Nebraska Law Review

Volume 53 | Issue 3 Article 4

1974

Presumption Rules Try to Indicate if Fact Can, Should Be Inferred

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Presumption Rules Try To Indicate If Fact Can, Should Be Inferred

I. NATURE OF THE PROBLEM

A. Inferring Facts

The existence of a fact is quite often established by inference. Fact A and Fact B are proven and from these facts Fact C is inferred. This is a common occurrence in ordinary, everyday reasoning. However, judicial refinements of this logical process leave something to be desired. In most situations, a judicial determination relating to an inferred fact is the outgrowth of an inquiry into the sufficiency of the evidence to support the inference. In any given situation, a court may reach the conclusion that based upon the facts and circumstances established by the evidence: (a) the inferred fact cannot reasonably and logically be inferred; (b) the inferred fact must be inferred; or (c) the inferred fact may, but need not, be inferred.

Since judges are fallible, results are sometimes irreconcilable in cases involving substantially similar evidence. The courts and legislatures sought to remedy the situation by establishing "presumptions," *i.e.*, legal ground rules which would indicate in certain situations that a fact could be inferred or in other situations that a fact should be inferred. Their efforts brought chaos out of chaos. Legislative and judicial adoption of presumptions without a clear indication of their effect merely compounded the confusion.

B. Effects of Presumptions

Is a presumption evidence? In Nebraska,[1] and most jurisdictions,[2]

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1. *In re* Estate of Drake, 150 Neb. 568, 35 N.W.2d 417 (1948); Witthauer v. Paxton-Mitchell Co., 146 Neb. 436, 19 N.W.2d 865 (1945).
2. Annots., 34 A.L.R. 938, 951 (1925); 47 A.L.R. 968 (1927) listing cases supporting the view that presumptions are not evidence.

courts have given a negative response to this question.[3] If a presumption is not evidence, what is its effect? A recent survey discloses the following:

> Legal scholars have divided the effects of a presumption into seven basic groups. The first suggested effect is that introduction of basic facts shifts the risk of not introducing evidence sufficient to support the nonexistence of the presumption to the opposing party. In simpler terms, if the opposing party fails to provide rebuttal evidence, the presumption will continue to affect the trier-of-fact's final determination, but if the opposing party gives enough evidence to support the nonexistence of the presumption, it will disappear. This effect is better known as Professor Thayer's "bursting bubble" theory. Many problems arise in the context of the "bursting bubble" theory which will be discussed later in this comment. The second effect which is an outgrowth of the first, places the burden of producing "substantial" evidence on the opposing party to show the nonexistence of the presumption.
>
> Where the opposing party must give evidence sufficient to support a finding of the nonexistence of the presumption, a third effect allows the trier of fact discretion whether to believe the evidence of the opposing party. Under this view the presumption exists until the trier of fact actually determines its nonexistence. A fourth theory states that the presumption exists until the trier of fact finds that the presumption's nonexistence is at least as probable as its existence. The Pennsylvania rule, the fifth theory of effect, goes one step further and states that the presumption exists until the trier of fact finds that its nonexistence is more probable than its existence. As will be shown shortly, this theory actually affects the burden of persuasion. A sixth classification, which coincides with one of the justifications for presumptions, is that the presumption has the effect of placing the burden of producing evidence on the opposing party when he has access to the evidence. In such a case, it is held that the nonintroducing party has both the burden of disproving the existence of the presumption and the burden of persuasion. The final suggested effect of a presumption is that when evidence is introduced to prove its nonexistence, the trier of fact—while he need not assume the presumption—will use the presumption as evidence of the existence of the basic fact. In most of the above cases where the presumption disappears, it is generally felt that, regardless of its elimination, the basic facts leading to the presumption remain in effect and are considered by the trier of fact the same as other facts.[4]

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3. In some jurisdictions, courts have said that a presumption is evidence. *See, e.g.*, Coffin v. United States, 156 U.S. 432 (1895); Freeman v. Blount, 172 Ala. 655, 55 So. 293 (1911); Webb v. State, 11 Ga. App. 850, 76 S.E. 990 (1912); Wood v. Sovereign Camp of Woodmen of the World, 166 Iowa 391, 147 N.W. 888 (1914); State v. Wolfley, 75 Kan. 406, 93 P. 337 (1907); City Motor Trucking Co. v. Franklin Fire Ins. Co., 116 Ore. 102, 239 P. 812 (1925). *But see* Holt v. United States, 218 U.S. 245 (1910).
4. Comment, *Judicial Notice and Presumptions Under the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 135, 154-55 (1969).

