6-30-1943

Evidence: Presumptions as Evidence--A Reply

George G. Olshausen

Follow this and additional works at: http://scholarship.law.berkeley.edu/californialawreview

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/californialawreview/vol31/iss3/6

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38QY2K

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
is unfair, poorly administered, and imposes undue burdens, it will yield no real revenue to the state.

Aldo P. Guidotti.

EVIDENCE: PRESUMPTIONS AS EVIDENCE—A REPLY

Recent discussion of the question whether presumptions and inferences "are" evidence prompts further comment on this problem.1

The basic issue is usually framed by saying on the one hand that presumptions "are evidence"; on the other, that they "take the place of evidence". Subsidiary questions are whether presumptions "disappear", if so, when; how "presumptions" can be weighed against "evidence", whether all presumptions should be given the same "vitality", if not, why not. An intermediate solution of the main question has also been attempted by some of the writers mentioned in note 1.2

NATURE OF PRESUMPTIONS AND INFERENCES

We shall first attempt to analyze the nature of a presumption. That will give a basis for solution of the other questions.

First, a distinction has been drawn between the general "burden of proof", and presumptions of specific facts.3 This note deals with the latter. Presumptions as to specific facts have variously been classified as "conclusive presumptions", "rebuttable presumptions", "presumptions of law", and "presumptions of fact".

Of these, the first may immediately be ruled out. All authorities agree that a so-called "conclusive presumption" is really a rule of substantive law.4 The so-called "presumption of fact" will be touched upon later. This leaves the "rebuttable presumption" and "presumption of law" which, as will presently appear, are different names for the same thing. It is the presumption proper. Inasmuch as the presumption of due care has been the subject of the latest discussion5 we shall take it as illustrative.

1 Blank v. Coffin (1942) 20 Cal. (2d) 457, 46 A. C. A. 933, 117 P. (2d) 53, Peters, P. J. dissenting at 58; Speck v. Sarver (1942) 20 Cal. (2d) 585; Traynor, J. dissenting at 590, 128 P. (2d) 16, 19, noted in (1942) 31 Calif. L. Rev. 108; Morgan, Instructing the Jury upon Presumption and Burden of Proof, (1933) 47 Harv. L. Rev. 59; McBaine, Presumptions: Are They Evidence? (1938) 26 Calif. L. Rev. 519.

2 Morgan, op. cit. supra note 1; McBaine, op. cit. supra note 1; Traynor, J., dissenting in Speck v. Sarver, supra note 1, at 590.

3 Cf. Thayer, Preliminary Treatise on Evidence (1898) 380-84.

4 Cf. 9 Wigmore, Evidence (3d ed., 1940) 292, §2492.

5 Speck v. Sarver; Note 31 Calif. L. Rev., both supra note 1.
What is meant by saying that a party to any action is presumed to have exercised due care? This question has two parts—first, what is the concrete application in a given case; second, how is it arrived at?

The application of this presumption to a concrete case, means that the specific person involved is "presumed" to have done a specific act in a careful manner. In other words the concrete application refers to a specific act of a specific person. Since the same presumption holds in every case, it is applied to each specific act of each specific person.

How does the law arrive at this "presumption" of due care with respect to any given specific act of any given specific individual? Clearly the reasoning is that people in general usually act in accord with the instinct of self-preservation and with due care for their own safety. From this it may be inferred that the specific litigant likewise generally acted with due care, and from this that he acted with due care in the particular case. That is, the habits and proclivities of human beings in general are taken as evidence of what a specific person did on a specific occasion. It is the same type of reasoning involved in permitting evidence of character or of habit to be introduced on the issue of a specific act. In fact the reasoning involved in the admission of habit evidence is precisely the same, except that it proceeds from a smaller base, and the chain of reasoning is shorter. When an individual's habits of care are introduced, they relate to his habit in doing the particular type of act which is in question in the litigation. The reasoning is that if this man generally performs this type of act in a careful manner, he probably performed the particular act carefully on the occasion in question. The reasoning is from the general to the specific, from the individual's manner of doing a certain type of act to his act in a particular instance. In the presumption of due care the reasoning is from all persons' manner of doing all acts to the individual's manner of doing a particular act. As stated, the type of reasoning is the same, though the presumption covers a much greater span.

