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NOTES

THE PRESUMPTION OF INNOCENCE IN CRIMINAL CASES

The word presumption has had a long history in the Anglo-American law, and there are few terms the use of which has been more varied, or the meaning of which has been more obscured. It was not until close to the turn of the past century, when Thayer¹ first subjected the term to careful legal scholarship, that its true meaning began to be perceived. His work, followed by that of Dean Wigmore,² has resulted in some clarification. But as will be presently seen, basic conflict still exists. All that can be said with certainty is that the true presumption is a rule of adjective law whereby the establishment of one fact leads automatically to the assumption of another fact, which other fact can be disproven by the introduction of evidence.³

At this point there is general agreement. Beyond this point there is general disagreement. Thayer and Wigmore early maintained that the sole purpose and effect of rebuttable presumptions was to "throw upon the party against whom they work, the duty of going forward with the evidence; and this operation is all their effect, regarded merely in their character as presumptions."⁴ Under this theory as soon as the party against whom the presumption operates introduces substantial evidence that the assumed fact does not exist the presumption disappears from the case.

Later writers⁵ agree that all rebuttable presumptions have this

¹Thayer, *Evidence* (1898) 313-352.

²Greenleaf, *Evidence* (Wigmore's ed. 1899) 93-103.

³*Simpson v. Simpson*, 162 Va. 621, 175 S. E. 320 (1934); *Restatement, Evidence, Introductory Notes* (Tent. Draft No. 2, 1941) Chap. IX; Wigmore, *Evidence* (3rd. ed. 1940) § 2490. This definition applies only to the rebuttable presumption of law. It is necessary to distinguish this sense of the term from: (1) The conclusive presumption which is actually a rule of substantive law. Wigmore, *Evidence* (3rd. ed. 1940) § 2492. (2) The presumption of fact which is merely an inference which may or may not be drawn. *Judson v. Bee Hive Auto Service Co.*, 136 Ore. 1, 297 Pac. 1050, 74 A. L. R. 944 (1931); *Simpson v. Simpson*, 162 Va. 621, 175 S. E. 320 (1934). There is no uniformity in the definition of the rebuttable presumption of law. For other definitions see 20 Am. Jur. 161-162 and 22 C. J. 124.

⁴Thayer, *Evidence* (1898) 339; Greenleaf, *Evidence* (Wigmore's ed. 1899) 102; 9 Wigmore, *Evidence* (3rd. ed. 1940) § 2487.

⁵The following discussion is a general statement of the view held by Morgan, deduced from several articles by him. Morgan, *Some Observations Concerning Presumptions* (1931) 44 Harv. L. Rev. 906; Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1934) 47 Harv. L. Rev. 59; Morgan, *Presumptions* (1937) 12 Wash. L. Rev. 255; Morgan, *Techniques in the Use of Pre-*

effect. But they assert that many presumptions do not disappear from the case when this effect has been achieved. They assert that many have the additional effect of putting upon the party against whom they operate the duty of introducing evidence of varying degrees of persuasiveness to the jury. Whether a particular presumption has this additional effect, and whether the evidence produced is of the necessary degree of persuasiveness, will depend upon the basis of, and the elements in, the presumption. Some presumptions are based on probability and logic; that is, the fact assumed as a result of the presumption is so assumed because its existence is more probable than not, or because its existence may be logically inferred from the existence of the given fact. The degree of probability or the strength of the logical inference will determine the quantity and quality of evidence necessary to rebut the presumption. Similarly, some presumptions are based upon public policy; that is, the fact assumed as a result of the presumption is so assumed because the policy of the law prefers its existence to its non-existence. The importance which the law attaches to the particular policy will determine the quantity and quality of evidence necessary to rebut the presumption. In either case the quantity and quality of the evidence necessary to rebut the presumption may be so great as to shift the "burden of proof in the sense of the risk of non-persuasion of the jury"⁶ from the party for whom the presumption operates to the party against whom it operates. This is an effect which Thayer and Wigmore assert that a rebuttable presumption never has.

