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CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

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THE PRESUMPTION OF INNOCENCE; ITS APPLICABILITY TO PROSECUTIONS FOR SPEEDING VIOLATIONS

The "presumption of innocence", although the term may be of doubtful meaning,[1] is a keystone in the American theory of criminal law.[2] The principle that an accused is presumed innocent until proved guilty beyond a reasonable doubt is applied in all criminal cases,[3] both misdemeanor and felony,[4] and has also been applied in cases involving traffic violations.[5] There appears to be a uniformity in the effect of this presumption, whether it is created by statute, or exists merely by force of the common law.[6]

[1] Most commentators contend that "presumption of innocence" is a misnomer, because it is not based on any logical inference. See Chaffe, *The Progress of the Law*, 35 HARV. L. REV. 302, 315 (1922). ("There is no probability that the man indicted by grand jury is innocent").

The use of the term "presumption of innocence" has further been criticized as being a fiction and only another way of stating that the burden of proof is on the prosecution. See 9 WIGMORE, EVIDENCE § 2511 (3rd ed. 1940).

However, although the term may be only a fiction, courts still recognize the presumption of innocence as having meaning, and for purposes of this article it will be treated in the manner in which it is considered in the majority of jurisdictions.

[2] UNDERHILL, CRIMINAL EVIDENCE § 41 (4th ed. 1935).

[3] Hammond v. United States, 127 F.2d 752, 753 (D.C. Cir. 1942) (Attempted rape); United States v. Abda, 32 F. Supp. 23, 25 (M.D.Pa. 1940) (Sale of rubbing alcohol to drink); Turner v. State, 238 Ala. 352, 355, 191 So. 396, 398 (1939) (Assault with intent to commit murder); Hawes v. State, 88 Ala. 37, 72, 7 So. 302, 314 (1890) (Murder); State v. Lutz, 113 N.E.2d 757, 761 (Ohio 1953) (Assault and battery).

[4] United States v. Commercial Creamery Co., 43 F. Supp. 714, 715 (E.D. Wash. 1942) (Shipping rotten eggs in interstate commerce in violation of Federal Food, Drug and Cosmetic Act); Vandwenter v. State, 38 Neb. 592, 595, 57 N.W. 397, 398 (1894) (Assault and battery—here classed as a misdemeanor); Fuller v. State, 12 Ohio St. 433, 434 (1861) (Selling liquor in violation of state law. "... [I]n *all* cases where a party stands charged with a crime or *offense*, his innocence is presumed, andss a burden of proof is on the prosecutor, unle the different rule has been expressly provided by statutes.") (Emphasis added).

Proof of guilt beyond reasonable doubt is also required in trials for misdemeanors. Wasden v. State, 18 Ga. 264 (1855) (Adultery and fornication. The trial court was reversed for qualifying its instruction as to reasonable doubt by adding that in lesser grades of offenses such as misdemeanors the rule was somewhat relaxed); Stewart v. State, 44 Ind. 237 (1873) (Selling liquor in violation of state law. "... [I]n criminal and misdemeanor cases, the evidence must be beyond a reasonable doubt to support a conviction".); Sowder v. Commonwealth, 71 Ky. (8 Bush) 432 (1871).

[5] McCarthy v. Cincinnati, 27 Ohio N.P. (n.s.) 362 (1928) (conviction for parking violation reversed, correspondence between the license number of the ticketed car and the license number issued to the defendant held insufficient to overcome the presumption of innocence).

See also Burke v. Cincinnati, 27 Ohio N.P. (n.s.) 589 (1930) (Distinguished from *McCarthy* case, *supra*, in that here ownership of the ticketed car was admitted).

[6] "The presumption of innocence is founded upon the first principles of justice; it is the same pre-

In its application the presumption has been variously interpreted. In 1895 the Supreme Court of the United States held that the presumption was evidence in favor of the accused, remaining with him throughout his trial, and was to be weighed with the other evidence in the jury's deliberations.[7] This view was later repudiated; the Supreme Court[8] and the majority of the state courts[9] now adhere to the rule that the presumption compels the prosecution to assume the burden of proving guilt beyond a reasonable doubt[10] and that when this burden is met the presumption is removed from the case. It is well established that direct evidence proving beyond reasonable doubt all the essential elements of the crime charged will overcome the presumption.[11] However, when the prose-

sumption of law which obtained in behalf of the accused at common law". Monaghan v. State, 10 Okla. Crim. 89, 97, 134 Pac. 77, 80 (1913); Culpepper v. State, 4 Okla. Crim. 103, 111 Pac. 679 (1910).

[7] "This presumption on the one hand, supplemented by any other evidence he (defendant) may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is drawn." Coffin v. United States, 156 U.S. 432, 459 (1895).

[8] Holt v. United States, 218 U.S. 245 (1910); Agnew v. United States, 165 U.S. 36 (1897).

In *Agnew v. United States* the Court sustained the trial court's giving an instruction that the presumption remains with the defendant until such time when the jury is satisfied of guilt beyond reasonable doubt, instead of the requested instruction that the presumption of innocence was to be regarded as evidence by the jury. *Id.* at 51.

