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## CONFLICTING PRESUMPTIONS: AN EVALUATION OF THE SOLUTION PROPOSED BY UNIFORM RULE 15

### I.

#### INTRODUCTION

*If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.*<sup>1</sup>

In his Preliminary Treatise on Evidence, Professor Thayer dismisses the doctrine of conflicting presumptions as "an exotic, ill-adapted to an English or North American climate."<sup>2</sup> Thayer's disciple, Dean Wigmore, in his treatise on evidence, states simply that presumptions "do not conflict."<sup>3</sup> The American Law Institute<sup>4</sup> and a few courts<sup>5</sup> also adopt this position that conflicting presumptions cannot arise in the trial of a case. It has been asserted, however, that most American courts do recognize a problem of conflicting presumptions and endeavor to solve it in each case, not by summarily abandoning both presumptions at the first hint of conflict as Thayer would have them do, but by weighing one against the other and giving effect to the stronger of the two.<sup>6</sup> Uniform Rule of Evidence 15, quoted above, gives recognition to this practice and offers a solution to the problem of conflicting presumptions which is more flexible and perhaps more realistic than the one proposed by Thayer. The purpose of this comment is to examine the Uniform Rule 15 proposal that conflicting presumptions should be balanced and the stronger one given effect. For purposes of contrast, there will also be a brief discussion of the Thayer-Wigmore approach.

### II.

#### THE NATURE AND PROCEDURAL EFFECT OF PRESUMPTIONS<sup>7</sup>

##### A. *Presumption Defined*

Generally, the term "presumption" describes a relationship between one fact or group of facts, called the basic fact (or facts) and another fact

1. UNIFORM RULE OF EVIDENCE 15.

2. THAYER, PRELIMINARY TREATISE ON EVIDENCE 343 (1898) [hereinafter cited as THAYER].

3. 9 WIGMORE, EVIDENCE § 2493, p. 292 (3d ed. 1940).

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

5. See, e.g., *Town of Lexington v. Ryder*, 296 Mass. 566, 6 N.E.2d 828 (1937); *Turner v. Williams*, 202 Mass. 500, 89 N.E. 110 (1909); *City of Montpelier v. Town of Calais*, 114 Vt. 5, 39 A.2d 350 (1944).

6. 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 37 (3d ed. 1961).

7. For more extensive discussions of the plethora of problems with which this area of the law is fraught, see Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291 (1927); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1 (1958).

or group of facts, called the presumed fact (or facts).<sup>8</sup> For convenience the basic fact may be called *A* and the presumed fact *B*. Any more specific definition in terms of describing the exact relationship between the basic and presumed facts would of necessity be a definition of one of the specific "types" of presumption. These are generally recognized to be three: conclusive, mandatory, and permissive.<sup>9</sup>

Conclusive presumptions are those which require the trier of fact absolutely to find *B* once *A* is established, *i.e.*, proof of fact *A* is the legal equivalent of proof of fact *B* and the opponent of the presumed fact may not attempt to rebut its existence. The presumption of a lost grant in adverse possession is an example of this type. It has been suggested that conclusive presumptions are not presumptions at all but substantive rules of law,<sup>10</sup> and in view of the fact that they are irrebuttable this would certainly seem to be the case.

Mandatory presumptions are those which *require* the trier of fact to find fact *B*, once fact *A* is established, if insufficient evidence is offered in rebuttal of the existence of the presumed fact, *i.e.*, given fact *A*, the trier must find fact *B* unless the opponent of the presumed fact has produced enough evidence to render the presumption of fact *B* unwarranted.<sup>11</sup> The presumption that a child born in wedlock is legitimate is an example of this type. Thayer,<sup>12</sup> Wigmore,<sup>13</sup> and the Uniform Rules of Evidence<sup>14</sup> indicate that these are the only true presumptions and they are the ones to which this discussion is primarily directed.

Permissive presumptions are those which *permit* the trier of fact to find fact *B* upon the establishment of fact *A* although the existence of *B* does not logically follow from the existence of *A*, *i.e.*, given *A*, the trier *may* assume *B*, though it does not logically follow, unless the opponent of the presumed fact has produced sufficient evidence to render the presumption unwarranted. These are purely artificial devices created by the courts to give a party, for reasons of policy, a procedural advantage he would not otherwise have. *Res ipsa loquitur* is, in the opinion of some commen-

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8. 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 31 (3d ed. 1961).

9. Presumptions are frequently dichotomized into those of law and those of fact. Where this is done the so-called presumptions of law are said to be the only true presumptions whereas the so-called presumptions of fact are merely inferences. 9 WIGMORE, EVIDENCE § 2491, p. 288 (3d ed. 1940). See also Bohlen, *supra* note 7. According to Thayer, however, such a distinction has "no special significance in the law of evidence." THAYER 339.

