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## Conclusive Presumptions in West Virginia

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## STUDENT NOTE

### CONCLUSIVE PRESUMPTIONS IN WEST VIRGINIA

Presumptions, as might be expected, have been appearing and disappearing throughout the history of evidence. Much confusion has attended the use of the word, and there has been no less confusion about the kinds of presumptions, be they presumptions of law, presumptions of fact, conclusive presumptions or whatever name courts and writers ascribe to them. The conclusive presumption is an especially troublesome creature, some writers denying its existence while others recognize it but devote very little time to it. It is the purpose here, in a humble way, to look at its use in this state and to determine if in fact it does exist.

Whenever the term presumption is used, it describes a relationship between one fact or group of facts and another fact or group of facts.<sup>1</sup> It is the assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group

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<sup>1</sup> State v. Dodds, 54 W. Va. 289, 46 S.E. 228 (1904); State v. Heaton, 23 W. Va. 773 (1883); 1 MORGAN, BASIC PROBLEMS OF EVIDENCE § 30 (1954).

of facts found or otherwise established in the action.<sup>2</sup> Call the one fact, *A*, and the other, the presumed fact, *B*. Presumptions are commonly used in two situations: (1) when fact *A* is established in an action, the existence of fact *B* must be assumed,<sup>3</sup> and (2) when fact *A* is established in the action, the existence of fact *B* may be inferred by the application of ordinary rules of logic.<sup>4</sup> The basic fact, or fact *A*, may be established by the pleadings, by judicial notice, by stipulation of the parties or by a finding supported by the evidence.

Generally, courts have treated presumptions in different ways according to the meaning they place on them and the way in which they apply them. Mr. Morgan lists the meanings that courts attach to them in four categories.<sup>5</sup>

1. If the court means that when *A* is established in the action, the existence of *B* may be deduced by the operation of ordinary rules of reasoning, it sometimes says that the trier of fact may presume the existence of *B* if it finds *A*. The presumption is said to be one of fact, and careful judges and writers insist that the proper term is "inference" rather than "presumption".

2. If the court means that when *A* is established, it is for all purposes in the case the legal equivalent of *B*, it frequently declares that the existence of *B* is conclusively presumed. For example, if it is established that *D* is under seven years of age, it is conclusively presumed that he is incapable of committing a felony. This is merely a way of expressing the rule of substantive law that a person under seven years of age cannot be legally convicted of a felony.

3. If the court means that if *A* is established, the trier of fact is permitted, but not compelled, to find *B*, even though *A* would not in the opinion of the court form the basis of a deduction that *B* exists if the ordinary rules of reasoning in the light of human experience were used, it is obvious that the trier is being allowed to give an artificial effect to *A*. This is the theory upon which, as some commentators insist, the doctrine of *res ipsa loquitur* is based. They say that it is a justified presumption because the defendant in the particular situation has peculiar knowledge, or peculiar means of access to evidence of the pertinent fact. At times a legislature declares that when *A* is established the trier may find *B*, even though

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<sup>2</sup> UNIFORM RULE OF EVIDENCE 13.

<sup>3</sup> 9 WIGMORE, EVIDENCE § 2490 (3d ed. 1940).

<sup>4</sup> MCCORMICK, EVIDENCE § 308 (1954).

<sup>5</sup> Morgan, *Foreword*, in MODEL CODE OF EVIDENCE 52 (1942).

the judicial decisions in the jurisdiction have theretofore declared that a trier could not justifiably deduce *B* from the existence of *A*. In these situations the right of a party to have the jury make the inference persists unless and until evidence has been received which would require a directed verdict of the nonexistence of *B*.

4. Thayer, Wigmore, the American Law Institute, and commentators generally have argued, and many courts have agreed that the term "presumption" should be used only to mean that when *A* is established in the action, the existence of *B* must be assumed unless and until a specified condition is fulfilled. All courts agree that "presumption" is properly used in this situation, but there is wide disagreement as to the terms of the condition.

Although courts have treated presumptions in different ways their reasons for creating them are principally the same. There are many situations which naturally require courts to declare that when the basic fact *A* is found then fact *B* must be assumed. Although the reasons are various all presumptions find life in them.<sup>6</sup>

1. Some presumptions are created to expedite the trial by making unnecessary the introduction of evidence upon issues raised by the pleadings which are not likely to be seriously litigated. So, where courts put upon the prosecution the burden of persuading the jury of defendant's sanity beyond a reasonable doubt, the prosecution has the benefit of a presumption of the defendant's sanity.<sup>7</sup>

2. Presumptions are created to avoid a procedural impasse where evidence of the existence or nonexistence of the presumed fact is lacking. It is now generally held that unexplained absence for seven years and lack of news of the absentee by those who would normally have heard from him were he alive raise a presumption of his death.<sup>8</sup>

3. Presumptions are created because of the impossibility of securing evidence as to the existence or nonexistence of an essential fact. Where a testator and his beneficiary die in a common disaster, it is impossible to secure evidence tending to show which predeceased the other.<sup>9</sup>

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<sup>6</sup> Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588 (1955).

