PRESUMPTIONS

A Review

Someday someone will record the whole story leading to the adoption by the American Law Institute of sections 701 to 704 of the Model Code of Evidence.[1] The conflict of views, the changes of opinion, the heated discussions, cry out to be put on paper. When told the story may be either a somber drama, in which the years of work of Professor Morgan are tragically destroyed and his hopes frustrated, or, it may be a splendid comedy written with high spirits in the vein in which Lord Macnaghten wrote his famous judgment in *Van Grutten* v. *Foxwell.* A glance at the list of members on the Committee on Evidence of the Institute shows that distinguished authors are available to do either job and one can only await with patience the appearance of a full and particular account of the subject. To stir the muddy water and bring to the surface all the shifting views is a task too intricate, subtle and lengthy for the scope of this paper which merely attempts to review the problem in broad outline.

It is now commonplace that the expression "burden of proof" has two meanings, one being the "risk of non-persuasion" and the other the "duty of producing evidence to the judge."

This view, based on the then existing authorities, English as well as American, was expounded by Thayer[2] and accepted by Wigmore.[3] It was stated dogmatically that the risk of non-persuasion never shifts. On the other hand, the duty of producing evidence did pass from one party to the other. The "risk of non-persuasion" was fixed by "the law of pleading or some further rule of practice." The result of the adoption of this reasoning was, as was subsequently pointed out by Bohlen,[4] that one was driven to the position that any rule which fixed the risk of non-persuasion was a matter of pleading, or in any event, was something dealing with a problem other than one of evidence.[5]

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[1] Model Code of Evidence, American Law Institute, 1942.

[2] Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) p. 353 *et seq.*

[3] Wigmore, Evidence, paras. 2483 to 2487.

[4] Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof* (1920), 68 Univ. of Penn. L. Rev., 307.

[5] Bohlen pointed out (*op. cit.*, p. 308, 309) that no authority was cited nor was there any attempt to support the statement that rules involving the risk of non-persuasion were usually a question of pleading. "Facts not of themselves determinative of the litigant's rights, no matter how probative of the fact on which they depend are matters of evidence and are not to be pleaded. If any presumption, no matter how strong may be rebutted the facts on which the presumption is based are not of themselves

These rules, stated in somewhat similar language, are to be found in Halsbury[6] and have been accepted by the Supreme Court of Canada.[7]

It is when we come to the part which presumptions play in this dual burden that we lift the lid of Pandora's box. The swarm of conflicting decisions and views are so numerous and so perplexing that to borrow an expression used by Lord Eldon when discussing the rule in Shelley's Case, "the mind is overpowered by their multitude and the sublety of the distinction between them". As Professor Morgan put it, "Every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair."[8]

The word "presumption" has been very loosely used and at the outset let us adopt certain definitions,—

(a) Basic Fact—means the fact or group of facts giving rise to a presumption or a justifiable inference.

(b) Presumption—When a basic fact exists the existence of another fact *must be assumed* whether or not the other fact may be rationally found from the basic fact.

(c) Justifiable Inference—When a basic fact exists the existence of the presumed fact *may be inferred*. This is also sometimes called a presumption of fact or, again, a permissive presumption.[9]

According to Professor Morgan's analysis, in the various articles written by him, there are at least eight views of the procedural effect of a presumption but in the foreword to the Model Code these are reduced to four of the more important views, which are given as follows:—

> 1. The existence of the presumed fact must be assumed unless and until evidence has been introduced which would justify a jury in finding the non-existence of the presumed fact. When once such evidence has been introduced, the existence or non-existence of the presumed

determinative of the rights of the litigants, either in theory or fact. The fact presumed is still open to investigation and is the sole ultimate and issuable fact, which, as such, must be found by the jury: The presumption is an aid to the establishing of this fact, and so is matter of evidence and is not and cannot either in form or substance be matter of pleading."

[6] HALSBURY (2nd Ed.) vol. 13, p. 544, 545.

[7] *Smith* v. *Nevins*, [1924] S.C.R., p. 619; *Ontario Equitable Life* v. *Baker*, [1926] S.C.R. 297.

[8] Morgan, *Presumptions*, 12 Washington Law Review, 255.

[9] (a) and (b) are from the MODEL CODE, Rule 701.
(c) is based on the text to the Code, p. 308, and on the language of Dean McCormick in *Charges on Presumptions and Burden of Proof*, 5 N.C.L. 291.

fact is to be determined exactly as if no presumption had ever been operative in the action; indeed, as if no such concept as a presumption had ever been known to the courts. Whether the judge or the jury believes or disbelieves the opposing evidence thus introduced is entirely immaterial. In other words, the sole effect of the presumption is to cause the establishment of the basic fact to put upon the party asserting the non-existence of the presumed fact the risk of the non-introduction of evidence which would support a finding of its non-existence. This may be called the pure Thayerian rule, for if Thayer did not invent it, he first clearly expounded it.

