CASE NOTES

RE PEATLING, *deceased*[1]

Intestacy—Capacity of wife to re-marry—Presumption of death of first husband—Presumption of validity of marriage—Presumption of innocence —Burden of Proof.

Many eminent writers have consistently pointed out that the topic of presumptions abounds in grave difficulties.[2] The use of varying and even conflicting terminology to describe any one presumption, and the true effect which a presumption may have on the incidence of the burden of proof, as well as the perplexing question of which presumption is to prevail when there is a conflict between them, are instances of the tangle which faces judges, writers and students alike. But one must concede that presumpions, although a subject-matter fraught with doubt and confusion, may play an invaluable role as an aid to evidence in reaching a conclusion where evidence is sparse.

McInerney J. in the Supreme Court of Victoria recently had the task of coping with this difficult subject-matter. In *Re Peatling*,[2a] he was concerned with the administration of an intestate estate. In this case, the Supreme Court gave the presumption of death a more meaningful operation than had hitherto been thought possible, in that it had stressed a special presumption of death arising from the statutory defence connected with the crime of bigamy.[3] The judgment is additionally of interest because of its discussion of the presumption of innocence and of the effect which the presumption of validity of marriage has on the burden of proof.

The case involved the not infrequently occurring situation of a person re-marrying in the belief that the former spouse, of whom nothing had been known for many years, was dead. The deceased, P., had married E., in 1959. E. had previously lawfully married G. in 1939, but G. had disappeared in 1945 or 1946, and had not thereafter been heard of. On an originating summons, the Court was asked to determine whether E. was entitled to share in P.'s intestate estate as his widow.[4]

To answer this question, the Court had to determine whether the widow, E., was the lawful wife of the deceased, P. Certainly, the deceased had married E. in 1959, but complications arose because E. had, in 1939, married G. and there was no evidence that this marriage had been dissolved or annulled. E. would have lacked capacity to marry the deceased, P., in 1959, unless she could show in some way that G. was dead in 1959.

There being no direct evidence one way or another, McInerney J. considered various presumptions to determine the issue. In the result, His Honour held that E. was the deceased's lawful wife and thus entitled to share in his estate as next of kin, for she was aided by the presumptions of death prior to re-marriage, of innocence of the crime of bigamy, and of validity of the second marriage. One presumption upon which the judgment is based is the 'presump-

[1] [1969] V.R.214. Supreme Court of Victoria; McInerney J.

[2] Cross, *Evidence* (3rd ed. 1967) 101; Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed. 1940) ix, 286; Williams, *Criminal Law* (2nd ed. 1961) 877.

[2a] [1969] V.R. 214.

[3] Although Mr Justice McInerney's analysis had previously been adopted in *Re Watkins* [1953] 1 W.L.R. 1323, and also by Evatt J. in *Axon v. Axon* (1938) 59 C.L.R. 395, 410.

[4] The Court was also asked to pronounce on the question whether E.'s children, born respectively in 1950, 1952 and 1953 were capable of being legitimated.

tion of death of an absent spouse prior to the date of re-marriage of the other spouse'.[5] But His Honour appeared to consider that this presumption could be most conveniently discussed with the so-called 'presumption of innocence'. This presumption of innocence has caused some confusion in the law of evidence and will be discussed subsequently.

With reference to the presumption of death, His Honour adopted an analysis which ran counter to the view generally understood to represent the law in Australia. The judgment, in discussing the presumption of death, distinguished the 'general presumption of death arising where a person has not been heard of for a period of seven years or longer by those with whom he might naturally have been expected to have communicated had he been alive',[6] from the presumption that an absent spouse had died prior to the date of the second, allegedly bigamous, marriage. Under the general presumption, a person is presumed not to have died at any particular time prior to the institution of the proceedings, whereas under the special presumption, he is presumed to have died prior to the second marriage. Thus, McInerney J. envisaged two distinct presumptions of death—a general presumption and a special presumption.[6a]

The 'special presumption' of death had previously appeared in the judgment of Evatt J. in *Axon v. Axon*.[7] There, the wife was seeking maintenance from her husband, whom she had married in 1932. There was evidence that she had also lawfully married, in 1911, one Mauro Herzich. In order to succeed, the wife had to show that her first husband was dead at the time of the second marriage to Axon. Evatt J. spoke in terms of the 'general presumption of death', and another, distinct presumption, which derived from a bigamy enactment.[8] This bigamy enactment contained a specific provision which provided that it should be a defence to a bigamy charge to show that the spouse had been continually absent for at least seven years before the re-marriage and had not been known by the accused to be living within that time. From this statutory defence, the inference was drawn that the spouse had died prior to the remarriage. Thus, the special presumption was said to be established. McInerney J., in the case under review, regarded the reasoning of Evatt J. as 'persuasive'.

