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The Law of Presumptions in Tennessee

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NOTES

THE LAW OF PRESUMPTIONS IN TENNESSEE

Nowhere in the law of evidence does greater confusion exist than in the concept of a presumption and its effect. Not only is the confusion widespread, but it is intensified by the intransigence of most judges in their rejection of the views of respected writers in the field. No attempt will be made here to restore order to the Tennessee law of presumptions. The purpose of this note is merely to catalogue some of its inconsistencies.

THE NATURE OF A PRESUMPTION

A presumption is regarded, in the abstract, as a rule of law. To synthesize the views of several authorities, presumptions are described as rules of procedure which assign to certain fact groupings a standard significance in order to achieve procedural convenience and desired policy ends.[1] At least one author thinks it best to describe presumptions in terms of what they are not.[2] Perhaps the simplest illustration of how the courts use the term is to call the basic fact or fact-group *A*, the presumed fact or fact-group *B*. Then, if *A* is established by proper means, the court presumes the existence of *B*. Thus, if it is established that a properly addressed and stamped letter was mailed (fact *A*), it is presumed to have been duly delivered to the addressee (fact *B*).

Before advancing to a consideration of the Tennessee law, it is desirable to define certain terms as they will be used in the following material. An *inference* is a logical deduction based on proven circumstances, a conclusion drawn from common experience. Thus if fact *A* is established, fact *B* may be inferred if it follows logically therefrom. A *mandatory presumption* is a rule of procedural law which compels the trier of fact to find the presumed fact upon a finding of the basic fact. A mandatory presumption has this compelling effect even though the basic fact may or may not support an inference of the presumed fact. A *permissive presumption* is a rule of procedural law

1. A presumption is "a standardized practice, under which certain oft-recurring fact groupings are held to call for uniform treatment whenever they occur, with respect to their effect as proof to support issues." McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 639 (1954). A presumption is "a relationship between one fact or group of facts and another fact or group of facts." MORGAN, BASIC PROBLEMS OF EVIDENCE 30 (1954). Presumptions are "aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry." THAYER, EVIDENCE AT THE COMMON LAW 314 (1898).

2. A presumption is not "a conclusive presumption," nor is it "an inference." Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 326 (1952).

which permits, but does not compel, a finding of the presumed fact upon a finding of the basic fact. A permissive presumption will thus permit a finding of the presumed fact even though the basic fact may or may not support an inference of the presumed fact. Both mandatory and permissive presumptions assign an artificially persuasive effect to the basic fact if by itself it would not support an inference. It should be noted here that the Tennessee cases rarely, if ever, use the term permissive presumption. They contain many presumptions, however, which seem to have only a permissive effect. Professor McCormick says that a permissive presumption has the effect of establishing a prima facie case.[3] A caveat to this statement is necessary here, however. Tennessee decisions use the term prima facie case, or prima facie evidence, in two senses: it either permits the jury to make a finding, or it requires this finding, if the opposing party does not go forward with the evidence.[4]

The courts of Tennessee have variously described a presumption as a "rule of law,"[5] "a name for a conclusion reached by means of the weight of proven circumstances,"[6] "a substitute for evidence,"[7] and "a fiction of law [that] is an assumption for convenience."[8] These generalizations would seem to be in accord with the authorities cited above. They are little help in the analysis of the problem, however, except to provide a springboard for the plunge into the murky waters below.

Presumption of Law v. Presumption of Fact; Presumption v. Inference: It is difficult to discuss any supposed difference between a presumption of law and a presumption of fact without considering the correlative problem of the difference between a presumption and an inference. The text writers are in substantial accord that a presumption is a rule of law calling for certain fixed procedural consequences, and that an inference denotes only a rule of logic whereby one fact may be inferred from another.[9] They thus reason that the consequences of a presumption are compulsive, because fixed by rules of law; that the consequences of an inference may or may not be compulsive,

3. MCMORMICK, *op. cit. supra* note 1, at 640.

4. That it permits a finding seems to be the general rule in Tennessee. See Dale v. Temple Co., 186 Tenn. 69, 208 S.W.2d 344 (1947); Davis v. Newson Auto Tire & Vulcanizing Co., 141 Tenn. 527, 213 S.W. 914 (1919). *But see* Hadley v. Morris, 35 Tenn. App. 534, 249 S.W.2d 295 (W.S. 1951); Duggan v. Ogle, 25 Tenn. App. 467, 472, 159 S.W.2d 834, 837 (E.S. 1941).

5. Illinois Cent. R.R. v. H. Rouw & Co., 25 Tenn. App. 475, 480, 159 S.W.2d 839, 842 (W.S. 1940), quoting to this effect 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

6. Marquet v. Aetna Life Ins. Co., 128 Tenn. 213, 225, 159 S.W. 733, 736 (1913).

7. Raines v. Pile, 182 Tenn. 283, 291, 185 S.W.2d 628, 631 (1945); Siler v. Siler, 152 Tenn. 379, 386, 277 S.W. 866, 887 (1925).

8. H.G. Hill Co. v. Squires, 25 Tenn. App. 164, 167, 153 S.W.2d 425, 427, (E.S. 1941).

9. See, *e.g.*, THAYER, *op. cit. supra* note 1, at 340; Gausewitz, *supra* note 2, at 326-27.

depending on the varying dictates of the rules of logic and experience in a given situation. These writers say further that there is only one class of presumptions, and to distinguish between presumptions of law and presumptions of fact is merely to distinguish between presumptions and inferences.[10]