2. The existence of the presumed fact must be assumed unless and until evidence has been introduced which would justify a jury in finding the non-existence of the presumed fact. When such evidence has been introduced, the existence or non-existence of the presumed fact is a question for the jury unless and until 'substantial evidence' of the non-existence of the presumed fact has been introduced. When such substantial evidence has been introduced, the existence or non-existence of the presumed fact is to be decided as if no presumption had ever been operative in the action. Thus if the basic fact, by itself or in connection with other evidence, would rationally support a finding of the presumed fact, the existence or non-existence of the presumed fact is a question for the jury; if the basic fact is the only evidence of the presumed fact and would not rationally justify a finding of the presumed fact, the judge directs the jury to find the non-existence of the presumed fact. Unfortunately the cases which support this rule do not define substantial evidence; it is certainly more than enough to justify a finding; sometimes it seems to be such evidence as would ordinarily require a directed verdict. In many decisions in the State of Washington, a variant of this view substitutes for 'substantial evidence', evidence from one or more disinterested witnesses.

3. The existence of the presumed fact must be assumed unless and until the evidence of its non-existence convinces the jury that its non-existence is at least as probable as its existence. This is sometimes expressed as requiring evidence which balances the presumption.

4. The existence of the presumed fact must be assumed unless and until the jury finds that the non-existence of the presumed fact is more probable than its existence. In other words the presumption puts upon the party alleging the non-existence of the presumed fact both the burden of producing evidence and the burden of persuasion of its non-existence. This is sometimes called the Pennyslvania rule.[10]

[10] MODEL CODE, p. 55 to 57.

In the text to the Code itself there was added a fifth view as being one of the important ones,—

> " The presumption as such is said to operate as evidence of the presumed fact, and this effect is given to it regardless of evidence of the non-existence of the presumed fact. It is exceedingly difficult to understand the concept thus expressed. Its effect is often to make the existence of the presumed fact a question for the jury when otherwise a verdict of its non-existence would be directed."

This view which is held by some of the courts seems to be completely untenable in theory. This was clearly the view of Thayer and Wigmore. To say that a presumption is evidence is "an absurd and mischievous fallacy" —McBaine, *Presumptions: Are They Evidence?* 26 California Law Review, 519. For a contrary view see Reaugh, *Presumptions and the Burden of Proof*, 36 Illinois Law Review, 803 at p. 839.

It is to be observed that the Thayerian rule as given in (1) merely calls on the party asserting the non-existence of the presumption to produce evidence. This evidence may be disbelieved but none the less the presumption is gone. To take an example used by Professor Morgan: If an accident occurs following a collision with a truck belonging to X but driven by A, it is assumed in some jurisdictions that A was driving the truck with the permission of X. If X however goes into the box and swears that A was driving without his permission this evidence though entirely disbelieved by the jury complies with the Thayerian formula and the presumption is gone. The absurd results which this reasoning brings about has led the courts to try and escape from it. Some courts have avoided the consequences of the rule by giving a decision directly contrary to it while pretending to follow its letter. Other courts have adopted one or other of the rules set out above or the other variants which made up Professor Morgan's eight possible views of the procedural effect of a presumption. Reams of judgments have rolled from the presses as the judges struggled hopelessly with a formula which wound its strangling tentacles around them.

Now it would seem to be almost self evident that the effect of the introduction of evidence which is not believed is a complete nullity and that it should have no effect on the presumption. But the followers of Thayer have reasoned out the problem from a different approach. A presumption, it is said, only assists the party for whose benefit it is invoked to go forward. It is merely a device which enables the judge to tell the jury that assuming the basic fact is proven the jury must find the presumed fact as also proven, that is, if no contrary evidence is introduced. The presumption has no artificial probative effect. When the contrary evidence is introduced it disappears. Picturesque phrases have been invented to describe this process. It is said that "Like Maeterlinck's male bee having functioned they disappear,"[11] or that they "may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts,"[12] Wigmore supplies the simile "that presumptions are the pitcher's fair balls which unless the batsman hits them become 'strikes' and may finally put the batsman out."[13] But to complete the simile—if the batsman strikes and misses (which is the effect of evidence which is not believed) then by some new rule of the

[11] Bohlen, *op. cit.*, p. 314.
[12] Quoted in WIGMORE, (3rd Ed.) vol. 9, p. 289.
[13] WIGMORE, (3rd Ed.) vol. 9, p. 290.

game the batter is in the position as if the ball had not been thrown, the fair ball does not count merely because the batter swung at it.

