Cornell Law Review

Volume 11
Issue 1 *December 1925*

Article 2

Presumptions

Otis H. Fisk

Presumptions

OTIS H. FISK*

We, of the legal profession, shall never get out of the quagmire of the Law of Presumptions until we shall have agreed upon certain premises.

By not following the lead of the courts too closely, and by approaching the subject from the outside with a more independent spirit of analysis, the writer believes more progress can be made in establishing the desired premises.

Starting with the analysis of the great body of our law, we find that relationships are regulated by a branch of that law, which gives or assigns to a certain grouping of facts certain effects. The "certain grouping of facts" constitutes a relationship. The "certain effects" are the rights and duties following or flowing from the relationship. This process of giving or assigning to certain groupings of facts certain effects is the regulation of relationships.

That branch of the law is called Substantive Law. Its function is to regulate relationships.

That establishes our first premise.

Carrying the analysis further, we discover another branch of the law, which regulates the proof and disproof of relationships, which is another way of saying proof and disproof of rights and duties, for rights and duties are proved or disproved by proving or disproving the relationship from which they spring.

That branch of the law is the Law of Proof. Its function is to regulate the proof and disproof of rights and duties.

That is our second premise.

Pursuing the analysis a little further, we learn, that in courts rights and duties must be proved or disproved, as the case may be, before they will be recognized or enforced or denied, as the case may be, and they must be proved or disproved to the satisfaction of a judicial organ, which, in form, can be either individual (for example, one judge, a referee) or collegiate (for example, more than one judge, a jury, combined judge and jury); and that organ in reaching its conclusions can consider only what is placed before it in the form of proof—it cannot go outside the proof placed before it, in making its

*A. B. Yale, 1892; Ph.D. Heidelberg, Germany, 1895; Dr. juris—Heidelberg, Germany, 1896; LL.B.—University of Cincinnati, 1899. Since 1899 engaged in the active practice of the law at Cincinnati. For more than ten years Professor of Medical Jurisprudence at the Medical College of the University of Cincinnati.

decisions—its function is, to decide facts upon the basis of the proof placed before it, and only upon that basis.

That is our third premise—a composite one, it is true, but not objectionable on that score.

Proceeding with the analysis of the Law of Proof, we find there exist different means or methods or ways of placing the proof before the judicial organ just mentioned, which are designated Admissions, Judicial Notice and Evidence.

Admissions are made by the parties. Facts admitted by them are *deemed proved* by the admitting of them by the parties. Admissions are acts of the parties. They constitute a waiver by the parties of formal inferential proof of the facts admitted. The facts admitted are placed in proof by act of the parties and are undisputed by the parties and indisputable by the law.

Facts of which judicial notice is taken are *deemed proved* without any act of the parties. No formal inferential proof of them is required. They are deemed by law proved as a matter of course. The law waives formal inferential proof of them. They are placed in proof by act of the law and are undisputed by the law and indisputable by the parties.

In Admissions we have waivers by the parties. In Judicial Notice we have waivers by the law. By both, undisputed facts are placed in proof, and the organ deciding those facts *must* be satisfied with such proofs of them, i. e., it must decide they are proved. That decision is not the result of an inferential process of or by that organ.

Evidence is that which is adduced or adducible by the parties to prove what is not already deemed proved, or to prove or further prove what is already deemed proved, or to disprove what is, or may become, deemed proved. "To prove or further prove what is already deemed proved" is, of course, a work of supererogation, but it is not impossible. A party could, for instance, introduce evidence to prove something of which judicial notice is taken or which is admitted.

Evidence must be adduced by the parties. It is placed in proof by the parties.

To repeat, there are three means or methods or ways of placing proof before the judicial organ which is to decide the facts, namely, Admissions, Judicial Notice and Evidence; and there is no other.

That commingling of functions and definitions gives us our fourth premise.

Further analysis of the Law of Proof reveals this: After proof has been placed before the judicial organ which is to decide disputed facts. there are allowed that organ two processes in reaching its conclusions.

as to those facts. In one of them the organ *may or may not* reach a certain conclusion. In the other, it *must* reach a certain conclusion. In each it makes an inference. Indeed, that organ can act only by way of inference in deciding disputed facts.

Our fifth premise is just that, namely, in deciding disputed facts the judicial organ deciding them can act only by way of a process of inference.

A corollary of the above is, that the function of deciding disputed facts cannot be exercised by that organ until that from which an inference can be made is placed in proof before it.

One of the two processes of inference allowed that organ is, as already indicated, voluntary—the organ may or may not reach a certain conclusion. The other is involuntary or compulsory—the organ must reach a certain conclusion.

Those two processes constitute our sixth premise.

The process of the voluntary inference should today be called "*presumptio hominis*"; and the involuntary or compulsory one, "*presumptio juris*".

Let us explain more in detail.

Presumption is a process of reasoning by which something not already proved by admissions[1] or by judicial notice is deemed proved.

The term "presumption" comes from the "*presumptio*" of the Roman system of law.

The primary distinction between presumptions in our law terminology is that between *presumptio juris* and *presumptio hominis*. Sometimes the English equivalents are given as " presumption of law" and "presumption of fact". The true distinction is, not between law and fact, but between law and man. *Presumptio hominis* is not the same as *presumptio facti*. "Homo" does not mean "factum".