In *Holt v. United States*, citing the *Agnew* case, this view was made more explicit when the Court approved the trial court's refusal to instruct that the presumption was evidence in the accused's favor, and its instructing that "the evidence must *overcome* the legal presumption of innocence". (Emphasis added). *Id.* at 253.

See also Nimerick v. United States, 118 F.2d 464 (2d Cir. 1941) (held not error to refuse instruction that presumption was evidence in defendant's favor).

See also 9 WIGMORE, EVIDENCE § 2511, at 407 (3d ed. 1940) ("But this term has been subjected to two special fallacies, namely . . . , and, 2, that it is per se evidence").

While on the surface there may be little difference in these two views, under the view of the *Coffin* case, *supra* note 7, a jury is allowed to regard the presumption of innocence as having probative force and to treat it as affirmative testimony for the accused.

[9] State v. Hayes, 127 Conn. 543, 18 A.2d 895 (1941); Broadnax v. State, 57 So.2d 651 (Fla. 1952); Brock v. State, 91 Ga. App. 141, 85 S.E.2d 177 (1954); People v. Isonhart, 259 Ill. App. 9 (1930); State v. Linhoff, 121 Iowa 632, 97 N.W. 77 (1903); Commonwealth v. Powers, 294 Mass. 59, 200 N.Y. 562 (1936); Warner v. State, 75 So.2d 741 (Miss. 1954); State *ex rel.* Detroit Fire and Marine Insurance Co. v. Ellison, 268 Mo. 239, 187 S.W. 23 (1916); State v. Kilcoyne, 82 N.H. 432, 135 Atl. 532 (1926); State v. Cephus, 239 N.C. 521, 80 S.E.2d 147 (1954); Culpepper v. State, 4 Okla. Crim. 103, 111 Pac. 679 (1910); Commonwealth v. Russogulo, 263 Pa. 93, 106 Atl. 180 (1919); State v. Quigley, 26 R.I. 263, 58 Atl. 905 (1904); State v. Steadman, 70 Utah 224, 259 Pac. 326 (1927); State v. Demag, 118 Vt. 273, 108 A.2d 390 (1954); State v. Reppert, 132 W.Va. 675, 52 S.E.2d 820 (1949).

However, some states still hold that the presumption of innocence is to be regarded as a matter of evidence. Perry v. State, 37 Ala. App. 683, 74 So.2d 619 (1954); Alford v. Bello, 130 Cal. App. 2d 291, 278 P.2d 962 (1955); State v. Bubis, 39 Idaho 376, 227 Pac. 384 (1924); State v. Gilbert, 125 Mont. 104, 232 P.2d 338 (1951); Behrens v. State, 140 Neb. 671, 1 N.W.2d 289 (1941); Smith v. Commonwealth, 92 Va. 186, 64 S.E.2d 761 (1951).

[10] What constitutes proof "beyond reasonable doubt" has also been surrounded by much confusion. A reasonable doubt has been defined as being such a doubt a reasonable man might entertain after a fair review and consideration of the evidence—a doubt for which some good reason arising from the evidence can be given. People v. Guidici, 100 N.Y. 503, 3 N.E. 493 (1885).

However, even this definition might tend to confuse the juror. Probably one of the most accurate and concise definitions of proof beyond reasonable doubt is that which amounts to a moral certainty as opposed to an absolute certainty. Commonwealth v. Costly, 118 Mass. 1, 24 (1875).

[11] Sauls v. State, 29 Ala. 587, 588, 199 So. 254 (1940); People v. Hurley, 13 Cal. App. 2d 208, 213, 56 P.2d 978, 981 (1936); Rivers v. State, 140 Fla. 487, 489, 192 So. 190, 191 (1939); Huntsinger v. State, 200 Ga. 127, 139, 36 S.E.2d 92, 100 (1946);

cution seeks to overcome the presumption through the use of circumstantial evidence the problem becomes more difficult.[12] Since circumstantial evidence is by definition admissible and probative evidence,[13] it should be sufficient to negate the force of the presumption. It would follow, therefore, that a presumption of fact,[14] which arises when circumstantial evidence is of sufficient probative force,[15] will also suffice to rebut the presumption of innocence. A presumption of law[16] arising from a proved fact, permitting the judge to instruct the jury to find according to that presumption in the absence of any counterproof will, a fortiori, rebut the presumption. The problem of rebutting the presumption of innocence through the use of such a counter presumption of law arose in a recent New York case involving a traffic violation.

In *People v. Hildebrandt*,[17] the defendant was convicted of speeding. An automobile had been photographed by two cameras and the distance traveled in the time that elapsed between the two photographs was computed by the police to determine the speed of the car. Although the driver was not identified in the pictures, by checking the license number through the registration bureau, the police established that the defendant was the owner. The defendant received no notice that he had been charged with the offense until two weeks later,[18] when he was

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People v. Bagwell, 295 Mich. 412, 419, 295 N.W. 207, 210 (1941); State v. Fitch, 162 S.W.2d 327, 330 (Mo. 1942); Commonwealth v. Marmo, 137 Pa. Super. 467, 468, 9 A.2d 181 (1939); Blankenship v. State, 131 Tex. Crim. 146, 147, 97 S.W.2d 475 (1936); Abdell v. Commonwealth, 173 Va. 458, 470, 2 S.E.2d 293, 298 (1939).

