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# Legal Presumptions and Their Role in Criminal Proof (A Comparative Study)

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**Abstract:** The aim of this study is to show the effectiveness of presumptions and their role in criminal proof, through the extent of its impact on the criminal case as one of the evidentiary pieces of evidence therein, and the extent of the freedom they present to the criminal judge to take them as indirect evidence, and since the rules of evidence occupy great importance in the divisions of law, and as it is said "A right without evidence to support it is the same as nothingness", evidence is what supports the right and makes it prevail, and presumption is of such importance as it is one of the means of proof stipulated by the legislator, and adopted and approved by the judiciary and jurisprudence.
The presumption is regarded to have an important, vital, and effective role in the field of criminal proof, as original, complementary, or supporting evidence added to other evidence . It is no less in importance than other evidential evidence, especially when it has become the most reliable method in criminal justice in our current era due to scientific and technological progress in all fields, particularly after criminals resorted to using the most accurate modern scientific methods to commit their crimes without leaving any single trace. Worthy to say that the the judicial presumption also has an important and influential role in demonstrating the reliability of the other evidence obtained and existing with it in the criminal case. The evidence extracted using the judicial presumption method is more like a controller and an observer on other evidence such as the testimony of witnesses and the confessions of the accused, etc., And because the inference of the unknown fact to be proven from the concrete fact is consistent with the rest of the criminal case circumstances, deducing the presumption requires the judge to derive the presumption from an established case for which there is no evidence to prove, and then show the logical causal relationship between the known fact and the other to be proven.

However, the supervision that the Court of Cassation imposes on the judge's authority to derive or prove judicial presumption is only a legal supervision over the decisions and procedures either in terms of their reasoning or occurrence by mistake or the judge's deviation from his discretionary authority in issuing the final ruling in the case before him or if his decision was not consistent with reason or with the common sense.
Consequently, we find it crucial and inevitable duty to address the issue of presumption, as it is one of the very important pieces of proof with the development of the criminal's mind and his or her attempt to evade punishment. Therefore, we set out to write this research to show the role of presumption, whether legal or judicial, and its role in criminal proof according to a research plan consisting of two topics. In the first section, we will address the concept of presumption according to two requirements. In the first requirement, we explain the definition of presumption, and in the second requirement, the elements of presumption. As for the second section, it is devoted to the types of presumption. In two requirements, we will discuss in the first requirement the legal evidence, and in the second section we will explain the judicial evidence, and this is what we will address successively according to the research plan.

**Keywords:** simple, decisive, most likely to happen, inference

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**Introduction**

Generally speaking, it is usually known that the role evidences play is of great importance in matters of criminal proof, especially the presumption, as it is one of the methods of proof in the principles of criminal trails. Though it is regarded indirect evidence of proof with the supremacy of the direct evidence of proof, as mentioned in the principles of criminal trails, and contained in the prescription of the law and must be followed as part of the public order, and it is not allowed to take a decision about anything that contradicts it. These direct evidences are regarded the basis for the subject of criminal proof. However, presumption ,from another side, is also of great importance in the subject of criminal proof and influential in the conduct of the criminal case. Legal presumption is also an evidence and indirect proof, since it is deducing an unproven matter from an established matter, or deducing an adjudication on a specific case from other cases in accordance with the requirements of reason and logic. That is to say deducing the case to be proven from an established case that necessarily leads to it and proved by virtue of rational necessity. Accordingly, it comes in the last place in the sequence of proof evidence.

In spite of being less important than other indirect proof evidences and regarded the last proof to depend on, research on the importance of presumption becomes very necessary for being of great importance in criminal proof and its vital role to rely on and to direct the judge's thinking to find out the facts of the matters in the case presented, especially when there is no direct evidence in to rely upon in adapting the criminal adjudication, and when its conditions are met and linked to it with a view to issuing a fair adjudication in it by imposing punishment on the offender in a manner that suits the criminal act he or she committed.

Forasmuch, the standard of right and wrong can affect all direct evidential evidence, such as false testimony, or an incorrect confession, as well as the falsification of written evidence, the researcher, for this reason, believes that the validity of the presumption is no less important than the rest of the other evidential evidence, as long as the matter is left to the discretion of the trial court judge and this depends on the merits and evidence of the crime.

**First: the importance of the topic**

The means of criminal proof are regarded one of the most important issues that have sparked controversy in legislation and judiciary .The rules of proof occupy great importance in the branches of law, and presumption has also this importance as a means of criminal proof. Legal and judicial presumptions might become one of these pieces of evidence that has a direct impact on the whole judicial process in detecting the crime and arresting the offender.

**Second: Research problem**

The research problem lies in the extent of the legal impact that the presumption has on the subject of criminal proof, which in turns has a direct impact on the course of the judicial process in detecting the crime and reaching its doer through the conviction achieved by the court when declaring the decree.

**Third: Scientific research method**

The researcher has adopted the inductive analytical scientific method to investigate the principles on which the presumption is based through extrapolation of the opinions of jurists in various legal schools of thought, as well as to find out how presumption can be adopted as evidence of proof in legislative and judicial applications.

**Fourth: Research plan**

The research consists of two sections ,as prepared earlier. The first section deals with the concept of presumption and it has two additional subsections;. the first one shows the definition of presumption and it also has two branches. Whereas the second section will state the elements of evidence in two sections.

The second section is prepared to explain the types of evidence in two requirements. The first requirement has two branches that explain the legal presumption. While the second is devoted to the judicial presumption and in also two branches, and this is what is going to be addressed successively, as follows:

**The first section**

**The concept of presumption**

The research requires to be divided into three requirements. The first requirement explains the definition of presumption, the second deals with the elements of presumption, and the third one is devoted to the types of presumption, as follows:

**The first requirement**

**Definition of Presumption**

The research involves to follow the definition of presumption linguistically and then terminologically

**Part One: The linguistic Definition of Presumption:**

The word "presumption" in Arabic language is "qareena". It is the feminine form of "qareen". It is said that "qareen" is (your companion who never leaves you)(1) ,a man's mate is his wife for being the closest person to him(2) and "qareenah" is taken from the meaning of companionship, and the "qareen" is someone's companion, as it is said that (Someone is other one's companion if he does not separate from him, and the plural is qaranaa), and we say that "a thing is qareen of another thing to the degree that they become one as "qurana'a" like the companionship of stars(3) :in His Noble Book, Almighty God says: "And We appointed for them quran'a, who adorned for them what was before them and what was said behind them"(4). He also says in another Sura "And someone of them said I had already have a qareen".(5)

**The second section: Definition of Presumption in terminology**

**First: in legislation**

Worth to mention that the Egyptian legislator did not provide a full definition of the presumption in general in codification(6), nor did it define it in the law of evidence in either civil and commercial matters(7), as well as in the criminal law(8).