In every presumption, whether *juris* or *hominis*, a *fact* is involved. In every presumption, in the Law of Proof, a *fact* is, by inference, *deemed proved.*

Presumptio juris is a presumption in which an inference of fact is made; *presumptio hominis* is also a presumption in which an inference of fact is made. In each of them the inference is made by man—the *homo* figures in each of them. But in the *presumptio juris* the law says the inference must be made—the *homo* has no discretion, he involuntarily makes the inference; while in the *presumptio hominis* the law says the inference *may* be made—the *homo* has a discretion, he voluntarily makes the inference. In the *presumptio juris* the law

[1]By "admissions" in this article are meant admissions in pleadings and admissions in court outside of pleadings, both of the conclusive type.

in effect makes the inference, by controlling the *homo;* in the *presumptio hominis* the *homo* makes the inference, uncontrolled by the law. It is, therefore, not difficult to understand how the one can be called an inference by law, and the other, an inference by man; and the one process called *presumptio juris*, and the other, *presumptio hominis*, for the Latin genitives here import agency, in addition to, if not rather than, possession—"by" is a more exact translation than "of" in connection with them. Thus understood, the meaning of the two Latin phrases is clear.

It happens that who the *homo* is makes no difference. He may be embodied in the form of a judge or judges, or in the form of a jury, or in some other form of human beings.

A fact *voluntarily* inferred by the *homo* is nothing but the result of an inference made by human reasoning (logic). But when we come to a fact *involuntarily* inferred by the *homo*, we have a different problem, because it is not necessarily the result of logical inference. Indeed, the result is sometimes most illogical, and sometimes absolutely false when compared with the real truth. It is sometimes the result of logical reasoning; sometimes it is not. It is always the result of what is called "legal reasoning",[2] which has as its absolute basis, not logic and truth, but expediency.

The existence of the fact deemed proved by a presumption is questionable both in law and in the human mind. But the law applies expediency in dealing with the situation. It says it is sometimes expedient to allow the human mind full sway in making inferences in determining facts. Sometimes, it says, it is expedient to control the processes of the human mind (logic) in making inferences in determining facts. Where we have the "full sway" of logic we have a *presumptio hominis*. Where we have the "control" of logic we have a *presumptio juris*. Where the control is conditional we have a rebuttable *presumptio juris*. Where the control is absolute we have an irrebuttable or conclusive *presumptio juris*. In the *presumptio hominis* truth is the goal, and logic has full sway. In the *presumptio juris* law has conditional or absolute sway, and its action may produce a result in accord with truth, or a result opposed to truth. In the *presumptio hominis* human reasoning controls the process. In the *presumptio juris* legal reasoning controls the process, and it may or may not act in the same way and with the same result as human reasoning. That is to say, truth may or may not result from legal reasoning.

---

[2]On "legal reasoning" see James B. Thayer, "A Preliminary Treatise on Evidence at the Common Law" pp. 270–276.

As already shown, an inference is involved in every presumption. That from which the inference is made is the *base* of the presumption. This base is necessarily proof in the case, because in the proof or disproof of rights and duties the *homo* can consider nothing that is not proof, or, to express it positively, the *homo* can consider only what is proof in the ease.

Every presumption is clearly a part of the Law of Proof. An inference from proof is made in it. Proof is produced by it. It begins and ends with proof. Every presumption is a step in the process of proving or disproving rights or duties. It is inseparable from "proof" the noun, and from "prove" the verb.

The law attaches no special significance to whether or not a particular fact is deemed proved by the inference made in a particular *presumptio hominis*, unless perhaps the discretion in making the inference is abused, in which instance the abuse is corrected, but the process of making the inference is not controlled, an example of which would be the setting aside of a special verdict or a finding of a fact on the ground that it is contrary to the weight of, or not supported by, the proof. The law says that a particular fact may be deemed proved by the process of a *presumptio hominis*, but does not have to be deemed proved by it. It says that the process, or the step, of a *presumptio hominis* must be gone through with, but that is the only compulsion that exists in connection with a *presumptio hominis;* and that is the only important thing in a *presumptio hominis* in the eyes of the law, unless, as already mentioned, perhaps where the discretion in making an inference is abused, for man is sometimes wild with his logic. But the law does attach special significance to whether or not a particular fact is deemed proved by the inference made in a particular *presumptio juris*. The matter is so important that the law says, not only must the process, or the step, of a *presumptio juris* be gone through with, but a particular fact must be deemed proved by it.

Although the *presumptio hominis* is relatively unimportant in the Law of Proof, the term or expression "*presumptio hominis*" should not be discarded entirely, because it is useful to contrast it with "*presumptio juris*". But when we speak of presumptions, we almost invariably mean *presumptiones juris;* and when the word "presumption" is used alone, it should be confined to meaning *presumptio juris*. From here on in this article it has that meaning, unless the context shows otherwise.

While the base of a presumption is always in the proof, it is not always evidence. It is always a fact or facts, but that fact or those

facts may be proved by admissions, or by judicial notice, or by evidence.

As just indicated, the base of a presumption may be limited to a single fact or embrace several or many facts. It may be as broad as the every-day or usual affairs of life or experience of mankind, which are always deemed in the proof in any and every case—the *homo* always considers them in the proof or disproof of rights and duties, and if they were not proof in the case the *homo* could not consider them, because the *homo* can consider nothing that is not proof. The every-day or usual affairs of life or experience of mankind are judicially noticed, and they are thereby introduced as proof in a case. To repeat, they are in the proof in every case in our system of law.