Tennessee courts, however, continue to distinguish between presumptions of law and presumptions of fact, sometimes using the terms "legal presumptions" and "natural presumptions" to make the same distinction. They usually fail to distinguish between presumptions and inferences, often using the terms interchangeably. As elsewhere in the law of presumptions, the resulting confusion may be traced to the careless use of words rather than to a lack of understanding of the inherent distinction between a presumption and an inference. The latest Tennessee case containing a thorough discussion of these two concepts is *Bell Cab & U-Drive-It Co. v. Sloan*,[11] which concerned the question of whether an employee of the defendant taxicab company was acting within the scope of his employment when defendant's cab, driven by the employee, struck the plaintiff. The court said that, since the cab was registered in the principal's name, a statutory presumption[12] arose that the employee was acting within the scope of his employment. This presumption was rebutted by defendant's evidence that the owner had loaned the cab to the employee for the latter's personal use. Remaining in the case in favor of the plaintiff was testimony concerning the basic facts to the effect that the cab was owned by the defendant and registered in its name, the driver was wearing his regular uniform, and was apparently carrying a passenger. These facts, said the court, constituted the basis for an inference that the cab was being used in the business of its owner, and this inference alone was sufficient to permit the jury to find for the plaintiff. This is logical, for this inference is a conclusion of common experience, and the court seems to have here correctly analysed the basic distinction between a presumption and an inference. That is to say, though the presumption is destroyed, the inference from the basic facts remains. A thoughtful analysis of the same problem is contained in *McCloud v. City of LaFollette*,[13] in which the court holds that the doctrine of res ipsa loquitur does not create a presumption of negligence, but raises only an inference thereof.

This recognized difference is blurred, however, by the language in other cases. In *Beretta v. American Cas. Co.*,[14] the court endorses

10. For a good discussion of this view, see 20 AM. JUR., *Evidence* § 162 (1939); 9 WIGMORE, *op. cit. supra* note 5.
11. 193 Tenn. 352, 246 S.W.2d 41 (1952). H.G. Hill Co. v. Squires, 25 Tenn. App. 164, 153 S.W.2d 425 (E.S. 1941) makes the same distinction without discussing the matter.
12. TENN. CODE ANN. §§ 59-1037, -1038 (1956).
13. 38 Tenn. App. 553, 276 S.W.2d 763 (E.S. 1954).
14. 181 Tenn. 118, 178 S.W.2d 753 (1944).

the language of several authorities to the effect that "presumptions must conform to the commonly accepted experiences of mankind,"[15] and "natural presumptions are derived from . . . the common experience of mankind."[16] In *Illinois Cent. R.R. v. H. Rouw & Co.*,[17] the court speaks of "presumptions of law," but goes on to say that "a presumption of this kind adds nothing to the probative force of the facts that give rise to it . . . ."[18] The latter is of course true if a presumption is considered only a procedural device. What the court seems to be saying is that in a "presumption of law" the basic fact need not support an inference of the presumed fact. In *Frank v. Wright*[19] the court adopts the proposition that:

> "Presumptions of fact" are but deductions drawn from particular facts or circumstances proved; the connection between them and the sought-for fact having received such sanction in the common experience of mankind as to have become recognized as justifying the deduction to be made by the triers of facts.

The presumption involved therein was the same statutory presumption considered in the *Bell Cab & U-Drive-It Co.* case.[20] Similar language was used to define a presumption of fact in *Cox v. Nance*,[21] the court in the latter case holding that the receiver of an insolvent national bank would not be presumed to have been guilty of misconduct in the discharge of the duties of his office.

From these cases it can be seen that Tennessee judges realize the existence of an inherent difference between a presumption and an inference. The difference is that one is a rule of law; the other is a rule of experience. This distinction is complicated, however, by the fact that many of these presumptions actually, but not necessarily, conform to rules of experience and logic. That is to say, the basic fact of a presumption may or may not support an inference of the presumed fact. The phrase "support an inference" means that, given the basic fact, the existence of the presumed fact is more probable than not; it does not mean only that there is some rational connection between the basic and presumed facts. Thus, a jury would be justified in finding the existence of the presumed fact even in the absence of the presumption, if the presumption's basic fact "supports an inference" of the presumed fact. While this distinction between a presumption and an inference may seem merely a question of semantics to those who, with Holmes, believe that the life of the law is ex-

15. *Id.* at 123, 178 S.W.2d at 755.
16. *Id.* at 124, 178 S.W.2d at 755.
17. 25 Tenn. App. 475, 159 S.W.2d 839 (W.S. 1940).
18. *Id.* at 480, 159 S.W.2d at 842.
19. 140 Tenn. 535, 547, 205 S.W. 434, 437 (1918).
20. See note 11 *supra*.
21. 24 Tenn. App. 304, 143 S.W.2d 897 (E.S. 1940).

perience, the difference is nevertheless important, not for its nature, but for its effect. Were the courts uniformly to perceive that this distinction requires them to be consistent in attaching different procedural consequences to each, the problem would be greatly simplified.

"Conclusive" Presumptions: There have been many injudicious statements in Tennessee decisions that certain presumptions are conclusive. This language is generally used to express what is actually a rule of substantive law; *e.g.,* a woman who shot through the door and killed her husband behind it will be conclusively presumed to have intended the natural consequences of her act,[22] parties to a contract are conclusively presumed to understand the consequences thereof,[23] and a woman is conclusively presumed capable of bearing children until death.[24] In other instances the courts have said that certain facts are conclusively presumed when there is no evidence to the contrary.[25] The latter cases merely state what are generally termed mandatory presumptions,[26] in that they require a directed finding if not rebutted. That the term "conclusive" is misleading when used to describe a presumption is borne out by the relatively few allusions to the term in Tennessee cases.

Presumptions as Evidence: It must be said, to be technically correct, that a presumption can never be evidence, for a rule of law is a concept quite distinct from an evidentiary fact, as for example, human nature is a concept distinct from the term humanity. Although this view is widely accepted,[27] the cases in Tennessee indicate that in practice some presumptions are treated as having evidentiary value.

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22. Jamison v. Metropolitan Life Ins. Co., 24 Tenn. App. 398, 145 S.W.2d 553 (M.S. 1940).

23. McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 134 S.W.2d 197 (M.S. 1939). See also De Ford v. National Life & Acc. Ins. Co., 182 Tenn. 255, 185 S.W.2d 617 (1945) (insured is conclusively presumed to have knowledge of clause in policy limiting agent's authority).

