Portugal, Germany and most other countries in Europe—to say nothing of the Isle of Man (Lex Scripta of the Isle of Man 70, 75), Guernsey, Jersey, Lower Canada, Saint Lucia, Trinidad, Demerara, Berbice, The Cape of Good Hope, Ceylon and the Mauritius—also in Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Indiana and Ohio (Burge on Foreign Law 101). It becomes, therefore, an important consideration how far such legitimation can be accepted by countries where the contrary rule prevails, such as England and the other states of the United States of America.

HUGH WEIGHTMAN.

New York.

RECENT ENGLISH DECISIONS.

High Court of Justice. Crown Cases Reserved.

THE QUEEN *v.* WILLSHIRE.

In 1864 the prisoner had married A. In 1868, A. being alive, he had married B., and had been convicted of bigamy. In 1879 he married C., and in 1880, C. being alive, he married D., and was now convicted of bigamy upon an indictment charging the marriage with D. in the lifetime of C. For the defence the previous conviction was proved, in order to invalidate the marriage with C., by raising the presumption that A. was still alive in 1879, no evidence being given as to her death. The judge at the trial ruled that it lay on the prisoner to prove that A. was still alive. *Held*, that this ruling was wrong, and the conviction could not therefore be sustained.

THE prisoner was tried before the Common Serjeant (Sir W. T. Charley, Q. C.) at the session of the Central Criminal Court held on the 31st of January last.

The indictment charged that he married Charlotte Georgina Lavers on the 7th of September 1879, and that he feloniously married Edith Maria Miller on the 23d of September 1880, his wife Charlotte Georgina being then alive. The indictment also charged that the prisoner had been previously convicted of felony at the Central Criminal Court in the month of June 1868.

A marriage between the prisoner and Charlotte Georgina Lavers on the 7th of September 1879, and a subsequent marriage between the prisoner and Edith Maria Miller, on the 23d of September 1880, were clearly proved. It was also proved that at the time

of the prisoner's marriage to Edith Maria Miller, his alleged wife, Charlotte Georgina, was alive.

When the case for the prosecution was concluded, the prisoner's counsel asked the counsel for the prosecution to call a witness whose name appeared on the indictment, but the counsel for the prosecution declined to call him. The prisoner's counsel then himself called the witness, who produced a certificate of the previous conviction of the prisoner for felony in June 1868.

The indictment for this felony and caption were also produced in court by the proper officer at the instance of the prisoner's counsel.

The indictment was for bigamy, and alleged that the prisoner married Ellen Earle on the 31st of March 1864, and feloniously married Ada Mary Susan Leslie on the 22d of April 1868, his wife Ellen Earle being then alive.

The prisoner's counsel contended that he had proved that the prisoner had a wife living in June 1868, and that in order to convict the prisoner on the present indictment it was incumbent on the prosecution to show that this wife was dead on the 7th of September 1879, when the prisoner married Charlotte Georgina Lavers.

Counsel for the prosecution contended that there being no presumption of law that Ellen Earle was alive on the 7th of September 1879, when the prisoner married Charlotte Georgina Lavers (the presumption, if any, after seven years being indeed the other way), and the *prima facie* case of bigamy having been clearly proved by the prosecution on the present indictment, the onus was thrown upon the prisoner of showing that Ellen Earle was alive on the 7th of September 1879, when the prisoner married Charlotte Georgina Lavers.

The Common Serjeant held that the burthen of proof was on the prisoner.

No evidence was offered by the prisoner's counsel that Ellen Earle was alive on the 7th of September 1879.

There was no evidence that the alleged marriage of the prisoner with Ellen Earle was declared void or dissolved by any court of competent jurisdiction.

The prisoner was found guilty. He was then arraigned on that part of the indictment which charged the previous conviction of felony in June 1868, and pleaded guilty. Judgment was respited, and the prisoner remained in gaol.

The question reserved for the opinion of the Court for the Consideration of Crown Cases Reserved was, whether the prisoner had been properly convicted of feloniously marrying Edith Maria Miller, his wife Charlotte Georgina being then alive.

Ribton, for the prisoner.—The only legal marriage appearing on the face of the proceedings is that in 1864. The presumption, if any, is that this wife is still alive, no evidence of her death being given. The marriage in 1879 was, therefore, invalid, and this being the only marriage alleged in the indictment as the foundation of the offence, the conviction ought not to be affirmed.

