Vanderbilt Law Review

Volume 5
Issue 3 *Issue 3 - April 1952*

Article 4

4-1952

Presumptions in a One-Rule World

Alfred L. Gausewitz

PRESUMPTIONS IN A ONE-RULE WORLD

ALFRED L. GAUSEWITZ*

"When a learned Italian began a treatise upon Presumptions three hundred years ago, he opened with these words: 'The matter we are about to take up is very useful and in daily practice; but it is confused, almost inextricably.' These words of Alciatus were put by Best, in 1844, upon the title-page of his early treatise on this subject; and in the minds of most students of the matter, they have always found a lively echo."[1]

"It would be easy to demonstrate that the law as to presumptions is even more in need of simplification than that relating to hearsay. The confusion in the cases is due in part to the use of inaccurate terminology and the consequent misapplication of precedents, in part to faulty analysis and careless presentation by counsel, and in part to the generally accepted assumption that all presumptions are to be given the same procedural effect."[2]

These excerpts are worth quoting and requoting because they indicate that there is a presumption problem, that it is of long standing, that it is difficult, and that it is important.

I.

In the 54 years since Thayer wrote the first excerpt, an enormous amount of excellent scholarship has been devoted to presumptions. Yet confusion persists. It may not be presumptuous, therefore, to suggest some causes of confusion more radical than those mentioned by Professor Morgan in the second excerpt quoted above. This is not to say that he has not stated them. In fact he has painstakingly pointed out the fundamental difficulties in a number of articles written both before and after he became draftsman of the Model Code.[3] As draftsman he has had to carry a burden of expounding it and perhaps has been led to emphasize the sections on presumptions because, although he drafted them, they are not those that he recommended and desired. He sketches the difficulties again in the context from which the sentence is quoted. Many other scholars have contributed to a general cooperative effort to solve the presumption problem.[4] All in all, the subject has been completely

*Dean, University of New Mexico College of Law.

1. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 (1898). The inner quotation is in Latin.

2. Morgan, *Foreword*, in MODEL CODE OF EVIDENCE 1, 52 (A.L.I. 1942).

3. To cite some: Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); *Federal Constitutional Limitations Upon Presumptions Created by State Legislation*, in HARVARD LEGAL ESSAYS 325 (1934); PRESUMPTIONS, 12 WASH. L. REV. 255 (1937); *Techniques in the Use of Presumptions*, 24 IOWA L. REV. 413 (1939); *Further Observations on Presumptions*, 16 So. CALIF. L. REV. 245 (1943); *Choice of Law Governing Proof*, 58 HARV. L. REV. 153 (1944); PRESUMPTIONS: THEIR NATURE, PURPOSE AND REASON (Pub. of Brandeis Lawyers Society 1949).

4. Early general articles commonly cited include: Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. OF PA. L. REV. 307 (1920); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291 (1927).

developed and thoroughly discussed. This article can do no more than to make a shift in emphasis in using what others have said very well. It is hoped that this emphasis will help to orient the problems and to appraise the solution proposed in the Model Code of Evidence. The Code proposes to make true, with one perhaps telltale exception, the now false assumption "that all presumptions are to be given the same procedural effect."

But first, what is, and what is not, a presumption? A presumption is a procedural device that splits off and shifts one burden of proof, or shifts both burdens of proof on a particular issue in a trial. The two burdens are the burden of producing evidence and the burden of persuasion. Usually they are both upon the same party at the inception of the trial and that party has both upon all of the issues made by denial of his necessary averments. But there may be a rule of law that upon the establishment at the trial of a fact or group of facts, called the "basic facts," another fact, called the "presumed fact," must or may[5] be assumed to exist unless and until whatever condition is specified by the rule of law has been fulfilled. That rule of law will also define the "basic fact" and the "presumed fact," but the essence of the rule is the condition that it specifies.[6] The rule may provide that only the burden of producing evidence on the particular issue is split off from the burden of persuasion and shifted to the opponent. Or it may specify that both burdens are shifted to the opponent on the particular issue. Which of these it does and, in the latter case, the extent to which it does it, will depend upon what the rule specifies that the opponent must do, what condition he must fulfill, to oust the assumption of the "presumed fact" or put the burden or burdens back where they were. Here the content of the rule may vary greatly, that is to say, there may be a number of different rules.

Morgan reduces the various rules that he has found applied in the cases to "at least" eight.[7] This is complicating and therefore confusing, especially to a person who assumes that there is only one possible rule. That is precisely the assumption of a legislature that provides that the establishment of one fact shall be "presumptive" or "prima facie" evidence, or shall create a presumption, of another fact without specifying which of the eight, nine or ten possible effects it has in mind. There can be one universal rule giving uniform effect to all presumptions. Or, if a sufficient number of different effects can be invented, each presumption can be given a particular effect under its peculiar rule. Or there can be one rule for most presumptions with a different rule for

5. See *infra*, note 8.

6. 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940). Presumptions get their name from the presumed fact—*e.g.*, the "presumption of death": What are the basic facts and does the presumed fact include a date of death?

7. Morgan, *supra*, note 2, at 55. He there describes only the most important four. See also the articles cited *supra*, note 3.

one as an exception, or with special rules or a special rule for some as exceptions. Or presumptions can be classified with a different rule for each group. But there cannot be one universal rule for all presumptions and several different rules at the same time.

What is it that a presumption is not? It is, of course, not anything that is not a presumption. But the chief thing that it is not is an inference. A "conclusive presumption" is not a presumption. A "permissive presumption"—*i.e.*, a rule permitting but not requiring the finding of the presumed fact although the basic fact would not support the finding as a matter of logic and experience—may well be.[8] But an inference is not a presumption because an inference is not a matter or rule of law but a matter or rule of logic and experience. If there is but one rule of logic and experience for all inferences, then inferences exist in a one-rule world. But it is not a legal world. Professor Jerome Michael in a mimeographed lecture has defined an inference as follows:

> "Proof or inference can be defined as a process in which one proposition must be asserted as true or probable as the result of the assertion of other propositions as true or probable.
>
> A. Proof or inference is thus an operation performed by the mind consisting of acts of assertion.
>
> 1. The assertion of a proposition is an act of judgment expressing knowledge. The content of the judgment is the proposition asserted.
>
> B. A proof or inference ends with the establishment of the proposition to be proved which is called the conclusion of the proof.
>
> C. Every proof or inference represents a gain in knowledge. We proceed inferentially by the exercise of our reason from knowledge which we possess (premises) to knowledge which we did not theretofore have (the conclusion). Unless we can achieve an item of knowledge directly by the exercise of our senses or intellect, we can only attain it indirectly by the exercise of our reason."[9]

Of course in a legal trial there will probably be counter-inferences and the ultimate proposition can be asserted as true or probable only on the basis of all the evidence.