10. 9 WIGMORE, EVIDENCE § 2492 (3d ed. 1940); Chafee, *The Progress of the Law, 1919-1921: Evidence*, 35 HARV. L. REV. 302 (1922). See also THAYER 317-19 and Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 909 (1931), approving conclusive presumptions as a permissible form of judicial legislation.

11. As to the amount of evidence required to rebut the presumptions, see subsection B *infra*.

12. THAYER 317, 321, 326.

13. 9 WIGMORE, EVIDENCE § 2490 (3d ed. 1940).

14. UNIFORM RULE OF EVIDENCE 13 defines presumptions as follows: "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action."

tators, the prime example of a permissive presumption.<sup>15</sup> It is the factor that B may be presumed though it does not logically follow from A which distinguishes permissive presumptions from inferences. The latter are merely logical conclusions which the trier of fact is permitted to draw from certain facts in evidence, *i.e.*, given A the trier may assume B because the existence of B logically follows from the existence of A. Thus if X is proved to have been the agent of Y at a certain time, the trier may assume that he continued to be Y's agent for a reasonable period thereafter in the absence of evidence to the contrary.

### B. *Procedural Effect of Presumptions*

The burden of proof is composed of two elements: (1) the burden of producing evidence, which is the responsibility of seeing that there is introduced at trial sufficient evidence to support a finding in favor of the party having the burden, and (2) the burden of persuasion, which is the responsibility of seeing that the trier of fact is actually persuaded to find in favor of the party having the burden.<sup>16</sup> It is upon the burden of proof that presumptions have their effect, but whether that effect is only upon the burden of producing evidence or upon both the burden of producing evidence and the burden of persuasion is a question on which the courts are in dispute. The question is: what duty is imposed by a presumption on the opponent of the presumed fact? May he rebut the presumption merely by producing a required amount of evidence pointing to the non-existence of the presumed fact or must he persuade the trier of fact that the presumed fact does not exist?

According to the Thayer view the opponent has only the duty of producing sufficient evidence from which the trier of fact could reasonably conclude the non-existence of the presumed fact. Once he has produced this amount of evidence (and it makes no difference whether it is believed by the judge or the jury)<sup>17</sup> the presumption drops out of the case completely and has absolutely no effect on the determination of the existence or non-existence of the presumed fact.<sup>18</sup> It should be emphasized that under the pure Thayer view *all* presumptions have the effect of shifting the burden of producing evidence *only*; they never affect the burden of

15. 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 31-32 (3d ed. 1961). For a thorough discussion of the procedural effect of *res ipsa loquitur*, see Roberts, *supra* note 7, at 11.

16. MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 419-23 (4th ed. 1957). The authors suggest that the burden of producing evidence and the burden of persuasion are more accurately called the risk of non-production and the risk of non-persuasion respectively, since the burdens are discharged when the required amount of evidence has been introduced irrespective of whether it has been introduced by the party having the burden or by his opponent. *Id.* at 422.

17. *McIver v. Schwartz*, 50 R.I. 68, 145 Atl. 101 (1929).

18. See, *e.g.*, *Silva v. Traver*, 63 Ariz. 364, 162 P.2d 615 (1945); *Kirschbaum v. Metropolitan Life Ins. Co.*, 133 N.J.L. 5, 42 A.2d 257 (1945); *Strawhorne v. Atlantic Coast Life Ins. Co.*, 238 S.C. 40, 119 S.E.2d 101 (1961); MODEL CODE OF EVIDENCE rule 704 (1942).

persuasion. The so-called New York rule is, in effect, the Thayer rule modified by the requirement that to rebut the presumption the opponent must introduce "substantial" evidence.<sup>19</sup>

Diametrically opposed to the Thayer rule is the so-called "Pennsylvania rule"<sup>20</sup> under which a presumption imposes upon the opponent of the presumed fact not only the duty of producing evidence of its non-existence but also the duty of persuading the trier of fact that it does not exist. Many courts apply the "Pennsylvania rule" to some presumptions<sup>21</sup> although they apply essentially a Thayerian rule to most. In *Hinds v. John Hancock Ins. Co.*<sup>22</sup> the Supreme Court of Maine adopted a sort of "semi-Pennsylvania rule," holding that a presumption persists until the trier of fact is convinced that the non-existence of the presumed fact is as likely as its existence.<sup>23</sup>

Unlike Model Code of Evidence Rule 704 which expresses a pure Thayerian view of the procedural effect of presumptions, Uniform Rule of Evidence 14 offers a dual approach. If the facts giving rise to the presumption have some probative value as evidence of the presumed fact,<sup>24</sup> the presumption is rebutted only when the trier of fact is persuaded that the presumed fact does not exist. If the basic fact or facts have no such