The Model Code of Evidence (hereinafter "Model Code") contains a similar survey of the effect of presumptions in various jurisdictions.[5]

Nebraska courts have not been immune from the presumption problem. The following somewhat ill-defined categories have developed in this state:

(a) Rule of Law

A conclusive presumption cannot be rebutted by the opponent; it is in effect a rule of substantive law.[6] For example, a person is conclusively presumed to know the law and evidence that such person did not in fact know the law is inadmissible.[7] Similarly, a person is conclusively presumed to know the vicious nature of a wild animal,[8] and evidence of such knowledge is unnecessary and irrelevant. When the presumed fact must be accepted as true, *i.e.* it is not subject to disproof by rebuttal evidence once the basic facts which give rise to the inference are established, the process does not involve an inference or presumption in any real sense at all. The basic facts are essential elements of a cause of action and a rule of substantive law comes into play to determine conclusively that the presumed fact exists.

(b) Discharging the Burden of Producing Evidence

The burden of proof is an equivocal term which normally includes two concepts.

1. The burden of producing evidence; and
2. The burden of persuasion.[9]

The person having the burden of producing evidence must produce sufficient evidence from which reasonable minds could infer the existence of the fact he has to prove. If he does not produce the required evidence, he will be subject to a motion to dismiss because he has failed to discharge his burden of producing evidence.[10]

5. MODEL CODE OF EVIDENCE, Introductory Note at 306 (1942) [hereinafter cited as MODEL CODE].
6. Heiner v. Donnan, 285 U.S. 312 (1932); Early v. People, 142 Colo. 462, 352 P.2d 112 (1960).
7. Satterfield v. State, 172 Neb. 275, 109 N.W.2d 415 (1961).
8. Crunk v. Glover, 167 Neb. 816, 95 N.W.2d 135 (1959).
9. *See* Kucaba v. Kucaba, 146 Neb. 116, 18 N.W.2d 645 (1945). *Compare* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 336 at 783 (2d ed. 1972) [hereinafter cited as MCCORMICK].
10. State *ex rel.* Beck v. Associates Discount Corp., 168 Neb. 298, 96 N.W. 2d 55 (1959).

Sometimes a presumption will come into play and assist the proponent in discharging his burden of producing evidence. Under the doctrine of *res ipsa loquitur*, if a thing which causes injury is shown to be under the defendant's control and management, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, the facts of the occurrence permit, but do not compel, an inference of negligence, and afford reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care.[11] In a sense the *res ispa loquitur* type of "presumption" takes the place of evidence and fills a void in the proponent's proof. In other words, the law permits the trier of fact to reach a factual conclusion from the evidence presented which might not be a proper conclusion if the usual rule of reason were followed. The legislative or judicial presumption created in situations similar to the *res ipsa loquitur* situation is usually justified on the ground that the opponent may have better access to the evidence and should be required to come forward with it or subject himself to the possibility of an unfavorable jury verdict.

(c) Shifting the Burden of Producing Evidence

Under the classic definition of a presumption, as stated by Thayer, once a presumption arises, it shifts the burden of producing evidence.[12] If evidence to rebut the presumed fact is introduced, the "bubble bursts" and the presumption disappears.[13] The Supreme Court of Nebraska has described the Thayer type presumption as follows:

> A disputable presumption is a rule of law to be laid down by the court, which shifts to the party against whom it operates the burden of evidence, merely. It points out the party on whom lies the duty of going forward with evidence on the fact presumed. And when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the office of the presumption is performed, and the fact in question is to be established by evidence as are other questions of fact, without aid from the presumption, which has become functus officio. To translate this statement into the language of this Court, all such presumptions are locative, merely. A presumption, of itself alone,

11. Nownes v. Hillside Lounge, Inc., 179 Neb. 157, 137 N.W.2d 361 (1965); Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954); Miratsky v. Beseda, 139 Neb. 229, 297 N.W. 94 (1941); Comment, *Res Ipsa Loquitur—An Analysis of its Application and Procedural Effect in Nebraska*, 41 NEB. L. REV. 747 (1962).
12. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313-52 (1898) [hereinafter cited as THAYER].
13. 9 J. WIGMORE, EVIDENCE §§ 2487, 2491 (3d ed. 1940) [hereinafter cited as WIGMORE].