Likewise, the same thing did the Jordanian legislator by ignoring a full definition for presumptions, whether in the Law of Evidence in Civil and Commercial Matters(9), or in the Code of Criminal Procedure(10).

Also, the Iraqi legislator did not take the initiative to define presumptions in the civil law, despite the existence of a special magazine for Judicial Judgments, which prevailed before the issuance of the civil law, and which was defined (the emirate that reaches the limit of certainty)(11)

**Second: in the judiciary**

The Egyptian Court of Cassation defined presumption as "deducing an unknown matter from an established, known fact"(12), and the Jordanian Court of Cassation defined presumption as "deducing a fact

(1) Abu Mansour Muhammad bin Ahmed Al-Azhari, *Tahtheep Al-Lughah*, Egyptian House for Writing and Translation. 1964, part 7, p.93 .
(2)Ibn Manzur, Muhammad bin Makram, Lisan al-Arab, first print, part 13, Dar Sader, Beirut, 1999, p. 339.
(3)Ibn Manzur, Muhammad bin Makram, previous source, p.361 .
(4)Surah Fussilat, verse 25
(5)Surat Al-Saffat, verse 51.
(6)Dr. Abd al-Razzaq al-Sanhouri, Al-Wajeez fi Sharh al-Qanon Al-Madani Al-Jadid, Egyptian Universities Publishing House, vol. 2, Cairo, 1952, p. 372.
(7)Dr. Tawfiq Hassan Farag, Rules of Evidence in Civil and Commercial Matters, University Culture Foundation, Alexandria, 1982, p. 71.
(8)Articles 291 and 302 of the Egyptian Code of Criminal Procedure, No. 50 of 1950
(9)Articles 40 and 43 of the Jordanian Declaration of Civil and Commercial Matters Law, No. 30 of 1952.
(10)Articles 147 and 496 of the Jordanian Code of Criminal Procedure No. 9 of 1961.
(11)Article 174 of the Iraqi Judicial Code.
(12)Resolution No. 496 of 4/27/1961, a set of legal rules decided by the Egyptian Court of Cassation, in Fifty Years of Thought, Part 1, Year 12, p. 399.

required to be proven from another fact on which evidence is based"[13]. Yet, we did not find a definition of presumption in the Iraqi judiciary, which appears, from other judicial definitions, that there is an agreement that presumption is the fact that there is a known and established case through which the unknown fact can be deduced and proven.

As for the legal presumption, Article 98 of the Iraqi Evidence Law[14], defines the legal presumption as "the legislator's inference of an unproven matter from an established matter," which is useful and fair enough for the person and make all other proof evidences mere obsolete."

In the same respect, Article number 213 of the Iraqi Code of Criminal Procedure[15] specifies that "the court shall give its decree on the case based on its conviction that it has from the evidence presented in any stage of the investigation or trial, which is the confession, witness testimony, investigation records, records, other official statements, and, experts reports, technicians, presumptions and other evidence required by law."

**Third: In Legislation :**

According to the experts and commentators of civil law, a presumption is (what a judge or legislator infers from a known matter to indicate an unknown matter)[16], and others have defined it as (the results that the law or judge draws from a known case fact in order to find out an unknown fact)[17].

Meanwhile, Jurists have also gone to several definitions of presumptions, but agreement is clear among them on the same logic or concept as having the same essence, which is based on the idea of deducing the unknown from the known. Some have defined it as (the necessary connection between two facts where the proof of the first being evidence of the occurrence of the second. Or it is a connection between an event and its result, and the proof of the event is evidence of the occurrence of its results)[18], as others have defined it as (the sign that points us to the hidden, unknown matter, without it there would not have been possible to reach it)[19], and others see it as (extracting the unknown from the known, by rational and logical necessity, based on general experiences and the normal course of things[20]

**The second requirement**

**Elements of Presumption**

According to the previous definitions of presumptions, it is clear that it is based on two elements. The first one is the element of probability, which expresses the idea of "the most likely thing to happen," and the second element is "the decision." ,This will be explained in two successive sections as follows:

**The first section: the element of probability**

What is meant by " most likely to happen" is the high probability that indicates certain results that lead to certain outcomes. It is a fact based on existing facts, which is what is expressed by the idea of what is most likely in the course of events and what is most likely to occur[21].

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([13])Resolution No. 143/92, Discriminating a Jordanian Penalty, Journal of the Jordanian Bar Association: 1993, p. 384.

([14])Iraqi Evidence Law, No. 107 of 197, p. 140.

([15])Iraqi Code of Criminal Procedure No. 32 of 1971, p. 31.

([16])Dr. Abdel Hamid Al-Shawarbi, Legal and Judicial Evidence in Civil, Commercial, and Personal Status Matters, Dar Al-Fikr Al-Jami'i, Alexandria, 199, p. 17.

([17])Dr. Salah al-Din al-Nahi, Principles of Obligations, Salman al-Azami Press, Baghdad, 1968, p. 427.

([18])) Dr. Ahmed Fathi Sorour, Mediator in the Code of Criminal Procedure, 4th edition, Dar Al-Nahda Al-Arabiya, Cairo, 1987.

([19])Dr. Mahmoud Naguib Hosni, Explanation of the Code of Criminal Procedure, 3rd edition, Dar Al-Nahda Al-Arabiya, Cairo, 182, p. 498.