[12] Considerable confusion has surrounded the test for the sufficiency of circumstantial evidence. The traditional test has been that the prosecution has to prove that all circumstances are inconsistent with any reasonable hypothesis of the accused's innocence. Cristian v. State, 228 Ind. 30, 89 N.E.2d 445 (1950); Commonwealth v. Shea, 324 Mass. 710, 88 N.E.2d 645 (1949); People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953). However, it has been strongly urged that a stricter test should not be used for the sufficiency of circumstantial evidence than used for the sufficiency of direct evidence, *i.e.*, proof beyond reasonable doubt of all the essential elements of the crime charged. This controversy has yet to be resolved, but recently the United States Supreme Court in Holland v. United States, 348 U.S. 121 (1954) held that it is unnecessary and even improper to charge the jury in terms of the reasonable hypothesis test. For a comprehensive article on this controversy see Note, 55 COLUM. L. REV. 549 (1955).

[13] "The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion. . . . All evidence is more or less circumstantial, the difference being only in the degree. . . . But the law exacts a conviction whenever there is legal evidence to show the prisoner's guilt beyond reasonable doubt; and circumstantial evidence is legal evidence." Commonwealth v. Harman, 4 Pa. 469 (1846).

[14] A presumption of fact is defined as a logical or natural inference of one fact from another. MODEL CODE OF EVIDENCE, *Forward* (Morgan) 52 (1942).

[15] Where antecedent experience shows the connection between an ascertained fact and a fact otherwise undetermined to be constant or greatly uniform, the inference deducible is properly termed a presumption. Stevenson v. Stewart, 11 Pa. 307, 308 (1849).

[16] Presumptions of law are artificial presumptions created by law whereby one fact is presumed to exist if another fact is proved, although the fact proved is not in itself direct evidence of the presumed fact. Such presumptions are created because of a customary or probable relationship between the proved and the presumed fact, or because of a rule of convenience or public policy. See Comment, *Illinois Presumptions and the Uniform Rules of Evidence*, 49 NW. U.L. REV. 657, 658 (1954).

[17] 308 N.Y. 397, 126 N.E.2d 377 (1955).

[18] A point raised by the defense on appeal to the county court was that his constitutional rights were violated by the delay in notifying him of the charge. The county court dismissed that objection, saying that, while the defendant may well have been placed at a disadvantage, especially in view of the manner in which the evidence was obtained, the delay did not violate the statute of limitations. Hence it could not rule as a matter of law that the delay was sufficient ground for reversing the con-

summoned to appear before the justice of the peace court, at which time he entered a plea of not guilty. At the hearing there was no direct evidence as to who had been driving the car; the only proof on this issue was that the accused was the licensed and registered owner. In order to find the defendant guilty, the justice of the peace presumed that the defendant owner was operating the car at the time of the alleged violation.[19] On appeal the conviction was sustained by the county court which relied on the ruling in *People v. Rubin*,[20] to the effect that in prosecutions for parking violations there is a rebuttable presumption that the owner was the operator.

The defendant then appealed to the New York Court of Appeals, where he did not contest the admissibility or accuracy of the evidence or dispute the fact that he was the owner of the car; instead he relied solely upon the proposition that mere proof of ownership was insufficient to support the presumption that he, specifically, had been the driver. The Court reversed and, in a four to three decision, held that neither a presumption nor an inference,[21] of the driver's identity could arise from mere proof of ownership in a case involving a moving violation.[22] The dissent based its opinion on the validity of the inference of operation, public policy and convenience, and a respect for the precedent of *People v. Rubin*.[23]

A preliminary question in this case is whether the presumption of innocence is applicable to traffic violations. Cases involving traffic violations are generally termed "offenses," "violations," or "infractions."[24] Since such a charge might not rise to the level of a misdemeanor or felony, it could be argued that the accused was not entitled to the protection of this presumption.[25] In the *Hildebrandt* case, however, this

viction. The court did acknowledge, however, that there should be no unnecessary delay in bringing such violations to the attention of the accused. People v. Hildebrandt, 204 Misc. 1116, 129 N.Y.S.2d 48 (County Ct. 1954).

[19] Such a presumption has been enacted into law in some states. See CONN. GEN. STAT. § 1039 (c) (Supp. 1953); PA. STAT. ANN. tit. 75, § 739 (1953). But see CAL. VEH. CODE ANNOTATIONS § 591 (Supp. 1955) (Expressly stating that this section shall apply *only* to parking violations).

[20] 284 N.Y. 392, 31 N.E.2d 501 (1940).

