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John Bennett

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PRESUMPTION—EVIDENCE TO REBUT—DISPOSITION.

There has been much confusion in the cases as to the nature of a presumption. This condition has come about because of the use of the word to connote a presumption of law and one of fact.¹ Historical reasons have brought about this misuse.² The presumption of law, or, as it is put, the only real presumption,³ is a rule of law that courts and Judges shall draw a particular inference from a particular fact or evidence, unless and until the truth of such inference is disproved.⁴ It places the burden of going forward with proof on the party against whom the presumption has been raised.⁵ Concerning the presumption of fact, or, as it has been called, the pseudo-presumption,⁶ it merely allows the Court to draw an inference from certain facts but it is not bound so to do.⁷

Because of such usage the real presumption has been given an evidentiary weight which it does not possess.⁸ Mr. Thayer says that a presumption of law amounts to a substantive rule of law and has no place in the law of evidence.⁹ He defines evidence as "any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact."¹⁰ The law of evidence has to do with the furnishing of this matter of fact."¹¹ It sets forth 1. the manner of presenting evidence; 2. the qualifications and privileges of witnesses, and mode of examining them; and 3. what classes of things shall not be received.¹² A presumption, though, was brought into the law because when evidence, as to certain facts, was introduced it was found by the general experience of mankind that a certain conclusion could be drawn.¹³ And this conclusion cannot be held to have evidentiary value.¹⁴

But there are cases where the opposite conclusion has been stated. In a New York case,¹⁵ where the question was as to the receipt of a letter, it was stated that the presumption of receipt is rebuttable, "and it is for the jury to say, after considering presumption and proof given by person addressed, whether letter had been

¹ 5 WIGMORE, EVIDENCE (2d ed. 1923) 451.

² Thayer, *Presumption in the Law of Evidence* (1889) 3 HARV. L. REV. 141.

³ *Supra* note 1.

⁴ STEPHEN, INTRODUCTION TO DIGEST OF EVIDENCE, art. I.

⁵ *Supra* note 2.

⁶ Hildebrand v. Chicago, B. & Q. R. R. Co., 17 Pac. (2d) 651 (1933).

⁷ *Supra* note 1, at 453.

⁸ *Supra* note 2.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ G. S. R. Co. v. Taylor, 129 Ala. 238, 29 So. 673 (1901).

¹⁵ McCurdy v. Wegner, 129 Misc. 230, 220 N. Y. Supp. 213 (1927).

received." Elsewhere it was held that the party in whose favor a presumption stands is entitled to its benefit as evidence.¹⁶ Likewise Mr. Richardson says that the trial Court or jury is entitled to weigh the presumption against the evidence and decide the issue either way as a finding of fact.¹⁷

Still the greater weight of authority seems to be the other way. Presumptions are rules of law; they govern a disposition of the case by a trial Judge; they are not evidence to be given effect by the trial jury.¹⁸ In another case concerning the presumption of receipt of a letter, the defendant denied receipt of it, and the lower court ruled that her positive denial overcame presumption.¹⁹ Judge Hatch, writing for the Appellate Division, declared that this was error because the person who made the denial was an interested party and it was within the province of the jury to reject her statement.²⁰ It would seem to follow from such reasoning that if statement was not interested there would be no question for the jury.

Now the question is presented as to what kind, and how much, evidence is necessary to overcome a presumption. Mr. Wigmore says that some evidence will do away with it.²¹ In a case where there was a presumption as to the negligence of defendant railroad, the United States Supreme Court held that "the only legal effect of this inference is to cast upon the railroad the burden of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all of the evidence."²²

But the statement that some evidence is necessary prompts one to ask what must that some evidence be. In an able and thorough opinion this point was discussed by the Supreme Court of Wyoming.²³ Here we had a situation where a statute raised a presumption of negligence if certain facts were shown. The defendant contended that some evidence was enough to dissipate presumption. The Court admitted that it was true that a *prima facie* case, or a presumption, disappears in the face of evidence. But what evidence? The Court answered the query by stating that the evidence must be substantial and credible.²⁴ A presumption cannot stand against unimpeached and positive evidence.²⁵

¹⁶ Nichols v. Baltimore R. R. Co., 33 Ind. 229, 70 N. E. 183 (1904).

¹⁷ RICHARDSON, EVIDENCE (1931) §28.

¹⁸ Hogan v. O'Brien, 212 App. Div. 193, 208 N. Y. Supp. 477 (3rd Dept. 1925).

¹⁹ Moran v. Abbott, 26 App. Div. 570, 50 N. Y. Supp. 337 (2d Dept. 1898).