Because of the effects produced, the *presumptiones juris* are divided into their two main classes, already mentioned, namely, irrebuttable (conclusive) and rebuttable. An irrebuttable presumption is one which the law does not allow to be defeated. It is absolutely conclusive at all times. A rebuttable presumption is one which the law allows to be defeated.

A rebuttable presumption always determines the burden or duty of going forward with proof, in the sense of thrusting upon the party against whom the presumption operates the burden or duty of going ahead with proof on the point determined by the presumption—in other words, and in short, the burden or duty of attacking with counterproof the fact deemed proved by the presumption.

Irrebuttable or conclusive presumptions are terminative of the question as to the existence of a fact. A fact deemed proved by them is not subject to attack. There is no further going forward with proof on a fact deemed proved by them. They are definitive. The only attack with which an irrebuttable presumption is associated is one on the *base* of the presumption. The characteristic difference between a rebuttable and an irrebuttable presumption is, that, in the case of the former both the base of it and the fact deemed proved by it are subject to attack, while in the case of the latter only the base of it is subject to attack.

"Overcoming a presumption" means, that the presumption as a controlling process of reasoning is prevented from further functioning; it is checkmated, as it were—"the king is dead"—the presumption as a controlling process of reasoning becomes *functus officio.* What results is, that the process of reasoning which the law says must be applied ceases to control, and the matter is decided by a process of reasoning conducted by *man* alone. There are two steps in "re-

butting" a presumption (*presumptio juris*). The first step is that of "overcoming" the presumption *as a controlling process of reasoning*. That results in the substitution of a *presumptio hominis* as the controlling process of reasoning. The second step is that of defeating the *inference* made in the *presumptio juris* by an inference made in the *presumptio hominis*. A presumption may be "overcome" without being "rebutted." That is the case when the inference made in the *presumptio hominis* is the same as that made in the *presumptio juris*. A presumption is not rebutted until the inference made in the *presumptio hominis* is to the contrary of that made in the presumption. So "overcoming" a presumption is not the same as "rebutting" a presumption. "Overcoming" a presumption simply means vanquishing it as the *controlling process of reasoning*. "Rebutting" a presumption means, ultimately defeating the inference made in it by another inference made in a different process of reasoning, namely, a *presumptio hominis*. "Overcoming" a presumption does not defeat the inference made in the presumption. "Rebutting" it does, and "overcoming" is only a step in the process directed to that end. The process is one of attack on the fact deemed proved by the presumption, and is, actually or at least logically, not started in motion until the presumption has already become applicable. Before a presumption becomes applicable the only attack possible in connection with it is one on the base of it. Such an attack precipitates a contest over the existence of the base of the presumption. If the base of the presumption is not established, there is no necessity to "rebut" the presumption, or even to "overcome" it. But once the base is established, there arises the necessity of attacking the fact deemed proved by the presumption, if that fact is not to stand. The preliminary skirmish in that attack is constituted by the effort to "overcome" the presumption. Once that skirmish is successful, the attack may or may not prove successful in the outcome, depending upon whether or not the presumption in the end becomes "rebutted."

It is clear that an irrebuttable presumption can never be "rebutted", or even "overcome", because the fact deemed proved by it is never open to attack.

Let us, for illustration, take the presumptions relating to mental capacity for crime, at common law. Mental incapacity for crime is conclusively presumed to exist if the person accused is not over seven years old. Once it is established the accused is not over seven years old, the matter of proof as to mental eapacity is ended— no other proof on the question of mental capacity can be considered, *i. e.*, there is no contest over the fact deemed proved by the presump-

tion. If there is any controversy, it is confined to the question whether or not the accused is over seven years old, *i. e.*, the contest is over the base of the presumption.[3] After the age of seven and until the fourteenth year, mental incapacity is presumed to exist, but this presumption is rebuttable. The first attack here is centered on the age of the accused, *i.e.*, the base of the presumption. Once the age is established to be between seven and fourteen years, other proof relating to mental capacity for crime in the particular case may be considered, *i. e.*, a contest over the fact deemed proved by the presumption may take place. After the fourteenth year the presumption is, that the accused is mentally capable of crime, and that presumption is rebuttable. The first attack is over the base of the presumption, namely, the age of the accused, and the final contest is over the fact deemed proved by the presumption, namely, mental capacity for crime.

Physical capacity for crime is treated in somewhat the same manner. It is presumed, for example, that a boy under fourteen years of age cannot commit rape or attempt to commit rape, but some jurisdictions make the presumption rebuttable, while others make it conclusive.

The proof used to overcome and rebut a presumption (called "conflicting" proof) is sometimes actually introduced at the time required by the burden or duty of going forward with the proof. Sometimes it is actually introduced at some other time or times in the trial or hearing. But the time for introducing it always exists, either actually or merely logically, because a presumption always determines (as previously defined) the burden or duty of going forward with proof, and the proof used to overcome and rebut a presumption always relates to the time, actual or logical, when it must be introduced or produced under that burden or duty. A presumption sometimes must be rebutted at some fixed time, either actual or

[3]If it be a rule of the substantive common law that a person under seven years old has not mental capacity for crime, then there exists no *presumption* that a person under seven years old lacks that capacity. But if the rule of substantive law be, that a person must possess mental capacity for crime before he can be punished, then it is up to the *law of proof* to establish whether or not that capacity exists, and there exists a presumption that a person under seven years old lacks that capacity. It seems more logical to hold that the latter is the true state of affairs. That would establish one rule of substantive law for all places where common law prevails, and leave the proof of capacity or incapacity subject to peculiar conditions of different localities. And it would place all questions of establishing capacity or incapacity within the law of proof, and not divide them between the substantive law and the law of proof.

