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A learned judge once said to a young lawyer, "If you are ever a trial court judge, never give reasons for your decisions. Your rulings will probably be right, but your reasons will likely be wrong." That statement may aptly apply to judicial pronouncements relating to the subject of presumptions. Decisions are largely free from criticism so far as concerns the results reached, but the reasoning processes by which they are reached appear to be in hopeless confusion. It is believed that a theory can be presented which will both reconcile these confusions of judicial techniques and explain the general consistency in the results of decided cases. In part II of this essay an effort is made to do this. In the presentation and development the Thayer theory, which has been criticized by much legal writing of late, is supported, but with qualifying explanations believed important. First, it is believed desirable to limit the concept of the term "presumption."

I

The article on Evidence in *Corpus Juris Secundum* lists 113 so-called presumptions. In addition, cross-references are made to many other special subjects, e.g., marriage, where additional presumptions are discussed. In checking source material relative to various of the presumptions referred to, it soon becomes evident that the word has been so promiscuously used as to be devoid of much of its utility.[1] The language of the law is permeated by "magic words," such as the word res gestae,[2] which are used as substitutes for exact analyses. The word "presumption" is rapidly becoming such a word. It has been used to indicate numerous and unrelated rules of substantive and

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[1] Professors Morgan and Maguire enumerated four senses in which the term "presumption" is used: (1) as synonymous with permissible inference, (2) as establishing a case sufficient to permit the trier of the fact to decide that the presumed fact exists, even though no logical inference of the presumed fact may be made from the basic fact, (3) as requiring the acceptance of the presumed fact until certain specified conditions are met, and (4) as a conclusive presumption or rule of substantive law. MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE, 3d ed., 73-75 (1951). A similar classification is made by Professor Bohlen, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof," 68 UNIV. PA. L. REV. 307 at 310 (1920).

[2] See 2 HOLMES-POLLOCK LETTERS 284-285 (1941); Homes v. Newman, [1931] 2 Ch. 112 at 120.

procedural law. In most instances its use could be entirely eliminated without affecting the thought. Courts have too frequently behaved like law students when pushed to solve a particular problem. Instead of analyzing they glibly seize upon such and such a presumption. In the following paragraphs some of the diverse senses in which the word "presumption" has been used will be enumerated.

1. *As indicating a general disposition of courts.* The United States Supreme Court in *United States v. Ross*[3] quoted with approval from *Best on Evidence,* section 300, in connection with an asserted presumption of regularity of judicial acts, as follows:

> "The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative. . . ."

2. *As an authoritative reasoning principle.* All reasoning including legalistic reasoning, is grounded upon one or more assumptions. According to Dean Pound these assumptions, or authoritative starting points, are called "principles"[4] of law, as distinguished from rules of law, strictly speaking. Courts sometimes, in announcing such authoritative reasoning principles, call them "presumptions."[5] An example of this use of the term is found in *Farmers' National Bank v. Jones.*[6] Suit, in that case, was against the principal and sureties on a promissory note. Gardner, who handled the case as cashier of the payee bank, was one of the sureties. He was not served with process. The other sureties defended upon the theory that a later note (for the amount of the original note less a payment) discharged the original note. In holding against that contention the reviewing court, apparently determining the issues de novo, said:

> "These are some of the things that have led us to this conclusion: It would have been a dishonest act on the part of Gardner for him to have surrendered the note upon which he and others were surety and to have accepted in lieu thereof a note without surety, and the legal presumption is that men act honestly."

In effect, what the court did was to say that in reaching its conclusion on the facts of the case it started with the assumption that men act

[3] 92 U.S. 281 at 284 (1875).

[4] In the symposium MY PHILOSOPHY OF LAW 249 at 257 (1941).

[5] This is discussed in THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 335 (1898).

[6] 234 Ky. 591 at 594, 28 S.W. (2d) 787 (1930).

honestly.[7] Authoritative reasoning principles are frequently used in connection with rulings on pleadings[8] or on the admission of evidence.[9]

The tendency to call a reasoning principle a presumption is particularly found in non-jury cases.[10] The breakdown of the issues of a case is logically the same whether trial is by a court and jury, or by a court without a jury. It was astutely observed, however, in the early North Carolina case of *Lee v. Pearce*[11] that, practically, such is not the case. The court in that case was called upon to apply a presumption of fraud arising from the dealings of a fiduciary with the subject matter of his trust. Such issues had been recently made triable by jury. The court regarded precedents established when trials of that type of case were by chancellors without juries as of little value because of the tendency of courts, when deciding all the issues of a case, simply to decide the case and not differentiate between questions of law and questions of fact. The reasoning of the case bears out the proposition that in non-jury cases what are called presumptions are in most in-

[7] See also Sandlin v. Gragg, (10th Cir. 1943) 133 F. (2d) 114, cert. den. 318 U.S. 785, 63 S.Ct. 983 (1943); and Berretta v. American Casualty Co. of Reading, Pa., 181 Tenn. 118, 178 S.W. (2d) 753 (1944). In the first of these cases a so-called presumption of judicial regularity was explained in the head-note as follows: "Where motion by judgment creditor's administrator was to revive appeals in name of administrator, federal court would assume, absent contrary showing, that Oklahoma Supreme Court's order was in accordance with motion and within limits of administrator's order of appointment." In the second case the coverage of a policy of liability insurance depended upon whether assured's vehicle was being driven, at the time of the accident, by her son who was under the legal age. There was no evidence as to that fact at the time of the accident because all parties were suffering from retrograde amnesia. The evidence did show that the son was driving shortly before the accident. The court said that the presumption of continuance of an existing state of affairs was really only a legitimate conclusion from the evidence.

[8] In Farley v. Davis, 10 Wash. (2d) 62, 116 P. (2d) 263 (1941), the court, in passing upon the sufficiency of pleadings, used the term "presumptions" to indicate things it would assume in the absence of contrary averment. That case represented litigation concerning the legitimacy of an executor's account. There had been no express allegation that certain statutory requirements had been complied with. The court however said that in the absence of contrary allegations it would be presumed that there had been adequate compliance. The court here used a reasoning assumption to fix the burden of making affirmative allegations. In a like situation the court used similar language in Curl v. Security Trust Co., 127 W.Va. 501, 33 S.E. (2d) 677 (1945). The presumption in Miller v. Aldrich, 202 Mass. 109, 88 N.E. 441 (1909), that the law of a foreign jurisdiction is the same as that of the forum, is a judicial reasoning principle.

[9] In a suit upon a fire insurance policy, the issue being whether the loss had been total, the court in Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses, (8th Cir. 1938) 96 F. (2d) 30, considered whether there was a presumption as to the pre-existence of a present condition in ruling upon the relevancy of an offer of evidence as to the condition of the premises sometime after the fire.

[10] Attention has been directed to issues presented on the pleadings and the admissibility of evidence, which are, of course, issues decided by a court and not a jury. What is more particularly contemplated at this point are ultimate trials in which the entire case is decided by a court without a jury, as in chancery cases or law cases in which trial by jury has been waived.

[11] 68 N.C. 76 (page 63 in some editions) (1872).

stances reasoning principles.[12] By actual count of a number of cases in which the word "presumption" is used it was found that well over half were non-jury cases.[13] The use of the term "presumption" as a reasoning principle in a non-jury case is somewhat analogous to the use of that term as a "permissible inference"[14] in a jury case; but the two are not exactly the same. When a court finds that an inference exists, it merely holds that the trier of the fact, i.e., the jury, may hold that the inferred fact does exist. That is not the same as a court, sitting without a jury, finding that the fact does actually exist. Neither is the term "presumption" when used as synonymous with an argument or reasoning principle exactly the same as a proposition of judicial notice.[15] The court does not, as in a case of judicial notice, hold that a proposition of fact must be true; it merely concludes that it is true. Such a reasoning principal is not entitled to any particular weight. In *Stone v. Stone*[16] the Court of Appeals for the District of Columbia reversed the trial court for holding that the result of its decision was determined by the presumption of official regularity.[17]

3. *As a rule of substantive law.* That the so-called "conclusive" or "irrebuttable presumptions" are really not different from rules of substantive law is well known and recognized by innumerable judicial decisions.[18] Such "presumptions" serve the same general purpose in

[12] The court also makes an elaborate classification of presumptions that has little value for our purposes.

[13] In reading cases dealing with the term "presumption" I was struck by the great frequency of non-jury cases. At first the constant recurrence of non-jury cases made only slight impression on me, but as my research continued the impact became increasingly stronger, until I finally decided to keep score. That was toward the end of my case reading, but among the cases tallied I counted 18 non-jury to 14 jury.

[14] Discussed infra p. 204.

[15] Discussed infra p. 205.

[16] (D.C. Cir. 1943) 136 F. (2d) 761.

[17] Suit was for nullification of a marriage contracted in Virginia upon the ground that the defendant husband was afflicted with syphilis. In order to be entitled to the relief requested it was necessary for plaintiff to prove that she was ignorant of the defendant's condition at the time of their marriage. Virginia law required the usual blood tests prior to the issuance of a marriage license, and it also required that if either blood test show the existence of the disease, the other party must be so informed by the medical examiner. It did not forbid the issuance of the license or the marriage. Plaintiff testified that the medical examiner merely told her that there was "no reason why she should not marry." The trial court, however, denied the divorce because of his belief that the issue was controlled by the presumption that the medical examiner had done his official duty. In reversing, the reviewing court held that said "presumption" was a mere argument to be considered in deciding the issue.

[18] Messmore v. Madison Glue Mfg. Co., 82 Ind. App. 184, 145 N.E. 556 (1924) (compensation act specifying certain persons as conclusively presumed to be wholly dependent); Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410 (1924) (rule of law that knowledge of an attorney is chargeable to his client is sometimes expressed as a conclusive presumption that the attorney has communicated the facts to his client); United Life &

our law as fictions. By expressing what are in reality rules of law in the form of rules of evidence, the courts have a method by which the law can change its content without ostensibly announcing new rules.

As in the case of rules of substantive law, rules of procedural law are frequently called presumptions, although they are not conclusive. The next three uses of the term "presumption" fall into that category.