<sup>7</sup> Wright v. Wright, 78 W. Va. 57, 88 S.E. 606 (1916); Hielt v. Shull, 36 W. Va. 563, 15 S.E. 146 (1892).

<sup>8</sup> Fleisher v. Dep't of Veterans Affairs, 138 W. Va. 765, 77 S.E.2d 890 (1953).

<sup>9</sup> W. VA. CODE ch. 42, art. 5, § 1 (Michie 1955).

4. A large proportion of presumptions are based wholly or partly on probability. That is, when fact *A* is proved the existence of fact *B* is so probable that courts may assume its truth. Where a letter bearing the correct address and properly stamped is mailed, then it may be assumed that it was received because of the great probability that such was the case.<sup>10</sup>

5. Presumptions are created to require the party who has peculiar means of access to the facts to first produce evidence of them. For example, where freight is delivered in good order to an initial carrier and is delivered in bad order to the consignee by the terminal carrier, although it may have been transported over the lines of several connecting carriers, there is a presumption that the damage was done by the terminal carrier. As between the carriers and the consignee, the last carrier has peculiar means of access to the evidence of the facts.<sup>11</sup>

6. Where in the opinion of the court or legislature the existence of the basic fact makes socially desirable the legal results which will follow if the presumed fact also exists, the accomplishment of the desired end may be facilitated by the creation of a presumption. For example, the presumption of possession or use of realty for a long period of time is evidence of a lost grant.<sup>12</sup>

Many presumptions rest upon a combination of two or more of these reasons in that when the basic fact is found to exist, the assumed fact is highly probable; it may be almost impossible to produce competent and convincing evidence; and the assumed fact may be socially desirable.<sup>13</sup>

The effect that courts have given to the use of presumptions is still another thing. At least eight different views have been expressed in judicial opinions.<sup>14</sup> First, the compulsory assumption of the presumed fact disappears whenever evidence has been introduced which would justify a jury in finding the nonexistence of the presumed fact. Whether the judge or jury believes or disbelieves the evidence is immaterial. The issue is now to be determined disregarding the presumption completely.<sup>15</sup> Second, the assumption

<sup>10</sup> *Antonowich v. Home Life Ins. Co.*, 116 W. Va. 155, 179 S.E. 601 (1935); W. VA. CODE ch. 48, art. 2, § 2 (Michie 1955).

<sup>11</sup> *Mulroy v. Co-operative Transit Co.*, 95 S.E.2d 63 (W. Va. 1956).

<sup>12</sup> W. VA. CODE ch. 55, art. 2, § 1 (Michie 1955).

<sup>13</sup> *Dwight v. Hazlett*, 107 W. Va. 192, 147 S.E. 877 (1929); W. VA. CODE ch. 48, art. 2, § 2 (Michie 1955).

<sup>14</sup> 1 MORGAN, BASIC PROBLEMS OF EVIDENCE § 30 (1957).

<sup>15</sup> *Dwight v. Hazlett*, *supra* note 13.

vanishes upon the introduction of such evidence unless the jury positively disbelieves the evidence. Third, the assumption disappears only if the jury positively believes the evidence. Fourth, the assumption continues until the introduction of "substantial" evidence of the nonexistence of the presumed fact. The cases do not clearly show what is meant by "substantial", but it certainly means more than evidence which would merely justify a finding. Fifth, the assumption continues until the evidence convinces the jury that the nonexistence of the presumed fact is at least as probable as its existence. It is sometimes said that the evidence must balance the presumption. Sixth, the assumption continues until the evidence convinces the jury that the nonexistence of the presumed fact is more probable than its existence. In other words, the presumption puts upon the party denying the presumed fact the burden of persuasion as well as the burden of producing evidence to rebut the presumption. Seventh, where a presumption is created because the opposing party has peculiar knowledge concerning facts for determining the existence or nonexistence of the presumed fact, the assumption persists until the jury is convinced that facts are shown from which reasonable minds could find against the existence of the presumed fact. Eighth, the presumption operates as evidence of the existence of the presumed fact, and this is so regardless of the evidence of its existence.