19. See, e.g., *Pariso v. Towse*, 45 F.2d 962 (2d Cir. 1930).

20. Considering the confusion which exists in the Pennsylvania decisions on the effect of presumptions it seems anomalous, if not ridiculous, to refer to a "Pennsylvania rule" on the effect of presumptions. Until *Watkins v. Prudential Life Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934), most of the Pennsylvania decisions had held that a presumption shifts the burden of persuasion. See, e.g., *Linaweaver v. Wanamaker*, 299 Pa. 45, 149 Atl. 91 (1930); *Doud v. Hines*, 269 Pa. 182, 112 Atl. 528 (1921); *Vuille v. Pennsylvania R.R.*, 42 Pa. Super. 567 (1910). But there were a few decisions indicating that only the burden of producing evidence was affected. See, e.g., *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123 (1905); *Mansel v. Nicely*, 175 Pa. 367, 34 Atl. 793 (1896). *Watkins* was generally considered to have abolished in Pennsylvania the rule that presumptions shift the burden of persuasion and to have put Pennsylvania squarely in the Thayer column. But four years after *Watkins*, in *In re Grenet's Estate*, 332 Pa. 111, 2 A.2d 707 (1938), the Pennsylvania Supreme Court held that the presumption of payment of a judgment note arising from lapse of time had the effect of shifting the burden of persuasion. And later decisions have attributed the same effect to other presumptions. See, e.g., *Obici Estate*, 373 Pa. 567, 977 A.2d 49 (1953) (presumption of continuing domicile); *McNulty v. General Am. Life Ins. Co.*, 153 Pa. Super. 288, 33 A.2d 796 (1943) (presumption of death after seven years absence); *Sefton v. Valley Dairy Co.*, 345 Pa. 324, 28 A.2d 313 (1942) (presumption of agency). In addition the validity of reading *Watkins* as having changed the Pennsylvania law with regard to presumptions generally has been directly challenged. *Smith v. Hennessey*, 11 D.&C.2d 354 (1957); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 12-15 (1954). For further discussion of the confusion existing in Pennsylvania with respect to presumptions see Cooper, *The Procedural Effect of a Rebuttable Presumption of Law*, 23 U. PRR. L. REV. 685, 696-703; Levin, *supra* 12-20; Roberts, *supra* note 7, at 22-29.

21. See, e.g., Page v. Phelps, 108 Conn. 572, 143 Atl. 890 (1928) (presumption of undue influence); *Wyckoff v. Mutual Life Ins. Co.*, 173 Ore. 592, 147 P.2d 227 (1944) (presumption against suicide); *Peoples Nat'l Bank v. Manos*, 226 S.C. 257, 84 S.E.2d 857 (1954) (presumption of legitimacy).

22. 155 Me. 349, 155 A.2d 721 (1959).

23. See also *Diller v. North California Power Co.*, 162 Cal. 531, 123 Pac. 359 (1912); *Tresise v. Ashdown*, 118 Ohio St. 307, 160 N.E. 898 (1928).

24. The comment to UNIFORM RULE OF EVIDENCE 14 states, "Nearly all presumptions are of this sort."

probative value the presumption is rebutted, as under the Thayer approach, by the introduction of sufficient evidence to support a finding of the non-existence of the presumed fact.<sup>25</sup> The Supreme Court of Connecticut has approved another hybrid view. In *O'Dea v. Amodeo*<sup>26</sup> that court said, "No general rule . . . can . . . be laid down as to the effect of a particular presumption in the actual trial of a case, for this depends upon the purpose it is designed to serve."<sup>27</sup> Presumptions based on convenience<sup>28</sup> or probability,<sup>29</sup> said the court, cease to have effect when the opponent produces substantial countervailing evidence, but those which arise against a party because he has peculiar knowledge or ability to acquire knowledge of facts proving or disproving the presumed fact<sup>30</sup> impose upon him the duty of proving those facts peculiarly within his knowledge.<sup>31</sup>

### C. Instructing the Jury on Presumptions

Much has been written on the subject of how the jury should be instructed as to presumptions.<sup>32</sup> The great weight of authority supports the proposition that the jury should never hear the word "presumption".<sup>33</sup> Where a presumption has only the effect of shifting the burden of producing evidence, the determination as to whether sufficient evidence has been introduced to rebut the presumption rests entirely with the judge. If such evidence is introduced he merely eliminates the presumption from the case at that point. Where a presumption has the effect of shifting the burden of persuasion the judge need only inform the jury that one party or the other has the burden of persuasion on a certain issue without telling them why. However, this failure to supply the jury with a reason for allocating the

25. The drafters of the Uniform Rules of Evidence chose to follow the Model Code position with respect to presumptions in which the basic fact has no probative value as evidence of the presumed fact because the Supreme Court of the United States has held unconstitutional a statute which made the establishment of such a basic fact fix the burden of persuasion on the party against whom the presumption was invoked. *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929). The Court has also held unconstitutional a statute which made the establishment of such a basic fact shift the burden of producing evidence to the defendant in a criminal case. *Tot v. United States*, 319 U.S. 463 (1943).