Poland and *Montagu Williams*, for the prosecution.—*Prima facie* the marriage of 1879 was a good marriage, and it must be assumed to be so until the contrary is shown. It was open to the prisoner to procure evidence on this point, but he did not do so. [Lord COLERIDGE, C. J.—There is also a presumption that a person once shown to be alive remains alive until the contrary be shown: *Nepean* v. *Doe*, 5 B. & Ad. 86.] The presumption of law that Ellen Earle was alive in 1879, because proved to have been alive in 1868, is not sufficient to displace the presumption that the marriage of 1879 was valid. Moreover, it cannot be said that there was no evidence of her death, inasmuch as the prisoner must have stated that he was free to marry in 1879, the prisoner was the person most likely to know, and, indeed, must be presumed as against himself to have stated the truth. [Lord COLERIDGE, C. J.—The Common Serjeant did not leave this question to the jury as one of conflicting presumptions; he ruled that it lay on the prisoner to prove that Earle was alive.] In substance it is submitted that he intended to do so.

Lord COLERIDGE, C. J.—I am of opinion that this conviction cannot be sustained. There was an undoubtedly valid marriage proved with Ellen Earle in 1864, and there was some evidence that she was alive in 1868. Then in 1879 the prisoner contracted a marriage *in facie ecclesiæ*, in respect of which it has been suggested that we are to assume its validity. The prisoner is indicted upon the marriage of 1880, and that of 1879 is relied on to render it illegal. Then the prisoner shows a valid marriage in 1864, and produces evidence that the wife was alive in 1868; thus setting up a life in 1868 which must be presumed, in the absence

of any evidence to the contrary, to be continuing in 1879. It is said that the fact of the marriage in 1879, and the prisoner's statement that he was then free to marry, raises a presumption of the truth of that statement sufficient to rebut the presumption of the continuance of Earle's life. I agree that this is sufficient to raise a conflict of presumptions which could be left to the jury, but the Common Serjeant did not so leave it. He ruled that, besides showing the existence of the life in 1868, further evidence was necessary, and I am clearly of opinion that he was wrong. No such proof could be required of the prisoner; it was for the prosecution to determine the life set up. This ruling being wrong, and the jury not having had the proper questions submitted to them, the conviction cannot be sustained.

LINDLEY, J.—I am of the same opinion. There appears to have been some evidence both ways upon the question whether Earle was alive or dead in 1879. The whole case turned entirely upon this question, but it was not left to the jury. The conviction cannot therefore be sustained.

HAWKINS, J.—The question turns entirely upon whether Ellen Earle was alive or dead in 1879. The proof was on the one side that she was alive in 1868, and must be presumed to be still living, and, on the other side, that the prisoner presented himself to be married in 1879, and must be taken to have represented himself as being then free to marry. This raises a question of fact which ought to have been left to the jury, but the Common Serjeant took it upon himself to say that further proof was required. In this he was wrong, and therefore the conviction must be quashed.

LOPES, J.—The only question upon which this case turns is whether Ellen Earle was alive in 1879. This is clearly a question of fact for the jury, and should have been left to them.

BOWEN, J.—I am of the same opinion.

Conviction quashed.

That the burden of proof, in trials for bigamy, is on the government to establish that there was once another wife, and that she was living when the second marriage ceremony took place, is elementary law: *Regina* v. *Lumley*, Law Rep., 1 C. C. R. 196; *Squire* v. *The State*, 46 Ind. 459. And that this proposition involves the necessity of proving the prior marriage a legal one, is equally clear. It must have been a marriage *de jure* as well as *de facto*. If

