772 (inference of undue influence for jury; proof of fiduciary relationship, benefit to fiduciary, opportunity for undue influence).

Accomplice.

State v. White, 126 S. W. (2d) (Mo. Div. 2) 234, l. c. 235 (accomplice, affects credibility).

State v. Broyles, 295 S. W. (Mo. Div. 2) 554, l. c. 556; 317 Mo. 276 (fact that witness is an accomplice affects his credibility, but not his competency).

Identity of persons from identity of names.

Jones v. Phillips Petroleum Co., 186 S. W. (2d) (K. C. App.) 868, l. c. 872-875 (identity of names is mere evidence of identity of persons, an inference of fact for determination by the trier of facts).

Brooks v. Roberts, 220 S. W. 11, l. c. 13; 281 Mo. 551 (identify of name raises "presumption", i. e. inference, of identity of person without further showing, which may be weakened by rebutting evidence, "but the question of identity remains o for the jury to determine"; a "prima facie" case is made "for the determination of the trier of the facts under the usual rule of burden of proof and preponderance of evidence").

Continuance of fact, status or condition based on logical fact inferences.

Corpus Juris Secundum, Vol. 31, Evidence, Section 124, pages 736-745 (logical fact inferences of continuance having probativ value).

Missouri Power & Light Co., v. City of Bucklin, 163 S. W. (2d) (Mo. Div. 1) 561, l. c. 563-564 (proof of existence of "fact of continuous nature gives rise to an inference within logical limits, that it exists at a subsequent time"; probative value).

Gray v. Union Electric Light & Power Co., 282 S. W. (St. L. App.) 490, l. c. 493; (electrician killed by fallen heavily charged wire; inference wire was making noise from escaping current at 10 o'clock from proof of noise at 8:30 and 9:00 o'clock; deceased held guilty of contributory negligence as matter of law).

City of Cape Girardeau v. Hunze, 284 S. W. (Mo. Div. 1) 471, l. c. 478 (proof of fact or condition at a particular time within reasonable limits gives rise to an inference of continuance; prior unsanitary condition of stream).

Williams v. Lack, 40 S. W. (2d) (Mo. Div. 1) 670, l. c. 673; 328 Mo. 32 ("evidence is competent to show the condition of his (testator's) mind long prior to and closely aproaching the time of the execution of the will, as well as the condition of his mind shortly subsequent to its execution. The purpose of such testimony is to indicate the state of his mind at the very time of the execution of the will. The condition of his mind is tried as of that time. All such evidence is receivable for the purpose of indicating to the jury whether or not the testator at the time the will was executed, had sufficient mental capacity to fill the requirements of the law").

COMMENTS

The classification of presumptions as either conclusive or rebuttable would appear to be both comprehensive and logical. It accords with the major premise that all presumptions are rules of law—in the one case a rule of substantive law, and in the other case a rule of evidence.

It will be observed that this Code treats all presumptions as presumptions of law, and disregards any division of presumptions into presumptions of law and presumptions of fact. The thing presumed is always a fact, either positive or negative, but a fact so usually and commonly associated with the basic facts that upon the appearance of the basic facts, its existence will be assumed in the light of general human experience. In this sense the presumption of fact becomes a presumption of law by universal recognition of the ordinary relation between the basic

facts and the fact presumed, and in such respect is to be distinguished from an inference, which is a deduction the jury may accept or reject according to how they may have been impressed by the evidence.

The chief difficulty has been encountered in dealing with presumptions that are rebuttable in character. To say that a presumption is rebuttable is merely to say that the particular rule of law, which assumes the existence of a fact not otherwise known, does not foreclose the admission of evidence in regard to the actual existence or non-existence of the fact, but leaves the matter open to further inquiry. Borrson v. Missouri-Kansas-Texas R. Co., Mo. Sup., 161 S.W. 2d 227; Sanderson v. New York Life Ins. Co., Mo. App., 194 S.W. 2d 221. It is thus generally said that where the facts appear, a presumption recedes or vanishes, since there is no necessity for resorting to a presumption where there is substantial evidence upon the matter in issue. This is true with regard to rebuttable presumptions of law affecting the burden of evidence (where the presumption aids the one having the burden of persuasion) but is inaccurate with regard to rebuttable presumptions of law that are addressed directly to the burden of persuasion (See Section 4.05).

Bearing in mind that a rebuttable presumption does not foreclose the admission of evidence in regard to the actual existence or non-existence of the fact assumed but leaves the matter open to further inquiry, the determination of whether a particular presumption falls within one or the other of the classes of rebuttable presumptions depends upon the circumstances under which it arises and the function it is designed to serve.

Presumptions founded on co-extensive inferences of fact and presumptions of fact no longer recognized.

Until recently in Missouri presumptions were classified as (a) absolute presumptions of law, (b) rebuttable presumptions of law (1) based on co-extensive logical fact inferences, or (2) procedural in nature, based on arbitrary administrative deductions, and (c) presumptions of fact.

It is now recognized in Missouri that the term "presumption of fact" is a misnomer and should no longer be used. This so-called presumption is nothing more than an inference of fact—circumstantial evidence—which the jury may or may not recognize. It has no mandatory rule of law connected therewith. So-called "presumptions of fact," therefore, are not recognized in this code.