[21] Courts generally are very lax in drawing a distinction between the meanings of these two words. Legal writers, however, define an inference as being a permissible deduction of the existence of a certain fact which arises as a reasonable probability from a proven fact. See 9 WIGMORE, EVIDENCE § 2487 at 281 (3d ed. 1940). A presumption is generally regarded by legal writers as being a rule of law laid down by the court, arbitrarily attaching to a proven fact sufficient weight so that the party against whom the rule operates will lose as a matter of law, if counter-proof is not produced. See 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

[22] This seems inconsistent with a statement made in People v. Rubin, 284 N.Y. at 396, 31 N.E.2d at 502, that, "To rule that this inference may not be drawn from the established facts would be to deny to the trier of facts the right to use a common process of reasoning."

[23] The dissent stressed four points in arguing for affirmance of the conviction: (1) that ownership of a car does furnish a basis for an inference, supported by reason and logic, that the owner was the driver of the car; (2) that the practical ends of justice should not be hampered by rendering less effective the mechanical aids for traffic control; (3) that since the facts were peculiarly within the defendant's knowledge, it did not prejudice him in any way to impose the burden of offering evidence to rebut the presumption of operation; and (4) that this case was not distinguishable from *People v. Rubin*, and that it is as logical to presume that the owner is at the wheel of his car when it is speeding as when it is being parked.

[24] *E.g.*, COLO. STAT. ANN. c. 16, § 159 (1935) (offenses); N.Y. VEHICLE AND TRAFFIC LAW § 2, subd. 29 (1952) (infractions).

[25] As indicated in Fuller v. State, 12 Ohio St. 433, 434 (1861), the presumption of innocence might not always be available to the accused in lesser offenses, when the presumption is abolished by statute. The view that the accused in speeding violations might not be entitled to the protection of the presumption is further supported by the fact that the explicit constitutional guaranty of trial by jury is denied to traffic violators in New York. N.Y. VEHICLE AND TRAFFIC LAW § 2, subd. 29 (1952).

question was moot because of two New York statutes: the first making vehicular violations misdemeanors; the second extending to persons accused of such violations the same procedural safeguards as are available in a criminal case while, at the same time, declaring that such violations are not crimes.[26]

Although moot in the *Hildebrandt* case, this question may present a more serious problem in other jurisdictions. In those states which expressly classify speeding as a misdemeanor,[27] the accused should be granted the benefit of the presumption.[28] In addition, all states prescribe that violations of speeding regulations shall be punishable by a fine, a short jail sentence, or both, and therefore such violations should be classified as misdemeanors, at least for the purpose of applying procedural safeguards including the presumption of innocence.[29]

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[26] One of these statutes is an act enabling the New York State Thruway Authority to:

> promulgate rules and regulations with respect to the throughway: Such rules and regulations shall relate to vehicular speeds . . . and such other matters as may be deemed necessary and proper to regulate traffic in the interest of safety, the maximum convenience using the thruway. . . . Violations of such rules and regulations shall be a misdemeanor punishable by a fine of not exceeding fifty dollars or by imprisonment for not more than thirty days or both. N.Y. PUBLIC AUTHORITIES LAW § 361, subd. 1 (1950).

Since speeding is a violation of these rules, the defendant would be afforded the safeguards of the presumption.

The other statute provides that a traffic infraction is a violation of any traffic law where a penalty is imposed, but it is not a crime, and the penalty imposed should not be deemed a criminal punishment. A conviction of such an infraction is not to impair that person's credibility as a witness or for any other purpose. Courts that had jurisdiction over such violations when they were deemed misdemeanors are to continue to exercise jurisdiction over traffic infractions, and *"all provisions of law relating to misdemeanors"* shall apply to these infractions. N.Y. VEHICLE AND TRAFFIC LAW § 2, subd. 29 (1952).

While a detailed discussion of whether the presumption of innocence could technically come under the phrase "all provisions of law relating to misdemeanors" is beyond the scope of this article, it is probable that the purpose of this statute is to reduce traffic violations from the rank of misdemeanors, and thereby protect those convicted of traffic violations from having criminal records, but to retain the traditional safeguards afforded persons accused of more serious crimes. Under this analysis the above phrase should be interpreted as "all provisions of law *and all procedural safeguards* relating to misdemeanors . . . shall apply to traffic infractions." This appears to be the interpretation applied by the court in construing this statute. *E.g.*, Applications of Gross, 284 App. Div. 786, 135 N.Y.S.2d 435 (3d Dep't. 1954) (even though charge is a traffic violation, not a crime, procedural requirements relating to misdemeanors apply).

While these two statutes may appear inconsistent in that the first states that speeding is a misdemeanor and the second says that it is only an infraction, the former applies only to violations of regulations promulgated by the Thruway Authority, and the latter applies to violations of any regulations, state or local law or city ordinance.