The facts on which this reasoning is based are circumstantial evidence of the point at issue. The conclusion from them has been crystallized into a presumption. So we now have the first characteristic of a presumption: it is a conclusion from circumstantial evidence.

This circumstantial evidence need not be brought before the court. The facts are treated as common knowledge and the conclu-

---

6 See 1 WIGMORE, OP. CIT. SUPRA NOTE 4, AT 446 ET SEQ.
7 WALLIS v. SOUTHERN PACIFIC CO. (1921) 184 CAL. 662, 195 PAC. 408; BOONE v. BANK OF AMERICA (1934) 220 CAL. 93, 29 PAC. 409.
8 Cf. MCBAIN, OP. CIT. SUPRA NOTE 1, AT 529, TO THE EFFECT THAT PRESUMPTIONS ARE FOUND ON PROBABILITIES.
sion is drawn without proof of the facts themselves. In short, the facts are the subject of judicial notice.9

This gives the second feature of presumptions and allows us to formulate a definition. A presumption is the conclusion from judicially noticed circumstantial evidence.10

The underlying judicially noticed facts are not equally cogent in all presumptions, however.

That is undoubtedly the reason why it is said that some presumptions attempt to apply probabilities whereas others only try to resolve a dilemma.11

For example, the presumption of due care rests on simple reasoning. It is not weakened by any obvious circumstance tending to contradict it. But there are other presumptions of which the same cannot be said. An extreme instance are the presumptions of survivorship in a common catastrophe.12 The presumptions are based

9 THAYER, op. cit. supra note 3, recognizes this loosely, but does not follow it through. He says, at 314-15, “They are thus closely related to the subject of judicial notice; . . . It would be as true and no more so, to say that an instance of judicial notice is evidence, as to say that a presumption is evidence.”

We agree, but the last statement leads to the opposite conclusion from the one which Thayer draws from it. Judicial notice dispenses with the necessity of proof—but in all except this mechanical aspect a matter which is the subject of judicial notice has the same characteristics as formal evidence.

10 This definition is short but disregards technical distinctions between facts and evidence on the one hand; and between evidence and judicial notice on the other. A longer and slightly more accurate phrasing might be, that a presumption is the conclusion from judicially noticed facts which constitute circumstantial evidence of the point at issue.

The facts judicially noticed are, of course, always the same in each instance, as is the reasoning which leads to the conclusion. This introduces the element of fixity which gives the definition of the California Code of Civil Procedure §1959, quoted infra n. 20. This approach shows the weakness of Thayer’s criticism: “The law has no mandamus to logical faculty; it orders nobody to draw inferences—common as that mode of expression is.” (THAYER, op. cit. supra note 3, at 313-14.)

This statement is literally true, but misses the point. The law does not mandamus the logical faculty, but it adopts and crystallizes the conclusions which are made generally. In this respect the legal inference is on the same footing as the multiplication table or the rule that the sum of the squares on the side of a right triangle equals the square of the hypothenuse—except that while mathematics is an exact science, the law, being anything but that, must get along as best it can on approximations.

11 Cf. McBaine, op. cit. supra note 1, at 529.

12 CALIF. CODE CIV. PROC. (1941) §1963, “All other presumptions may be controverted. All other presumptions are satisfactory if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

“40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age and sex, according to the following rules:

First—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived;
first upon life expectancy in the absence of the catastrophe.\textsuperscript{13} This disregards the very circumstance which calls the presumption forth. Secondly, the presumption is based on the supposed relative vitality to withstand violent injury.\textsuperscript{14} This disregards the circumstances that the presumption is used only, where by hypothesis the parties died at substantially the same time. But even in such a case, where the conclusion is drawn in the face of obvious inconsistent facts the conclusion is not haphazard. It is in accordance with circumstantial evidence, even though the bearing of this evidence may be remote. In other words, there is at least an attempt to decide according to probabilities.\textsuperscript{15}

A reading of the presumptions listed in California Code of Civil Procedure, section 1963, will show that all are based on circumstantial facts of common knowledge though the chain of reasoning is more tenuous in some instances than in others.

The definition that a presumption is a conclusion from judicially noticed circumstantial evidence includes the basic features common to all presumptions. A few, however, state the conclusion drawn from the combination of facts judicially noticed, and facts proven.