26. 118 Conn. 58, 170 Atl. 486 (1934).

27. *Id.* at 60, 170 Atl. at 487.

28. *E.g.*, the presumption that the laws of a sister state are the same as those of the forum and the presumption of the survival after death of the others of one of several persons killed in a common disaster.

29. *E.g.*, the presumption that a letter properly addressed, stamped and mailed was received by the addressee and the presumption of death after seven years absence without tidings.

30. *E.g.*, the presumption of loss through the bailee's negligence on his failure to return the bailed property and the presumption that plaintiff's deceased was in the exercise of due care when killed by defendant's negligence.

31. *O'Dea v. Amodeo*, 118 Conn. 58, 61, 170 Atl. 486, 487-88 (1934).

32. See, *e.g.*, McCormick, *supra* note 7; McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185 (1938); Morgan, *Instructing the Jury Upon Presumptions and the Burden of Proof*, 47 HARV. L. REV. 59 (1933).

33. See, *e.g.*, *New York Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938); *Alpine Forwarding Co. v. Pennsylvania R.R.*, 60 F.2d 734 (2d Cir. 1932); *Orient Ins. Co. v. Lox*, 218 Ark. 804, 238 S.W.2d 757 (1931); *Ammundson v. Tinholt*, 228 Minn. 115, 36 N.W.2d 521 (1949).

burden of persuasion in a particular manner may tend to bewilder them. Because of this tendency, Professor McCormick has suggested that the jury be told that there is a presumption in favor of the existence of fact *B* and that they are to find fact *B* to be true unless they are persuaded that it is not.<sup>34</sup> But an instruction of this sort comes dangerously close to an instruction that the presumption is evidence of the presumed fact, a proposition which has been rejected by most authorities.<sup>35</sup> Presumptions are not evidence, *i.e.*, material to be weighed by the jury in reaching their conclusion, but rather aids to judicial reasoning by which the judge may determine which party shall have the burden of producing evidence or the burden of persuasion on a given issue.

### III.

#### THE THAYER-WIGMORE VIEW OF CONFLICTING PRESUMPTIONS

Thayer's summary denunciation of the doctrine of conflicting presumptions is followed in his text by this line of reasoning:

At common law our principal triers of fact are that changing untrained body of men the jury, to whom it would be idle to address such speculations on the subject as fill the books of the civilians; the considerations which are to govern and sway their thoughts must be large, simple, untechnical. Nor are these refinements much better adapted to the mental habits of our judges.<sup>36</sup>

Since the turn of the century, when this criticism was voiced, the questions which juries and judges have been called upon to resolve in the determination of the outcome of cases have become increasingly complex, so complex, in fact, that the mental process of determining the weights to be accorded two conflicting presumptions seems simple by comparison. Thayer's argument, therefore, has little validity as a reason for summarily deleting from the trial of a case all presumptions which are in conflict with other presumptions.

Wigmore's attack is more direct. The problem, as he sees it, is not one of *conflicting* presumptions, but one of *successive* presumptions. He argues thus: A presumption either does or does not operate against a given party at a given point in the trial. If it does, and he rebuts it by the introduction of sufficient evidence, then it drops out of the case. He may then succeed in creating by his evidence a second presumption which operates against his opponent who may in turn dispatch this second presumption by the introduction of contrary evidence. "But the same duty

34. MCCORMICK, EVIDENCE § 314 (1954).

35. U.S. *ex rel.* Scharlon v. Pulver, 54 F.2d 261 (2d Cir. 1931); Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 Atl. 644 (1934); Van Ausdall v. Van Ausdall, 48 R.I. 106, 135 Atl. 850 (1927); THAYER 314: "Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both." *Contra*, *In re Pitcairn's Estate*, 6 Cal. 2d 730, 59 P.2d 90 (1936); Siler v. Siler, 152 Tenn. 379, 277 S.W. 886 (1925).

36. THAYER 343.

cannot at the same time exist for both parties, and thus in strictness presumptions raising the duty cannot conflict.”<sup>37</sup> This argument has met with approval in a few cases. In *City of Montpelier v. Town of Calais*,<sup>38</sup> the leading case following the Thayer-Wigmore view, the question was which of two towns was liable for the funeral expenses of a pauper. During the trial two presumptions arose, the presumed fact of one being that plaintiff city’s overseer of the poor had the duty to care for the pauper and the presumed fact of the other being that he had no such duty. After quoting extensively from an earlier Vermont case<sup>39</sup> holding that a presumption shifts only the duty of producing evidence the court said:

Since under the rule adopted in the latter case the sole effect of a presumption is to fix the burden of producing evidence, it is a necessary corollary that conflicting presumptions are legal impossibilities, because the burden of producing evidence as to the same issue cannot be put upon both parties at the same time.<sup>40</sup>

The logic of the Wigmore argument seems, at first blush, to be unimpeachable. A closer examination, however, reveals that the argument leaves several matters unexplained. In the first place, what of the situation where the evidence introduced by one party gives rise to both of the conflicting presumptions? If that were the case the trial judge would have to decide immediately which presumption was stronger in order to fix the burden of producing evidence, he could not wait for the second party to introduce evidence neutralizing the effect of one or both of the presumptions thus solving the conflicting presumptions problem before it arose as suggested by Wigmore. In the second place, on the practical side, most American courts follow the Thayer view with regard to the effect of presumptions generally, yet they also indulge in the practice of balancing conflicting presumptions.<sup>41</sup> Apparently these courts see no inconsistency in balancing two presumptions whose effect is to shift only the burden of producing evidence. Alternatively, these courts may see the logical inconsistency of the practice but choose to balance the presumptions anyway for reasons of policy. Finally, it has been seen above that the Thayer view of the effect of presumptions is by no means the only one in use, and that even those courts which adopt the Thayer view as a general rule may

37. 9 WIGMORE, EVIDENCE § 2493 (3d ed. 1940).

38. 114 Vt. 5, 39 A.2d 350 (1944).

39. *Tyrell v. Prudential Ins. Co. of America*, 109 Vt. 6, 192 Atl. 184 (1937).

40. *City of Montpelier v. Town of Calais*, 109 Vt. 6, 14, 39 A.2d 350, 356 (1944). *Contra*, *McMahon v. Cooney*, 95 Mont. 138, 25 P.2d 131 (1933); “It is sometimes said that conflicting presumptions of law do not arise in the consideration of a cause; that they appear successively, and exist until overcome by another. But such a statement is a mere quibbling with terms. . . . One presumption of greater dignity may overcome another of less.” *Id.* at 143, 25 P.2d at 133.

41. *Compare* *Kirschbaum v. Metropolitan Life Ins. Co.*, 133 N.J.L. 5, 42 A.2d 257 (1945), declaring for the Thayer view of the procedural effect of presumptions, *with* *Sillart v. Standard Screen Co.*, 119 N.J.L. 143, 194 Atl. 787 (1937), balancing the presumption in favor of the continuance of life against the presumption in favor of the validity of marriage.

apply to some presumptions a different theory; to wit, one having some effect on the burden of persuasion. Where this is done the major premise of the Wigmore argument — presumptions have the effect of shifting only the burden of producing evidence — is gone and the whole argument falls to the ground.<sup>42</sup>

#### IV.

### THE UNIFORM RULE 15 APPROACH TO CONFLICTING PRESUMPTIONS

#### A. *The Scholars*

The major support for the technique for dealing with conflicting presumptions suggested by Uniform Rule 15 is found in the fact that it represents, far more than the Thayer approach, the actual practice of a majority of American courts. However, there is also scholarly support for the Uniform Rule 15 position, primarily in the person of Professor Edmund M. Morgan.<sup>43</sup> Professor Morgan's dispute with the Thayer approach goes to its very root, *i.e.*, the proposition that a presumption shifts only the burden of producing evidence. The Thayer approach, Morgan contends, is fundamentally unsound in that it fails to take account of the reasons behind the creation of various presumptions.

To contend that a presumption which has behind it only considerations of convenience should have the same procedural consequences as one in accord with the normal balance of probability or supported by accepted ideas of desirable social policy, or both, is to argue for a crass rule of thumb and to approve a sort of action in this field which provokes severe condemnation in most others.<sup>44</sup>

Morgan urges adoption of Professor Bohlen's suggestion<sup>45</sup> that a presumption should affect the burden of proof or the burden of persuasion depending upon the purpose for which the presumption was created.

Professor Morgan is also of the opinion that presumptions should be classified according to the reasons behind their creation and that where there is a conflict between two presumptions of different classes the one which should prevail is that which belongs to the class supported by the weightier reasons; if both presumptions are of the same class, then both should be dropped from the action.<sup>46</sup> The advantage of such a classification

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42. It should be noted that a trial judge could, for reasons of convenience, decide to eliminate both conflicting presumptions from the action notwithstanding that they have the effect of shifting the burden of persuasion. Indeed, Uniform Rule 15 provides that this should be done where neither presumption is supported by weighty considerations of policy or logic.

43. See Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 916-34 (1931).

44. *Id.* at 924.

45. See Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920), reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* at 636 (1926).

46. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 931-32 (1931). See also 1 MORGAN, *BASIC PROBLEMS OF EVIDENCE* 32-34 (3d ed. 1961).

is that it provides for greater uniformity of decision than the Uniform Rule 15 proposal; the courts are provided with a workable standard to which they can refer in resolving conflicts. The disadvantage of such a system, however, is that if too rigidly applied it may lead to results which are both unsound and unfair in those cases where a peculiar set of circumstances calls for an alteration of the weights to be accorded the presumptions.<sup>47</sup> It will be noted that Uniform Rule 15 is stated in very general terms thus allowing the courts a wide discretion in determining which presumption is supported by "the weightier considerations of policy and logic" under all the circumstances of the case.

Professor Levin<sup>48</sup> has praised the Uniform Rules of Evidence for adopting the "Pennsylvania rule" on the effect of presumptions at least as to presumptions whose basic fact has some "probative value as evidence of the existence of the presumed fact."<sup>49</sup> He questions the desirability of the conclusion reached by Thayer and Wigmore on conflicting presumptions while characterizing the Uniform Rule 15 approach as an immediate advantage of the Uniform Rules of Evidence.<sup>50</sup>

### B. *The Cases*

The practice of balancing conflicting presumptions according to the reasons supporting them first appears in the case of *Rex v. Twynning*.<sup>51</sup> In that case Mary had married Richard and had co-habited with him for only a few months before he "enlisted for a soldier," went abroad, and was not heard from again. A little more than a year after Richard's departure, Mary married Francis with whom she co-habited and by whom she had children. Six years after the second marriage took place Mary and her children were removed by officers of the crown to the town of Twynning which was the place of Mary's legal residence and, since she was a pauper, the community responsible for her care. The town refused to accept responsibility for the care of the children contending that since Mary had a husband living at the time of her marriage to Francis, the marriage was invalid and the children were illegitimate. They were therefore the responsibility of the town in which they were born and not the town of their mother's legal residence. On the issue of the validity of the second marriage two conflicting presumptions arose: (1) since at the time of Mary's second marriage Richard had been ab-

47. Another possible system of classifying presumptions would be to ascribe a specific weight or force to each individual presumption. Although open to the same objection as the Morgan system, the more detailed system would certainly have the advantage of greater procedural efficiency. The task of grading every presumption in existence, however, has been appropriately characterized as an "esoteric exercise in abstruse categorization." Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 475, 482 (1959).

48. Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1 (1954).

49. UNIFORM RULE OF EVIDENCE 14(a).

50. Levin, *supra* note 42, at 21-22.

51. 2 B. & Ald. 386 (1819).

sent for only one year, it was presumed that he was still alive and thus it was impossible for Mary to contract a valid marriage. (2) the second marriage was presumed to be valid or, in other words, Mary was presumed to be innocent of crime. The Court treated the case as if it were a criminal prosecution for bigamy and held that in order to establish the invalidity of the second marriage, it was necessary to *prove* that Richard was alive at the time of the second marriage and that a mere presumption that he was still alive would not suffice. The presumption of validity of marriage, said the court, overcame the presumption of life and the party attacking the marriage had the burden of proof.<sup>52</sup>

Under the Thayer view, the approach taken by the court was clearly wrong. Both presumptions should have been eliminated from the case regardless of the strong social policy behind the presumption of the validity of marriage, and regardless of the fact that due to the hazardousness of the first husband's occupation it was as likely, if not more likely, that he was dead at the time of the second marriage than that he was alive. Under the view espoused by Uniform Rule 15, however, the court's resolution of the problem was correct. The social policy behind the presumption of the validity of the second marriage was properly considered and that presumption accorded greater weight than the opposing one which had no support in social policy and under the circumstances only questionable support in logic.

If the Court had followed the Thayer approach, the situation would have been this: The plaintiff town would have begun the action with the burden of proving that Mary's children were illegitimate. In order to meet this burden, plaintiff would have introduced evidence of Mary's marriage to Richard only one year before her marriage to Francis. Since a person is presumed to remain alive for seven years after departure, this evidence would have created a presumption that Richard was alive at the time of the second marriage. Defendant, the Crown, in support of the legitimacy of the children would have introduced evidence that the husband was engaged in a dangerous occupation (soldier) and that there had been no word of him for one year. This would have been sufficient evidence, under the Thayer rule, to rebut the presumption of continued life since a reasonable jury could find on defendant's evidence that Richard was dead at the time of the second marriage. The evidence of Mary's marriage to Francis would ordinarily have created a presumption that the marriage was legitimate but that presumption would already have been rebutted by plaintiff's evidence of the prior marriage since that evidence was sufficient to support a finding that Richard was alive at the time of the second marriage. The court would have sent the case to the jury on the evidence telling them nothing of the presumptions which had arisen and been destroyed by the production of evidence. In favor of the invalidity of the marriage there was the evidence that Mary's

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52. *Id.* at 389.

first husband was seen alive and in good health just one year before her second marriage. In favor of the validity of the marriage was the fact that he was engaged in a dangerous occupation and, at the time of the trial, had not been heard of for seven years. On these facts the jury could have resolved the question in favor of the validity of the marriage even without the presumption, but they could also have resolved the issue in favor of the invalidity of the marriage. By balancing the conflicting presumptions and retaining in the action the one in favor of the validity of the second marriage the court made it more likely that the jury would find affirmatively on that issue. It thereby protected a strong interest in favor of the legitimacy of children while it depressed the hardly comparable interest of the town in not having to support persons it is not legally obligated to support.

Where, as in the *Twynning* case, the presumption of the continuance of life conflicts with the presumption of the validity of marriage, and therefore the presumptions of innocence of crime and legitimacy of children born in wedlock, the courts are almost unanimous in holding that the latter presumption prevails over the former.<sup>53</sup> For example, in *Sillart v. Standard Screen Co.*<sup>54</sup> plaintiff sued for workmen's compensation benefits as the wife of the deceased employee. The defense was that plaintiff was not the wife of the decedent because at the time of her purported marriage to him her first husband, from whom she was not divorced, had been missing for only five years. The Supreme Court of New Jersey pointed out that the presumption of the validity of marriage was one founded on public policy and innocence of crime ". . . and it is well settled that such presumptions overcome the presumption of the continuance of the life of a person even three or four years absent."<sup>55</sup>

The prevalence of the presumption of innocence of crime over lesser presumptions has also been declared in circumstances other than the marriage cases. *McMahon v. Cooney*,<sup>56</sup> for instance, saw a conflict between the presumption that the laws of a sister state are the same as the laws of the forum and the presumption that the law has been obeyed. The court held that the former presumption, based largely on convenience, is inferior to the presumption of innocence and must give way to it. In *Excelsior*

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53. See, e.g., *Murchison v. Green*, 128 Ga. 339, 57 S.E. 709 (1907); *Smith v. Fuller*, 138 Iowa 91, 115 N.W. 912 (1908); *Keller v. Linsenmyer*, 101 N.J. Eq. 664, 139 Atl. 33 (1927); *Palmer v. Palmer*, 162 N.Y. 130, 56 N.E. 501 (1900); *In re Thewlis' Estate*, 217 Pa. 307, 66 Atl. 519 (1907); *Town of Greensborough v. Town of Underhill*, 12 Vt. 604 (1839). *Contra*, *Turner v. Williams*, 202 Mass. 500, 89 N.E. 110 (1909).

Note that there may be circumstances under which the presumption of the continuance of life is supported by such overwhelming probability that even the presumption of innocence of crime and legitimacy of children must fall before it, as, for example, where the previous spouse was seen alive a few days before the second marriage. See *State v. Plym*, 43 Minn. 385, 45 N.W. 848 (1890); *Boudinier v. Boudinier*, 203 S.W.2d 89 (Mo. 1947).

54. 119 N.J.L. 143, 194 Atl. 787 (1937).

55. *Id.* at 146, 194 Atl. at 788.

56. 95 Mont. 138, 25 P.2d 131 (1933).

*Mfg. Co. v. Owens*,<sup>57</sup> X had possession of a promissory note on which he was maker thus creating a presumption that the note had been paid. X had also made an assignment of all his property for the benefit of his creditors. The status of his assets was such that if he had in fact paid the note he had nothing left to assign to his creditors and the assignment was fraudulent. The court held that the presumption that the note had been paid was overcome by the presumption that the assignment to the creditors was not fraudulent. Moreover, it has been asserted that ". . . no legal presumption is so highly favored as that of innocence; ordinarily most other presumptions yield to it in case of conflict."<sup>58</sup>

The presumption of innocence is not the only one supported by strong social policy which has been held to prevail over other presumptions not so supported. In *Turro v. Turro*<sup>59</sup> the infant plaintiff, who was the posthumous child and sole heir of his intestate father based his claim to certain land on a deed made to his father as grantee. Defendant, plaintiff's paternal grandfather, had paid the purchase price to the grantor named in the deed. Two presumptions arose: (1) the fact that defendant paid the purchase price created a presumption that he intended the grantee to take title in trust for him, *i.e.*, there was a presumption against a gift (2) since, however, the grantee was the defendant's son a presumption arose that in paying the purchase price defendant intended a gift. In holding that the second presumption took precedence the court stated first that presumptions not heavily fortified by policy or probability disappear from a case when sufficient evidence is adduced which would support a finding of the non-existence of the presumed fact, in other words, such presumptions are governed by the Thayer rule and when two such presumptions conflict both may properly be dropped from the case. "But . . . where one of two conflicting presumptions rests on substantially stronger considerations of policy or probability, it displaces the weaker one and stands alone in the action."<sup>60</sup> The presumption in favor of the integrity of judicial decisions has been vigorously protected when threatened by a contradictory presumption. Thus, where on rehearing of a foreclosure action in which the plaintiff had had judgment, defendant contended that the record with the original order of foreclosure did not show compliance with the statutory requirements of notice and that there was a presumption that the clerk had entered all papers filed in connection with the action, the court held that this presumption was overcome by the stronger presumption that the court in awarding foreclosure had acted within its jurisdiction, *i.e.*, only after all statutory requirements had been fulfilled. Pointing out that a judgment or order of a court should be set aside only upon clear, satis-

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57. 58 Ark. 556, 25 S.W. 868 (1894).

58. 1 JONES, EVIDENCE § 113, p. 196 (5th ed. 1958). See also *McArthur v. State*, 59 Ark. 431, 27 S.W. 628 (1894); *Holtan v. Beck*, 20 N.D. 5, 125 N.W. 1048 (1910). *But see*, note 47, *supra*.

59. 38 N.J. Super. 535, 120 A.2d 52 (1956).

60. *Id.* at 540, 120 A.2d at 55.

factory, and convincing evidence, the court said that to hold otherwise ". . . would subject every order and judgment to uncertainty and make their integrity depend upon the question of whether or not a ministerial official had fully performed his statutory duty".<sup>61</sup>

### C. *The Analysis*

Thayer and Wigmore, probably the most respected authorities in the field of evidence, laid down a simple rule for courts to follow when confronted with conflicting presumptions: drop both from the action and send the case to the jury on the evidence. Most American courts, however, have ignored the proposed simple rule and have chosen to apply the somewhat complex one that conflicting presumptions should be weighed according to the reasons supporting them and effect given to that one supported by the worthier reasons. The question arises, why has the Thayer-Wigmore approach been rejected in favor of the one embodied in Uniform Rule 15.

It is submitted that the answer lies in the use of presumptions by the common law judges as a device "to control the jury in its function of fact finding."<sup>62</sup> It is common knowledge that the courts, learned in the law and possessed of a healthy fund of experience in the trial of cases, have developed certain ideas as to what is a fair and reasonable resolution of certain types of cases. Moreover, there are certain interests which the courts deem worthy of protection and which interests they have moved to protect by wrapping them in presumptions of greater force than the ordinary presumption. For example, one who attempts to rebut the presumption of legitimacy may find that he can do so only by proof that is "not only clear, direct and satisfactory, but irrefragable as well."<sup>63</sup>

As dealers in theories Thayer and Wigmore may lay down a rule to be universally applied to all presumptions under all circumstances, and certainly such a rule has the advantages of simplicity and theoretical purity. But the courts, as dealers in practical trial situations, may find presumptions a useful device with which to bring about, or attempt to bring about results which are deemed to be fair and reasonable under all the circumstances. So, where a court is presented with conflicting presumptions rather than drop both from the action and thus lose a powerful instrument of control over the outcome of the case, *it will balance the interests protected by each presumption*, choose the one most worthy of protection and retain the presumption which protects it. Evidence that this is the practice of some courts is not wanting. Said one court, "Rather than rip up such a judgment and a sale under it, both of them so old, *any presumption*

61. *Burgess v. Lasby*, 91 Mont. 482, 488, 9 P.2d 164, 168 (1932).

62. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 909 (1931). See also *Lishon v. Lyman*, 49 N.H. 553 (1870): "In each instance a critical examination is to be made to ascertain whether that which is asserted as a legal presumption is anything more than a conclusion of fact at which the court may think the jury ought to arrive." *Id.* at 564.

63. Levin, *supra* note 48, at 20. *Accord*, *In re Kerwin's Estate*, 371 Pa. 147, 89 A.2d 332 (1952); *In re Mays' Estate*, 141 Pa. Super. 479, 15 A.2d 569 (1940).