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THE EFFECT OF REBUTTABLE PRESUMPTIONS OF LAW UPON THE BURDEN OF PROOF

It may seem a mere waste of time to devote even a few pages to the subject of the effect of Presumptions on the Burden of Proof. The accepted theory, at least among law teachers and students, makes the whole matter a very simple one. The term Burden of Proof is used in a primary sense, the burden of overcoming the inertia of the court,[1] which is fixed by the pleadings and never changes, and in a secondary sense, the burden of producing evidence, which may shift as the weight of the evidence on the one side or the other so far preponderates as, if no further evidence were given, to require a ruling by the court which would in effect take the matter from the jury,[2] or it may shift as some presumption operates to give to the evidence the effect of prima facie proof.

The term presumption is used in a variety of senses, but only one form of presumption, the "Rebuttable Presumption of Law," is a true rule of evidence and its only effect is to shift the burden of producing evidence. Nothing could be simpler, more easily administered, more effective to prevent confusion and conflict. Yet there is no class of case more confused or confusing, more difficult to analyze or

[1] Called by Prof. Wigmore "the risk of persuasion."

[2] The risk of an adverse ruling by the court, either on the trial or on some subsequent proceeding, to set the verdict aside as without evidence to support it.

rationalise, than those which deal with the effect of presumptions on the burden of proof. The settled practice in at least one important jurisdiction[3] denies the theory *in toto.* And in every jurisdiction there are certain presumptions, not mere presumptions of fact, mere expressions of judicial experience as to the probative value of certain data, not on the other hand conclusive presumptions of law (judicial legislative masquerading as an exercise of the courts admitted supervisory power in matter of evidence), but true Rebuttable Presumptions of Law to which the converse of the theory is applied.

Prof. James Bradley Thayer regards them as being rather part of those portions of the substantive law to which they severally relate than as part of the law of evidence. Many of these do operate in rather restricted fields and tc that extent may appear part of the substantive law to which they apply, but so do many of those presumptions which only shift the burden of producing evidence. In fact there is no presumption universal to the whole field of proof.[4]

The greatest living authority on the subject of evidence says, "sometimes the ruling involves the first 'burden of proof,' i. e., *the risk of non-persuasion of the jury;* that is, in strictness and usually, a question of Pleading rather than of Evidence."[5] Yet his own book as well as all other text and case books on the subject of Evidence give instances of such rulings under the title "Presumptions," and courts rarely if ever treat such rulings as laying down principles of pleading.

While it is doubtful whether such presumptions are more limited in operation than presumptions which merely change the burden of producing evidence, and while to regard them as "in strictness" dealing with questions of pleading may require a complete revision of the normal and usual concept of

[3] Pennsylvania, where substantially every presumption recognized by the courts does shift the "risk of persuasion."

[4] Even the presumption which operates in aid of one who, having the risk of persuasion, ought to bear the ancillary burden of producing evidence of facts peculiarly within his opponent's knowledge, is far from universal.

[5] Wigmore on Evidence, Sec. 2499.

pleading,[6] the important thing is to recognize that such presumptions do exist and to discover the reasons for their existence and effect, instead of dismissing them as mere alien interlopers into the law of evidence and as such unworthy of serious consideration.

[6] No authority is cited nor is there any attempt to support this statement by argument or even explanation. It is submitted that it is in conflict with the accepted concept of both pleading and evidence. The object of pleading is to reduce the disputes between litigants to an issue of fact or law, and, so far as it concerns a trial by jury, its purpose is to submit to the decision of the jury the existence of a fact, which, if it exists, of itself and without more establishes the plaintiff's claim or the defendant's defense, the sufficiency of the fact in apoint of substantive law having, if questioned, been determined upon demurrer. Facts not of themselves determinative of the litigant's rights, no matter how probative of the fact on which they depend, are matters of evidence and are not to be pleaded.