24. Stewart v. Chattanooga Sav. Bank, 12 Tenn. App. 68 (E.S. 1927). See also 12 TENN. L. REV. 302 (1934).

25. Rankin v. McDearmon, 38 Tenn. App. 160, 270 S.W.2d 660 (W.S. 1953) (presumption of revocation of one spouse's will after divorce and property settlement); Fann v. Fann, 186 Tenn. 127, 208 S.W.2d 542 (1948) (presumption that attesting witness signed in presence of testator).

26. See MCCORMICK, *op. cit. supra* note 1, at 638. The question of whether presumptions are permissive (take the case to the jury) or mandatory (require a directed finding) falls under the heading of the procedural effect of presumptions and is discussed *infra.*

27. THAYER, *op. cit. supra* note 1, at 337-39; McBaine, *Presumptions, Are They Evidence?,* 26 CALIF. L. REV. 519 (1938); Morgan, *Some Observations Concerning Presumptions,* 44 HARV. L. REV. 906, 908 (1931). For an opinion to the contrary, see Palmer, *Battle of the Presumptions,* 15 LOS ANGELES DAILY J. No. 197 (1942), in which the author says that judicial evidence is anything which the law permits the trier of fact to consider in deciding an issue of fact. This view is critically discussed by Morgan, *Further Observations on Presumptions,* 16 So. CALIF. L. REV. 245 (1943).

Southern Motors, Inc. v. Morton[28] involved the oft-discussed statutory presumption[29] that registration of an automobile is prima facie evidence of ownership, and that operation thereof was for the benefit of the owner. The court there said, "[A] presumption *of the kind we have in hand* operates primarily on the power of the judge and is not properly a factor to be considered by the jury in any event . . . ." (Emphasis added.) Two results follow from this reasoning. First, this type of presumption is dissipated by credible evidence to the contrary; second, if not dissipated by the opponent's evidence, it operates only on the power of the judge to require or permit a finding of fact, but is never to be considered by the jury as evidence. There are many Tennessee cases in substantial accord with this view, at least in circumstances where the opponent presents contrary evidence.[30] It will be seen from a study of these cases that the presumption which is not to be considered by the jury is one based primarily on procedural convenience rather than probability or the furtherance of a desired policy.

The Tennessee cases holding that presumptions are evidence and therefore to be considered by the jury are limited to a few fairly well-defined factual situations. Foremost among the more recent cases is *Bryan v. Aetna Life Ins. Co.*,[31] which held that the presumption against suicide, in an action by the beneficiary to recover the proceeds of a life insurance policy, remained in the case and should be considered by the jury until overcome by a preponderance of evidence to the contrary. In *Hammond v. Union Planters Nat'l Bank*,[32] which involved the contest of a will on the basis of insanity, the court held that the question of testator's alleged insanity "is to be submitted to the jury on the preponderance of the evidence with consideration of the presumption in favor of sanity."[33] Thus this presumption is treated as having the force of evidence in that the jury is allowed to consider it. Likewise, the statutory presumption[34] that a person whose blood is fifteen hundredths alcohol "shall be presumed" to be

28. 25 Tenn. App. 204, 214, 154 S.W.2d 801, 807 (W.S. 1941).
29. TENN. CODE ANN. §§ 59-1037, -1038 (1956).
30. McMahan v. Tucker, 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948); Raines v. Pile, 182 Tenn. 283, 185 S.W.2d 628 (1945); Central of Ga. Ry. v. Fuller Combining Gin Co., 2 Tenn. Civ. App. 343 (1911). For other cases in point, see note 49 *infra*. It is only rarely that the court must determine the effect of a presumption when no evidence to the contrary is introduced, for the opponent almost necessarily must present some favorable testimony if he is seriously to present his side of the dispute.
31. 174 Tenn. 602, 130 S.W.2d 85 (1939). This case analysed briefly and followed Provident Life and Acc. Ins. Co. v. Prieto, 169 Tenn. 124, 83 S.W.2d 251 (1935), admitting that both decisions were contra to New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938). See also Annots., 114 A.L.R. 1226 (1938); 103 A.L.R. 185 (1936).
32. 189 Tenn. 93, 222 S.W.2d 377 (1949).
33. *Id.* at 99, 222 S.W.2d 380.
34. TENN. CODE ANN. § 59-1033 (1956).

intoxicated may be considered by the jury and court along with other evidence on the subject.[35]

These are the only noted cases explicitly holding that certain presumptions are evidence. Why have the courts of Tennessee singled out these presumptions and ascribed to them the force of evidence? A partial answer lies in the reasons underlying their creation.[36] The presumptions in favor of sanity and against suicide are founded in strong probability; *i.e.*, most people are sane, and most love life. The statutory presumption of intoxication is based on strong scientific probability, and a legislative policy designed to punish the intoxicated driver and to compensate those whom he injures. While these factors may afford an explanation of why some presumptions are considered evidence, it does not follow that such a view is consistent with the general law of presumptions in Tennessee. There are other presumptions founded on equally strong policy considerations; *e.g.*, the presumptions of the legitimacy of a child born to a married person,[37] and the validity of a second marriage.[38] There are also many so-called presumptions as strongly founded on probability.[39] These presumptions are not treated as having evidentiary value. It may be suggested that when courts desire to increase the force of a presumption, they usually require evidence of greater persuasive effect to dissipate it rather than giving evidentiary value to the presumption itself. This method is certainly the lesser of two evils.

Only one further thought need be expressed. It seems clear from the decisions that the evidentiary value of the basic fact of an inference, as distinguished from that of a presumption, is never destroyed by contrary evidence, however persuasive.[40] This is what Tennessee courts mean when they say that "the inference [itself] is not destroyed by contradictive testimony."[41] Were the matter to be left here, the law would be much less confusing than it is. Many decisions go farther, however, and completely fail to distinguish between presumptions and inferences, indicating that a given proposition may be either, as if it made no difference.[42] This indiscriminate use of the two terms makes it impossible to apply the rule that a jury may properly draw an inference, but may only rarely consider a presumption, for one can never be certain which of the two concepts will be used to describe a given fact situation.

