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A Prolegomenon to Presumption as a Canon of Justice: The Judicial Perspective

V. Sree Vidya*

Abstract

Presumption as a Canon of Justice is a theory, which cannot be avoided, and has applicability in the day to day proceedings of every civil or criminal court. The legal fraternity including the judiciary today look up to presumption as only an underdeveloped theory and have the fear of misinterpreting the theory of presumption with all the types and methods of presumption as they perceive. Presumption, being an exception to the law of evidence, is treated as the same by different countries which are developing in the field of law, as a mysterious theory, and many are still confused about the applicability of conclusive proof as against presumption.

This article has been mooted for decongesting the theory of presumption, demarcating the concept of burden of proof, and conclusive proof from statutory presumption of law. It is also attempting to differentiate the presumptions of fact with the presumption of law. It deals with the appreciation of evidence when conclusive proof is offered.

***Keywords**: Presumption, Pre-emption, Justice, Evidence, Presumption theories*

Introduction

Empirical research shows that judges have sometimes dealt with presumption on a sarcastic note. Justice Scalia of the Supreme Court of California, was ranked number one for his sarcasm, "Well, duh!" was his usual word, and, the second reaction would be "Oh, really? Well, can you prove it?" was the most asked question.[1] Sarcastically, how can one prove presumption? Can proved pre-emption be also termed as presumption? The Indian Evidence

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1 Hasen, Richard L., *Essay: The Most Sarcastic Justice* (February 8, 2015). 18 Green Bag 2d, 215, 2015; UC Irvine School of Law Research Paper No. 2015-11. Available at SSRN

Act, 1872 deals with presumption under various sections that need not be mentioned here, but presumption can be termed comprehensively as an exceptional exception to the Law of Evidence itself. Presumption is a Canon of Constructive Law, and on a shorter note presumption is a deemed assumption and on the other hand presumption can be termed as prevention and is a corollary to presumption.

Presumption and its Connotation

A presumption is a supposition, opinion, or a belief that is previously formed. In *Fanshow v. Rotterdam,* it was observed that 'Presumption' is the evidence of things not seen; where, from an apparent effect, you may infer a probable cause'[2]. "Though presumption is that, what may be doubted of, yet it shall be accounted as a truth, if the contrary be not proved."[3]

A presumption can be termed as an inference about the existence of a fact that is not actually known and has arisen from its connection with another fact, which is known. It is a conclusion that is drawn from proof of facts or circumstances, and stands as an establishing fact until it is overcome by a contrary proof. As observed by Abbott, C.J., in *R v. Burdett*, "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof"[4]. Therefore it can be observed that the presumption of any fact is and would be an inference of that fact from others that are known.

"The word presumption, inherently imports an act of reasoning a conclusion of the judgment and it is applied to denote such facts or moral phenomena, as from experience we know to be invariably, or commonly, connected with some other related facts."[5] A presumption is a probable inference that common sense draws from circumstances that usually occur in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made.[6]

2 *Fanshow v. Rotterdam* I Ellen, 284

3 *Presumption,* Tomlins Law Dictionary

4 *R. v. Burdett*, 4B. & Aid, 16

5 Sir Alfred Wills,*" 'Wills' Principles of Circumstantial Evidence" (1937)* A book on Circumstantial Evidence

6 *M S Narayana Menon v. State of Kerala and Anr*, AIR 2006 SC 3366

Presumption of Fact, Presumption of Innocence and Presumption of Law: The most confused concepts of law

A *'Presumption of fact'* is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known. A presumption of fact is an inference, which a reasonable man would draw from certain facts, which have been proved. Its basis is in logic, and its source is probability. A presumption of fact is a logical argument from fact to fact; or, as the distinction is sometimes put, it is an argument, which infers a fact otherwise doubtful from a fact, which is proved. Hence, a presumption of fact, to be valid, must rest on a fact in proof.[7]

A *'Presumption of Innocence'* means that every accused is to be presumed innocent until proved guilty. The legal presumption of innocence, which arises in favour of the accused on the trial of every criminal case, is to be regarded by the jury as a matter of evidence in favour of the accused, introduced by the law in his behalf.