4. *As a rule fixing the burden of persuasion.* A presumption which operates against the party who does not have the burden of persuasion would seem to be redundant, or, as Justice Lummus says, "Like a handkerchief thrown over something covered by a blanket."[19] Actually, it would seem, the rule announcing such a "presumption" is really another way of indicating the party upon whom the burden of persuasion is placed. A striking example of this situation is in connection with the "presumption of innocence." Courts have had great trouble in determining whether said presumption may be the subject matter of an instruction to the jury. Such difficulty should disappear if it were only realized that said presumption is another way of saying that the burden is upon the prosecution to persuade the jury of the guilt of the defendant. Fortunately, courts have recognized that presumptions of this variety are rules locating the burden of persuasion.[20] In *Yeary v. Holbrook*[21] the court recognized that what was called a "presumption against negligence" indicates merely that the burden of proving negligence is on the plaintiff. *Sheldon v. Wright*[22] was a malpractice case against a doctor. It was held that an instruction to the effect that there is a "presumption against malpractice" was

Accident Ins. Co. v. Prostic, 169 Md. 535, 182 A. 421 (1936) (inability to recover on an accident policy for a death feloneously inflicted is sometimes expressed by saying that the intention to inflict death is conclusively presumed); United States v. Jones, (9th Cir. 1949) 176 F. (2d) 278 (where, in a case under the Surplus Property Disposal Act the court said at p. 288: ". . . But where, as here, the Government deals with its own property, and declares certain memorials of official acts to be 'conclusive evidence of compliance with the Act' there is evidenced the intent to insure the title of the purchaser for value . . . against any absence of authority preceding the execution of the memorials . . ."); Kellogg v. Murphy, 349 Mo. 1165, 164 S.W. (2d) 285 (1942) (dicta); Puget Sound Electric Ry. v. Benson, (9th Cir. 1918) 253 F. 710 (legislative enactment declaring that the operation of a streetcar in excess of the speed limit creates a conclusive presumption of negligence was construed as a negligence per se statute); Peterson v. Wahlquist, 125 Neb. 247, 249 N.W. 678 (1933) (in creditor's bill to set aside fraudulent conveyances, it was held that where a debtor knowingly conveyed all his property without consideration he could not be heard to say that he did not intend to defraud because "he is conclusively presumed to intend the obvious and probable consequences of his voluntary acts").

[19] Concurring in Brown v. Henderson, 285 Mass. 192 at 196, 189 N.E. 41 (1934).
[20] Usually called the "burden of proof."
[21] 171 Va. 266, 198 S.E. 441 (1938).
[22] 80 Vt. 298, 67 A. 807 (1907).

properly refused. The opinion recognized that some courts had used such language but characterized it as "unguarded and inexact" and pointed out that it meant no more than that the plaintiff had the burden of proving the doctor's negligence. And it was held in *Bailey v. City of Ravenna*[23] that the presumption of regularity of the passage of a municipal ordinance really means that the burden of persuasion is on the party asserting invalidity.[24]

A view has been taken by some[25] that the proper effect of a presumption should be to shift the burden of persuasion.[26] That theory is more specifically discussed in the second section of this article. For present purposes it may be observed that such a view might appear to place all presumptions within the fourth category, here discussed. Such, however, is not the case. The reference here is not to rules *shifting* the burden of persuasion, but to rules *locating* said burden. Of course, any rule which shifts said burden locates it, at least for the time being. Much can be said for the proposition that the burden of persuasion never shifts. In most cases an inspection of the pleadings should show which party has the burden of persuasion. Of course, it is a mistake to speak of the burden of persuasion as if there were only one such burden in an entire law suit. There is a separate burden of persuasion for each operative fact. The operative facts material

[23] 280 Ky. 21, 132 S.W. (2d) 532 (1939).

[24] The rationale of other cases would be clearer if the court had recognized the reasoning in the cases cited. Worth v. Worth, 48 Wyo. 441, 49 P. (2d) 649 (1935), was a suit by one spouse against the parents of the other for alienation of affections. The court's difficulty with the question of instructing upon the presumption of good faith would have been avoided if it had been realized that said presumption was another way of placing the burden of persuasion as to good faith upon the plaintiff. In Brazill v. Green, 243 Mass. 252, 137 N.E. 346 (1922), the court announced that "where a return on a writ is made by one who purports to act as an officer qualified to serve process, it is presumed that the signer is an incumbent of the office until the contrary is proved." This is really another way of saying that the burden of persuasion is upon the party attacking the jurisdiction of the court over his person. The same may be said regarding the presumption of a plaintiff's legal capacity to sue recognized in Harrington v. Central State Fire Ins. Co., 169 Okla. 255, 36 P. (2d) 738 (1934). Upon a plea in abatement the burden of persuasion would be upon the defendant. The presumption that a judgment or decree appealed from is correct, referred to in Dent v. Foy, 214 Ala. 243, 107 S. 210 (1925), means no more than that the appellant must convince a reviewing court that a decision is wrong before he can expect a reversal.

[25] With considerable modern following in professorial circles.

[26] This is the so-called "Pennsylvania view" which is supported by the older cases of that jurisdiction. Grenet's Estate, 332 Pa. 111 at 113, 2 A. (2d) 707 (1938); Holzheimer v. Lit Brothers, 262 Pa. 150, 105 A. 73 (1918). That view is also supported by many professors and law review writers. See Morgan, "Further Observations on Presumptions," 16 So. CAL. L. REV. 245 (1943); Morgan, "Presumptions," 12 WASH. L. REV. 255 (1937); Helman, "Presumptions," 22 CAN. B. REV. 118 (1944). Recent Pennsylvania cases seem to have abandoned that view. See MacDonald v. Pennsylvania R. Co., 348 Pa. 558 at 567, 36 A. (2d) 492 (1944); Conley v. Mervis, 324 Pa. 577, 188 A. 350 (1936); Watkins v. Prudential Ins. Co. of America, 315 Pa. 497, 173 A. 644 (1934).

in a particular case may be called "if" facts and "unless" facts.[27] For example: *If* the defendant was guilty of negligence *and if* said negligence proximately caused injury to the plaintiff, the plaintiff may recover damages *unless* he was guilty of contributory negligence, *or unless* the plaintiff validly released the defendant.[28] It seems self-evident that the plaintiff has the burden of persuasion upon all facts introduced by "if," whereas said burden is on the defendant as to all facts introduced by "unless." Except where pleading is complicated by the use of general issue pleas, as in criminal cases, the "if" factual issues should be capable of being differentiated from the "unless" issues by an inspection of the pleadings.[29] The same legal policy which determines the location of the burden of persuasion[30] should, and normally will, determine the burden of making allegations. When it is said that the burden of persuasion shifts, what is really meant is that alternative propositions regarding the issues of a case may arise from the pleadings. Consider the most frequently cited instance of the shifting of the burden of persuasion, the presumption of legitimacy. The issues in such a case might be stated as follows: If *S* is the legitimate son of *F*, now deceased, he is entitled to share in *F*'s estate, *or* if *S* is the son of a woman who was married to *F* at the time of the birth of *S*, he is entitled to share in the estate of *F unless F* was not the father of *S*. Properly pleaded, *S* would not allege the paternity of *F*, but would allege the maternity of *F*'s wife. Thus the burden of persuasion has not been shifted but is the same throughout the case, and its location is susceptible of being determined by the pleadings.

The location of the burden of persuasion as to any particular issue is eventually determined by policy considerations of the same type as determine the rules of substantive law.[31] For instance, in an action for defamation the plaintiff need not prove falsity, but if truth of the scandalous publication is a defense at all it must be affirmatively estab-

[27] Compare Michael and Adler, "The Trial of an Issue of Fact," 34 COL. L. REV. 1224 at 1241 and 1242 (1934).

[28] This example is obviously over-simplified. In an actual case the operative facts in issue would normally be far more numerous.

[29] Compare 9 WIGMORE, EVIDENCE, 3d ed., §2485 (1940).

[30] The position is taken infra that the location of the burden of persuasion is determined by the same policy considerations as determine substantive rules of law.

[31] Compare 9 WIGMORE, EVIDENCE, 3d ed., §§2484, 2485, 2488 (1940), and Morgan, Foreword to the Model Code, p. 58. Under a modern system requiring completely responsive pleadings, policy considerations will mediately determine the burden of persuasions via pleading rules requiring allegations. See SCOTT AND SIMPSON, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE 468, editorial statement (1950). Under any single pleading situation, as for instance where general issue pleas are allowed, policy considerations will immediately determine the location of the burden of persuasion.

lished. Falsity could have been made an element of the plaintiff's case. But there is no strong social policy favorable to the claims of a man who desires to publish derogatory truth. The law could have made truth irrelevant.[32] However, that seems a bit too favorable to a plaintiff. The compromise position is to make it relevant, but to impose the burden of persuasion on the defendant. The importance of considerations of justice (i.e., policy considerations) in determining the location of the burden of persuasion is shown by the decision of the Supreme Court of the United States in *Morrison v. California.*[33] That case arose under the Alien Land Law of California. It was held that a statutory provision imposing upon the defendant the burden of proving that he was not an alien ineligible for citizenship violated the due process clause. The following passage from the opinion of Justice Cardozo is pertinent:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

It is not contended that a due process problem is presented in the usual civil case. The use of the *Morrison* case is by way of analogy. The considerations of fairness and policy which may invoke the due process clause in a criminal case underlie the location of the burden of persuasion in any case.[34]

[32] A result which has been partially accomplished by statute in some states.

[33] 291 U.S. 82 at 88, 54 S.Ct. 281 (1934).

[34] Compare Sheldon v. Wright, 80 Vt. 298, 67 A. 807 (1907), discussed supra note 22. The court there held that a presumption against malpractice was really a rule locating the burden of persuasion. The court recognized strong policy considerations in favor of giving a medical practitioner the optimum of protection. It was implicit in the opinion that said policy considerations could be disposed of by the rule placing the burden of persuasion on plaintiff.

A novel problem in relation to the burden of persuasion is presented in Reliance Life Ins. Co. v. Burgess, (8th Cir. 1940) 112 F. (2d) 234, cert. den. 311 U.S. 699, 61 S.Ct. 391 (1940). The plaintiff insurance company sued for a declaratory judgment to determine its liability for the death of an assured covered by a policy insuring against accidental death. Plaintiff's theory was that the death resulted from suicide and not from accident. One of the principal questions considered was the location of the burden of persuasion on the question of suicide. It was implicit in the opinion that if the beneficiary had sued on the policy he would have had the burden of persuasion on that issue. The majority of the court, however, held that because of the fact that the insurance company, as plaintiff, was required to allege suicide, it had the burden of persuasion. Judge Sanborn argued that the

The location of the burden of persuasion should not be confused with the ability to persuade, or with what is required to sustain said burden. The suggestion was made by Justice Cardozo in the passage quoted above that the greater ability of a party to produce evidence might be a factor in placing the burden of persuasion. Dean Wigmore makes the same suggestion.[35] It would seem that the relative ability of two parties to produce evidence relates more to the obligation to produce it than it does to the burden of persuasion. That such is the case may more clearly appear when the other possible confusion is considered.

Jeremy Bentham argued that the burden of persuasion should be upon the defendant to disprove the elements of the plaintiff's case, or upon a criminal defendant to establish his innocence, rather than upon a plaintiff to prove the elements of his case or upon the prosecution to prove the criminal defendant guilty.[36] Bentham's reasoning is that the balance of probability is in favor of the plaintiff or prosecution because civil or criminal actions are not usually instituted unless the probabilities are in favor of the instigator. Bentham's fallacy consists in confusing the location of the burden of persuasion with the necessary requirements for meeting said burden. The weight of probability is all important in determining whether a persuasion has been accomplished, but the question of who has the burden should be determined by the policy considerations which underlie our jurisprudence. It is probably true that most persons indicted of criminal offenses are guilty. The thorough screening given to such cases by committing magistrates, prosecuting attorneys and grand juries would seem to assure a probability of guilt in all cases coming to trial. But if a man could be indicted and thereby have the burden of proving his innocence cast upon him, the law could easily become an instrument for persecution which would be contrary to sound social policy.

location of that burden should not depend upon the accidents of pleading, but upon the general policy underlying the law, and he could see no reason why that burden should be changed by the fact that the company sued for a declaratory judgment. Judge Sanborn's position seems sound. To be sure, the burden of persuasion should correspond to the burden of making affirmative allegations. The plaintiff company should be able to allege a cause of action for declaratory relief by alleging the existence of justiciable issues, placing upon the defendant beneficiary the burden of alleging death by accidental means, thereby negativing suicide.