The force of our illustration in the text is not destroyed by any uncertainty as to whether or not there exists a conclusive presumption of mental incapacity for crime if the accused is not over seven years old. Any conclusive presumption would answer the same purpose.

merely logical, during the trial or hearing, *i. e.*, before all the proof in the case is in, because the determining of the burden or duty of going forward with the proof requires it. In some cases the presumption is carried, with all the proof in the case, to the end of the taking of proof before it is deemed "rebutted."

As above explained, when a rebuttable presumption is "overcome", a *presumptio hominis* is substituted in its place as the controlling process of reasoning. The question then becomes one of a *presumptio hominis* subject to the same rule of burden of proof as if there had been no presumption. And the base of the *presumptio hominis* is *all* the proof in the case, relating to the question to be answered, including the "conflicting" proof and the base of the defunct *presumptio juris* itself.

"Conflicting" proof used in "overcoming" a presumption must be of real merit. A presumption should not be allowed to be "overcome" by a sham showing, made for the purpose of causing to be applied a *presumptio hominis* really upon the same base that underlies the *presumptio juris*, in the hope that the *homo* will make an inference different from that made by the *presumptio juris*.

It must be remembered that often (including instances of a conclusive presumption) the law does not supply the base of a presumption, but the *homo* must himself find that the base exists, *i. e.*, that the facts from which the inference is made exist, before he can apply the *presumptio juris* involved. If he finds that that base exists, and there is no "conflicting" proof involved, then he must apply the presumption. But if he finds that that base exists, and there is "conflicting" proof involved, then he must apply the process of a *presumptio hominis*.

Can there exist a "conflict of presumptions" or "conflicting presumptions"?

These expressions are confined to rebuttable presumptions.

Presumptions cannot conflict unless they are on opposite sides of a controversy, *i. e.*, they do not conflict if they act in favor of the same party; and in order to be conflicting they must be active on opposite sides of the controversy at the same time. Nor can they conflict unless they absolutely and completely negative each other, *i. e.*, they must be equally broad.

There is no such thing in our law as a conflict of presumptions.

Rebuttable presumptions always determine the burden of going forward with proof, in the sense explained above. There can not exist in the same case at the same time two burdens of going forward in opposite directions with the proof—such a situation would or

could produce a standstill or deadlock in procedure; the duty of going forward with proof would simultaneously pull in opposite directions, and that our law does not tolerate; indeed, it is unthinkable in any system of judicial proof.

There can exist in a case a sequence of presumptions. Such a sequence is a series or succession of presumptions. If two presumptions in favor of the same party are active at the same time they are parallel presumptions; but if they act at separate times they constitute a *sequence* of presumptions.[4] But a sequence of presumptions is not confined to such a situation, for there can be a sequence of presumptions between the two parties, one being in favor of one party at one time, the next in favor of the other party thereafter. The observance of the actual or logical burden of going forward with the proof, and of the shifting of that burden, brings this matter out clearly.

It must not be forgotten that a presumption may sometimes (and nearly always does) relate to only a single or isolated fact in a chain of facts involved in an issue or defense, and thus produce a shifting of the burden or duty of going forward with proof as to that fact only. In other words, such shifting of the burden or duty of going forward with proof does not refer to the whole of the issue or defense. When such presumption is one of a sequence of presumptions there does not result a shifting of the burden of going forward with proof on the entire issue or defense from one party to the other. The shifting refers to only the single or isolated fact. In short, a whole issue or defense or "case" does not swing in every sequense of presumptions. Where there is such a swing, a "*prima facie* case" has been established.

There may, during the trial of a case, be many such incidental facts which are links in the chain of proof. That gives a broad field within which presumptions relating to such facts may interchange or interplay.

It is to be remembered that "conflicting" proof to overcome or rebut a *presumptio juris* does not necessarily have to be introduced by the party against whom the presumption operates. It may be produced by the party in whose favor it runs. And it is, of course, sufficient if it is brought out upon cross-examination of his witnesses. It may be produced by both parties—some by each. In other words, how or by whom the "conflicting" proof is introduced is immaterial.

And it is immaterial how or by whom the proof establishing the base of a presumption is introduced.

---

[4]They may not arise at the same time, but if they at any time are active together they are parallel during that time. Thus they may arise in sequence and become parallel.

As to the time for overcoming or rebutting presumptions, there need not be a direct, actual, intentional, formal adjustment of the burden of rebutting presumptions, or the burden of going forward with the proof. Sometimes it is necessary that the step be so taken or to make an actual, formal ruling on the point at a particular time. Sometimes it is not desirable, possible or practicable to do so. Sometimes where the point is not raised, or where it is impossible or impracticable to make the ruling at a particular time, *e. g.*, because of the impossibility of separating the proof into disconnected portions, or because some proof relates to more than one presumption, or because of otherwise useless interruptions in the procedure, the ruling is not necessary. Some courts even require a party to put in all his proof at once or at one time. There results a mass of proof, accumulated without regard to a precise observance of the procedural steps. But that proof should be handled in the logical order of those steps. If, for example, there is a sequence of presumptions, each presumption should be considered and disposed of in its logical order.