The Thayerian doctrine as set out in (1) above was seized on by the bench and bar of the United States as if it was of divine inspiration. To suggest that a presumption might shift the burden of persuasion was looked on as "heresy." This is all the more startling because, as has been recently pointed out[14] Thayer did not go quite as far as his disciples claimed. While Thayer made it quite clear that, in his opinion, a presumption was not evidence and only fixed the duty of going forward with proof, he did go on to say "How much evidence shall be required from the adversary to meet the presumption, or as it is variously expressed, to overcome it or destroy it is determined by no fixed rule. It may be merely enough to make it reasonable to require the other side to answer; it may be enough to make out a full *prima facie* case or it may be a great weight of evidence excluding all doubt."[15] Both Thayer and Wigmore recognized that after the mandatory effect of a presumption had been dissipated the basic facts would continue to operate with their own natural force as part of the total mass of probative evidence.[16] This meant that in cases where the presumption was based on facts which in themselves had probative force, that is, they would support a "justifiable inference", the inference still operated. In cases where the basic facts did not support a justifiable inference then the Thayer theory operated in all its naked glory. There is, of course, a great body of presumptions coming within the last category, such as those created by statute, those based on trial expediency and those created as a matter of social policy. The benefit of all these presumptions is much too easily destroyed under the Thayerian theory. In many instances it is just as desirable that such presumption should persist as presumptions based on a justifiable inference. To hold otherwise is often contrary to common sense. It is in the cases which seek to escape this dilemma that we find tortured reasoning of the kind associated with medieval scholasticism or talmudic lore. A simple solution of this problem is available if the shibboleth that the burden of persuasion does not shift is discarded, This means that the Pennsylvania Rule as set out in clause (4) above would be adopted.

The first break in the current of thought on this subject is to be found in the essay of Professor Bohlen published in

[14] Reaugh, *op. cit.*, at p. 821 *et seq.*
[15] THAYER, PRELIMINARY TREATISE, p. 575.
[16] THAYER, PRELIMINARY TREATISE, p. 546; WIGMORE, para. 2491.

1920 on "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof;"[16A] an essay which does not lend itself easily to condensation and which every one interested in the problem should read. "Presumptions," Professor Bohlen argued, "are created by some policy of law to meet some judicially felt need or to accomplish some purpose judicially recognized as desirable." Hence, he concludes, "that the force of each presumption and its effect as shifting the burden of overcoming the inertia of the court or of only shifting the burden of producing evidence depends on the nature of the need or purpose which has led to the recognition of that presumption."

While Professor Bohlen accepts the view that certain presumptions disappear on the production of evidence, he holds that even in these cases the witnesses must be shown to be creditable, *i.e.*, that their evidence is believed. Again, he points out that certain other presumptions habitually shift the burden of persuasion but he made no attempt to classify the various presumptions. Some of the presumptions, he pointed out, like that where the so-called doctrine of res ipsa loquitur applies, have been held to shift the burden of persuasion. "This is in part due," he said, "to a failure to discriminate between proof by satisfactory evidence of the facts and persuasion as to whether those facts show conduct conforming to or falling short of that of a reasonable man under like circumstances ,and in part is due to a growing tendency to a compromise between the modern theory of tort liability as based exclusively on fault and the more modern renaissance of the ancient concept that every man must answer for the harm done even by his most innocent acts, by not only raising the presumption of negligence upon the mere fact of harm done but by holding that such presumption requires the defendant to rebut it by proving that he has done all that is possible to prevent the harm that his activities caused."[16B]

In 1922 some of the difficulties of the problem were touched on by Professor Chafee in an article on "The Progress of the Law of Evidence"[17] in which reference is made to Professor Bohlen's views. Professor Chafee made a valuable contribution

[16A] See *supra* note 4.

[16B] The question whether the so-called doctrine of *res ipsa loquitur* creates a presumption, as here apparently assumed by Bohlen, has been the subject of considerable discussion. See Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 Minnesota Law Review, p. 241; Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 Chicago Law Review, 519, and 10 Southern California Law Review, 166; the illuminating notes by Dr. Wright in 14 Can. Bar Rev. 514, and 15 Can. Bar Rev. 381, and the article and note by Professor Paton in 14 Can. Bar Rev. 480 and 15 Can. Bar Rev. 45."

[17] 35 Harv. L. Rev. 302.

to the discussion by pointing out that some presumptions rest on some policy of a particular branch of the substantive law with which they are connected. Others rest on experience as well as policy and thus they have what he termed "a logical core." This "logical inference "must be weighed in the scale against the rebutting evidence. As an example of a presumption with a logical core he cites the presumption that a letter properly addressed, stamped and mailed arrived at its address. Such a presumption, he states, is both an inference and a presumption. Such logical inferences are evidence and the fact trier is left free to apply his reasoning power to such evidence. Aside from Professor Chafee's artcle, practically no attention was given to Professor Bohlen's views, as expressed in this essay, until Professor Morgan of Harvard University wrote his series of epoch making essays on this problem, the first of which was published in 1931.[18] In this essay an attempt was made to classify the presumptions. Professor Morgan accepted the theory which had been advanced by Bohlen, a decade before, that all presumptions should not be given the same operative effect regardless of the considerations responsible for their creation. "To contend that a presumption which has behind it only considerations of evidence should have the same procedural consequences as one in accord with the normal balance of probability or supported by accepted ideas of desirable policy or both is to argue for a crass rule of thumb and to approve a sort of action in this field which provokes severe condemnation in most others."