35. Fortune v. State, 197 Tenn. 691, 277 S.W.2d 381 (1955).
36. For a thorough analysis of the usual reasons underlying the creation of presumptions, see McCormick, *op. cit. supra* note 1, § 309.
37. Whipple v. McKew, 166 Tenn. 31, 60 S.W.2d 1006 (1933).
38. Rutledge v. Rutledge, 293 S.W.2d 21 (Tenn. App. W.S. 1953); Gamble v. Rucker, 124 Tenn. 415, 137 S.W. 499 (1911).
39. See note 49 *infra* and related text.
40. Bell Cab & U-Drive-It Co. v. Sloan, 193 Tenn. 352, 246 S.W.2d 41 (1952); H.G. Hill Co. v. Squires, 25 Tenn. App. 164, 153 S.W.2d 425 (E.S. 1941).
41. H.G. Hill Co. v. Squires, *supra* note 40.
42. See, *e.g.*, Moore v. Watkins, 293 S.W.2d 185 (Tenn. App. E.S. 1956).

THE PROCEDURAL EFFECT OF A PRESUMPTION

It is the purpose of this section to discuss the procedural effect of presumptions in the law of Tennessee, approaching the problem from two sides. The first part of the discussion will consider whether presumptions are permissive or mandatory; the second will undertake to present the varying degrees of evidence required to dissipate or cancel certain presumptions.

Permissive and Mandatory Presumptions: A mandatory presumption is one which, in the absence of contrary evidence, requires a directed finding for its proponent. The widely accepted dogma that all presumptions are mandatory had Thayer as its principal protagonist,[43] and his views were subsequently adopted by Wigmore[44] and the American Law Institute.[45] The procedural effect of a mandatory presumption is thus to fix the burden of going forward with the evidence on the opposing litigant. However, many courts refuse to classify all presumptions as mandatory, and treat some presumptions as permissive only.[46] A permissive presumption has the effect of allowing a jury to find for the proponent in the absence of contrary evidence, but does not require it. The effect of the latter is thus to create a prima facie case, in the sense that it allows the proponent to get his side of the issue to the jury.[47]

Both views as to the procedural effect of presumptions find acceptance in the Tennessee decisions. There are few if any statements in these opinions which use the precise language that a given presumption requires a directed finding of the presumed fact, but many statements to the effect that certain presumptions, if not rebutted, have a compulsive effect.[48] These presumptions are thus treated as having a manda-

43. "A rule of presumption does not merely say that such and such a thing is a permissible and usual inference from other facts, but it goes on to say that this significance shall always, in the absence of other circumstances, be imputed to them . . . ." THAYER, *op. cit. supra* note 1, at 317.

44. WIGMORE, *op. cit. supra* note 5, § 2491(2).

45. MODEL CODE OF EVIDENCE rule 704 (1942).

46. See MCCORMICK, *op. cit. supra* note 1, at 640.

47. See cases cited note 4 *supra* for Tennessee opinions defining a prima facie case.

48. Pruitt v. Cantrell, 196 Tenn. 142, 264 S.W.2d 793 (1954) (presumption that value placed on automobile in replevin action was within jurisdictional amount of J.P. court); Edgemon v. State, 195 Tenn. 496, 260 S.W.2d 262 (1953), citing Sells v. State, 156 Tenn. 610, 4 S.W.2d 349 (1928) (presumption of the regularity of prior judicial proceedings); Morrow v. Person, 195 Tenn. 370, 259 S.W.2d 665 (1953) (presumption that subscribing witness signed in presence of testator); Wilson v. State, 190 Tenn. 592, 230 S.W.2d 1014 (1950) (presumption that defendant was represented by counsel at trial); Fann v. Fann, 186 Tenn. 127, 208 S.W.2d 542 (1947) (presumption that testator signed in presence of attesting witnesses); Nichols v. State, 181 Tenn. 425, 181 S.W.2d 368 (1944) (presumption that public official has done his duty) [*Cf.* Lay v. Clymer, 27 Tenn. App. 518, 182 S.W.2d 425 (E.S. 1944)]; Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 130 S.W.2d 85 (1939) (presumption against suicide); Provident Life & Acc. Ins. Co. v. Prieto, 169 Tenn. 124, 83 S.W.2d 251 (1935) (same); Garner v. State, 37 Tenn. App. 510, 266 S.W.2d 358 (M.S. 1953) (presumption of knowledge of the law) [*But see* Bayless v. Knox County, 286 S.W.2d 579 (Tenn.

tory effect rather than a permissive one. Most of these statements must be considered dicta, however, for the occasion rarely arises in which some rebuttal evidence is not presented. A study of the subject matter of these presumptions reveals no particular pattern or common denominator. It would seem, however, that a majority of these mandatory presumptions are rules established by the courts primarily to further a desired policy; *e.g.*, the presumptions relating to the regularity of judicial proceedings, the jurisdiction of courts, and the diligence of public officials. It is fairly easy to see that these matters are not properly questions for the trier of fact, in the absence of rebuttal evidence, for their subject matter is not usually within a jury's common experience.

No Tennessee case has been found which holds a presumption specifically permissive. This is because the opponent of the presumption is normally able to present some degree of persuasive evidence to the contrary, so the courts are not faced with the problem of the effect of such a presumption in the absence of any evidence. Several cases, however, use terminology which seems to indicate that these presumptions have the effect only of permitting the trier of fact to find for the proponent.[49]

In addition, there are some cases which seem to say that certain mandatory presumptions are made permissive by the introduction of persuasive evidence to the contrary. For example, in *Hadley v.*

1955)]; Bates v. Equitable Life Assurance Society, 27 Tenn. App. 17, 177 S.W.2d 360 (M.S. 1943) (presumption that law of foreign state is same as law of Tennessee, if neither counsel raises the question); Duggan v. Ogle, 25 Tenn. App. 467, 159 S.W.2d 834 (E.S. 1941) (presumption of the validity of marriage); Snyder Bros. v. Morgan, 24 Tenn. App. 131, 141 S.W.2d 508 (E.S. 1940) (*semble*) (presumption of compliance with the law). [See also Todd v. Roane-Anderson Co., 35 Tenn. App. 687, 251 S.W.2d 132 (E.S. 1952)]; Stewart v. Chattanooga Sav. Bank, 12 Tenn. App. 68 (E.S. 1927) (presumption that human beings are always capable of producing children); Central of Ga. Ry. v. Fuller Combining Gin Co., 2 Tenn. Civ. App. 343 (1911) (presumption of negligence of the last connecting carrier) [See also Illinois Cent. R.R. v. H. Rouw & Co., 25 Tenn. App. 475, 159 S.W.2d 839 (W.S. 1940)].