One of the points in handling presumptions which bother the courts most is that at which the principle is applied that when a *presumptio juris* is "overcome" the question becomes one of a *presumptio hominis* subject to the same rule of burden of proof as if there had been no *presumptio juris*. When this point is reached the courts sometimes flounder. Or, to apply metaphors taken from the national game, when it comes in their direction, either they cannot see it, or they "muff" or "fumble". Even when they make a "good catch" they seem to fail to appreciate the logical processes that lead to the correct result, for those processes are not satisfactorily explained by them. Their analysis is not clear, because their conception of the whole doctrine of presumptions is not clear. They are hazily conscious of the doctrine, but they do not elucidate it. They do not distinguish neatly between "overcoming" and "rebutting". They do not notice carefully when the *presumptio juris* vanishes as a controlling process of reasoning, and the *presumptio hominis* is substituted. After the "overcoming", the question is: What amount or weight of proof is necessary to "rebut"? The answer to this question depends upon the burden of establishing the case or upon the burden of proving a particular fact, incident, issue or defense. Sometimes the proof, to rebut, must outweigh or overbalance the proof establishing the *presumptio juris*. Sometimes it need only counterbalance it. Sometimes not even that much is required. If the burden of establishing the case or the particular fact, incident, issue or defense and the burden of rebutting the presumption rest

upon the same party, then overbalancing proof is necessary—just how much it must overbalance depends upon the degree of proof involved ("beyond a reasonable doubt", "preponderance of the proof," "clear and convincing proof," etc.). If these two burdens are not upon the same party, then only counterbalancing proof is necessary, if the burden of proof involved requires preponderance of the proof; but less than counterbalancing proof is necessary if the burden of proof involved requires "clear and convincing" proof or a similar standard. If in any instance the proof required to "rebut" is not produced, the presumption is not "rebutted," although it may be "overcome", *i. e.*, vanquished as a controlling process of reasoning.[5]

In bigamy and kindred cases there is no conflict of presumptions, but merely a sequence of presumptions. In all such cases there necessarily arise two presumptions, namely, one of the continuance of life (or, saying it differently, the continuance of the existence of a prior marriage) and one of the legality of a subsequent marriage. They cannot conflict, because, as already pointed out, if they did they would produce a deadlock in procedure, which is something unknown and impossible in our law. They can arise only in sequence, and perhaps the one whose base is first proved is the first to arise; but as the two are always present in the case, it answers no purpose to theorize about which arises first and which arises in sequence to the first. In solving the problem presented to them, some courts have been led astray by some idea of one of the two presumptions being "stronger" than the other, whereas what is stronger is, not one of the presumptions, but the persuasive force of the facts favoring a particular inference in a *presumptio hominis* into which a *presumptio juris* has been turned (or, otherwise expressed, which has been substituted for a *presumptio juris*) by virtue of "conflicting" proof. The bases of the two *presumptiones juris* unavoidably "conflict", and thus each *presumptio juris* is turned by the base of the other into a *presumptio hominis*. What really results is, that the two *presumptiones juris* are turned into one composite *presumptio hominis*, for the question becomes one of one broad, comprehensive *presumptio hominis*. In solving that *presumptio hominis* the result depends upon the combined persuasive force of the base of one of the two *presumptiones juris* and any and all other proof favoring an inference like the one in that *presumptio juris*, on the one hand, and the combined persuasive force of the base of the other of the two *presumptiones*

[5]We should here like to discuss Klunk v. Railway 74 Ohio State 125 (1906), Ginn v. Dolan, 81 Ohio State 121 (1909), and McAdams *v.* McAdams, 80 Ohio State 232 (1909).

juris and any and all other proof favoring an inference like the one in that other *presumptio juris*, on the other hand. In short, all the proof bearing on the question is taken into consideration, and one or the other of the two *presumptiones juris* becomes rebutted, according as the persuasive force of the proof leads, in the mind of the *homo*, to one or the other of two possible inferences. Some courts lean towards a rebuttal of the presumption of the continuance of the prior marriage, but that is not a good rule of law. It should not be a rule of law, because such a rule would sometimes result in a crass miscarriage of justice. However, it has appealed strongly to some courts, because forsooth it tunes in with the so-called "presumption of innocence", with which the bar has bewitched the bench. So some courts have declared that it is a rule of law that the "presumption of innocence" (by which is meant presumption of the legality of a subsequent marriage) is "stronger" than the presumption of the continuance of a prior marriage. Some courts have even been carried so far as to hold, that a subsequent marriage shall conclusively be presumed to be valid unless it is shown that both parties to the prior marriage were actually, and not inferentially, alive at the time of the subsequent marriage. Yea, even if both parties to the prior marriage are so shown to be alive, some courts say it shall be presumed that they have been divorced, unless the negative (no divorce) be proved. But why should the *law* in any case say the sacredness of a prior marriage and of the rights flowing from it is destroyed by a suspicious subsequent marriage?[6]

The trouble with "conflicting presumptions" started in England. We stumblingly followed her. It has been an instance of the blind leading the blind and both falling into the ditch.

In the ubiquitous case of *The King v. The Inhabitants of Twyning*,[7] which was decided in 1819, and is the usual starting point in the discussion of "conflicting presumptions", a man, after living with his wife a few months, enlisted, about 1812, as a soldier, went abroad on foreign service, and was not heard of thereafter; in a little more than twelve months after he left, his wife married a second time, and two children were born of the second marriage. The children and woman became paupers. The proceeding was not a criminal one, but a civil action—to determine whether or not Twyning was to

[6]Space forbids following this up at length. We should like to quote from Turner v. Williams, 202 Mass. 500, 504–505 (1909). Cf. Colored Knights of Pythias v. Tucker, 92 Miss. 501 (1908), Williams v. Williams, 63 Wis. 58 (1885), which reviews leading English cases. As to the tendency in the other direction, see Maier v. Brock, 222 Mo. 74 (1909).