[35] WIGMORE, EVIDENCE, 3d ed., §2486 (1940).

[36] I have no source reference. The authority for my statement regarding Bentham's view is a reference thereto in an article entitled "Presumptions of Law and Presumptive Evidence," published in the (English) LAW MAGAZINE, VI, 348, October, 1831, and reprinted by Professor Thayer in his PRELIMINARY TREATISE ON EVIDENCE, Appendix A, 539 at 544 (1898).

5. *As a permissible inference.* Courts are frequently called to pass upon the permissibility of inferences to be made, by someone else, from circumstantial evidence. Such action is usually required when a court passes upon the question of whether a verdict is, or can be, supported by the evidence.[37] Standardized situations in which courts have held that assumptions by a trier of the fact are warranted, but not required, have been called permissible inferences, and have also frequently been called presumptions.[38] Thus, in *People v. Swiggy*,[39] the court, in upholding a jury's determination upon an issue of paternity, judicially noticed the usual period of gestation and then *presumed* that birth occurred according to the usual course of nature. Although the word "presumed" was used, it was evident that the court meant that the jury was entitled to infer that the defendant was the father of the child whose paternity was in question. A refusal to regard an inference of this type as a presumption was recently made by Justice Lummus in *Moroni v. Brawders*.[40] The issue in that case was whether a merger between two labor unions had been legally accomplished. A dissenting faction in one of the unions contended that it had not because the constitution of that union required an affirmative two-thirds vote of the entire membership before it could merge with another union. There was no immediate evidence that the two-thirds vote had been obtained, but it was argued that a presumption of regularity existed. The court pointed out that no problem of presumption existed, but that the trial court was permitted to infer that the merged union had been legally established because it had functioned for several years without prior challenge.[41] It should be reiterated that a presumption, used as synonymous with a permissible inference, is not exactly the same as a presumption used as synonymous with a reasoning principle. Courts usually declare permissible inferences to exist in cases in which other

[37] For example, upon a motion for a directed verdict, new trial, or judgment notwithstanding the verdict, or upon an issue presented to a reviewing court as to whether the judgment of a trial court, entered upon a jury's verdict or a court's finding, can stand or must be reversed because not supported by evidence.

[38] This is the sense in which the term "presumption" is used in the MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, §138.

[39] 69 Cal. App. 574, 232 P. 174 (1924) (hearing denied by Supreme Court of California).

[40] 317 Mass. 48, 57 N.E. (2d) 14 (1944).

[41] For a slightly earlier Massachusetts case, in which the headnote editor calls a presumption what the court regarded as a permissible inference, see Conroy v. Fall River Herald News Pub. Co., 306 Mass. 488, 28 N.E. (2d) 729 (1940). The court in Wellisch v. John Hancock Mut. Life Ins. Co., 293 N.Y. 178, 56 N.E. (2d) 540 (1944), recognized that the presumption against suicide in a suit on an ordinary life insurance policy is different from other types of presumptions and is really a "judicial recognition of what is probable."

judicial bodies find the facts, whereas, when a court itself determines the facts, it does more than find that a particular inference may legitimately be made; it actually makes the inference.

6. *As a statutory prima facie case.* This use of the term presumption is somewhat similar to that previously mentioned, and yet differs in that here there is no judicially recognized permissible inference. The legislature has, nonetheless, declared that proof of certain facts shall be sufficient to constitute prima facie evidence, i.e., evidence sufficient to authorize submission of the issue as to the existence of an operative fact to the jury.[42] Sometimes such a statutory prima facie case is called a presumption;[43] other times the statutes merely provide that proof of certain facts shall constitute prima facie evidence of the facts made operative. Except for possible constitutional objections,[44] a legislature, having power to define the elements of a cause of action, would have power to prescribe the proof necessary to submit particular cases to the jury. No useful purpose is gained, however, by calling such a statutory prima facie case a presumption.

7. *As a proposition of judicial notice.* Courts have sometimes likened particular presumptions to propositions of judicial notice.[45] Such a comparison is true only in the sense that the court judicially notices the usual course of human experience and then uses the proposition so judicially noticed as either the basis for a reasoning principle or the basis for a permissible inference.

8. *As a rule shifting the burden of producing evidence.* The party upon whom the burden of persuasion as to any operative fact is imposed will also have the burden of producing evidence upon that issue. If he fails to produce evidence from which the existence of said operative fact may be inferred, the court will direct a verdict or otherwise hold as a matter of law against him. It is unfortunate that the term "in-

[42] Wigmore points out [EVIDENCE, 3d ed., §2494 (1940)] that the term "prima facie evidence" is used in two senses, (1) as sufficient evidence to authorize a directed verdict unless rebutted; (2) as sufficient evidence to authorize submission of an issue of fact to the jury. When used in connection with statutory prima facie evidence it is normally used in the second sense.

[43] Morgan, "Further Observations on Presumptions," 16 So. CAL. L. REV. 245 at 246 (1943); AMERICAN LAW INSTITUTE, MODEL CODE 307 (1942).

[44] Compare Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 (1943); Western & Atl. R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445 (1929); Mobile, J. & K.C. R. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136 (1910); Morrison v. California, 291 U.S. 82, 54 S.Ct. 281 (1934).

[45] Indication to that effect is found in Allen v. Merchants Fire Assur. Corp., 179 Wash. 189, 36 P. (2d) 545 (1934); Franklin Life Ins. Co. v. Heitchew, (5th Cir. 1944) 146 F. (2d) 71, cert. den. 324 U.S. 865, 65 S.Ct. 914 (1945); and People v. Swiggy, 69 Cal. App. 574, 232 P. 174 (1924) (hearing denied by Supreme Court of California).

ference" has come to be limited to inferences from circumstantial evidence. Even in the case of testimonial evidence tending to sustain an operative fact, it is necessary to infer that fact. The witness' perception or memory may be faulty, we may not correctly understand him, or he may not be truthful.[46]

The burden of producing evidence may be shifted from one party to the other. In this way, it is possible that the two burdens may be separated, i.e., the burden of producing evidence may be upon one party, whereas the burden of persuasion is upon his opponent. A rule bringing about this shifting of the burden of producing evidence is called a presumption. We may call the party who has the burden of persuasion the proponent, and his opposite party the opponent.[47] The effect of a presumption, as thus used, is to impose upon the opponent the alternative of producing evidence against the operative fact in issue or of having a verdict directed against him upon that issue. The operation of such a presumption is illustrated by the case of *Basham v. Prudential Insurance Company of America*.[48] Suit was upon a policy insuring against accidental death. Insured met his death by falling from a window. There was no evidence to indicate how or why he fell. It was incumbent upon plaintiff to persuade the jury that the death was the result of accident and not suicide. However, the plaintiff was aided by a presumption against suicide. There being no actual evidence of suicide, it was held that the court properly instructed the jury, in effect, that they must accept the death as accidental.

How does such a presumption come into existence? Two general types of explanations may be made. It may be that the proponent has produced a case of such strong persuasive force that a decision in his favor will be clearly indicated unless rebutting evidence is introduced. On the other hand, even though the proponent has not been able to produce a case of such persuasive force as clearly to entitle him to recover, there may be some paramount legal policy requiring the opponent to "show his hand."[49]

The first of the two bases for presumptions of this type can be understood by realizing that the problem of proof involves the determining of relative probabilities.[50] The determination of an operative

[46] See MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE, 3d ed., 501 (1951). It might further be observed that inference would normally be necessary, even in the case of real evidence. The testimony of witnesses is necessary to qualify such evidence.

[47] As to most issues the plaintiff will be proponent and the defendant opponent, but, of course, that will not always be true.

[48] 232 Mo. App. 782, 113 S.W. (2d) 126 (1938).

[49] See Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 A. 644 (1934).

[50] Michael and Adler, "The Trial of an Issue of Fact," 34 COL. L. REV. 1224, 1462 (1934). The thought that proof is dependent upon probability runs completely through this long and learned article. Special reference may be made to pages 1239 and 1257.

fact in issue must depend upon whether, given the same evidence, the experience of mankind would indicate that said fact is more probably true than not. Such probabilities as are involved in law suits are not determinable with exactitude. Judgment is involved. The court may believe that reasonable minds cannot differ as to where the weight of probability is to be found. If so, the court decides the issue. If, however, reasonable minds can differ, the question is one for the trier of the fact, i.e., the jury, if there is one. If the evidence in favor of the proponent is so weak that, upon the basis thereof, reasonable minds must agree that the operative fact contended for is probably not true, the proponent has failed to prove a case and will suffer a directed verdict against him. If, however, his evidence is sufficiently strong that reasonable minds may at least differ, he has the benefit of an inference[51] and is entitled to have his case submitted to the trier of the fact. A third situation exists in which the proponent has introduced evidence so persuasive that, if it is not rebutted, reasonable minds must agree that the fact contended for is probably true. If the proof for the proponent arises to such dignity, he will be entitled to a directed verdict, unless evidence is introduced by the opponent. Thus, the burden of introducing evidence has been shifted, and a presumption, in the sense in which the term is now used, exists.

It is unfortunate that the term presumption, indicating a case so strong as to require rebutting evidence, has been conventionally limited to a case predicated upon circumstantial evidence. Therefore, in conventional usage a basic fact is usually required before a presumption comes into existence. It is doubtful that the natural meaning of the word "presumption" requires such a limitation. It would seem to have the same significance as in the expression "heir presumptive," i.e., one who is entitled to inherit unless someone with a superior right comes into existence. The term "prima facie case" is ambiguous.[52] It may mean (1) sufficient evidence to authorize a directed verdict if rebutting evidence is not introduced, or (2) sufficient evidence to authorize submission of a case to the jury. In lieu of the term "prima facie case" the following terms could well be used: (1) "presumptive case," to indicate the first of the above meanings, and (2) "inferential case," to indicate the second of the above meanings.[53] However, the purpose of this article is not to quibble with conventional terminology. We may therefore regard a presumption as predicated upon circumstantial evidence.

[51] That is, the trier of the fact could decide in his favor.

[52] 9 WIGMORE, EVIDENCE, 3d ed., §2494 (1940).

[53] It has been pointed out supra that an inference is necessary to permit a case to be submitted to the trier of the fact, even where evidence is in no way circumstantial.

It is noted above that the burden of producing evidence may be shifted to the opponent even though the proponent's evidence is not so strong as to require a verdict in his favor. Such a result can be accomplished only by some kind of policy consideration. A discussion of that subject will not be embarked upon at this point because it is fully considered in Part II of this article.