Everyone knows what an inference is and utilizes inferences in his daily affairs. "Where is Bill?" "I think he is in the library; that is where he planned to go." The same thing might come up in a trial, though in the past tense. It is the same as, "*A* planned to kill *B;* therefore, *A* probably did kill *B.*" It is useful to make explicit the generalization, the major premise, which is established by judicial notice or expert testimony: "Men's fixed designs are probably carried out; *A* had a fixed design to kill *B;* therefore, *A* probably carried out his original design and did kill *B.*"[10] If the generalization in the major

8. Morgan, *supra*, note 2, at 53.

9. See also MICHAEL AND ADLER, THE NATURE OF JUDICIAL PROOF 14-16 (propositions 11 to 12.5) (1931).

10. 1 Wigmore, Evidence § 30 (3d ed. 1940).

premise were "always" instead of "probably," the word "probably" could be omitted from the conclusion and it could be stated as truth instead of as a probability. In either case an inference would not be a presumption, though its actual effect might be the same in a particular case. As an inference its effect might also be more or it might be less than it would be under some particular rule of presumption. One would have to select a particular rule of presumption to compare it with, and different inferences carry different degrees of probability. A word about the latter point later. But one can see how easy it is for inaccurate terminology to develop and why there might be faulty analysis of a particular case. The basic fact of many, if not most, presumptions will support an inference. But "A rule of presumption does not merely say that such and such a thing is a permissible and usual inference from other facts, . . . it goes on to say that this significance shall always, in the absence of other circumstances, be imputed to them. . . ."[11] The compulsive effect of an inference, if it has any, is based entirely upon logic and experience, not upon law. The basic fact of a presumption, on the other hand, may be one that would not support a finding of the presumed fact as a matter of logic and experience, that is, as an inference.

Perhaps there are other difficulties of terminology. One may be the use of a common word, "presumption," for all presumptions. Judge Stephen thought that the use of *mens rea* for many different states of mind was misleading.[12] And Shartel has pointed out how the word "possession" has affected us.[13] One word, therefore one rule. But usually we can use such a word as "fruit" without thinking that all fruits are alike or that there is but one fruit.

Morgan says that the "generally accepted assumption that all presumptions are to be given the same procedural effect" is to be charged to Thayer and Wigmore.[14] Just as the law of Evidence, and some other law as well, is often more difficult to believe than to understand, so also is the story of how or why Thayer laid down the one-rule-for-all-presumptions doctrine. It was done by terminology, by strictly reserving the term "presumption" for those presumptions which prescribe the rule that the presumption is rebutted when the opponent has produced evidence sufficient to take the issue to the jury. The amount or weight of evidence necessary to do this was not stated by Thayer or Wigmore with specific reference to this rule, but it seems clear that they meant evidence sufficient to justify a finding. Courts later said "some" evidence, which may have led other courts to say "substantial"

11. Thayer, *op. cit. supra,* note 1, at 317.

12. Queen v. Tolson, 23 Q.B.D. 168, 185-88 (1889).

13. Shartel, *Meanings of Possession,* 16 MINN. L. REV. 611 (1932).

14. Morgan, *Presumptions,* 12 WASH. L. REV. 255 (1937). The hornbook frequently consulted by some students, MCKELVEY, EVIDENCE, 144 *et seq.* (1944) follows the Thayer view, calling certain presumptions "spurious."

evidence and apparently to use the term as requiring something more than sufficient evidence to justify a finding. Terminology is important. It may not solve problems, but it surely can create them.

Then what terminology or name did Thayer have for the rules of presumption, of which there were plenty, that required more than sufficient evidence to justify a finding? He suggested none. He did not deny their existence. He simply said that they are not rules of presumption, they are not presumptions. But they are. They are presumptions in function and in every other way. They do not cease to be such if called something else or left unnamed. After asserting that the sole function of a presumption is to fix the burden of going forward, Thayer said:

> "This appears to be the whole effect of a presumption, and so of a rule of presumption. There are, indeed, various rules of presumption which *appear* to do more than this,—to fix the amount of proof to be adduced, as well as the duty of adducing it. But in these cases also, the presumption, merely *as such,* goes no further than to call for proof of that which it negatives, *i.e.,* for something which renders it probable. It does not specify how much; whether proof beyond a reasonable doubt or by a preponderance of all the evidence, or by any other measure of proof. . . . When, therefore, we read that the contrary of any particular presumption must be proved beyond a reasonable doubt, as is sometimes said, *e.g.,* of the 'presumption of innocence' and the presumption of legitimacy, it is to be recognized that we have something superadded to the rule of presumption, namely, another rule as to the amount of evidence which is needed to overcome the presumption. . . . It is the substantive criminal law and the substantive law as to persons respectively that fix the rule about the strength of conviction. . . ."[15]

The suggested differentiation between appearance and reality, between a device which does its work "as such" and also in some other capacity or under some other name, is so beguiling by its mystery that it is no wonder legislatures think that they have finished their work when they have stated the basic and presumed fact of a presumption, leaving the specification of the condition on which the presumed fact shall no longer be assumed to some other but unspecified subject of the law. And it is so beguilding that further analysis is necessary to make clear that the rule of law "as to the amount of evidence" is not "another rule" but is the essence of the presumption itself, is in fact the presumption or that part of it that produces the difficulty. The difficulties of definition and administration arising in the effort to carry out the important policies served by presumptions cannot be eliminated by the assertion that an appearance is a false appearance, by the assertion that the essential rule will be found in the law under another name when in truth that is often not the case, nor by limiting the word "presumption" so as not to include those which by function and by common usage of the word, including the usage by Thayer, are presumptions.