Formerly in Missouri rebuttable presumptions of law founded on co-extensive logical fact inferences were recognized. This is pointed out in the case of Loehr v. Starke, 332 Mo. 131, 56 S.W. 2d 772 where the following language is used:

> "The presumption under consideration is not a mere legal fiction or procedural rule. It rests on a substantial basis of fact or inference. The presumption and fact, or inference, go hand in hand and really are the same thing. Hence, the presumption, with its underlying facts or inferences, once being in the case, never does or can disappear but raises an issue for the jury."

See also Bond v. St. Louis-San Franciso Ry. Co., 315 Mo. 987; 288 S.W. 777.

The above quotation from the Loehr case demonstrates that a rebuttable presumption of law based on co-extensive logical fact inferences is unnecessary to carry the case to a jury and therefore serves no useful purpose. Such being the case such presumptions should be discarded. This has been done in recent decisions.

In McCloskey v. Koplar, 329 Mo. 527, 46 S.W. (2d) 557, 563-564 the Supreme Court of Missouri en banc held that a res ipsa loquitur case gives rise to a logical fact inference of negligence and does not give rise to a rebuttable presumption of law founded on logical fact inferences, the court saying: "these facts raise an inference, *** that the accident was occasioned by the defendant's negligence in *some way*." *** "The so-called 'presumption' in such cases is ordinarily nothing more than a permissive inference of fact."

In Harke v. Haase, 335 Mo. 1104, 75 S.W. (2d) 1001 the court quoted with approval from the McCloskey case, supra, and held that a res ipsa loquitur case reduced to its simplest terms means "that negligence can be proved by circumstantial evidence and that certain circumstances as to the character of the accident, are sufficient to take the case to the jury."

In Turner v. Missouri-Kansas-Texas R. Co., 142 S.W. (2d) (Mo.) 455, l.c. 460 the court discussing the inference of negligence in a res ipsa loquitur case, says:

> "In other words it amounts to an *inference* which the jury *must* weigh, and from which they *may* find the fact of negligence. *** It is a presumption only in the sense that the *law* declares it substantial evidence of negligence and thereby makes it binding on the judge but not on the jury."

It was formerly held in Missouri that the possession of recently stolen property created or gave rise to a rebuttable presumption of law that the possessor was guilty of larceny or other crime. Since the case of State v. Swarens, 294 Mo. 139, 241 S.W. 934, however, it has been held that such possession gives rise merely to a logical fact inference of guilt and does not give rise to a rebuttable presumption of law that the person is guilty of a crime. See also State v. Denison, 178 S.W. (2d) (Mo. Div. 2) 449; State v. Curley, 142 S.W. (2d) (Mo. Div. 2) 34; and State v. Enochs, 339 Mo. 953, 98 S.W. (2d) 685, and cases cited. These cases are to the effect that the possession of recently stolen property merely "warrants an inference that the possessor was a thief." See also State v. Day, 95 S.W. (2d) (Mo. Div. 2) 1183 to the effect that there is no presumption that the possessor of recently stolen property had *knowledge* that the property was stolen; and State v. Hogan, 252 S.W. (Mo. Div. 2) 387, 389 that unexplained flight of an accused does not give rise to a presumption of guilt but merely an inference of fact.

It is surprising that our courts did not recognize before the above decisions that the above inferences in criminal cases, if recognized as "presumptions," would be in direct conflict with the strongest presumption in a criminal case, namely, the presumption of innocence.

The trend of Missouri decisions is to limit rebuttable presumptions of law to mere procedural presumptions which are not supported by logical fact inferences, and eliminate rebuttable presumptions of law based on co-extensive logical fact inferences.

In Missouri Power & Light Co. v. City of Bucklin, 163 S.W. (2d) (Mo. Div. 1) 561, 564, the court said:

> "A presumption is *only allowed from necessity,* to prevent a failure of justice, in cases where the litigant has nothing better. It is not allowed when the party seeking its indulgence knows or has evidence of the actual fact; that is, when a litigant does not need it, he should not ask it." (Italics ours).

In State ex. rel. Alton R. Co. v. Shain, 143 S.W. (2d) 233, l.c. 239, the court uses this appropriate language:

> "The decisions of this court seem to treat presumptions as merely procedural."

In Sellars v. John Hancock Mutual Life Insurance Co., 149 S.W. (2d) 404, l.c. 406, the St. Louis Court of Appeals states that the presumption that death was accidental from a gunshot wound is

> "merely a rule of procedure or rebuttable legal presumption."

In Dove v. Atchison, T. & S. F. Ry. Co., 163 S.W. (2d) (Mo. Div. 1) 548, 551, the court uses this language:

> "Presumptions usually concern the shifting of the burden of the evidence and are for the court rather than the jury; *** In other words, presumptions are procedural and are not for consideration of the jury which has the function of considering and determining what facts are shown by the evidence."