([20])Dr. Hassan Jogdar, Principles of Criminal Trials, Part 2, Damascus University, 1997, p. 189

([21])Dr. Adam Wahib Al-Nadawi, The Role of the Civil Ruler in Proof, Al-Dar Al-Arabiya Press, Baghdad, 1976, p. 377.

Hussein Al-Mumen, AlMuhami, The Theory of Evidence, Part 4, Al-Fajr Press, Beirut, 1983, p. 10.

The presumption, however, is an assumption based on the prevailing or most likely belief that it will occur according to the normal course of things. If, as a matter of assumption, a murder occurred in a specific house, and the criminal was not discovered. People witnessed a man holding a knife fully covered with blood coming out of the crime scene ,"the same house mentioned". He was in a harry and signs of fear were visible on him. Then people entered the house and found the victim but did not find anyone beside him. No one could deny that all the assumptions lead to the man who escaped from the house as the killer, because the natural course of the incident leads us to this decisive conclusion. Although this result is not conclusive, meaning that we cannot confirm with certainty that the person who left the house is the killer, but the evidence obtained in these matters (was conclusive in the sense of established, so the knowledge obtained about it is conclusive knowledge in this regard))[22] . Conclusive knowledge is used in two senses. The first is what completely determines possibility and is called "the knowledge of certainty". The second is what determines the possibility arising from evidence and is called "the knowledge reassurance". Yet, presumptions represent the knowledge of reassurance, which is the most likely opinion. As long as it is hard to reach conclusive evidence that denies every possibility and suspicion , it becomes necessary to take conclusive evidence and arguments, and if that is also not possible and we do not reach certain knowledge, then reassuring knowledge or something close to it with sound suspicion is sufficient to take it as evidence[23]. One cannot reach the truth as it is, since the arriving to such a truth seems difficult, and in many cases impossible (and thus, the source of the presumption begins with an analysis of the actual circumstances and makes an assumption inspired by the natural course of things, and the believe that events cannot take place as they mentioned above, in contrast to the assumptions made regarding a certain type of event[24],

Consequently, the legislator uses probability to establish an objective rule or legal presumption that he or she arrives at from an idea in most cases, and so does the judge who arrives at it from what is most likely to occur. However, the presumption remains merely a possibility that is likely to occur, so there is no escape (from the scientific standpoint and from being satisfied with presumptive arguments since conclusive arguments remain elusive. In addition, the nature of legal facts, as well as the nature of the means of proving them, and indeed the nature of human beings in general, necessitates that judicial facts be relative facts[25]. And it is not an absolute truth, like the factual fact, because the judge is restricted to proving the disputed fact by means specified by the law, so he cannot deviate from it, and proving this fact in front of the judge makes it a judicial fact because the judge has no choice but to confirm it after proven, and this judicial truth may be consistent with the factual truth[ 26], but at other times it is far away from it, so the judicial truth is thus merely a likely possibility and not a conclusive truth, and from a practical standpoint it is necessary to be satisfied with the speculative arguments as long as they are probable, because the requirement of definitive arguments closes the door of evidence before the judge[27] as he cannot reach the absolute truth in most cases, and for this reason a difference may occur between the judicial truth and the factual truth, because establishing the truth is a probable proof and not a certain proof, and if reaching the point of certainty is sometimes impossible in a dispute, then the judge must not stop at the mere likely possibility. Rather, he must make every effort to reach the level of certainty, if possible, to make the judicial truth match the actual truth[28]. It is the hope that every judge seeks to achieve. Judicial truth is not an absolute, but rather relative and based on what is most likely to occur. Therefore, the idea of what is most likely to occur is an essential element in the evidence[29].

In most cases, however, there is criticism of the idea of the most likely occurrence of the presumption, as it is difficult to draw a dividing line between what is possible and likely to occur, and what is certain and most certain, so the distinction between these matters remains largely personal, and basing the evidence on what

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([22])Ibrahim Naguib Mahm Awad, Judiciary in Islam, edition of the Islamic Research Academy, Cairo, 1975, p. 227.
([23])brahim Naguib Muhammad Awad, The Jurists in Islam, a previous source, p. 228.
([24])Qais Abdul Sattar Othman, judicial evidence and its role in proof, Shafiq Press, Baghdad, 1975, pp. 59-60.
([25])Hussein Al-Mumen, AlMuhami, The Theory of Evidence, previous source, p. 10-11.
([26])Diyaa Sheet Khattab, The Art of the Judiciary, Institute of Arab Research and Studies, Baghdad, 1984, p. 117.
([27])Dr. Abdel-Razzaq Ahmed Al-Sanhouri, Al-Wajeez in Explanation of the New Civil Law, previous source, p. 881.
([28])Diyaa Sheet Khattab, The Art of Judiciary, previous source, p. 119.
([29])Qais Abdel Sattar Othman, Legal Evidence and its Role in Proof, previous source, p. 30.

is most likely to occur leads to eliminating the differences between evidence and other methods of proof, especially testimony and writing, as the idea appears that it is more likely to fall into direct proof as well. Testimony, when attributed to it, does not lead to the absolute truth, as the witness may give false testimony, and the evidence may be forged.

Therefore, the idea of what is most likely to occur alone cannot be the basic element of the evidence, but rather there must be another element with it that can fill the aforementioned deficiency[30].

**Section Two/Decision**

The idea of what is most likely to occur must lead to the emergence of many possibilities that outweigh others in terms of their probability of occurring in the majority of circumstances, and stopping at that is of no use. Rather, it is necessary to move beyond the possibilities that have been suggested to the stage of reporting these possibilities, and to sway between the various hypotheses.