15. Thayer, *op. cit. supra,* note 1, at 336 (italics added).

What are the policies served by presumptions, that is, the reasons for judicial or legislative creation of presumptions? Briefly extracted from Morgan they are: (1) To expedite the trial by making unnecessary the introduction of evidence upon issues raised by the pleadings but not likely to be litigated. It would be a waste of time to prove sanity until the accused has made it a serious issue by the introduction of evidence of insanity. How much evidence? The policy is served by sufficient evidence to justify a finding, to raise a reasonable doubt in a criminal case. (2) To avoid a procedural impasse where evidence is lacking but it is considered unwise to let the question be determined by the original burdens of proof. If there is a presumption of death but none of the precise time of death where that is determinative some courts have created a presumption that death occurred at the expiration of the seven year period. (3) Similarly, to avoid the impasse because of the impossibility of securing legally competent evidence, as when there is an issue of survivorship in a common disaster and the problem cannot be solved by the construction of writings (will or insurance policy). The Uniform Simultaneous Death Act recognizes the problem. In (2) and (3) by hypothesis there cannot be produced evidence sufficient to justify a finding. But whatever evidence there is will at least in part be testimonal and it should be credible or be actually believed. If there is a stronger social policy back of the presumption, as in the case of the presumption of a lost grant, more may be required. (4) To promote a determination in accord with the preponderance of probability where the basic fact of the presumption justifies a strong inference, where the presumption has a "logical core." Here the party asserting the unusual should be required to produce evidence at least sufficient to justify a finding if not to carry the burden of persuasion. (5) Where one party has peculiar means of access to the evidence or peculiar knowledge. If freight is delivered in bad order by the last of several connecting carriers, ought it or the shipper be required to prove which carrier did the damage? And ought not "prove" mean both budens? (6) Where the basic fact makes socially desirable the legal results which will follow if the presumed fact also exists. In the case of a presumption of ownership from user the policy will be inadequately served by a rule requiring less than a full burden of persuasion. (7) Where there is a combination of two or more of the above reasons or policies, as in the case of the presumption of the legitimacy of a child born to a married woman during wedlck, much more than the mere shifting of the two burdens is required.[16]

"Mr. Thayer's attempt to clarify [the subject] was almost completely futile; and, in my opinion, has served only to furnish a formula which many courts have verbally

16. This is taken from the articles by Morgan, cited *supra* note 3, especially *Some Observations Concerning Presumptions,* 44 HARV. L. REV. 906 (1931). The policies served by presumptions are again stated in some of the later articles cited, most recently in MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 76-79 (3d ed. 1951). But Morgan is not responsible for everything in the paragraph to which this note is appended.

> adopted, few have understood, and fewer still have actually applied. . . . When we canvass the various situations . . . to which the courts have commonly applied the term, 'presumption,' in a technical sense, we realize that no system which gives to the term the same legal significance in all of them can be rational. . . . How, then, could such brilliant scholars and sound thinkers as Thayer and Wigmore advocate such a result? They must have known that in some situations the courts had said a presumption was so strong that it could be overcome only by clear and convincing evidence, in others of such strength that it could be destroyed by a preponderance of evidence, and in still others so weak as to give way before the mere introduction of evidence of a prescribed quantity and quality. Of course they knew it, but they evaded the difficulty by inventing, without expressly so stating, a new vocabulary. . . . The question fundamentally is not one of terminology but one the decision of which is to be made upon considerations of fairness, convenience, and sound social policy."[17]

Since a presumption shifts and sometimes modifies the burdens of proof, it would seem obvious that the reasons for fixing the burdens in the first place would have to be considered in deciding whether and to what extent to change them. It would further seem that the decision to change the burdens would have to be based upon considerations similar to those which fixed them initially. As for the initial incidence of the burden of persuasion, Wigmore says: "this apportionment depends ultimately on broad considerations of policy, and, for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases." He adds, concerning the burden of producing evidence: "There is therefore no one test, of any real significance, for determining the incidence of this duty. . . ."[18] Neither can there be one test or one rule for all presumptions that modify this duty on particular issues. At least there cannot be if the one rule provides a procedural effect so slight that it barely gives effect to the weakest of the policies and is not adequate for the more important policies upon which presumptions are based, which is what a rule that merely shifts the burden of producing evidence and is satisfied by evidence sufficient to justify a finding would do. On the other hand, the rule must not impose so heavy a burden that its unfairness and inconvenience would more than offset the values in the policy or policies presumptions are created to serve.

The theoretically sound view, therefore, is that "the procedural effect of each presumption should depend upon the reasons which induced the courts to create or enforce it, [but it] has met with little favor, principally because of the practical difficulties of applying it at the trial."[19] Such a view would not call for a different rule for each presumption, but for each class of presumptions. It would call for, say, five or six rules. Nevertheless, it would be difficult to administer if not to understand and keep somewhat uniform. Morgan

17. Morgan, *supra* note 14, at 277-81.

18. 9 WIGMORE, EVIDENCE § 2488 (3d ed. 1940).

19. Morgan, *supra* note 2 at 52. This suggestion was first made by Bohlen, *supra* note 4. It was applied in O'Dea v. Amodeo, 118 Conn. 58, 170 Atl. 486 (1934).

and the Advisers and Council of the American Law Institute approved the Pennsylvania rule, a rule that all presumptions shift the burden of persuasion as well as the burden of going forward, but it was rejected at the Annual Meeting because it was judicially recognized in only a few jurisdictions and because there would be doubt of its constitutionality.[20] The Thayer view was adopted.

II.

It is believed that the problems that arise in the use of the presumption device are not "problems" because of difficulty in understanding and describing the rules, principles or facts involved in a particular case. They are problems because there is a conflict between two fundamental principles or policies which may cause a court to follow one principle or policy on one case and a different one in another case without making it clear that this is what it is doing and sometimes notwithstanding that the court had said or given the impression that the one policy would control in all cases.