[7]The King v. The Inhabitants of Twyning, 2 Barn. & Ald. 386 (1819).

support the woman and the children. She was not accused of bigamy. No one was on trial for the commission of a crime. There arose in the case no question of a presumption of innocence in a criminal case. Whether or not any one committed a crime was really foreign to the question. The question was whether or not the second marriage was legal. That question was determinable regardless of the fact whether or not a crime was committed, and of the fact whether or not a crime was intended. Two presumptions arose in the case. One was that the second marriage was legal; the other, that the life of the first husband continued until the time of the second marriage (or, expressed differently, that the first marriage continued until the time of the second marriage).

The two presumptions arose in sequence. They did not "conflict", because, if they had "conflicted", they would or could have produced a deadlock in procedure, which would be intolerable in our law, as previously stated.

For our present purpose it is not important to know which of the two presumptions arose first, because they were both "overcome".

The base of the presumption of the legality of the second marriage was the proof as to the second marriage itself. The base of the presumption of the continuance of life was the proof as to the interval of less than seven years between the disappearance of the first husband and the second marriage. These two bases "conflicted" and thereby reciprocally turned the two presumptions into *presumptiones hominis*—the base of each presumption turned the other presumption into a *presumptio hominis*. There was additional "conflicting" proof which assisted in turning the presumption of the continuance of life into a *presumptio hominis*, namely, that the first husband, when he disappeared, enlisted as a soldier in the foreign service.

The case resulted correctly, because it would, under the circumstances of the case, have been unreasonable to find that the life of the first husband continued until the time of the second marriage. A strong point in making the inference that the first husband had died before the time of the second marriage would have been the fact that the first husband, when he disappeared, had enlisted as a soldier and gone abroad on foreign service. That meant more in 1812 than it would now. Other things weighing in making the inference of the death of the first husband would have been the facts, that finding the first husband was alive at the time of the second marriage would have made the woman a bigamist and the children bastards and all of them social outcasts. In making the inference of the death of the first husband *man* would pay more attention to the social and

legal (other than criminal) consequences (to the woman and the children) of an illegal marriage than to whether or not the illegal marriage would be a crime. Moreover, the first husband dropped out of the case without leaving any question as to his property or his heirs. There was nothing in the case justifying a finding that the second marriage was illegal.

The final result in the case was satisfactory, but the court did not handle the case properly. There was no "conflict of presumptions". The court was certainly wrong in turning the presumption of the continuance of life into a parallel presumption; which the court did, by saying the presumption of law was that the first husband was dead at the time of the second marriage, thus paralleling the presumption of the legality of the second marriage. If the court had said that there was a *presumptio hominis* of such death, it would have stated the matter correctly. There is not even a *presumptio juris* that a person absent seven years was dead at any particular time during the seven years of his absence.

It must be remembered that presumptions were not well understood in 1819. The court was so carried away with the importance of the "presumption of innocence" in a criminal case, that it lost all sense of perspective. There escaped its notice the fact that whether or not the presumption of the legality of the second marriage was "rebutted" depended upon the persuasive force of proof supporting an inference of the continuance of life. It also failed to consider what degree of proof would satisfy it that the first husband was alive at the time of the second marriage. The decision is not clear-cut, and has been made the subject of much discussion, and it will never be determined whether or not the court, on the face of its rulings, held, that, in the absence of direct proof that the absent spouse was positively, actually alive at the time of the second marriage, the presumption of the legality of the second marriage controls absolutely; that is, in the absence of such proof, the presumption as to the continuance of life is not even turned into a *presumptio hominis*. That would make the presumption of the legality of the second marriage conclusive. But we think the court did not mean to go that far. It does not use such an expression as "direct," "positive" or "conclusive" proof, but only says "unless proof has been given that the first husband was alive at the time". But that was said in the face of the fact that the husband had been absent only "a little more than twelve months" before the second marriage.

There should be no difficulty in handling a criminal case of bigamy or adultery involving the presumption of the continuance of life or,

putting it differently, the presumption of the continuance of a prior marriage.

In *The Queen v. Lumley*,[8] the court left the question of the continuance of life in a criminal bigamy case to the jury, saying "the law makes no presumption either way" as to that question. We agree that the presumption of the continuance of life in the case should have been deemed turned into a *presumptio hominis*, but we can not agree with the court when it says there is never a *presumptio juris* of the continuance of life, but "that * * * is always a question of fact."

Reg. v. Willshire,[9] was a similar bigamy case. The court correctly held that the question of the continuance of life should have been left to the jury, *i. e.*, it was made a *presumptio hominis*; but the court did not elucidate clearly any theory or principle in its ruling. It seems, however, to support the position that the mere fact of a second marriage is "conflicting" proof, and "conflicting" proof of enough merit to "overcome" the *presumptio juris* of the continuance of life and turn it into a *presumptio hominis*.[10]

There is no justification for saying, as was said in *State v. Plym*,[11] a criminal bigamy case involving the same question of the continuance of life, that it is not "true that there is any presumption of *law* one way or the other as to the continuance of life", and that the inference of the continuance of life is one that may or may not be made. In some cases it must be made, and where it must be made, nothing but a *presumptio juris* can make it. Where it must be made, man (a jury, for instance,) can not make a contrary inference. The court in *Reg. v. Willshire, supra*, recognized the existence of the *presumptio juris* of the continuance of life.[12]

All the proof does not appear in the report of *State v. Plym*, but enough appears, to show that the *presumptio juris* of the continuance of life was "rebutted"; so the result seems to be correct. The theory upon which the decision was based is unsound, however.