But neither Latham C.J. nor Dixon J. made reference to the 'special presumption of death' in *Axon v. Axon*.[9] They proceeded on the basis that only the common law presumption of death existed,[10] and declined to draw any further 'special presumption' from the terms of the bigamy statute. This demonstrates the element of uncertainty and the conflicting manner in which various judges approach individual presumptions.[11] A common complaint voiced against the whole area of presumptions is that the rules have never been formulated with precision. The fact that Latham C.J. and Dixon J. declined to recognize a special presumption may be interpreted to mean that they considered such a step erroneous. But they do not specifically refer to it and from this lack of condemnation, one could infer that they may not consider it to be wholly unsatisfactory. This topic is thus surrounded by uncertainty and a definite choice

[5] [1969] V.R. 214, 218.

[6] *Ibid.*

[6a] McInerney J. dismissed the general presumption as having no application in this case [1969] V.R. 214, 218.

[7] (1938) 59 C.L.R. 395, 411.

[8] Criminal Law Consolidation Act 1876, s. 77. A similar provision is now contained in: Crimes Act 1958, s. 64. See also Marriage Act 1961-1966 (Cth), s. 94.

[9] (1938) 59 C.L.R. 395.

[10] Dixon J. clearly stated that there was no presumption as to what date a person died. 'The presumption authorizes no finding that he died at or before a given date. It is limited to a presumptive conclusion that at the time of the proceedings the man no longer lives'. *Ibid.*, 405.

[11] Cross, *op. cit.* 122, states that the view of Evatt J. is 'arguable'.

between explicit recognition and silent disregard by the High Court would be welcome.

The analysis by McInerney J. of the presumption of death will meet with support from those who maintain that this is the way in which the presumption can be of any assistance in cases where the finding of death at the time of the proceedings will not suffice because it is necessary to prove that death occurred before a particular date. However, the legislature enacted the defence with the crime of bigamy in mind, and as a defence to an indictment for that offence. Thus, it may be going too far to suggest that the presumption is applicable in civil litigation. Nevertheless, this is a more convenient view, and in future, tribunals may consider it attractive. It remains to be seen whether it will command general acceptance.

McInerney J. also refers to the presumption of innocence. In criminal cases, this presumption merely states in another form that the proponent of a claim or charge must adduce evidence in support of it. Thus, the presumption appears to be a by-product of the fact that the prosecution is obliged to prove the case against the accused beyond reasonable doubt.[12]

Many writers confirm the existence of such a presumption,[13] but they unanimously state that the presumption in the criminal law is not, in truth, a genuine addition to the existing number of presumptions, but rather another mode of expressing the accepted rule relating to the burden of proof in criminal cases (that it is for the prosecution to adduce evidence and to produce proof beyond a reasonable doubt).[14]

Although it is generally recognized that this 'presumption' operates in criminal litigation, McInerney J. attempts to extend it to resolve an issue sometimes arising in civil litigation, the implication of a party in a criminal act, thus treating the presumption as 'part of a wider presumption against misconduct'. His Honour cites various Victorian decisions to support this extension.[15] However, none of these cases deals in express terms with the presumption of innocence. Thus, on a literal reading of these cases, they do not support the extension by McInerney J. At first glance, it seems that these cases merely illustrate the application of the presumption of regularity. Under the presumption of regularity, it is presumed that public and official acts and duties have been regularly and properly performed, and that persons acting as public officers, or in public capacities, have been regularly and properly appointed.

It may also be objected that three of these cases are criminal cases[16] and thus do not support the extension of the presumption of innocence, if it exists, to civil litigation. However, it might be said that the fact that they are criminal proceedings is irrelevant. For, in these cases, quite apart from the actual crime

[12] Viscount Sankey L.C. stated in *Woolmington v. D.P.P.* [1935] A.C. 462, 481: 'Throughout the web of English law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'.

[13] Cross, *op. cit.* 102; Turner, *Kenny's Outlines of Criminal Law* (18th ed. 1962) 442; Wigmore, *op. cit.* 406; Archbold, *Pleading, Evidence and Practice in Criminal Cases* (35th ed. 1962) 475.

[14] On the presumption of innocence in criminal cases, see Wigmore, *op. cit.* 406-12.

[15] [1969] V.R. 214, 219.