A *'Presumption of law'* is a presumption that is artificially made by annexing a rule or legal incident to a particular fact to be proved. A presumption of law is a judicial postulate that a particular incident is universally assignable to a particular subject. A presumption of law is conclusive in nature and is an inference, which the Court draws from the proof, which no evidence, however strong, will be permitted to overturn. Legal presumptions are artificial rules established by law on consideration of public policy or public convenience, against which no evidence is received. Presumptions of law are usually founded upon reasons of public policy and social convenience and safety, which are warranted by the legal experience of Courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only prima facie evidence, and may be rebutted.[8]

According to the Harvard Law review[9], a detailed consideration of presumption is a herculean task, which is unprofitable. There are many courts, which have not differentiated or demarcated the connivance between the presumption of law and the presumption of fact. Until this day, disputable presumptions of law have always confused the judiciary in undisputed presumption of facts. Simply speaking synonymous to presumption, "it is just a rule of law and just shall draw a particular inference from a particular fact or from

7 The Legal Concept of Evidence, First published Fri Nov 13, 2015, Stanford Encyclopedia of Philosophy

8 Presumptions; Are They Evidence? J. P. McBaine California Law Review Vol. 26, No. 5 (Jul., 1938), pp. 519-563

9 *Harvard Law Review, Vol.3. 141-166 No.4 (November 15, 1889).* Available online at https://www.jstor.org/stable/1321688?seq=1#metadata_info_tab_contents Accessed on 05.04.2018

particular evidence, unless and until the truth of such inference is disproved", are the invincible words of Justice J.F. Stephen in an introduction to the Indian Evidence Act in 1872.

Hence, accordingly, one can understand that law has not mandated any rule for any inference, to be presumed by any Court of law. "The word 'evidence' in legal parlance includes all the means by which, any alleged matter of fact, the proof of which is submitted to investigation, is established or disproved." These are the words of Green Leaf in his opening sentence of Global Treaties, but Sir Henry Maine quotes that, "the English law of evidence would probably never come into existence but for one peculiarity of the English judicial administration, judge of law, or judge of fact or of the judge from the Jury." Of course, evidence is only a set of rules, which persuade the court of law to do some investigations regarding question of fact and question of law. Hence where presumptions are concerned, each Court of law is an investigating officer itself without restricting the process of reasoning and arguments. Hence, presumption can also be qualified as a process of natural reasoning. In *re Brown v. Foster*[10] "inference is supplied otherwise than by reasoning or by statements, whether oral or written and it seems impossible to deny to this, in the name of evidence, and, this is what Bentham called real evidence - valuable discrimination, when it is limited to that which is presented directly to the senses of the Tribunal."

Testing Presumption in the Touchstone of Logic, Assumption and Reasoning

Law has prescribed neither any test of relevancy nor any test for presumption, and refers only to the test of logic and assumption with use of reasoning. That any test of reasoning is known to the judiciary is also presumed, and assumed to have been sufficiently made known, is the concept. The simple role of exception to presumption is whether any presumption is logically inadmissible or whether the facts are logically admissible. The rules of exclusions with exceptions are presumption so that the primary exceptions to the rules now become law. In law hearsay, evidence is excluded but, still it can be admitted on the proposition, when it has a logical connection, relevancy and admissibility with the chain of circumstances so relied upon with the presumption. Thus totally summing up we can treat the term 'Evidence', as an ambiguous term only. Hence, any substantial law or

10 *Brown v. Foster, In Re*. 113 Mass., at page 137, a basis of inference is supplied otherwise than by reasoning or by statements, whether oral or written; and it seems impossible to deny to this the name of 'evidence'.

pleading with any proposition of the substantial law must be proved with the evidence, according to the procedural law. It means, if one is having a wrong conception of the standard of diligence, which has to be confirmed to, in evidence then, that determination of controversial diligence, would make you clear about the proposition of the substantial law taken by the person and the true proposition of evidence, which has to be logically treated as evidence only. Thus, evidence as a matter of ambiguity, can be stated to be a logical inference of the proof of existence of ultimate facts.

Is presumption a disguised form of evidence?

It can be said that the rule of presumption in cases of paternity, will be that, an existing marriage is a conclusive proof of legitimacy. Even if the mother remained unmarried, when the child was born in continuance of a valid marriage within 280 days, then, it shall be a conclusive proof that he is the legitimate son of that man in marriage, unless it can be shown that the parties have had no access to each other when the child had been begotten. This is propounded in Section 112 of the Indian Evidence Act[11] and of course protects the child from being termed as a illegitimate. In the view of the legislators, it is not in the interest of a person being termed as an illegitimate who is being protected but it is the chastity of the women which is being tested and protected by the lawmakers. Given the constant, polygamy is illegal and monogamy is the rule of law, chastity being presumed, illegitimacy prevented, and presumption as a rule of evidence displays role of the society as well.

