Committee on Judiciary
Reference Paper

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"Disputable Presumptions and Prima Facie Evidence Provisions"
(November 1973)
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I. INTRODUCTION

This paper examines the use and legal function of disputable presumptions and prima facie evidence provisions in Oregon statutory and case law. The purpose of the paper is to provide the Committee on Judiciary with a summary of the issues and main points of law that are important to consider in using such provisions in drafting statutes.

II. DEFINITION AND CLASSIFICATION

"A presumption is a deduction which the law expressly directs to be made from particular facts." (ORS 41.340).

"All presumptions other than conclusive presumptions are satisfactory, unless overcome. They are disputable presumptions and may be controverted by other evidence, direct or indirect, but unless so overcome, the jury is bound to find according to the presumption." (ORS 41.360).

The standard jury instruction on the statutory disputable presumption as its effect has been interpreted by the Oregon Supreme Court is as follows:

> "The law provides for certain disputable presumptions which are to be considered as evidence.
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> "A presumption is a deduction which the law expressly directs to be made from particular facts

and is to be considered by you along with the other evidence. However, since these presumptions are disputable presumptions only, they may be outweighed or equalled by other evidence. Unless outweighed or equalled, however, they are to be accepted by you as true." Oregon Jury Instructions for Criminal Cases, Instruction No. 2.02.

A presumption is one of two kinds of indirect evidence; the other kind is an inference. (ORS 41.310).

"An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." (ORS 41.320).

Prima facie evidence has been defined as "such evidence as in judgment of law is sufficient to establish the fact, and, if not refuted, remains sufficient for the purpose." Millar v. Semler, 137 Or 610, 613, 2 P2d 233, 3 P2d 987 (1931); In Re Estate of Thomberg, 186 Or 570, 577, 208 P2d 349 (1949). This legal effect of prima facie evidence, under this definition at least, appears to be the same as a disputable presumption. The Oregon Supreme Court employed an earlier statute regarding the effect of a disputable presumption (now ORS 41.360) to determine the correctness of an instruction as to prima facie evidence of intent to defraud in a prosecution for uttering a check without sufficient funds. The Court concluded that the provision in the criminal statute that "as against the maker or drawer thereof, the making,

drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds" was "tantamount to a presumption." State v. Robinson, 120 Or 508, 516, 252 P 951 (1927).

III. PURPOSE AND FUNCTION OF PRESUMPTIONS

Courts and legal scholars for many years have debated over the purpose and function of presumptions. Thayer and Wigmore and the American Law Institute's Model Code of Evidence take the view that a presumption is a preliminary assumption of fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. Morgan and McCormick argue that a presumption should shift the burden of proof to the adverse party. A third view espoused is that the Thayer-Wigmore view is right as to some presumptions, but that the Morgan-McCormick view is correct as to others. In other words, that some presumptions affect the burden of producing evidence, while others affect the burden of proof.

The Oregon Supreme Court has interpreted ORS 41.360 as applying only where no evidence opposing the presumption has been adduced and as binding the jury only under such circumstances. The Court in U. S. National Bank v. Lloyd's, 239 Or 298, 382 P2d 851, 396 P2d 765 (1964), states: "On this view, if there were some evidence opposing the presumption,

the jury, taking into consideration all of the evidence introduced by both parties, would be free to decide either way. Were the evidence in equipoise, the jury would be bound to find for the defendant inasmuch as plaintiff would not have met his burden of proof." (At 324). The word "overcome" as used in the statute is construed to mean "equal" or "outweigh." See also, Hansen v. Oregon-Wash. R. & N. Co., 97 Or 190, 188 P 963, 191 P 655 (1920).

IV. CONSTITUTIONALITY OF CRIMINAL PRESUMPTIONS

Five recent decisions of the U. S. Supreme Court have considered the validity under the Due Process Clause of criminal presumptions and inferences. Barnes v. United States, 13 Cr L 3153 (June 1973); Turner v. United States, 396 US 398 (1970); Leary v. United States, 395 US 6 (1969); United States v. Romano, 382 US 136 (1965); and United States v. Gainey, 380 US 63 (1965).

In Barnes the Court approved a trial court jury instruction that "possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference, and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." The Court's majority opinion held that the instruction satisfied due process standards because it only permitted the inference of guilt from the unexplained possession of recently stolen property because the evidence

established that the defendant possessed recently stolen Treasury checks payable to persons he didn't know, and it provided no plausible explanation for such possession consistent with innocence. Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that the defendant knew the checks were stolen.

In Gainey, the Court sustained the constitutionality of an instruction tracking a statute which authorized the jury to infer from defendant's unexplained presence at an illegal still that he was carrying on "the business of a distiller or rectifier without having given bond as required by law." Relying on the holding of Tot v. United States, 319 US 463 (1942), that there must be "a rational connection between the facts proved and the fact presumed," the Court upheld the inference on the basis of the comprehensive nature of the "carrying on" offense and the common knowledge that illegal stills are secluded, secret operations.

The following Term the Court determined, however, that presence at an illegal still could not support the inference that the defendant was in possession, custody or control of the still, a narrower offense. In the Romano case the Court stated that "presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt - the inference of the one from the proof of the other is arbitrary."

The Court, in Leary, considered a challenge to a statutory inference that possession of marihuana, unless satisfactorily explained, was sufficient to prove that the defendant knew that the grass had been illegally imported into the United States. The Court concluded that in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, the inference did not meet the standards set by Tot, Gainey and Romano. The Leary Court stated that an inference is "'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

Then, in the Turner case, the Court considered the constitutionality of instructing the jury that it may infer from possession of heroin and cocaine that the defendant knew that the drugs had been illegally imported. The Court noted that Leary reserved the question of whether the more-likely-than-not or the reasonable doubt standard controlled in criminal cases, that is, whether a criminal presumption must satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends on its use. The Court in Turner held that the inference with regard to heroin was valid judged by either standard. With

respect to cocaine, the inference failed to satisfy even the "more-likely-than-not" standard.

In Barnes the Court concluded that "the teaching of the foregoing cases is not altogether clear." That to the extent that the "rational connection," "more-likely-than-not" and "reasonable doubt" standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. "What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury is sufficient to support conviction satisfies the reasonable doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process."

The Oregon Supreme Court incorporated the Tot "rational connection" requirement in this 1960 statement: "Presumptions, whether conclusive or disputable, are generally defined as inferences required by a rule of law to be drawn as to the existence of one fact from the existence of some other established basic fact. They may be created by statute if there is some justification of public policy, or a rational connection between the fact proved and the fact presumed. But statutes declaring certain facts to be even prima facie or rebuttable evidence of other facts can violate constitutional

guarantees of due process where there is no rational connection between the facts proved and the ultimate fact presumed." State Land Board v. United States, 222 Or 40, 50, 352 P2d 539 (1960).