49. Some of the more commonly found presumptions which seem to be permissive appear in the following cases: De Ford v. National Life & Acc. Ins. Co., 182 Tenn. 255, 185 S.W.2d 617 (1945) (presumption that one knows the content of a written agreement to which he is a party and intends to be bound thereby); Berretta v. American Cas. Co., 181 Tenn. 118, 178 S.W.2d 753 (1944) (presumption that a fact or condition once in operation continues in operation); Storie v. Norman, 174 Tenn. 647, 130 S.W.2d 101 (1939) (presumption of the validity of a written instrument); Moore v. Watkins, 293 S.W.2d 185 (Tenn. App. E.S. 1956) (presumption that the deceased owner of a wrecked automobile, found in the wreckage, was driving when the accident occurred); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (E.S. 1952) (presumption that the failure of a party to testify in his own behalf as to facts peculiarly within his knowledge shows that such facts do not exist); Waller v. Skeleton, 31 Tenn. App. 103, 212 S.W.2d 690 (M.S. 1948) (presumption that if a party has power to produce a witness who was in a position to know the facts, and the witness is not called, his testimony would not support party's contentions); Richmond & Co. v. Security Nat'l Bank, 16 Tenn. App. 414, 64 S.W.2d 863 (W.S. 1933) (presumption of the delivery of matter properly mailed).

Morris[50] the court dealt with the presumption that a child between the ages of seven and fourteen was not capable of contributory negligence. The court there said this was a "prima facie presumption", but if "material evidence of capacity" was presented by the opponent, the question became one for the jury. The court in *Tidwell v. Ward*[51] spoke in similar terms of the statutory presumption making registration of an automobile prima facie evidence of ownership and of the fact that the automobile was being operated for the benefit of the owner.[52] The plaintiff therein evidently relied solely on the presumption to get to the jury on the question of agency; the defense produced uncontradicted testimony to the contrary. In affirming a directed verdict for the defendant the court said:

> When the *basic fact* (here, registration of vehicle in defendant's name) is stipulated or otherwise established, the *presumed fact* (operation in defendant's service) must be taken as true and a verdict directed for plaintiff unless defendant meets the burden of producing evidence to justify a finding of the nonexistence of the presumed fact.

So far the court had indicated that this presumption is mandatory in nature, even though it was designated a "bare, rebuttable" presumption in the *Bell Cab & U-Drive-It Co.* case.[53] However, the court went on to say:

> If the defendant does adduce such evidence it may dispel the presumption—negative the presumed fact—so as to require a directed verdict for him, or it may merely make an issue for the jury as to the nonexistence of the presumed fact, depending upon whether or not the evidence adduced by defendant is not in conflict with any evidence, testimonial or circumstantial, for the plaintiff, and comes from a witness or witnesses whose credibility is not in issue.

These cases are susceptible of two interpretations. They may be said to adopt a rule similar to that which Morgan suggests is followed in Pennsylvania,[54] that an opponent's contrary evidence destroys the compulsive effect of the presumption, but not the presumption's permissive effect. Or, they may be deemed strictly mandatory presumptions, dispelled by contrary evidence. By the latter interpretation, when the court says that the opponent's evidence creates a jury question, it may be implicit in the opinion that a jury question results

50. 35 Tenn. App. 534, 249 S.W.2d 295 (W.S. 1951).
51. Docket No. 9476, Tenn. App. M.S., Nov. 11, 1956, unpublished at the time of this writing.
52. TENN. CODE ANN. §§ 59-1037, -1038 (1956).
53. See note 11 *supra*.
54. MORGAN, PRESUMPTIONS: THEIR NATURE, PURPOSE AND REASON 15-19 (Brandeis Lawyers Soc'y 1949), discussing Kunkel v. Vogt, 354 Pa. 279, 47 A.2d 195 (1946); McDonald v. Pennsylvania R.R., 348 Pa. 558, 36 A.2d 492 (1944). *Cf.* L. Hand, J., in Pariso v. Towse, 45 F.2d 962 (1930).

only when the proponent has presented evidence *other* than the basic fact of the presumption sufficient to carry his side to the jury. The first interpretation, however, seems more likely, for the language of these decisions indicates that the proponent may get to the jury on the basic fact alone. Since the basic fact of neither of these presumptions will support an inference of the presumed fact, the courts must be assigning an artificially persuasive effect to the basic fact in allowing the jury to find the presumed fact. Thus the presumption has not been dispelled, but rather made permissive.

The vagueness of the judicial language in Tennessee makes it difficult in many cases to determine whether the court is using the term presumption in its mandatory or permissive sense. The reasons underlying both types seem in many instances to be the same. It may be suggested that if a presumption is not surrounded by an aura of arbitrariness, as are many mandatory presumptions, the courts seem to feel that it does not require a definite, fixed result. Whatever the reasons for the apparent distinction, its results are unfortunate. It not only creates procedural uncertainty, but contributes to the confusion inherent in the same courts' failure to distinguish between a presumption and an inference.

Evidence Required to Dissipate a Presumption: It may easily be predicted at this point that the persuasive effect of evidence required to dissipate a presumption in Tennessee will vary according to the nature of the presumption. The facility of making this prediction, however, belies the difficulty of its application.