If any presumption, no matter how strong, may be rebutted, the facts on which the presumption is based are not of themselves determinative of the rights of the litigants, either in theory or fact. The fact presumed is still open to investigation and is the sole ultimate and issuable fact, which, as such, must be found by the jury. The presumption is an aid to the establishing of this fact, and so is matter of evidence and is not and cannot, either in form or in substance, be matter of pleading.

Indeed it would seem that Professor Wigmore's statement can only be supported by assuming (1) that the burden of proof is fixed, finally and irrevocably, by the pleadings, from which it would of course follow that any ruling which changes and so fixes the burden of proof is a matter of pleading, and (2) that the only effect of a true evidentiary presumption is to shift the burden of producing evidence, from which it would as inevitably follow that, in so far as a presumption does more, it ceases to deal with evidence.

Here it may be well to call attention to the fact, that even conclusive presumptions of law are not always matters of pleading. When the parties ceased to plead orally in open court and pleading was done by written papers, the reverence for traditional forms peculiar to writings became attached to them. The pleadings became the prime exponents of traditional legal theory, and while new defenses were occasionally permitted, the averments originally regarded as essential to the plaintiff's right of action were religiously included in the declaration in each form of action. When a traditional theory became antiquated, there was a natural reluctance to changing the averments. To do so would have been to make an obvious change in the law. Where the change desired was in reducing the number of facts required to constitute a good cause of action, it could be covertly made through the court's control of the pleadings. The averment of the particular fact no longer regarded as essential could be held mere surplusage and not traversable. Thus the scope of the action of trover was immensely enlarged by forbidding a traverse of the averment of finding. But often the same object was effected by holding that the obsolete fact must be presumed from some other averment not necessarily implying its existence, as malice originally required in slander and libel is now said to be presumed from the fact of publication. Where, however, it was desired to add a new fact or to use an old action or process to cover facts not included therein, it could not be done by the exercise of the court's control over the pleadings without disclosing the fact that the substantive law was being changed. Such changes had therefore to be made through the court's power over the jury, by creating conclusive presumptions of law, such as the change in the law of treason which by a conclusive presumption made a conspiracy to depose the king as much treason as imagining his death. The purpose in all cases is the same, to actually change the substantive law while professing to adhere to tradition; only the means differ.

The term presumption is used by both text writers and judges in a variety of senses, among others the following:

1. As a synonym for inference.

2. As laying down a rule for requiring the assumption, the taking for granted, of certain facts upon data[7] whose probative force falls short of that strength usually required to justify or require such fact to be inferred.

3. As stating a change in the substantive law while apparently exercising the courts long admitted power to supervise the jury's exercise of its function of judging the effect of evidence produced before it.[8]

So long as an individual judge is stating in terms of a so-called presumption his own opinion as to the inferences that may, should or must be drawn from the data before him and the jury, he is laying down no rule of law. But when a court, considered as perpetual, though its membership changes, in the exercise of its judicial functions acquire experience in the valuation of the probative force of constantly recurring data, binding traditions arise as to the inferences which may, should or must be drawn from certain data. Such traditions like rules of construction, have the force of law.[9] But though of great practical importance, they are so numerous and vary so greatly in different jurisdictions that an attempt to enumerate and classify them is

[7] The word "data" is used in preference to "evidence," because presumptions are based upon all the facts before the jury whether shown by evidence, admitted by the pleadings, or known through judicial notice.

[8] In addition there is a tendency to state the fact that the duty of overcoming the inertia of the court is upon a particular litigant in the form of a so-called presumption operating in favor of his opponent.

[9] In exercising its power to control a jury's exercise of its function of judging the effect of the data before it, the court is laying down rules of law when it announces any binding rule as to the effect which the jury either must or may give to the data submitted to it. These rules fix the field within which the jury may exercise its own judgment; they limit or extend the area within which its rules which require the jury to give a particular effect to such data. The sanction of such a ruling is the power of the court to set aside a verdict which disregards it. A ruling which permits a finding of a fact is a judicial statement that the jury may exercise its own discretion without fear of its verdict being disturbed. It is submitted that the ruling is as much matter of law where it opens as when it closes the matter to the jury's discretion. And this is so, whether the rule is embodied in a presumption giving an arbitrary value to data in itself not legally probative or where it states a fixed attitude of the particular court as to the probative value of certain data.