This section eliminates all so-called presumptions of fact as well as all rebuttable presumptions of law affecting burden of evidence that are unnecessary; that is, rebuttable presumptions of law based on co-extensive logical fact inferences. In short, rebuttable presumptions of law affecting burden of evidence are only recognized in those cases where it is *necessary* so to do to prevent a failure of justice. See Missouri Power & Light Co. v. City of Bucklin, 163 S.W. (2d) (Mo. Div. 1) 561, l.c. 564. Even in such cases if additional fact evidence is introduced of sufficient probative value, together with other fact evidence, to take the case to the jury the rebuttable presumption of law affecting burden of evidence disappears from the case and the case is considered on factual evidence only. See as an outstanding example, State ex. rel. Waters v. Hostetter, 126 S.W. (2d) (Mo. en banc) 1164 (cited under Section 4.04).

See also Sections 4.04—4.06, including Source Notes and Comments.

SECTION 4.03. CONCLUSIVE PRESUMPTIONS—DISTINCTIVE CHARACTERISTICS.

a. A conclusive presumption of law is a rule of substantive law which is applied without regard to the actual facts and cannot be contradicted by evidence to the contrary.

b. Included in conclusive presumptions of law, referred to in para-

graph a. of this section, but not exclusively, are the following:

1. A child under seven years of age lacks capacity to commit a crime;
2. A person is presumed to intend and know the natural and probable consequences of his acts;
3. A person is presumed to know the law, both civil and criminal;
4. Presumptions by way of estoppel;
5. Statutory conclusive presumptions.

Source Notes

Wigmore on Evidence, 3rd Edition, Vol. IX:
Section 2492, pg. 292 (conclusive presumption rule of substantive law; term "conclusive presumption" has no place in the principles of evidence);
Section 2514, pg. 424 (incapacity for criminal intent, child under age of seven; conclusive presumption).

Greenleaf on Evidence, 16th Edition, Vol I, Sections 14y and 15, pgs. 107-111 (conclusive presumptions and others);
Section 18, pgs. 113-115 (natural consequences of acts, intent, malice);
Sections 22-27, pgs. 117-123 (estoppels; recitals in deeds; by deed, lessee as to lessor, consideration, statements acted upon);
Section 28, pgs. 123-124 (incapacity child under 7 to commit crime);
Section 32, pgs. 126-127 (principle of conclusive presumption, substantive law).

20 American Jurisprudence, Evidence,
Section 160, pgs. 164-165 (conclusive presumptions);
Section 211, pgs. 208-210 (knowledge of law);
Section 215, pgs. 213-214 (child under 7, incapable of committing crime).

31 C. J. S., Evidence, Sections 115 and 117, pgs. 724-725, 731 (conclusive presumptions, rules of substantive law).

43 C. J. S., Infants, Section 96d(b), pages 216-217 (infant under 7 years conclusively presumed incapable of crime).

State ex. rel. Baumann v. Doder, 121 S. W. (2d) (St. L. App.) 263, l. c. 265 (conclusive presumptions of law).

Kellogg v. Murphy, 164 S. W. (2d) 285, l. c. 294, 349 Mo. 1165 (conclusive presumption is in the field of substantive law).

Beck v. K. C. Public Service Co., 48 S. W. (2d) (K. C. App.) 213, l. c. 215 (conclusive presumptions of law; under compensation law wife conclusively presumed as totally dependent on husband).

State v. Tice, 2 S. W. 269, 90 Mo. 112 (under 7 years of age an infant cannot be guilty of a felony).

Camp v. John Hancock Mutual Life Ins. Co., 165 S. W. (2d) (St. L. App.) 277, l. c. 281 (one is presumed to intend the natural and probable consequences of his acts and conduct).

Davis v. Buck's Stove & Range Co., 49 S. W. (2d) (Mo. Div. 1) 47, l. c. 51 (if one commits a negligent or wrongful act he is presumed to know and intend the natural results).

State v. Speyer, 106 S. W. 505, l. c. 509, 207 Mo. 540 (every sane person is presumed to intend the natural and probable consequences of his acts, presumption applied in criminal prosecutions).

Poe v. Illinois Central R. Co., 99 S. W. (2d) (Mo. Div. 2) 82, l. c. 89 (everyone is conclusively presumed to know the law; legal duty of parties to contract to know contents).

State v. Dogulas, 278 S. W. 1016, l. c. 1022, 312 Mo. 373 (one is conclusively presumed to know the criminal law).

Sol Abrahams & Son Const. Co. v. Osterholm, 136 S. W. (2d) (St. L. App.) 86, l. c. 92 (conclusive presumption entire agreement reduced to writing).

Brown v. Brown, 146 S. W. (2d) (Mo. Div. 1) 553, l. c. 554-555 (elements of estoppel, must be pleaded and proved before conclusive presumption of estoppel operates).

Mo. R. S. A., Section 522 (conclusive presumption of revocation of will by marriage and leaving issue).

Mo. R. S. A., Section 571 (conclusive presumption property transferred without adequate valuable consideration within two years prior to death was transferred in contemplation of death).

Mo. R. S. A., Sections 5632, 5651 and 5675 (conclusive presumption, purchaser in good faith for value of public utility property not useful or necessary for operation).

Mo. R. S. A., Section 6984 (conclusive presumption bonds of third class city duly and regularly authorized and issued).

Mo. R. S. A., Section 7736 (conclusive presumption tax lien paid after 2 years if suit not filed or notice of suit given).