Can conclusive presumption be termed as a good presumption?

A cross-sectional study on the theory of presumption puts in line the prima facie rules, which lead to evidentiary values in substantive law and that which form the fundamental proposition of the law as well. Mostly, substantive law is always aimed at interpreting the conduct of a man with the society, or in the personal perspective of behavior of men with each other. Preponderance of probability inferences the existence of the facts, which become the substantive law itself. The degree of evidence becomes the degree of proposition. There are cases in the Negotiable Instruments Act, 1881 also, which mandate that the judges shall draw a particular inference as a mode of proposition but, the said inferences can only be a presumption of fact under the garb of presumption of law. Section 113 of the Negotiable Instruments Act, 1881,[12] propounds the court to presume consideration to be legal and valid

11 Section 112, Indian Evidence Act, 1872

12 Section 113, Negotiable Instruments Act, 1881

in the light of section 9 Negotiable Instruments Act, 1881,[13] but whether this proposition acts as a fact under the garb of legality, is subject to discussion and clarification.

The General Principles regulating 'the Burden of Proof'

The section 102 of the Indian Evidence Act, 1872[14], reiterates that the burden of proof in a suit or proceeding lies only on that person, who would fail if no evidence at all were given on either side. It is always asserting the affirmative, who has the burden to prove, the facts, and the general rule of evidence is that, if in order to make out a title, it is necessary to prove the negative, if the assertion of a negative is essential, then the proof of such assertion rests upon the party contending the affirmative, for in the rules of evidence we see that affirmative or negative are, after all relative and not absolute. This general rule is the test of evidence and there are other rules also like, which party would badly suffer if evidence were not let in. If evidence is not let in, then, it becomes *onus probandi*, the distinct meaning of which is that if no evidence is given by the party, on whom the burden is cast the inference must be found against him. *Onus probandi* is thus collateral with statutory presumption. Presumably, this can be said as a reason why burden of proof has not been defined in the Indian Evidence Act, 1872.

Hence, strictly saying, burden of proof according to Section 102 of the Indian Evidence Act 1872 is conceptually on a different proposition with Section 105 of the Indian Evidence Act 1872.[15]

The burden of proof as seen in section 102 of the Indian Evidence Act, 1872 lies on the party who would be unsuccessful first if no evidence were given and this for the test of burden of proof, then the burden cannot remain constant but must shift as soon as he produces evidence which prima facie gives rise to a presumption in his favour. It may shift back if the rebutting evidence produced by his opponent preponderates. Rebuttable presumption clearly is rule of evidence effect of shifting the burden of proof and it is hard to see how unconstitutional one has the opportunity to displace presumption by leaving evidence.[16]

Statutory presumptions are in other words the legal way of saying that no one shall be entitled to give evidence of any fact without first showing that he is legally entitled to do so. It means the person first must have a burden of proof to prove any assertive proposition,

13 Section 9, Negotiable Instruments Act, 1881

14 Section 102, The Indian Evidence Act, 1872

15 Section 105, The Indian Evidence Act, 1872

16 *Sodhi Transport Co. & Anr. v. State of U.P. & Anr*, 1106 (1986) 2 SCC 486.

permitted by law. Just as how rebuttable presumption shifts a burden of proof, similarly, burden of proof may also be shifted by evidence raising a prima facie case. Presumptions of law are rebuttable, but presumptions of fact are stronger and the parties by every piece of evidence must be strong enough to establish negative of the negative.

Specific and varied cases of presumption in other laws

As observed in *Ramanathan v. Bank of Bengal*[17] ordinarily a person who has the title, carries with him the presumption in his favour and hence, when adverse possession is asserted, loss of title, by the plaintiff to the person in adverse possession is proved by the person in adverse possession. An agent carries with him the presumption of agency, the burden of proving the authority of the agent is the only on the plaintiff. Also as observed in *Kalyan v. Ahmed*[18] in case of appeals, it is very well settled that the burden of proof that the judgment appealed from is wrong rests upon the appellant.