impracticable. Therefore to reduce the law of evidence to a manageable size they are ignored, except where there is a unanimity of judicial opinion as to the effect of data which frequently come before substantially all courts.[10] The so-called presumptions by which the court gives to the temporary and transient jury the aid of its experience, accumulated during years and even centuries of dealings with similar data, by advising and admonishing them, or by defining the field in which they are free to give effect to their own opinion as to the probative value of the data submitted to them, if part of the law of evidence at all, are part of that portion of it which deals with the relevancy or weight of evidence.

On the other hand, the theoretical concept that the function of courts is to apply without change the traditions and precedents of the past has laid a taboo upon judicial legislation. In theory, only the legislature can change the law—the courts' duty is to administer it. To overcome this taboo, to make the law livable under changed conditions, to make it tolerable to a changed public opinion, while appearing to preserve a reverent adherence to tradition, courts have, in addition to resorting to directly stated legal fictions, used their admitted power of supervising and directing the jury in the exercise of its function of judging the effect of data produced before it, to make such changes, often very radical, as seemed to them necessary.[11] They have created many presumptions, commonly called conclusive presumptions of law, which require the jury to find some legally important fact from data which does not necessarily imply its existence and forbidding the production of even the most direct and convincing proof of its non-existence. Such presumptions have obviously no place in the law of evidence. The very fact that no evidence can be given to prove the invalidity of such a presumption shows plainly that the fact has ceased to be of exclusive legal importance. Such a presumption

[10] Such as the value of the proof of motive, preparation, flight, etc., as evidence of the commission of a crime.

[11] Indeed this form of outward deference to concepts which are actually repudiated is not confined to courts—it appears in many legislative acts.

concerns the law of proof to exactly the same extent as other changes in the substantive law. It affects the object and not the means of proof. The "actor" who previously had to prove the presumed fact, may now either prove it or the data on which the presumption rests. He has an additional target at which to aim. There are now two sets of facts, the proof of either one of which is of as great a legal effect as the proof of the single one previously was.

But between the so-called presumption, which only express the court's opinion of the probative value of data before it and the jury, and the conclusive presumption of law which is judicial legislation, there are a large mass of presumptions permitting or requiring the jury to presume or take for granted a fact upon data normally insufficient to justify or require a finding that it exists, but, however, permitting the presumption to be "rebutted" or overthrown.[12] They permit or require the jury to take for granted the existence of the fact presumed upon data which lacks that probative value usually required to justify or require such a finding. It is this additional force given to the data by the presumption which is its legal effect. Since the presumption only operates till nullified or overthrown by the production

[12] A presumption is in the strict sense rebutted only when the data on which it rests is not disputed, but where direct or circumstantial evidence is given by him against whom it operates to overcome its effect as sufficient or prima facie proof of the fact presumed. Yet a presumption is sometimes said to be rebutted by proof of the non-existence of the data on which it rests. This use of the term is unfortunate. While the presumption is displaced, it is not overthrown but undermined. Such proof does not destroy a presumption; it shows that there is no presumption to destroy. One does not speak of rebutting direct evidence by proving the witness unworthy of belief, or of rebutting circumstantial evidence by disproving one of the chain of circumstances necessary as a whole to support an inference or finding of the fact which the circumstantial evidence is offered to prove. It is equally inexact to speak of rebutting a presumption by disproving any of its basic data.