A consideration of the relative merit of these divergent theories is beyond the scope of this discussion. It is sufficient to consider them in their possible relation to the presumption of innocence. It is clear that the Wigmore-Thayer concept of presumptions has no relation to the so-called presumption of innocence. That presumption cannot operate as a rule of law whose purpose and effect is to shift the burden of going forward with the evidence. This is readily understood from the fact that that burden is placed upon the prosecution, against whom the presumption of innocence is said to operate, in the first instance.

It is equally clear that the later concept of presumptions has no relation to the presumption of innocence. The presumption of in-

sumptions (1939) 24 Iowa L. Rev. 413. This view is substantially that of: Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920) 68 U. Pa. L. Rev. 307; Chafee, *The Progress of the Law* (1922) 35 Harv. L. Rev. 302, 310; McBaine, *Presumptions; Are They Evidence?* (1938) 26 Calif. L. Rev. 519.

⁶This phrase, coined by Wigmore, is used in contradistinction to "burden of proof in the sense of the duty to go forward with the evidence."

nocence is based on no logical inference that can be evidence for the defendant and thereby affect the quantity and quality of the evidence required of the prosecution. "There is no probability that a man indicted by a grand jury is usually innocent."⁷ It is based on a public policy which requires that one accused of crime be treated with the utmost fairness, be given the benefit of all reasonable doubt, and be not prejudiced by the fact of his arrest, indictment, and trial.⁸ But the effect of that policy on the quantity and quality of the evidence required of the prosecution is not secured in the form of, or as a result of, the presumption of innocence. That policy has already been called into operation, and its effect on the evidence required of the prosecution already been secured, by the simple and concise rule that the prosecution has the burden of proving guilt beyond a reasonable doubt. In truth then, the presumption of innocence has no independent significance. The rule that the accused is presumed to be innocent is synonymous with the rule that the prosecution has the burden of proof.

There is ample authority in support of the concept of the presumption of innocence as synonymous with the burden of proof. In England it has rarely been questioned that the presumption of innocence is "otherwise stated by saying that the prisoner is entitled to the benefit of every reasonable doubt."⁹ Indeed, so closely connected are the two propositions that the very use of the term "presumption of innocence" is rare.¹⁰ As for the United States, Thayer, in his authoritative work, considers that the presumption includes two things: "First, the accused stands innocent until he is proved guilty; and, second, that this proof of guilt must displace all reasonable doubt."¹¹ Wigmore treats the presumption of innocence as "merely another form of expression for a part of the accepted rule that it is for the prosecution

⁷Chafee, *The Progress of the Law* (1922) 35 Harv. L. Rev. 302, 314. Actually the probability is that the defendant is not innocent. In suits for malicious prosecution the fact of indictment is considered as prima facie evidence of probable cause. *Stidham v. Diamond State Brewery*, 21 A (2d) 283 (Del. 1941).

⁸*Commonwealth v. De Francesco*, 248 Mass. 9, 142 N. E. 749, 34 A. L. R. 947 (1924); 9 Wigmore, *Evidence* (3rd. ed. 1940) § 2511.

⁹1 Stephen, *History of the Criminal Law of England* (1883) 438; 13 Halsbury, *Laws of England* (2nd. ed. 1934) 628.

¹⁰*Woolmington v. Director of Public Prosecutions* [1935] A. C. 462 (the only general charge being one to the effect that the Crown had to satisfy the jury of guilt beyond a reasonable doubt).

¹¹Thayer, *Evidence* (1898) Appendix B, 551, 558, *The Presumption of Innocence in Criminal Cases*.

to adduce evidence, and to produce persuasion beyond a reasonable doubt."¹²

Furthermore, this concept is sustained by the better reasoned cases,¹³ as the recent case of *United States v. Nimerick*¹⁴ will serve to illustrate. The defendant was convicted of bank robbery. The jury was charged to the effect that the prosecution must prove guilt beyond a reasonable doubt and that:

"If, after an impartial consideration of all of the evidence, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt and you should find him 'not guilty.'"¹⁵

The defendant assigned as error the failure of the court to charge as to the presumption of innocence. Judge Augustus Hand, speaking for the Circuit Court of Appeals for the Second Circuit, held that the sentence quoted above contained "the essentials of the usual charge as to the presumption of innocence" and that the defendant's rights were "adequately protected by the foregoing charge in spite of the failure to comply literally with the customary formula."¹⁶