[16] In *The Queen v. Wright* (1871) 2 V.L.R. 204, the prisoner was charged with forging a bill of lading In order to prove the handwriting of the ship's captain, the ship's manifesto, purporting to be signed by the captain, was produced This evidence was held admissible by applying the assumption that the signature on the manifesto was genuine. In *The King v. Arrowsmith* [1950] V.L.R. 78, it was presumed that an affidavit was lawfully made. In *Hardess v. Beaumont* [1953] V.L.R. 315, the defendant was charged with having sold adulterated meat; the issue was whether an analyst's certificate could be accepted as evidence. The presumption of regularity was applied to presume that the certificate was made by an approved analyst.

charged, an incidental allegation of criminality had been made (that the documents in question had not been properly and lawfully made), and the question of the application of presumptions was raised with reference to this incidental allegation. Thus, the position is analogous to situations where an issue having 'overtones' of criminality is raised in a civil case. The question arising from the cases cited is whether they imply a presumption of innocence with regard to the incidental criminal issue, as distinct from the general presumption of innocence as applied to criminal cases (that is, whether the presumption rests on a *broader* basis).[17]

These cases, it may plausibly be maintained, do support, only by implication, the existence of a presumption of innocence as applying to issues of the kind mentioned, whether arising in criminal or civil litigation. For instance, in the civil case of *Clutterbuck v. Curry*,[18] the plaintiff brought an action against the defendant, the owner of a cab, for injuries sustained because of negligence by the defendant's driver. By-law 78 of the City of Melbourne provided that no owner of a licensed carriage should entrust it to any person as driver except as his servant. It was held that it was to be presumed that the by-law had been obeyed, thus arriving at the conclusion that the cab-owner was vicariously liable for his 'servant's' negligence. So the issue raised was in one sense criminal, namely, whether there had been a breach of the by-law. Higinbotham J. stated:

> [the proprietor] must be presumed . . . to hold himself out as complying with the conditions of the bye-laws, and until the contrary is proved the presumption is that he has done so.[18a]

This presumption, although generally regarded as a presumption of regularity, may be more accurately described as a presumption that the law has been obeyed. By presuming that the law has been obeyed, the Court is in effect assuming that the person against whom the 'criminal' allegation has been made is innocent. Thus, when the presumption is expressed in these terms, it appears to be a re-formulation of the presumption of innocence.

In *Re Peatling*,[19] McInerney J. recognized that the presumption of innocence applied to the criminal allegation of bigamy.[19a] However, His Honour obscured its actual application by treating it, not as an independent presumption, but as being material only in so far as it supported the more specific presumptions of death prior to re-marriage and of validity of marriage.

Mr Justice McInerney's discussion of the effect of the presumption of the validity of marriage on the burden of proof is also of interest.[20] The present case involved the 'essential validity' of the marriage. The presumption is that a marriage which is unobjectionable as to form remains a valid marriage until some evidence is adduced that the marriage was, in fact, a nullity.

The effect of such a presumption of essential validity on the burden of proof has not been conclusively settled and conflicting opinions are notable. Here,

[17] Taylor, *A Treatise on the Law of Evidence* (12th ed. 1931) 106 maintains that the presumption of innocence also applies to civil proceedings where a criminal issue is raised.

[18] (1885) 11 V.LR. 810. *McKinnon v. Gange* [1910] V.L.R. 32 and *Dillon v. Gange* (1941) 64 C.L.R. 253 involved similar fact situations. These cases arose from By-law 78, s. 16 of the City of Melbourne The by-law was made pursuant to power conferred by The Licensed Carriages Statute 1864, ss. 4-5.

[18a] (1885) 11 V.L.R. 810, 815.

[19] [1969] V.R. 214, 220-1.

[19a] Wigmore, *op. cit.* 479 notes: 'Often the solution is judicially attempted by invoking a presumption against the crime of bigamy; but this is an artificial solution, and virtually leaves it to a jury's guess'.

[20] McInerney J. held that proof on the preponderance of probabilities was the standard required to rebut the presumption.

McInerney J., although he did not have to decide this matter,[21] nevertheless expressed his view.

After considering the authorities, His Honour concluded that the topic was one of considerable complexity, but ventured to suggest that the presumption of validity of marriage did not cast a legal burden on the party against whom it operated. The legal burden remained throughout on the person relying on the presumption.

In *Axon v. Axon*,[22] the effect of the presumption of the validity of marriage was considered. Dixon J. adverted to the question of onus of proof and explicitly stated that the effect of the presumption was to cast upon the party denying the validity of the marriage the burden of proving that the absent spouse was still living at the time of the re-marriage.[23] Thus, His Honour felt that the presumption altered the legal burden:

> . . . it was for the respondent to overcome the presumption in favour of the marriage celebrated on that date between himself and the appellant. He failed to obtain . . . an affirmative finding that Mauro Herzich was then alive, and unless such a finding is made the marriage must be treated as valid.[24]

However, Latham C.J. inclined to the contrary view (now adopted by McInerney J.) that the effect of the presumption was merely to cast an evidentiary burden on the person against whom it operated:

> . . . it was for the complainant to establish upon a balance of probabilities, after all the evidence had been duly considered, that she was the wife of the defendant. If the justices were left in a state of doubt as to whether or not she was the wife of the defendant, no order should have been made in favour of the complainant.[25]

Evatt J. did not directly deal with this extremely fine point, but His Honour indirectly implied that the effect of the presumption was to cast an evidentiary burden on the opponent. He concluded that the wife had established her case with the aid of the special presumption of death prior to the re-marriage arising out of the special statutory defence and the concurrent presumption in favour of the validity of the second marriage.