As examples of different presumptions, Professor Morgan takes first those presumptions which have no reason for existence save a purely procedural convenience such as statutory presumptions as to survivorship among persons meeting death in a common disaster or that an absentee is presumed dead at a particular time where there is an unexplained absence for seven years. Such presumptions fulfill their whole purpose if they merely fix the burden of producing evidence "but," he goes on to say, "it must be evidence which the trier of fact believes."[19]

[18] 44 Harv. L. Rev. 906.

[19] It was suggested at the 1941 meeting of the Institute that Professor Morgan did not adhere to the view that evidence to meet a presumption must be believed. Judge Lummus said:—

"JUDGE LUMMUS: The situation as I conceive it is this: As to the Thayerian doctrine, there is no difficulty as to its content, no difficulty as to drafting it. The only practical alternative for the Thayerian doctrine is the one that is presented here. I say that because it is so easy to want to create a presumption and then have it die or be rebutted only when some evidence is introduced that is believed by the tribunal of fact. That is such an attractive notion that some courts and judges fall into it at times. They talk about the presumption being rebutted

He next proceeds to presumptions which have their origin in considerations of the comparative convenience with which the parties can produce evidence such as the presumption that where goods are delivered by a carrier to a consignee in bad order that the last carrier caused the damage. Here again the evidence to be produced to rebut the presumption must be such as is credited by the trier of fact. Such a presumption, the author argues, should not be destroyed by uncredited testimony. There would be little objection to throwing the burden of persuasion on the carrier in a case of this kind.

The next class of presumptions considered are those which express the normal balance of probability. Those which exist merely because they are presumed from the basic facts because they are so concomitant with the basic facts that it would be a waste of time to take the evidence, should have no effect beyond regulating the order of evidence. In some cases, such a presumption arises because the party against whom it operates is relying on the unusual, such as the presumption that a person found to have met his death by violence did not commit suicide. Professor Morgan sees no reason why such a presumption should not effectively put the burden of persuasion upon the party against whom it operates.

Then there is the class of presumption which has been invented because it is socially desirable such as the presumption respecting the existence of a prescription, where there has been a usage as of right as far back as evidence goes. Such presumptions should shift the burden of persuasion.

Some presumptions, the author points out, are supported by two or more considerations. In the case of the presumption against a carrier where a passenger is injured in a wreck the

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only by the introduction of credible evidence or evidence that is believed or something of that sort. In fact, I don't want to quip the Reporter on his past history, but there was a period in his career when he flirted with that doctrine and was almost ready to marry it but some of us I think dissuaded him. This was before he became Reporter. This was when he was writing for a law magazine. Some of us succeeded in persuading him that that was perfectly impracticable, and to make a long story short, the Reporter now agrees that no scheme by which the presumption persists until the jury by a process of self-analysis, psychoanalysis, have determined the effect of the evidence on their minds, no theory of that sort, can possibly be applied; so we need not discuss it except to say that there is no intermediate ground of that sort that is workable or possible." (p. 209, 210).

Professor Morgan's remarks as quoted later in this article show, however, that notwithstanding the statement of Judge Lummus, he did adhere to his views as to the necessity of the counter evidence being creditable and a reading of his foreword to the Model Code clearly indicates that his views in this regard have not been altered.

presumption of negligence which arises is due both to the comparative convenience of producing evidence and to the balance of probability. It may also have strong support in a judicial policy to make easy the enforcement of the high duty of care imposed by substantive law. These reasons are sufficient to make the rule in such cases one which requires the defendant to take on the burden of persuading the fact finder.

This essay was followed by a further essay by Professor Morgan in 1933 on "Instructing the Jury upon Presumptions and Burden of Proof,"[20] in which the author again attacked the rule that a presumption disappears upon the introduction of evidence which has no "significance to the trier of fact." With most presumptions the rule should either be that it is not destroyed until the evidence persuades the jury at least that the non-existance of the presumed fact is as probable as its existence or it should shift the burden of persuasion. The effect to be given to the presumption should depend, he argued, upon the court's judgment as to the reasons which called for the creation of the presumption.

In 1937 Professor Morgan again returned to the problem of presumptions.[21] Having again reviewed some of the many cases on the subject and having demonstrated the hopeless confusion on the subject, he brings forward the suggestion that an attempt should be made to simplify the situation by statute. The ground would be cleared "without harm to the courts, clients or lawyers" by a statute enacting a rule similar to the common law rule of Pennsylvania — that the sole effect of a presumption is to put upon the opponent the so-called burden of proof in the double sense of producing evidence and of persuading the jury that the presumed fact did not exist.

In the same year we find Professor Morgan joining with Professor Maguire, also of Harvard, to write an article entitled "Looking Backward and Forward at Evidence."[22] Here the view is put forward that in most instances a presumption is created against a litigant for the same reasons as those which allocated to him the burden of persuasion. The burden of producing evidence to escape a directed verdict and the burden of persuasion are usually coincident. The conclusion of the authors is that a statute embodying the rule that the risk of persuasion shifts is desirable.