It must be a decisive moment for the one who created the presumption to end the dispute and choose to adopt one of the possibilities and hypotheses. This selection process represents the second element of the presumption, which is (the decision), which means choosing between the available alternatives, the most likely possibilities, and the possible hypotheses. Whoever wants to adopt one of these hypotheses must decide to choose one among others that is most likely[31] . Although the decision ends the conflict, but in fact it is a possible matter, a process of the will and it is not similar to possibility in any way. To say that a certain event is possible is a statement that includes a judgment, and therefore it is a process of mental perception.[32 ] For example, the evidence or indications in the judicial presumptions determines its material element, but it has no effect on the proof except when the judge intervenes to interpret these indications and signs and chooses from them one possibility that is the most likely and predominant over the rest of the possibilities, and thus the element of the decision is highlighted, as it allows going beyond the idea of what is most likely to happen, and thus the decision element leads to confirming the probable nature of an event, and from here the importance of the idea of prior judgment in the presumption appears[33]. Thus, it appears that the idea of what is likely to occur alone is insufficient for the presumption to exist. Rather, the decision must be present[34] .These two elements are closely linked to each other. The idea of "what is likely to occur" reveals to some extent the decision, and assesses one of its motives for one side and on the other is that when the creator of the presumption goes beyond the idea of what is likely to occur, he only uses it for accidents[35], and thus the presumption is based on two elements, namely the idea of what is likely to occur and the decision. The legislator uses it to determine an objective rule or legal presumption, and the judge uses it to create a judicial presumption, although The rulings issued by the judiciary show the judicial facts, reasoned and explained, as conclusive facts, but they are relative facts and subject to change[36]

**The second topic**

**Types of evidence**

Generally speaking, the use of presumption as a proof does not fall on the incident that is regarded the source of the truth itself, but rather on another incident that, if proven, can be used to deduce a fact that is sought to be proven, and this process of deduction may be carried out by the judge and may be carried out by the legislator. Presumptions are of two types: judicial presumptions and legal presumptions. Yet, each has its nature, elements, and characteristics that distinguish it from the other type. Therefore, this study consists of two requirements: The first one deals with the explanation of the legal presumptions, and in the second requirement, the judicial presumption will be fully explained ,as follows:

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([30])Qais Abdel Sattar Othman, Legal Evidence and its Role in Proof, previous source, p. 33.
([31])Hussein Al-Mumen, AlMuhami, The Theory of Evidence, previous source, p.11
([32])Qais Abdel Sattar Othman, Legal Evidence and its Role in Proof, previous source, p. 34.
([33])Qais Abdel Sattar Othman, Legal Evidence and its Role in Proof, previous source, p. 34.
([34])Hussein Al-Mumen, AlMuhami, The Theory of Evidence, previous source, p.36
([35])Hussein Al-Mumen, AlMuhami, The Theory of Evidence, previous source, p.11
([36])Hussein Al-Mumen, AlMuhami, The Theory of Evidence, previous source, p.11

**The first requirement**

**Legal Presumption**

**The first type**

**First: Definition of the legal presumption**

Most of the criminal legislation does not contain a definition of the legal presumption[37], but civil legislation has stipulated that. The Iraqi legislator has stipulated in the Evidence Law that the legal presumption is "the Iraqi legislator's inference of an unproven matter from an established matter" [38].

Respectively, the Egyptian legislator has stipulated in the Law of Evidence in Civil and Commercial Matters that "the legal presumption is sufficient for the person in whose favor it is decided over any other method of proof, provided that this presumption may be refuted by contrary evidence unless there is a text requiring otherwise"[39].

The Jordanian legislator mentioned the same text in the Evidence Law[40]. And It may be noted that the definition given by the Egyptian legislator and adopted by the Jordanian legislator is that it is a definition of the legal presumption in terms of its result and purpose. Whereas the Iraqi legislator defined it in terms of its essence. However, truly speaking, these definitions that the legal presumption is an act carried out by the legislator and its purpose is to enrich the accuser to prove the alleged incident and is satisfied with proving the alternative fact. It transfers the proof from the original incident to another incident close to it or connected to it. If it is proven, the legislator exempts the accuser from proving the second incident, which the legislator considers established by law. Even though the instructors of the civil law and the criminal law have differed in their definitions, one can say that the legal presumption is (the legislator deducing an unknown fact from an established fact due to a relationship between them that leads to it necessarily and by virtue of rational necessity).

**Second: The Pillar of legal presumption**

The context of the law is regarded the pillar of the legal presumption and thus the judge can't do anything but to see the work and the role of the legislator who chooses to describe the established fact, and he is the one who draws inferences and conclusions until he reaches the unknown fact due to a connection between it and the established fact. As long as the fact that the legislator chose is proven, the other fact is proven by its evidence, so the pillar of the legal presumption is the context of the law and nothing else, and it cannot be a legal presumption without this text[41]

This leads to the fact that the judge cannot work diligently based on similarity or priority, and might bring some legal presumptions not stipulated by the legislator. Rather, there must be a special text or a group of texts for each presumption[42], So, it is not possible to compare the legal presumption to another one without a text supported by the law, even If it was by analogy of unity , of cause or effect, or from a fortiori[43].

Even if it is based on the idea of what is most likely to occur, the legal presumption, , does not entail danger, because the legislator places the legal presumption in a general, abstract formula so that it applies to everyone without distinction between persons, and it applies to all similar facts without distinction between one fact and another, even if it is in some cases not consistent with the truth. So, the legislator

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([37])Articles (216-221) of the Iraqi Code of Criminal Procedure, Articles (291-302) of the Egyptian Code of Criminal Procedure, and Articles (147-62) of the Jordanian Code of Criminal Procedure

([38])Article 98 First of the Iraqi Evidence Law No. 107 of 1979.

([39])Article 99 of the Egyptian Law of Evidence in Civil and Commercial Matters.

([40])Article 40 of the Jordanian Data Law.

([41])Dr. Abdel Hamid Al-Shawarbi, Legal and Judicial Evidence in Civil, Criminal, and Personal Status Matters, previous source, p. 63.

([42])Dr. Abdel Razzaq Ahmed Al-Sanhouri, Al-Wajeez in Explanation of the New Civil Law, previous source 600.

([43])Dr. Mahmoud Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Evidence in Egyptian and Comparative Legislation, Dar Al Nahda Al Arabiya, Cairo, 1996, p. 298.

evaluates them in advance and applies them before the event to which it applies specifically occurs. He does not look at each case in itself, as is the case with the judicial presumption. It is very conceivable that cases will occur to which the presumption applies despite their being different from the truth of an incident or event. There are cases that vary in number or frequency in which the legal presumption does not hold up when applied. Therefore, some jurists believe that the legislator should confine himself to determining some few pieces of evidence and not expand on them and leave it to the judge's task as the one who will decide and deduce the presumption that is suitable and concord with the case's circumstances and facts and not resorting to legal presumption except when urgently necessary(44).