The one policy is to do actual, concrete, substantial justice in each individual case; the other policy is to do formal, procedural justice by having a uniform rule that is easily administered regardless of its effect in the particular case. The conflict is to some extent between rule and discretion. But that is not a completely adequate description of it because those who would do justice in the particular case would also operate under general rules formulated with reasonable definiteness, usually supportable by respectable authority, and almost always supported by more or less powerful policy reasons articulated with as high a degree of definiteness and clarity as is called for by legal standards.

The first of these conflicting policies can be called the "particular justice policy" because it aims at actual justice in the particular, individual, case. The other can be called the "procedural justice policy" because it aims at an easily understood and administered uniform rule that will probably result in justice in the average case or in most cases regardless of its effect in the individual case and also avoid injustices due to difficulties of administration. Almost everyone seems to agree, and always to have agreed, that the procedural justice policy should be followed in dealing with presumptions; that there should be one rule for all, or all but one or two or a very few presumptions. The controversy in the American Law Institute was not over that question. The question was, which one rule: the rule that only the burden of producing evidence is shifted (the Thayer-Wigmore or "orthodox" rule), or the rule that the burden of persuasion is also shifted? Put in other words,

20. Morgan, *supra*, note 2, at 59-60.

the question was whether the opponent of the presumption should merely be required to produce evidence that would justify a finding or evidence that would persuade the trier that the nonexistence of the presumed fact is more probable than its existence. The Thayerian rule was adopted and promulgated with the Code, with one exception. But no legislature has enacted it into law. The United States Supreme Court had adopted it.[21] But so had most courts more or less clearly. The question is, will they stick to it? Most courts have purported to follow it but have departed from it under the pressure of powerful policy reasons that pushed them over to the other rule, sometimes over to a particular justice policy, in particular cases. They made more than the one exception which the Code makes for the presumption of legitimacy. But the courts did not recognize or did not make clear that they were making an exception, nor articulate a rule for the exception or exceptions, as the Code does. Thus the courts leave or permit the impression that there is a different rule for each presumption, that presumptions are in the realm of free law, or that the rule applied in the individual case is a rule for all presumptions when such is not the case. The fact that the Code had to make the one exception may presage that under the compulsion of similar policy reasons courts may find ways of making other exceptions in a state that adopts the Code, and in the same old way, thus destroying the beautiful simplicity created.

These departures have led to confusion because it cannot be said that the courts were "wrong" in making them unless the individual court had laid down the other rule and definitely adopted a procedural justice policy. Even then it would be wrong only on the ground of logical inconsistency with precedents not overtly overruled, and not intended to be overruled. Each presumption can have its own law and own rules. When it is realized that a lawyer in studying a presumption case must not only have one rule and policy as a standard but must also thoroughly understand the issue, evidence and procedural steps taken, as well as be on the alert to discern whether the court has relied upon the basic fact as a presumption rather than an inference, it is no wonder that lawyers have been guilty of "faulty analysis and careless presentation."

In the belief that the presumption problem can be made clearer by a description of some departures from an assumed one-rule, the following departures are listed. Few cases will be cited because a useful citation would require an encumbering review of their issues and evidence. Besides there are so many of them. The assumed rule is that expressed in Rules 701 to 704 of

21. New York Life Ins. Co. v. Gamer, 303 U.S. 161, 58 Sup. Ct. 500, 82 L. Ed. 726 (1938).

the Model Code of Evidence, where the formula for applying it is stated in Rule 704 as follows:

> "(1) . . . when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.
>
> "(2) . . . when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action."

1. Since a presumption is by definition mandatory, a verdict must be directed that the presumed fact exists if the presumption is not rebutted. One instance of a departure may be the case of *res ipsa loquitur*. The problem here takes the form of a dispute as to whether this is a true presumption instead of a mere inference. If the basic facts are sufficient to support a finding, it can be said to be a mere inference. But if the basic facts will not rationally support a finding, it must be a presumption of some type. If it is held that it will merely take the case to the jury, it must be a presumption of a permissive type and not mandatory as the definition requires.

Another departure from the rule that a presumption is mandatory is found in cases where the courts have found that the presumption is not rebutted and yet have sent the case back for a new trial even though the proponent of the presumption had moved for a directed verdict and assigned as error the denial of the motion.

2. If the basic fact of the presumption is one from which the presumed fact cannot rationally be found (the basic fact will not support an inference) and the party in whose favor the presumption operates has no additional evidence, there is nothing left to support his case when the presumption has been rebutted and a verdict should be directed or a nonsuit entered against him. This situation presents a severe test of the rule for it will keep a case from the jury although the presumption may be rebutted by very questionable evidence. Courts can evade the rule by saying that the presumption has not been rebutted. This will be discussed later. But sometimes they seem to concede that the presumption has been rebutted, yet hold that the presumption will take the case to the jury, thus in effect transforming it into a "permissive" presumption. One device for doing this is to say that the presumption is evidence or "in the nature of" evidence.[22] But "presumption" means a rule of law about the effect of evidence that merely fixes the burden of producing

22. McBaine, *Presumptions, Are They Evidence?* 26 CALIF. L. REV. 519 (1938); see also, 31 CALIF. L. REV. 316 (1943).

evidence. This rule of law cannot be evidence for the reason that it is psychologically impossible to weigh a rule of law against evidence. But, to repeat, the basic fact may be evidence and this criticism applies only to cases in which the courts have found both (1) that the basic fact will not support an inference, and (2) that the presumption has been rebutted.