the first marriage was absolutely void, the second is not illegal: *Rex* v. *Butler*, R. & R. 61; *People* v. *Lambert*, 5 Mich. 349; *State* v. *Hodgskins*, 19 Me. 155; *Oneale* v. *Commonwealth*, 17 Gratt. 582; *Shafher* v. *The State*, 20 Ohio 1; *State* v. *Horn*, 43 Vt. 20. So that if at the time of the alleged prior marriage a still earlier lawful wife was living, the second could not have been legal, and therefore an indictment for the third marriage alleging the *second* wife to be the prior lawful wife, cannot be sustained; although, of course, it might have been, had it alleged the *first* wife to be still living. As one step, therefore, in proving the second marriage lawful in such cases, is to prove the first wife not living when it took place, the burden of proving that fact also, must be upon the government; and when it is shown that she was living shortly before the second marriage ceremony was performed, the question becomes one of the ordinary presumption of the duration and continuance of human life. And clearly this is too well settled to be open to discussion. Like other continuing facts, being once shown to exist, the presumption is—a presumption of fact—that it continues to exist, unless some evidence is offered to the contrary. And, therefore, in ordinary cases of only two marriages where the first marriage was clearly legal, and the first wife was shown to be living at a stated time, the presumption of the continuance of her life would be sufficient *prima facie* proof of that fact, at the time of the second marriage, except for a counter presumption, viz.: of innocence; which has been thought to neutralize the presumption of duration of life, and so to require that some *evidence* be offered in such cases to show that the first wife was living: *Rex* v. *Twyning*, 2 B. & Ald. 386; *Greensborough* v. *Underhill*, 12 Vt. 604; *Kelly* v. *Drew*, 12 Allen 110.

The fundamental error in the trial below in *Willshire's Case*—so common in criminal cases—was the ruling that the burden of proof was on the prisoner at all. For so long as the issue is merely guilty or not guilty, the burden of proof—in the proper sense of the phrase—is never on the prisoner. The plea of not guilty itself denies and puts in issue every material fact and circumstance necessary to constitute guilt. These facts may be simple or complex, may relate to the present, the past, or the future, may be easy or difficult of proof; but that does not change the burden of proof and cast it on the defendant to prove his innocence—or, in other words, to prove the non-existence of the fact, the existence of which is absolutely necessary in order to constitute guilt. So long as the defence is never guilty, the burden of proving guilt is, and must be, always and constantly on the government, and never shifts.

A man is indicted for an assault and battery: his excuse is that he gave the blow in self-defence; in other words, that although he used violence, it was not *guilty* violence. Clearly the burden of proving that it was not in self-defence, or, in other words, that it was guilty violence, is, at the first and to the end remains, on the government; and proof of the blow given by the defendant does not shift the burden on him to show affirmatively that he was acting in self-defence. And, therefore, if the jury, upon the whole evidence in the case, have reasonable doubts upon the point, they cannot properly convict: *Commonwealth* v. *McKie*, 1 Gray 61; *United States* v. *Lunt*, 1 Sprague's Dec. 311; *The People* v. *Schryver*, 42 N. Y. 1; *Tweedy* v. *The State*, 5 Iowa 434; *State* v. *Porter*, 34 Id. 131; *Kingen* v. *The State*, 45 Ind. 518. So where the defence is that the blow was accidental and not intentional, the burden of proof is to the end on the government to show that it was wilful: *United States* v. *McClare*, 7 Boston Law Rep. (N. S.) 439 (1854).

If the defence be an *alibi*, is the burden on the defendant, as some say, to establish his absence, or on the government to prove his presence? Clearly the latter; notwithstanding the ruling of some judges at nisi prius to the contrary. Consequently, if the jury have reasonable doubts of the defendant's presence, they cannot convict: *Commonwealth* v. *Choate*, 105 Mass. 451; *The State* v. *Waterman*, 1 Nev. 543; *Turner* v. *The Commonwealth*, 86 Penn. St. 54; *Toler* v. *The State*, 16 Ohio St. 583; *Chappel* v. *The State*, 7 Coldw. 92; *State* v. *Josey*, 64 N. C. 56; *Adams* v. *The State*, 42 Ind. 373.