We have seen in the preceding paragraphs at least eight conceptions of the word "presumption." The term is so vague and ambiguous that a more thorough research might uncover other senses in which it has been used.[54] It should be noted that different meanings may be ascribed to the very same presumption depending upon how the problem arises in a particular instance of litigation. Consider, for example, the presumption against suicide. Such a presumption may become pertinent in either one of two ways: (1) The beneficiary may be suing upon an ordinary policy of life insurance, and the defendant may assert a defense of suicide; (2) the beneficiary may be suing upon a policy covering death by accidental means. In the first situation the burden of persuasion is on the defendant insurance company to prove suicide. Thus a presumption against suicide is no more than a restatement of that burden, and we see the fourth conception of the term being used, as enumerated above. In the second instance the burden of persuasion is upon the plaintiff beneficiary to prove death by accidental means, which involves refuting suicide. However, he is aided by the presumption against suicide, or the corresponding presumption that any violent death is accidental. Thus, before an issue as to suicide can be submitted to the trier of the fact the defendant insurer must introduce evidence from which a conclusion of suicide can be inferred. Thus we see a presumption in the eighth sense above enumerated, i.e., as a procedural device shifting the burden of producing evidence. Here the two burdens are separated. The plaintiff has the burden of persuasion if the issue ever goes to the trier of the fact; the defendant has the burden of producing evidence before the issue can be submitted to the jury.

As indicated at the outset of this article, the uses of the term "presumption" are so numerous and varied as to deprive that term of much usefulness. It is difficult to see any common meaning among all the conceptions of the term. It cannot be said that in all instances in

[54] No attempt has been made to differentiate between presumptions of fact and presumptions of law. The differentiation itself is ambiguous. Under some differentiations a presumption of fact is regarded as simply a permissible inference (sense number five above), whereas a presumption of law is regarded as a procedural device shifting the burden of producing evidence (sense number eight above). Under other classifications a procedural device shifting the burden of producing evidence is called a presumption of fact, whereas all other uses of the term "presumption" are regarded as presumptions of law.

which the word is used the proof of one fact, a basic fact, requires the assumption of another fact. Some presumptions may exist without the establishment of any particular basic fact, for example, the presumptions of sanity and of innocence.

Not only is this common meaning absent, but there are numerous cases which, without using the word "presumption," establish rules not differing in principle from those which do use the word "presumption" in the first seven of its meanings discussed above. Thus, it is rare that a general disposition of courts is called a presumption. As pointed out above, some authoritative reasoning principles may be called "presumptions," but usually they are regarded merely as principles of law. Likewise, only a small minority of all the rules of law are expressed as conclusive presumptions. There is no need whatever for calling a rule locating the burden of persuasion a presumption. There are many such rules that are not so called. We know that the burden is upon a defendant alleging truth in a defamation case to prove his allegation. Yet we do not say that "all derogatory statements are presumed to be false." Such a statement, however, would make as much sense as to say that a criminal defendant is presumed to be innocent merely because the burden of persuasion is on the prosecution to prove him guilty. There is no objection to calling a permissible inference a presumption, except the fact that we already have a good, unambiguous term, i.e., permissible inference, and the fact that the term "presumption" is also used in other senses.

The one distinctive conception of the term "presumption" appears to be the eighth, i.e., as a procedural device for shifting the burden of producing evidence. So far as I know there is no other legal symbol readily applicable to such rules. The term "presumption" is a useful one in that regard. The temptation to call all other uses of the term "spurious" may be resisted. Instead it may be said that the eighth sense is the only one that is significant.

II

In this section the term "presumption" is limited to the eighth sense, i.e., as a procedural device shifting the burden of producing evidence. In the first instance, therefore, a presumption operates in favor of the party with the burden of persuasion as to any particular operative fact of a case. It benefits him in two particulars: (1) It saves him from a directed verdict against him;[55] (2) it entitles him to

[55] Of course, a presumption may not always be necessary for that purpose because the proponent may have other evidence sufficient to establish an inferential case and thereby be submitted to the trier of the fact.

a directed verdict upon that issue in case the opponent fails to introduce evidence, or another presumption, against the operative fact in issue. If the opponent does introduce evidence sufficient to warrant a negative finding upon the operative fact in issue, or is aided by another presumption, there can be no directed verdict against him. Thus far, I believe, all authorities agree. Professor Thayer took the position that a presumption had no other effect.[56] It follows that once the opponent has introduced evidence, the presumption has served its purpose and the case proceeds as though there were no presumption. That view finds support in the writings of Dean Wigmore[57] and in the American Law Institute's *Model Code of Evidence*.[58]

The Thayer view has, however, been under severe attack from many quarters. Leader of this attack has been Professor Edmund H. Morgan of the Harvard Law School.[59] Among the more recent of the articles by the learned professor is one which he wrote in collaboration with Professor John M. Maguire, also of the Harvard Law School, entitled "Looking Backward and Forward at Evidence."[60] The view is there expressed, "The Thayer-Wigmore view has proved unacceptable because it is both arbitrary and unreasonable. Its unreason consists in assigning so slight and evanescent procedural effect to every presumption." The critics[61] of the Thayer view generally take the position that a presumption cannot be said to have been rebutted except by evidence credited by the trier of the fact. They, therefore, support the so-called "Pennsylvania" rule[62] to the effect that a presumption shifts the burden of persuasion. By said rule the effect of a presumption would never be overcome unless the trier of the fact were persuaded by the rebutting evidence. Adherents to these conflicting views came to grips over the position to be taken in the Model Code,[63] with the

[56] THAYER, PRELIMINARY TREATISE ON EVIDENCE 339 (1898).

[57] 9 WIGMORE, EVIDENCE, 3d ed., §2491 (1940).

[58] Rule 704, p. 313. See particularly pages 315 to 317.

[59] Professor Morgan's articles have been numerous. Outstanding among them are "Further Observations on Presumptions," 16 So. CAL. L. REV. 245 (1943); "Presumptions," 12 WASH. L. REV. 255 (1937); "Instructing the Jury Upon Presumption and Burden of Proof," 47 HARV. L. REV. 59 (1933); see "Observations Concerning Presumptions," 44 HARV. L. REV. 906 (1931).

[60] 50 HARV. L. REV. 909 at 913 (1938).

[61] There are many others besides Professor Morgan. For recent criticisms see particularly Reaugh, "Presumptions and the Burden of Proof," 36 ILL. L. REV. 803 at 819 (1942); and Helman, "Presumptions," 22 CAN. B. REV. 118 (1944).

[62] Not now followed in Pennsylvania. See Watkins v. Prudential Ins. Co. of America, 315 Pa. 497, 173 A. 644 (1934); MacDonald v. Pennsylvania R. Co., 348 Pa. 558 at 567, 36 A. (2d) 492 (1944).

[63] For an interesting satire on the Thayer view, together with extensive quotations from the proceedings of the American Law Institute showing the conflict of minds, see Helman, "Presumptions," 22 CAN. B. REV. 118 (1944).

law professors generally supporting the Pennsylvania view and the judicial representatives supporting the Thayer position. By a close vote the Thayer view carried the day, and, as above indicated, was adopted. Professor Morgan, although not entirely reconciled, is at least now an apologist for the view finally adopted by the American Law Institute.[64] Thus it appears that the Thayer view has at least temporarily prevailed. It is believed, however, that a support of that view is in order.

Let us start by offering a criticism of the opposing view principally contended for, the "Pennsylvania view." The theory that the effect of a presumption should be to shift the burden of persuasion is recommended by considerations of simplicity and easy applicability. Notwithstanding, there are the following objections:

(1) It could not be made applicable to all conceptions of presumptions, for example, rules of substantive law and inferences. Thus the great ambiguity in the term would not be eliminated. This is, of course, also true of the Thayer theory. The point being made is that the Pennsylvania rule is of no particular benefit in this regard.

(2) Wholly apart from "presumptions" the law has rules fixing the burden of persuasion. There is therefore no need to use a presumption for that purpose. It would render the concept an entirely unnecessary one.

(3) It is generally true and sound that rules fixing the burden of persuasion are determined by matters of general policy similar to the policy considerations which determine rules of substantive law. Presumptions are normally based upon inferences and balances of probability, which introduce a foreign element into the problem of placing the burden of persuasion.

(4) It is not desirable that the burden of persuasion be subject to constant shifting from one side of the case to the other. In view of the possibility of conflicting presumptions, the exact location of the burden of persuasion could never be known under the Pennsylvania view until all the evidence had been introduced. In that connection, the Thayer view avoids the troublesome problem of conflictive presumptions.[65]

(5) The supporters of the Pennsylvania theory recognize[66] that

[64] See Morgan, "Observations on Presumptions," 16 So. CAL. L. REV. 245 (1943).
[65] MODEL CODE, p. 315.
[66] Morgan, "Further Observations on Presumptions," 16 So. CAL. L. REV. 245 at 253 (1943).

presumptions are usually based upon natural probabilities.[67] They argue that therefore a presumption should be used to determine the burden of persuasion because that burden should be favorable to the party whose case is most strongly supported by probability. That argument involves the same fallacy as Jeremy Bentham committed.[68] It confuses the problem of which party must persuade with the problem of what proof is necessary for persuasion. There is no point in placing the burden of persuasion on one party merely because the balance of probabilities favor the other. If such is the case, the party with the balance of probabilities in his favor has no need of having the burden of persuasion arbitrarily placed upon his adversary.

(6) The Pennsylvania view would leave the law without any technique for separating the two burdens. It may be rare that such a result is sought, but there are probably situations in which general policy demands that the burden of persuasion be on one side, and yet, in which it is desirable that the opponent be required to produce evidence. The desirability of being able to separate the two burdens is shown by *Janevesian v. Esa*,[69] a seduction case. Plaintiff offered no evidence of her prior chaste character, but, since defendant offered no evidence of unchastity, the plaintiff, aided by a presumption of chastity, was entitled to a finding as to that issue, and a general verdict in her favor was upheld. Suppose there had been evidence on both sides of the issue of prior chastity. It seems self-evident that the same legal policy that denies to an unchaste woman a cause of action for seduction should impose upon her the burden of persuasion upon that issue. It also seems self-evident that she should not be required to prove chastity unless the defendant first offers evidence of unchastity. Both of these two principles could not be realized under the Pennsylvania view.

Much of the objection to the Thayer theory, it is believed, arises from a misconception as to that view. Critics of that theory contend that presumptions may disappear too easily upon the introduction of evidence which, if submitted to the trier of the fact, would be disbelieved. It would follow from that criticism that courts following the Thayer view might be prone to direct verdicts improperly. For example, in *Pariso v. Towse*[70] Judge Learned Hand indicated that, if free to follow his own view of the law, he would have sustained the

[67] Holmes' opinion for the Court in Greer v. United States, 245 U.S. 559 at 561, 38 S.Ct. 209 (1917), is cited on that point.

[68] See discussions supra at note 36.