3. A presumption need not and never should be mentioned to the jury, because it is for the court to decide whether the presumption has been rebutted. When the case reaches the stage of submission to the jury, the presumption either will or will not have been rebutted. If it has been rebutted, it has gone out of existence and should not be mentioned to the jury. If it has not been rebutted, the court should direct a verdict in favor of the party for whom the presumption operated. If it is for the jury to decide whether the basic fact exists (*i.e.*, if the basic fact is not admitted or judicially noticed and there is conflicting evidence on it), the basic fact will have to be submitted to the jury and it may be that the judge will mention the word "presumption" in submitting that issue. He might not mention it because the word "carries unpredictable connotations to different minds,"[23] and the judge can apply a rule of law without mentioning its name to the jury. His instruction will be that, if the basic fact does exist, the jury *must* find the presumed fact. If there is evidence in the record sufficient to support a finding of the nonexistence of the presumed fact, the presumption will have been rebutted even though the basic fact be found to exist—rebutted in advance—and the presumption is out of the case.[24] If the basic fact will support an inference, it will remain like any other circumstantial evidence. Whether the judge should mention this *inference* by an instruction that the jury *may* infer, is a different question from that of mentioning the presumption. The judge's mention of an inference may amount to commenting on the evidence, though the evils inherent in the various meanings of "presumption" do not exist. It has been said that an inference is a matter of argument and that it is for counsel, not the judge, to make arguments.[25]

4. A difficulty, if not a departure or deviation, may creep in because of a failure to determine what the basic facts of a particular presumption are. For example, in a series of Wisconsin cases[26] there was involved the question

23. MODEL CODE OF EVIDENCE 314 (1942) (Comment *b* on Rule 704, ¶ 2).

24. *Ibid.*

25. Alexander, *Presumptions: Their Use and Abuse*, 17 MISS. L.J. 1, 6 (1945); McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?* 13 WASH. L. REV. 185 (1938).

26. The first two cases, Ewing v. Metropolitan L. Ins. Co., 191 Wis. 299, 210 N.W. 819 (1926), and Hansen v. Central-Verein, 198 Wis. 140, 223 N.W. 55, 57, 64 A.L.R. 1284 (1929) are discussed in MORGAN AND MAGUIRE, CASES IN EVIDENCE 75 (3d ed. 1951). These two cases were reviewed in Egger v. Northwestern Mutual Life Ins. Co., 203 Wis. 329, 234 N.W. 328 (1931), in which there was an explanation of the absence. The court seem to think that absence of explanation should be one of the basic facts

whether the presumption of death from seven years' absence is based upon all three or only the first two of the following: (1) absence for seven years, (2) without tidings, and (3) without explanation, such as that the absentee was in hiding because he had embezzled or had had domestic difficulties. Some courts declare a fourth item, diligent search, essential, whether or not they require the other three. If explanation, (*i.e.*, evidence that the absentee had not embezzled or had domestic trouble) is considerd to be evidence of life, there is no difficulty under the Code Rule; the case is for the jury whether the evidence in explanation be considered as rebutting or as unfounding the presumption. But under the Pennsylvania rule that a presumption shifts the burden of persuasion, the burden would be upon the proponent if it be considered foundation fact, otherwise upon the opponent. The difference in the Wisconsin cases was due to an unexpressed deviation from one rule to the other.

5. Since a presumption is not evidence and becomes nonexistent when rebutted, it should never be mentioned or utilized by an appellate court in sustaining or setting aside a finding on the ground of sufficiency or insufficiency of the evidence; although, of course, the court might use the basic fact of the presumption as evidence and the presumption would have to be considered if the court were passing upon the question whether the trial court ruled correctly upon whether the presumption had been rebutted. Yet appellate courts have relied upon presumptions in cases in which they have explicitly or implicitly recognized the presumption to have been rebutted. Usually this will be merely a misnomer for the inference from the basic fact; but if the court treats the basic fact differently from the treatment that would be given it as circumstantial evidence, such treatment is a deviation.[27]

6. Because both parties cannot have the burden of producing evidence upon the same issue at the same time, there can be no problem of conflicting presumptions. The basic facts of each of the conflicting presumptions operate merely as rebutting evidence of the other presumption, and upon rebuttal each presumption ceases to exist. If the basic fact of one presumption is not sufficient to support an inference and that of the other is sufficient, the party in whose favor the latter operates should prevail if there is no other evidence in the record; but this is because he has the evidence and not because of a pre-

---

of the presumption (203 Wis. at 332-33, 234 N.W. at 329). But the court concludes that it is not necessary to decide the question because "the presumption is one that varies in weight according to the circumstances" (203 Wis. at 335,234 N.W. at 330) and it makes no difference "for practical purposes" whether it is basic fact, for, "No matter what the philosophic reasoning may be, the result is the same, in that a jury question is presented." (203 Wis. at 336, 234 N.W. at 330).

27. *Cf.* Cook v. Cook, 342 U.S. 126, 72 Sup. Ct. 157 (1951); Griego v. Connell, 54 N.M. 287, 222 P.2d 606, 608 (1950); Holzschuh v. Webster, 246 Wis. 423, 17 N.W.2d 553 (1945).

sumption.[28] But courts have departed from this rule and treated one presumption as prevailing because stronger.

7. Since the only effect of a presumption is to shift the burden of producing evidence, it can never affect or shift the burden of persuasion. It is this rule or principle which is most frequently departed from or violated.

The statement that a presumption cannot affect the degree of persuasion—*i.e.*, cannot shift, or add to the load carried by one having the burden of persuasion—is true only if the Thayerian rather than the Pennsylvania procedural justice rule is adopted. It will be observed that Rule 703 adopts the particular justice policy for the presumption of legitimacy and not only shifts the burden of producing evidence and the burden of persuasion but weights the latter burden to the degree of requiring the person to whom the burden is shifted to persuade the trier of the fact of the nonexistence of the presumed fact to what is almost, if not actually, the highest degree of conviction known to the law, namely, beyond a reasonable doubt.

The Code does not mention the presumption of innocence, whether in a civil or criminal case, although it, too, is based upon powerful policy reasons. This may be because that presumption in a criminal case operates against the party who already has both the burden of producing evidence and the burden of persuasion to the highest degree. The two burdens are, therefore, not split and put upon different parties by the so-called presumption and, if that which does not split them is not a presumption, the presumption of innocence is not a presumption.

Or, if the foundations of such presumptions are not especially compelling, they may nevertheless prevail if they are much stronger than the reasons which determined the allocation of the two burdens in the first instance. When, in a case of a particular type, reasons lying back of a presumption are strongly compelling or greatly outweigh the reasons for placing the burdens in the first instance upon the party in whose favor the presumption operates, the courts (and the legislatures too, although not always clearly and explicitly) have departed from the Code rule, although they have not always done so with the frankness and candor that one has a right to expect of them.