[27] *E.g.*, ALA. CODE tit. 36, § 5(2) (1953 Supp.); CAL. VEH. CODE ANN. § 760 (1948); COLO. STAT. ANN. c. 16, § 159 (1935); DEL. CODE ANN. tit. 21, § 4155 (1953); GA. CODE ANN. § 68–9908 (1933); ILL. ANN. STAT. c. 95½, § 234 (1950); IOWA CODE ANN. § 321.482 (1949); KAN. GEN. STAT. § 8-5, 125 (1949); N.C. GEN. STAT. § 20-176 (1951); VA. CODE § 46-18 (1950).

[28] See note 4 *supra.*

[29] The definition of a misdemeanor, while largely statutory, usually does not require a minimum penalty, and generally includes offenses less severe than felonies which are punishable by fine or imprisonment otherwise than in a penitentiary. *E.g.*, United States v. Stevenson, 215 U.S. 190 (1909); People v. Pointer, 348 Ill. 277, 180 N.E. 796 (1932). It is also generally accepted that the penalty determines the classification of the offence. People *ex rel.* Cooley v. Wilder, 234 App. Div. 256, 255 N.Y. Supp. 218 (4th Dep't. 1932).

Since the punishment for a speeding violation, especially in those states which impose harsher penalties for each successive traffic violation within a specified period, or even revocation of the operators' license, is as great or even greater than the punishment in many misdemeanors, it would be adhering to form without substance to deny an accused the procedural protection of requiring the state to prove his guilt beyond reasonable doubt,

Concluding that the presumption of innocence was properly applied in the *Hildebrandt* case does not, however, automatically lead to the conclusion that the Court of Appeals should have reversed the conviction. Hildebrandt was properly convicted and the presumption of innocence overcome if a presumption of operation could be invoked here. The principles underlying the creation of a presumption, such as a presumption of operation, have been examined by Professor Morgan. He recognized six different reasons for creating a presumption, two of which are involved in the *Hildebrandt* case: presumptions based on the preponderance of probability and presumptions created because of the comparative convenience of producing evidence.[30] Morgan added that most of the generally recognized presumptions are supported by two or more of the six. The first critical issue in determining whether a rebuttable presumption of law existed in the *Hildebrandt* case is, therefore, whether an inference of operation arises as a reasonable probability from proof of ownership. The majority answered this question negatively, pointing out that there are considerably more driver's licenses issued than automobile registrations; that cars are frequently driven by persons other than the owner; that many persons own more than one car; and that some owners are not licensed operators. Although the dissent agreed with these conclusions, they felt that other considerations outweighed those advanced by the majority, and would have adopted this presumption of operation as a rule of evidence. The dissent argued that the possibility that the owner is not always the one driving his car does not, ipso facto, invalidate the inference. "The basic test is whether common experience supports *the probability, not the certainty*, that, if the first fact is true, the second is also true."[31] The conclusion of the dissent that the inference of operation was permissible is persuasive in the light of the established rule that a jury may infer from one fact the existence of another, if the inference is supported by reason and experience.[32]

merely because a speeding violation is not expressly defined as a "misdemeanor" or a "felony".

Furthermore, offenses involving an analogous amount of improbity have been classed as misdemeanors. Taylor v. United States, 142 F.2d 808 (9th Cir. 1944) (violation of rent regulations); McLean v. State, 16 Ala. App. 196, 76 So. 480 (1917) (vagrancy—evidence must show guilt beyond reasonable doubt); Douglass v. Smith, 66 Fla. 460, 63 So. 844 (1913) (violation of fish and game laws); Madron v. McCoy, 63 Idaho 703, 126 P.2d 566 (1942) (failure of truck driver to signal intended change in course); People v. Katz, 284 N.Y. 244, 49 N.E.2d 482 (1943) (simple assault); State v. Orton, 145 Wash. 289, 259 Pac. 1077 (1927) (operating automobile without a license).

[30] The six considerations listed are: a) presumptions based on the preponderance of probability; b) presumptions created to alleviate the difficulty in securing legally competent evidence in some cases; c) presumptions which owe their origin to the fact that one party has peculiar means of access to evidence or has peculiar knowledge of the facts; d) presumptions created to express a socially desirable result; e) presumptions which are necessary to avoid a procedural impasse; and f) presumptions designed to expedite the trial by relieving a party from introducing evidence upon issues which may not be litigated. Morgan, *Presumptions*, 12 WASH. L. REV. 225, 257 (1937).

Most writers follow some such classification as this, but many group two or three of the above into one category. In this article b) and c) will be considered as one unit entitled comparative convenience of evidence production. While the type of presumption contemplated by Morgan under d) was of the type which presumes that the possessor of real estate holds under a lost grant when he has possessed the land for a long and continuous period as if he were the true owner, it is submitted that a presumption which has been raised by some of the other factors could be at least supported by this consideration if the use of the presumption would serve the public interest. Also, considerations e) and f) are ignored here as having no bearing on the problem.

[31] 308 N.Y. at 404, 126 N.E.2d at 381.

This natural and rational connection requirement is the basic test for constitutionality and is well recognized. For a leading case upholding this rule see Tot v. United States, 319 U.S. 463, 467 (1943).

