FAMOUS CASES OF CIRCUMSTANTIAL EVIDENCE: WITH AN INTRODUCTION ON THE THEORY OF PRESUMPTIVE PROOF

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649581412

Famous Cases of Circumstantial Evidence: With an Introduction on the Theory of Presumptive Proof by S. M. Phillipps

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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S. M. PHILLIPPS

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Trieste

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BY

S. N. PHILLIPS,

AUTHOR OF "PHILLIPS ON EVIDENCE."

BOSTON:
ESTES & LAURIAT.
1873.

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THE THEORY

OF

PRESUMPTIVE PROOF.

THERE is no branch of legal knowledge which is of more general utility, than that which regards the rules of evidence. The first point in every trial, is to establish the facts of the case; for he who fails in his proof, fails in every thing. Although the jurists hold the law to be always fixed and certain, yet the discovery of the fact, they say, may deceive the most skillful. No work has as yet appeared in the English language on the theory of evidence; and the nature of circumstantial evidence has been still less inquired into. The object of the present Essay is to inquire into some of the more general principles of legal proof, and particularly into that species of proof which is founded on presumptions, and is known to the English lawyer by the name of circumstantial evidence.

Evidence and proof are often confounded, as implying the same idea; but they differ, as cause and effect. Proof is the legal credence which the law gives to any statement, by witnesses or writings; evidence is the legal process by which that proof is made. Hence, we say, that the law admits of no proof but such as is made agreeably to its own principles.

The principles of evidence are founded on our observations on human conduct, on common life, and living manners: they are not just because they are rules of law; but they are rules of law because they are just and reasonable.

It has been found, from common observation, that certain circumstances warrant certain presumptions. Thus, that a

mother shall feel an affection for her child,—that a man shall be influenced by his interest,—that youth shall be susceptible of the passion of love,—are laws of our general nature, and grounds of evidence in every country. Of the two women who contended for their right to the child, she was declared to be the mother who would not consent to its being divided betwixt them. When *Lothario* tells us that he stole alone, at night, into the chamber of his mistress, "hot with the Tuscan grape, and high in blood!" *Cætera quis nescit?*

As the principles of evidence are founded on the observations of what we have seen, or believed to have been passing in real life, they will accordingly be suited to the state of the society in which we live, or to the manners and habits of the times. The following passage, in the excellent memoirs of *Philip de Comines*, I believe to be perfectly true, because it is confirmed by other accounts of the general state of manners at the period when he wrote.

Louis XI. distributed, he asserts, for corrupt purposes, sixteen thousand crowns among the King of England's officers that were about his person, particularly to the chancellor, the master of the rolls, the lord chancellor, &c.*

The truth of this narrative has never been called in question, because it is given by an historian of great gravity and character, and is illustrated by the manners of the age; yet although the author says that his design in writing of these transactions, is to show the method and conduct of all human affairs, by the reading of which such persons as are employed in the negotiation of great matters, may be instructed how to manage their administrations, we should find it difficult to give credence to such facts, if related of any modern lord high chancellor or officer of state of the court of England. Thus, the same presumptive evidence that is good as to the court of Edward IV. and the era of 1477, is altogether extravagant if applied to the court of George III. and the beginning of the 19th century.

* V. 2. p. 7.

The oration of Cicero for Cluentius, exhibits evidence of judicial corruption which can only be credited from our general knowledge of Roman manners at the era of the facts which he describes.

The King of Siam gave credence to everything which a European ambassador told him, as to the circumstances and condition of Europe. until he came to acquaint him, that the rivers and sea were occasionally made so hard, by the cold, that people could walk on them; but this story he totally disbelieved and rejected, as entirely repugnant to every thing which he had either seen or heard; and the ground of his disbelief was perfectly rational.

A similar principle sways our belief in respect to the acts of individuals, as arising in the society and period in which we live. We always refer the credibility of the case to what has fallen within our own observation and experience of men and things. We readily give credence to acts of common occurrence, and are slow in yielding our assent to the existence of new and unlooked for events. When a wretch, at no distant period, in affluent circumstances, was accused of having stolen some sheets of paper in a shop, the judges admitted him to bail against evidence, because the charge was altogether unlikely in one of his condition in life. From these instances, we may safely infer that the principles for our believing or disbelieving any fact, are rather governed by the manners and habits of society, than by any positive rule. The writers on the general law of evidence, such as Mascardus and Menochius, have accordingly declared that all proof is arbitrary, and depends on the feelings of the judges.

There are two species of presumptive proof: the first is the presumption of the law, and the second the presumption of the judge, juryman, or trier.

The presumption of the law is that conclusion which the law attaches to a certain species of guilt. Thus, that he who has deliberately and willfully killed another, has done so from malice, is a presumption of the law. But how far he who has

been found with the sword in his hand by the body of the man just killed, did or did not give the mortal stroke, is a presumption to be made by the jury, and is not determinable by any positive rule of law.

The presumption of the law, Montesquieu observes, is preferable to that of man. The French law considers every act of a merchant, during the ten days preceding his bankruptcy, as fraudulent; this is the presumption of the law.

The modern French code has wisely decreed, that when the law, on account of circumstances, shall have deemed certain acts fraudulent, proof shall not be admitted that they were done without fraud. And in our own, as in every other system of legislation, a variety of qualities are presumed as to different persons and things, against which no proof shall be allowed. Certainty is the great object of legislation, and nothing could be established but by the determination of some thing as already fixed.

All proof is in reference to some fact already known and admitted,—what is doubtful must be proved in reference to what is true.

The following rules, by Quintilian, proceed upon this principle, but they are, perhaps, rather curious than useful:—*One thing is, because another is not:* it is day, therefore it is not night. *One thing is, therefore another is:* the sun is risen, therefore it is day. *One thing is not, therefore another is:* it is not night, therefore it is day. *One thing is not, therefore another is not:* he is not rational, therefore not a man.

Evidence is divided into positive and presumptive. Positive evidence is where the witness swears distinctly to the commission of the act or crime which forms the subject of the trial. Presumptive evidence is that conclusion which the jury draw for themselves, from circumstances or minor facts, as sworn to by the witnesses.

Presumptions are consequences drawn from a fact that is known to serve for the discovery of the truth of a fact that is