In some cases of divorce on the ground of adultery, indictments for bigamy, criminal conversation, and the like, it is ruled, as a matter of law, that an actual, formal marriage must be proved by direct proof, and the presumption or inference of marriage from cohabitation, acknowledgement, reputation, etc., will not be enter-

[8]The Queen v. Lumley, L. R. 1 Cro. Cas. Res. 196. (decided in 1869).
[9]Reg. v. Willshire, 6 Q. B. Div. 366. (decided in 1881).
[10]Apparently the presumption of death from absence dropped out of the case because the base of it had not been proved.
[11]State v. Plym, 43 Minn. 385 (decided in 1890).
[12]For a good review of the English cases up to 1885, see Williams v. Williams 63 Wis. 58 (1885).

tained. In the absence of such direct proof there can not arise, in a "conflict" or otherwise, a presumption of the validity of a prior marriage, because a prior marriage has not been proved. Not even evidence or proof of a prior marriage from cohabitation, acknowledgement, reputation, etc., will be entertained. The effect is, that, in the absence of direct proof of an actual, formal prior marriage, the marriage attacked is conclusively presumed to be valid—the presumption of its validity becomes a conclusive presumption.

Somewhere above it is stated that the bar has bewitched the bench with "presumption of innocence". Doubtless an explanation of that statement is expected.

It is not the property of a presumption to fix the burden of establishing the case. It has no duty or function in connection with the fixing of that burden. That burden is fixed by law, independently of any presumption. Man—the *homo*—has nothing to do with it. A presumption is a step in the proof-stage of a case, and such a step can be taken only after the burden of establishing the case is fixed. It always operates to assist in meeting or defeating the burden of establishing the case. It never acts until after that burden has been fixed. All of which is clear, because the proof-stage of a case, *i. e.*, the stage when proof is introducible in the case, does not begin until after the burden of establishing the case is fixed, that is to say, placed upon somebody.

The so-called presumption of innocence in a criminal case is not a legitimate presumption. It is a bastard presumption; and, like other bastards, it has caused considerable trouble. It is not a legitimate presumption because nothing is *deemed proved* by it. It is neither a fact nor a theory that the accused in a criminal case starts out with his innocence deemed proved in his favor. The *homo* has no part in the "presumption of innocence". The law acts alone in prescribing it. It precedes the proof-stage of the case, which a presumption cannot do. It precedes the appearance of the *homo* in the case, and there is no presumption without the *homo*.

Whatever the reason for, or the method of justification or explanation of, fixing the burden of establishing the case, neither a *presumptio juris* nor a *presumptio hominis* has anything to do with it.

The great force given to, and the great stress laid upon, the "presumption of innocence" in criminal cases developed from the rule that guilt must be proved beyond a reasonable doubt. This rule in the mouths of adroit, influential members of the bar produced a "presumption of innocence". The expression so persisted that it became adopted by the bench, and has become so important that it

has been ruled that it must be embodied, and, apparently, *in proprio nomine*, in the charge to the jury.[13] This is how we interpret the historical development of "presumption of innocence", given to us by Prof. Thayer.[14] We believe that this historical development, culminating in the obsession of the courts by "presumption of innocence", revealed in so many adjudicated cases (even civil cases) right up to the present time, justifies the assertion that the bar has bewitched the bench.

Historically, therefore, "presumption of innocence" in criminal cases is apparently a bastard, as far as the law of proof is concerned. We believe, and have attempted to show, that, schematically, as a presumption, it is a bastard. Moreover, even if it were a true presumption, it would serve no schematically useful purpose in the law of proof. What would be the use of having two things—a burden of establishing the case and a presumption of innocence—functioning together, in the same way and to the same end, in connection with the determination of the burden of going forward with proof, especially since the burden of establishing the case determines the amount or degree of proof, while the presumption of innocence does not? The latter would add nothing to the former; on the contrary, in our judgment, it would rather subtract from it, because it says nothing about the amonnt or degree of proof.

"Presumption of innocence" in a criminal case is a rule or maxim of the substantive law, which has been erroneously engrafted on the law of proof. It should be cut off and restored to its proper place, namely, in the substantive law. The rule or maxim should "hold", instead of "presume", that one is innocent until proven guilty. It simply defines a certain relationship or simply says, that a certain relationship, or the effects of a certain relationship, shall continue until guilt is actually proved, without saying anything about how guilt shall be established. It is translatable into terms of a relationship, and not into terms of the proof or disproof of a relationship. Everything translatable into the terms of a relationship is part of the substantive law. Everything translatable into terms of the proof or disproof of a relationship is a part of the law of proof, which is a part of the remedial law. The confusion in connection with "presumption of innocence" has been caused by the effort to make it a rule of the law of proof.

---

[13]See Coffin v. United States, 156 U. S., 432 (1895).

[14]"A Preliminary Treatise on Evidence at the Common Law," pp. 552–560. As to Coffin v. United States, 156 U. S. 432 (1895), see the same work, pp. 566–571.