One method of doing this is to say that a presumption is evidence, or is "in the nature of evidence." It has been pointed out above under point No. 2 that a presumption is a rule of law and cannot be weighed as evidence. It can be given the effect of evidence, if at all, only by having it shift the burden of, or affect the degree of, persuasion by adding to the load of the burden of producing evidence a requirement that the rebutting evidence be clear and

28. See note 23 *supra*.

satisfactory evidence, or by the use of some similar phrase or formula. This can be done, as shown by the treatment of the presumption of legitimacy. But it can only be done as an exception. It has been pointed out that the Model Code of Evidence makes this exception by Rule 703. But courts have done this in cases of other presumptions. It is understandable that courts should create exceptions in addition to that for the presumption of legitimacy. In fact, it is in a sense irrational and wrong not to do so. But it is confusing when it is done by a court which explicitly or implicitly denies that there are such exceptions.

Sometimes courts recall that the credibility of witnesses is for the jury and therefore revolt against the rule that it is for the judge to decide whether a presumption has been rebutted in a case of very questionable testimonial evidence by saying that credibility is for the jury. The fallacy in this is the same as that underlying many of the erroneous solutions of the problem of the respective functions of the judge and jury: it assumes that the judge and the jury are passing upon the same question. In truth they are not. The judge is merely performing his function of deciding whether the evidence is such that a jury may make a certain finding. The jury decides whether to make the finding. The judge may permit a finding by the jury that he would not make if he were the trier.

Somewhat different from the thought that credibility is for the jury is the feeling that a presumption ought not to be wiped out by evidence that would merely support a finding by the jury. Upon an issue whether an automobile was being driven by a servant of the defendant acting within the scope of his employment, the plaintiff would commence subject to the usual notion that he must allege and prove his case. But the automobile owner will usually be in a better position than the plaintiff to obtain and supply to the tribunal evidence upon this question and most often servants are driving within the scope of their employment. Moreover, it may be thought that it is good policy to make owners liable for damages caused by their automobiles, at least in all doubtful cases. The plaintiff, therefore, may be aided by a presumption of agency. An easily understood and administered rule as to the effect of this presumption is that it is rebutted and out of the case when the defendant has put in sufficient evidence to justify a finding of nonagency. Therefore, if the defendant takes the stand and testifies to the effect that his servant was not acting within the scope of his employment, the presumption would be rebutted under such a rule. But neither the court nor the jury may believe the defendant's testimony, or they may be in doubt as to whether to believe it, or even if they do believe it they may not infer nonagency from it or may be more or less in doubt as to whether so to infer. The easily understood and administered rule, therefore, permits strong policies of substantive and pro-

cedural law as well as the policy of giving effect to what is probably the truth of the matter to be frustrated by the defendant's merely taking the stand and saying something. It is no wonder that courts are tempted to require something more, even though this requirement may necessitate complicated instructions to the jury and the enunciation of a rule not uniformly applicable to all presumptions.[29] If it be said that the evidence to the contrary must be clear and satisfactory, one might suppose that the judge must find it clear and satisfactory. But to be consistent with the treatment of other presumption problems, it should mean that the judge must find that the jury could find it clear and satisfactory, and it is doubtful whether the judge, in making such a ruling, can differentiate between evidence which the jury could find to be a preponderance, a clear and satisfactory preponderance, or even evidence which the jury could find convincing beyond a reasonable doubt, and the ordinary preponderance.[30] However that may be, courts have sometimes variously required that the contradicting evidence be evidence which the jury do not disbelieve or discredit, testimony of disinterested witnesses, evidence which balances or neutralizes or equals the presumption, evidence which puts the jury in equilibrium, etc. Any rule which provides that the presumption remains in effect (either as mandatory or permissive as discussed in point 1 above) necessarily continues the artificial effect given to the basic fact and affects the burden of persuasion.

This results in, and is demonstrated by, the necessity that the presumption then be mentioned to the jury. And if the judge is following the assumed definition of presumption, he will have to instruct the jury that they must find in favor of the person for whom the presumption operated unless the contradicting evidence is disbelieved, or does not equal or balance, etc. And even if he is using a definition that would include a permission to find, he must tell the jury that they *may* find unless, etc. The vice of this is that once a presumption must be mentioned to the jury there immediately arise the complexities and administrative difficulties that the procedural justice policy has been adopted to obviate.[31]

29. See De Witt, *Presumptions—Automobile Driver as Agent of Owner*, 1941 WIS. L. REV. 521.

30. United States v. Andolschek, 142 F.2d 503, 504 (2d Cir. 1944) ("The standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases"). See also Hills Dry Goods Co. v. Industrial Commission, 217 Wis. 76, 83, 258 N.W. 336, 339 (1935), where the court said, "While the language relating to the quantum of evidence varies somewhat, the terms used, such as 'credible evidence,' 'some evidence,' and 'evidence' are practically, as used, synonymous. . . . The real question is, in a particular case, is there or is there not evidence of the fact found?" This was applied in Squires v. Industrial Commission, 248 Wis. 189, 21 N.W.2d 264 (1946).

31. For the nature of instructions that would be required if presumptions are mentioned to the jury, see Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933); Morgan, *Techniques in the Use of Presumptions*, 24 IOWA L. REV. 413 (1939); *cf.* McCormick *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291 (1927); McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?* 13 WASH. L. REV. 185 (1938).

8. Since a presumption is merely a rule that places the burden of producing evidence, it cannot operate against the person who already has that burden. This is so because the party who has the burden of producing evidence in the first instance will necessarily have produced sufficient evidence to justify a finding before his opponent need produce anything or have any need for a presumption in his favor, and if the opponent does establish the basic fact of a presumption in his favor, that presumption will have been rebutted in advance by the evidence that made out a *prima facie* case for the person having the burden of going forward in first instance.