Second—if both were above the age of sixty, the younger is presumed to have survived;

Third—if one be under fifteen and the other above sixty, the former is presumed to have survived;

Fourth—if both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived; if the sexes be the same, then the older;

Fifth—if one be under fifteen, or over sixty, and the other between those ages, the latter is presumed to have survived.

\textsuperscript{13} Compare the language of the Maryland statute (Md. Code [Flack, 1939] art. 35, §89): "If several persons respectively entitled to inherit from one another should, after the passage of this Act, perish in the same calamity, such as a wreck, collision, battle, conflagration, flood, earthquake, storm or accident, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship shall be presumed from the probabilities resulting from the strength, age and difference in sexes . . . "

\textsuperscript{14} Ibid.

\textsuperscript{15} For an analysis of the presumption of sanity see Davis v. United States (1895) 160 U. S. 469, 486, where it is said, "If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of laws against crime, and in most cases be unnecessary. Consequently, the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts."

The language "and in most cases be unnecessary" is another way of saying that most people are sane. That is the judicially noticed fact from which the presumption is derived.

The words following, \textit{i.e.}, "and then supplies in the first instance the required proof of capacity" are another way of saying that the presumption is given the effect of evidence.

Note the converse: a statutory presumption is unconstitutional if it does not square with matters of common knowledge, Manley v. Georgia (1939) 279 U. S. 1; Western &
Such are the presumptions of death from seven years absence, the presumption of authenticity of ancient documents, the presumption of survival in a common calamity. In these cases certain facts have to be proven first. The law then takes judicial notice of certain other supplemental facts. From the total it draws its conclusions.

"Inferences", as the term is used in California law, describes certain other fixed conclusions, drawn by the courts but not contained in any statute. So far as we have been able to ascertain no inference is based on judicial notice alone. All arise from a combination of facts proven and facts judicially noticed.

The foregoing "rebuttable presumptions" and legally fixed inferences correspond to the "presumptions of law" of the older terminology. Beyond them are countless inferences drawn in every case based on circumstantial evidence. They depend primarily on the facts proven, and do not call into operation any particular set of judicially noticed facts. They are the ordinary "inferences" defined by California Code of Civil Procedure section 1958, or the "pre-
sumptions of fact" of the older text writers.

To return to "rebuttable presumptions". We have seen that they are conclusions from circumstantial evidence. The process of bringing this evidence before the court is simplified by what is called "judicial notice". "Judicial notice" is an administrative shortcut. There follows another administrative short cut. The underlying judicially noticed facts are familiar. The process of reasoning by which they lead to a certain conclusion is familiar, as is the conclusion itself. Just as the law does not make the parties prove facts which are common knowledge, so it does not make them go through the whole rigmarole of reasoning from the evidence to the conclusion in each individual case. Instead it proceeds directly to the well known conclusion and deals with it as it would have dealt with the circumstantial evidence on which the conclusion is based. The conclusion from circumstantial evidence is substituted for the evidence itself, and thereafter is treated as if it were evidence. To criticize this substitution from the standpoint of theoretical logic or semantics, is to misconceive the process. "The life of the law has not been logic; it has been experience."

The result of experience has been that for practical purposes presumptions are evidence. As a matter of fact presumptions are treated as evidence both by authorities which do so avowedly and by authorities which say "presumptions take the place of evidence". In the first case the presumption is considered along with all other

sumption is a deduction which the law expressly directs to be made from particular facts." The type of "inference" considered in Blank v. Coffin is simply a nonstatutory presumption.

1943
evidence. In the second, the presumption is treated as evidence, but only in the absence of all other evidence. The difference is in the circumstances under which presumptions are given effect; not in the effect given to them when they are used. The differing circumstances under which the two rules recognize presumptions, leads to the topic of "disappearance".

"DISAPPEARANCE" OF PRESUMPTIONS

The question whether a presumption is evidence is usually treated as being interrelated with the question as to when a presumption "disappears". That is, classifying a presumption as evidence is thought to have the corollary that it remains as evidence throughout all stages of the case. Classifying a presumption as "taking the place of evidence" is thought to carry the corollary that the presumption "disappears" from the case when evidence is introduced.

Refinements of these two basic ideas are (a) that the presumption "disappears" if evidence is introduced by the party relying on the presumption, but not if the evidence comes from the opponent, and (b) that the presumption "disappears" if the jury believes the opponent's evidence, but not if they disbelieve it.