[69] 274 Mass. 231, 174 N.E. 279 (1931).

[70] (2d Cir. 1930) 45 F. (2d) 962.

trial court's directed verdict. The reaction I have observed in law students to that remark is, "I am glad he did not regard himself as free." In that case permission to drive an automobile was presumed from proof of ownership. Said presumption was rebutted by the testimony of the owner and her nephew, the driver, both highly interested witnesses. Yet, under the Thayer view, the presumption of permission would disappear. It does not, however, necessarily or usually follow that because a presumption has been rebutted, the court will direct a verdict against the presumed fact. Most of what follows in this article is devoted to proof of the aforesaid proposition.

In discussing rule 704 of the Model Code, the American Law Institute[71] differentiates two situations: (1) When "the basic fact has not sufficient value as evidence of the presumed fact to support a finding" and (2) where "the basic fact has sufficient value as evidence of the presumed fact to support a finding." Judge Hand's fallacy in *Pariso v. Towse* was his assumption that the case fell into the first category, whereas, properly considered it should fall into the second. In fact, the first category would rarely, if ever, exist. Justice Holmes expresses this thought in his opinion for the Court in *Greer v. United States*[72] as follows:

> "A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth."

Inferences are so vitally tied to presumptions that the Supreme Court of the United States has held statutory presumptions unconstitutional unless attended by logical inferences. The statute involved in *Tot v. United States*[73] made it an offense for any person previously convicted of a crime of violence to possess a pistol acquired in interstate commerce. The act also provided that possession of a pistol established the presumption that it had been acquired in interstate commerce and prior to the effective date of the act. This last section was held to be unconstitutional as creating a presumption when there was no rational inference.[74] Of course, it is not every inference that helps to establish

[71] Pages 315 and 317.

[72] 245 U.S. 559 at 561, 38 S.Ct. 209 (1917).

[73] 319 U.S. 463, 63 S.Ct. 1241 (1943), criticized by Hale, 17 So. CAL. L. REV. 48 (1943), and in many other law review articles. Although the case may be subject to criticism insofar as it regards an inference as absolutely indispensable to a statutory presumption, it is of value in showing the important connection between the two concepts.

[74] *Accord:* Western & Atl. R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445 (1929); Mobile J. & K.C. R.R. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136 (1910); and see Morrison v. California, 291 U.S. 82, 54 S.Ct. 281 (1934).

a presumption. In *Foltis v. City of New York*[75] it was held that the doctrine of res ipsa loquitur presents merely an inference and not a presumption and that thus a directed verdict for the plaintiff was not justified even in the absence of evidence of due care by defendant.

It is not contended that all presumptions involve the element of a rational inference. It is contended that nearly all presumptions involve that element. Let us proceed by examining some of the presumptions frequently regarded as falling within the American Law Institute's first category, i.e., presumptions in which the "basic fact has not sufficient value as evidence of the presumed fact to support a finding." It can be shown that many of the presumptions which are sometimes regarded as free from any basis in logical inference are really based, at least in part, upon a judgment as to the usual course of human experience. It must be borne in mind that the evidential value of an inference, i.e., whether an inference is legitimate or not, depends upon the balance of probability in its favor.[76] To explicate, if it can be said that given the basic fact the course of human experience is such that the presumed fact will probably be true, then "the basic fact has sufficient value as evidence of the presumed fact to support a finding."

The presumption of course of employment from ownership of a vehicle is frequently regarded as devoid of any inferential basis.[77] There are two versions of this presumption.[78] The broader statement of the rule is that if a vehicle involved in an accident was not being operated by the owner, from proof of ownership alone it may be presumed that the driver was the owner's employee and was acting in the course of his employment. The more narrow statement of the rule is that proof of employment must be added to proof of ownership before course of employment may be presumed. Closely analogous to the presumption of course of employment is the presumption (found in jurisdictions which impose upon the owner of a vehicle responsibility for the negligence of any person operating it with his permission) of permission to operate a vehicle from proof of ownership thereof.[79] It is submitted

[75] 287 N.Y. 108, 38 N.E. (2d) 455, 153 A.L.R. 1122, with annotations at p. 1134 (1941).

[76] Michael and Adler, "The Trial of an Issue of Fact," 34 COL. L. REV. 1224, 1462 (1934).

[77] McIver v. Schwartz, 50 R.I. 68, 145 A. 101 (1929); Bond v. St. Louis-San Francisco Ry. Co., 315 Mo. 987, 288 S.W. 777 (1926). *Accord:* Capello v. Aero Mayflower Transit Co., 116 Vt. 64, 68 A. (2d) 913 (1949); notes in 30 BOST. UNIV. L. REV. 284 (1950), and 1941 WIS. L. REV. 521.

[78] Judson v. Bee Hive Auto Service Co., 136 Ore. 1, 297 P. 1050, 74 A.L.R. 944 and annotations (1931).

[79] Pariso v. Towse, (2d Cir. 1930) 45 F. (2d) 962.

that in the case of all of these presumptions logical inference can be found.

Consider first the easiest case, the narrower version of the presumption of course of employment. From proof of ownership of a vehicle, plus proof of agency, course of employment may be presumed. Although it is known that employees sometimes use their employers' vehicles for purely private missions, yet, that would constitute a distinct minority of cases. Such would seem to be common knowledge. The same reasoning applies to the presumption of permission. It is far more common for a driver to obtain permission before using the vehicle of another than it is for the driver to take such a vehicle without permission.[80] It is more difficult to see that the broader version of the presumption of course of employment is also based upon an inference. From proof of ownership of a vehicle involved in an accident, it is presumed that the operator was an employee of the owner and was operating the vehicle in the course of his employment. If the vehicle were of a business type the case would be clearer, but assume that it is an ordinary passenger vehicle. Whether such a presumption involves a rational inference depends, of course, upon the question of probability. No statistics are available so far as I know. If, past a given point in the highway, one hundred automobiles are driven by persons other than the owner, how many are being driven upon missions for the owner? Here are the possibilities: (1) vehicles being driven by thieves; (2) vehicles having been loaned to the driver for purposes of the driver; (3) vehicles being driven by a member of the owner's family for his own purposes; and (4) vehicles being driven by someone, member of the family or otherwise, upon a mission for the owner. The first possibility would be negligible, the second slight and the third far more substantial. Yet the third possibility would not be as striking as it might seem. Operation of a father's vehicle by one of his children for the child's own purposes would ordinarily be confined to a limited number of years, i.e., from the time he reaches the legal age to the time he leaves home. Many family vehicles are owned jointly by husband and wife. In those instances in which such is not the case it is not unusual to find husband and wife with their own separate vehicles. In cases in which the wife is driving the husband's vehicle it is quite likely that she will be driving it upon a family mission, which would make her either an agent for her husband or a joint enterpriser. Granted, the probabilities might be fairly even; but it is believed that in the majority of cases the vehicle would be

[80] Bridges v. Welzien, 231 Iowa 6, 300 N.W. 659 (1941).

operated for some purpose of the owner. It was so held in *Judson v. Bee Hive Auto Service Co.*[81] The court, in that case, said:

> "We think, therefore, that when a person is found in possession of a car and is operating it, it is not an unreasonable deduction that he is the agent of the owner and is using the automobile for the latter's benefit. Experience teaches that when automobiles are involved in accidents they are ordinarily being operated by the owner or by someone for whose negligence he will be responsible."

The presumption of death after seven years unexplained absence is also referred to as one in which the basic fact will not sustain an inference of the presumed fact.[82] But any long and unexplained absence would seem to involve an inference of death. People do not normally fail to communicate with relatives or friends without reason. It is granted that if the exact date of death becomes material, there is no reason to infer that death occurred on the last day of the sixth year of absence. But the seven year provision may well be construed as a limiting provision rather than a provision specifying the exact time of death. Some time would naturally have to elapse before a reasonable inference of death could be indulged. Any specified number of years, including seven, is arbitrary. But the seven year limitation does not seem to be the real essence of the presumption. It is rather a necessary, although arbitrary, limitation.

There are some presumptions that are said to depend upon the superior facilities of the opponent for producing evidence. Examples of such presumptions are the "no eyewitness" presumption,[83] and the presumption that a holder of a negotiable instrument had notice that it was obtained by fraud.[84] The former arises in an action for death by wrongful act, in which there are no witnesses available for the plaintiff. It is usually presumed that the deceased was free from contributory negligence. It has been said that this presumption is based upon the natural tendency toward self-preservation.[85] But that view has been properly criticized on the ground that said instinct would be operative whether there are eyewitnesses or not.[86] It would seem that

[81] 136 Ore. 1 at 8, 297 P. 1050, 74 A.L.R. 944 and annotations (1931).

[82] See Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 A. 644 (1934).

[83] Wolf v. New York, C. & St. L. R. Co., 347 Mo. 622, 148 S.W. (2d) 1032 (1941); Seiler v. Whiting, 52 Ariz. 542, 84 P. (2d) 452 (1938); 6 UNIV. DETROIT L.J. 96 (1943).

[84] See Bond v. St. Louis-San Francisco Ry. Co., 315 Mo. 987, 288 S.W. 777 (1926).

[85] 6 UNIV. DETROIT L.J. 96 (1943).

[86] Wolf v. New York C. & St. L. R. Co., 347 Mo. 622, 148 S.W. (2d) 1032 (1941). This case said that the presumption is based upon the necessities of the situation. Why? It is difficult to follow the court. The idea of a presumption being predicated upon necessity is discussed infra.

the presumption, like some other presumptions, is based upon the greater facility of the opponent for producing evidence. Such presumption may be regarded as similar in purpose to modern discovery devices, and therefore to involve no element of inference. Yet it is submitted that an inferential basis can be shown.

If the proponent does not have the benefit of an existing inference he is at least favored by a potential inference. This potential inference is based upon the inference which arises when a party fails to call witnesses or introduce other evidence within his power to call or introduce.[87] The withholding of evidence which a party is capable of producing is a type of spoliation. The inference is that the reason the evidence was not used was that it would have been adverse to the offering party had it been introduced. Inferences from this type of spoliation have been held to be drastic.[88]

In a situation in which the opponent has a decidedly superior means of producing evidence, the proponent is not entitled to an actual inference until the opponent has had the opportunity to produce evidence and has failed to do so. Since the proponent is called upon to produce evidence first, such an actual inference would not benefit the proponent in the first instance. But does not the law give the proponent, in this situation, the benefit of a *potential* inference, which will develop into an actual inference if the opponent eventually fails to offer the evidence he has the power to produce? If such evidence is produced, the potential inference is never actualized. In that way it can be said that any presumption based upon the superior capacity of the opponent to produce evidence is still based upon an inference at least potential.

The statutory presumptions offer no exception to the analysis here presented. They too may be analyzed as based upon inferences, i.e., upon the balance of probabilities. The probability of the existence of

[87] Donald v. Swann, 24 Ala. App. 463, 137 S. 178 (1931), cert. den. 223 Ala. 493, 137 S. 181; 34 CORN. L.Q. 637 (1949); 33 MINN. L. REV. 423 (1949).