The rule as stated by Thayer is that evidence to the contrary—that is, evidence which will support a jury finding of the non-exsitence of the presumed fact—will cancel or dissipate a presumption.[55] It is purportedly adopted in the Tennessee courts, at least with regard to presumptions which the courts feel are "rules of law".[56] The method is nowhere made clear, however, by which the lawyer or judge may determine whether or not a given presumption is of this category. One must evidently plow through the plethora of cases involving presumptions in order to discover the quantum of evidence necessary to rebut the presumption with which he is concerned. Nevertheless, there are many Tennessee decisions stating that contrary evidence, or its equivalent, will dissipate a presumption.[57]

55. THAYER, *op. cit. supra* note 1, at 336.

56. "The presumption fixed by [TENN. CODE ANN. §§ 59-1037, -1038 (1956)] is 'A rule of law, fixed and relatively definite in its scope and effect, which attaches to certain evidentiary facts and is productive of specific procedural consequences respecting the duty of proceeding with the evidence. According to this view, where the opponent offers evidence contrary to a presumption, the presumption disappears, and the case stands upon the facts and whatever inferences may be drawn therefrom.' 20 Am. Jur., Sec. 162, page 165. This is the rule we follow." Bell Cab & U-Drive-It Co. v. Sloan, 193 Tenn. 352, 356, 246 S.W.2d 41, 43 (1952).

57. *Contrary evidence:* Norbert Trading Co. v. Underwood, 194 Tenn. 489,

Other Tennessee cases indicate that certain presumptions do not disappear from the case until rebutted by "satisfactory" or "material" evidence.[58] Still others require "cogent and convincing" evidence to the contrary,[59] and at least one presumption does not disappear until rebutted by a "preponderance" of evidence to the contrary.[60]

The practice of requiring different amounts of evidence to rebut various presumptions raises several important questions. Is the credibility of witnesses offering rebuttal testimony a question for the judge or jury?[61] Does the court or the jury make the decision as to whether the presumption has been dissipated? If the presumption has not been rebutted, may the trier of fact consider the presumption as evidence? The answers to these questions would seem to lie partially in the views of the Tennessee courts with regard to presumptions as evidence, and the judge's charge to the jury with respect to presumptions. The cases themselves afford little in the way of a definitive answer.

Conflicting Presumptions: The question of the procedural effect

253 S.W.2d 723 (1952) (presumption that trading company's president may discount and transfer negotiable instruments); Shelton v. State, 190 Tenn. 518, 230 S.W.2d 986 (1950) (presumption that head of household owns whiskey found on premises); Brown v. Hows, 163 Tenn. 138, 40 S.W.2d 1017 (1931) (presumption that election certificate signifies a valid election); Todd v. Roane-Anderson Co., 35 Tenn. App. 687, 251 S.W.2d 132 (E.S. 1952) (presumption of compliance with the law); McMahan v. Tucker, 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948) (presumption that driver of owner's automobile is driving for owner's benefit); Central of Ga. Ry. v. Fuller Combining Gin Co., 2 Tenn. Civ. App. 343 (1911) (presumption of negligence of last connecting carrier). *Affirmative evidence:* Veal v. State, 196 Tenn. 443, 268 S.W.2d 345 (1954) (presumption that head of household owns whiskey found on premises); Morrison v. State, 195 Tenn. 646, 263 S.W.2d 504 (1953) (same). *Countervailing evidence:* Illinois Cent. R.R. v. H. Rouw & Co., 25 Tenn. App. 475, 159 S.W.2d 839 (W.S. 1940) (presumption of negligence of last connecting carrier). *Positive testimony:* Fann v. Fann, 186 Tenn. 127, 208 S.W.2d 542 (1948) (presumption that testator signed in presence of attesting witnesses). *Credible evidence:* Evans v. State, 188 Tenn. 58, 216 S.W.2d 724 (1949) (presumption that owner of home where whiskey is found is owner of the whiskey); Crocker v. State, 148 Tenn. 106, 251 S.W. 914 (1923) (same).

58. *Satisfactory evidence:* Cox v. City of Bristol, 183 Tenn. 82, 191 S.W.2d 160 (1945) (presumption of validity and regularity of tax assessment). *Material evidence:* Hadley v. Morris, 35 Tenn. App. 534, 249 S.W.2d 295 (W.S. 1951) (presumption that a child 7-14 years old is not capable of negligence).

59. Gamble v. Rucker, 124 Tenn. 415, 137 S.W. 499 (1911); Hall v. Hall, 13 Tenn. App. 683 (W.S. 1931) (presumption of validity of marriage).

60. Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 130 S.W.2d 85 (1939) (presumption against suicide).

61. If the presumption involved is of the type which is not considered to have evidentiary value, it necessarily follows that the question of credibility is initially for the judge. It has thus been held that, even though the defendant goes forward with evidence to rebut a presumption, if there is "substantial evidence" upon which the jury could discredit defendant's witness "by his own statements or other contradictory proof," and there is no other credible evidence on the matter, the presumption remains in the case. McMahan v. Tucker, 31 Tenn. App. 429, 443, 216 S.W.2d 356, 362 (W.S. 1948). See also McParland v. Pruitt, 284 S.W.2d 299 (Tenn. App. M.S. 1955); McConnell v. Jones, 33 Tenn. App. 14, 228 S.W.2d 117 (M.S. 1949); Welch v. Young, 11 Tenn. App. 431 (M.S. 1930). These cases seem to agree with the language in Tidwell v. Ward, note 51 *supra*, that a mandatory presumption may become permissive instead of being entirely destroyed by the introduction of contrary evidence.