Not only is it inexact but it may in practice lead to confusion of thought. It may seem to imply that the burden of him, who would undermine a presumption by disproving the data on which it rests, is the same as that of him who would overthrow it, and so varies with the nature of the presumption in question. Whereas he who asserts the existence of a presumption must persuade the court and jury by sufficient evidence produced by him or otherwise known to them, of the existence of facts sufficient to raise such presumption. Till this is done, no presumption aids him. No artificial value is attached to the data which he produces, and this is as true where the facts, if proved, would raise a conclusive presumption of law as where it would raise a presumption binding only till the production of legal proof of the fact assumed.

of evidence rendering doubtful or proving the non-existence of the facts presumed by it, it does not change the substantive law. The fact presumed has not ceased to be of exclusive legal importance. Such a presumption is a rule of law, and since, until rebutted, it so far establishes a fact as to require the adjudication of the rights of litigants on the basis of its existence, it is a rule of the law of evidence. And it is not a rule of that part of the law of evidence which deals with relevancy, since it attaches to the data on which it rests a value as proof which its probative force would not, but for the presumption, warrant.

The legal force of a presumption is then the additional weight given by it to data not in itself of sufficient probative force to permit or require the jury to find the existence of the fact presumed. All such presumptions are, therefore, created by some policy of law which requires this abnormal weight to be given to meet some judicially felt need or to accomplish some purpose judicially recognized as desirable. While it cannot be expected that there will be complete agreement among the courts of the many common law jurisdictions, it may be stated with some confidence, that these needs and purposes can be roughly divided into two classes:

I. The necessity of relaxing the stringency of proof in theory required to justify or require an inference or finding of certain facts.

II. The desire to determine, if possible, certain rights and duties as though certain facts existed.

And it is submitted that the force of each presumption and its effect, as shifting the burden of overcoming the inertia of the court or of only shifting the burden of producing evidence, depends upon the nature of the need or purpose which has led to the recognition of that presumption.

I. The requirement of proof to that degree of certainty which the common law in theory demands, if strictly insisted upon in certain constantly recurring situations, would result in waste of time or in a denial of justice to those whose rights depend upon facts which in their nature are usually incapable of strict proof.

The need of relaxing the stringency of the proof in theory required by the common law has led courts to create certain presumptions. These presumptions arise in three situations:

1. Where the fact assumed so usually exists that, to require the production of evidence to establish its existence, would cause unnecessary waste of time, money and effort of both courts and litigants.

2. Where the rights of the litigants depend upon facts which from their nature are usually incapable of proof to the certainty or by that sort of evidence which theoretically is alone regarded as legally probative.

3. When the power to produce evidence of the fact on which the litigant's rights depend is exclusively in the power of the opponent of him, who, having the risk of persuasion, should in theory also bear the burden of producing evidence sufficient to persuade.

In all of these, the need is satisfied when evidence is produced. Having accomplished their purpose they have, of course, no further effect. Like Maeterlinck's male bee, having functioned they disappear. (1) If evidence is given sufficient to cast a doubt upon the existence of a fact so usual that its existence may in the absence of evidence usually be safely assumed, the presumption based on the desire to save unnecessary waste of time and effort disappears, since the time and effort is now seen to be no longer mere waste, but a necessary expenditure to clear up a real doubt. At all events, when evidence on both sides is produced the time and effort have been expended, the purpose of the presumption has failed and it ceases to exist. (2) So, in those few presumptions which are based on the usual impossibility of proving certain legal important facts, if there is evidence whether direct or circumstantial amounting to legal proof of such facts, the very basis of the presumption, the assumed impossibility of strict proof fails carrying with it the presumption based on it. (3) Where a presumption is recognized because the power of producing evidence is exclu-

sively in the opponent of him who has the burden of persuasion, in so far as it is recognized for the purpose of relieving him of a burden which is impossible for him to successfully bear, that purpose is satisfied when his opponent produces evidence of what actually took place.[13]

There is no reason why the risk of persuasion should be shifted and that the defendant, let us say, since such presumptions usually arise in aid of a plaintiff in an action on the case for negligence, should be forced to convince the jury that the facts as proved establish a preponderance of probability in favor of his innocence. If the defendants witnesses are believed to have told the whole truth and his records are accepted as full and accurate, the facts are known and the plaintiff is in no worse position than if such facts had been proved by his own witnesses or books. What disadvantage he originally labored under has disappeared, and the presumption based on the desire to remove the disadvantage is satisfied. Yet many courts do hold, where the so-called doctrine of *res ipsa loquitur* applies, that not only the burden of producing evidence showing to the satisfaction of the jury