Although the first, third and seventh effects have found rare application, the others considered have been applied often according to the type of presumption with which the courts have dealt. In most cases it is difficult to distinguish which type of presumption is being applied and just what effect the court applying it is giving to it. In this respect most courts have applied a rule to fit the particular case instead of developing a rule of presumptions that will apply generally with some certainty.<sup>16</sup>

It is held in this state that presumptions, whether they are presumptions of law or fact, are not evidence of a fact, but purely a conclusion, having no probative force, and are designed only to sustain the burden of proof until evidence is introduced tending to overcome the presumption.<sup>17</sup> It does not shift the burden of proof, and with the introduction of evidence it loses entirely its

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<sup>16</sup> Gausewitz, *Presumptions in a One Rule World*, 5 VAND. L. REV. 324 (1952).

<sup>17</sup> *Laphew v. Consolidated Bus Lines*, 133 W. Va. 291, 55 S.E.2d 881 (1949); *Jenkins v. Spittler*, 120 W. Va. 514, 199 S.E. 368 (1938).

legal force. Only the basic facts remain to be considered by the trier along with the other evidence.<sup>18</sup> It is sometimes said, and rightly so, that the presumption shifts the burden of going forward with the evidence but does not shift the burden of persuasion.<sup>19</sup>

The West Virginia court has held that there are two kinds of presumptions, legal and artificial, or natural.<sup>20</sup> The legal and artificial presumption is commonly called a presumption of law, and derives from the law a technical or artificial operation and effect beyond mere natural tendency to produce belief and operates without applying the process of reasoning on which it is founded to the circumstances of the particular case. The natural presumptions, or more commonly called presumptions of fact, operate by their own efficacy and are inferred by the application of ordinary rules of logic.<sup>21</sup> The presumption of fact may be rebutted by the introduction of evidence of facts to the contrary, if such facts are established in the action.<sup>22</sup> On the other hand, a presumption of law in this state is irrebuttable.<sup>23</sup> That is, once the basic fact has been established in the action, the law requires that the assumed fact be taken as true, and the party resisting the presumption may not introduce evidence to rebut it. This view is inconsistent with the general rule that presumptions of law may be either rebuttable or conclusive. Generally, a presumption of law is one in which the law requires that a certain assumed fact must be drawn from the existence of a certain established fact in the absence of direct evidence on the matter. If it is rebuttable, then the opposing party must establish facts which show the nonexistence of the presumed fact, and if this is done the presumption disappears and the trier is left with the evidence otherwise established in the action. If the presumption of law is conclusive, then the law still requires that a certain fact be assumed from the existence of a certain established fact, but the party opposing the assumption is precluded from introducing any evidence to rebut the assumed fact.

The distinguishing feature between a presumption of law and a presumption of fact is that in the former the law requires that

<sup>18</sup> 1 JONES, EVIDENCE § 30 (2d ed. 1952).

<sup>19</sup> THAYER, PRELIMINARY TREATISE ON EVIDENCE § 313 (1898).

<sup>20</sup> Goshorn v. Snodgrass, 17 W. Va. 717 (1881).

<sup>21</sup> First Nat'l Bank v. Tri-State Equip. Co., 108 W. Va. 686, 152 S.E. 635 (1930); Sadler v. Kennedy, 11 W. Va. 187 (1877).

<sup>22</sup> Dwight v. Hazlett, 107 W. Va. 192, 147 S.E. 877 (1929); Hunt v. Hunt, 91 W. Va. 685, 114 S.E. 283 (1922); Hamilton v. Steele, 22 W. Va. 348 (1883).

<sup>23</sup> State v. Toley, 181 W. Va. 326, 47 S.E.2d 40 (1948); Holly v. Purity Baking Co., 128 W. Va. 531, 37 S.E.2d 729 (1946).

the trier assume the existence of a presumed fact, while in the latter the trier is under no duty created by a rule of law to assume the presumed fact. The presumption of fact, as Mr. Morgan contends, may more properly be called an "inference" rather than a "presumption".<sup>24</sup>

Many courts and writers deny the existence of such a thing as a conclusive presumption. As Wigmore has stated,

"In strictness, there cannot be such a thing as a 'conclusive presumption'. Whenever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence. The term has no place in the principles of evidence and should be discarded."<sup>25</sup>

This view seems to carry much weight because it is clear that when a court declares that a presumption is irrebuttable it is either creating a rule of substantive law or stating a previously created rule of substantive law. When it declares that the burden is on a party to prove a material fact, his failure, without proper excuse, to produce an important witness to the fact, raises the conclusive presumption that such witness could not prove it,<sup>26</sup> the court is merely stating the rule of substantive law that a party will not be aided by facts which he cannot prove by witnesses, when such party has that burden of proof. Also when the court states that the failure of a party to present a fact necessary to his case, when to offer that fact in evidence is within the power of such party, must be taken as conclusive that such fact does not exist<sup>27</sup> is to state the rule of substantive law that a party must, if it is within his power to do so, introduce any fact necessary to his case in order that he may rely on such fact. It may be said that each time a fact is conclusively presumed the same fact in the particular circumstance is a rule of substantive law.<sup>28</sup>

<sup>24</sup> 1 MORGAN, BASIC PROBLEMS OF EVIDENCE § 33 (1957).