Mo. R. S. A., Section 8029 (conclusive presumption corporate trust company or employee did not prepare will, when—when rebuttable).

Mo. R. S. A., Section 14078 (presumption of knowledge of nature of substitute for butter, during possession, not marked as such, when).

See also Mo. R. S. A., Index, Evidence, Presumptions, for statutory examples, in general.

COMMENTS

To say that a presumption is conclusive is to enter the field of substantive law. Kellogg v. Murphy, 349 Mo. 1165, 164 S.W. (2d) 285.

A typical example is the conclusive presumption that a child under the age of seven years has no capacity to commit a crime. 43 C.J.S., Infants, sec. 96 (b); 20 Am. Jur., Evidence, sec. 160, pages 164-165.

This particular presumption vividly illustrates the distinction between conclusive and rebuttable presumptions. Between seven and fourteen years of age the same presumption is indulged, except that the presumption may be overcome (rebutted) by showing that notwithstanding the child's tender years, it possessed criminal capacity. State v. Tice, 90 Mo. 112, 2 S.W. 269; State v. Adams, 76 Mo. 355; State ex. rel. v. Tincher, 258 Mo. 1, 166 S.W. 1028; State v. Jackson, 346 Mo. 474, 142 S.W. (2d) 45. See also Section 4.05.

In the one case a fixed and definite rule of substantive law provides that the child cannot be guilty irrespective of what the facts may show; in the other case the child is merely adjudged prima facie to be incapable of committing a crime, with the burden on the state to prove that it possessed that mischievous discretion which supplies the place of age and renders the child amenable to legal punishment.

As conclusive presumptions concern substantive law and have no direct relationship to the principles of evidence no lengthy recitation and cataloging of such absolute presumptions are here necessary. Absolute presumptions are referred to and mentioned in this code for the sole purposes of analysis and clarity.

SECTION 4.04. REBUTTABLE PROCEDURAL PRESUMPTIONS AFFECTING BURDEN OF PRODUCING EVIDENCE. DISTINGUISHING CHARACTERISTICS. FUNCTION.

a. A procedural presumption of law affecting the burden of producing evidence is a rule of evidence which for administrative convenience and necessity presumes the existence of an otherwise unknown fact as a deduction from basic facts and circumstances which in and of themselves lack sufficient substantial probative value upon the question of the existence of the fact presumed. Such a presumption casts upon the party against whom it operates the burden of producing evidence of the non-existence of the fact presumed. This presumption functions or operates in a given case in one of the three following ways:

1. If the basic facts upon which such presumption is founded are admitted or are not disputed and substantial evidence is not introduced of the non-existence of the fact presumed the presumption in that event stands in lieu of evidence and will on the particular issue support a judgment for the party in whose favor it operates.
2. If the basic facts upon which such presumption is founded are disputed and substantial evidence is not introduced of the non-

existence of the fact presumed, the finder of facts upon finding the basic facts must observe the presumption by finding or assuming the fact that is presumed—in jury cases under proper instructions.

3. If the party against whom such presumption operates introduces substantial evidence controverting the fact presumed the existence or non-existence of such presumed fact is to be determined exactly as if no presumption had ever been operative in the action.

b. Included in rebuttable procedural presumptions of law affecting the burden of producing evidence, referred to in paragraph a. of this section, but not exclusively, are the following:

1. Presumption that automobile driver was acting in the scope of his employment upon proof that automobile was owned by the defendant employer and that automobile driver was regular employee of defendant employer.
2. Presumption of death upon proof of continuous unexplained absence for a period of seven years or more without being heard from;
3. Presumption against suicide upon proof of death either by forceful means or otherwise;
4. Presumption that death from violence was accidental;
5. Presumption of legitimacy of children born during wedlock or born prior to marriage and recognized by later husband as his.
6. Presumption of delivery of deed from proof of possession by grantee;
7. Presumption of ownership from proof of exclusive possession and control of property;
8. Presumption of acceptance of beneficial gift;
9. Presumption that user of private way for prescriptive period is adverse;
10. Presumption of continuance of a fact, condition or status of a continuing nature from proof of the prior existence of such fact, condition or status;
11. Presumption of sanity of witness;
12. Presumption that confession is voluntary;
13. Presumption of good reputation;
14. Statutory rebuttable presumptions.

Source Notes

Wigmore on Evidence, 3rd. Edition, Vol. IX:
Section 2490, pages 286-288 (findings on basic facts by jury);
Section 2498a, pages 337-338, 340, 349 (submitting basic facts to jury);
Section 2527, pages 448-451 (legitimacy);
Section 2531a-e, pages 464-480 (presumption of death from disappearance);
Section 2536, pages 492-495 (presumption of similarity of foreign law);
Section 2510a, pages 399-406 (presumption of ownership and agency of vehicle).
Wigmore on Evidence, Students' Textbook, Section 451, pages 452-454 (submit evidential facts re presumption to jury).
Greenleaf on Evidence, 16th Edition, Vol. 1:
Sections 14y and 15, pages 107-111 (presumptions affecting burden of evidence, and others);
Section 33, page 127 (disputable presumptions in general);
Section 41, pages 138-140 (continuity; life, death; partnership, sanity);
Section 43, pages 141-142 (similarity of foreign law).