> contributes no evidence and has no probative quality. It takes the place of evidence, temporarily, at least, but if and when enough rebutting evidence is admitted to make a question for the jury on the fact involved, the presumption disappears and goes for naught. In such a case, the presumption does not have to be overcome by evidence; once it is confronted by evidence of the character referred to, it immediately quits the arena.[14]

In Nebraska, the Thayer type presumption has the following effects: (1) the presumption shifts the burden of producing evidence; (2) the presumption is not itself evidence and not to be weighed by the jury as evidence; and (3) when evidence is introduced sufficient to satisfy the judge that reasonable minds could either find the existence or nonexistence of the presumed fact, the presumption disappears.[15] Depending upon the quantum of evidence relevant to the basic and presumed fact, the effect of this type of presumption in typical situations has been summarized as follows:

> 1. If the party relying on the presumption fails to produce sufficient evidence from which reasonable minds could infer the existence of the basic facts, the presumed fact never arises. Consequently the presumption does not enter the case.
>
> 2. If the person relying upon the presumption produces sufficient evidence from which reasonable minds could infer the existence of the basic facts, the presumption arises and either one of two results will follow:
>
> a. If the opponent fails to introduce any evidence relating to the presumed fact the case goes to the jury under instructions treating the presumption as a rule of law; i.e., the jury is instructed that if they find the existence of the basic facts from the evidence presented to them, they must find the existence of the presumed fact as a matter of law.
>
> b. If the opponent of the presumption introduces evidence relating to the presumed fact from which reasonable minds could infer that the presumed fact does not exist, the presumption disappears, and the case should be submitted to the jury without any instruction relating to the presumption at all. The presumption having disappeared, no mention is made of it, and the jurors are left free to infer, or not to infer, the existence of the presumed fact upon the basis of all of the evidence presented to them.
>
> 3. If the proponent of the presumption introduces so much evidence that reasonable minds would be required to infer the existence of the basic facts then the opponent has two alternatives:
>
> a. The opponent may introduce evidence tending to rebut

14. Patrick v. Union Cent. Life Ins. Co., 150 Neb. 201, 204-05, 33 N.W.2d 537, 540 (1948) quoting Tyrrell v. Prudential Ins. Co. of America, 109 Vt. 6, 23-24, 192 A. 184, 192 (1937). *See also In re* Estate of Hunter, 151 Neb. 704, 39 N.W.2d 418 (1949).

15. *In re* Estate of Drake, 150 Neb. 568, 35 N.W.2d 417 (1948); *In re* Estate of Goist, 146 Neb. 1, 18 N.W.2d 513 (1945); Bohmont v. Moore, 138 Neb. 784, 295 N.W. 419 (1940).

> the existence of the basic facts and create a question of fact which goes to the jury on the basic facts. If all of the opponent's evidence related to the basic facts, then the case should be submitted to the jury with an instruction treating the presumption as a rule of law; i.e., if the jurors find the existence of the basic facts, they must find the existence of the presumed facts.
>
> b. The opponent alternatively may introduce evidence relating to the presumed fact, and if reasonable minds from the evidence presented by the opponent could infer that the presumed fact does not exist, then the presumption disappears and the case goes to the jury without any instruction relating to the presumption, as indicated above.[16]

(d) Allocating the Burden of Persuasion

The function of some presumptions is simply to allocate the burden of persuasion. There is a presumption that one accused of a crime is innocent, and this presumption exists until sufficient evidence is introduced to overcome it.[17] This presumption is described to the jury as follows:

> The defendant is presumed to be innocent.
>
> This presumption of innocence is evidence in favor of the defendant and continues throughout the trial, until he shall have been proved guilty beyond a reasonable doubt.[18]

This presumption is used as a method of describing the principle that the state has the burden of persuading the jury that the defendant is guilty. It is in effect an amplification of the prosecution's burden of persuasion, but really adds little substance to the existing requirement that the state persuade the jury beyond a reasonable doubt that the defendant is guilty.[19]