If this be so as to overt acts, is it the less so as to mental condition, intention, knowledge, &c., when that is necessary to constitute the crime charged? Could any one doubt that in an indictment for passing counterfeit money, or for receiving stolen goods, the burden of proving the guilty knowledge is and continues to be on the government throughout, and never shifts upon the defendant to disprove it? Or on an indictment for an assault "with intent to kill," is not the burden equally (in order to convict of the whole charge) on the government to prove affirmatively and beyond a reasonable doubt the particular intent alleged? And suppose the defence is insanity; or, in other words, a denial of sanity; is not the burden logically upon the government to prove the sanity? And if the jury doubt on that point, how can they properly convict? Does not the plea of "not guilty" deny and put in issue *the mental capacity to be guilty*, as well as the overt act alleged, and must not the prosecution prove the one as well as the other? Is not the one as essential an element or ingredient of the crime as the other? It certainly seems so, and a large class of well-considered cases have not hesitated to declare such to be the only sound, safe and logical rule. And therefore a reasonable doubt as to sanity must result in acquittal. See *The People* v. *McCann*, 16 N. Y. 58; *The People* v. *Garbutt*, 17 Mich. 9; *State* v. *Bartlett*, 43 N. H. 224; *Bradley* v. *The State*, 31 Ind. 492; *Brotherton* v. *The People*, 75 N. Y. 162; *Hopps* v. *The People*, 31 Ill. 385; *Ogletree* v. *The State*, 28 Ala. 701; *State* v. *Crawford*, 11 Kans. 32; *Smith* v. *The Commonwealth*, 1 Duvall 224, and many other cases. It cannot be denied, however, that in this particular defence, many courts have taken a different view, holding the burden of proving insanity to be on the defendant, some requiring more, and some less degrees of positive proof. The chief argument being, shortly stated, that as every one is presumed to be sane, it is incumbent on any one alleging his insanity to prove it; or, in other words, that the existence of a presumption in favor of the government as to any particular fact, changes the burden of proof, and compels the defendant to prove affirmatively the opposite. But is that true as to other presumptions equally well established as the presumption of sanity? Every woman is presumed to be chaste, but when the question of a particular woman's chastity is involved, the burden of proving it is on the government alleging it, and does not shift upon the defendant to prove her unchastity: *West* v. *State*, 1 Wis. 209; *Commonwealth* v. *Whittaker*, 130 Mass. 12 Reporter 16. The possession of personal property, recently stolen, creates a presumption that the possessor stole it; but the burden of proof is not thereby shifted upon him to prove that he did not. See *State* v. *Merrick*, 19 Me. 398; *Jones* v. *The People*, 12 Ill. 259. The fabrication of evidence, a flight, or an attempt to escape, raises a presumption of guilt, but no one supposes that the burden of proof is thereby shifted upon the defendant to prove his innocence. This would be giving undue weight to a presumption. A presumption that a certain fact exists is only one means of proving it—one piece of evidence—one

inanimate witness, so to speak, testifying that these things are so. But if the positive testimony of one living witness to a defendant's guilt—one who actually saw him commit the act—does not shift the burden on him of proving his innocence, as no one pretends, how can the existence of a mere presumption on the same side have more effect. The presumption of innocence—always innocence—certainly ought to have as much effect as any presumption against the prisoner.

So long as a defence to a criminal prosecution rests upon a denial of the *corpus delicti*, or of any essential element of fact or intention necessary to constitute the crime, so long the burden never shifts upon the defendant. It is only when he sets up some defence of confession and avoidance—like a former conviction for instance—that the burden of proof is on him. But the defence of insanity is not one of confession and avoidance; it is one of denial, wholly of denial. He denies his sanity; sanity is necessary to constitute crime, and a denial of sanity denies the original commission of the offence; not the *act*, but the guilty act; and, therefore, so long as the jury have a reasonable doubt of the defendant's sanity, whether founded wholly on the government's testimony, or on that of the defendant, or partly on both, so long they cannot properly convict; and in that sense, the burden of proving sanity is throughout upon the prosecution, and never shifts. A verdict would hardly be sustained which said, "We find the defendant guilty of the murder, but have reasonable doubts whether he was at the time sane or insane."

The error in the opposite view obviously arises from confounding the phrase, "burden of proof," with a *prima facie* case, on the weight and force of the evidence. That may shift, from time to time, from the one side to the other, in the progress of the trial. The presumption that all men are sane, undoubtedly constitutes a *prima facie* case that the particular defendant on trial was sane, sufficient to justify a conviction, unless some doubt be created by the evidence itself from one side or the other. That presumption may, for the time being, and in the first instance, satisfy and fulfil the burden of proof, but it does not *change* it. See *Commonwealth* v. *Kimball*, 24 Pick. 373; *State* v. *Flye*, 26 Me. 312; *Ogletree* v. *The State*, 28 Ala. 693; *Chaffee* v. *United States*, 18 Wall. 516. It may properly call upon and require some evidence to countervail it, and in the absence of such, it may be and is sufficient to justify a conviction; but if, after giving due weight to this presumption, and to all the other evidence offered by the government in favor of sanity, the jury still have reasonable doubts of the sanity, the burden of proof has not been sustained, and they cannot convict. The difference of views on this particular point may be in part owing to a difference in the meaning given to the term "burden of proof," the cause, perhaps, of some theological as well as legal disagreements in the world.

EDMUND H. BENNETT.