[20] 47 Harv. L. Rev. 59.
[21] 12 Washington Law Rev. 255.
[22] 50 Harv. L. Rev. 909.

So far two views in respect to the way to deal with presumptions have been put forward; the so-called Thayerian rule on the one hand and the so-called Pennsylvania rule on the other hand. However, Professor Morgan in an article printed in 1940[23] came back with a third proposal. This article discussed a Model Code of Evidence. A compromise between the two theories was suggested, that was to apply the Thayerian theory where the basic fact upon which the presumption rests has no probative value as evidence of the presumed fact and 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 to support a finding, the question of the existence or nonexistence of the presumed fact shall be for the trier of fact unless evidence has been introduced sufficient to compel a finding. These suggestions were apparently put forward as a basis of argument because Professor Morgan was at that time, as reporter, engaged in formulating the Model Code of Evidence for the American Law Institute. "The compromise," he argued, "has the merit of giving a substantial procedural effect to every presumption. The question for the trial judge is one which he constantly has to answer, and can answer without undue difficulty, namely what, if any, probative value has the basic fact of the presumption." Although this article does not say so, it appears quite clearly that this compromise was put forward due to certain constitutional difficulties which, it was suggested, would make the Pennsylvania rule unacceptable to the Supreme Court of the United States.

In 1940 Wigmore brought out the third edition of his great Treatise on Evidence. An examination of it will show that in the main part of the text he has adhered to the theories put forward in the original work. But realizing that the application of these theories was not satisfactory, he added a new section dealing with the "Future of the Rules for This Subject."[24] The shortcomings to be corrected were admitted.[25] To over-

[23] 89 Penn. L. Rev. 145.

[24] WIGMORE (3rd Ed.) para. 2498 (a).

[25] These were grouped under three heads:

I. The terms used in defining the process are ambiguous or unsettled in their meaning.

II. The rules for the processes recognized as involved in the burden or risk or duty of proof tend to so many verbal and logical discriminations that they become unreal and impractical.

III. The traditional method of instructing the jury upon these rules and expecting the jury to apply them to the evidence has broken

come them Wigmore devised a series of 45 rules of court to which were added 27 examples making 72 in all. These proposals seem unduly complex for an attempt to simplify the subject and it is impossible to deal with them at any length within the limits of this article. Briefly, Wigmore puts forward the position that the jury may be told that they "may give special weight, if they think fit, to the course of experience as embodied in the maxim (here stating the fact that formed the basis of the presumption)." This instruction is termed "Instruction on the Evidential Value of Experience." Wigmore's own statement of the effect of this instruction is in the following language:—"It will thus be observed that the view is here accepted that the basic fact ought to have some special probative value other than its effect as a legal rule binding the jury, and that, even when the latter fails, there remains a probative value based on experience" (Rules 20 to 22 inclusive). The difficulty of instructing juries on the burden of proof is to be avoided so far as possible by a "pre-trial conference" at which special interrogatories to be submitted to the jury will be formulated which may be answered without any instructions as to the law of presumptions. Where evidence contrary to a presumption is introduced then the instructions on the Evidential Value of Experience is to be given. This procedure, it is suggested, will take care of most simple cases where one or two of the standard presumptions occur in the course of evidence.

In 1939 the American Law Institute appointed its committee on evidence. It consisted of a dozen distinguished judges and law teachers with Professor Morgan as the reporter. There were in addition some seventy consultants with Professor Wigmore as the chief consultant. In this field the purpose was to advocate legislation which would effectively remedy the "variegated inconsistency" of the decisions. Taking the four views of the rule given earlier in this review, the second was discarded as being too vague and the meaning of "substantial evidence" too difficult to comprehend. The third view was considered to have no advantage over the fourth. The fourth view or the Pennsylvania rule was put forward by the reporter and accepted by most of the advisers.[26] Unfortunately at the 1940 meeting of

down because the jury in their brief moment of service cannot comprehend the legal refinements, hence the rules are futile and their use becomes a solemn farce.

[26] *Foreword:* MODEL CODE OF EVIDENCE, p. 57, where the views are summarized as follows:

"They were convinced that a presumption, if it is to be an efficient legal tool, must (1) be left in the hands of the judge to administer and

the Institute this simple and commendable solution was objected to on several grounds. First, it was said that it had been judicially recognized in only a few jurisdictions. Then it was strongly urged that it was unconstitutional as being contrary to a decision of the Supreme Court of the United States,[27] in which it had been held that a statute shifting the burden of persuasion was unconstitutional where the basic fact had no probative value as evidence of the presumed fact. Although the reporter thinks this case was wrongly decided[28] a new rule was drawn up, which was approved by the advisers and council, reading in part as follows:—

not be submitted to a jury for a decision as to when it shall cease to have compelling force, (2) be so administered that the jury never hear the word, presumption, used, since it carries unpredictable connotations to different minds, and (3) have enough vitality to survive the introduction of opposing evidence which the trier of fact deems worthless or of slight value. A rule which gives a presumption the effect of fixing the burden of persuasion meets this test. A party with that burden cannot discharge it by the introduction of evidence which has no convincing power with the trier of fact. His evidence must be credited and must have persuasive force. If a presumption is to have any appreciable effect other than merely fixing the burden of producing evidence, it can have no less effect than would be given to an item of evidence of sufficient weight to tip mental scales which are in equilibrium. This is not to say that the presumption is evidence or is to be treated as evidence. It is to say merely that a presumption is a procedural device for securing a decision of a disputed question of fact when the mind of the trier is in equilibrium, that is, when the trier thinks that the existence and non-existence of the fact are equally probable. A tiresome statement of the obvious in an attempt to make this clear may be tolerated." (p. 57, 58).