²⁰ *Ibid.*

²¹ *Supra* note 1, at 452.

²² Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136 (1910).

²³ *Supra* note 6.

²⁴ *Ibid.*

²⁵ Moore v. Wooten, 280 S. W. 742 (C. A. of Tex. 1926).

In the case of *Frankel v. Traveler's Insurance Co.*²⁶ the plaintiff invoked the rule that there is a presumption that death is due to accident and not to suicide. Below the Judge had refused to submit the case to the jury and this was claimed by the appellant to be error. The Court says,

"But plaintiff had the burden of proving the fact necessary to establish the liability of the insurance company, and the legal presumption that might aid her could be of value only under circumstances leaving the cause of death in doubt. The presumption is overcome by evidence that death was self-inflicted, or facts inconsistent with any reasonable hypothesis of death by accident, or circumstances and conditions leaving no room for any reasonable hypothesis than suicide."²⁷

Evidence was substantial and credible and it was held, that the Judge was not in error in refusing to submit case to jury. For if they found the other way the verdict could not be allowed to stand, and the trial Court would have been required to set it aside, in the exercise of sound judicial discretion. Presumptions must give way in face of clear, distinct and convincing proof.²⁸

In New York it has been repeatedly stated that when substantial evidence to the contrary is introduced the presumption disappears and ceases to be a legal factor in the case.²⁹ In *Rose v. Balfe*,³⁰ plaintiff rested on the presumption of control growing out of ownership of a car. *Held*, presumption continues until there is substantial evidence to the contrary.³¹ The Court in *Potts v. Pardee*³² declared that:

"Presumption growing out of a *prima facie* case, remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely thereon."

And in the latest case in New York on the subject, *St. Andrassy v. Mooney*,³³ the plaintiff rested on the presumption that defendant's automobile was being lawfully operated by the driver. The question of negligence was not disputed but defendant claimed that the

²⁶ 51 F. (2d) 933 (C. C. A. 10th, 1931).

²⁷ *Ibid.*

²⁸ Note, 10 R. C. L. 868.

²⁹ *Kennell v. Rider*, 225 App. Div. 391, 233 N. Y. Supp. 252 (3rd Dept. 1929).

³⁰ 223 N. Y. 481, 119 N. E. 842 (1918).

³¹ *Carroll v. Kinich*, 218 N. Y. 435, 116 N. E. 507 (1916); *Chaika v. Vandenberg*, 252 N. Y. 101, 169 N. E. 103 (1929).

³² 220 N. Y. 431, 116 N. E. 78 (1917).

³³ 262 N. Y. 368, 186 N. E. 867 (1933).

evidence was sufficient to overcome the presumption of permission. Defendant and his wife testified that the car was being used without their permission and therefore it was unlawfully in operation. This testimony was not contradicted. The chauffeur corroborated this testimony. Surrounding this evidence were circumstances which tended to bolster up defendant's statement, *i.e.*, the car was being used after hours and also contained a party of the chauffeur's friends. The trial Judge submitted the testimony to the jury to decide upon its credibility, and they found for plaintiff.

On appeal the respondent maintained that this evidence was interested and discredited. But the Court of Appeals held that even though interested the fact still remained that it was not discredited. The only conclusion, said the Court, that could be reasonably drawn from the uncontradicted evidence was that the chauffeur at the time of the accident operated the car unlawfully and without permission. The judgment was accordingly reversed and the complaint dismissed.

Summing up, the rule may be stated that a presumption is overcome by substantial and credible evidence.³⁴ And when a party does not come forward to discredit such evidence it is apparent that there is no question for the jury.

JOHN BENNETT.

EFFECT OF INDORSEMENT IN FORM OF ASSIGNMENT.

By the adoption of the Negotiable Instruments Law in 1897,¹ New York aligned itself with its sister states in the interests of commerce and for the purpose of bringing into the law of commercial paper a uniformity which heretofore had been lacking. In the main, the statute codified the common law, although some of the old rules were changed. It might be supposed that with a common basis for adjudication, the courts of the several states would find it easy to agree on basic principles. But often a question of construction of the same section of the statute will arise in two separate states and be answered differently. It is possible, therefore, for states with the same Negotiable Instruments Law to adopt different constructions of the statute.

³⁴In criminal cases the rule is different. Presumption of sanity and evidence are all to be considered by the jury. *Brotherton v. People*, 75 N. Y. 159 (1878); *People v. Tobin*, 176 N. Y. 278, 68 N. E. 359 (1903). "This presumption [of innocence] on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence can be drawn." It must be charged to the jury. *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394 (1894).

¹N. Y. Laws 1897, c. 612; Cons. Laws 1909, c. 38.