

PRESUMPTION

NOTE:

The word “presumption” should be avoided in charging the jury where a permissible inference is meant, *Commonwealth v. Hughes*, 380 Mass. 596, 603, 404 N.E.2d 1246, 1250 (1980) (inference of intent to steal from breaking and entering a dwelling at night), even if the statute itself uses the word “presumption,” *Commonwealth v. Moreira*, 385 Mass. 792, 797, 434 N.E.2d 196, 200 (1982).

It is constitutionally impermissible to shift the burden of proof as to an element of the crime to the defendant by means of a presumption. *Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459 (1979) (presumption that person intends natural and probable consequences of his acts); *DeJoinville v. Commonwealth*, 381 Mass. 246, 408 N.E.2d 1353 (1980) (same); *Mullaney v. Wilbur*, 421 U.S. 684, 704, 95 S.Ct. 1881, 1892 (1975) (presumption of malice from intentional and unlawful homicide); *Commonwealth v. Zezima*, 387 Mass. 748, 754-755, 443 N.E.2d 1282, 1285-1286 (1982) (presumption that person intends natural consequences of using a dangerous weapon); *Moreira, supra* (statutory breathalyzer presumptions); *Commonwealth v. Munoz*, 384 Mass. 503, 509, 426 N.E.2d 1161, 1164-1165 (1981) (presumption that vehicle uninsured); *Commonwealth v. Callahan*, 380 Mass. 821, 822-826, 406 N.E.2d 385, 386-388 (1980) (presumption of malice from intentional use of deadly weapon). This is true even if the jury is instructed that the presumption is rebuttable. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985).

“Conclusive and mandatory presumptions are constitutionally infirm, while permissive presumptions, or inferences, are permissible.” *Moreira*, 385 Mass. at 794, 434 N.E.2d at 199. A mandatory presumption is one that requires the jury to find an ultimate fact to be true upon proof of another fact unless they are otherwise persuaded by a preponderance of evidence offered in rebuttal. *Id.*, 385 Mass. at 795, 434 N.E.2d at 199.

In criminal cases, statutory provisions designating specified items as prima facie evidence of a fact to be proved must be presented to the jury as sufficient evidence of a permissible inference, and not as a mandatory presumption. See Instruction 3.260 (Prima Facie Evidence).