[27] MODEL CODE, p. 60, The case is *Western & Atlantic Railroad* v. *Henderson*, 279 U.S. 639.

[28] Asked at the 1941 Institute Meeting to give an example of a presumption in which the basic fact had no probative value, Professor Moragn said :

"MR. MORGAN: I am hard put to it to give one that would satisfy me, but I can give you illustrations where the court has said that the basic fact has no probative value. I give you *Western & Atlantic Railroad* v. *Henderson*, where, I submit, Mr. Justice Butler was wrong in all aspects. A man was hit by a locomotive when he was driving his wagon across a crossing; there was a statute in that case which said that under these circumstances the burden should be upon the railroad company to prove due care, the statute ending 'the presumption, being always against the railroad company.' Mr. Justice Butler said in a case of that kind there were four possibilities in human experience. One, that the plaintiff's negligence caused the injury and no other. Two, that the defendant's negligence caused the injury. Three, that a combination of negligence of the defendant and negligence of the plaintiff caused the injury and four, that it was a pure accident. Human experience showed that there were two chances out of four that the railroad company was negligent, but Mr. Justice Butler said that the basic fact, injury by a locomotive at a crossing had no logical connection with the presumed fact, negligence of the railroad company, and the basic fact having no logical connection with the presumed fact, it would be unconstitutional to put the burden of persuasion of due care upon the company. That is why we felt it was necessary to make a division into two clauses." (p. 206).

Rule 904. Effect of Presumptions.

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

(2) 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 sufficient 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. (p. 199, 200)[29]

The rule thus drawn went as far as possible having regard to the constitutional limitations with which the committee was confronted. The Pennsylvania doctrine is used where the basic fact "has *any* probative value as evidence of the presumed fact whether or not sufficient to support a finding of the presumed fact." The net was thrown widely but the rule was subject to the serious objection that certain presumptions would not come within its scope and, as has been pointed out, these excepted presumptions require to be bolstered up as well as the others.[30]

The rule as above set out came before the meeting of the Institute held in 1941. The dissension which had existed in the committee and in the ranks of the advisers finally came out in the open. One gathers from the notes of the proceedings that the judges on the committee, although representing a minority, were opposed to anything but the straight Thayerian rule while the various teachers of law were in favour of the Pennsylvania rule. The opposition to the rule as drafted was largely voiced by Judge Lummus of the Supreme Court of Massachusetts and by Judges Learned Hand and Augustus

[29] Rule 703 deals with the presumption of legitimacy. Sub-paragraph 3 dealing with inconsistent presumptions has been omitted.

[30] Reaugh (*op. cit.*) "The inherent probative value of the probative presumption continues until the jury has decided the facts to the contrary, but the non-probative presumption can be made effective only through artificial means such as the permissive, mandatory, or burden shifting effects. If the permissive or mandatory initial effects do not provide a sufficient handicap, the handicap may be increased by an instruction when the presumption has a probative basis, but if it has no probative basis instructions are not as effective.": p. 822. See also same article at p. 850.

Hand of the United States Circuit of Appeals, Second Circuit. Professors Morgan and Eldredge supported the rule. All three Judges were Members of the Committee on Evidence and also Members of the Council of the Institute. Judge Learned Hand was the then Vice-President of the Institute.

The debate focused the conflicting views on the subject and brought them into sharp outline. The following extracts from the views expressed, put forward in unconventional form in the heat of argument, will be of interest to those who have not access to a transcript of the proceedings:—