[88] Prudential Ins. Co. of America v. Lawnsdail, 235 Iowa 125, 15 N.W. (2d) 880 (1944). Suit was by an insurance company to cancel an insurance policy with a cross bill for relief on the policy. The issue was whether the policy had been obtained by misrepresentation. Statements were made in the application which were without doubt untrue. Plaintiff insurance company contended that those false answers had been written by the insured. Defendant beneficiary contended that the insured had given correct answers to plaintiff's agent who wrote them down wrong. There was evidence that plaintiff had destroyed certain of its records which might have included entries confirming defendant's version of what occurred when the application was executed. The trial court found the issues for plaintiff but that finding was reversed by the supreme court which directed entry of a judgment for defendant. The action was based upon the inference resulting from spoliation.

a fact can never be known with certitude. It can only be approximated. The function of making such an approximation may fall to the court, the jury, or the legislature. In the usual case, the court makes the determination itself if the evidence is so clear that reasonable minds cannot differ; otherwise the determination is left to the jury. A statutory presumption[89] may be regarded as representing a legislative determination as to what inferences are permissible from a specified basic fact. The legitimacy of an inference is determined by reference to the usual human experience, with which members of a legislature should be as familiar as courts or jurors. Of course, the United States Supreme Court has held in *Tot v. United States*[90] that the legislature cannot create a presumption wholly divorced from an inference. The opinion in the *Tot* case brings out, however, at least by implication, that the power of the legislature to create a statutory presumption is not limited to those presumptions which have been judicially found to exist. It is clearly inferable that there is a permissible legislative margin between those presumptions which are judicially declared and those so lacking in any inferential basis as to be beyond the scope of legislative determination.

The preceding analysis should provide a solution for the problems of the disappearance of presumptions and of directed verdicts. It is submitted that all presumptions always disappear when sufficient evidence is introduced by the opponent to justify a finding against the presumption. That would follow from the very concept of the presumption, that of a procedural device requiring the production of evidence by the opponent. Once evidence is produced, the presumption has served its procedural purpose and is of no more utility in the case. It does not follow that the removal of a presumption by the introduction of evidence will necessitate a directed verdict against the proponent. The reason is that, although the presumption may disappear when rebutting evidence is introduced, the inference connected therewith may remain.[91] That inference will be weighed by the trier of the fact against the rebutting evidence.

The foregoing discussion has been predicated upon the premise

[89] As differentiated from a statutory prima facie case, sometimes called a presumption, discussed supra. The difference is that the court, in case of a true statutory presumption, will direct a verdict on the operative fact in issue if the opponent offers no rebutting evidence, whereas a statutory prima facie case only entitles the proponent to have his case submitted to the jury.

[90] 319 U.S. 463, 63 S.Ct. 1241 (1943).

[91] 9 WIGMORE, EVIDENCE, 3d ed., §2491 (1940). Bond v. St. Louis-San Francisco Ry. Co., 315 Mo. 987, 288 S.W. 777 (1926); Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65 (1924); see Barstow v. Federal Life Ins. Co., 259 Mich. 125, 242 N.W. 862 (1932).

that all, or practically all, presumptions are associated with permissible inferences. Two questions must here be faced: (1) Can the aforesaid premise be substantiated? (2) If there are presumptions which involve no element of inference,[92] what will be the effect upon the analysis heretofore made? To answer the first question an inquiry must be made as to why presumptions exist, i.e., why is the burden of producing evidence, at the risk of suffering an adverse directed verdict for failure, ever imposed upon the party who does not have the burden of persuasion?

Several reasons have been given for the existence of presumptions.[93] Although various sources do not enumerate them the same, the classifications given may be synthesized as follows:[94]

1. Social policy.
2. Balance of ability to obtain evidence.
3. Necessity, sometimes referred to as a matter of procedural expediency or procedural convenience.
4. Balance of probability.

Since it is the contention of this paper that there is little, if any, need for presumptions based upon other than the fourth enumerated ground, each of the grounds should be considered.

The first of the mentioned grounds is very general and could include all the others. It is true that policy considerations do and should affect the problem of judicial proof. But it seems that such an effect should be expressed by carefully locating the burden of persuasion rather than through the burden of producing evidence. As pointed out above, the problem of determining upon what party the burden of persuasion should be located must be kept distinct from the problem of determining whether that burden has been fulfilled. The first of these problems is answered by reference to considerations of social

[92] The number I situation as presented by the American Law Institute, MODEL CODE 315.

[93] See Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 A. 644 (1934); Wolf v. New York C. & St. L. R. Co., 347 Mo. 622, 148 S.W. (2d) 1032 (1941); Helman, "Presumptions," 22 CAN. B. REV. 118 (1944), discussing the debate by the American Law Institute and quoting from Professor Edmund H. Morgan at pp. 124, 125.

[94] Professors Morgan and Maguire enumerate seven reasons for presumptions in their casebook on Evidence, 3d ed., p. 77 (1951). The seventh is merely a combination of two or more of the other six. The first three are really different versions of variations of procedural necessity or convenience. It is said that some presumptions, for example the presumption of sanity, exist as a matter of convenience in excusing proof of facts which usually are not seriously contested. But it can well be argued that this is merely a result of the presumption, and that it is based upon the fact that most people are sane and that therefore the probabilities are that any particular person is sane.

policy; the answer to the second depends upon a balance of probabilities.

The second of the above-mentioned grounds for presumptions was relied upon by the prosecution in *Tot v. United States*.[95] The Supreme Court of the United States held, nevertheless, that such a balance of convenience in producing evidence is not enough, standing alone, to create a presumption. There must be a basis in logic inference, at least permissive. A permissive inference alone would be sufficient to justify a verdict for the proponent, but not sufficient to require one. The opponent's failure to produce evidence when he has the ability to do so may justify a directed verdict for the proponent.

The *Tot* case merely passed upon the constitutionality of a statutory presumption. It cannot be regarded as holding that a judicially-created presumption cannot be based upon the greater facility for producing evidence. But why should it? Normally, law suits should not be instituted unless the prosecuting party can obtain evidence upon all operative facts upon which he has the burden of persuasion. As a discovery method such a basis for a presumption may find support, especially as viewed historically. The opponent who has means of information would be forced to take the stand and subject himself to cross-examination. The sanction for compelling him to do so is the threat of a directed verdict against him if he fails. Such justification for a presumption may still exist, but its force is less striking in the light of modern types of discovery, including the power to call one's opponent and subject him to cross-examination. It would seem that the principal justification for such a presumption is the inference that if a party fails to produce evidence which is within his power to produce, the evidence would be against him if it were produced. Thus, it would seem that the second of the enumerated grounds for presumptions is based upon an inference or at least a potential inference.[96] Professor Morgan has indicated that in some presumptions the basic fact may form the basis of a logical inference, but one insufficient to support a verdict.[97] The potential inference arising from the fact that

[95] 319 U.S. 463, 63 S.Ct. 1241 (1943).

[96] This same question has been discussed supra where various presumptions, such as the "no eyewitness" presumption, were discussed, and it has been shown that said presumptions may be explained as based upon potential inferences.

[97] "Further Observations on Presumptions," 16 So. CAL. L. REV. 245 (1943). In that article, presumptions are classified in three categories: (1) cases in which the basic fact has no logical connection with the presumed fact, (2) cases in which the basic fact has some value as evidence of the presumed fact, but not sufficient to support a verdict, and (3) cases in which the basic fact is such strong evidence of the presumed fact that, in the absence of other evidence, a failure to find the presumed fact would be arbitrary.

the opponent may fail to produce evidence within his power to produce is not insufficient. It is analogous to the inference which arises from spoliation. Such an inference has been held to have compelling force.[98] For such a presumption to disappear when rebutting evidence is introduced means no more than the fact that the potential inference has failed to ripen into an actual inference.

The third of the bases for presumptions is said to be necessity. That implies that there are fact issues which cannot be decided without indulging in a presumption. Why would such issues exist? The burden of persuasion must be located somewhere. If it is impossible for either side to produce evidence, the result would normally be easy—the party with the burden of persuasion loses. Thus, it might seem that there would never be a necessity of arbitrarily creating a presumption.

If necessity may be the basis for a presumption it would certainly seem that there would be a presumption regarding the sequence of death when two parties die in a common catastrophe. Not all American authority recognizes such a presumption.[99] It has been considered that rules establishing the burden of persuasion as to particular issues are sufficient for procedural purposes.[100] If an impasse exists in which there is no evidence either pro or con upon some material issue, the ready solution is to find against the party who has the burden of persuasion. It may be objected that if the decision of a case depends upon the burden of persuasion, justice will not be sufficiently even, because the location of that burden may depend upon the procedural accident of how an issue happens to arise in a particular case.[101] However, the location of the burden of persuasion should be, and I believe usually is, determined from policy considerations.

It would seem from the analysis heretofore presented that all presumptions involve logical inferences and such may well be the case. Yet, it is not desired to make such an assertion dogmatically. Certainly many courts recognize presumptions which they believe have no basis in the usual experience of mankind. So far as I have been able to discover, those presumptions can be logically explained, but there are other presumptions, sometimes recognized, which cannot be so ex-

[98] Prudential Ins. Co. of America v. Lawnsdail, 235 Iowa 125, 15 N.W. (2d) 880 (1944). In a case in which the evidence was otherwise conflicting, destruction of evidence by the plaintiff was held to be sufficient to justify setting aside a finding for the plaintiff and entering one for the defendant.

[99] MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE, 3d ed., 77, 78 (1951).

[100] Carpenter v. Severin, 201 Iowa 969, 204 N.W. 448 (1925).

[101] Cf. Reliance Life Ins. Co. v. Burgess, (8th Cir. 1940) 112 F. (2d) 234, cert. den. 311 U.S. 699, 61 S.Ct. 391 (1940).

plained. As pointed out above, a presumption of death after seven years absence can be regarded as based upon natural inference. But obviously there is no reason to infer that death occurred at any particular time during the seven years, e.g., on the 365th day of the sixth year. In jurisdictions in which such a presumption is recognized it must be conceded that we have a presumption in which the basic fact is insufficient to support a conclusion that the presumed fact exists.

If, in some jurisdictions, presumptions are found which have no basis in logical inference, they, like all others, disappear once evidence is introduced. Although that result would necessitate a directed verdict against the proponent, it is difficult to see any objection to such action. It is said that a presumption should not be regarded as having been rebutted except by evidence believed by either the court[102] or the trier of the fact.[103] But why? It is easy to see why, if the presumption is based upon inference; on the other hand, if there is no logical inference, the verdict would be directed, not because the rebutting evidence is credited but because evidence is lacking on behalf of the proponent. The only value such a presumption could have would be to give a basis for deciding the case in the absence of any evidence whatever.[104] That value would seem to be gone once actual evidence is introduced. It may be that the proponent finds it difficult to obtain evidence, but the law has never given cause of action to a party without evidence merely because the obtaining of evidence is difficult or impossible.

