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J. Frazier Glenn Jr.

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THE CONSTITUTIONALITY OF STATUTORY PRESUMPTIONS

Legislation declaring that proof of one fact shall be presumptive of an ultimate fact to be proved is deemed invalid unless there is a rational connection between the facts proved and those which may be inferred.\(^1\) Thus, a Georgia statute\(^2\) placing upon a railroad company the burden of disproving a presumption of negligence\(^3\) raised upon mere proof of injury caused by the "running of locomotives or cars" was held by the Supreme Court of the United States unconstitutional because there was no rational connection between the fact of injury and the negligence inferred therefrom.\(^4\)

This same court, in construing a statute creating a presumption of knowledge of insolvency against bank officials upon proof of receiving deposits during insolvency, held that a rational connection between fact proved and fact inferred was unnecessary where the legislature had the power to impose absolute liability upon proof of the fact raising the presumption.\(^5\) Under this ruling, a preliminary test as to the validity of a presumption would be whether a like rule, imposing absolute liability, would be invalid. Applying this test to the Georgia statute,\(^6\) the first question would be, whether the legislature had the power to impose absolute liability upon a railroad for any injuries caused by the running of its locomotives or cars. That absolute liability may be imposed under certain conditions is shown by statutes making railroads absolutely liable for fire communicated

\(^{2}\)Ga. Ann. Code (Miche, 1926) §2780. "A railroad company shall be liable for any damage done to persons, stock or other property by the running of locomotives, or cars, or other machinery of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."
\(^{4}\)Plaintiff's husband was killed when the truck he was driving collided with the defendants' train at a crossing. The Georgia courts, in construing the statute above, supra note 2, held that the defendant railroad company must disprove by a preponderance of evidence every particular in which it was alleged to have been negligent. Western and Atl. R. R. v. Henderson, 35 Ga. App. 353, 133 S. E. 645 (1926), aff'd, 36 Ga. App. 679, 137 S. E. 855 (1927), aff'd, 167 Ga. 22, 144 S. E. 905 (1928), rev'd, 49 S. Ct. 443, 73 L. Ed. 519 (1929), aff'd, 149 S. E. 101 (1929).
\(^{5}\)Ferry v. Ramsay, 277 U. S. 88, 48 S. Ct. 443 (1923); cf. Manley v. State, supra note 1, where a similar statute creating a presumption of criminal intent was held unconstitutional. See (1929) 7 N. C. L. Rev. 62, 453.
\(^{6}\)Supra note 2.
by its engines,\textsuperscript{7} for injuries to passengers,\textsuperscript{8} and for injuries to third persons caused by failure to maintain their crossings in safe condition.\textsuperscript{9} Whether a legislature has the power to go a step further in imposing absolute liability upon a railroad seemingly resolves itself into a question of policy. As contrasted with the foregoing statutes, the Federal courts\textsuperscript{10} and those of a majority of the states\textsuperscript{11} adopt a policy more favorable toward railroads in imposing the duty to stop, look, and listen upon persons approaching railroad tracks. This is based upon the practical considerations that a person can avoid a train more easily than a train can avoid him, and the expense and inconvenience of stopping and starting trains. A frequent reason for imposing absolute liability is that in the particular type of cases, the class of persons so made liable is the one usually at fault. This would not be true in the railroad accident cases because the person injured is as often at fault as the railroad. On the other hand, it may be argued that due to the danger inherent in operating trains, a number of accidents occur unavoidably, and that still more occur through the fault of both parties, and that even where only one party is to blame, it is often impossible to prove that he is the one at fault. It may be suggested that society should indirectly bear the burden of these accidents by making the railroads pay for them in the first instance—a burden which the railroads can ultimately shift to the public by means of their rates.\textsuperscript{12} It seems then fairly arguable that absolute liability for train accidents might constitutionally be imposed upon the railroads. The court, however, in the Georgia case, absolutely ignored this phase of the question.

Conceding, however, that a legislature does not have the power

\textsuperscript{7} St. Louis and S. F. R. R. v. Matthews, 165 U. S. 1, 41 L. Ed. 611, 17 S. Ct. 243 (1896); Anderson v. Minneapolis, etc. R. R. Co., 150 Minn. 530, 185 N. W. 299 (1921). See 5 Wigmore, Evidence, (2d Ed.) §2509, and notes 3 and 4.


\textsuperscript{9} Talley v. Pittsburg, etc. R. R., 231 Ill. App. 513 (1923); Mouson v. Chicago, etc. R. R., 181 Iowa 1354, 159 N. W. 679 (1916).