Missouri Power & Light Co. v. City of Bucklin, 163 S. W. (2d) (Mo. Div. 1) 561, l. c. 563-564 (presumption of continuance of things or conditions of a continuing nature within logical limits but there is no such presumption that a public debt continues at a certain amount).

Eberle v. Koplar, 85 S. W. (2d) (St. L. App.) 919, l. c. 921 (status of a continuing nature once shown to exist will be persumed to continue, absent any showing to the contrary; existence of assets of corporation at time of dissolution).

Kelly v. Laclede Real Estate & Inv. Co., 155 S. W. (2d) (Mo. Div. 1) 90, l. c. 94 (presumption of continuance of certain condition or state of affairs, so long as usual, until contrary is shown by direct or circumstantial evidence; proof of execution of lease, presumption of continuance of lease).

Fassold v. Schamburg, 166 S. W. (2d) 571, l. c. 572-573; 350 Mo. 464 (presumption that user continues either permissive or adverse upon proof of permissive or adverse user; user for prescriptive period presumed adverse).

McDaniels v. Cutburth, 270 S. W. (Mo. Div. 1) 353, l. c. 359-360 (adverse possession evidence; presumption status continued).

Presumption of sanity of witness.

State v. Barker, 242 S. W. 405, l. c. 410; 294 Mo. 303 (absent confinement or adjudication of insanity burden of showing incompetency of witness as insane is on one objecting).

Beil v. Gaertner, 197 S. W. (2d) (Mo. Div. 1) 611, l. c. 616:

State v. Pierson, 85 S. W. (2d) (Mo. Div. 2) 48, l. c. 53-54:
(adjudication of insanity creates only prima facie presumption of incompetency of witness which is rebuttable by voir dire examination or otherwise).

No presumption of sanity of testator.

Weaver v. Allison, 102 S. W. (2d) (Mo. Div. 1) 884; 340 Mo. 815 (no presumption of sanity in will contest case; statute prevents and puts burden of proof on proponents of will).

Presumption confession of accused voluntary.

State v. Higdon, 204 S. W. (2d) (Mo. en banc 754, l. c. 755 and cases cited (presumption confession voluntary until contrary shown; burden of proof on state to prove beyond a reasonable doubt that confession is voluntary).

Presumption of good reputation.

Burns v. Burns, 193 S. W. (2d) (St. L. App.) 951, l. c. 953 (action for damages resulting to reputation on account of false arrest and imprisonment—presumption of good reputation until contrary shown; same rule exists in libel and slander action).

Statutory rebuttable presumptions.

Mo. R. S. A., Sections 264, 1873 (presumptions of death from proof of continuous absence for 7 years or more).

Mo. R. S. A., Section 1801 (presumption that personal property in possession of person entitled to same until contrary appears; replevin action).

Mo. R. S. A., Section 1949 (presumption of due execution and acknowledgment of conveyances etc., unless contrary appears).

Mo. R. S. A., Section 5491 (presumption of ownership of logs with recorded mark thereon).

See also, Mo. R. S. A., Index, Evidence, Presumptions, for statutory examples of rebuttable presumptions.

COMMENTS

It will be noted that under Section 4.02 rebuttable presumptions of law are limited to procedural presumptions (presumptions that are not based on coextensive logical fact inferences); such presumptions being recognized of necessity to prevent the failure of justice and for administrative convenience. Such recognized rebuttable presumptions of law fall into two classes, namely (1) those affecting burden of producing evidence, and (2) those affecting burden of persuasion. The first class of such rebuttable presumptions of law *assist (either temporarily or permanently) the party having the burden of persuasion on the particular issue or issues.* The second class of such rebuttable presumptions of law *operate against the party having the burden of persuasion on the particular issue or issues.* The first class of rebuttable presumptions, presumptions affecting burden of producing evidence, are covered by this Section 4.04 and the second class of such rebuttable presumptions, pre-

sumptions affecting burden of persuasion, are covered by Section 4.05. A goodly number of recognized examples of the two classes of presumptions are set forth in the said respective sections and Source Notes for guidance and explanation of the sections themselves. Whether or not a rebuttable presumption of law falls within the one section or the other depends upon the circumstances under which the particular presumption arises and the function that it is designed to serve. If its function in the particular case is to support the party having the burden of persuasion with regard to a particular issue or issues the presumption properly falls within this Section 4.04. If its function in the particular case is to operate not in favor of, but against the party having the burden of persausion on the particular issue or issues, then such presumption properly falls under Section 4.05.

The sole procedural function of the rebuttable presumption of law affecting the burden of producing evidence is to impose upon the party against whom it operates the duty of producing evidence of the nonexistence of the fact presumed. The basic facts which give rise to such presumption do not, in and of themselves, possess sufficient probative value upon the question of the existence of the fact presumed. Nevertheless such presumption serves a most important purpose, since without it many meritorious causes and defenses would fail through the inability of the particular party to produce affirmative evidence of some fact essential to the party's cause of action or defense, but peculiarly within the knowledge of his adversary.