The foregoing contentions may be summarized by the following propositions: (1) almost all presumptions include permissible inferences; (2) under the Thayer view all presumptions become inoperative with the introduction of rebutting evidence; (3) nevertheless, the inferences involved in said presumptions remain, and may present evidence sufficient to be evaluated by the trier of the fact, even though rebutting evidence has come forth. The question then arises, how, except in that rare minority of "non-inference" presumptions, can there ever be a directed verdict against a proponent who has the benefit of a presumption. Yet we know that directed verdicts do occur, and prop-

[102] Chaika v. Vandenberg, 252 N.Y. 101, 169 N.E. 103 (1929).

[103] Helman, "Presumptions," 22 CAN. B. REV. 118 (1944). At p. 124 reference is made to the debate by the American Law Institute. Professor Morgan is cited as taking the position indicated.

[104] This is not the situation in which a presumption is used as a discovery device. That situation contemplates superior knowledge on the part of the opponent. It has been shown above that a presumption predicated upon superior knowledge on the part of the opponent really involves an inference, at least potentially. Here, the hypothesis is that there is no actual knowledge and that neither side has better means of knowledge than the other.

erly occur in many cases. The view here presented must be able to account for that fact. Does the theory here expounded, in order to save the judicial voyager from the rock of Scylla throw him upon the bank of Charybdis? Has this theory proved too much? Has it followed from the attempt to show that the Thayer view does not require directed verdicts in a large portion of cases[105] in which presumptions have been met with rebutting evidence that directed verdicts could rarely if ever be given, even in what might otherwise appear to be appropriate cases? It is submitted that such is not the case. In order to assert that directed verdicts may still be readily available, it is necessary to maintain another proposition, one which, so far as I know, has never been formulated. The proposition is that although an inference attending a presumption may survive the evidence rebutting the presumption, the inference itself may be eliminated by sufficiently cogent rebutting evidence, thus making a directed verdict possible. If this is true, many cases which otherwise cannot be explained become intelligible, and many attempts at elaborate classification of presumptions become unnecessary.

The basic premise may be regarded as a heresy. It is that the court in directing a verdict is compelled to weigh evidence. An inference standing alone may be sufficient to carry a case to the jury but be so outweighed in the presence of rebutting evidence that a directed verdict is indicated. It is an orthodoxy that courts do not weigh evidence in deciding motions for directed verdicts. That proposition is particularly true when the weighing of evidence requires an estimation as to the relative credibility of witnesses. The function of evaluation is less exclusively the jury's, however, when weighing of evidence depends upon the strength of inference to be drawn from circumstantial evidence.[106] The difference would seem to be that there is such a strong inference that a witness, even though impeached, is telling the truth, that if there is testimonial evidence on both sides of a question it could rarely, if ever, be said that the weight of the evidence was manifestly on one side. But inferences from circumstantial evidence vary greatly in persuasive effect.

[105] Those cases represented by the American Law Institute's first category (MODEL CODE, p. 315) i.e., cases in which "the basic fact has not sufficient value as evidence to support a finding and there is no other evidence that the presumed fact exists." The position here taken is that the twofold classification in the Model Code is correct but that almost all presumption cases fall into the second category, i.e., cases in which "the basic fact has sufficient value as evidence of the presumed fact to support a finding."

[106] In Dent v. Foy, 214 Ala. 243 at 250, 107 S. 210 (1925), the court uses the following language: "Neither the verdict of a jury nor the finding of the register, given the same effect, is to be accorded that conclusive character which obtains when the finding is upon disputed facts depending upon the veracity of witnesses rather than a matter of judgment arrived at from opinion evidence aided by their own."

Courts have had difficulty in determining when a presumption disappears and when it does not, and they have attempted to answer the problem by classifying presumptions. The result of most of the cases can be rationalized by realizing that the problem is not one of determining when presumptions disappear, but of determining when evidence is sufficient to overbalance inferences so completely as to authorize directed verdicts. The problem of presumptions then becomes one aspect of the more general problem of directing verdicts. It is sound to regard the presumption as disappearing with the introduction of rebutting evidence leaving the case to stand as though there had never been a presumption. In such a state of affairs the court must decide whether to determine the issue itself or submit it to the jury. The most satisfactory test for directing verdicts is the "reasonable minds" test.[107] If reasonable minds cannot differ as to a particular operative fact, only a question of law is presented and the court must direct a finding as to that issue. If, on the other hand, reasonable minds can differ, the question must be presented to the trier of the fact.[108]

The presumption having disappeared with the introduction of rebutting evidence, the question of a proponent's being entitled to have a case which is based upon the surviving inference submitted to the jury therefore depends upon whether or not in view of the nature of rebutting evidence it can be said that reasonable minds would differ or agree. It is submitted that most of the cases can be explained upon that basis. The case of *Judson v. Bee Hive Auto Service Co.* is persuasive.[109] The presumption of agency and course of employment from ownership of a vehicle was there involved. The court specifically regarded said presumption as based upon a logical inference. In rebuttal the defendant introduced evidence to the effect that it operated a "drive urself" business, and that, at the time of the accident, the operator was a bailee for hire. The written contract showing the rental of the vehicle was placed in evidence. In holding that the trial court should have directed a verdict for the defendant the court said:

"Ordinarily, whether an inference or presumption has been

[107] It is sometimes said that the evidence must be considered in its aspect most favorable to the party against whom the verdict is to be directed. But that qualification principally means that in case of conflict between the testimony of witnesses, the court, in determining whether or not to direct, must consider only the testimony favorable to the party against whom the verdict would be directed, if at all. The reason for that may well be said to be that issues of credibility are always sufficiently doubtful that it cannot be said that all reasonable minds would agree.

[108] Michael and Adler, "The Trial of an Issue of Fact," 34 COL. L. REV. 1224, 1462 at 1488 (1934).

[109] 136 Ore. 1 at 14, 297 P. 1050 (1931).

overcome is a question for the jury, but if the evidence is of such character, that but one reasonable deduction can be made therefrom, the court may so declare as a matter of law. It is entirely reasonable that an inference may be drawn during one stage of the trial and a different one at a later time, after all the evidence is in the record. At the close of plaintiff's case in chief, it might have been reasonable, in view of proof of defendant's ownership of the automobile, to infer that Mills was driving the same for the owner's benefit; but would such inference still obtain after it had been shown by clear, positive, and uncontradicted evidence that Mills had rented the automobile from defendant, and was driving it for his own pleasure."

It has generally been considered that in the State of Ohio the jury determines whether or not the persuasive effect of a presumption has been equally balanced by rebutting evidence.[110] But in the recent Ohio case of *Brunny v. Prudential Insurance Company of America*[111] it was held that the rebutting evidence may be of sufficient cogency to authorize a directed verdict. The plaintiff in that case sued upon an insurance policy, contending that her husband, whose life had been insured, was dead because more than seven years elapsed since she last heard of him. The defendant offered cogent evidence, including a recent picture of the husband and his deposition, that the husband was still alive. In holding that the trial court should have directed a verdict for the defendant the court reaffirmed the usual "Ohio" rule, that a presumption remains until met by evidence which exactly equals it in persuasive force, and then said:

"A court should not invade the province of the jury, but in a case like the present one, where upon all the evidence adduced, reasonable minds could not fairly conclude that the presumption should stand, it disappears, and if in addition to such presumption, there is no evidence tending to show that the absentee is in fact dead, the duty devolves upon the trial court to direct a verdict or to render judgment for the defendant upon his motion therefor."

The result reached by the Ohio court shows the applicability of the analysis here suggested. Unfortunately, the court talked about reasonable minds being unable to conclude fairly that the presumption could stand. Under the Thayer view the presumption would disappear with the introduction of any evidence, but the inference attending the pre-

[110] Tresise v. Ashdown, 118 Ohio St. 307, 160 N.E. 898 (1928); Klunk v. Hocking Valley Railway Company, 74 Ohio St. 125, 77 N.E. 752 (1906).

[111] 151 Ohio St. 86 at 94, 84 N.E. (2d) 504 (1949).

sumption could not stand if the rebutting evidence was so persuasive that reasonable minds could not differ. As explained above, the results of cases can be reconciled more easily than their reasoning techniques. Although there are many different views as to the rebuttal of presumptions, cases can generally be explained by the theory here announced.[112]

[112] Reference will be made to only a few cases. The court in Ezzard v. United States, (8th Cir. 1925) 7 F. (2d) 808 at 812, noted in 10 MINN. L. REV. 542 (1926), was confronted by the statutory presumption that possession of narcotics created a presumption of illegal dealing therein. Defendant was arrested with a trunk containing narcotics in his possession. He proved (by his own testimony, so far as the court's opinion reveals) that he had no knowledge of the content of the trunk, and was hauling it as an accommodation for someone else. Apparently defendant was a respected member of the community, and his insistence that he was an innocent bystander was unimpeached. The court talks about inferences and presumptions interchangeably, and in holding that the trial court should have directed a verdict said: "It may be conceded that the strength or weight of presumptions is for the jury, but it is obvious that the law attaches to them slight consideration in the face of credible testimony leading to a contrary conclusion." The controlling issue in Beggs v. Metropolitan Life Ins. Co., 219 Iowa 24, 257 N.W. 445 (1934), was whether a life insurance policy had been effectively delivered to the insured before his death. A presumption of delivery arose from its possession by the insured. The defendant insurance company introduced the testimony of its agent to the effect that the policy had been given insured for purposes of inspection only and that the first premium had not been paid as required for the policy's effectiveness. The court regarded the presumption of effective delivery as based upon the usual experience of mankind that policies are not delivered for inspection only without a receipt being taken. The court held that the question was properly submitted to the jury, while indicating that the presumption (meaning inference) would have disappeared if conclusive evidence had been presented against it. See also Veihelmann v. Manufacturers Safe Deposit Co., 99 N.Y.S. (2d) 727 (1950), noted in 64 HARV. L. REV. 998 (1951); Collins v. Streitz, (9th Cir. 1938) 95 F. (2d) 430.