In essence and principle there is no difference between the "presumption of innocence" in criminal cases and the so-called presumption of innocence in quasi-criminal cases and purely civil cases. In none of them is it a true presumption. In all of them it is a spurious presumption. All "presumptions of innocence" express a rule of substantive law.

The only escape from the conclusions reached above about "presumption of innocence" in criminal cases is to hold that by "presumption of innocence" the innocence of the accused is *deemed proved* in favor of the accused. Such a presumption would, of course, be a rebuttable one. It would be "overcome" in every case tried on the merits. It would be "rebutted" if and when the burden of establishing the case should be met. The base of it would be, of course, the every-day or usual affairs of life or experience of mankind, which would be considered judicially noticed. But, as already asked, what useful purpose would be served by adding such a rule of the law of proof as a presumption of innocence to the rule requiring conviction beyond a reasonable doubt, which is itself a rule of the law of proof? Why not let the content of one be expressed in terms of the substantive law, and the content of the other be expressed in terms of the law of proof? That would avoid the confusion which must inevitably arise if in the same branch of the law the same content is expressed wholly in one formula and partially in another formula of no similarity of terms. As for the rest, is it undesirable to have the one formula of the substantive and the other formula of the law of proof? One mentions guilt. The other mentions innocence. Which would counsel for the defense prefer to emphasize? Does not that explain the very genesis of "presumption of innocence"?

It is perhaps not an evil thing that the bench has been bewitched, because the spirit of our law is one of zealousness for emphasizing innocence. As long as we have a rule of law called "presumption of innocence" it may be perfectly proper and even necessary to cover it in a charge to the jury, but it is not evidence or proof, any more than any other rule of law properly included in a charge to the jury is evidence or proof. The accused is entitled to the benefit and protection of it,[15] as he is entitled to the benefit and protection of any other rule of law in his favor.

Whether "presumption of innocence" is a rule of the substantive law or a rule of the law of proof may be of no practical importance to the practitioner, but the student of systematic law demands, when

[15]This is what was apparently in the back of the mind of the court in Coffin v. United States, 156 U. S. 432 (1895).

possible, clarity and order and everything in its proper place. Clarity harms no one. May it not help everyone interested or affected? If we must have a rule of law, why not place it where it belongs in our scheme of law? It strikes us that "presumption of innocence" is a rule or maxim of the substantive law and not a presumption in the law of proof.

There are certain other so-called presumptions that are not real presumptions.

"Ignorance of the law excuses no one" is a rule of the substantive law. The true rule is, that the consequences growing out of a relationship are the same whether one has knowledge of them or not. No expression of proof or disproof of the relationship is involved in that rule. Nothing is *deemed proved* by the rule. Indeed, neither ignorance of the law nor knowledge of the law is subject to proof or disproof one way or the other. Thus the expression "Every one will be presumed to know the law" is not correct. There is here no presumption one way or the other. Ignorance of the law or knowledge of the law not being open to proof or disproof, there is no place in connection therewith for proof, and hence no place for a presumption or any other rule of proof. "Presumed" here can not mean *deemed proved*, but, if it has any real meaning, only "held," so that the rule should run as follows: "Every one will be held to know the law," or "Every one is held to know the law."

If, however, we had a rule of substantive law that in certain cases ignorance of the law would excuse one, there could be a legitimate or real "presumption" of knowledge (or ignorance) of the law, because we would then have a question of proof. That knowledge (or ignorance) could be *deemed proved*—say, by the process of a rebuttable presumption. In those cases the knowledge or ignorance would be subject to proof or disproof. The situation would therefore justify the existence of a presumption or some other rule of proof.

The same reasoning applies to the so-called presumption that every one will be presumed to intend the natural and probable consequences of his acts. Intent cuts no figure in the rule of law in question. It is not subject to proof or disproof one way or the other. The consequences of the acts are the same whether intended or not intended. So that this rule is a rule of the substantive law, and it should be worded as follows: "Every one will be (or is) held to intend the natural and probable consequences of his acts." Nothing is *deemed proved* by the rule.

But where intent is subject to proof or disproof we can have a real, legitimate presumption. Thus presumptions relating to intent or

malice in certain cases are real presumptions. Something is *deemed proved* by them.

It is possible (but unfortunate, because of resulting confusion) that the word "presume" or "presumption" may be used in the substantive law, but if it is, it is used in some sense other than that of something being "deemed proved." If an inference of fact in the proof or disproof of something is meant or intended, we have a real "presumption" of the law of proof. If an inference of fact in the proof or disproof of something is not meant or intended, the so-called presumption is spurious, so far as the law of proof is concerned, and "presumed" must be translated in terms of "holding" to a right or duty, or in some term or terms other than that of being "deemed proved". Sometimes such "presumptions" relate solely to procedure as such and distinct from the law of proof.

A real presumption in the law has no place outside a court or similar proceeding. That shows it can not be part of the substantive law. If we had never had a law of proof, we would not hear of real presumptions in the law today, *i. e.*, presumptions whereby something is deemed proved.

Ordinarily, the question whether a certain "presumption" is a part of the substantive law or a part of the law of proof is of no practical importance as long as either decision can be applied and the result of either will be the same as that of the other. But it is conceivable that it may be of importance even under such conditions. For instance, where it is held that all the substantive law is contained in a written code, the law of proof, being a part of the remedial law, could come to the relief of humanity with presumptions, but the substantive law could not help out.

But let us have a clearly systematized exposition of the law, with every feature logically and schematically in its proper place!