And if the presumption is the context of the law itself , then the text must include the known and the unknown fact(45).

**Second section**

**First: Types of legal presumption .**

The legal presumption is principally based on proving the opposite . This means giving a space and freedom to the defense, through rebutting evidence by evidence, since it is based on the idea of what is most likely to occur and is stated in a general, abstract formula, as this stipulates the permissibility of proving its opposite in each case separately, and on this basis the legal presumption accepts proof of the opposite(46), However, the legislator, for reasons that he deems appropriate and must be taken into account, decides not to refute the presumption by the opposite evidence and specifies that. In light of this basis, the legal presumptions are divided into simple and conclusive presumption that are going to be explained in full.

**A- Simple legal presumption :**

With this type of presumption proof of the opposing is accepted, since the basic principle in legal presumption is that it is permissible to refute it with the proof of the opposite and the legislator bases his deduction of the legal presumption on the majority of the circumstances, meaning that there is a possibility that the presumption does not match each individual case, and therefore the Iraqi legislator allowed to the opponent who insists the use of the legal presumption to prove the opposite by giving him the opportunity to establish evidence that the presumption does not match the truth and reality(47).

The legal presumption may be simple and not conclusive, so it may be proven to the contrary, as is the case when a witness's failure to appear in the court despite being notified of his attendance at a specific date is considered a presumption of his refusal to testify unless he provides an acceptable excuse for his failure to appear(48).

**B/ Decisive legal presumption:**

The principle of legal presumption is not conclusive, so proof of the opposing is also accepted, taking into account the idea of rebutting evidence by another evidence. However, the legislator may see, for an important reason that he appreciates, that it is not permissible to nullify the validity of some of the evidence that he establishes due to their connection to public order(49), and it is an exceptional freedom from the burden of proof required by general rules. It is obligatory for the judge to take it into account whenever its conditions stipulated by the law are met, whether it is consistent with the existing truth or contradicts it(50) . Yet, it does not mean that it is never refuted, because the legal evidence in any level the legislator intended

(44)Dr. Abdel Moneim Farag???? Proof in Civil Matters, 2nd edition, Al-Halabi Library and Press, p. 1955, p. 293.
(45)Dr. Mahmo Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Proof in Egyptian and Comparative Legislation, Dar Al-Nahda Al-Arabiya, Cairo, 1996, p. 267.
(46)Article 40 of the Jordanian Proof Law.
(47)Dr. George Hazboun Al-Sarraf, Introduction to the Science of Law, Dar Al-Thaqafa for Publishing and Distribution, Amman, 1997, p. 237.
(48)Text of Article 174 of the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended.
(49)Dr. Muhammad Zaki Abu Amer, Evidence in Criminal Matters, Al-Fanniyya Printing and Publishing, Amman, 1997, p. 21.

(50)Dr. Mahmoud Abdel Aziz Halifa, The General Theory of Evidence in Criminal Proof in Egyptian and Comparative Law, previous source, p. 280.

for it to be decisive and conclusive is not difficult to be refute by admission and oath as long as it is one of the rules of proof[51].

The Iraqi legislator explicitly stipulated this in Article 101 of the Evidence Law, which states: "A confession and an oath may not be accepted to negate a conclusive legal presumption that does not accept proof of the opposing in matters not related to public order."

Yet, this text applies in Jordanian law as well without an explicit text on it, and the reason is that legislation is unanimous in that it is permissible to refute the conclusive legal presumption by oath and confession, as they are two methods of proof, and resorting to proving the opposite, and that the legal presumption, by confession and oath, does not apply to cases related to the public system, since these cases are not personal but related to the public property , and it was legislated in the public interest to maintain public order[52]. The legal presumption decided by the penal laws are all considered part of the public order, and it follows that it is not permissible to prove the opposite. An example of this is what is stated in Article 331 of the Jordanian Code of Criminal Procedure, which relates to the presumption of Validity of judgments[53].

**Second: Features of the legal presumption:**

The legal presumption is what the legislator has stated in explicit texts in the laws that derive the strength of proof exclusively from the law, not from the judge. This is due to the fact that the judge may not estimate it at a level that ranges between strength and weakness, according to what he sees of the circumstances of the case. He also has no right to refrain from taking it even if It became clear to him that it was not consistent with the truth, but it was considered in the eyes of the law to be a guide to the truth[54]. Legal presumption doesn't exempt from being proved but it exempts the one who holds the burden to prove, but he has to prove the verification of the case on which the presumption is based first[55].The legal presumption carries the proof of a case, to whom the judge wants to assure, to another fact connected to it by a way or another, determined by the legislator to the degree that the last case becomes the basis for the legal presumption proved and verified by the law[56] .In special legal texts that show the general conditions of the appliance of legal presumption, these presumption become a general abstract rule when become available all the decisions of the trial court judge are subject to the oversight of the Court of Cassation. It is a legal issue[57].Therefore, the legal presumption constitutes a restriction on the freedom of the criminal judge in the field of his conviction with the evidential evidence, as the judge's role is limited to verifying the proof of the incident to which the legal presumption is linked, and then applying it to the case before him after adhering to the accuracy of the meaning specified for it by the legislator, and without having discretionary authority over it[58]

Worthy to say that legal presumption entails some risk for being based on the idea of " the most likely occurrence or possibility", as the legislator places the legal presumption in a general, abstract formula, taking into account the most likely presumption, even if there are some cases that are not consistent with the truth, as the legislator does not look at each case separately, by itself. As is the case with judicial evidence, which is why the judiciary must take caution in ignoring it[59], and a trend of schoolars may see that it is better for the legislator to reduce the determination of these presumptions, and leave to the judge the task of deriving the evidence according to the circumstances and facts of each individual case and its