It is interesting to note how the modern cases of a single jurisdiction can be explained according to the analysis here advanced. The West Virginia courts have talked about many categories of presumptions: presumptions of fact, presumptions of law, legal presumptions, prima facie presumptions, rebuttable presumptions, etc. One searches in vain through the cases for an exact meaning of the different categories, and to determine whether there are that many different types or whether some of the terms used are different symbols for the same concept. Yet, the cases seem to be subject to quite a logical analysis so far as their factual situations are concerned. A United States circuit court of appeals had occasion in Mutual Life Ins. Co. v. Blodgett, (4th Cir. 1942) 126 F. (2d) 273, to interpret §48-8-1 of the West Virginia code providing for a presumption of death after seven years unexplained absence. The court stated that when rebutting evidence was introduced the presumption disappeared but that there was also an inference of death which remained. Similar language was used by the Supreme Court of Appeals of West Virginia in Weismantle v. Petros, 124 W.Va. 180, 19 S.E. (2d) 594 (1942). In that case the presumption of agency and course of employment from proof of ownership of a vehicle was involved. The owner and operator of the vehicle were brothers. Their father was in the hospital and their mother was visiting him. The operator brother took the vehicle to bring her home and was driving when the accident occurred. Both brothers testified that the operator brother took the vehicle on his own to bring the mother home. However, it was held that such testimony was not enough to create a sufficiently clear case of no agency to authorize a directed verdict for the owner brother, the defendant. The operator brother had been impeached by prior contradictory statements. The court talked about the presumption not disappearing unless credible evidence was introduced in rebuttal, but, obviously the testimony of the two brothers was sufficiently credible to prevent a directed verdict for the plaintiff on that issue. The court really meant that the inference of agency and scope of employment was not clearly overcome by such testimony. The issue in Antonowich v. Home Ins. Co., 116 W.Va. 155, 179 S.E. 601 (1935), was whether notice of loss had been given in time not to forfeit the right of recovery under an insurance policy. Appar-

The argument here presented may seem to be similar in result to the theory, underlying certain New York decisions, that a presumption is not so completely rebutted as to authorize a directed verdict for the opponent unless "substantial" evidence is introduced against it.[113] It

ently receipt of the notice was necessary. Plaintiff testified to the mailing and relied upon the presumption that a letter properly stamped, addressed and mailed is received. The chief of defendant's loss section testified that no such letter appeared in the file of the assured. It was held that such testimony was not enough to authorize a directed verdict for the defendant. It was indicated, however, that if the employee who receives the mail could testify that no such letter had been received, such testimony would have been sufficient. The aforementioned cases held that there were still questions for the jury notwithstanding the introduction of rebutting evidence. There are also cases which hold that directed verdicts are indicated. The case of Lambert v. Metropolitan Life Ins. Co., 123 W.Va. 547, 17 S.E. (2d) 628 (1941), involved the presumption that a violent death is accidental. Suit was upon a policy insuring against death by accident. Assured, a bank teller, was short in his accounts. When a bank examiner arrived unexpectedly, assured excused himself to go home for a few minutes. Shortly after his arrival at home a gunshot was heard and he was found dead. It was held that there should have been a directed verdict for the defendant because the presumption could not stand against the strong evidence of suicide. Actually, what the court's decision comes to is that reasonable minds cannot but conclude that the inference of suicide from the circumstances proved outweighs the inference of accidental death from the basic fact of violent death. The same presumption was involved in Beckley Bank v. Provident Life Ins. Co., 121 W.Va. 152, 2 S.E. (2d) 256 (1939). It was there held that the presumption of accident could not stand against the positive testimony of decedent's wife that she shot him. In Mullens v. Frazer, 134 W.Va. 409, 59 S.E. (2d) 694 (1950), suit was filed to set aside an alleged fraudulent conveyance. That the conveyance was in fraud of creditors was undisputed. That the grantee paid actual value was also undisputed. Whether or not the conveyance could be set aside against the grantee therefore depended upon whether he had actual notice of the fraud. The grantee was a brother-in-law of the grantor. From this evidence there was a presumption of guilty knowledge. However, the evidence also showed that the grantee lived a long distance from the grantor, gave up a good situation to move because of his health, and spent a considerable sum to improve the premises conveyed. From all of this it was held that the trial court was compelled to conclude that there was no actual knowledge on the part of the grantee. These cases show the confusion resulting from talking about what evidence is necessary to eliminate a presumption from a case. How much better to say that any evidence eliminates the presumption, and that, when eliminated, the court is merely presented with a standard problem of whether or not to direct a verdict.

The same situation would seem to exist today in Pennsylvania. After having long supported the view that a presumption shifts the burden of persuasion, the court seems to have adopted the Thayer view. In MacDonald v. Pennsylvania R. Co., 348 Pa. 558 at 567, 36 A. (2d) 492 (1944), the court uses strictly orthodox Thayer language and quotes from Thayer's PRELIMINARY TREATISE at page 339. Yet, in Conley v. Mervis, 324 Pa. 577, 188 A. 350 (1936), the court, recognizing the same general rule, clearly implies that the court will not withdraw a case from the jury unless rebutted by evidence which for some reason the court considers to be more persuasive than the presumption. There, a presumption of operation of a vehicle from proof that the license plates on this vehicle involved in the accident had been issued to defendant was rebutted by proof that defendant's plates had been stolen and used on another vehicle. The court stated that if such rebutting evidence had come from the defendant or his witnesses, the case would not have been withdrawn from the jury, but since it came from the plaintiff's own witnesses a directed verdict would be authorized.

[113] Chaika v. Vandenberg, 252 N.Y. 101 at 104, 169 N.E. 103 (1929); Pariso v. Towse, (2d Cir. 1930) 45 F. (2d) 962, applying New York law. Compare St. Andrassy v. Mooney, 262 N.Y. 368, 186 N.E. 867 (1933), which follows the analysis presented in this article.

is evident that the "substantial" evidence required by the New York courts is something more than what would be sufficient to sustain a verdict against the presumed fact. Evidence from one of the plaintiff's own witnesses[114] and evidence from a disinterested witness[115] have been held to be substantial and therefore sufficient to justify directed verdicts against the presumed facts. The method of analysis used by the New York courts involves a glaring ambiguity. It uses the term "rebut" in two senses. It is evident that one standard of evidence against the presumed fact is sufficient to rebut the presumption in the sense of preventing a directed verdict for the proponent, but that a higher standard is necessary to rebut the presumption in the sense of authorizing a directed verdict for the opponent. The Thayer view, as here analyzed, limits the concept of rebuttal to the first of the two meanings, i.e., a presumption is rebutted when sufficient evidence is introduced to prevent a directed verdict for the proponent. The case is then regarded as though there were no presumptions. Unless the evidence against the inference is sufficiently strong that reasonable minds could not differ, the case will go to the jury with the inference which remains after the presumption is rebutted. The concept of "substantial" evidence, as used by the New York courts, is the same as the concept of that amount of evidence which will be sufficiently strong that reasonable minds cannot differ in concluding against the proponent. Thus, the analysis of the Thayer view here given renders it consistent in result with the New York view.

It is also consistent with the practice followed by the Ohio courts. Those courts say that the presumption must be met by evidence sufficient to balance it in persuasive force. That is equivalent to saying the presumption is eliminated and the inference will permit a finding for the opponent unless balanced by evidence. Since reasonable minds generally differ on that question it will usually be decided by the jury. It has, however, been shown above that said question might be decided by the court.[116] In fact, the Supreme Court of Ohio has recently said[117] that "substantial" evidence against a presumption will eliminate it and bring about a directed verdict for the opponent. It is thus indicated that the "substantial" evidence of the New York courts is the same as the evidence necessary to balance a presumption of the Ohio courts and

[114] Potts v. Pardee, 220 N.Y. 431, 116 N.E. 78 (1917).

[115] Der Ohannessian v. Elliott, 233 N.Y. 326, 135 N.E. 518 (1922).

[116] Brunny v. Prudential Ins. Co. of America, 151 Ohio St. 86, 84 N.E. (2d) 504 (1949).

[117] Shepherd v. Midland Mutual Life Ins. Co., 152 Ohio St. 6, 87 N.E. (2d) 156 (1949).

the same reasoning makes both views consistent in result with the Thayer theory.

The objection has been made to the substantial evidence rule of the New York courts that it involves too much of an element of judgment on the part of the court in determining whether evidence offered against a presumption is substantial or not.[118] But that type of problem of judgment cannot be avoided in any case, nor should it be. Judges, not being automatons, are supposed to exercise judgment. The position here taken is that the problem of passing upon motions for directed verdicts in cases involving presumptions is no different from the problem of ruling upon such motions generally. If the reasonable minds test is used a problem of judgment will be involved in every case. Under the view that a presumption shifts the burden of persuasion to the opponent, problems of judgment will not be eliminated unless the position is taken that there can never be a directed verdict for the opponent. Otherwise, the court will be called upon to decide whether the opponent has met the presumption with evidence so conclusive as to entitle him to a directed verdict.

Admittedly there are situations in which some courts hold that a presumption, unsupported by other evidence, disappears upon the introduction of any testimonial evidence against the presumed fact, even though it came entirely from the opponent himself or from other interested witnesses. This situation causes no embarrassment since it can be explained in three ways: (1) The presumption disappears with the introduction of any rebutting evidence, leaving to the court the function of weighing the inference against the rebutting evidence. But a strong inference always exists in favor of testimonial evidence. An inference is merely a rule of probability. But improbable things frequently do happen. The probability in favor of the truth of testimony is such that courts may conclude that reasonable minds cannot weigh an inference against such testimony.[119] That might be true even though testimony comes from a party or other interested witness. All witnesses take an oath, are subject to the sanction of perjury prosecution, and are subject to cross examination. The Thayer theory, as here analyzed, does not require a directed verdict on such testimony. Most courts which purportedly follow that theory likely would not grant such a motion. The question is one of judicial judgment. (2) In many

[118] Morgan, "Further Observations on Presumptions," 16 So. CAL. L. REV. 245 at 254 (1943).

[119] This is not inevitably true even as regards testimony from unimpeached witnesses. Andrew Jergens Co. v. Conner, (6th Cir. 1942) 125 F. (2d) 686.

cases in which rebutting evidence by interested witnesses has been held to authorize directed verdicts the presumption involved was based upon the greater facility of the opponent for the obtaining of evidence. That type of presumption has been analyzed above as involving a potential inference which becomes an actual inference when evidence is not produced. If the opponent produces such evidence as he can, the basis for any inference is gone and the proponent fails because of his lack of evidence. It would seem to be axiomatic that parties who would prosecute law suits must produce evidence. It is difficult to think of a legal policy which would treat ignorance as the equivalent of proof. (3) Some courts may regard some presumptions as in no wise involving any logical inference. Such presumptions could exist only as a means of giving a basis for decision when no evidence is available. In such a situation it would seem that any evidence, however weak, would furnish the only basis upon which a case could be decided.

In conclusion let it be said that no contention is made that the analysis here exposed is generally followed, even by courts purporting to follow the Thayer view. The writer believes that some misconceptions regarding the Thayer theory have caused unnecessary opposition to that position. The cases are in hopeless confusion so far as reasoning techniques are concerned. The analysis here advanced will serve to reconcile many of the results reached if not the reasoning by which they have been reached. Basically the views here presented follow Thayer strictly. Most of the points here made have been presented by that learned author and by others. Since detailed familiarity with the extensive writing on this subject would be impossible it may be that no idea has been initially presented. The following thoughts which have been developed, however, were spontaneous with the writer: (1) the full realization of the purport and accuracy of Justice Holmes' dicta in *Greer v. United States*[120] to the effect that all presumptions are based upon probability, i.e., inference, (2) the realization that it is the inference and not the presumption that the court weighs against rebutting evidence, and (3) the realization that the problem as to the effect of presumptions is one phase of the broader problem of directing verdicts.

If it has any other effect than to impose the burden of producing evidence upon the party who does not have the burden of persuasion, the concept of a presumption confuses rather than facilitates the analysis of specific fact issues.

[120] 245 U.S. 559 at 561, 38 S.Ct. 209 (1918).