of conflicting presumptions has rarely arisen in Tennessee. As would be expected, the Tennessee courts do not follow the Thayerian doctrine[62] that conflicting presumptions cancel each other. This doctrine is consistent with Thayer's emphasis on procedural convenience, which is normally given only secondary importance in Tennessee decisions. The rule adopted in Tennessee, as in other states which attach varying procedural effects to various presumptions, is that the stronger of conflicting presumptions overcomes the weaker. An example of this rule is found in dictum in *Nichols v. Mutual Life Ins. Co.*,[63] where the court said that the presumption against suicide, in a civil case, was stronger than the presumption against murder, and thus prevailed. If the two presumptions are of equal weight they cancel each other and there is no presumption either way.[64] It is difficult to determine, however, just how the court is to decide what weight is to be assigned a given presumption. In *Dunlap v. State*,[65] a prosecution for bigamy, two presumptions were present. The court held that the presumption of the continuance of life in the defendant's first wife, last seen alive and in extremely poor health four and a half years before trial, was to be given equal weight with the presumption in favor of the defendant's innocence. The court there gave no reasons for this holding. It may be supposed that the criteria to be used to determine a presumption's weight are: whether or not it is considered evidence if not rebutted, whether it is permissive or mandatory, and the quantum of evidence required for its rebuttal. Thus, the rule requiring a determination of the weight of conflicting presumptions carries within it all the problems pertaining to the general status of presumptions when standing alone.[66]

THE CHARGE TO THE JURY

Probably the most confusing aspect of the law of presumptions concerns the judge's charge to the jury with respect to the procedural effect of various presumptions. The simplest rule, advocated by a few authorities,[67] is that the trial judge should never mention a pre-

62. See THAYER, *op. cit. supra* note 1, at 343.
63. 178 Tenn. 209, 215, 156 S.W.2d 436, 438 (1941). *Accord,* Milstead v. Kaylor, 186 Tenn. 642, 212 S.W.2d 610 (1948).
64. Dunlap v. State, 126 Tenn. 415, 150 S.W. 86 (1912).
65. *Ibid.*
66. In Lay v. Clymer, 27 Tenn. App. 518, 182 S.W.2d 425 (E.S. 1943), the defendants were public officials and did not testify. The court said that the failure of the defendants to testify did not raise an inference that the facts within their knowledge were adverse to their claim, because of the contrary presumption that they, as public officials, had regularly performed their duties. Query: did the court, because of a failure to distinguish between inferences and presumptions, fail to see the existence of conflicting presumptions?
67. See 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 1085 (1911); L. Hand, J., in Alpine Forwarding Co. v. Pennsylvania R.R., 60 F.2d 734, 736 (2d Cir. 1932).

sumption in his charge. This rule has several advantages in that it is relatively easy of application, it results in procedural uniformity, and it tends to prevent the judge from commenting to the jury on the evidence. Most of the modern authorities, however, refuse to adopt this rule. Morgan's recommendation is that a presumption should shift the burden of proof to its opponent, and that the jury should then be instructed only in terms of this burden.[68] McCormick feels that the jury should be instructed that the presumption stands, and has its assigned procedural effect, until the jury is persuaded to the contrary.[69] Many courts purportedly adopt the rule that the presumption is never to be mentioned. Other courts,[70] faced with the task of reaching a just result in the decision of a complex, living problem, seem to feel that the rule of not mentioning any presumption simply will not accomplish the purpose for which most presumptions were initially created; *i.e.*, to aid the court, in the absence of adequate evidence, in effectuating a probable and socially desirable result.

The Tennessee courts seem to endorse the latter view, although the few cases so holding do little more than merely air the problem. The case of *McMahan v. Tucker*[71] dealt with the statutory presumption that proof of registration of an automobile in a defendant's name is prima facie evidence of ownership and that operation is for the owner's benefit.[72] The court there held that it was reversible error for the trial judge to instruct the jury that this presumption was to be considered by them as evidence and weighed with the proven facts. The presumption against suicide in a civil case, on the other hand, must be mentioned to the jury.[73] The cases involving the latter presumption hold that the jury must consider it along with other evidence until convinced otherwise by a preponderance of the evidence. These two presumptions are the only ones noted concerning which the court deals specifically with the question of instructing the jury. They are a "bare, rebuttable presumption" and a very weighty one, respectively, which together may be said to represent the opposite extremes of procedural effect.

68. Morgan, *Presumptions*, 12 WASH. L. REV. 255, 281 (1937).

69. McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185 (1938). See also Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1939).

70. For a collection of opinions sanctioning instruction on presumptions, see MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 314 n.6 (1954).

71. 31 Tenn. App. 429, 216 S.W.2d 356 (W.S. 1948). This opinion is in accord with the holding in Southern Motors, Inc. v. Morton, 25 Tenn. App. 204, 154 S.W.2d 801 (W.S. 1941) that the type of presumption therein involved related solely to the power of the judge, and was in no event to be considered by the jury.

72. TENN. CODE ANN. §§ 59-1037, -1038 (1956).

73. Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 130 S.W.2d 85 (1939); Provident Life & Acc. Ins. Co. v. Prieto, 169 Tenn. 124, 83 S.W.2d 251 (1935). For a cursory statement of the reasons why this presumption should *not* be mentioned to the jury, see Jefferson Std. Life Ins. Co. v. Clemmer, 79 F.2d 724, 730-31 (4th Cir. 1935); Annot., 103 A.L.R. 185 (1936).

The unarticulated rule in Tennessee may therefore be understood to require a mention of some presumptions and to forbid the mention of others. The view may thus be hazarded that a presumption which is susceptible of rebuttal by credible evidence to the contrary may never be mentioned to the jury. Further, a presumption which is rebutted only by some greater quantum of evidence should be mentioned by the judge in the same breath in which he defines this quantum. Such a view, however, is contrary to the historical concept that a presumption is an aid only to the judge, not the jury. If a presumption has the force of evidence, the judge must obviously inform the jury of its effect if it is to be weighed by them.

This aspect of the law of presumptions has been thoroughly discussed by various learned jurists,[74] with little or no seeming effect upon the overabundance of confusion therein. It is therefore not surprising that this same confusion is no stranger to the law of Tennessee. Fundamentally, the judge must inform the jury of the law on the subject with which they must be concerned for the moment. If the law insists on distinguishing between varying types of presumptions with varying procedural effects, the judges must state this law, confusing as it may be, to the jury. Only if some semblance of uniformity is brought to the rules regarding the procedural effect of presumptions will the judge's task be lightened.