Expressions were once used in many of the decisions which indicated that presumptions covered by this section could only be overcome by positive, unequivocal and unimpeached testimony on the part of the one against whom the presumption operates. It is now definitely settled that mere substantial evidence will suffice. State ex. rel. Steinbruegge v. Hostetter, 342 Mo. 341, 115 S.W. (2d) 802; State ex. rel. Waters v. Hostetter, 344 Mo. 443, 126 S.W. (2d) 1164. Even though the presumption be overcome and has taken flight, the facts which gave rise to it *along with other evidence,* if sufficient to raise a fact inference will take the case to the jury. State ex. rel. Waters v. Hostetter, 344 Mo. 443, 126 S.W. (2d) 1164; Kellogg v. Murphy, 349 Mo. 1165, 164 S.W. (2d) 285. However, the bare minimum of facts which give rise to the presumption are insufficient, in and of themselves, to support a finding by the jury or court in the plantiff's favor. State ex. rel. Waters v. Hostetter, 344 Mo. 443, 126 S.W. (2d) 1164.

A familiar example of the application of a rebuttable presumption affecting burden of producing evidence is to be found in a case where the plaintiff brings an action to recover damages for injuries sustained when struck by an automobile owned by the defendant and driven at the time by a person in the defendant's general employ. The question left in doubt, but upon which the defendant's liability depends, is whether the driver, at the time of the accident, was operating the automobile in the course of his employment as the agent and servant of the defendant.

The plaintiff may have no information upon this question, which, in

view of the fact that it involves a private relationship between the defendant and the driver, is peculiarly within the knowledge of the defendant, and of course the driver. To make his case, the plaintiff may put either the defendant or the driver on the stand as his witness, but if such witness should give direct testimony unfavorable to the plaintiff, then the latter would be bound by such testimony, and his case would fail, assuming he had nothing to support his case except the bare presumption. Draper v. Louisville & N. R. Co., 348 Mo. 886, 156 S.W. (2d) 626.

Rather than incur the risk of being concluded by the testimony of a hostile witness, the plaintiff may elect to attempt no proof upon the question of agency other than to show the defendant's ownership of the automobile and the driver's general employment by defendant. However these facts, as already pointed out, are in and of themselves insufficient to support an inference that the driver, at the time of the accident, was operating the automobile in the course of his employment. This because of the well-known fact that automobiles, unlike trains and street cars, may be readily moved from place to place, and drivers do operate them upon missions of their own.

In this situation, the law, for administrative convenience, indulges of necessity a presumption—an arbitrary deduction—which imposes upon the defendant the duty of producing evidence to show the true facts within his special knowledge. While the effect of such presumption will be to require the court to overrule the defendant's motion for a directed verdict or judgment at the close of the plaintiff's case, the court is not thereby ruling that the plaintiff, in all events, has a case for submission to the jury. On the contrary, the effect of the presumption, in obedience to which the court acts, is merely to keep the question of agency open to further inquiry.

The defendant may then offer substantial fact evidence to rebut the presumption. If the defendant does produce substantial evidence that the driver, at the time of the accident, was not acting within the scope of his employment, the plaintiff must then come forward with additional proof—substantial evidence—to the contrary, or else the defendant will be entitled to a directed verdict or judgment at the close of the whole case. If the defendant fails to produce substantial evidence that the driver, at the time of the accident, was not acting within the scope of his employment, the presumption, in that event, will stand in lieu of evidence so as to warrant the submission of the case to the jury or court and support the judgment if the plaintiff prevails.

See Section 4:05 for comments as to rebuttable presumptions of law affecting burden of persuasion.

Section 4.05. Rebuttable Procedural Presumptions Affecting Burden of Persuasion. Distinguishing Characteristics. Function.

a. A ~~procedural~~ rebuttable presumption of law affecting the burden of persuasion is a rule of ~~evidence~~ procedure which, upon joinder of issue regarding any matter

as to which the presumption exists, imposes upon the party against whom the presumption operates the continuing duty throughout the trial of establishing the truth of such party's charge or allegation by whatever quantum of evidence the law demands in the particular case.

b. Included in rebuttable procedural presumptions of law affecting burden of persuasion, referred to in paragraph a. of this section, but not exclusively, are the following:

1. Presumption of innocence;
2. Presumption of due care;
3. Presumption that infant over seven and under fourteen years of age lacks capacity to commit a crime;
4. Presumption of sanity (a) of insured and (b) of beneficiary in insurance policy when settlement of claim on policy made;
5. Presumption of right action: (a) presumption of jurisdiction, regularity of proceedings and right action by courts of general jurisdiction, and (b) that public officers are regular and perform their duties.

SOURCE NOTES

Wigmore on Evidence, 3rd. Edition, Vol. IX:
Section 2501(3), page 361 (accused has burden of proving insanity; presumption of sanity);
Section 2511, pages 406-412 (presumption of innocence);
Section 2514, pages 424-425 (presumption of incapacity to commit a crime between ages of 7 and 14 years).

Greenleaf on Evidence, 16th Edition, Vol. 1:
Sections 14y and 15, pages 107-111 (presumptions affecting burden of persuasion, and others);
Section 33, page 127 (disputable presumptions in general);
Sections 34-35, pages 127-131 (innocence);
Section 40, pages 137-138 (regular course of business in public office).