The same thing is true even if the court is operating under a rule that a presumption shifts or affects the burden of persuasion. If both the burden of coming forward with evidence and the burden of persuasion are already on the opponent of the presumption, a presumption can be of no value to the proponent if not mentioned to the jury. An example of this is the usual negligence suit where the burdens of evidence and of persuasion on the issue of contributory negligence are both upon the defendant. If the plaintiff is entitled to the benefit of a presumption of due care from the instinct of self-preservation, this presumption cannot shift the burdens to the defendant, because the defendant already has them. Therefore, the presumption is of no value or use to the plaintiff unless it is mentioned to the jury or in some way held to persist after it has been rebutted.[32]

9. Whether or not a rebuttable presumption is a legal fiction,[33] it has long been recognized that it can be used, tactily or otherwise, to modify the substantive law. Indeed, the substantive law may be stated in terms of presump-

---

32. Biersach v. Walf River P & F Co., 247 Wis. 536, 20 N.W.2d 658 (1945) (presumption that deceased used due care for his own safety). The majority of the court held that there was rebutting evidence and applied the orthodox rule in the following language: "Appellant is entitled to the presumption claimed, but that presumption is not conclusive. It is rebuttable and ceases to have force when credible evidence is adduced which permits a contrary inference." (20 N.W.2d at 660). Three judges dissented in an opinion by Fowler, J., on the ground that there was no evidence that the deceased was negligent. But one has a feeling that the dissenting judges were revolting against the application of the orthodox rule to a presumption that operated against one who already had the burdens. The dissenting opinion states (*Id.* at 662): "This presumption is 'in itself a very substantial presumption, and while it does not constitute affirmative evidence that due care was exercised, it does require proof to the contrary in order to remove its persuasive force.' Seligman v. Orth, 205 Wis. 199, 203, 236 N.W. 115, 116 [1931]. I think the evidence in the instant case does not 'remove' that 'persuasive force.' . . . Where the circumstances do not show or warrant inferences to a reasonable certainty what the deceased did the presumption compels the conclusion that he exercised due care." Note the mixture of intimations that the "presumption" is to be treated as evidence or shifts or affects the burden of persuasion. Actually the defendant already had the burdens of evidence and persuasion without the use of any presumption. And see Worth v. Worth, 48 Wyo. 441, 49 P.2d 649 (1935); *cf.* Judge Lummus in Brown v. Henderson, 285 Mass. 196-97, 189 N.E. 41 (1934): "The statutory presumption of due care is like a handkerchief thrown over something covered by a blanket also."

33. Fuller, *Legal Fictions,* 25 ILL. L. REV. 363, 394 (1930).

tion.[34] If the rule of the Model Code is adopted, it will simplify such use, but it will also seriously restrict it. This is merely another way of saying that theoretically the effect of a presumption should depend upon the policy or policies that it serves, and if that policy or those policies be strong, they may prompt departures even from a statutory one-rule.

10. The failure of a court or legislature to state the essential rule of law expressing the condition upon which it ceases to be true when it is said that evidence of one fact or group of facts shall establish a "presumption" of, or shall be "presumptive evidence" of, or shall be "prima facie evidence" of, another fact is not a direct departure from a one-rule or one-policy legal system, but it surely leads to departures or deviations when the one-rule has not elsewhere been clearly and adequately stated. Unless and until it is settled and understood that "presumption," "presumptive evidence," and "prima facie evidence" all mean the same thing and what that meaning is, a legislature or court must provide a meaning for each use of the term.

11. Inferences are by nature so indeterminate that courts may utilize them to depart from the one-rule adopted by the Code. When a presumption has been rebutted, the basic fact remains to support an inference if capable of it. It is a simple matter for a court to hold that an inference is strong enough to do what a permissible presumption would do, take the case to the jury. Contrariwise, a court may hold or courts may differ as to whether it is possible to hold that the basic fact of a presumption cannot support an inference after rebutting evidence has been put in.[35] The indeterminate nature of inferences permits improper manipulation of or covert departures from a one-rule policy.

---

34. In New Mexico the determination of whether property is separate or community is controlled by a statutory presumption that all property acquired after marriage, other than that obtained by gift or inheritance, is community property. To this presumption there are three statutory exceptions, also phrased in terms of presumption. In applying the statute the court will also use nonstatutory presumptions. It has already used one, a presumption of gift from husband to wife. In the administration of these presumptions, judges and counsel have been perplexed by the usual presumption problems, including that of whether they are substantive or procedural. The first mentioned has been considered substantive and as creating a "vested" property right. Clark, *Presumptions in New Mexico Community Property Law: The California Influence,* 25 So. CALIF. L. REV. 149 (1952).

35. One wonders whether different holdings of the court in the *Ewing, Hansen* and *Egger* cases discussed in note 26 *supra* were not more a difference as to the effect to be given to inferences than as to the policy of presumptions. And see De Witt, *Presumptions —Automobile Driver as Agent of Owner,* 1941 WIS. L. REV. 521; Hartman, *Presumption Against Suicide in Insurance Cases,* 19 MARQ. L. REV. 20 (1934); Note, 121 A.L.R. 1078 (1939). Judges can disagree seriously both in their logic and their interpretation of the experience expressed in the generalization involved in drawing an inference. Thus Black, J. in his dissent in New York Life Ins. Co. v. Gamer, 303 U.S. 161, 176, 58 Sup. Ct. 500, 82 L. Ed. 726 said: "The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances," while Judge Denison, in New York Life Ins. Co. v. Ross, 30 F.2d 80, 84 (6th Cir. 1928) said: ". . . I cannot see how any presumption, or even inference, as to the action of the average man under average circumstances could help the jury to determine the action of *this* man under *these* circumstances." Compare with both, the following: "Common knowledge is in the nature

CONCLUSION

The indiscriminate use of "presumption" for "inference" and of "presumed" for "inferred"; the fact that a presumption is frequently raised by a basic fact that will support an inference and that remains after the presumption has been dissipated; the indeterminate probative values of inferences; the notion that there is one rule for all presumptions, perhaps arising from the notion "one name, therefore one rule," but more basically and soundly predicated upon a conscious or intuitive awareness that all presumptions are expressions of one dominant policy, a procedural justice policy; and the failure of courts to analyze the situation or to explain with complete candor when the policies of arriving at truth or of furthering some social demand in a particular case have impelled them to depart from a usually followed one-rule or procedural justice policy to do particular justice in that case—all these have produced complications and confusions in the law and administration of presumptions that cry out for simplification by adherence to one dominant policy. The Model Code of Evidence of The American Law Institute has chosen the procedural justice policy. It has firmly decided upon one rule for all presumptions except the presumption of legitimacy and has provided guides for the administration of that rule that are consistent with it and should, if guides will do it, prevent courts from departing from it as they have in the past. The rule, unlike rules of courts and legislatures in the past, covers all phases of the presumption except that it cannot, of course, define the basic and presumed fact of particular presumptions. Courts and legislatures in the past have defined the basic and presumed fact but left unstated the essential rule—the rule as to what and how much evidence must be produced to oust the assumption of the presumed fact and as to whether that evidence must be submitted to the judge or to the jury.