Relationship of Presumptions and Burden of Proof

The generally accepted definition of the burden of proof is that it is the burden of persuading the trier of fact to make a finding; *i.e.*, the risk of non-persuasion. It is thereby distinguished from the burden of going forward with the evidence, which is the burden of producing sufficient evidence to justify a finding of fact; *i.e.*, the risk of non-production of evidence.[75] Also generally accepted is Thayer's statement that the burden of proof is fixed by the pleadings, or their equivalent, preliminary to trial and, once fixed, never shifts.[76] He further states that the burden is always on the actor, which is the party who has the affirmative side of the issue.[77] The actor may be either the plaintiff or the defendant, depending on whether the issue is a part of the plaintiff's case or an affirmative defense, respectively.

Tennessee purportedly adopts both the definition and the rule advocated by Thayer. The modern Tennessee cases which discuss the relationship of a presumption and the burden of proof hold that, since this burden never shifts, presumptions shift only the burden of going

74. See notes 67-69 *supra*.
75. See Model Code of Evidence rule 1 (1942).
76. Thayer, *op. cit. supra* note 1, at 378.
77. *Id.* at 355.

forward with the evidence.[78] This is of course in accord with the many cases cited above[79] which hold that a presumption is dissipated by varying amounts of evidence short of a preponderance thereof.

Were the Tennessee lawyer or judge faced only with this material, his ideas on the relationship of presumptions and burden of proof would be reasonably clear-cut, and his task proportionately simpler. Other cases on the subject, however, muddy the waters. In *Provident Life & Acc. Ins. Co. v. Prieto*,[80] the court sanctioned a charge to the jury which said: (1) "[T]he presumption against suicide . . . does not relieve the plaintiff of the burden of proving . . . that the death of J. A. Prieto was brought about solely through accidental means,"[81] and (2) "[The defense that the insured did commit suicide] is an affirmative defense set up by the defendant, and the burden is upon the defendant to *establish* same by the *preponderance* of the evidence."[82] (Emphasis added.) The court's treatment of this inconsistency is not clear, but it seems to escape the dilemma by saying that the defendant had the burden of proof only in its secondary sense, which, though not stated, must mean the burden of going forward with the evidence. This rationalization simply will not hold water. The defendant was not required merely to go forward; it was required to persuade the jury by a preponderance of the evidence. The persuasiveness of evidence required to dissipate the presumption in this case in fact shifted the burden of proof.

Other cases show that the courts use the phrase "burden of proof" when they mean burden of going forward with the evidence. In a suit to have a deed declared void, if the complainant's evidence shows suspicious circumstances surrounding the deed's execution, "the burden is then cast on the vendee to prove the bona fides of the transaction . . . ."[83] The court evidently felt that the vendor's evidence implied a presumption in his favor. Similarly, in an action for divorce, the presumption in favor of the validity of marriage casts upon the defendant the burden of proving it invalid.[84] This same confusion of the two burdens is especially prevalent in wills cases, and these decisions are thoroughly discussed elsewhere.[85]

78. Whipple v. McKew, 166 Tenn. 31, 60 S.W.2d 1006 (1933); Illinois Cent. R.R. v. H. Rouw & Co., 25 Tenn. App. 475, 159 S.W.2d 839 (W.S. 1940). See also 13 MICHIE'S TENN. DIGEST §§ 43-50 (1938). Some older cases held that a presumption shifted the burden of proof. See, *e.g.*, Caruthers & Wright v. Harbert, 45 Tenn. 362 (1868); Robertson v. Branch, 35 Tenn. 302 (1856).

79. See cases cited notes 57-59 *supra*.

80. 169 Tenn. 124, 83 S.W.2d 251 (1935).

81. *Id.* at 139, 83 S.W.2d 257.

82. *Ibid.*

83. Anderson v. Nichols, 286 S.W.2d 96, 102 (Tenn. App. M.S. 1955). See also Braswell v. Tindall, 294 S.W.2d 685 (Tenn. 1956). For an example of the converse of this situation, involving fraud in the execution of a will, see Haynes v. Mullins, 30 Tenn. App. 615, 209 S.W.2d 278 (E.S. 1947).

84. Hall v. Hall, 13 Tenn. App. 683 (W.S. 1931).

85. Morgan, *Burden of Proof and Presumptions in Will Contests in Tennessee*, 5 VAND. L. REV. 74 (1951).

One further inconsistency exists in the relationship between a presumption and the burden of proof. It will be remembered that both mandatory and permissive presumptions exist in the framework of Tennessee law, and that they have different procedural consequences. As has been noted, however, the courts of Tennessee adhere generally to the rule that all presumptions, permissive or mandatory, do no more than shift the burden of going forward with the evidence. It is correct to say that a mandatory presumption shifts the burden of going forward with the evidence, for if a mandatory presumption is not rebutted, it will result in a directed finding of the presumed fact for its proponent. Thus, a true burden has been shifted, for without the presumption in favor of the proponent, he has the burden of first producing evidence concerning the issue which is the subject of the presumption. Without the presumption he will not get to the jury on that issue. It is quite incorrect, however, to say that a permissive presumption shifts the burden of going forward with the evidence, for the opponent may still get to the jury even if he offers no rebuttal evidence. No true burden, therefore, has been shifted. In this sense, permissive presumptions create a prima facie case in that they merely permit the jury to find for the proponent.

Conclusion

Many divergent views regarding presumptions and their effect are present in Tennessee cases. The result is that glaring inconsistencies co-exist within this body of law, and opposing litigants with contradictory views on presumptions may each find support in Tennessee authorities. This confusion is at best a malignant growth. Though by no means a cure, the operation most likely to relieve the suffering caused by this growth is a strict adherence to the belief that a presumption and an inference should not be equated. This would require diligence, for the two are not easily distinguishable. Beyond that, it is difficult to generalize. The Thayerian doctrine commends itself for its simplicity, but it fails to put sufficient emphasis on the reasons behind the creation of presumptions. As the reasons vary in importance, so should the effects of presumptions. The best medicine on a long term basis is a realization on the part of judges and lawyers alike that the rules concerning presumptions require precise expression. This realization, if applied, would go far toward improving the patient's prognosis.

E. William Henry