The Concepts of Presumption of Payment, Presumptive Damages, Presumptive Evidence and Presumptive Notice

There is a presumption of law that a judgment on which no execution has been issued or attempt is made to enforce the same for over 20 years has been paid. Mere lapse of time less than the period prescribed by the statute of limitation creates no *'presumption of payment'* and hence a presumptive fact is that which may be assumed valid or true until the contrary is established. Just as, a presumptive heir is one presumed or expected to be heir; presumptive evidence founded on some presumption or supposition; so likewise presumptive reasoning; but a presumptuous man, a presumptuous thought, a presumptuous behavior all indicate an unauthorized presumption in one's own favour. Presumptuous is a stronger term than presuming because it has a more definite use; the former designates the express quality of presumption, the latter the inclination.

The term *'presumptive damages'* is used to designate those damages that are allowed to the victim by way of imposing a punishment on the wrong-doer. It is synonymous with the terms 'exemplary', 'vindictive', and 'punitive' damages.

The term *'presumptive evidence'* consists in the proof of minor or other facts incidental to or usually connected with the fact sought to be proved, which, when taken together, inferentially establish or prove the fact in question to a reasonable degree of certainty. The

17 *Ramanathan v. Bank of Bengal* 7 BUR, LT 126: 23. IC. 516

18 *Kalyan v. Ahmed* 38 CWN 1157 PC

term *'presumptive evidence'* is sometimes used to designate what is ordinarily known as circumstantial evidence, and consists of evidence drawn by human experience from the connection of cause and effect and observation of human conduct.

'Presumptive notice' is where the law imputes to a purchaser the knowledge of an act of which the exercise of common prudence and ordinary diligence must have apprised him and that causes, the difference between *'presumptive notice'* and '*constructive notice'*. The former is an inference of fact, which is capable of being explained or contradicted, while the latter is a conclusion of law, which cannot be contradicted, and thus presumptive proof is not positive proof, but sufficient to raise a presumption in favour of the fact alleged.

The Abortive Rule of Presumption

The characteristic of presumption is that, a logically evident rule of substantial law in a subsidiary proposition is the process forever discovering the identity legally and practically. Hence, it can be said that the difference between the enacted rule of presumption and the judicial rule is only in the development of the judicial rule and the ground rules are those which must be remembered and applied in legal discussions.

The Bursting of the Bubble Theory

According to the *Corpus Juris Secundum*[19], presumptions of nearly 113 types have been classified. The bursting of bubble theory is one such theory, which can be applied in Indian law also. It can be said that, here in India, the bubble theory may have been termed as the preponderance of probability. Considering the issues of self-defence, *mens rea*, insanity etc., as defence are the probabilities, which would burst the bubble of the statutory presumption. Affirmative defence or even the burden to persuade the prosecution to preponder probability to a certain degree would be the bursting bubble theory. Many of the legal professionals in Indian would have never even heard about the bursting of the bubble theory.

19 *Corpus Juris Secundum: A Contemporary Statement of American Law, As Derived From, Reported Cases and Legislation, Volume 38A*- It is an encyclopedia of United States law at the federal and state levels. It is arranged alphabetically, into over 430 topics, which in turn are arranged into subheadings. As of 2010, CJS consisted of 164 bound volumes, 5 index volumes and 11 tables of cases volumes.

Presumption in civil cases

The Nebraska Law Review on Presumption[20] has dealt with presumption in civil cases in detail. It states that, "the effect of presumption is that the mission is impossible for the party against whom it is directed and the burden of proving the non existence of the presumed effect is more probable than the existence," and this is most apt and direct definition to presumption.

Case study on Rebuttable Presumption

The most appropriate and earliest case study on presumption is that of *Balfour v. Balfour*[21]. The brief facts of the case is that, Mrs. and Mr. Balfour were married in 1900, and they spent the first 15 years of their marriage in Ceylon where Mr. Balfour was employed as a civil engineer and they went to England from November 1915 to August 1916 on a vacation. Towards the end of the vacation Mrs. Balfour received an advice that she remain in England for treating rheumatic arthritis, and on August 8, 1916 before returning to Ceylon, Mr. Balfour agreed to send Mrs. Balfour a monthly amount of Rs.30 as an allowance, until she could join him in Ceylon. Mr. Balfour had to be separated later on.