> JUDGE LUMMUS: May I ask for the purpose of clarification whether this is not true. That there the basic fact furnishes no ground for the logical inference of a presumed fact, then the Thayerian doctrine of this rule amount to about the same thing.
>
> MR. MORGAN: Yes, that is right.
>
> JUDGE LUMMUS: Going on from there, if the basic fact does furnish a logical ground for inferring the presumed fact, then there is nothing in the Thayerian doctrine to prevent that inference being drawn.
>
> MR. MORGAN: If it furnishes a sufficient basis for that but we apprehend that there is evidence which would have a logical bearing but not have sufficient weight in the opinion of the court to justify a jury in finding the presumed fact.
>
> JUDGE LUMMUS: You agree that that is quite a refinement.
>
> MR. MORGAN: No, I don't think it much of a refinement.
>
> JUDGE LUMMUS: If the basic fact is that a letter was mailed properly addressed, that raises a presumption of receipt in some jurisdictions, but wholly apart from that presumption and no matter how much it is rebutted by evidence of the respondent that no such letter came, there remains a ground of inference that will enable the jury to say, even if the presumption be rebutted under the Thayerian doctrine, that the letter was not ever received. In that situation the only substantial difference between your rule and the Thayerian doctrine is that under your rule the burden of proof in the sense of the burden of persuasian changes, whereas under the Thayerian rule the burden of proof in that sense remains upon the same party and it becomes merely a question for the jury whether the burden is satisfied. So that really is it not true that what you do is to obliterate from the law presumptions as they have been known under the Thayerian doctrine and make a rule which merely has some further specifications than the existing law under the head of burden of proof?
>
> MR. MORGAN: I should not say that we obliterate the Thayerian doctrine. We obliterate the Thayerian doctrine wherever the basic fact has some probative value upon the existence of the presumed fact.

JUDGE LUMMUS: And you substitute a rule which might just as well be called a rule as to the burden of proof as a rule as to presumption.

MR. MORGAN: I don't think so. I think it is a rule which causes the presumption to have an effect upon the burden of proof. That is all. It is not a rule as to burden of proof. It is a rule as to presumptions which affect burden of proof. (pp. 203 and 204).

JUDGE AUGUSTUS HAND: 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 want to have heard, as I think you all will, Judge Lummus on this subject. I think 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 a 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 a logical inference or not, that the presumption disappears from the case and 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 apply it. I think they have got some good stuff. There is Chief Justice Moulton of the Supreme Court of Vermont on the subject in that state. It has been dealt with in a good many other places and as I feel now I am not for this variation of the Thayerian rule. (p. 208, 209).

MR. PEPPER: And your view of the Reporter's rule is that as compared with the pure Thayerian rule, under the Thayerian rule the presumption vanishes utterly the instant that some evidence is introduced to the contrary and thereafter the case will be decided by the trier of fact upon a mere balance of the denial and of the inference drawn from the basic fact. Whereas, under the Reporter's rule the defendant has two dilemmas shot at him. One is the probative effect of the fact of mailing plus a presumption of some sort in addition to the probative inference.

JUDGE LUMMUS: I would not call it a presumption that remains. I think under the Reporter's rule the presumption disappears, because when evidence to the contrary is introduced, no longer can the judge say to the jury you must take this letter as having been delivered, but, according to the Reporter's rule, the fact that there once was a presumpton has the peculiar and rather illogical effect of changing the burden of proof. I say it is workable. It is not a bad rule, but it is not a good enough rule to make the great majority of the states throw their law overboard in order

to agree with the law as it seems to be in one state. I think that is all I care to say. Thank you. (p. 214).

MR. ELDREDGE: It seems to me that you get into this difficulty under the Thayerian rule. We worked this over at great length. We had it half a dozen different ways. But take the illustration Judge Lummus gave of the testimony that the letter was mailed. If there is no further testimony, there is a direction to the jury to find that the letter was received. Now, the addressee takes the stand and he says 'I did not get the letter.' He is completely broken under cross-examination and the jury is pretty well convinced he is not telling the truth. It would seem as if that evidence is not believed that you should get an instruction something like this: 'If you don't believe the addressee's testimony, then I direct you to find that the letter was received' just as the judge would have charged had that testimony which is not believed not entered the picture. But you cannot have that under the pure Thayerian rule if I understand it correctly. The judge can now say to the jury 'though you don't believe this addressee, you are still free to to decide for yourselves whether or not that letter was received.' It seems to me that that is a pretty illogical position to put anybody into. Then it seems to me there is this one further difficulty. Suppose that you can have your permissible inference, Judge Lummus says the presumption disappears and the jury will be permitted to infer from the basic fact that fact B exists. Suppose, however, that proof of the basic fact in itself is not a sufficiently strong record to sustain the finding of the jury that fact B exists, although it has some weight as evidence, but not enough to sustain a verdict, unless there is something else. There, you get into trouble unless you take the rule as the Reporter has stated it. (p. 215, 216).

JUDGE LEARNED HAND: If the motion is before the house I beg in the most earnest way that the house will not pass it. It is utterly futile to refer this rule back to the Reporter, to the Advisers and, as you know, sir, to the Council. We have done the best we could. After this was done, I think I took two solid days to prepare a letter to the Reporter. I happen to be one of those who don't agree with the text, but I am not going to address myself to it. It did not budge him a bit. I am quite sure he is wrong but it is no use to ask him to go over it again. We have been over it ad nauseam. We spent days on it. The responsibility is yours. You are the final word on this. Judges have mixed it up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't care much what it is. I am beaten and through with it and for myself I am frank to say I am not going to do anything more with it. You can refer it back but you won't get a lick of work out of me on it. (p. 217, 218).