There are other presumptions which are given the same effect as the presumption of innocence. In federal tax cases, there is a presumption that the determination of a deficiency made by the Commissioner of Internal Revenue is correct, the sole effect of which is to place the burden of persuasion on the taxpayer.[20] There is a presumption that a child born of a married woman during wedlock is presumed to be child of the individual who was her husband at the time of conception, and this presumption also shifts the burden of persuasion to the party against whom it operates.[21] These presumptions support Morgan's theory that a presumption

16. D. Dow & J. North, Nebraska Evidence 2-4, 2-5 (State Bar, 1969).
17. Bartley v. State, 53 Neb. 310, 73 N.W. 744 (1898).
18. Nebraska Jury Instructions 14.07 (1969); Behrens v. State, 140 Neb. 671, 1 N.W.2d 289 (1941).
19. McCormick § 342.
20. Morse v. United States, 371 F.2d 474 (Ct. Cl. 1967).
21. Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949).

should have the effect of placing the burden of persuasion of the issue on the party against whom it operates.[22]

II. PRIOR CODIFICATIONS

Codifying the basic effect of a presumption is not a new problem. The drafters of both the Model Code and the Uniform Rules of Evidence (hereinafter "Uniform Rules") struggled for a palatable solution.

A. The Model Code

The Model Code released in 1942 states: "Presumption means that 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."[23] In general, "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 nonexistence."[24] When evidence has been introduced which would support a finding of the nonexistence of the presumed fact, "the existence or nonexistence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action."[25] The Model Code adopts the Thayer approach: a presumption merely shifts the burden of producing evidence "and should be administered so that the jury never hear the word presumption."[26] It seems clear that the rule of the Model Code could not be applied in federal criminal cases. The United States Supreme Court has recently and emphatically restated the rule that a presumption (in criminal cases) is unconstitutional unless there is some rational connection between the facts proved and the facts presumed.[27] With the exception of this deficiency, the Model Code was at the time it was drafted a reasonably accurate reflection of the meaning of presumptions adopted by a considerable number of courts.

B. The Uniform Rules

In 1953, the drafters of the Uniform Rules defined a presumption as "an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of

22. MODEL CODE, Foreward at 57 (1942).
23. MODEL CODE rule 701(2) (1942).
24. *Id.* rule 704(1).
25. *Id.* rule 704(2).
26. *Id.* Comment (2)(b).
27. Leary v. United States, 395 U.S. 6 (1969); Tot v. United States, 319 U.S. 463 (1943).

facts found or otherwise established in the action."[28] This rule is sufficiently broad to include "conclusive" or "irrebuttable presumptions" which are in fact substantive rules of law.[29] The basic fact can be established by the pleadings, stipulation of the parties, judicial notice or production of sufficient evidence.[30] Morgan suggested that a presumption should have the effect of placing the burden of persuasion on the issue on the party against whom it operates.[31] Rule 14 of the Uniform Rules contains the essence of Morgan's suggestion. Under the rules, if the basic fact has some logical value in proving the presumed fact, the burden of establishing the nonexistence of the presumed fact is on the party against whom the presumption operates.[32] The phrase "burden of establishing" contained in the Uniform Rule is not defined; however, it undoubtedly means the burden of persuading the jury of the nonexistence of the presumed fact by the necessary evidence.[33] When there is no rational connection between the basic fact and the presumed fact, the presumption merely shifts the burden of producing evidence and not the burden of persuasion under the Uniform Rules.[34]

III. THE FEDERAL RULE

Comparing the Model Code with the Uniform Rules would lead one to agree with Morgan that "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 left it with a feeling of despair."[35] The drafters of the Proposed Federal Rules of Evidence (hereinafter "Federal Rule[s]" or "federal proposal") are no exception. From the initial draft presented by the United States Supreme Court Committee on the Rules to the most recent legislative amendment, the definition of "presumption" has come full circle.