But having decided to have but one rule, there was still the question of which rule. Two rules were considered, a rule that shifts only the burden of producing evidence and a rule that also shifts the burden of persuasion. The former was approved, not because the latter would serve the procedural justice policy less well but on the basis of precedent and constitutional doubt.

---

of evidence, and does not disappear from the case when special circumstances are proven, but the general rule based on that knowledge yields to inconsistent evidence in the particular case. Yet it need yield only to the extent of the inconsistency. The trier of the facts considers the evidence in the light of common experince and decides. . . ." Franklin Life Ins. Co. v. Heitchew, 146 F.2d 71, 75 (5th Cir., 1945). ". . . whenever we see something in one way we cannot see it at the same time in a different way. . . . We can say that the chance of throwing a double six with two dice is one in thirty-six; but we could not say this, nor anything else about the chances of such a throw, if we knew the mechanical conditions prevailing at the moment of the throw. . . . Thus a more detailed knowledge may completely destroy a pattern which can be envisaged only from a point of view excluding such knowledge." Polanyi, *Scientific Convictions and the Free Society*, 6 BULL. OF THE ATOMIC SCIENTISTS 38 (Feb. 1950). Perhaps something put in one scale of a balance is removed when something is put in the other scale.

Legislatures will have to decide which rule to adopt. They should adopt the latter rule. History teaches that courts in the past have not been willing ruthlessly to adhere to a rule that merely shifts the burden of producing evidence when this would do violence to the truth or policy in a particular case. Assuming, by indulging before experience can provide rebutting evidence the sometimes violent presumption of "performance of official duty and regularity of proceedings,"[36] that courts could by legislation be forced to adhere to such one-rule in the future, so to coerce the courts would be carrying procedural justice too far. The Thayer rule is too weak for a presumption based upon a high degree of probability or important policy. The rule shifting the burden of persuasion is theoretically not much stronger. Theoretically it does not come into play unless the mind of the trier is in equilibrium after the evidence is all introduced, counsel have argued, and in a jury case, the judge has given his charge. As a practical matter it plays a part before the trier finds himself in doubt without it, because it is not left to be mentioned only if and when the trier is in doubt. But even then it is not too strong even for the weakest of presumptions. The fact that the law has taken the trouble to create a presumption is in any case evidence of its importance. The only doubt can be as to whether the mere shifting of the burden of persuasion "that the nonexistence of the presumed fact is more probable than its existence," is sufficiently strong for the "strong" presumptions. Of course it is not; otherwise courts would not in the past have required "a clear, satisfactory and convincing preponderance," or some variant that is not satisfied by evidence sufficient to justify a finding, for some presumptions. But the very nature of procedure is to limit discretion and to ignore significant factors when their positive values are more than offset by the disadvantages of encumbering procedures or a confusing plethora of rules. This is true of the substantive law also, notoriously in the efforts to prescribe treatment of criminals by law instead of by administrative individualization. Procedure can provide the legality that is demanded. It is so provided in the case of adolescent offenders by the Youth Correction Authority Act of the American Law Institute. It is provided by the suggested rule for presumptions. One can recognize the substantive aspects of presumptions yet believe that the proponent of a presumption should be satisfied with a rule that puts the burden of producing evidence and persuading the trier on his opponent; the opponent, satisfied with a rule that leaves the issue open to litigation and merely requires him to produce evidence and persuade the trier.

A legislature in deciding which rule to adopt may reconsider generally the precedents that derive from the Thayer-Wigmore solution by terminology.

36. 9 WIGMORE, EVIDENCE § 2534 (3d ed. 1940).

But the constitutional problem will have to be studied both generally and as to each presumption thereafter created by it and to be tested by the opinion in the *Tot* case.[37]

If a party has had a determination by an official properly motivated and fully informed as to the facts of the particular case and as to the ideals and laws of the particular time and place, after that party has had an opportunity so to inform the official by notice and hearing in accordance with the procedures of his jurisdiction, that party has had justice whether the ideals and laws of the time and place be those of the Trobriand Islands or those of a jurisprude's Utopia. He has had "procedural justice," the only kind of justice that we can have. That is something different from and more than relative justice. If the procedural aspects of justice were but given more attention, there might be more and better attended courses on Jurisprudence in the law schools.

---

37. Tot v. United States, 319 U. S. 463, 63 Sup. Ct. 1241, 87 L. Ed. 1519 (1943). "See adverse comments in [Morgan] 56 HARV. L. REV. 1324-1330 (1943); [Hale] 17 So. CAL. L. REV. 48 (1943); [McCormick] 22 TEX. L. REV. 75 (1943); [Morgan] HARV. L. REV. 481, 503-505 (1946). See generally Brosman, The Statutory Presumption, 5 TULANE L. REV. 17, 178 (1930-31); Keeton, Statutory Presumptions—Their Constitutionality and Legal Effect, 10 TEX. L. REV. 34 (1931); Morgan, Federal Constitutional Limitations upon Presumptions Created by State Legislation, Harvard Legal Essays 323-356 (1934). 2 Selected Essays on Constitutional Law 1500 (1938)." The portion of this footnote quoted is from MORGAN AND MAGUIRE, CASES ON EVIDENCE 109 n.26 (3d ed. 1951). See Jones v. United States, 193 F.2d 115 (10th Cir. 1951).