[32] In the *Tot* case, *supra* note 30, the Court said that an indictment merely charges the defendant with an offense; it does not constitute proof of the commission of the offense. The prosecution is

The mere fact, however, that a logical inference can be supported in this case does not compel the conclusion that a valid presumption of law was established, nor would it necessarily shift the burden of production of evidence[33] to the defendant in the instant case. It is difficult to declare any definite standard as to when the production burden shifts to the accused. Professor Morgan has enumerated four a priori tests for allocating the burden in civil cases.[34] These tests place the initial burden upon: (1) the party having the affirmative of the issue; (2) the party to whose case the fact in question is essential; (3) the party who has the burden of pleading it; or (4), the party having the peculiar means of knowing the fact. In criminal cases the first three tests are of doubtful value inasmuch as the prosecution already has the initial burden of proving guilt beyond a reasonable doubt. However, the fourth test has been applied in many criminal proceedings to *shift* the production burden to the defendant.[35] A frequently quoted standard for shifting the production burden appears as dicta in *Morrison v. California*[36] where Mr. Justice Cardozo said:

> "... [T]he state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience of the opportunity for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."[37]

Interpreting Cardozo's words as meaning that the burden of coming forward with the evidence is shifted to the defendant when he has a better opportunity for knowledge and when this will aid the prosecution without subjecting the accused to any hardship, it becomes appar-

required to present proof of some sort. Although such proof may consist of testimony of witnesses to the offense, the fact that the Government may be unable to produce eye witnesses does not necessarily mean that it cannot produce proof sufficient to support a verdict. The jury may infer from one fact the existence of another, if the inference is supported by reason and experience. Courts often hold that proof of the first fact furnishes a basis for inference of the other. *Id.* at 466.

While it may be argued that such an inference does not arise as a reasonable probability from proof of ownership, it has frequently been held that the relationship is natural and logical. See Bastian v. Baltimore & O.R.R., 144 F.2d 120, 123 (3d Cir. 1944) ("... an owner is presumed to be in charge of and have control over his property, even if that property be a vehicle."); People v. Bigman, 38 Cal. App. 2d Supp. 773, 777, 100 P.2d 370, 372 (App. Div. 1940) ("Relationship between the registered owner of an automobile and its operation is natural"); People v. Kayne, 286 Mich. 571, 584, 282 N.W. 248, 253 (1938) ("... there is a rational connection between the ownership of an automobile, ..., and the actual use of the highways by such owner in the operation and parking of his automobile thereon.").

[33] The "burden of proof" is generally recognized as having two aspects: The burden of persuasion, or, as more descriptively named by many legal writers, the risk of non-persuasion; and the burden of production of evidence, alternatively, the risk of non-production.

The persuasion burden is that of convincing the tribunal, either a jury or a judge sitting without a jury, that the existence of the fact in question is more probable than the non-existence of that fact. See MODEL CODE OF EVIDENCE, Rule 11, Comment (1942).

The production burden is that of convincing the judge that sufficient evidence as to the existence of the fact in question has been produced to justify submitting the question to the jury, and to support a finding that the fact does exist. *Ibid.*

[34] Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 911 (1931).

[35] United States v. Fleischman, 339 U.S. 349 (1950); Williams v. United States, 138 F.2d 81 (D.C. Cir. 1943); Williams v. District of Columbia, 65 A.2d 924 (D.C. Mun. App. 1949); State v. Grieco, 184 Ore. 253, 195 P.2d 183 (1948).

[36] 291 U.S. 82 (1933).

[37] *Id.* at 88.

However, does this language really prescribe a standard for the shifting? It merely says that the burden can be shifted, not when or under what circumstances it will be shifted. It is submitted that the correct interpretation, from its context in the case and its use in subsequent cases, as a test should be "... that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, *when*, upon a balancing of convenience. ..." If this interpretation be adopted, a standard is provided.

ent that the burden of production could properly have been shifted to Hildebrandt. The identity of the driver was peculiarly within the owner's knowledge, and evidence that he was not driving at the time the violation occurred would rebut a presumption of operation. In view of the fact that the defendant could have accomplished this by producing others to testify, by offering other evidence, or by his testifying himself,[38] such a requirement would not subject him to any hardship or oppression. Thus the *Hildebrandt* case contained both a logical inference and a procedural necessity to raise the presumption of law advocated by the dissent.

The use of this presumption, raised by logic and necessity, could find further support if it would aid in reaching a result beneficial to the public interest.[39] Speeders and the number of accidents caused by them create a very grave social problem and attempts to lessen this problem would be frustrated by requiring chase and capture to sustain each speeding conviction. While it may be argued that it is more the function of the police to patrol than to arrest, as long as mechanical aids, such as the phototraffic camera here employed, have been developed, it would be unwise to curtail their use.[40] Any possible way to control speeders and abate the problem caused by them should not be restricted unless offensive to our sense of freedom and justice.[41]

The dissent also felt since the same considerations giving rise to the presumption in *Rubin* existed here—a logical inference and a procedural advantage—reinforced by the beneficial effects, that stare decisis required a similar result. As pointed out in the opinion of the court, the current case is distinguishable from the *Rubin* case on its facts—*i.e.*, a "moving violation" here as contrasted to a "standing violation" in *Rubin*; however, the minority argued that in principle and logic the two cases could not be distinguished.[42] To be consistent with the *Rubin* case Hildebrandt's conviction should have been sustained.