A. Presumptions in Criminal Cases

The original draft issued in March 1969 contained the following rule for presumptions in federal criminal cases:

28. UNIFORM RULE OF EVIDENCE 13 [hereinafter UNIFORM RULE].
29. E. MORGAN, J. MAGUIRE & J. WEINSTEIN, EVIDENCE 439 (4th ed. 1957).
30. UNIFORM RULE 13; Morgan, *The Law of Evidence, 1941-1946*, 59 HARV. L. REV. 481, 495 (1946).
31. MODEL CODE, Foreward at 57 (1942).
32. UNIFORM RULE 14(a).
33. McBaine, *Burden of Proof; Presumption*, 2 U.C.L.A.L. REV. 13, 24-28 (1954); Morgan, *Presumptions*, 10 RUTGERS L. REV. 513-14 (1956).
34. UNIFORM RULE 14(b).
35. Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937).

(a) Scope. In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule, unless otherwise provided by Act of Congress.

(b) Submission To Jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. Under other presumptions, the existence of the presumed fact may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(c) Instructing The Jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.[36]

The foregoing rule was based largely upon the American Law Institute's Model Penal Code[37] and *United States v. Gainey*.[38] In *Gainey*, the Court had sustained the validity of Title 26 of the United States Code, section 5601(b) which stated that presence at the site is sufficient to convict of the offense of carrying on the business of distiller without giving bond unless the presence is expalined to the jury's satisfaction. The Advisory Committee relied upon the following conclusions reached by the Court:

> The power of the judge to withdraw a case from the jury for insufficiency of evidence is left unimpaired; he may submit the case on the basis of presence alone, but he is not required to do so. Nor is he precluded from rendering judgment notwithstanding the verdict. It is proper to tell the jury about the "statutory inference," if they are told it is not conclusive. The jury may still acquit, even if it finds defendant present and his presence is unexplained. (Compare the mandatory character of the instruction condemned in Bollenbach v. United States, 326 U.S. 607 (1945)). To avoid any implication that the statutory language relative to explanation be taken as directing attention to failure of the accused to testify, the better practice, said the Court, would be to instruct the jury that they may draw the inference unless the evi-

36. PROP. FED. R. EVID. 3-01 (Prelim. Draft, 1969).
37. MODEL PENAL CODE § 1.12(5) (Prelim. Offic. Draft 1962).
38. 380 U.S. 63 (1965).

> dence provides a satisfactory explanation of defendant's presence, omitting any explicit reference to the statute.[39]

Although the Federal Rules were published, circulated for comment and revised by the Supreme Court, no substantial change was made in the rule relating to presumptions in federal criminal cases as that rule was finally adopted by the Supreme Court.[40]

When the Federal Rules were transmitted to Congress, they were referred to the House of Representative's Committee on the Judiciary. This committee deleted the Rule relating to presumptions in federal criminal cases because

> the subject of presumptions in criminal cases is addressed in detail in bills now pending before the Committee to revise the federal criminal code. The Committee determined to consider this question in the course of its study of these proposals.[41]

The House version of the Federal Rules, H.R. 5463, was adopted by the House on February 6, 1974, without any provision at all for presumptions in federal criminal cases.[42] The study commenced by the Judicial Conference in March 1961 is not yet over, and to date, there is little or no indication which rule will govern federal courts in applying presumptions in criminal cases.

B. Presumptions in Civil Cases

The March 1969 draft contained the following rule for presumptions in federal civil cases:

> (a) Scope. Presumptions in all cases not otherwise provided for by Act of Congress or by these rules are governed by this rule.
>
> (b) Effect of Presumption. A presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.
>
> (c) Procedure.
>
> (1) Determination of Evidence of Basis Facts. When no evidence is introduced contrary to the existence of the presumed fact, the question of its existence depends upon the existence of the basic facts and is determined as follows:
>
> (A) If reasonable minds would necessarily agree that the evidence renders the existence of the basic facts more probable than not, the judge shall direct the jury to find in favor of the existence of the presumed fact; or
>
> (B) If reasonable minds would necessarily agree that the evidence does not render the existence of the basic facts

39. PROP. FED. R. EVID. 3-01, Advisory Committee's Note (Prelim. Draft 1969).
40. PROP. FED. R. EVID. 303.
41. H.R. REP. No. 650, 93d Cong., 1st Sess. 5 (1973).
42. 120 CONG. REC. H541, H570 (daily ed. Feb. 6, 1974).

more probable than not, the judge shall direct the jury to find against the existence of the presumed fact; or

(C) If reasonable minds would not necessarily agree as to whether the evidence renders the existence of the basic facts more probable than not, the judge shall submit the matter to the jury with an instruction to find in favor of the existence of the presumed fact if they find from the evidence that the existence of the basic facts is more probable than not, but otherwise to find against the existence of the presumed fact.