<sup>25</sup> 9 WIGMORE, EVIDENCE § 2492. It may well be urged that all of these so-called conclusive presumptions of law be more properly described as substantive rules of law. 1 JONES, EVIDENCE § 23.

<sup>26</sup> Vandervort v. Fouse, 52 W. Va. 214, 43 S.E. 112 (1902).

<sup>27</sup> Despard v. Percy, 65 W. Va. 140, 63 S.E. 871 (1909).

<sup>28</sup> Moundville, B. & W. Ry. v. Wilson, 52 W. Va. 647, 44 S.E. 169 (1902); Pusey v. Gardner, 21 W. Va. 460 (1883).

As stated before, presumptions are not evidence of a fact, but this statement loses some of its force when one considers it in the light of a conclusive presumption. If the court says that if the basic fact, *A*, is established in the action then the presumed fact, *B*, must be conclusively presumed, then the presumed fact, *B*, does in fact become evidence of the fact and the court will so instruct the jury.<sup>29</sup> If this view is taken we return to the situation where there is no conclusive presumption but rather a rule of substantive law. The rule cannot be contradicted by evidence but rather rests on grounds of policy so compelling in character as to override the generally fundamental requirement of law that fact questions must be resolved according to proof. It therefore seems to be acceptable for the court to use the term "conclusive presumption" so long as it is clearly understood that it is really creating or preserving a rule of substantive law.

In conclusion, it is suggested that some basic rules with respect to the use of presumptions, as well as inferences should be formulated. The following rules are respectfully submitted with full knowledge that all situations are unique and the task of applying a set rule to all circumstances will prove to be an impossible task even though it may be a very desirable end.

1. The presumption of fact should henceforth be termed an "inference" in all situations in which the court means that if the basic fact, *A*, is established in the action, the existence of the assumed fact, *B*, *may* be deduced by the operation of ordinary rules of reasoning, in other words, where the court says that the trier of fact *may* presume the existence of *B* if it finds *A*. Such "inference" should remain until it is met and overcome by evidence which would justify a jury in finding the nonexistence of the inferred fact. The issue should then be determined disregarding the "inference" completely.

2. The term "presumption of law" should henceforth be used only to mean that when the basic fact, *A*, is established in the action, the existence of *B* *must* be assumed. Such "presumption of law" should remain until the evidence to the contrary convinces the jury that the nonexistence of the presumed fact is at least as probable as its existence, or where the presumption is created because the opposing party has peculiar knowledge concerning facts determining the existence or nonexistence of the presumption, the assumption

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<sup>29</sup> State v. Reppert, 132 W. Va. 675, 52 S.E.2d 820 (1949).

should persist until the jury are convinced that facts are shown from which reasonable minds could find against the existence of the presumed facts. If the assumed fact is rebutted then it should, just as in the case of an "inference", disappear. The "presumption" should function only as a procedural device of going forward with the evidence which would dictate a decision only where there is an entire lack of competent evidence to contradict it, but the moment substantial, countervailing evidence appears from any source, the presumption should cease to have any function. The presumption should merely shift the burden of going forward with the evidence but should not shift the burden of persuasion.

3. The court should in every case avoid the use of the term "conclusive presumption". If the end accomplished is no more than to declare a rule of substantive law, which is beyond the province of the trier, then it should not be reached through the fiction of presumption, but rather by way of a positive statement by the court declaring or preserving a substantive common law rule.

J. L. R.

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### CASE COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS—EVIDENCE OF PRIOR CONVICTION.—*D* was convicted of first degree murder in the state court and sentenced to death. Under Pennsylvania law, the jury has the duty of determining the penalty when they find a defendant guilty of first degree murder. The court allowed the admission of evidence of a prior conviction, instructing the jury that such evidence was to be used solely for the purpose of assessing the penalty. This evidence was allowed before the jury determined the guilt or innocence of *D*. *D* contends that the introduction of such evidence before the verdict on the theory that the jury will disregard this knowledge in determining his guilt, and yet use it later in determining his penalty is a denial of due process under the fourteenth amendment. *Held*, that the fourteenth amendment guarantees no particular form of procedure in state criminal trials, and the states should have the widest latitude in administering their own systems of justice; consequently, Pennsylvania procedure, permitting the introduction of prior convictions for the sole purpose of enabling the jury to assess the proper penalty, did not deprive *D* of due process of law. *United States ex rel. Thompson v. Price*, 258 F.2d 918 (3d Cir. 1958).