It is asked how the fact finder may weigh a "presumption" against "evidence". (Morgan; McBain; Traynor, J., dissenting in Speck v. Sarver, Note 31 Calif. L. Rev., all supra note 1). The answer is—precisely as he would weigh the circumstantial evidence on which the presumption is based. Cf. Peters, J., dissenting in Blank v. Coffin, supra note 1, "An inference is evidence—indirect evidence it is true, but nevertheless evidence."

We have shown that in setting up a presumption the law substitutes a conclusion for evidence and then treats the conclusion as if it were evidence. Presumptions might, therefore, be called quasi evidence. But that is an unnecessary refinement. Yet insistence upon this distinction when the law itself declines to observe it, has been the source of most of the controversy and confusion on this subject. When the law uses a presumption as a shorthand device for the evidence on which the presumption is based, from then on the presumption is evidence for all purposes. To argue that because of the theoretical distinction between evidence and presumptions they should have differing legal consequences is to reason backwards from a point which the law has discarded.

To say that in the absence of any other evidence the trier of facts must find in accordance with the presumption is to make the presumption operate as evidence. It becomes the legally sufficient basis for a finding of fact. Cf. Thayer, supra note 3, at 576: "A presumption . . . may be called a substitute for evidence and even 'evidence'—in the sense that it counts at the outset, for evidence enough to make a prima facie case." In this respect it is precisely the same as judicial notice, but is applied only where no other kind of evidence has been introduced.


See sources cited in note 1, supra. This suggestion seems unworkable. It leads right back to the original problem instead of solving it. The presumption is said to "disappear" if the jury disbelieves the opponent's evidence. Upon what basis are they authorized to disbelieve? Evidence may be disbelieved on two grounds: (a) internal weaknesses; (b) other evidence. If the presumption is evidence, it is in itself legal ground for disbelieving the opponent's evidence. On the other hand, if the presumption is not evidence the opponent's evidence can be disbelieved only on the basis of internal
But if all presumptions are evidence a different explanation is necessary. Once that view is accepted, the rules as to “survival” or “disappearance” of presumptions take shape as rules of admission and exclusion of evidence. Inasmuch as presumptions come before the jury only through the judge’s instructions, the ordinary mechanics of sustaining objections or striking out answers are not brought into play.

Exclusions of presumptions rests on two principles: (1) secondary evidence, (2) remoteness.

The authorities seem in agreement to the extent that a presumption is excluded if direct evidence is produced upon the issue in question. They differ as to the precise point at which this rule comes into operation.

A rule which excludes a presumption when direct evidence is introduced treats the underlying circumstantial evidence as secondary, and direct evidence as primary. This follows the same principle as the rule excluding habit evidence where eye-witness testimony has been introduced.29

We now have the answer to the question: “What manner of evidence is that that loses its force upon the production of other evidence?” The answer is, secondary evidence.

The two main rules as to the “disappearance” or “survival” of presumptions are then merely two different rules as to the point where the secondary evidence becomes inadmissible. Under one rule, the exclusion occurs upon the introduction of any direct testimony. Under the other rule, the secondary evidence is held inadmissible when primary (that is, direct) evidence is introduced by the same side which relies on the secondary evidence (presumption). The objections to the first rule are generally recognized: it eliminates the presumption, even where the trier of fact disbelieves the direct evidence.30 There are, however, no logical objections to either rule. It becomes a question of policy, at what point the law will permit the circumstantial evidence to be used.31

The second principle of exclusion is that of remoteness. This

impeachment. This difference may have some weight with a jury; in testing the sufficiency of evidence on appeal it can be decisive.

29 Boone v. Bank of America (1934) 220 Cal. 93, 29 P.(2d) 409.

30 Traynor, J. in Speck v. Sarver, supra note 1, at 590, 128 P.(2d) at 19. The “eye-witness” testimony may be untrue, first in that the witness may not have been an eyewitness at all, second if he was actually an eyewitness, his account may be intentionally or unintentionally incorrect.

31 Boone v. Bank of America, supra note 29, is not clear on the point whether habit evidence is excluded by any direct evidence or only by direct evidence offered by the party relying on the habit evidence. In general circumstantial evidence is treated as primary.
depends upon the policy as to when a presumption should be made admissible.