[13] Here it is necessary to discriminate between the credibility of a witness and the probative value of his testimony if believed. It is the duty of him against whom any presumption operates to produce evidence, not merely witnesses, and therefore he must satisfy the jury of the credibility of his witnesses. And where as in this particular sort of presumption, the witnesses are necessarily persons in his own employment who generally are the very persons who are at fault, or the proof is by books and records kept and produced by him, it is only natural that a wide latitude is allowed to the jury in distrusting such testimony or proof. While the common law prohibition against admitting the testimony of persons in any way interested in the result of the litigation has been universally removed by legislation, there remains in practice a strong distrust of such testimony. And where the presumption requires a party to give an account of his own actions, he is bound to satisfy the jury that he is giving a full account, and is not merely stating that part which is most favorable to him and holding back that part which is to his disadvantage.

In actions of negligence in which presumptions, based on inequality in the power of proving what actually occurred, most usually arise, there remains after the facts are sufficiently proved, the further question of so-called fact: Is the defendant's conduct negligent? This is a matter as to which, when once the facts are known, neither party has any exclusive or even peculiar power of persuasion. Even in those relations such as carrier and passenger, to which this presumption is held to be peculiarly applicable, if it appear that the plaintiff by some chance does know and thus can prove all the essential facts, no presumption arises to relieve him of his full burden of proving the facts and convincing the jury that the defendant's conduct was negligent. Equally where the facts are made known by witnesses or documents accepted by the jury as credible, the presumption should disappear.

what actually took place but of convincing the jury that his conduct is not negligent is shifted to the defendant.[14] This is in part due to a failure to discriminate between proof by satisfactory evidence of the facts and persuasion as to whether those facts show conduct conforming to or falling short of that of a reasonable man under like circumstances,—and in part is due to a growing tendency to a compromise between the modern theory of tort liability as based exclusively on fault and the more modern renaissance of the ancient concept that every one must answer for the harm done even by his most innocent acts, by not only raising the presumption of negligence upon the mere fact of harm done, but by holding that such presumption requires the defendant to rebut it by proving that he has done all that is possible to prevent the harm that his activities has caused. This tendency chiefly appears in cases in which the harm is done by what is called ultra hazardous operations or businesses. The additional weight is given the presumption because the court desires to hold those engaged in such work to a strict accountability without definitely breaking with the traditional concept of that there can be no liability without fault,[15] and to this extent the presumption becomes akin to those of the second class.[16]

In all of these presumptions—the data while not sufficient either in its character or in the probative force to constitute strict legal proof, has a real probative value. It is, in fact, probable that the fact presumed is true. At the least the data on which the presumption rests creates a strong suspicion of the existence of the fact assumed or required to

[14] In Weber v. Chicago R. I. & P. R. R., 175 Ia. 358 (1916) it is held that while the presumption expressed by the phrase "res ipsa loquitur" usually shifts only the burden of producing evidence, where the relation of carrier and passenger exists it also shifts the risk of persuasion.

[15] Some courts, less anxious to pay lip-service to time honored theory, have definitely broken with tradition and have held certain operations, no matter how carefully carried on, to contain such risk of injury to persons not interested in their success, that they must be at the operator's peril, he being required to answer for any and all damage done by them.

[16] There is here a strong analogy to those early cases in trespass for injury to the person, in which the rigor of the ancient doctrine was mitigated by permitting the defendant to prove in excuse unavoidable necessity or the fact that the harm was accidental, he having taken every precaution to avoid it.

be taken for granted. The ordinary man would not hesitate to act upon such data in even his important personal affairs. They have a sufficient force to the layman—it is only the strictness of proof legally required that prevents them from having the effect of legal proof. The whole force of the presumption is to make the legal concept of sufficient proof conform to the popular concept by adding to data, which complies with the popular standard of adequate proof, that additional weight necessary to satisfy the more exigent legal standard.