American Jurisprudence, Vol. 20, Evidence:
Sections 167-169, pages 172-174 (regularity of judicial proceedings);
Sections 170-177, pages 174-182 (regularity of official acts);
Sections 221-223, pages 217-220 (presumption of innocence, burden of proof);
Sections 227-229, pages 222-225 (regularity and right conduct).

Corpus Juris Secundum, Vol. 22, Criminal Law, Section 581, pages 893-898 (accused presumed innocent until guilt proved beyond reasonable doubt).

Jones v. Phillips Petroleum Co., 186 S. W. (2d) (K. C. App.) 868, l. c. 874 ("A presumption is generally only a rule of law as to which party shall first proceed and go forward with the evidence to prove an issue, the presumption being against the party having the burden of proof).

Ronchene v. Gamble Const. Co., 89 S. W. (2d) (Mo. Div. 1) 58, l. c. 63 (burden of proof instructions should state burden simply and should not state too many technical rules).

See Missouri Revised Statutes Annotated. Index, Evidence, Presumptions, for statutory examples in general.

Presumption of innocence.

State v. Simler, 167 S. W. (2d) (Mo. Div. 2) 376, l. c. 382 (presumption of innocence of accused; state must prove guilt beyond a reasonable doubt).

State v. Galbraith, 50 S. W. (2d) 1035, l. c. 1036-1037; 330 Mo. 801 (presumption of innocence must be overcome by proof on the part of the state; presumption of innocence overcomes any presumption that accused owner of auto and passenger therein was directing movements of auto; other presumptions contrary to presumption of innocence eliminated as presumptions).

State v. Powell, 217 S. W. (Mo. Div. 2) 35, l. c. 38 (instruction approved that presumption of innocence attends accused throughout trial and "until his guilt has been established to the satisfaction of the jury beyond a reasonable doubt").

State v. Bowman, 245 S. W. (Mo. Div. 2) 110, l. c. 117; 294 Mo. 245 (presumption of innocence follows accused until case finally disposed of);

State v. Kennedy, 55 S. W. (Mo. Div. 2) 293, l. c. 299-300; 154 Mo. 268, l. c. 288 (refusal of instruction on presumption of innocence not reversible error when court fully instructs on doctrine of reasonable doubt; cases analyzed re instructions on presumption of innocence).

State ex rel. Detroit Fire & Marine Ins. Co., 187 S. W. (Mo. en banc) 23, l. c.

that they do their duty until otherwise shown).

Wymore v. Markway, 89 S. W. (2d) (Mo. Div. 1) 9, l. c. 11 (presumption that assessor did his duty).

State v. Nolan, 192 S. W. (2d) (Mo. Div. 2) 1016, l. c. 1021 (peace officers are presumed to be in lawful discharge of their duty in attempting to make arrests).

COMMENTS

The characterization of presumptions as procedural is most commonly employed with reference to the type of presumptions dealt with in Section 4.04, infra, which are mere legal fictions whose primary function is to shift the burden of going forward with the evidence from one party to the other at successive stages of the trial. But not all presumptions which affect a party's burden fall within such classification. On the contrary, many presumptions affect the burden of persuasion, and are therefore no less procedural in their consequences than those which merely affect the burden of producing evidence. Whether a particular act or transaction gives rise to a cause of action is a question of substantive law, but how such cause of action shall be enforced is a question of procedure, which includes the question of the burden of persuasion.

Unlike inferences of fact and presumptions affecting the burden of producing evidence, the presumptions in question, that is, presumptions affecting the burden of persuasion, do not depend for their existence or operation upon the establishment of basic facts during the progress of the trial. Instead they are based primarily on human instinct or the first principles of justice, and are inherent in certain matters as to which issue may be joined so as to be present in a case at the outset of the trial and affect the burden of persuasion imposed upon the party against whom the presumption operates.

A familiar example of a presumption affecting the burden of persuasion is the presumption of innocence which clothes an accused in a criminal proceeding and is designed to prevent, so far as human agencies can, the conviction of an innocent person. The presumption is not in itself evidence (State ex. rel. Detroit Fire & Marine Ins. Co. v. Ellison, 268 Mo. 239, 187 S.W. 23), but casts upon the state the burden of proving the guilt of the accused beyond a reasonable doubt. State v. Simler, 350 Mo. 646, 167 S.W. (2d) 376; 22 C.J.S., Criminal Law, sec. 581; 20 Am. Jur., Evidence, sec. 223. In fact, the presumption of innocence in a criminal case is synonymous with the reasonable doubt rule. State v. Kennedy, 154 Mo. 268, 55 S.W. 293; 22 C.J.S., Criminal Law, sec. 581. It is rebuttable, but may only be overcome when the guilt of the accused has been established to the satisfaction of the jury beyond a reasonable doubt. State v. Powell, Mo. Sup., 217 S.W. 35. In other words, it attends the accused from the initiation of the proceeding until a verdict is brought in which either finds him guilty or else converts the presumption of innocence into an adjudged fact. 20 Am. Jur., Evidence, sec. 222. Moreover the presumption is no less to be indulged in a civil case where the commission of a crime is in issue, save only that the burden of persuasion which such presumption imposes in a civil action is merely to prove the commission of a crime by the preponderance of the evidence. State ex. rel. Detroit Fire & Marine Ins. Co. v. Ellison, 268

Mo. 239, 187 S.W. 23; 20 Am. Jur., Evidence, sec. 221.