MR. MORGAN: In the first place, I want to say that the Thayerian rule does not have anything like as wide an acceptance as Judge Lummus' statement would lead one to believe. The Thayerian rule has been given lip service in very, very numerous

cases. It is only comparatively recently that it has been actually applied in cases like *McIver* v. *Schwartz*. As I have suggested, that is the Rhode Island case where the effect of the Thayerian rule was to destroy the presumption and allow a directed verdict against the presumed fact when the evidence which was introduced by the opponent of the presumption was disbelieved by the jury, and there are numerous cases which say that under these circumstances where the evidence is such that it may be disbelieved by the jury the question is for the jury. In a case very like *McIver* v. *Schwartz* in New York Court of Appeals you had exactly the same sort of thing. The statutory presumption that a person in driving a car was driving it with the consent of the owner and then the statutory responsibility of the owner for damage caused by negligence of one driving with his consent. The evidence was that the owner's son had been given permission to drive only on Long Island and that he had been distinctly forbidden to take the car over to Manhatten where the accident occurred. Both the father and the boy testified to that. Under the Thayerian doctrine that would have required a directed verdict for the defendant because there was no other evidence of the authority of the boy, and plaintiff relied solely on that statutory presumption. The New York Court of Appeals said that the evidence of the father and the son was not sufficient to destroy the effect of the presumption, and that the question was for the jury. There are numerous cases of the same kind where the court has held that you cannot destroy the total effect of the presumption by evidence which the jury is at liberty to disbelieve and which the jury does disbelieve. If you take the example that Judge Lummus has given, I think there would not be so much to say against the Thayerian rule. What I object to in the Thayerian rule is this: the creation of a presumption for a reason that the court deems sufficient, a rule of law if this basic fact stands by itself there must be a finding of a presumed fact, whether the jury would ordinarily find it from the basic fact or not; but then the total destruction of the presumption just the minute some testimony is put in which anybody can disbelieve, which comes from interested witnesses, and which is of a sort that is usually disbelieved. It seems to me it is futile to create a presumption if it is to be so easily destroyed. And the case where the evidence would ordinarily take the case to the jury anyhow, the basic fact would ordinarily justify a finding of the presumed fact, is the case where a presumption is not so much needed. There I will agree, I should not make a very strong argument against the Thayerian rule because it is going to be in the hands of the jury anyhow. But I think that you ought to give greater effect to a presumption than the mere burden of putting in evidence which may be disbelieved by the trier of fact. I say that the slightest definite weight you can give, not letting the jury guess one way or the other about the weight of it, is to fix the burden of persuasion because the burden of persuasion is important, as these notes point out, only where the mind of the jury or the trier of fact is in equilibrium. If the jury is satisfied either way, it makes no difference who has the burden of persuasion, but when the mind of the jury

> or the mind of the trier of fact is in equilibrium, then the party having the burden of persuasion loses; so that the most effect that this gives to a presumption when evidence is introduced contrary to it is the effect which a piece of evidence would have that would throw the case out of equilibrium; and it is my firm conviction that if a presumption is worth creating it is worth that much value even in the face of evidence to the contrary. The next point that was made was the impracticability of making this distinction between evidence that has some probative value and evidence which has no probative value. In my opinion there is just absolutely nothing impracticable in this situation at all. If it were not for *Western & Atlantic* v. *Henderson*, I should much prefer the Pennsylvania rule. I agree that we would be making a change which would overrule almost all decisions if you take it generally. Pennsylvania has the rule that every presumption fixes the burden of persuasion. But there are numbers of states that have rules that certain kinds of presumptions fix the burden of persuasion; and if we are to get at this theoretically, we have to have some easily applied rule so as to get out of this welter of confusion in the cases. (pp. 220, 221, 222).

Finally the vote was taken and the Institute by a vote of 59 to 42 decided to substitute the Thayerian rule in its "unadulterated form" in the place of the rule proposed by the reporter. The rule now appears in the Code in the following language:—

> Rule 704. Effect of Presumptions.
> (1) Subject to the Rule 703, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.
> (2) Subject to Rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action.

As was to be expected Professor Morgan was not satisfied with the rule as adopted.[31]

Having read many of the articles on the subject, one cannot escape from the view that the Thayerian rule, while it appears simple, is apparently too delicate an instrument for trial use. It creates psychological problems in the process of thought formation which escape explanation or definition. The results which flow from its application too frequently defeat the justice

[31] 27 A.B.A.J., p. 744.

of the case. As Professor Morgan has said "The real decision is made upon the judicial judgment based upon experience as to what is convenient, fair and good policy."[32] As most presumptions have either a "logical core" or a "basis of experience" or have been created because they are desirable as a matter of "social" or "statutory" policy, the writer's view is that the adoption of the Pennsylvania rule gives a simple solution which will more often lead to justice than the rule which was adopted. This is particularly true in Canada where we are not vexed with constitutional limitations which caused the Pennsylvania rule to be discarded by the Institute and where in jury trials our judges are able to comment freely on the evidence.

S. J. HELMAN.

Calgary.

[32] 44 Harv. L. Rev. 911.