II. But there are many presumptions which permit or require the jury to find a fact to exist upon data, which even to the lay mind would appear far from sufficient to justify or require such a finding, or even upon data which the lay mind would accept as sufficient proof of its non-existence. These presumptions are inspired by the desire to adjust the rights of the litigants as though the fact assumed did exist.[17] Yet these presumptions do not, like conclusive presumptions of law, forbid inquiry into the existence of the fact assumed by them. They cannot be said to be changed in the substantive law by judicial legislation masquerading as rules of evidence. The fact assumed remains legally important.[18]

It may seem illogical to regard a fact as determinative of legal rights and yet require it to be assumed as existing upon data which does not tend to raise a real belief in the probability of its existence. It is certainly illogical to require such an assumption upon data which even to the lay mind would render its existence highly improbable, and it is still more so to require its assumption till its existence is shown to be impossible. Yet courts may well be unwilling to abandon a theory and yet equally unwilling to apply it in strict

[17] For example, it may be suggested that various and varying presumptions as to whether an alteration in a deed or will is to be made before or after execution, are inspired by the differing desires of the courts at different times and in different jurisdictions to facilitate or obstruct the transfer of titles in order to protect the grantee or devisee, or the heir at law or next of kin. See note on this subject, 68 U. of P. Law Review 264 (March, 1920).

[18] The presumption of legitimacy at its strongest did not regard the actual paternity of the child as legally immaterial. The son of a married mother could be proved a bastard by showing that her husband could not possibly have been its father.

logic, without regard to the inconvenience of such an application. And the common law has never shrunk from such compromise if by the sacrifice of logic and symmetry it could reach a workable rule.[19]

Strictly speaking, it is illogical to be unwilling to change the common law concept of descent through the father and adopt the principle that a husband must father all the children born to his wife during marriage, and yet assume that a child born to a married mother is begotten by her husband until the barest possibility thereof is disproved.[20] It is equally illogical to refuse to open cohabitation as man and wife the same legal effect as to marriage by religious ceremony or actual contract, and yet assume the existence of a valid though informal contract from such cohabitation, though the actual circumstances make extremely slight the chance that such a contract was actually entered into.[21] It is even

[19] Just as such presumptions are often created to modify the practical application of some earlier theory which the court is unwilling to abandon or even to covertly change by creating a conclusively presumption of law—so we find presumptions used to bring an ancient practice based on a theory, itself forgotten or abandoned, into apparent conformity with the newer, more fashionable doctrine.

The doctrine that tort liability is dependent upon proof that the defendant is in fault received a far more universal acceptance in America than in England. So in America the courts have recognized presumptions of negligence in cases where the English courts frankly apply the earlier concept that a bailee, such as an agister of cattle, must return uninjured the cattle entrusted to him, uninjured or excuse his failure to do so by showing that he had done all in his power to preserve them. Compare Coldman v. Hill, L. R. 1 K. B. 443 (1919) with the American cases cited in a note on that case in U. of P. Law Review, pp. 179–182 (January 1920).

[20] This presumption of legitimacy was originally so strong that only the most conclusive proof of the husband's absence beyond the four seas was capable of rebutting it. In a case decided in 1304, Y. B. 32 & 33 Edw. 1–60– , the jury on proof that the husband had been abroad during the time when the child must have been conceived, expressly found her not to be his daughter; but the justices adjudged her legitimate since the husband "may have come into the country by night before and begotten this woman upon his wife." The weight of this presumption is materially reduced by later English cases. But in America it remains almost, if not quite as strong as it originally was in England. See Wigmore on Evidence, Sec. 2527.