([51])Dr. Abdel Hamid Al-Shawarbi, Legal and Judicial Evidence in Civil, Criminal, and Personal Status Matters, previous source, p. 70.
([52])Dr. Ahmed Nashaat, The Epistle of Evidence, vol. 2, 1986, p. 415.
([53])Article 331, which states: "Unless there is another provision, the criminal case shall be invalidated with regard to the person against whom it is brought and the facts based on it by issuing a ruling acquitting it, not being responsible, dropping it, convicting it, or issuing a ruling on the merits of the criminal case, it may only be reconsidered." To appeal the ruling through the methods prescribed by law, unless there is a provision to the contrary."
([54])Ronaldo del Carmen op,Cit.p.135
([55])Hussein Al-Mumen, the lawyer, The Theory of Evidence, previous source, p. 106.
([56])Dr. Adam Wahib Al-Nadawi, The role of the civil ruler in proof, previous source, p. 218
([57])Ronaldo del Carmen op,Cit.p.135
([58])Dr. Suleiman Morcos, Principles of Evidence in Civil Matters, Modern Press, Cairo, 1952, p. 110.
([59])Jundi Abdul Malik, The Criminal Encyclopedia, Part 1, Arab Heritage Revival House, Beirut, 1976, p. 209.

facts, and not resort to legal presumption unless if there is an urgent need for such recourse[60], and the researcher supports this trend because it gives a greater opportunity to reveal the truth and reduces the error rate in the realistic and actual correspondence.

**The second requirement**

**Judicial evidence**

**First section**

**One: Definition of the judicial presumption:**

There is no definition of judicial evidence in criminal legislation, but in civil legislation, some of it is sufficient to refer to it, such as French legislation, which contented itself with referring to it in the French Civil Code in Article (1353) thereof, and the Egyptian legislator also referred to it in the Law of Evidence in Civil and Commercial Matters in Article 1353 of it. (100) of it, and the Iraqi legislator has defined it in the Evidence Law in Article (102/First) thereof, and the Jordanian legislator has also defined it in Article (23) of the Jordanian Evidence Law.

However, some of the commentators on criminal law, have defined it as (every inference of an unknown fact from a known fact such that the conclusion is necessary by virtue of rational necessity and there is nothing in it that is considered conclusive, rather the matter is left to the discretion of the judge)[61] and others have defined it as that which is left to the judge, so he chooses from it what he wants and concludes what matches his thought and intuition[62] .Others said that it is (the judge's deduction from a fact on which evidence was based to prove another fact with a logical relationship to it)[63].

A judicial presumption is "every deduction of an unknown fact from a known fact, such that the conclusion is necessary, and by virtue of rational and logical necessity. The matter of assessing the judicial presumption is left to the judge so that he draws from it what is consistent with his mind and eases his conscience, as he is the one who estimates the circumstances and the degree of their impact on the case"[64].

The Iraqi Court of Cassation also ruled that "the ruling is based on personal conviction devoid of any firm evidence and certainty free of doubt that can be relied upon to issue the penalty"[65]. And is regarded the result that the judge should devoid or conclude from a fact.[66] . This evidence is from the established fact before him by way of deduction, and the arrangement of the results over the premises is based on the causal connection approved by reason and logic. They are derived from the rule of rational necessity, and they derive their strength from the principle of the judge's freedom to form his belief[67].

**Second: The elements of judicial presumption**

The elements of the legal presumption are two elements, the material element and the moral element. We will discuss these two elements as follows: -

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([60])Dr. Subhi Muhammad Najm, Al-Wajeez in the Principles of Jordanian Criminal Trials, House of Culture Library, Amman, 1991, p. 2.

([61])Dr. Raouf Obaid, Principles of Criminal Procedure in Egyptian Law, 14th edition, Cairo, 1982, p. 613.

([62])Ali Al-Sammak, The Criminal Encyclopedia in the Iraqi Criminal Judiciary, 2nd edition, Part 1, Al-Jahiz Press, Baghdad, 1990, p. 175.

([63])Saeed Hasaballah Abdullah, Explanation of the Code of Criminal Procedure, Al-Ani Press, Baghdad, 1990, p. 396.

([64])Decision of the Jordanian Court of Cassation in its criminal capacity, No. 1406/2003 (five-member panel), dated 2/9/2004, Adalah Center publications

Decision of the Jordanian Court of Cassation in its criminal capacity No. 636/2006 dated 7/25/2006, Adalah Center publications. Al-Qurain considers inferring an unknown fact from a known fact to be one of the acceptable pieces of evidence in criminal matters.

([65])Ethnic Court of Cassation Decision No. (81/28) General Assembly / 2000 on 7/5/2000, Judiciary Magazine, first issue, p. 131.

([66])Dr. Raouf Obaid, Principles of Criminal Procedure in Egyptian Law, 2nd edition, previous source, p. 727.

([67])Dr. Abd Abd al-Wahhab Humd, Principles of Criminal Trials, Part 3, University Press, Damascus, 1957, p. 104

**A. The material element**

Material element is regarded as an established fact or facts that the judge chooses from among the facts presented before him in the case he is considering, and this fact or facts are called evidence or indications[68].

It is the judge's duty, if he has an idea for himself about the incident, to expect, assuming that there will be another idea, until he reaches in his research the result that does not bear interpretation and that is completely consistent with all the premises, provided that this agreement must be real [69]

Just as there is no specific or specific rule or rule for the court to choose the fact to make it a basis for conclusions. And this fact should be established with certainty, and that its deduction is reasonable and sufficiently justified and leads to the result at which it concluded, and that the judicial presumption gains its strength in proof from the large number of true indications on which this evidence is based, so these indications must be carefully examined. Legal presumption must determine its meaning through number of indications and give it its correct interpretation. Since this is the case, it must have certain characteristics, the most important of which are the following:

1 These indications must be precisely defined:

This means that, the evidence must be precisely defined and clear, in order to facilitate the deduction process[70]

2. This evidence must be proven with certainty .

That is, the evidence must be proven with certainty as a matter of certainty and confirmation and does not tolerate interpretation and controversy[71]

3. The connection between the known evidence and the unknown incident:

There must be a causal link between the evidence and the information about the unknown fact to be proven, in accordance with the rules of logical deduction, so that the unknown fact can be deduced with known evidence[72].