Thus, the position is far from clear. Although there may be effective reasons for either view, it seems that the view of Dixon J. (endorsed by Professor Cross[26]) may be preferable. In view of the social advantages in favouring a marriage which has been proved to have been performed, especially when a prior spouse has not been heard of for a long interval, the presumption of validity of marriage should operate to cast a legal burden on the party against whom it operates. In this case, if the issue had to be decided in terms of burden of proof, it would seem preferable to adopt the view of Dixon J. to reach the more desirable result. Noting the fact that the wife had been cohabiting with P. since 1947, and their ensuing marriage in 1959, there seems to be no doubt that P. would have wished E. to share in his estate. If the case rested on the question of burden of proof, and the view of McInerney J. was adopted, E. would fail if it were left uncertain whether G. was alive or dead, the onus being on her to establish her claim. However, if the view of Dixon J.

[21] It is only when, at the conclusion of the evidence, the tribunal is in doubt, that it is forced to rely on the doctrine of the burden of proof. Here, since McInerney J. was not in doubt, he did not have to consider the effect of the burden of proof.

[22] (1938) 59 C.L.R. 395.

[23] Brereton J. in *Jacombe v. Jacombe* [1961] S.R. (N.S.W.) 735, 745 supports the view of Dixon J.

[24] (1938) 59 C.L.R. 395, 406.

[25] *Ibid.* 402.

[26] Cross, *op. cit.* 115-16.

were adopted, E. would succeed, for the legal burden would shift from E. to those denying her claim.

The presumption of the validity of marriage is also considered to be extremely forceful[27] and as McInerney J. observed, it was created to further a result traditionally deemed socially desirable. Keeping this in mind, it seems more realistic to state that the party against whom the presumption operates has to overcome the presumption on the balance of probabilities. Of course, in the majority of cases, the Court can arrive at a result without relying on the burden of proof (as here), but it may become a vital issue in other cases.

GRACE LOLICATO

DOTTER v. EVANS[1]

Land under Torrens Title—Contract of Sale—Specific Performance—Vesting order—Four day order.

The action which forms the subject of this case was brought after the defendant, as vendor, had refused to comply with the terms of a decree of specific performance issued against him in respect of an unfulfilled contract with the plaintiff for the sale of land. As the land was subject to the Transfer of Land Act, the plaintiff sought to obtain his rights under the contract by having his name entered on the Register of Titles as the registered proprietor of the estate which the defendant had agreed to sell.

The claim was based upon s. 57 of the Trustee Act 1958 which provides that where a judgment for specific performance is given concerning any interest in land, the court may declare that any of the parties to that transaction are trustees of any interest in land, and on s. 58(1) of the same Act which empowers the court to make a vesting order where any person refuses to convey any property in accordance with the terms of an order of the court or where the property is vested in a trustee, and then upon s. 58(1) of the Transfer of Land Act 1958 which provides that where any person interested in land under the Act appears to be a trustee and a vesting order is made by the court, the Registrar shall enter a memorandum thereof in the Register Book.

However, the plaintiff, realizing that the title would not vest in him until appropriate entries had been made in accordance with the Transfer of Land Act,[2] and faced with the Registrar's refusal to enter the memorandum without the production of the duplicate Certificate of Title (which the defendant had already refused to surrender), sought in his motion an order that the court exercise the powers conferred upon it by s. 103 of the Transfer of Land Act 1958.[3]

In giving judgment, Gillard J. proceeded on the general principle that neither a vesting order under s. 58(1) of the Trustee Act, nor an order under s. 103 of the Transfer of Land Act should be used as a substitute for ordinary conveyancing practice. As His Honour was of the opinion that the provisions of these sections should only be resorted to in the last extremity, he refused to apply them to the facts before him. However, to enable the plaintiff to enjoy his rights under the contract, as contemplated by the decree of specific performance which had been made in previous proceedings, Gillard J. made a four day order commanding the defendant to execute a registrable instrument of transfer and deliver it to the plaintiff's solicitor. He stipulated that should the

[27] This presumption, in conjunction with the presumption of innocence and the presumption of death prior to the re-marriage was held to outweigh the presumption of continuance of life. On the conflict of presumptions see: [1969] V.R. 214, 226-227.

[1] [1969] V.R. 41.

[2] See s. 58(2) of the Transfer of Land Act 1958 to which 58(1) is subjected.

[3] Transfer of Land Act 1958, s. 103 would authorize the court to direct the Registrar to substitute the plaintiff's name as the registered proprietor.