Although the use of the term "presumption of innocence" in charges or instructions to juries may be harmless, the failure to recognize the fundamental identity between that term and the burden of proof, and the consequent fallacious treatment of the presumption as an independent proposition, is definitely harmful. In the attempt to attach independent significance to the presumption, courts have been led to treat it as evidence for the defendant. The case which gave a tremendous impetus to this practice is *Coffin v. United States*,¹⁷ decided by the Supreme Court of the United States in 1895. In the trial of the defendant for aiding and abetting in the violation of federal statutes relating to national banks the lower court refused to charge the jury that:

"The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. . . . and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt."¹⁸

¹²9 Wigmore, Evidence (3rd ed. 1940) § 2511.

¹³*Colonese v. State*, 108 Conn. 454, 143 Atl. 561 (1928); *State v. Boswell*, 194 N. C. 260, 139 S. E. 374 (1927) (extended discussion and reference to many authorities).

¹⁴118 F. (2d) 464 (C. C. A. 2nd, 1941).

¹⁵118 F. (2d) 464, 466-467 (C. C. A. 2nd, 1941).

¹⁶118 F. (2d) 464, 467 (C. C. A. 2nd, 1941).

¹⁷156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481 (1895).

¹⁸156 U. S. 432, 452, 15 S. Ct. 394, 402, 39 L. ed. 481 (1895).

The court did instruct the jury that they must be satisfied of guilt beyond a reasonable doubt. In reversing the conviction because of the refusal to give the proffered instruction, the Supreme Court of the United States held that the presumption of innocence was an instrument of proof created by the law, Chief Justice White saying:

"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 to be drawn."¹⁹

The effect of this decision is to treat the defendant, not as entitled to stand before the jury innocent until the prosecution proves guilt beyond a reasonable doubt, but to treat him as entitled to stand before the jury as better than innocent; to treat him as having offered evidence to support his claim of innocence, which evidence the prosecution is forced to overcome by its evidence. That the defendant should be in no such position is clear, since he has actually offered nothing of any probative value. The presumption of innocence is not probative material which can be treated as a genuine addition to any positive evidence offered on behalf of the defendant. In order that there be a conviction, the quantity and quality of the evidence of guilt must be greater than the quantity and quality of the evidence of innocence. It must be such evidence that will prove guilt beyond a reasonable doubt or such evidence that will rebut the presumption of innocence. Both the phrase "proof beyond a reasonable doubt" and the term "presumption of innocence" merely express the measure of preponderance required. To regard the presumption as evidence for the defendant is to make it count twice.²⁰

Although the *Coffin* case has apparently been rejected by the Supreme Court of the United States,²¹ its insidious influence has been wide. A few cases from Virginia, cases by no means unique,²² serve to illustrate the growth of the doctrine of the *Coffin* case and the failure to analyze the presumption of innocence, as well as the resulting harm and confusion in the administration of the criminal law.

In *Barker v. Commonwealth*,²³ decided in 1894, the year before the

¹⁹156 U. S. 432, 459, 15 S. Ct. 394, 405, 39 L. ed. 481 (1895).

²⁰Chafee, *The Progress of the Law* (1922) 35 Harv. L. Rev. 302, 314.

²¹*Agnew v. U. S.*, 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 621 (1897); *Holt v. U. S.*, 218 U. S. 245, 31 S. Ct. 2, 54 L. ed. 1021 (1910).

²²See Notes (1925) 34 A. L. R. 938, (1935) 94 A. L. R. 1042; 9 Wigmore, *Evidence* (3rd. ed. 1940) § 2511, n. 6.

²³90 Va. 820, 20 S. E. 776 (1894).

Coffin case, the defendant, on trial for seduction, requested the following instruction:

"The court instructs the jury that the prisoner comes to trial presumed to be innocent, and this presumption extends to the close of the trial; and the jury should endeavor to reconcile all the evidence with this presumption."²⁴

This instruction was refused, the court simply telling the jury that "the prisoner comes to trial presumed to be innocent, and this presumption continues until it is rebutted by the commonwealth beyond a reasonable doubt. . . ."²⁵ The Supreme Court of Appeals held that the proffered instruction was properly refused because it was misleading, inasmuch as the duty of the jury was no more to endeavor to acquit than to convict.