4. These indications must be identical and consistent:

Meaning that these evidences are identical, consistent with each other, and not contradictory, agreeing on the same result[73]

**B- The moral element**

It is required to say something about the term "moral pillar or element" which is based certain items of logic, deduction, and talking about the idea of what is most likely to occur, and the extent of its sufficiency in establishing evidence of presumption in criminal matters, as follows:

**1- Logic**

Logic means deduction or inference, and inference is usually about truth or falsity, and it does not mean the rational process in which a person arrives at a proposition called the conclusion in reference to another proposition or case, or more, called premises or evidence to establish a relationship between them. The mind has a specific way of linking meanings to one another and forming meanings as a chain of connected links that includes every thought, feeling, or will that comes to mind.

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([68])Dr. Suleiman Morcos, Principles of Evidence in Civil Matters, previous source, p. 76.
([69])Hussein Al-Mumen, AlMuhami, The Theory of Evidence, previous source, p. 29.
([70])Dr. Muhammad Al-Fadil, Al-Wajeez in the Principles of Criminal Trials, vol. 1, 4th edition, Al-Ihsan Press, Cairo, 1977, p. 438.
([71])Dr. Mahmoud Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Evidence in Egyptian and Comparative Legislation, previous source, p. 151
([72])Dr. Mamoun Muhammad Salama, Criminal Procedures in Egyptian Legislation, Dar Al-Fikr Al-Arabi, Cairo, p. 1979, p. 214.
([73])Dr. Mahmoud Naguib Hosni, Explanation of the Code of Criminal Procedure, previous source, p. 498.

The conclusion of the presumption begins with an analysis of the actual circumstances, and makes an assumption inspired by the natural course of things. Also, it is thought that events cannot take place in a manner other than the assumptions made with regard to a certain type of events, and then linking these assumptions to what logic requires, and in the correct conclusion, the premises are conclusive evidence of the truth of the result, such that it is convinced of a logical mental process, based on induction and deduction and ends at its conclusion to a certain result[74], so the judge of the précis subject is called upon to avoid extremism in deep analysis that is crowded with deep elements, distracting his attention from what has no value in terms of a legal solution[75]

In this regard, the Jordanian Court of Cassation ruled that "the judicial presumption is regarded indirect evidence that the judge extracts from a known fact to prove the fact that he wants to prove, and this deduction must be consistent with logic, and the facts of the case, otherwise they are considered evidence and indications that do not rise to the level of evidence intended in the case." Code of Criminal Procedure[76]

**2- Inference**

Inference should be used by man in order to indirectly identify as much of the facts surrounding him as possible, using mental discourse through the method of deduction, induction, and inference[77], .And there are two types of inferences:

**First: direct inference**

It means inferring one issue from another issue without resorting to any intermediary through which we arrive at a conclusion from a certain premise or premises.

**Second: indirect inference**

This kind of inference has two forms :

**A- Deduction:**

It is the inference in which the mind moves from universal issues that are recognized to other partial issues, and it always represents the source of rational truth, and it is a matter of deduction when moving from the general known to the specific unknown.

**B-Induction:**

It is inference in which the mind is transferred from partial issues to comprehensive issues, that is, studying or examining part of the aspects of the fact or parts of known facts, and then moving after that to all the facts in a comprehensive manner, and the method of induction reveals to us a complete, unknown matter from a partial, known matter.

Deduction is a mental, intellectual process carried out by the judge in light of the position of those facts that are the subject of the dispute before him, and the judicial results he issues in light of the data of those established and chosen facts in the subject of the dispute[78], so the judicial presumption must have a definite meaning, not a hypothetical one. The unknown matter must be extracted and reached by deduction from the known matter with extreme accuracy and keen awareness of its significance[79]

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([74])Ahmed Fathi Sorour, Cassation in Criminal Matters, Dar Al-Nahda Al-Arabiya, Cairo, 188, p. 160.

([75])Muhammad Zaki Abu Amer, The Imperfection of Error in the Criminal Judgment, University Press House, Alexandria, 1985, p. 265.

([76])Decision of the Jordanian Court of Cassation in its criminal capacity No. /651/2002 dated 6/27/2002, Adalah Center publications.

([77])Dr. Muhammad Ali Al-Kik, Cause of Judicial Judgments, Dar Al-Nahda Al-Arabiya, Cairo, 1982, p. 292.

([78])Dr. Mahmoud Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Evidence in Egyptian and Comparative Legislation, previous source, p. 189.

([79])Fadel Zaidan Muhammad, the authority of the criminal judge in determining evidence, a comparative study, doctoral thesis, University of Baghdad, 1987, pp. 282-289.

**Third: The idea of what is most likely to occur**

The deduction in the judicial presumption is based on the idea of what is most likely to occur or most likely to occur among people, and it is what gives the advantage of seeking help in proof in various areas of law.

The judge's choice of the established fact must be probabilistic, and therefore the judge's inference of the presumption is based on his choice of the most likely or most likely possibility to occur, and here a very important issue arises that revolves around the sufficiency of this most likely and likely occurrence in order to base a conviction judgment on it, knowing that whoever the accepted and established principles are that criminal rulings must be based on certainty and accuracy, given the seriousness of the guilty verdict and the personal and financial consequences that befall the suspect(80).

The interpreters of civil law are satisfied with the establishment of the judicial presumption, which is to deduce the unknown event from the known event, based on the idea of the most likely occurrence, and this differs from it in criminal proof, as the evidence of the judicial presumption must be the promotion of this strong possibility to the degree of certain certainty that does not tolerate doubt.

To illustrate this, an example given of a crime occurred in the theft of specific movable items with known and precisely defined descriptions, and the search procedures resulted in the capture of these stolen items in the possession of a specific person. Here the seizure of these stolen goods in the possession of this person is a known incident. Is this described and known incident sufficient?, based on this most likely opinion, to establish a judicial evidence that this possessor is the thief? The assumption here is that this keeper denied the crime of theft, and was also unable to prove a legitimate or illegal source for it.