Another typical example of a presumption affecting the burden of persuasion is the presumption of due care which is inherently present in every negligence action. Based upon natural human instinct, it is presumed that one will not voluntarily do an act which places his own life or the lives of others in peril. Otherwise stated, the law never presumes negligence on the part of either party to an action, but on the contrary initially assumes that each was in the exercise of due care. State ex. rel. Missouri Public Utilities Co. v. Cox, 298 Mo. 427, 250 S.W. 551; Yarnell v. The Kansas City, Fort S. & M. R. Co., 113 Mo. 570, 579, 21 S. W. 1. Consequently the burden of persuasion rests upon the plaintiff to prove that the defendant was guilty of negligence, and upon the defendant to prove that the plaintiff was guilty of contributory negligence. The presumption is not evidentiary, and its only function, as pointed out, is to impose the burden of persuasion upon the party against whom the particular presumption operates. Bleil v. Kansas City, Mo. Sup., 70 S.W. 2d 913. It is rebuttable, but is not overcome by the evidence of the party against whom it operates; and unless a party's negligence appears from his own evidence as a matter of law, it is for the jury, and not the court, to draw such inferences from the evidence as would overcome the presumption. Buesching v. The St. Louis Gaslight Co., 73 Mo. 219, 233.

The other rebuttable presumptions of law set forth in this section and referred to in the decisions mentioned in the Source Notes fall into the same pattern as indicated, supra, in these comments and need no further discussion.

See also Section 4.04, together with Source Notes and Comments.

Section 4.06. Conflicting Presumptions.

a. When conflicting presumptions of equal weight arise in relation to the same matter neither presumption shall be recognized.

b. When one presumption is stronger than a contrary presumption the stronger presumption shall prevail as for example, but not exclusively, (1) the presumption of innocence shall prevail over all conflicting presumptions; (2) the presumption of legality of a last marriage shall prevail over any contrary presumptions that would tend to support the legality of a prior marriage; (3) a presumption of death of a person absent from home or from the state for seven years without being heard from shall prevail over the presumption of a continuance of a prior status,—life; and (4) the presumption of legitimacy of children shall prevail over the presumption of continuance of a prior marriage.

Source Notes

Wigmore on Evidence, 3rd. Edition, Vol. IX, Section 2493, pgs. 292-293 (conflicting and counter presumptions).

Greenleaf on Evidence, 16th Edition, Vol. 1: Section 14y, pgs. 107-110 (conflicting presumptions); Sections 34-35, pgs. 127-131 (innocence; life and death; conflicting presumptions; presumption of innocence sufficiently strong to overthrow presumption of life).

American Jurisprudence, Vol. 20, Evidence, Section 163, pgs. 166-168 (conflicting

presumptions; presumptions of innocence prevails; presumption of validity of last marriage; presumption of death prevails over presumption of continuance of life).

Yarnel v. The Kansas City, Ft. Scott & M. R. Co., 113 Mo. 570, 579; 21 S. W. 1. ("one presumption rebuts and neutralizes the other, like the conjunction of an acid and alkali").

State v. Galbraith, 50 S. W. (2d) 1035, l. c. 1036-1037, 330 Mo. 801 (presumptions contrary to presumption of innocence not recognized; mere evidence of guilt,—owner of auto directing movements of auto, possession of stolen goods, flight of accused).

Acuff v. New York Life Ins. Co., 239 S. W. 551, l. c. 553-554; 210 Mo. App. 356 (presumption of innocent prevails in both civil and criminal cases).

Griggs v. Pullman Co., 40 S. W. (2d) (St. L. App.) 463 and cases cited (last marriage presumed legal).

Dinkelman v. Hovekamp, 80 S. W. (2d) 681, l. c. 683-684; 336 Mo. 567 (validity of second marriage overcome when).

Ferril v. Kansas City Life Ins. Co., 137 S. W. (2d) 577, 345 Mo. 777, (presumption of death prevails over presumption of continuance of life).

Nelson v. Jones, 151 S. W. 80, l. c. 82-83; 245 Mo. 579 (presumption of continuance of marriage must give way to presumption of legitimacy of children of one spouse and a third person).

Ribas v. Stone & Webster Engineering Co., 95 S. W. (2d) (St. L. App.) 1221, l. c. 1223-1225 (presumption of validity of second marriage; burden of producing contrary evidence).

De Ra Luis v. Carter Carburetor Co., 94 S. W. (2d) (St. L. App.) 1130; (presumption second marriage valid, burden of rebutting).

COMMENTS

In many cases conflicting presumptions of equal weight arise with regard to the *same* issue. In such situations the one presumption rebuts and neutralizes the other presumption, leaving the parties to their proof.

The four situations recited in paragraph b. supra, are examples where one presumption is stronger than contrary presumptions, and are examples where such stronger presumptions prevail.