It has been suggested that perhaps not all presumptions should have equal "vitality" or "tenacity". The concrete meaning of these expressions is that the same primary evidence may exclude some presumptions but not others. Thus we have the rule that the statutory presumptions are excluded only by evidence from the side which invokes them. On the other hand the non-statutory presumptions ("inferences") are excluded even by the opponent's evidence provided the latter is "clear, positive, uncontradicted . . . and not subject to doubt". This is opponent's evidence buttressed by epithets but opponent's evidence nonetheless. Its truth is not vouched by the party relying on the presumption, yet it is sufficient to exclude the presumption.

In short, some presumptions are rendered inadmissible by weaker evidence than is required to exclude others.

Under California decisions the distinction is quite mechanical; if the presumption is enacted by statute, it is excluded only by the proponent's primary evidence; if set up by judicial decision, it is excluded by the proponent's primary evidence and likewise by the opponent's evidence, if the latter meets certain tests.

It may be suggested, however, that the decisions have a better rationale.

A nonstatutory presumption like that of scope of employment depends on a more tenuous chain of reasoning than most of the statutory presumptions. For instance, the presumption of due care rests ultimately on the instinct of self-preservation, and from the resulting circumstance that every sane person will almost always make at least some feeble attempt to take care of himself. No such strong instinct stands in the way of an agent using the principal's vehicle for an isolated joy-ride or an errand of his own. There is much more room for facts which will defeat the deductive reasoning by which the presumption is reached. The bearing of the judicially noticed facts upon the ultimate issue is more remote.

Since the secondary evidence is weaker, it is more readily excluded.

This is probably the principle which runs through the rules as to "disappearance" of presumption. True, its application is very

---

82 Peters, P. J., dissenting in Blank v. Coffin, supra note 1. The supreme court's opinion in the same case says, at 461: "If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved the court must instruct the jury that the nonexistence of the fact [supported by the presumption] has been established as a matter of law."

83 What has already been said about some of the more far-fetched statutory presumptions indicates that this statement is a rough generalization.
approximate. But it represents the phenomenon found so often in
the law: an attempt to apply a workable general rule to complex
and varied facts. In this case the principle is that the more remote
the bearing of the underlying facts, the weaker the direct evidence
required to exclude the presumption.34

CONCLUSION

Presumptions are a short cut for standard inferences from judi-
cially noticed evidence. For all purposes of the law they are evidence.
They are treated as secondary to direct evidence, and are admitted
and excluded according to the principles of primary and secondary
evidence. Presumptions are more readily excluded where the bear-
ing of the facts on which they rest is more remote.

George G. Olshausen*

Notes and Recent Decisions

ADOPTION: VALIDITY OF DECREES AWARDED WITHOUT NOTICE TO NATURAL
PARENTS.

In Estate of Hampton, an illegitimate child of the testatrix filed oppo-
sition to the probate of her mother’s will. The proponents of the will con-
tended that since she had been adopted by a family in Kansas under Kansas
adoption statutes she was not an “interested party” and therefore could not
contest the will. The court ruled that the Kansas statutes were unconstitu-
tional; the adoption a nullity, and that she could, therefore, contest the will
as a pretermitted heir.2

Section 380 of the California Probate Code provides that any interested
person may contest the validity of a will at any time within six months after
probate. Whether a person is “interested” is a question of law.3 If the Kan-
sas adoption proceeding were valid, the child of the testatrix was not an
interested person and hence could not contest the will. Section 257 of the
Probate Code provides, “... an adopted child does not succeed to the estate

*Member of California Bar.

34 This follows a pattern similar to that of the California rule recognizing degrees
of secondary evidence.

1 (1942) 55 Cal. App. (2d) 543, 131 P. (2d) 565, hr'g den., Jan. 15, 1943, Gibson,
2 CAL. PROB. CODE (1941) §90, “When a testator omits to provide in his will for any
of his children, or for the issue of any deceased child, whether born before or after the
making of the will or before or after the death of the testator, and such child or issue
are unprovided for by any settlement, and have not had an equal proportion of the
testator’s property bestowed on them by way of advancement, unless it appears from
the will that such omission was intentional, such child or issue succeeds to the same
share in the estate of the testator as if he had died intestate.”
3 Estate of Land (1913) 166 Cal. 538, 137 Pac. 246; Estate of Nelson (1923) 191
Cal. 280, 216 Pac. 368.