The ultimate question is whether the presumption relied upon by the prosecution proved the defendant's operation of the vehicle, *i.e.*, guilt, beyond a reasonable doubt. Since the presumption of innocence is not evidence,[43] but merely allocates the burden of proof,[44] its purpose has been fulfilled when the prosecution has been required to produce evidence sufficiently strong to justify shifting the production burden onto the defendant.[45] Hence a trier of fact should be free in such a case to determine whether guilt has been established beyond

[38] Since in many jurisdictions a harsher penalty is imposed for each successive speeding violation within a certain period, cross-examination of the accused, if he chose to testify himself, should be limited to questions as to the particular offense charged, thereby avoiding any objections of compulsory self-incrimination.

[39] See note 30 *supra*.

[40] Furthermore, traffic laws are designed to prevent injuries to person and property, and to guard against accidents. State v. Swinney, 231 N.C. 506, 507, 57 S.E.2d 647 (1950).

[41] Courts have frequently held that mechanical aids, such as wiretapping, used to get a confession or information concerning a crime are illegal. However, those cases are distinguishable from the *Hildebrandt* case, in that the manner in which the mechanical devices were used in those cases violated fundamental rights of the accused. The use of the phototraffic camera in the *Hildebrandt* case did not invade any of Hildebrandt's rights. The only question here was whether the use of such evidence sustained the prosecution's burden of proof.

[42] It should be pointed out that in both of these cases the charge is aimed at the individual, rather than at the individual in a speeding violation and at the car in a parking violation. People v. Hildebrandt, 308 N.Y. 397, 404, 126 N.E.2d 377, 380 n.1 (1954).

[43] See notes 8 and 9 *supra*.

[44] State v. Hayes, 127 Conn. 543, 18 A.2d 895 (1941); McKibben v. State, 59 Ga. App. 345, 200 S.E. 314 (1939); Sayler v. Commonwealth, 264 Ky. 53, 94 S.W.2d 281 (1936); Carr v. State, 192 Miss. 152, 4 S.2d 887 (1942); Morrison v. California, 291 U.S. 82, 88 (1933).

[45] People v. Bigman, 38 Cal. App. 2d Supp. 773, 776, 100 P.2d 370, 373 (App. Dep't. 1940); People v. Kayne, 286 Mich. 571, 578, 282 N.W. 248, 250 (1950); State v. Giordano, 121 N.J.L. 469, 471, 3 A.2d 290, 291 (Sup. Ct. 1939); State v. Harris, 223 N.C. 697, 702, 28 S.E.2d 232, 237 (1944).

reasonable doubt, once a valid presumption of law has arisen.

It is doubtful whether the probability that the owner was the driver, standing alone, would be sufficiently persuasive to convince beyond a reasonable doubt. Furthermore, such a probability should not arbitrarily be given the required weight merely as a procedural convenience or to reach a result beneficial to the public interest.[46] According to Professor Wigmore, however, a presumption that the evidence was unfavorable to the accused arises from the failure of the accused to produce evidence.[47] Thus the presumption of operation supported by public interest and the failure of the defendant to produce evidence should more than satisfy the prosecution's burden of persuasion.

Of course, if there were a question of possible prejudice to the accused, the rule advocated by the minority should not be adopted. However, any dangers which could develop if the use of this presumption were expanded to include every misdemeanor and felony committed in the use of automobiles, do not seem as serious as they might. A sufficient protection against an innocent person's being wrongly convicted lies in the fact that this is a rebuttable presumption. It has earlier been pointed out the ease with which the presumption can be rebutted.[48]

The court in the *Hildebrandt* case did not discuss the constitutionality of the judicial presumption advocated by the minority. However, it may be well to consider how a court might rule if the legislature created a statutory presumption of this type.[49] To be held valid

[46] Some writers would hold that social and procedural benefits would add sufficient force to a logical inference to overcome reasonable doubt. Professor Bohlen said "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." Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 317 (1920).

[47] 8 WIGMORE, EVIDENCE § 2273 (3d ed. 1940).

Wigmore further states that if a legitimate presumption is raised, which has sufficient strength to create a duty for the accused to present some evidence to the contrary, there is no reason why the jury should not be directed to find according to the presumption. 9 WIGMORE, EVIDENCE § 2511 (3d ed. 1940). Wigmore was referring to civil actions and since there can be no directed verdict of guilty in a criminal trial, this principle would have no application in criminal proceedings before a jury. However, the judge, sitting without a jury, should be permitted to find according to the presumption.

[48] A California court in a similar case pointed out that the owner, if he were not the driver on a given occasion, knew and could easily prove who was driving. People v. Bigman, 38 Cal. App. 2d Supp. 773, 777, 100 P.2d 370, 372 (App. Dep't. 1940).