\textsuperscript{10} "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train and not the train stop for him." Baltimore and Ohio R. R. v. Goodman, 275 U. S. 66, 67, 48 S. Ct. 22 (1922).


to impose absolute liability upon railroad companies for all injuries caused by the running of their trains, it does not necessarily follow that a legislature should be denied the power to impose the lesser handicap of a presumption. Thus, a presumption of negligence from derailment has been held constitutional on the ground that there was a rational connection between the fact proved and the fact presumed therefrom. But the Court, in holding the Georgia statute unconstitutional because its "reasoning does not lead from the occurrence back to its cause," overlooks the fact that presumptions without such rational connection have been held constitutional upon the ground that they were based upon some reason of policy distinct from the mere probability of the inference. Professor Zechariah Chafee, Jr., says, "Some rebuttable presumptions have no logical core but rest upon some policy of that particular branch of substantive law with which they are connected." For illustration, the presumption that if goods are handled by several carriers, damage in transit was caused by the last carrier, is obviously based upon the policy of relieving the shipper of the initial burden of investigation and putting it on someone who has the facilities for doing it. Therefore, granting there is no basis of probability for the presumption created by the Georgia statute, it should not be held unconstitutional if it is based upon some reasonable policy. That such a presumption would stimulate railroads to disclose facts peculiarly within their own knowledge, the non-disclosure of which would defeat the ends of justice; and, also

22 Mobile, etc. R. R. v. Turnipseed, 219 U. S. 35, 55 L. Ed. 78, 31 S. Ct. 136, 55 L. R. A. (N. S.) 226, Ann. Cas. 1912 A, 463 (1910). It has been settled by the Supreme Court of the United States that a presumption must have a rational connection between fact proved and fact presumed therefrom, supra note 1. Thus, a statute raising a presumption of knowledge of actual possession of a still upon mere proof of finding the still on defendant's land was held valid because the "existence upon the land of distilling apparatus . . . has a natural relation to the fact that the occupant of the land has knowledge of . . . its existence." Haynes v. State, 258 U. S. 1, 42 S. Ct. 204 (1922). For further illustration see, Fong Yue Ting v. U. S., 149 U. S. 698, 729, 13 S. Ct. 1016 (1892); James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 71 L. ed. 589 (1926); Hawkins v. Bleakley, 243 U. S. 210, 214, 37 S. Ct. 255 (1916); Adams v. New York, 192 U. S. 585, 588, 24 S. Ct. 372 (1903). Contra: 2 Wigmore, Evidence (2d. ed.) §1354 at page 1672, "If the legislature can make a rule of evidence at all, it cannot be controlled by a judicial standard of rationality, anymore than its economic fallacies can be invalidated by the judicial conceptions of economic truth . . . the legislature is not obliged to obey either the axioms of rational evidence or the axioms of economic science.

22 Supra note 2.


24 Supra note 2.
that their great wealth and power would enable them to disprove negligence more easily than an individual could prove it, are practical arguments for such presumptions. It is submitted that it should be within the exclusive power of the legislature to determine when public interest makes necessary a shift in evidential procedure so long as such change is not merely arbitrary or capricious.\textsuperscript{17}

The Court also found the Georgia statute\textsuperscript{18} unconstitutional because the presumption created by it placed upon the railroad not a mere duty of proceeding but the burden of disproving every allegation of negligence by a preponderance of the evidence. This statute was distinguished from a Mississippi statute\textsuperscript{19} held constitutional by this same Court because the latter merely required that the railroad company go forward with the evidence.\textsuperscript{20} So far as we have been able to find, this is the first time the Supreme Court of the United States has ever given the shifting of the risk of non-persuasion as a ground for holding a statutory presumption invalid. On the other hand, several statutes which shifted the risk of non-persuasion have been held constitutional.\textsuperscript{21}

\textsuperscript{17}2 Wigmore, Evidence (2d ed.), §1354 at page 1670, "There is not the least doubt, on principle, that the legislature has entire control over such rules; as it has over all other rules of procedure in general, and evidence in particular, subject only to the limitations expressly enshrined in the Constitution." As to the constitutional limitations upon rules of evidence, see 1 Wigmore, Evidence (2d ed.), §7. The determination of the constitutionality of a rule of evidence resolves itself into a balancing of "rights." "Choice must be exercised. The choice is not, however, capricious, it involves judgment between defined claims, each of recognized validity, each with a pedigree of its own, but all of which cannot be satisfied completely." Frankfurter, Constitutional Opinions of Justice Holmes (1915) 29 Harv. L. Rev. 636, 686.

\textsuperscript{18}Supra note 2.

\textsuperscript{19}Miss. Ann. Code (Hemmingway, 1927), §1645. "... Proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." In Mobile etc. R. R. v. Turnipseed, \textit{supra} note 13, this statute was held to impose upon the defendant railroad the duty of going forward with the evidence. It should be noted that the plaintiff in the Georgia case was a third person killed in a crossing collision, whereas the plaintiff in the Mississippi case was an employee injured by a derailment.

\textsuperscript{20}The indiscriminate use of the word "presumption" has caused confusion. It may mean anything from just enough evidence to get to the jury to a conclusive presumption. McCormick, \textit{Presumptions and Burden of Proof} (1927) 5 N. C. L. Rev. 291, 307. That the Georgia statute does more than create a true presumption because it is not the function of a presumption to shift the onus of proof; see 4 Wigmore, Evidence (2d ed.), §2489. That a presumption may, exceptionally shift the onus of proof, see Bohlen, \textit{The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof}, \textit{supra} note 15.