Four years later, in *McBride v. Commonwealth*,²⁶ a conviction for murder was reversed because the trial court allowed the jury to consider the fact that the evidence did not disclose any one else who might have committed the crime. The court simply said that the defendant was presumed to be innocent until proven guilty beyond a reasonable doubt and was not required to vindicate his innocence by naming the guilty man.

In *Brown v. Commonwealth*,²⁷ decided in 1900, a conviction was reversed because of insufficient evidence. An instruction that the defendant was presumed innocent until proven guilty beyond a reasonable doubt was unquestioned. Similar instructions were unquestioned and the evidence held sufficient to sustain the convictions in two cases,²⁸ decided in 1900 and 1901.

In none of the foregoing cases was there any extended discussion of the principles underlying the presumption of innocence, and it does not appear that either the trial courts, or the Supreme Court of Appeals, or counsel made any attempt to distinguish the presumption from the burden of proof or to attach any extraordinary significance to it. That the Supreme Court of Appeals did not distinguish between the two is borne out by *Potts v. Commonwealth*.²⁹ In a trial for murder the court instructed the jury:

²⁴90 Va. 820, 822, 20 S. E. 776 (1894).

²⁵90 Va. 820, 822, 20 S. E. 776, 777 (1894).

²⁶95 Va. 818, 30 S. E. 454 (1898).

²⁷97 Va. 791, 34 S. E. 882 (1900).

²⁸*Longley v. Commonwealth*, 99 Va. 807, 37 S. E. 339 (1900); *Horton v. Commonwealth*, 99 Va. 848, 38 S. E. 184 (1901).

²⁹113 Va. 732, 73 S. E. 470 (1912).

"that if they believe from the evidence that the Commonwealth has proven, beyond a reasonable doubt, that the deceased was killed by the accused, and that the accused relies upon self-defense then the jury must be satisfied . . . that the said defense is a true one."³⁰

It was held that to give this instruction was reversible error because the rule requiring the accused, in homicide cases, to interpose the defence of self-defense by affirmative evidence did not require him to prove his innocence; but he was presumed to be innocent, and the burden was on the prosecution to prove his guilt beyond a reasonable doubt. There was no allusion to the fact that the term "presumption of innocence" was not used in the instruction.

In *Cochran v. Commonwealth*,³¹ decided in 1917, the defendant was convicted of unlawfully receiving liquor. Although he had introduced no evidence in his behalf, he asked that the jury be instructed that he was presumed to be innocent. The refusal of the trial court to give this instruction was upheld. The court said that to have given it would have been to announce a conclusion of the court and to have directed the jury to find that the defendant was still presumed innocent regardless of the evidence: "The correct rule . . . is that the accused . . . rests secure in that presumption of innocence until proof . . . establishes his guilt beyond a reasonable doubt."³²

It seems clear from these cases that, although the term "presumption of innocence" was continually used by the courts, it was little more than a well-turned phrase used to convey the general idea that the defendant must be tried fairly on the evidence offered and that he need not assert and prove his innocence. Thus employing a term, without a clear conception of its meaning, may be academically objectionable, but practically, in these instances, there is nothing to indicate that harm was done. Furthermore, the decision in the *Cochran* case shows that the Supreme Court of Appeals was alert to reject the use of this pat phrase when its use might clearly result in a miscarriage of justice.

However, in *Widgeon v. Commonwealth*,³³ decided in 1925, the Supreme Court of Appeals definitely fell victim to the formula. An otherwise proper conviction for unlawfully operating a still was reversed because the trial court failed to instruct the jury on the pre-

³⁰113 Va. 732, 733, 73 S. E. 470, 471 (1912).

³¹122 Va. 801, 94 S. E. 329 (1917).

³²122 Va. 801, 815, 94 S. E. 329, 333 (1917).

³³142 Va. 658, 128 S. E. 459 (1925).

sumption of innocence. It was held that such an instruction "has become one of the mile posts in criminal law." The presumption "is one of the cardinal defences upon which he [the defendant] has the right to rely."³⁴ It was further said that an instruction as to proof beyond a reasonable doubt was insufficient because it "nowhere deals with the presumption of innocence, a presumption so strong that not only is the accused entitled to the benefit of it, but if the case be a doubtful one, this presumption is always sufficient to turn the scale in his favor."³⁵ Here there is both confusion and a miscarriage of justice. If the court meant, by saying that the presumption may turn the scale for the defendant, that the presumption is evidence, the case cannot be reconciled with *Cochran v. Commonwealth*.³⁶ For if the presumption is evidence the defendant is entitled to the benefit of it, and the fact that he has introduced no other evidence, as in the *Cochran* case, is no ground for denying him the use of it. On the other hand, if it was merely meant that the presumption turns the scale in the sense that it expresses the measure of proof required and prevents a conviction on a mere preponderance of the evidence against the accused, that idea has been clearly conveyed to the jury by the instruction to the effect that they must be satisfied of guilt beyond a reasonable doubt.

In *Phillips v. Commonwealth*³⁷ the court again reversed a conviction because there had been no instruction on the presumption of innocence and cited *Coffin v. U. S.* to the effect that the error is not corrected by an instruction on proof beyond a reasonable doubt. In *Campbell v. Commonwealth*,³⁸ decided in 1934, the court reversed a conviction because there had been no instruction on the presumption of innocence, and quoted at length from the *Coffin* case to sustain its position that the presumption is independent from the rule regarding the burden of proof.

In 1938, in *Allen v. Commonwealth*,³⁹ Virginia definitely and completely embraced the rule of *Coffin v. United States*. In a trial of the defendant for malicious wounding the court, of its own motion, instructed the jury that:

"the defendant is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt, and

³⁴142 Va. 658, 665-666, 128 S. E. 459, 461 (1925).

³⁵142 Va. 658, 666, 128 S. E. 459, 461 (1925).

³⁶122 Va. 801, 94 S. E. 329 (1917).

³⁷143 Va. 504, 129 S. E. 259 (1925).

³⁸162 Va. 818, 174 S. E. 856 (1934).

³⁹171 Va. 499, 198 S. E. 894 (1938).

this presumption of innocence, *unless and until rebutted by the evidence, 'if so rebutted,'* goes with the defendant throughout the trial, and applies at each and every stage thereof. . . .⁴⁰

To give this instruction was held to be reversible error. It was said that the presumption is "to be balanced against evidence of guilt throughout the trial. Its protective covering is not stripped away until the jury . . . has reached the conclusion that guilt has been established."⁴¹ Further:

"If this presumption applies at every stage of the trial and goes with the evidence to be weighed by the jury . . . then at no stage thereof is it rebutted."⁴²

Thus the court, in effect, abandons, as violative of the rights of accused persons, the comparatively simple principles and procedure applied in the earlier cases. Instructions similar to that which was properly held to be misleading in *Barker v. Commonwealth*⁴³ must now be given.

To confuse the issue further and to add another fallacy to the *Coffin* case, which was logical at least to the extent of recognizing that under the rule adopted there was a distinction between the presumption of innocence and the burden of proof, *Allen v. Commonwealth* apparently ignores any distinction. This is demonstrated by the fact that, as authority for the statement that the presumption of innocence is a continuing one and that its protection is not taken away until the jury has found guilt, the court quotes the following from *Potts v. Commonwealth*:

"That burden [the burden of proof beyond a reasonable doubt] is continuous, and can never be imposed upon the accused, although the evidence may shift from one side to the other, to meet the varying exigencies of the trial."⁴⁴

Apparently then, in Virginia, the burden of proof and the presumption of innocence are identical. They are evidence for the defendant, and the jury must be instructed to that effect twice, once by an instruction on the presumption of innocence and once by an instruction on the burden of proof.

The least result of all of this is confusion in the mind of the jury, a group likely to be already confused and not likely to be adept at

⁴⁰171 Va. 499, 502, 198 S. E. 896 (1938). Italics supplied).

⁴¹171 Va. 499, 503, 198 S. E. 894, 896 (1938).

⁴²171 Va. 499, 504, 198 S. E. 894, 896 (1938).

⁴³90 Va. 820, 20 S. E. 776 (1894).

⁴⁴171 Va. 499, 503, 198 S. E. 894, 896 (1938).

threading such a maze of language. But worse results may follow. The jury may consider as evidence for the defendant a rule of adjective law which contains nothing of probative value; a rule which, unlike many presumptions, rests on no immediately significant fact but on the broad basis that one is accused of crime.

The zeal with which this rule is adhered to and the manifest absurdity of its application are shown by *Grosso v. Commonwealth*.⁴⁵ The defendant was tried for practicing chiropractic without a license. By statute the burden of proof was "upon him to establish his right to practice."⁴⁶ The prosecution offered virtually conclusive and uncontradicted evidence that the defendant was doing acts which were defined by the legislature as the practice of chiropractic. The prosecution also offered evidence that the defendant had no license. The latter offered no evidence on either of these issues. On appeal from a conviction it was assigned as error that the trial court had refused to instruct the jury that the law presumed the accused innocent of the offense, which presumption went with him throughout the entire trial and applied to every stage of the case. It was held that the defendant was entitled to such an instruction, and that the statute merely cast upon him the burden of bringing forward evidence to show his right to practice and in no way deprived him of the benefit of the presumption of innocence.

Aside from the statute, this decision requires that the court instruct the jury that, although the defendant has offered no evidence on his own behalf and has contradicted none of the evidence of the prosecution, he is still presumed to be innocent. As the Virginia court itself said, in a case now impliedly rejected,⁴⁷ so to instruct is to announce a conclusion of the court and to direct the jury to find that the defendant is presumed innocent regardless of the evidence.

Considered in view of the statute, the decision nullifies the will of the legislature. Examining the words of the statute in their natural meaning, in their context,⁴⁸ and in their relation to the subject matter,⁴⁹ it would seem that the intention was to require the defendant to

⁴⁵177 Va. 830, 13 S. E. (2d) 285 (1941).

⁴⁶Va. Code Ann. (Michie, 1936) § 1614.

⁴⁷*Cochran v. Commonwealth*, 122 Va. 801, 94 S. E. 329 (1917).

⁴⁸The statute also provides that, as a preliminary step in the prosecution of those practicing without a license, the board of medical examiners for the state may require one practicing "to make reasonable proof, satisfactory to the board, that he is the identical person licensed. . . ."

⁴⁹It is a general rule of the criminal law that the defendant has the burden of proof on the issue of whether he has or has not a license to do certain acts. The rule

satisfy the jury that he did the alleged acts with authority. If he must satisfy the jury that he is entitled to practice, it is obvious that he cannot be presumed to be entitled to practice.⁵⁰ But if the court is correct in interpreting the statute as merely requiring the defendant to produce evidence of his right to practice, the statute is still nullified. The purpose of requiring one to go forward with the evidence on a particular phase of the controversy is to place upon him the duty of putting that phase of the controversy in issue. If he fails in this duty issue is not joined, but is tacitly resolved against him. Therefore, if, as the court held, the defendant was required to produce evidence of his authority to practice chiropractic, his failure to produce any evidence entirely relieved the prosecution of the necessity of proving that he had no authority. But the effect of giving the requested general instruction on the presumption of innocence is to place material of no probative value before the jury as evidence for the defendant, thereby requiring the prosecution to introduce evidence in rebuttal and entirely relieving the defendant of his statutory duty.

It is submitted that the confusion and error manifested in the course of the Virginia decisions, and culminating with *Grosso v. Commonwealth*, can be entirely avoided by relegating the presumption of innocence to its true place. It is not necessary to cease using the term. It is only necessary to cease using it loosely and improperly. Recognizing that it expresses the same idea that is expressed in the rule requiring proof beyond a reasonable doubt, it still may be used effectively to emphasize that rule. It is so used in California by virtue of statute:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved . . . but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt."

"In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence need be given."⁵¹

The presumption of innocence may also be used to caution the jury

is based on the principle that this is a fact peculiarly within his knowledge. 20 Am. Jur. 155; 22 C. J. S. 885; 37 C. J. 269.

⁵⁰*Culpepper v. State*, 40 Okla. Cr. 103, 111 Pac. 679, 683 (1910). A statute provided that the burden of proof was on accused as to circumstances justifying or excusing homicide: "And by what process of reasoning can the statement that he is presumed to have been excusable or justifiable be reconciled with the statutory provision. . .? How can that be presumed which the law says must be proved?"

⁵¹Cal. Pen. Code (1941) §§ 1096, 1096A.