Quaere: Would not much of the value of the presumption be destroyed if it were too easily rebutted? That is, if the presumption could be rebutted merely by the accused's denying that he was the driver or by his producing a witness who merely denies that the defendant was driving, the doorway to perjury would be opened, and the prosecution might still be forced to make a full investigation before it could obtain a conviction, even though it had originally availed itself of the presumption of operation. For a discussion of the generally recognized views as to the quantum of evidence necessary to rebut a presumption see Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34, 45 (1952).

[49] To date there has been very little legislation on this question, but at least three states have statutes to the effect that the license plate shall be prima facie evidence that the owner was driving the car at the time of a traffic violation. See note 19 *supra*. These statutes and also similar city ordinances have been held valid. City of Chicago v. Crane, 319 Ill. App. 623, 49 N.E.2d 802 (1934); Commonwealth v. Ober, 286 Mass. 25, 189 N.E. 601 (1934); People v. Kayne, 286 Mich. 571, 282 N.W. 248 (1938); City of St. Louis v. Cook, 359 Mo. 270, 221 S.W.2d 468 (1949); *Contra*, Nasfell v. Ogden City, 249 P.2d 507 (Utah 1952).

A further indication that this type of presumption is not repugnant to the Federal or state constitutions is that the majority of states, including New York, have long accepted the presumption in civil cases that a car involved in an accident is presumed to have been in the possession of the owner. Wilson v. Harrington, 269 App. Div. 891, 56 N.Y.S.2d 157 (3d Dep't. 1945) (presumption rebutted); Christie v. B. F. Vineburg, Inc., 259

such a statute would have to satisfy the constitutional requirement of trial by jury, the guaranty of due process, and the protection against compulsory self-incrimination.[50] On the issue of trial by jury, it suffices to say that the presumption here involved would have no effect whatever on that right. The due process argument is that the statute is arbitrary or that it operates to deny a fair opportunity to repel the presumption.[51] These arguments can be answered by pointing out that in the presumption in question there is a natural and rational relation between the fact proved and that presumed[52] and also that here the accused has sufficient opportunity to repel the presumption.

The argument that a statute of this type is violative of the constitutional protection against compulsory self-incrimination poses a more difficult problem. Within a period of two years the Supreme Court of Michigan held one city ordinance unconstitutional because it afforded no way to rebut the prima facie case other than for the accused to testify,[53] and another ordinance constitutional because it did not require the owner of the vehicle to testify under oath or submit to an examination as to the identity of the person operating the car at such time.[54] In drafting a statute, care must be taken that the accused is not restricted, in rebutting the prima facie case, to the single method of testifying himself. If the statute affords alternative methods, the complaint that the presumption compels the accused to be a witness against himself can be easily dismissed. The statute compels nothing.[55]

Of course, before a statutory presumption could be declared constitutional in New York, the Court of Appeals may have to revise its theory that there is no natural connection between proof of ownership and the assumption that the owner was driving.[56] If, in time, the New York legislature does create this statutory presumption and the courts adopt the position urged by the minority in the *Hildebrandt* case, will the results reached do violence to the implicit constitutional provision that every accused is presumed innocent until proven guilty? From the foregoing analysis, this answer would be negative. The presumption of innocence is a shield designed for protection of the innocent; it is not a weapon to be wielded in the hands of the guilty to frustrate the operation of law and to evade the penalties they deserve.[57]

App. Div. 342, 19 N.Y.S.2d 252 (1st Dep't. 1940); Bennrona Corp. v. Mulroney, 254 App. Div. 630., 3 N.Y.S.2d 87 (4th Dep't. 1938); Callahan v. State, 201 Misc. 378, 107 N.Y.S.2d 319 (Ct. Cl. 1951).

[50] State v. Kelly, 218 Minn. 247, 257, 15 N.W.2d 554, 560 (1944).

It would appear that these same elements would be demanded whether the presumption is created legislatively or judicially.

[51] Manley v. Georgia, 279 U.S. 1, 6 (1929).

[52] Cases cited note 32 *supra*.

[53] People v. Hoogy, 277 Mich. 578, 269 N.W. 605 (1936).

[54] People v. Kayne, 286 Mich. 571, 282 N.W. 248 (1938).

[55] *Accord*, Yee Hem v. United States, 268 U.S. 178,185 (1925). The court there dismissed the argument that the practical effect of the statute creating the presumption was to compel the accused to be a witness against himself, by saying that the statute compeled nothing. The accused was entirely free to testify or not, as he chose, and if he happened to be the only repository of the facts necessary to negative the presumption, that was a misfortune which the statute did not create, but was inherent in the case.

[56] While the Court of Appeals in the *Hildebrandt* case did not feel that there was a sufficient connection on which to declare a judicial presumption, they refused to pre-decide the question of how they might rule if the legislature created a statutory presumption. It is submitted that if the legislature felt the need for such a presumption, the court would not raise any constitutional objections.

[57] State Board of Medical Examiners v. McHenery, 69 S.2d 592, 596 (La. 1953).