[21] The extreme to which this presumption is carried by American courts is shown by the case of Fitzgibbons' Est., 162 Mich. 416 (1910), in which, though the original marriage was admittedly illegal, because the man had a wife then living, a validating contract was presumed upon the death of the first wife, though the man never knew of her death and the second wife testified that she had in good faith believed the original marriage to be valid, having been satisfied by her husband that he had previously secured a divorce from his first wife. Thus a validating contract was presumed between a man who did not know that it could legally be made and a woman who did not even know that it was needed.

more illogical for judges to require juries to find that a custom to make a money payment for certain services, which is shown to have existed unchanged as far back as proof is available, has persisted unchanged since the accession of Richard I, even though as men the judges might recognize an inherent improbability so great that if they must act both as judges and juries they would be forced to find such an origin impossible.[22] Yet such things do not shock the common law judge, who realizes that the practical value of preventing disputes as to descent, social status and the enjoyment of customary rights is more important than strict logic.[23]

Clearly the mere production of evidence does not satisfy the purpose of such presumption. They therefore do habitually shift the burden of persuasion. The desire to decide the case as though the presumed fact existed varies in intensity. Sometimes it is required to be so decided only until the non-existence is proved by a bare preponderance of probability, such as is necessary to satisfy the normal burden of persuasion. In such cases the presumption merely shifts the risk of persuasion with its ancillary burden of producing evidence. In other instances the desire is more keen, and there are added "quantitative" and "qualitative" rules requiring the party against whom the presumption operates to exclude the probability, or even the barest possibility, of its existence, and fixing the nature of the evidence admissible to overcome the presumption; as for instance by forbidding the admission of other than direct evidence of the non-existence of the fact assumed.

While, in presumptions of the first class, the basic data have a real though not legally sufficient probative value and the additional weight given by them is but slight, presumptions of the second class are imposed without regard to value

[22] See the opinion of Cockburn, C. J. in Bryant v. Foot, L. R. 2 Q. B. 161. The more rational view of Blackburn, J. prevailed in a closely analogous matter in Angers v. Dalton, K. R. 6 A. C. 747. See also Phillips v. Halliday L. R. (1891) A. C. 228.

[23] See as to this, Lord Erskine's opinion in the Banbury Peerage case, in the appendix to Le Marchants refut of the Gardner Peerage Case, pp. 465 to 470.

of the data on which they rest. It is the presumption and the presumption alone which gives value as proof to data, which, but for it, would even to the lay mind have no tendency to make the presumed fact probable, or which in fact may even make its existence highly improbable.

There is a species of presumptions which does not fall exactly within either of the two principal classes. Where goods are delivered in good condition to a carrier to be carried to their destination by a series of connecting carriers, and are received in a damaged condition, neither the consignor nor the consignee knows in the custody of which of them the damage was sustained, nor can they hope to discover this save by information given by the carriers themselves. Stringent as the liability of such a carrier is, the consignor would lose all its benefit if he were held to strict proof against anyone of the series. Therefore, though there is usually no preponderance of probability that the goods were damaged in the custody of one rather than another of the carriers, a presumption is universally created which, though diametrical opposite in different jurisdictions, is effective in finally locating the carrier liable. In some jurisdictions, it is presumed that the damage occurred while in the custody of the initial carrier, in other while in the custody of the final carriers. But in either case, the carrier presumed to be liable can and in practice does prove by his records that he is not answerable. He passes the responsibility forward or back till ultimately the carrier is found who cannot show that he turned over the goods in the same condition they were in when he received them. Usually a demand on the carrier of presumed to be liable is sufficient to start an investigation by the successive carriers, which traces the carrier actually liable and leads to a settlement by him without the necessity of resorting to litigation. Here the presumption differs from those of the first class in that the data have practically no real probative value—they cannot be said to raise even a suspicion that the initial or final carrier had the custody of the goods when the damage occurred.

In fact he may be only one of several and may have had only a very brief custody of the goods. The presumption is therefore often purely arbitrary. On the other hand, it is not created because the court desired to hold either the initial or final carrier to a higher liability than the rest. It is created for the purely practical reason that it is the only way in which the shipper can be effectively secured in the protection, which the law intended to give him by the stringent liability it imposes on the carrier. And it can work no injustice to the carrier who labors under it, since he can rebut it, if it be in fact unfounded, by the production of the records which every carrier ought to keep. And the evidence which the carrier has in its power to produce being direct and conclusive if credible, it is of no practical moment whether such presumptions shift the risk of persuasion or only the burden of producing evidence.

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