The issue was whether the agreement between Mrs. and Mr. Balfour which was reached on 8 August 1916, was legally binding or not. Lord Atkin in his opinion had signified the plaintiff intention to establish a contract was not established. He also ruled that such arrangements made in between husband and wife are arrangements in which there are mutual promises or in which there are reservations found within the definition. Significantly, this decision established that, there is a rebuttable presumption in relation to agreements of a domestic nature that parties did not intend to create legally enforceable agreement. It was held that there was a rebuttable presumption embodied in the arrangement. This is the caption of cases of business transactions even in the Negotiable Instruments Act, 1881, today being the onus to establish on the party alleging that the legally binding contract exists to abort the presumption.

20 John E. North, *Presumption Rules Try to Indicate if Fact Can, Should Be Inferred, (1974)*. Nebraska Law Review on Presumption, Volume 53, Issue 3 Available online at : https://digitalcommons.unl.edu/nlr/vol53/iss3/4

21 *Balfour v. Balfour* (1919) 2KB 571

Criticism to the Theory of Presumptions

Presumption of Legal Knowledge

It is often said that the *'presumption of legal knowledge'* or knowledge of the laws of the state in every citizen is a positive rule of law, and applies to all cases where acts are knowingly done which are expressly forbidden by law, and gives rise to a conclusive presumption or criminal intent. If the word 'conclusive', in this connection, means 'irrefutable' then such presumption is very unreasonable when applied to all criminal charges, and is not justified to that extent. "No man knows all the law. Judges differ in their legal decisions, and lawyers are continually discussing in the Courts doubtful and controversial questions of law. The presumption of legal knowledge is a general rule, and not accurately defined as to the extent of its application. One cannot regard it as a positive rule of law, but as a very strong presumption, subject to some reasonable qualifications, in criminal trials where the life and liberty of the citizen are involved. In such cases the law should be literally construed, so as to give effect to all of its beneficent provisions, to avoid conflict of rules of law and secure the citizen against anything that would be unjust or oppressive. The beneficent presumption of innocence, and the doctrine of a reasonable doubt which is so important in a trial by jury would be of little benefit to a person on trial for crime, if the mere proof of an unlawful act, knowingly committed by him, was received in a Court of justice as conclusive evidence of guilt." Presumptions are the canons of law involving reasoning and augmentation, and one can say that presumptions are grounded on general experience and probability of some kind. These are in fact prima facie assumptions. The mechanism of presumptions has been dealt with Judge Maxey. He has suggested a rational creation of presumptions and division of presumptions into functional categories.

"Presumptions arise as follows: They are either (1) A procedural expedient, or (2) A rule of proof production based upon the comparative availability of material evidence to the respective parties, or (3) A conclusion firmly based upon the generally known results of wide human experience, or (4) A combination of (1) and (3)"[22]

Presumptions in the judicial process, is a law making tool and power of judges includes the authority to make law. The law made by the Judiciary, with presumptions indicate say that presumptions are now not with regard to the problem of proof, but are rather outmoded myths in law. It is law that a child under the age of 7 is conclusively presumed to be

22 Ernest f. Roberts, *An Introduction To The Study Of Presumptions,* Villanova Law Review, Vol. 4 Summer, 1959 Number 4, Cornell Law Faculty Publications. Paper 1260 available online at http://scholarship.law.cornell.edu/facpub/1260.

incapable of doing any crime and the child cannot be fully convicted for grave crime but these are pseudo procedural in nature, which have disguised rules of substantive law and in fact has nothing to do with presumptions. In criminal cases, there is a presumption of innocence.[23] In fact it is not a presumption at all but a method of fixing an accepted state of mind, which is orienting the mind of the court to do its duty only. The court is not supposed to draw any favorable inference from the fact before the court. In cases where persons go missing that the person has been in continuous absence away from home for 7 years and has not been and heard of by persons who would naturally have received news from him then the law will create a presumption that the person is dead and hence presumption also is a generator of proof for the court.

Conclusion

Presumption has always been perplexing and conflicting in many logical inferences. Judicial recognition of such logical inference is only resumption. Courts have been now burdened with the concept of presumptions without having been properly explained and hence statutory presumptions have been mandatorily followed in many courts of law. The courts must hold in mind substantive criminal law and the substantive laws which are necessary to the strength of a conviction, and hence the necessity for this critical review on presumption. Presumption as a canon of justice needs improvisation.

23 *Dataram Singh v. State of Uttar Pradesh & anr.* Criminal Appeal No. 227/2018