The fundamental principle that the plaintiff must prove his case has been modified both by legislative enactment and judicial decision to meet the complexities of a changing civilization. Thus, there are statutes which shift certain portions of the burden of proof from the plaintiff, upon whom it originally rested, to the defendant. In some instances, the mere duty of producing evidence has been shifted to the defendant, in others, the risk of non-persuasion has been imposed, and in still others, absolute liability has been placed upon the defendant. Also, the courts, by invoking the doctrine of "res ipsa loquitur," have achieved the same results obtained by legislative enactments. Of course it would be logical that where a legislature could impose absolute liability, it could also impose the lesser burdens of the risk of non-persuasion and of producing evidence. Likewise, if the legislature is empowered to shift the duty of proceeding with the evidence in a particular situation to the defendant, there seems little reason to deny it the power to impose the heavier burden of the risk of non-persuasion upon the defendant in a similar situation, as the effect of shifting the risk of non-persuasion is but to require the defendant, in his defense, to prove a part of the case which was originally required of the plaintiff. Illustrations of this apportionment can be found in every case of the so-called "affirmative defenses." Thus, in defamation, the plaintiff alleges but need not prove the falsity of the defendant's statements. The defendant must prove "truth." So, in an action on a note the plaintiff avers that it is unpaid, but the defendant must plead and prove payment. There is no logic in these apportionments, nor does experience indicate a probability that notes are unpaid or grave imputations false. The real reason for shifting this risk of non-persuasion is based upon beliefs as to the expediency of requiring one party or the other to bear the risk of the failure to disclose, convincingly, the pertinent facts about the particular issue.

v. Georgia, supra note 13; Hawkins v. Bleakley, supra note 13; James-Dickinson Farm Mortgage Co. v. Harry, supra note 13. It should be noted that the Supreme Court of the United States in construing the statutes in the above cases based their decisions upon the ground that there was probability in the presumptions created.

22 See excellent comment (1923) 12 CAL. L. REV. 138.
24 Where the plaintiff produces in evidence the defendant's note, uncanceled, upon which suit was brought, the burden is on the defendant to show that he had paid it, in order to establish this as a defense. Citizens Bank v. Knox, 187 N. C. 565, 122 S. E. 304 (1924); Swan v. Carawan, 168 N. C. 473, 84 S. E. 706 (1915).
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It is probable that the Court will not adhere to its distinction between presumptions imposing the risk of non-persuasion and those merely shifting the duty of proceeding with the evidence. If it continues to require that statutory presumptions be based upon a "rational connection," it will doubtless extend this same requirement to statutes shifting the mere duty of going forward with the evidence. It is hoped, however, that it will do neither, but will adopt the more liberal attitude of holding every type of statutory presumption valid where absolute liability could be imposed in the same situation, and, where absolute liability could not be imposed, of holding a statutory presumption valid if it is based either upon a "probable connection" or some authorized reason of policy.

J. FRAZIER GLENN, JR.

RISK OF LOSS IN BANK COLLECTIONS UNDER NORTH CAROLINA STATUTE

As an emergency measure, North Carolina, together with a number of other states, enacted a statute permitting a drawee bank to

2 A statute making failure to perform labor contracted for without refunding the money paid therefor prima facie evidence of criminal intent was declared unconstitutional although it was construed as meaning just enough evidence to go to the jury from which they could find for either party. Bailey v. Alabama, supra note 1. This case seems to indicate the importance placed upon a probable connection by the Supreme Court of the United States.

3 This attitude was adopted by the U. S. Supreme Court in Ferry v. Ramsay, supra note 5.

4 Since the completion of this note, and after the United States Supreme Court's decision holding the Georgia statute unconstitutional, supra note 4, the Court of Appeals of Georgia held this same statute constitutional on the ground that the U. S. Supreme Court had erroneously construed the statute as shifting the risk of non-persuasion when its proper construction, indicated by a long line of decisions, merely required the railroad company to proceed with the evidence. Ga. Ry. and Power Co. v. Shaw, 149 S. E. 657 (Ga., Oct. 1929). The constitutionality of this decision will be the subject of a comment in a forthcoming issue of this Law Review.

It should be noted that the Georgia legislature, immediately after and apparently as a result of the decision in the Henderson case, supra note 4, passed an act approved August 24, 1929, which creates a presumption of negligence against a railroad company in the words of the Mississippi statute, held constitutional in Mobile, etc. R. R. v. Turnipseed, supra note 13.

1 N. C. Code 1927, §220 (aa) as enacted by N. C. Pub. Laws 1921, Ch. 20, §2. In order to prevent the accumulation of unnecessary amounts of money in the vaults of the banks and trust companies chartered by this state, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable in exchange drawn on the reserve deposits of said banks, when any such check is presented by or through any Federal Reserve Bank, postoffice or express company or any respective agent thereof. Held constitutional in Farmers' and Merchants' Bank of Monroe v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct.