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AN INTRODUCTION TO THE STUDY OF PRESUMPTIONS

Ernest F. Roberts†

"Thayer, Wigmore, and their disciples use presumption in a more restricted sense: Given the existence of A, the existence of B must be assumed. A is the basic fact, B the presumed fact."¹

I. HOW EVIDENCE OF THE BASIC FACT IS INTRODUCED.

A. The Trial Scene:

By way of introduction let there be hypothecated jurisdiction X, within which sits a superior trial court with jury. For the determination of "facts" this court relies upon either the judge or the jury, depending upon the proclivities of counsel, so that it may be best to label the fact-finding machinery of the court the "trier of fact." Alternatively, the conduct of the judicial process in all of its other manifestations comes within the province of the judge, acting as, and herein designated as, the "law giver."

For the sake of brevity, questions of fact, law and discretion will be defined in the following manner. Questions of fact are those questions to which there are two right answers and they are answered by the trier of fact; i.e., if an issue is properly sent to the trier of fact, a verdict for either party normally will be upheld.² On the other hand, there is only one correct answer to a question of law, the answer to

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¹ Morgan, Presumptions, 12 Wash. L. Rev. 255, 257 (1937).

² For the purpose of this article the problem sent to the trier of fact is a group of facts upon which the trier must come to a conclusion either yes or no, i.e., that defendant was or was not negligent, that the letter was or was not sent, etc. The term "right," of course, refers to right insofar as the juridical system involved is concerned and is not used in any metaphysical sense.
which is given by the law giver; because if he errs in ruling as a matter
of law, the judge is subject to reversal by the tribunal above. Para-
doxically enough, it is a question of law whether or not a question of
fact exists for the trier of fact to operate upon. Lastly, a question of
discretion may be summarily categorized as a question of law to which
there are two right answers."

Not only is the trier of fact limited to finding the ultimate facts
in the case upon the evidence introduced by the litigants, but also
the scope allotted to the operations of the trier of fact by definition
assumes that evidence is introduced. Hence, given issue B as the point
at odds between the parties, and presuming that the proponent has
the burden of proving B, the proponent of yes-B, must introduce at least
"some" evidence yes-B\textsuperscript{4} or suffer a nonsuit or directed verdict,\textsuperscript{5} for
the law will not allow the trier of fact to operate in vacuo. But how
much evidence yes-B must the proponent of B introduce in order to
become entitled to have the trier of fact ponder the question? Enough
that the law giver will be satisfied that a reasonable man could posit
upon it a finding of yes-B.\textsuperscript{6} This, then, is known as the "burden of
proof"\textsuperscript{7} in its first sense, that of the risk of introducing some evidence
or losing as a matter of law.\textsuperscript{8}

If the proponent of B does introduce some evidence yes-B and
thereby entitles himself to reach the trier of fact, what must the opponent
do? The burden has now shifted to him, but, unlike the first burden
of the proponent, it is not a mandatory one. Instead the opponent
receives the option to proceed or go forward with evidence no-B or,
alternatively, merely to rest his case. The latter he can do because,
while having overcome the risk of introducing some evidence, the pro-

250 (1949): "Insufficient evidence, as presently understood, does not mean absolutely
no evidence but evidence which is so slight as to be in the eyes of the law no evidence;
or, differently stated, evidence which amounts to no more than a scintilla." See also
9 Wigmore, Evidence § 2494 (3d ed. 1940).
5. 9 Wigmore, Evidence § 2495 (3d ed. 1940); Wigmore, Evidence § 449 (Stud.
ed. 1935).
6. 9 Wigmore, Evidence § 2494 p. 299 (3d ed. 1940); "Are there facts in evidence
which if unanswered would justify men of ordinary reason and fairness in affirming
the question which the plaintiff is bound to maintain?"
7. This phrase, along with "presumption," has been labelled the "slipperiest"
in the family of legal terms. McCormick, Charges on Presumptions and Burden of
Proof, 5 N.C.L. Rev. 291, 295 (1927); McCormick, Evidence § 308 (1954). See
Thayer, Preliminary Treatise on Evidence at the Common Law 353-389 (1898).
(Hereinafter cited as Thayer, Treatise.)
8. Also called "the duty of producing evidence to the judge." 9 Wigmore, Evidence
§ 2487 (3d ed. 1940). See also Morgan, Maguire and Weinstein, Evidence Cases
ponent has not yet divested himself of the burden of proof in the second sense; that is, of persuading the trier of fact yes-B. This the proponent must do in the sense that he must move the trier of fact from a state of *tabula rasa* to a state of mind in which the trier of fact accedes to the proposition that yes-B is true so far.\(^9\) The opponent, therefore, may risk all on the divination that the proponent has not so persuaded the trier of fact and rest, or, in the alternative, he may himself proceed to introduce evidence no-B in order to detract from the force of the proponent’s case.\(^10\)

Who is to say who has the burden of proof in the sense of both the risk of introducing some evidence and of persuading the trier of fact? In the instance of an ordinary tort action, for example, the burden on the issue of defendant’s “negligence” is upon plaintiff, who must persuade the trier of fact that an accident occurred involving both plaintiff and defendant; that plaintiff was harmed; that the accident was the cause of this harm; that defendant ought to have foreseen the unreasonable risk of such harm; and that defendant violated the appropriate standard of care. Alternatively, where once the plaintiff also had the burden of showing his own freedom from “contributory negligence,” modern practice places this onus on defendant, who, thereby, becomes himself a proponent upon this particular issue.\(^11\) What, then, are the rules that determine the allocation of these several burdens? Unfortunately, this remains an *ad hoc* affair depending upon either the policy predilections of the particular tribunal, or, more likely, a tradition of stare decisis, the policy basis of which was forgotten long ago.\(^12\)

While it has been said that the proponent must convince the trier of fact that yes-B is “true so far,” what is meant by this? It is axiomatic in the ordinary civil case that the proponent must convince the trier of fact that yes-B is true “by a preponderance of the evidence,”

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9. As to how far, see text at note 13 infra.


11. But see Hanson v. Trust Co., 380 Ill. 194, 43 N.E.2d 931 (1942); Feurman v. Rourke, 133 Me. 466, 180 Atl. 314 (1935).

12. Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, 911 (1931): “... [H]ere [are] at least four a priori tests ... . These respectively make it fall upon (1) the party having the affirmative of the issue, (2) the party to whose case the fact in question is essential, (3) the party having peculiar means of knowing the fact, and (4) the party who has the burden of pleading it ... . [F]requently to apply one is to repudiate another ... . The real decision is made upon the judicial judgment based upon experience as to what is convenient, fair, and good policy ... .” See 9 Wigmore, Evidence § 2486 (3d ed. 1940); Wigmore, Evidence § 446(1) (Stud. ed. 1935).
i.e., that yes-B is "more probably true than not true."\textsuperscript{13} Viewed in this light, therefore, the proponent's burden of persuasion is designated the "risk of non-persuasion,"\textsuperscript{14} because if the proponent does not move the trier of fact into this state of mind, he loses.\textsuperscript{15} A state of equilibrium, however, is not enough; the trier of fact must come to accept yes-B as being 51-49 true or it must find in the opponent's favor.\textsuperscript{16} And while many essays have been written trying to analyze the "real" meaning of preponderance, and while the courts more often than not still think in terms of primitive word-magic about this topic,\textsuperscript{17} it is probably fair to observe that the proponent simply has to propel the trier of fact into believing B is true to the extent that the trier of fact is willing in good conscience to take a certain amount of money and award it to the proponent at the opponent's expense.

This does not mean, however, that the trier of fact runs, or is allowed to run, amok. The calculated solemnity of the proceedings, the very majesty of the judicial machinery, and the seriousness of the occasion tend to keep the jury \textit{qua} trier of fact restrained. Further, the subconscious realization that "There but for the grace of God go I" inculcates a mood of earnest seriousness, inspiring the jury to act as reasonably as the inherent capacities of the human animal will allow. But after the rules of tort liability have been explained to the jury by the judge, or after the involved charge in a first degree murder case has been recited, something besides pure reason and the rule of law accompanies the jury into their deliberations. This something else may be described as a kind of folk-conscience. These extra-judicial


\textsuperscript{15} In Winans v. Attorney General, 119041 A.C. 287, 289, when the Lord Chancellor could not reach a satisfactory conclusion with respect to whether or not B was true, he resolved the enigma against the proponent, observing that "... the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insolvable problem, because it directs me in my present state of mind to consider upon whom is the burden of proof."

\textsuperscript{16} Schaumatically any "quantum" of proof equals the product of [quality X quantity X credibility]. By analogy to solid geometry, if both sides offer evidence in a civil case, the proponent, in order to prevail, must create a cube of acceptance in the mind of the trier of fact, the volume of which is greater than that of his opponent's quantum.

\textsuperscript{17} Typical of this attitude is Botta v. Brunner, 138 A.2d 713, 717 (N.J. 1958): "It is said occasionally that the phrases, 'preponderance or greater weight of the evidence,' ... are illusory; that to the layman they represent distinctions and not differences. We cannot agree. These traditional devices ... have a long history of distinctive connotations ... ." But to whom are the connotations distinctive? See Larson v. Jo-Ann Cab Corp., 209 F.2d 929 (2d Cir. 1954); McCormick, \textit{Evidence} § 319 (1954).
forces are best illustrated, perhaps, in the classic murder case where
the defendant, who, regardless of his own worth, is not a repulsive
individual, shoots down the most obnoxious man in the community
because the honor of defendant’s wife is somehow at stake.18

In the typical trial these forces are probably a relatively minor
factor, at least where the feelings of the jury for either litigant are
not extraordinarily strong one way or the other and the facts to which
the law applies are relatively clear. But given stronger feelings in the
community, or facts less capable of an obvious resolution, then the trial
will take on all of its unpredictable and essentially democratic color
which historically has surrounded it in Anglo-Saxon climates.19

B. Testimonial Evidence:

How does the proponent of B proceed to introduce evidence of
yes-B, which, if believed, will persuade the trier of fact that B is more
probably than not true? Usually this will be done by calling to the
stand persons who have witnessed the event B1 and who, under oath,
will relate to the trier of fact what they have experienced. This, then,
is the “testimonial sequence.”

Thus, it is said that if the proponent is suing for an alleged
assault and battery, issue B becomes “did defendant hit plaintiff?”
The proponent alone may testify yes-B, or he may call several other
persons who swear that they have witnessed the event and that yes-B
is true. But the actual event, B1, the objective reality of the situation,
can never again be experienced by either the participants, the wit-
nesses or the trier of fact; it can only be recreated in the mind of the
trier of fact by word-pictures which the several witnesses give from
the stand. Thus, assuming all the while that B1 did in fact occur months

18. This human side of the law, of course, is why the law retains its interest as
a subject of the novel. Dreiser, AN AMERICAN TRAGEDY (1925); Cozzens, THE JUST
AND THE UNJUST (1942); Cozzens, By LOVE POSSESSED (1957); Travers, ANATOMY
OF A MURDER (1958). The interest is not confined to the literate, however. See T.V.

19. In an analogous situation in the tort field, where the jury has ignored the
“law” and has awarded plaintiff a sum of damages after having quite obviously de-
ducted an amount to take into account plaintiff’s own contributory negligence, the
courts of Pennsylvania have been remarkably realistic. Justice Bell in Karcesky v.
Laria, 383 Pa. 227, 234, 114 A.2d 150, 154 (1955) observed: “The doctrine of
comparative negligence, or degrees of negligence, is not recognized by the courts of
Pennsylvania, but as a practical matter they are frequently taken into consideration
by the jury. The net result, as every trial judge knows, is that in a large majority of
negligence cases where the evidence of negligence is not clear, or where the question
of contributory negligence is not free from doubt, the jury brings in a compromise
verdict. Moreover, it is important to remember that neither a jury nor a judge who
sees and hears the witnesses have to believe everything or indeed anything that a
plaintiff (or a defendant) or his doctor, or his other witnesses say, even though their
testimony is uncontradicted.” See Krusinski v. Chioda, 142 A.2d 780, 783 (Pa. 1958).
or even years ago, the testimonial sequence implicitly holds to the thesis that the witness did see the event, that he has in his memory at the trial an accurate impression of it, that the words he uses accurately describe the event, that the trier of fact understands by these words what the witness means by them, and that the trier of fact is intellectually capable of projecting in its mind an accurate recreation of B upon assembling the words of the witnesses into a coherent mental picture.\textsuperscript{20}

Simply because the chances of objective re-creation are rendered remote by the many "ifs" in this chain of communication, Learned Hand remarked that "I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death."\textsuperscript{21} This remark, in turn, inspired Jerome Frank to cry out:

"The problem exists for these reasons: The decision of a law suit, it is said, requires the application of a legal rule to the facts of the case. In most law suits, the litigants dispute solely about the facts, e.g., whether, on a certain day in the past, Gross made a promise to Gentle, or Tit hit Hat. As, at the time of the trial, those facts are past events, the trial court — a judge (in a non-jury case) or a jury — can't observe them. The judge or jury can do no more than to form a belief about those past events. That belief is formed after listening to the testimony of witnesses who have (or purport to have) observed those events. In most law suits, the witnesses testify in open court and contradict one another. In such a suit, the facts, for decisional purposes, are then not necessarily the actual facts. They are merely, at best, the belief of the trial judge or jury about those actual past events. For the practical purposes of a court decision, it does not matter what the actual facts were. All that matters is that belief. That belief, at best, is a guess based upon a belief — a guess — about the believability of some rather than other witnesses."\textsuperscript{22}

Lest it be thought that the law is naive enough to hold much stock in the reliability of such a tenuous process, the law explicitly allows the opponent to cross-examine the witness in order to search out and discover the weakest link in the chain of communicated experience, and, if possible, break it and destroy the effect of the witness' recitation. In short, the purpose of cross-examination is to "supply omissions

\textsuperscript{21} Hand, The Deficiencies of Trials to Reach the Heart of the Matter, 3 Lectures on Legal Topics 89, 105 (1926).
and expose falsities” and thus to “elicit and make plain the whole truth concerning the matters under investigation.”

Quite obvious, of course, is the fact that the most important factor in the entire testimonial sequence is the credibility of the witness as evaluated by the trier of fact. In reality, this credibility factor will determine what weight the trier of fact will give to the testimony of the witness. For our purposes, therefore, where one of proponent’s witnesses testifies “I saw defendant hit plaintiff” the process will be represented by $\pi W \in ('Yes B')(\rightarrow Yes-B)$, by which we mean to show that (1) a witness for proponent has testified $(\pi W)$; (2) in favor of the proposition that $B$ is true (“$Yes B$”); and that (3) if the trier of fact will credit his testimony $(\rightarrow)$ the trier of fact (4) is free to infer that yes-$B$ is a fact ($Yes-B$). (Alternatively, let $\Delta$ stand for the opponent.)

C. Circumstantial Evidence:

The proponent may also attempt to prove $B$ by introducing evidence of fact $A$, hoping, thereby, that if $A$ is established, or more likely, if $A$ is believed, that the trier of fact will go on to infer that $B$ exists. Thus, $A$ may be established by the pleadings, judicial notice, stipulation, autoptic preference, or, as is most often the case, by the testi-

23. MOSCHEISER, TRIAL BY JURY 154 (2d ed. 1930). But the student ought to compare this idealization of the trial process with Francis X. Willman’s protestation: “No one can frequent our courts of justice for any length of time without finding himself aghast at the daily spectacle presented by seemingly honest and intelligent men and women who array themselves upon opposite sides of a case and testify under oath to what appear to be absolutely contradictory statements of fact.” WILLMAN, ART OF CROSS-EXAMINATION 132 (3d ed. 1924).

Reflecting on these several views, how can they be rationalized? The student ought to ask himself whether or not two planes of “reality” are involved here; the trial as an agency of “truth” in terms that the verdict is “true” as a matter of objective reality, and the analytic observation that the verdict, while being “true so far” as it will not be overturned, bears only a 50-50 relationship to objective reality. In turn, this should make the student inquire into the purposes of the trial court, which, in a way, opens the door to jurisprudential thinking. If the purpose of the court is to keep the peace, then the system “works” in the sense that the trial has replaced the blood feud and society settles its disputes peacefully within an organized forum. If this be so, then whether the verdict mirrors objective reality is only a secondary quality, so long as the society thinks that it does. It, therefore, becomes the lawyer’s duty to reform the accuracy of the system without unsettling the society’s confidence in it.

24. The symbols used in this article are a polyglot assortment. Similar symbols have been used by Wigmore. WIGMORE, PRINCIPLES OF JUDICIAL PROOF 751-56 (1913); WIGMORE, EVIDENCE § 22(1) (Stud. ed. 1935). But most of all I am indebted to my own mentor in evidence, Professor Frederick A. McDermott, now Dean of Suffolk University School of Law.

25. WIGMORE, EVIDENCE § 22(1) (Stud. ed. 1935): “The process of thought by which we reason from evidence toward proof, is termed Inference. This process, for any one piece of evidence, does not mean complete persuasion, i.e., proof; it means merely a sort of mental push toward proof . . . . The term ‘tends to show’ or ‘indicates’ describes its force. In symbols it may be shown thus $E \rightarrow P$.”

26. These, however, are not evidence. See text at note 49 infra.
monial sequence. For our purposes, therefore, this process, which is most commonly known as "circumstantial evidence," 27 will be represented by the symbols $A \rightarrow B.\ 28$

This process gives rise to the obvious question: what relation must $A$ (factum probans) \textsuperscript{29} bear toward $B$ (factum probandum)? \textsuperscript{30} To this quaere the traditional reply has been that $A$ must be "relevant" to $B$, which answer only forces the analyst to inquire what is meant by the term "relevancy"? But before this term can be defined, it must first be distinguished from "competency" and "materiality." Thus, if the proponent of $B$ puts a witness on the stand to testify as to the existence of $A$, the witness must be competent to testify about $A$. \textsuperscript{31} Assuming that the witness is competent, $B$ must be an issue involved in the case, i.e., it must be material to the litigation.\textsuperscript{32} Hence, it follows that the question of relevancy involves the determination as to whether $A$ is somehow related to $B$, assuming that $B$ is a material issue and the witness is competent to testify about $A$.

Once it is isolated from these terms, however, "relevancy" is still an elusive word since it contains within itself a dichotomy; that is, for $A$ to be relevant to prove $B$, it is said that there must exist both a legal and a logical nexus between them. "Logical relevancy," the first test, has been defined as the existence of such logical relationship that $A$ renders probable $B$'s existence.\textsuperscript{33} It has also been said that relevancy in this first sense is "a matter of logic and experience and not of law."\textsuperscript{34} More realistically, it seems valid to say that $A$ is relevant to $B$ when the exponents of the general judicial experience

\textsuperscript{27} Professor McCormick prefers to distinguish between "direct," and "indirect" evidence in discussing the difference between testimony about fact $B$ and testimony about fact $A$ offered to prove fact $B$. McCormick, Evidence § 152 n.8, 10 (1954). Wigmore, on the other hand, takes the view that such terminology has no utility. 1 Wigmore, Evidence § 25 (3d ed. 1940); Wigmore, Evidence § 20(1) (Stud. ed. 1935).

\textsuperscript{28} Morgan, Basic Problems of Evidence 30 (2d ed. 1957): "If the court means that when $A$ is established in the action, the existence of $B$ may be deduced by the operation of the ordinary rules of reasoning, it sometimes says that the trier of fact may presume the existence of $B$ if it finds $A$. The presumption is said to be one of fact, and careful judges and writers insist that the proper term is 'inference' rather than 'presumption'." See 9 Wigmore, Evidence § 2491 (3d ed. 1940).

\textsuperscript{29} See 1 Wigmore, Evidence § 2 (3d ed. 1940).

\textsuperscript{30} Ibid.

\textsuperscript{31} For discussion of competence see McCormick, Evidence §§ 61-71 (1954).

\textsuperscript{32} McCormick, Evidence § 152 (1954): "If the evidence is offered to prove a proposition which is not a matter in issue . . . the evidence is . . . said to be immaterial . . . We start, then, with the notion of materiality, the inclusion of certain questions or propositions within the range of allowable controversy in the law suit. Relevancy, in the legal usage, embraces this test and something more."

\textsuperscript{33} 31 C.J.S., Evidence § 158 (1941).

\textsuperscript{34} Slough, Relevancy Unraveled, 5 Kans. L. Rev. 1 (1956). See Wigmore, Evidence § 2, 1 (Stud. ed. 1935): "All . . . evidence must of course be based upon rational grounds of everyday logic, i.e., must have some probative value."
of the given society feel that logic allows reasonable men to infer \( B \) from the existence of \( A \).

Logical relevancy means, therefore, that "none but facts having rational probative value are admissible." But if this were absolutely true, some facts \( A \), while logically connected with the proof of \( B \), would, if admitted, detract severely from the capability of the trier of fact to arrive at a disciplined and rational determination of the issues. Again, in a world ever growing more aware of the mutual interdependence of causes, the trial of issue \( B \) might never end. Therefore, the axiom has been qualified by a theorem; to-wit: "All facts having rational probative value are admissible, unless some specific rule forbids." In other words, \( A \) must not only bear a logical relation to \( B \), \( A \) must also be legally relevant to \( B \).

What is the test for "legal relevancy"? First of all, for some fact situations, which have so often repeated themselves that hard and fast exclusionary rules have evolved, ready made answers are available. These axioms, tailored to fit particular fact situations, are legion: "The reputation of a party as a careful or careless person is not admissible on the issue of negligence"; "Precautions taken after the accident are inadmissible to show an admission of liability"; etc. Thus, these rules stand as stark reminders that relevancy entails logic and "something more" — that is, considerations of sound policy.

But is there anything more where \( A \) is offered to prove \( B \) and no hoary rule explicitly forbids its use? If there is something more, what is it? Thayer took the view that if the something more existed, it was practical common sense which was incapable of definition. Wigmore, on the other hand, seemed to take the view that rules of law did exist, albeit ill-defined, even in the area beyond the agreed-upon exclusionary

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35. WIGMORE, POCKET CODE OF EVIDENCE 33 (1910): "The general underlying principal is, for both circumstantial and testimonial evidence: A fact is admissible as evidence of a factum probandum, if the inference desired to be drawn from it to the factum probandum is in human experience fairly capable of belief as possible or probable . . . ." STEVENS, DIGEST OF THE LAW OF EVIDENCE 36 (1964): "The word 'relevant' means that any two facts to which it is applied are so related to each other, that according to the common course of events one . . . proves or renders probable the . . . existence . . . of the other." See State v. Claymon, 96 N.J.L. 1, 4, 114 Atl. 155, 156 (1921); Fishman v. Consumers Brewing Co., 78 N.J.L. 300, 302, 73 Atl. 231, 231-32 (1909).

38. THAYER, TREATISE 265: "The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience, assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them." See also MCCORMICK, EVIDENCE § 152 n.36 (1954); James, Relevancy, Probability and the Law, 29 CALIF. L. REV. 689, 693-94, 702-04 (1941).
rules. In any event, the pendulum is swinging back toward the Thayerian point of view and the area has of late been described as one in which the law giver ought to exercise his "sound discretion." The best answer, perhaps, is that of Professor McCormick wherein he suggests that the law giver in weighing the admissibility of A ought to ask himself whether "its value [is] worth what it costs?"

Today, when the law giver prepares to exercise this neo-Jamesian "cash-value" test, however, he is not left completely on his own devices. He is advised, first of all, to approach the task, not from any theoretical plain, but with a "view to the practical." Therefore, if A is logically relevant to prove B and no rule explicitly forbids its introduction into evidence, the law giver, fortified in this pragmatic frame of mind, ought to allow it in unless the proof of A (1) will take too long; (2) involves extra issues which will tend to confuse the trier of fact; (3) will arouse the prejudices of the trier of fact; or (4) will unfairly surprise the opponent.

D. Sundry other Methods:

The proponent may also attempt to prove a fact other than by putting a witness on the stand to testify to it, or by asking the trier of fact to infer its existence from still other facts. For instance, the proponent may ask the law giver to take judicial notice that fact A is true, as is often done in the case of obvious facts ("common knowledge") or facts which are capable of ready and accurate demonstration. If the law giver does take judicial notice that fact A is true, in effect he rules as a matter of law that A is true, and he will instruct the trier of fact that it must accept A as true. It is also patent, of

39. 1 Wigmore, EVIDENCE § 12 (3d ed. 1940). Cf. State v. LaPage, 57 N.H. 245, 288 (1876): "... [A]lthough undoubtedly the relevance of testimony is originally a matter of logic and common-sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often ..., ruled upon, that the united logic of a great many judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may properly be called common-sense, and thus to acquire the authority of law. It is for this reason that the subject of relevancy of testimony has become, to so great an extent, matter of precedent and authority, and that we may with entire propriety speak of its legal relevancy."
42. Plumb v. Curtis, 66 Conn. 154, 166, 33 Atl. 998, 1000 (1895).
43. Model Code of Evidence, Rule 303; Uniform Rules of Evidence, Rule 45. For an interesting exposition by a non-lawyer on how the trier of fact is shielded by the rules of evidence see James Gould Gozzens, Notes on a Difficulty of Law by One Unlearned In It, 1 Bucks County Law Reporter 302 (1952).
course, that a fact may also be established in an action by the pleadings or by stipulation between counsel. But none of these devices for establishing fact $A$ is “evidence” because they establish $A$ as a matter of law and not by the process of having an ultimate fact arrived at through a process of inference executed by the trier of fact. They are mechanisms designed to interpolate fact $A$ into the trial as a given factor in the judicial equation through the aegis of the law giver, not to introduce data about $A$ upon whose truth or falsity the trier of fact may deliberate.\(^{47}\)

So, too, the proponent may introduce an object and present it to the senses of the trier of fact in a process designated “real proof” or “autopic proference.”\(^{48}\) Thus it is, that if defendant is charged in a criminal action with unlawfully possessing a machine gun, the prosecution may present the thing possessed to the trier of fact rather than relying on testimony of policemen as to what was found in the defendant’s possession. Again, this process, strictly speaking, is not evidence since it involves immediate perception rather than a belief arrived at through any process of inference.\(^{49}\)

II.

DEVICES OFTEN CONFUSED WITH PRESUMPTIONS.

A. *Res Ipsi Loquitur:*

Again the proponent may attempt to make use of the doctrine of res ipsa loquitur in certain cases. These are the negligence cases where the accident would not ordinarily have happened without someone’s negligence and the apparent cause is such that the defendant would be responsible for that someone’s negligence.\(^{50}\) But no logically sufficient nexus exists between these facts, $A$, and the conclusion that defendant was actually negligent, $B$, so that the proponent is saved from a nonsuit or directed verdict only by the fact that the law provides him with a nexus, a “permissive inference” ($A \rightarrow B$).\(^{51}\)

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\(^{47}\) 1 Wigmore, *Evidence* § 1(c) (3d ed. 1940); Evidence defined as “Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is asked.”

\(^{48}\) 4 Wigmore, *Evidence* § 1150 (3d ed. 1940).


\(^{50}\) Prosser, *The Law of Torts* § 42 (2d ed. 1955).

\(^{51}\) Morgan, *Presumptions*, 12 Wash. L. Rev. 255, 256 (1937); “And they do not mean merely that such a happening logically justifies an inference of negligence, but that the trier is permitted to draw an inference . . . which the application of ordinary rules of logic or the application of generalizations drawn from that segment of ordinary human experience known to the courts would not permit.” See Frosser, *Procedural Effect of Res Ipsi Loquitur*, 20 Minn. L. Rev. 241, 243 (1936).
The doctrine of res ipsa loquitur is not quite as simple as this, however, because the courts are not in agreement as to its procedural ramifications. Firstly, only some courts agree that a “permissive inference” exists, though even some of these courts often times cloud the issue by calling the mechanism “inference” \((A \rightarrow B)\), or, worse, “presumption of fact.” In any event, these courts are agreed that, like any other inference, the introduction of the fact-complex \(A\) allows the trier of fact to infer \(B\), so that proponent has introduced some evidence yes-\(B\). Hence, the proponent has satisfied his mandatory burden of introducing some evidence and has passed to the opponent the optional burden of proceeding with the evidence or taking the risk of resting on the assumption that the proponent has not satisfied the burden of persuasion.

Other courts, however, take the view that the introduction of the fact-complex \(A\) creates a “presumption” \((A \land B)\) that \(B\) is true. A presumption differs from an inference of either variety in that it has compulsive force; that is, if the trier of fact finds yes-\(A\), then it must find yes-\(B\), unless the opponent rebuts the presumption by introducing “some” evidence no-\(B\). In the event, however, that the opponent does introduce evidence to rebut the presumption, then the presumption disappears and the proponent will suffer a nonsuit or directed verdict unless he somehow introduces some evidence yes-\(B\) into the record.

Still other courts go even further and insist that the proponent’s introduction of fact-complex \(A\) shifts the risk of non-persuasion to the

52. For example, Holmes, J., in Graham v. Badger, 164 Mass. 42, 47, 47 N.E. 61 (1895): “Res ipsa loquitur, which is merely a short way of saying that, so far as the court can see, the jury from their experience as men of the world may be warranted in thinking that an accident of this particular kind commonly does not happen except in the consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case.”


“In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant’s general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.”

See also Kahalii v. Rosecliff Realty, Inc., 141 A.2d 301, 307 (N.J. 1958): “Under the maxim negligence may be a permissible inference so as to take the case to the jury, but it is not a necessary one.” Accord: Willauer v. Rudnevitz, 119 N.J.L. 471, 197 Atl. 252 (1938); Foltix v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941).


55. See text at note 74 infra.
opponent; that is, the opponent must persuade the trier of fact that more probably than not he was not negligent or lose the case. Thus, despite the hallowed axiom that "the burden of proof never shifts,"56 some jurisdictions insist that res ipsa loquitur catalyzes this unique metamorphosis.57 Typical of these states has been Pennsylvania.58

The trend today, however, seems to be in favor of the first view "... as recent decisions in many jurisdictions have swung over to the view that there is as a general rule no more than a permissible inference which merely gets the plaintiff to the jury."59 This evolutionary process, as it was experienced in New York and New Jersey, for example, can be followed by a comparison of Prosser's citations over the years in his several works with reference to the doctrine.60

The law in Pennsylvania seems still to be in the process of changing, albeit in the same direction. While formerly holding to the extreme view that the doctrine shifted the risk of non-persuasion to the defendant, Pennsylvania, perhaps because of this,61 tended to limit the doctrine's application to cases where there was a contract between the parties62 or where the defendant had undertaken to be responsible for the safety of at least a business invitee.63 Concomitant with res ipsa loquitur, however, Pennsylvania has developed the "doctrine of exclusive control," which has been defined as follows:

"The theory of exclusive control is that, when the instrumentality which causes the injury is shown to be under the man-

56. See text at note 88 infra.
57. For a book dedicated to the proposition that this is the "correct" view, see SHAIN, RES IPSA LOQUITUR, PRESUMPTIONS AND THE BURDEN OF PROOF (1945).
59. PROSSER, Torts 213 n.3 (2d ed. 1955).
60. PROSSER, Procedural Effect of Res Ipsi Loquitur, 20 MINN. L. REV. 241, 249 n.47, 251 n.63 (1936); PROSSER, Torts 304 n.45, 46 (1941); PROSSER, Torts 213 n.3 (2d ed. 1955).
agement and control of the defendant, and the accident is such that in the ordinary course of things does not happen if those who have the management and control use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident was due to negligence. It is a doctrine applicable only where the proof as to the cause . . . is peculiarly or exclusively within the possession of the defendant.\textsuperscript{64}

Despite the heavy emphasis upon the requirement of "exclusive control," even the courts admit that the distinction between the two doctrines is at best "tenuous." \textsuperscript{65} Further, in cases where the exclusive control doctrine has been applied, the mechanics of the permissive inference school have been adopted.

"In Sierocinski v. E. I. DuPont de Nemours & Co., 118 F.2d 531, (C.C.A. 3) Circuit Judge (now Mr. Justice) Jones pointed out that the duty always rests upon the plaintiff in an action for negligence to prove the allegation thereof either directly or by proof of circumstances from which an inference of the ultimate fact of negligence may reasonably be drawn; that ordinarily the requirement of such proof cannot be met by an inference of negligence drawn from the mere happening of an accident; that, in certain cases, however, the burden thus usually resting on the plaintiff is eased by the application of the doctrine either of \textit{res ipsa loquitur} or the inference of negligence permissible\textsuperscript{66} from the defendant's exclusive control . . . ; and that the doctrine of \textit{res ipsa loquitur} has been limited in Pennsylvania to cases where a contractual relation existed between the parties, whereas the doctrine of exclusive control was not so restricted." \textsuperscript{67}

In conclusion, therefore, it may be said that, whereas other jurisdictions have openly joined the inference camp, Pennsylvania is in the process of backing into it via the route of semantic sleight of hand.\textsuperscript{68}

B. The Conclusive Presumption:

Quite apart from the mechanisms thus far inspected, the "conclusive presumption" may also play a role in the trial. At common law, for instance, the proponent may introduce an instrument under seal, to which the opponent objects that it is a nullity for lack of consideration. At this point, however, in absence of allegations of fraud, the law giver will rule that the proponent has the benefit of a con-


\textsuperscript{66} Emphasis added.


\textsuperscript{68} \textit{But see} discussion of MacDonald v. Pennsylvania R.R. Co., 348 Pa. 558, 36 A.2d 492 (1944) text at note 103 infra.
clusive presumption that there is consideration \((A \rightarrow B)\).\(^6\) But, in reality, the law giver is saying that the seal, \(A\), is \(B\), consideration.\(^7\)

This phenomenon has to be carefully considered from other presumptions which merely operate to get the proponent past the hazard of a nonsuit or directed verdict, or to allocate the burden of proceeding with the evidence, or, even, to shift the burden of persuasion. The conclusive presumption is in reality another name for "substantive rule of law." Why, then, the disguise? Because it is a method common-law courts found convenient to adopt when they wanted to create a new rule of law (i.e., to legislate) while they appeared to be only manipulating some obscure procedural minutae, so dear to the lawyer's heart. Thus, by taking the fact of twenty years adverse possession as \(A\), and by giving \(A\) the effect of an inference to prove ownership, \(B\), the adverse possessor had some evidence yes-\(B\). Rather than say that \(A\) was \(B\) and so openly change the substantive law, the courts raised the effect of \(A\) to the level of a presumption, and finally to conclusive presumption, and thereby arrived at the same result.\(^7\)

III.

Presumptions.\(^2\)

A. The Thayer Presumption:

Let it be assumed that plaintiff, while driving his automobile at exactly 12:30 p.m., became involved in a collision with a delivery truck operated by \(X\) but owned by defendant. Not unnaturally plaintiff decides to sue the owner of the truck, but in order to collect damages plaintiff must (a) introduce at least some evidence of and (b) persuade the trier of fact that (1) \(X\) was at fault and (2) that at the time of the accident \(X\) was an agent of the defendant acting within

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\(^6\) Conrad's Estate, 333 Pa. 561, 563, 3 A.2d 697, 699 (1938): "This is more than a mere presumption; the seal takes the place of proof of consideration and in the absence of fraud makes the promise enforceable without it."

\(^7\) Wigmore, Evidence § 451(4) (Stud. ed. 1935): "Conclusive presumptions or 'irrebuttable presumptions' are usually mere fictions, to disguise a rule of substantive law . . . ." See Morgan, Basic Problems of Evidence 30 (2d ed. 1957).

\(^7\) Thayer, Treatise 317-319 (1898); Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, 909 (1931). See Presumptions and Preumptive Evidence, (English) Law Magazine, in Thayer, Treatise, Appendix A.

the scope of his authority. Conversely, in most states at least, defendant would have the option to become the proponent of a proposition to the effect that plaintiff himself contributed to the negligence involved; and defendant, of course, would also have the option to introduce evidence contrary to plaintiff’s propositions.

Further, let it be assumed that a dozen witnesses volunteer to testify in plaintiff’s favor on the issue of negligence, while the policemen who investigated the accident will testify that the truck belonged to defendant. This means that plaintiff will be able to introduce some evidence of X’s negligence, but that he has no evidence on the issue of agency. Further, assume that only X and defendant are cognizant of the details of the agency relationship existent between themselves and neither promises to be a particularly helpful witness. How then is proponent going to be able to introduce some evidence of agency, i.e., issue B?

It is here that the law comes to the aid of the proponent of agency and gives him the benefit of a mechanism known as a “presumption of law.” If testimony is introduced from which the trier of fact can infer that X was driving a truck owned by the opponent, herein designated the basic fact A, and the trier of fact comes to believe that A is more probably than not true, then the trier of fact must also find B to be true as a matter of law. Unlike the several forms of inference, therefore, the presumption (A \& B) has compulsive force; if A, then B. Thus, by introducing some evidence of A, the proponent has satisfied his burden of introducing some evidence of B since a nexus exists between them.

Assuming that the proponent does introduce some evidence of A and then rests, the law giver must deny the opponent’s motion for

73. See note 11 supra.

74. This, of course, is a variation upon a theme. In most jurisdictions the presumption does arise upon proof of ownership of the vehicle. Alternatively, in some jurisdictions the presumption arises in the case of business vehicles where the owner’s name is painted on it, while others require evidence to be introduced that the driver was in the regular employ of the owner. For a collection of cases and statutes see McCormick, Evidence 642 n.17, 18 (1954).

75. A “. . . presumption is a rule of law that if certain basic facts exist the presumed fact is true.” McBaine, Burden of Proof: Presumptions, 2, U.C.L.A.L. Rev. 13, 21, (1954).

76. Falknor, Evidence, Annual Survey of American Law 723 (1952): “It is certainly orthodox to say that the function of the true presumption is to relieve the party upon whom rests the burden of persuasion of his duty to go forward with the evidence in the first instance.” See 9 Wigmore, Evidence §§ 2487, 2491 (3d ed. 1940); Wigmore, Evidence § 451 (Stud. ed. 1935). Accord: Thayer, Treatise 336-37, 339, 383-84.
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a nonsuit or directed verdict on issue $B$. Analytically, therefore, at
the close of the proponent’s case the status of issue $B$ appears to be:

$$\pi W \text{ "Yes } A\text{" } \rightarrow A \land B$$

Thus, the witness for the proponent has testified to the basic fact $A$:
and if this testimony is credited by the trier of fact, the trier will
infer yes-$A$, whereupon the law demands that the trier accept yes-$B$
as well. Now, the proponent having rested, the opponent will proceed
in the normal course of events to take up his option to upset this com-
pelling equation.

First, the opponent can introduce evidence in order to dissuade
the trier of fact of the truth of yes-$A$, the basic fact, in this case the
fact that $X$ at the time of the accident was driving a truck owned by
defendant. The risk, however, is that if this effort fails and the trier
of fact does find yes-$A$, all is lost on issue $B$ since the presumption is
still operative. Therefore, it behooves the opponent to attempt to rebut
the presumption itself. Let it, therefore, be assumed that counsel for
defendant calls the defendant himself to take the stand, and after the
preliminary questions have been run through, the following colloquy
takes place:

"Q. What is your relationship with $X$?
A. He is employed by me to drive my delivery truck.
Q. Can you describe for the jury his duties?
A. Yes, indeed. He works from 8 to 5 every day with an
hour off for lunch at noon. During this time he makes deliveries
with the truck.
Q. Does he work regular hours?
(Objection. Sustained.)
Q. Will you tell the trier of fact in detail $X$’s duties with
respect to the truck?
A. Well, other than to make deliveries during the day, none.
I drive to and from the shop in it myself so that $X$ takes over
in the morning and leaves it in front of the shop at night.
Q. What arrangements have been made for the noon hour?
A. $X$ comes back to the shop at twelve, or usually a few
minutes before, goes into the back room where he eats his lunch,
and then reloads and goes off again at one.
Q. Is there any reason for this?
A. Oh, yes. The truck will only hold about a half-day’s round
of deliveries so that $X$ has to come back at noon.
Q. How do you explain the day in question then?
A. I can't, except that X was disobeying orders and doing some business of his own. I have always warned my drivers against that sort of thing, and I had never known X to do such a thing before. He had absolutely no authority to do it. Of course, the labor you get these days, you just can never tell; ever since the New Deal . . . .

Q. That will be all . . . ."

After making sure that defendant has reiterated several times that X was operating the vehicle without authority, and, indeed, that X was engaged upon an unique frolic, counsel for defendant would sit down. Then, after the defendant had been subjected to a gruelling cross-examination, he would rest the case for the defense and move again for a nonsuit or directed verdict. Whereupon his motion would be granted.77

What happened to disrupt what appeared to have been plaintiff's well-paved road to the trier of fact on issue B? Simply that the testimony of defendant no-B, rebutted the presumption, thereby destroying the nexus between the basic and presumed facts, and leaving plaintiff with no evidence of agency in the record. Defendant merely had to testify under oath to the fact that X was on a frolic (no-B) and the presumption dissolved. Analytically, the defendant's attack was simply $\Delta \ "no-B" \rightarrow no-B$, which left plaintiff's case in the status "Yes-A" (→ $A \ B$). Note, however, the glaring distinction between the two. Where the proponent of a presumption introduces evidence of the basic fact, $A$, he has introduced some evidence of $B$ to be sure, but he will not win on issue $B$ until the trier of fact believes (so far) his evidence of yes-A. If the opponent introduces evidence contrary to the basic fact, the proponent would still reach the trier of fact, because the presumption would still exist. It would be a question of fact for the trier whether or not $A$ was true so far or not. But when the opponent introduces evidence contrary to the presumed fact, the presumption is automatically dissolved. The question is not one of credibility of the witness through which the evidence no-B is introduced; rather, it is a question of law whether or not sufficient evidence has been introduced from which the trier of fact could reasonably find no-B. If such a measure of evidence has been introduced into the record, then the presumption is no more.78

77. But see Mccormick, Evidence § 311 (1954).
78. Morgan, Basic Problems of Evidence 33-34 (2d ed. 1957): "The presumption has no effect whenever there is evidence in the case from which the jury could reasonably find the non-existence of the presumed fact. It is immaterial that neither the judge nor the jury believes the testimony . . . . The issue . . . is to be determined exactly as if no such presumption were known to the law. In short, the presumption
Notwithstanding the oath, this state of affairs certainly presents a strong temptation to a defendant in the position of our hypothetical entrepreneur. What good is the classical presumption, therefore, if it can be rebutted by the testimony of an interested witness whose stature in the eyes of both the law giver and the trier of fact may be little above that of a lying halfwit? Despite its weakness, however, this form of presumption does accomplish two purposes. First, it gets the proponent past the motion for nonsuit or directed verdict at the close of his own case. Second, it forces the opponent to act if the opponent is going to avoid the compulsive effect of the presumption: that is, it shifts the burden of going forward with the evidence to the opponent. To rebut the presumption, moreover, the opponent must put someone familiar with the true facts on the stand where that someone will be subjected to the niceties of cross-examination. Caught on the stand by a clever advocate, for example, the opponent may admit something which the proponent can use as evidence that an agency relationship did exist at the time of the accident. Thus, even though the presumption would be dissolved, a skillful cross-examination may elicit positive testimony from which yes-B might be inferred, and so the proponent while losing the compulsive effect of the presumption, would still reach the trier of fact on the basis of this new evidence.

In this connection Learned Hand has observed:

"Thus it follows that the office of a presumption must disappear when the opposite side puts in proof, and the party charged with the burden of proof must fail, if he goes no further, or cannot use his adversary's evidence as support of the affirmative. To hold otherwise would be to impose the burden of proof upon the party having the negative.

Upon such an issue... it might indeed be possible to argue that the owner's denial could be used as positive support of his consent. He has personal acquaintance with the fact, and the jury is certainly free to find affirmatively that his denial is untrue. Moreover, to find the denial false of something necessarily known to the witness, ought to result in finding true the proposition


80. McCormick, Evidence § 310 (1954): "The practice which permits the adversary to call for a preliminary ruling from the judge as to its sufficiency as soon as the proponent rests his case, is a rigorous one, and a presumption which will take the proponent over this hurdle is an important element of his case."
denied. That, however, would, at least if generalized, carry matters too far . . . . The law does not ordinarily cut so fine; a party must produce affirmative proof.” 81

This, then, is the view espoused by Thayer, 82 Wigmore, 83 adopted by the federal courts, 84 and which is said to be the “prevailing view” in the several states. 85 But it has failed to satisfy everybody, particularly Professors Bohlen 86 and Morgan. In fact, the latter has complained: “If a policy is strong enough to call a presumption into existence, it is hard to imagine it is so weak as to be satisfied by the bare recital of words on the witness stand or the reception into evidence of a writing.” 87

B. The Pennsylvania Rule:

The alternative to the Thayer doctrine is the rule that a presumption shifts the burden of persuasion on the issue of the presumed fact to the opponent. Where this rule is applied, therefore, once the proponent has introduced some evidence of A, the trier of fact may find A to be more probably than not true; and if it does so find, it must also find B to be true, unless it is convinced by the evidence of the opponent that more probably than not no-B is true. Further, if the trier of fact is left in a state of equilibrium as to whether B is true or not true, then the trier must decide that yes-B is true since the risk of non-persuasion has shifted to the opponent. While this solution answers the objections made to the weakness of the Thayer presumption, it has itself met with equally severe objections.

First and most startling perhaps, is the fact that this concept of presumption manifestly flies in the face of the dogma that the “burden of proof never shifts.” Quite obviously the “burden of proof” referred to in the axiom is the burden of persuasion, since the burden of going forward often shifts during the course of any trial. But as to the burden of persuasion Thayer had no doubts:

“There is much ambiguity in what is said of the shifting of the burden of proof. As to this it is vital to keep quite apart

81. Pariso v. Towse, 45 F.2d 962, 964 (2d Cir. 1930).
82. See note 76 supra.
83. See note 76 supra. But Wigmore seems to have modified his view over the years. Observe the additional material added to the third edition of his magnum opus: Future of the Rules for this Subject at 9 Wigmore, Evidence § 2498(a) (3d ed. 1940).
85. See text at note 136 infra.
87. Morgan, Instructing the Jury Upon Presumptions and the Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933).
the considerations applicable to pleading, and those belonging to evidence. We see that the burden of going forward with the evidence may shift often from side to side; while the duty of establishing his proposition is always with the *actor*, and never shifts." 88

To which Wigmore added:

"The first burden above described — the risk of non-persuasion of the jury — *never shifts*, since no fixed rule of law can be said to shift." 89

Unfortunately, as has already been seen, in some jurisdictions the doctrine of res ipsa loquitur does shift the burden of persuasion.90 And, until recently at least, a presumption shifted the burden of persuasion in Pennsylvania.91 Hence, the Thayer-Wigmore doctrine goes too far; at best it can only be said that upon once being established by the pleadings and the substantive law, the burden of persuasion does not normally shift. Whether for the sake of uniformity it "ought" always to remain fixed is another question.

The second objection is that the Pennsylvania rule seems to be quite unacceptable to the United States Supreme Court in cases where there is no underlying relationship in logic between the basic fact and the presumed fact. Even if there is a logical nexus between the two, a presumption which works to shift the burden of persuasion, in a criminal case, is still unacceptable unless it can be shown that there is a significant procedural inconvenience to be overcome and that this particular solution does not visit any unfairness or hardship upon the defendant.92

The third objection is that the supreme court of the state from which the rule derives its name is thought by some to have repudiated the rule, or at least to have hopelessly befuddled its own doctrine. Thus, Professor Morgan, an advocate of the Pennsylvania rule, has lamented "... there is much doubt as to the exact total effect of a presumption in Pennsylvania."93

88. THAYER, TREATISE 378. (Emphasis in original.)
89. 9 Wigmore, EVIDENCE § 2489(a) (3d ed. 1940). (Emphasis in original.)
90. Note 57 supra.
91. Note 58 supra.
C. Chaos in Pennsylvania:

It seems to be the consensus that prior to the Watkins case, Pennsylvania held to the view that a presumption worked to shift the burden of persuasion to the opponent despite the Thayerian dogma. At the time of Holsheimer v. Lit Bros., it seems quite clear that this was the rule. In this case, which involved a collision between a pedestrian and a delivery truck bearing the name of the defendant, the court was quite explicit:

"So far as the liability of the defendant was concerned, the plaintiff's case rested wholly upon a presumption. There was no direct evidence as to who was the owner of the truck that inflicted the injury, nor as to who was in charge of it when the collision occurred. There was evidence, however, that the truck bore the name of the defendant company. This was sufficient to establish not only a prima facies that the defendants were the owners of the truck, but also that it was then in charge of their servant or employee. This was presumptive evidence, and as has frequently been ruled, was quite sufficient to carry the case to the jury. As a presumption it was, of course, rebuttable, but this does not mean that it had any less probative force than it would have had had it rested on direct evidence. It shifted the burden of proof as to this one issue so that the burden rested thereafter upon the defendant. Except as overcome by countervailing evidence produced by the defendant it stood as a fact in the case."

In the Watkins case, however, involving an action brought upon a life insurance policy under the terms of which payment was conditioned upon accidental death, plaintiff relied upon a "presumption against suicide" in the absence of direct evidence. The case went to the jury after the trial judge had charged: "Unless the jury find that the evidence of the defendant outweighs the presumption that Norman C. Watkins did not commit suicide, the verdict must be for the plaintiff." The state supreme court reversed the verdict and judgment for plaintiff, however, but on the specific ground that there was no such

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96. Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 499 (1946): "Until Mr. Justice Maxie wrote his opinion in the Watkins case, it was generally believed that in Pennsylvania a presumption fixed the burden of persuasion." See LADD, CASES AND MATERIALS ON EVIDENCE 827 (2d ed. 1955); MAGUIRE, EVIDENCE — COMMON SENSE AND COMMON LAW 187 (1947); MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 113 (3d ed. 1951).
97. 262 Pa. 150, 105 Atl. 73 (1918).
mechanism as a presumption against suicide, only a "permissible inference." 100

Thus, while the holding itself ought not to have been a source of confusion, Justice Maxie's extrapolation, involving a detailed analysis of presumptions in general, was, and still is, a source of no little confusion. In fact, the opinion is a veritable compendium of Thayerian doctrine, including quotations from Thayer's Storrs Lectures of 1896 at Yale101 and:

"Wigmore says... "There is in truth but one kind of presumption; and the term "presumption of fact" should be discarded as useless and confusing. Nevertheless, it must be kept in mind that the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent."" 102

Notwithstanding the fact that the classic view expounded in the opinion was by way of dicta, a wedge of doubt had been interpolated into the local jurisprudence. Then in MacDonald, Adm'rx v. Pennsylvania R.R. Co.,103 the then Chief Justice Maxie delivered the coup de grace to whatever certainty might have once existed. That case concerned an action of trespass for the wrongful death of a child in a railway accident. Plaintiff introduced evidence from which it could be inferred that the child was killed while a passenger on the wrecked train, while defendant introduced evidence to the effect that the derailment had been caused exclusively by sabotage. When the jury found for plaintiff, the trial judge entered judgment n.o.v. for defendant, whereupon the supreme court reversed, observing that at best a new trial ought to have been granted.

In order to arrive at this result, Chief Justice Maxie cited Doud v. Hines,104 res ipsa loquitur case holding to the original Pennsylvania rule, while at the same time citing, as apparently in accord, Thayer's axiom that the burden of persuasion never shifts.105 Not content with the enigma thereby created, he proceeded to wrap the subject in mystery by citing the Watkins case and then proceeding:

"In the instant case, the burden of proof was on the plaintiff. When plaintiff proved that her son while a passenger on de-

102. 315 Pa. 497, 500-01, 173 Atl. 644, 646-47 (1934). (Emphasis in original.)
105. Ibid. See note 88 supra.
defendant's train was killed by the derailment of that train she met
the burden of proof initially resting on her, and if no further
proof had been offered by either side, the jury should have re-
turned a verdict for the plaintiffs, because upon proof of the facts
just stated a presumption arose that the child's death resulted
from the defendant's negligence . . . . This presumption cast upon
the defendant . . . the burden of producing evidence to neutralize
the inference which the jury in the absence of countervailing evi-
dence would draw legitimately from the evidence produced by the
plaintiff . . . In this case the defendant, after plaintiff rested, came
forward with evidence of a most persuasive character to explain
the cause of the derailment as being one for which it was not
responsible . . . . All this made the case one whose submission to
the jury was required.”

Thus, Chief Justice Maxie seemed to be of the view that (1) a
presumption had arisen; (2) this presumption shifted only the burden
of going forward with the evidence to the opponent; and (3) the
opponent had introduced evidence designed to rebut the presumed fact.
Clearly if the Thayer view had been in vogue, the presumption would
have been rebutted and plaintiff would have lost on the basis of the
presumption. Alternatively, the Pennsylvania rule was not in vogue
since only the burden of producing evidence had shifted. Hence, Chief
Justice Maxie seems to have intended to walk a middle path between
the two, adopting the Thayer doctrine except for one variation:
whether the evidence introduced by the opponent was sufficient to rebut
the presumption was a question for the trier of fact to decide. In other
words, credibility of witnesses is brought back into the picture with-
out going so far as to shift the burden of persuasion.

It seems likely that an idiosyncrasy of local jurisprudence would
prohibit a verbatim copy of the classic view in any event, since directed
verdicts upon the basis of oral testimony are generally discouraged.107
Observe that in the MacDonald case the rebutting evidence depended
upon the credibility of the railroad's witnesses, so that it was com-
mented:

"This evidence rested largely on oral testimony and the
genuineness of the physical exhibits was attested by the same
kind of testimony. All this made the case one whose submission
to the jury was required.”

492, 496-497 (1944).
21, 137 Atl. 567 (1927). See Moschitz, Trial By Jury § 311 (2d ed. 1930);
Morgan, Maguire and Weinstein, Cases and Materials on Evidence 421 n.2 (4th
ed. 1957).
Alternatively, where the evidence of the opponent is not substantially oral, there is no reason why Pennsylvania could not apply the Thayer view of presumptions.\textsuperscript{109}

The inauguration of the new Maxie Rule, however, raised more problems than it solved. Clearly the older Pennsylvania rule had not been overruled since the new look in the \textit{Watkins} case was dicta, while the \textit{MacDonald} case is distinguishable as an example of res ipsa loquitur.\textsuperscript{110} In fact, the \textit{MacDonald} case with its compromise between the Pennsylvania and classic rules, taken together with the use of the word "inference," \textsuperscript{111} is of more interest as a harbinger of the re-evaluation of res ipsa loquitur than as any key to the riddle of presumptions.\textsuperscript{112}

Further doubt is cast on the scope of the Maxie rule because, within four years of its launching in the \textit{Watkins} case, the originator sat silent as the court expounded the Pennsylvania rule while discussing a presumption of payment arising from lapse of time:

"It is a presumption merely of fact, and amounts to nothing more than rule of evidence which reverses the ordinary burden of proof and makes it incumbent upon the creditor to prove, by a preponderance of the evidence, that the debt was not actually paid." \textsuperscript{113}

But lest it be thought that the Maxie rule was just a transient phase, the court recently reiterated its fond belief that, "the burden of proof never shifts." \textsuperscript{114}

It would appear, therefore, that in Pennsylvania two views of the effect of a presumption were in use, depending upon the nature of the case. The first is the original Pennsylvania rule, while the second is a copy of the Thayer rule subject to a caveat in favor of the trier of fact's function of evaluating the credibility of the rebutting witnesses. The difficulty is not so much in analysing the mechanics of the two

\textsuperscript{109} See Auel v. White, 389 Pa. 208, 132 A.2d 350 (1957), a tort suit arising out of a collision between defendant in his automobile and a pedestrian plaintiff. Plaintiff was rendered incompetent by the accident so that he was given the benefit of a presumption that he had not himself been contributorily negligent. Inasmuch as defendant was the only competent eye witness to the actual event, plaintiff called him for cross-examination, but defendant's testimony in effect rebutted the presumed fact. Since plaintiff had introduced this uncontradicted testimony in his own case, he was bound by it. Thus, there was no need to have the trier of fact pass on the credibility of the rebutting witness so that the presumption was rebutted as a matter of law and plaintiff was nonsuited.

\textsuperscript{110} See Note, 57 Dick. L. Rev. 234 (1953).
\textsuperscript{111} See text at note 106 supra.
\textsuperscript{112} See text at note 68 supra.
\textsuperscript{113} Grenet's Estate, 332 Pa. 111, 2 A.2d 707 (1938).
views, but in predicting which view the courts are going to apply to a given fact situation. Until the court acquires another spokesman interested in disentangling the precedents, the enigma is likely to continue for the foreseeable future.

In the meantime Professor Levin has adopted the view that, as between the two views, it doesn't very much matter since plaintiff gets to the trier of fact in either event:

"In most cases, having cleared the hurdle of getting to the jury, litigants will not be affected by the refinements . . . . Hence it seems fair to conclude that despite the vast amount of alleged confusion in Pennsylvania law and the differences in theoretical rationale between the various cases, in practice Pennsylvania's treatment of recognized presumptions has not been radically altered since pre-Watkins days." 115

This view, however, is only true so far. It does not meet the problem of the judge's action as trier of fact in those cases in which the judge finds himself in a state of equilibrium.116 Nor does it meet squarely the problem of the jury as trier of fact where the jury is in a relatively detached state of mind about the case and the litigants. This is so because in an equilibrium state of affairs the proponent will win the day under the Pennsylvania rule while the opponent triumphs under the Maxie rule.

Thus it was that the trial judge faced an enigma every time a charge relative to presumptions had to be framed. Typical was the case of Smith v. Hennessey,117 involving a presumption that a commercial vehicle involved in an accident is being driven by the owner's servant, acting at the time within the scope of authority. The trial judge had charged the jury that the presumption worked to shift the burden of persuasion to defendant on the issue of agency, whereupon defendant moved for a new trial on the ground that only the burden of going forward with the evidence ought to have shifted. Faced with an enigma Judge Flood denied the motion, after making a concise analysis of the situation:

"Defendants rely on certain dicta in the case of Watkins v. Prudential Ins. Co., 315 Pa. 497 (1934), to the effect that a presumption shifts only the burden of producing evidence, not the burden of proof. This case did not so hold, for it concluded that the pre-

116. See note 15 supra.
117. 11 D. & C. 2d 354 (1957).
preemption against suicide, there relied upon, did not exist. We have discovered no case in which this language subsequently appeared where it actually was necessary to the decision.

In the single group of cases presented to the Supreme Court since the Watkins case which actually required it to determine whether it would accept that dictum and which involved the presumption of payment after 20 years, it has said that a presumption shifts the burden of proof . . . . This presumption of payment is a strong one which is only rebutted by clear and convincing evidence, but at least it must be said that the Watkins case has made no difference at least in the case of such strong presumptions.

These cases may not be authority for the view that the Watkins dictum has been repudiated. It is quite possible that the conflicting language in the cases shows that since the Watkins decision the Supreme Court has attached different procedural consequences to different classes of presumptions. If so, then we think that the presumption of agency should be included in the category of presumptions which continue to shift the ultimate burden of proof.” 118

Finally, in Waters v. New Amsterdam Casualty Company,119 the supreme court seems at first glance to have come out in favor of the Thayer view. It will suffice to summarize the factual situation as follows: plaintiff, an occupant of one automobile, was injured when that vehicle became involved in a collision with a second machine, this one driven by X but owned by Y. Plaintiff sued both X and Y, but after Y filed an answer denying that he had given X permission to drive the vehicle, Y was discontinued as a party. Plaintiff thereupon secured judgment against X, and, in order to satisfy it, brought suit against defendant on its insurance policy with Y wherein it promised to insure both Y and any other person operating the machine with Y's permission.

At trial, plaintiff introduced evidence to the effect that Y owned the vehicle in question, that X had been the driver at the time of the accident, and that a judgment had been secured against X, whereupon plaintiff rested. Defendant moved that plaintiff be nonsuited, arguing that plaintiff had failed to introduce evidence tending to show that X had been operating the vehicle with Y's permission. The trial judge denied the motion, however, ruling that a presumption of permissive use had arisen on these facts. Thereupon, in order to rebut the pre-

sumption, defendant called X to the stand where he testified that he had been given only temporary custody of the vehicle in order to wax and polish it. Upon introducing this evidence defendant moved for binding instructions, which were denied. Instead, the trial judge instructed the jury that the presumption had shifted the burden to the defendant to persuade it that Y had not given X permission to operate the vehicle. Upon a verdict and judgment for plaintiff, and after the court en banc refused motions for judgment n.o.v. and new trial, defendant appealed.

Upon its consideration of the case, the supreme court granted defendant a new trial, ostensibly adopting the Thayer view as espoused by Justice Maxie in the Watkins case. Thus reasoned the court:

"In the present case, for the same reasons which justified the creation of the 'commercial ownership-agency' presumption, the lower court was correct in holding that ownership of a non-commercial automobile raised a presumption that the use of the vehicle was with the permission of the owner. The effect of this 'non-commercial ownership-consent' presumption is the same as that of the 'commercial ownership-agency' presumption — to require the defendant to come forward with credible evidence." 121

Unfortunately, the decision does not completely clarify the situation. While apparently starting from the Thayer position, the court held that in order for the trial judge to direct a verdict for defendant the evidence rebutting the presumed fact must be of such a nature "that a jury could not reasonably find otherwise . . . ." 122 Thus, the decision leaves open the question of what rule applies when the opponent introduces only "some" evidence contra the presumed fact.

Further, the court agreed that the trial judge had been correct in not directing a verdict for defendant after X denied the presumed fact. 123 But from the opinion it is difficult to determine exactly why the case should have gone to the jury. On the one hand, the court may have reasoned that, although the presumption had been rebutted by X's testimony, cross-examination had elicited at least some testimonial evidence of permission from which the trier of fact could have inferred permission. Alternatively, it may have been that after cross-examination the quality of X's denial was not of the quality that no reasonable jury could disbelieve. A literal reading of the opinion would

120. Id. at 356 n.1.
121. Id. at 356-57.
122. Id. at 357.
123. Ibid.
seem to support the second interpretation.\textsuperscript{124} Taken together with the reference to the \textit{MacDonald} case\textsuperscript{126} this may mean that the court intended to ratify the Maxie Rule at least in part; \textit{i.e.}, unless the rebutting evidence is overwhelming and uncontradicted, the trier of fact determines whether or not the rebutting evidence is credible and whether or not the presumption has been rebutted.

Lastly, the court itself distinguished between these facts and the case in which the presumption operates against \textit{Y} himself.

"The trial judge charged the jury that the so-called presumption that one acts rightfully rather than wrongfully shifted the burden of persuasion and required the defendant to prove \textit{[X's]} lack \textit{of} permission by the preponderance of the evidence . . . . But this principle does not require that a party to a law suit who alleges the impropriety of the conduct of a non-litigant assume the burden of persuasion on the issue." \textsuperscript{128}

Thus it is that Judge Flood's view in \textit{Smith v. Hennessey},\textsuperscript{127} may still be good law on those facts. And thus it is that "chaos" still aptly describes the situation in Pennsylvania.

D. \textbf{The Scholars Take Over:}

In 1939, the American Law Institute appointed a committee on evidence, comprised of a dozen judges and law professors, with Professor Morgan acting as reporter.\textsuperscript{128} In addition, a body of some seventy consultants was created to aid the committee, Professor Wigmore acting as chief consultant. Professor Wigmore, however, did not participate in the meetings of the advisers or in the actual drafting of the code, and, in the end, published his disapproval of the project as completed.\textsuperscript{129}

Professor Morgan, on the other hand, had become an advocate of the Pennsylvania Rule\textsuperscript{130} and it was probably he who convinced the

\textsuperscript{124} \textit{Ibid.}: "In the trial of the case defendant attempted to meet his obligation by adducing testimony that Koch did not have permission to use the Dreistadt automobile. Plaintiffs on the other hand, sought to shake the credibility of the defendant's witnesses through cross-examination and to elicit testimony from them that Koch did have permission. The court then properly permitted the case to go to the jury."

\textsuperscript{125} \textit{Id.} at 357-58. It must also be observed that two of the justices had granted judgment n.o.v. and that one justice dissented.

\textsuperscript{126} 11 D. & C. 2d 354 (1957).

\textsuperscript{127} Others on the committee included Professors Mason Ladd, and Charles McCormick, together with Judges Henry Lumnus, of the Supreme Judicial Court of Massachusetts; Augustus Hand; and Learned Hand, of the Court of Appeals for the Second Circuit.


committee to adopt this rule. At the 1940 meeting of the Institute, however, objections to the adoption of the Pennsylvania rule were so strong that it had to be withdrawn. In the meantime Professor Morgan had been postulating a middle road of his own between the Thayer and the Pennsylvania Rules:

"Limits of space prevent an exposition of the intolerable condition of the existing law governing presumptions. That has been done elsewhere almost ad nauseum. What is needed is a simple, legislative solution. No very simple solution will be completely rational. A rational solution has been attempted by the Supreme Court of Connecticut\textsuperscript{131}... which has declared that the effect of a presumption should depend upon the reasons which caused the courts or legislature to create it. To attempt to classify the myriads of existing presumptions or to assign to each a given effect would be hazardous or hopeless. One of the simplest proposals is to adopt the Thayer theory, recognized by the United States Supreme Court\textsuperscript{132}... which makes the presumption vanish wherever evidence is introduced which would justify a finding of the non-existence of the presumed fact. This cannot be rationally justified for presumptions created for any reason other than to require the litigant to demonstrate that he has evidence sufficient to raise an issue for the jury or other trier of fact. Another easily understood and easily applied solution is found in Pennsylvania where the normal effect of a presumption is to put the burden of persuasion upon the party asserting the non-existence of the presumed fact. This runs counter to the generally accepted but logically indefensible dogma that the burden of persuasion never shifts. A possible compromise is to apply the Thayer theory where the basic fact upon which the presumption rests has no probative value as evidence of the presumed fact; to use the Pennsylvania doctrine where the basic fact has sufficient probative value as evidence of the presumed fact to support a finding of the presumed fact; and to provide that where the basic fact has some probative value as evidence of the presumed fact but not sufficient value to support a finding, the question of the existence or the non-existence of the presumed fact shall be for the trier of fact unless evidence has been introduced sufficient to compel a finding..."\textsuperscript{133}

The upshot of this was that a new proposed rule was drawn up, approved by the advisers and council, and submitted to the 1941 meeting of the Institute.

\textsuperscript{131} O'Deo v. Amodeo, 118 Conn. 58, 170 Atl. 486 (1934).
"Rule 904. Effect of Presumptions.

(1) Subject to Rule 903, when the basic fact of a presumption has been established in action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence . . . .

(2) Subject to Rule 903, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact

(a) if the basic fact has no probative value as evidence of the existence of the presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if the presumption had never been applicable in the action;

(b) if the basic fact has any probative value as evidence of the existence of the presumed fact, whether or not sufficiency to support a finding of the presumed fact, the party asserting the non-existence of the presumed fact has the burden of persuading the trier of fact that its non-existence is more probable than its existence." 134

This, then, was obviously an outgrowth of Professor Morgan's proposed compromise solution, but with one major change. In his compromise proposal Professor Morgan distinguished between the cases where the basic fact is a sufficient evidentiary basis to support a finding of the presumed fact, and where the basic fact is only evidence of the presumed fact. In the former instance only did he suggest that full rigor of the Pennsylvania rule, while for the latter he proposed something similar to the Maxie rule. In Rule 904, however, wherever the basic fact is evidence of the presumed fact, the Pennsylvania rule applies.

In any event, the actual result was a triumph for the Thayer forces. It has been suggested that while the proponents of Rule 904 were mostly law professors, the opponents' ranks were made up of judges, led by Judges Lummus, and Augustus and Learned Hand, who would have to apply whatever rule was adopted. 135 Thus it was that Judge Lummus admitted the point that the Pennsylvania rule was easily workable, only to add:

"It is not a bad rule, but it is not a good enough rule to make the great majority of states throw their law overboard in order to agree with the law as it seems to be in one state." 136

Judge Augustus Hand joined the fray by observing:

"I have been converted, reconverted, unconverted, deceived, disillusioned and had all sorts of things done to me in this field. I must say that I have a strong feeling that has been growing on me that a distinction was being made here that was pretty unreliable for the trial judge . . . . I think that if you depart from the Thayerian doctrine and have the trial judge try to distinguish between a presumption that has an inferential basis in fact, a logical basis, and another kind of presumption you are going to get into a field of a great deal of confusion and I really believe, as I feel now — I may change in five minutes — in this confusing subject, but I believe in adhering to the Thayerian doctrine which is that as soon as evidence is introduced against the presumption, whether it be one founded on logical inference or not, that the presumption disappears from the case, the question is then left for the jury, if there are any facts for the jury as the evidence warrants. I believe that is really the way the case comes up in nine cases out of ten and this thing is too complicated for me. The Supreme Court of the United States some years ago came out for the strict Thayerian rule and I think it is pretty well understood by the profession that have studied the matter at all and tried to understand it." 137

Thereupon a motion was made to substitute the pure Thayer rule for the proposed rule and upon a vote of 59-42 this was done. 138 Thus came into being Rule 704 of the Model Code of Evidence:

"(1) Subject to Rule 703, when the basic fact of presumption has been established in an action, the existence of the presumed fact must be assumed unless and until either evidence has been introduced which would support a finding of its non-existence . . . .

(2) Subject to Rule 703, when the basic fact of presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact . . . the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action." 139

A battle had been lost, but the war was yet to be won. In 1948, the National Conference of Commissioners of Uniform State Laws decided that the law of evidence was an appropriate area for uniform legislation, and a committee set about drafting a uniform act. 140

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137. A.L.I. PROCEEDINGS 208-09 (1941).
139. MODEL CODE OF EVIDENCE rule 704 (1942).
140. Included on the committee were Professors Mason Ladd and Charles McCormick.
1949, the American Law Institute referred to the committee its Model Code for study and possible revision, while in 1952, the Institute appointed its own committee to review and comment on the proposed uniform act. Finally, at its annual meeting in Boston in 1953 the Uniform Rules of Evidence were adopted by the Conference.


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. Rule 14. Effect of Presumptions.

Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved."

As is readily seen, Rule 14 is a copy of Professor Morgan's proposed Rule 904 to the American Law Institute's Model Code. And, like Rule 904, it is subject to the same objections that were raised by Judge Lummus and Judge Augustus Hand. Further, these objections apparently have not been sufficiently refuted since the Uniform Rules of Evidence have yet to be adopted by any state legislature.

E. Afterthoughts:

The one outstanding objection to the presumption clauses of the Uniform Rules is the incorporation, even in part, of the Pennsylvania rule. Despite its manifest inaccuracy, Thayer's axiom that the burden

141. Including Professor Morgan acting as chairman and Professors Judson Falknor and John Maguire, along with Judge Learned Hand.
144. Uniform Laws Annotated 5 (1958 Supp.)
of proof never shifts is nonetheless a potent force operating against the adoption of the Pennsylvania view. While this general proposition may reflect an end to thinking, it is an existent belief; and in so far as the legal community seems willing to act on the basis of it, it is law. Thus, one solution to any dissatisfaction with the Thayer Rule may be to find yet another alternative to it.

Justice Maxie intimated a compromise solution; that is, to alter the Thayerian doctrine in order to allow the trier of fact to determine whether or not the presumption is rebutted. The difficulty arises, however, in asking the trier of fact to weigh a quantum of evidence and arrive at a relatively abstract decision, which after all, is substantially a question of law. More importantly, an opponent will always be left in a quandry as to whether or not as a practical matter the presumption has actually shifted to him the risk of non-persuasion.

But what other alternative is there? Judge Lummus spelled out a possible solution in Hobart-Farrel Plumbing & Heating Co. v. Klayman, by making use of a “prima facie presumption.” Thus the mailing of a properly addressed and stamped letter raises a presumption of receipt; but even if the presumption is rebutted by the introduction of evidence contradicting receipt, nonetheless the proponent is left with evidence of receipt in the record by way of an inference of receipt.

“The mailing of the letter properly addressed and postpaid does not merely create a presumption, but rather constitutes prima facie evidence of delivery to the addressee in the ordinary course of the mail. As soon as evidence is introduced that the letter failed to reach its destination, the artificial compelling force of the prima facie evidence disappears, and the evidence of non-delivery has to be weighed against the likelihood that the mail service was efficient in the particular instance, with no artificial weight on either side of the balance.”

145. Gauzewitz, Presumptions in a One-Rule World, 5 Vand. L. Rev. 324, 337 (1952): “Sometimes courts recall that the credibility of witnesses is for the jury and therefore revolt against the rule that it is for the judge to decide whether a presumption has been rebutted in a case of very questionable testimonial evidence by saying that credibility is for the jury. The fallacy in this is the same as that underlying many of the erroneous solutions of the problem of the respective functions of the judge and jury; it assumes that the judge and jury are passing upon the same question. In truth they are not. The judge is merely performing his function of deciding whether the evidence is such that a jury may make a certain finding. The jury decides whether to make the finding. The judge may permit a finding by the jury that he would not make if he were the trier.”


Analytically, therefore, this process may be represented by:

$$\pi W \text{ "Yes } A\text{"} \rightarrow \text{Yes}-A \kappa \rightarrow B$$

$$\Delta W \text{ "No } B\text{"} \rightarrow \text{No}-B$$

$$\pi W \text{ "Yes } A\text{"} \rightarrow \text{Yes}-A \kappa \rightarrow B$$

It may be observed, however, that all that has happened here was a fortuitous coalescence of both a presumption and a logical inference, so that the proponent had the benefit of the inference when the presumption was rebutted. But what about the agency cases where $X$ is driving the opponent’s vehicle at the time of an accident? These basic facts are not necessarily the basis for a logical inference that $X$ was the agent of the opponent at the time since it is equally plausible to infer that $X$ was a bailee. This objection might be evaded, however, by saying that upon these facts a permissive inference of agency exists ($A \rightarrow B$), in the manner of res ipsa loquitur. Thus, the next step in the construction is to join the Thayer presumption to the permissive inference and adopt Judge Lummus’ reasoning in the *Hobart-Farrel* case to explain its working.

What good is this device? It answers in a clear manner the defect of the Thayer Rule without shifting the burden of persuasion to the opponent and without leaving the litigants in doubt as to when or whether the presumption has in fact been rebutted. The next objection, however, may be more difficult: When would a *prima facie* presumption apply? In those cases where policy calls for a somewhat stronger procedural medicine than the Thayer Rule: for instance, in a mobile society like the United States today, the owner of a vehicle might be made subject to a *prima facie* presumption in the case where his vehicle is involved in a collision while another person is operating it. Harking back to the wisdom embodied in *O’Deo v. Amodeo*, that each presumption ought to be classified, and taking into account Wigmore’s objection that the Model Code was too abstract, a solution readily suggests itself. That is, every presumption will be declared to be of the Thayer type, except for certain named instances:

**Proposed Rule 1:** Presumption.

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.

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149. 118 Conn. 58, 170 Atl. 486 (1934).
150. See note 129 *supra.*
PROPOSED RULE 2: EFFECT OF A PRESUMPTION.

(a) Except for Rule 2(b), the presumption ceases to exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which otherwise would be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

(b) In the following instances, even though the presumption be dissolved as in Rule 2(a), there exists a permissive inference between the basic fact and the presumed fact so that the evidence of the presumed fact may be weighed against the evidence negating the existence of the presumed fact, with no artificial weight on either side of the balance:

(1) Person other than owner of motor vehicle involved in accident: agency.

(2) Servant injured or found dead on master’s premises: event took place within scope of employment.

[TO BE CONTINUED]