The most common occurrence in this case is that the possessor of these things is the criminal, the same thief, but this does not have the degree of definitive certainty that he committed them. Rather, it is a strong possibility that is subject to the most likely ruling. The reason for this is that what happens often does not always happen. The idea of what is most likely does not negate the existence of the rare few that it is considered a doubt associated with this strong possibility, as the owner of these things may be someone other than the thief, such as the buyer, for example. Or the depository in good or bad intention . If the possessor of these things is able to prove the opposite, it may be that he bought those things from another person and that he directed the court to that person. In this case, he is considered innocent, so the evidence of the judicial presumption must be based on a strong possibility to the degree of absolute certainty, through other facts that support it, such as traces or fingerprints belonging to him that were found at the crime scene, and if that is not possible, then we are faced with a presumption by way of inference - or a supplementary or reinforcing presumption that alone is not sufficient as evidence of proof, unlike the original presumption, as it alone is sufficient evidence in proof, like any other evidence(81)

The judicial presumption is distinguished from the legal presumption

The similarities and differences between the legal presumption and the judicial one is going to be fully explained as follows:

**First: the similarities**

1- The judicial and legal presumptions are based on the idea of what is most likely to occur(82).

2- The two pieces of evidence are considered transitive arguments, and what is proven by them is considered valid for all, without the matter being limited to the opponents of the case(83).

(80)Dr. Hassan Sadiq Al-Mardawi, Principles of Criminal Procedure - Mansha'at Al-Maaref, Alexandria, 1972, p. 747.
(81)Dr. Mahmoud Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Evidence in Egyptian and Western Legislation, previous source, p. 209.
(82)Dr. Mahmoud Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Evidence in Egyptian and Western Legislation, previous source, p. 220.
(83)Dr. Mahmoud Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Evidence in Egyptian and Western Legislation, previous source, p. 220.

3- The two types of presumptions are similar from a solid logical point of view, as each of them involves drawing conclusions from a known fact to find out an unknown fact[84].

4- The two presumptions are regarded similar in terms of qualification and conditioning. In terms of qualification, most of the legal presumptions have their origin in judicial evidences. This is after repeated efforts to derive a specific presumption from a specific incident and the jurists continued to apply it. The legislator circulated and organized it by stipulating it[85].

As for adaptation, both evidence is indirect evidence, as they are based on moving the place of proof from the disputed fact to another fact close to it, or closely related to it that is easy to prove, so that if it is proven, its proof is considered evidence of the argument for the disputed fact. This is the idea of transformation of proof[86].

**Second: aspects of difference**

The judicial presumption is at the core of the judge's work. He is the one who chooses the fixed fact that constitutes the material element of the judicial presumption, and in turn carries out the deduction process. As for the legal presumption, it is exclusively created by the legislator. He is the one who determines the fact that constitutes the material element of the legal presumption, and he is the one who carries out the deduction process. The judge is obligated to apply the ruling of this presumption to the dispute before him when the conditions for its application are met[87].

The judicial presumption is not conclusive, as it can always be proven to the contrary and in all circumstances, because no matter how strong it is, it is not devoid of possibility. As for the legal presumption, it is permissible to prove the opposite in other cases[88].

3- The judicial presumption is regarded evidence of proof, while the legal one is considered an exemption from proof. As for modern legislators, the idea of presumption is ……

**Conclusion**

After completing the preparation of this study, we reached a number of results and recommendations that we deem necessary for the purpose of completing it.

**First :**

**Conclusions**

1-The study reaches to certain conclusions that the establishment of the investigated unknown fact to be proven from the known fact is consistent with the rest of the circumstances and conditions of the criminal case. Inferring the presumption requires the judge to fully prove the fact from which he derives the presumption and then demonstrate the causal and logical relationship between the known fact and the other fact to be proven.

2. Proof devices in criminal law are not limited to a specific number that the judge must confine himself to and not exceeded to others. Rather, they are means of proof to reveal justice, and everything that leads to demonstrating justice is one of the methods of proof.

3-In addition, The study also found that there are similarities and differences between the judicial presumption in criminal matters and other evidence, such as the legal presumption and the civil judicial one.

4. The study also showed that judicial presumption is of great importance in the areas of criminal proof, whether from a scientific standpoint as a result of scientific progress, or from a practical standpoint to

(84)Hussein Al-Mumen, the lawyer, The Theory of Evidence, previous source, p. 113.
(85)Dr. Abd al-Razzaq al-Sanhouri, The Concise Explanation of the New Civil Law, previous source, p. 600.
(86)Dr. Adam Wahib Al-Nadawi, The role of the civil ruler in proof, previous source, p. 426..
(87)Hilal Abdul-Ilah Ahmed, The General Theory of Evidence in Criminal Principles, doctoral thesis, without mentioning the university and place of publication, 1987, p. 949.
(88)Dr. Mahmoud Abdel Aziz Khalifa, The General Theory of Evidence in Criminal Evidence in Egyptian and Western Legislation, previous source, p. 249.

enhance other evidential evidence in a criminal case, such as witness testimony, confession, and other evidence.

**Second :**

**Recommendations**

1. The study recommend, according to our view point, that it is crucial for the criminal judge to rely on presumptions alone because it is considered one of the original methods of proof, and at the same time it contributes to strengthening other evidential proof. Evidence is the standard by which the judge weighs between different pieces of evidence and evaluates the evidence in terms of its truthfulness or falsity, so assessing its value is an objective matter that the trial judge decides independently based on the principle of emotional conviction.

2. We recommend that the criminal judge must take the utmost care in inference and deduction, and the necessity of using a logical and right method to reach the just and correct decision he takes in the criminal case pending before him.

We recommend that the results of the presumption be consistent with each other, and to achieve this agreement, each piece of evidence must be evaluated separately to ensure that it has the quality of certainty, and that each piece of presumption converges with the other pieces of evidence in the fabric of the thread of the unknown matter in a logical manner, and there is no possibility of the evidence being separated from the matter to be proven.

It is a must that the judicial presumption should not be considered the lowest-ranking data in evidence, but that this should be left to the judge of the matter, as he has the authority to evaluate and estimate the evidence obtained according to the circumstances of each criminal case.

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