(2) Determination On Evidence Of Presumed Fact. When reasonable minds would necessarily agree that the evidence renders the existence of the basic facts more probable than not, the question of the existence of the presumed fact is determined as follows:

(A) If reasonable minds would necessarily agree that the evidence renders the nonexistence of the presumed fact more probable than not, the judge shall direct the jury to find against the existence of the presumed fact; or

(B) If reasonable minds would necessarily agree that the evidence does not render the nonexistence of the presumed fact more probable than not, the judge shall direct the jury to find in favor of the presumed fact; or

(C) If reasonable minds would not necessarily agree as to whether the evidence renders the nonexistence of the presumed fact more probable than not, the judge shall submit the matter to the jury with an instruction to find in favor of the existence of the presumed fact unless they find from the evidence that its nonexistence is more probable than its existence, in which event they should find against its existence.

(3) Determination of Evidence of Both Basic and Presumed Facts. When evidence as to the existence of the basic facts is such that reasonable minds would not necessarily agree whether their existence is more probable than not and evidence as to the nonexistence of the presumed fact is such that they would not necessarily agree that its nonexistence is more probable than not, the judge shall submit the matter to the jury with an instruction to find in favor of the existence of the presumed fact if they find from the evidence that the existence of the basic facts is more probable than not and unless they find the nonexistence of the presumed fact more probable than not, otherwise to find against the existence of the presumed fact.[43]

The Advisory Committee concluded that any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the nonexistence of the presumed fact in civil cases was laid to rest in *Dick v. New York Life Insurance Co.*[44] Since

43. PROP. FED. R. EVID. 3-03 (Prelim. Draft 1969).
44. 359 U.S. 437 (1969); PROP. FED. R. EVID. 3-03, Advisory Committee's Note (Prelim. Draft 1969).

there was no constitutional limitation, the committee readily departed from Thayer's view of presumptions:

> The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not not believed, is rejected as according presumptions too "slight and evanescent" an effect.[45]

It is interesting to note that the original draft of the rule spelled out in detail the procedure to be followed. However the revised rule as adopted by the Supreme Court was stated very simply:

> Presumptions in General. In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.[46]

The only comment made by the committee which deleted two pages of detailed procedural rules was that

> [t]he rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.[47]

At least one author felt the deleted procedural provisions would be "useful for quick reference either to refresh minds in the midst of a trial or to avoid the necessity of hasty research in support of authority to make a directed finding."[48]

In effect, the Supreme Court adopted the Pennsylvania rule with respect to the effect of a presumption. Until the trier of fact finds that the nonexistence of the presumed fact is more probable than its existence, the presumed fact and the presumption remain in effect.[49] The effect of such a presumption is to shift the burden of persuasion.[50] The rule has been criticized:

> There is little logic in placing the persuasion on a party just because he does not have the probabilities on his side. To do so "confuses the problem of which party must persuade with the problem of what proof is necessary for persuasion. Public policy in addition to probabilities might justify shifting the burden, but where this policy plays an important role in the presumption, the

45. PROP. FED. R. EVID. 3-03, Advisory Committee's Note (Prelim. Draft 1969).
46. PROP. FED. R. EVID. 301.
47. *Id.*, Advisory Committee's Note.
48. Fornoff, *Presumptions—The Proposed Federal Rules of Evidence*, 24 ARK. L. REV. 401, 409 (1971).
49. *In re* Grenet's Estate, 332 Pa. 111, 2 A.2d 707 (1938). *See also* Page v. Phelps, 108 Conn. 572, 143 A. 890 (1928).
50. MCCORMICK § 309.

states—not the Supreme Court—can promulgate law dealing with the burden of persuasion. Hopefully, states will adopt Professor McCormick's progressive view that the burden of persuasion does not arise until the jury reaches an impasse. Adopting such a view not only makes the judge's duty to instruct the jury easier, but also allows states to statutorily place the burden on one party or the other depending on public policy. For example, states could promulgate law which holds that where the jury reaches an impasse in a legitimacy case, the burden of persuasion would rest with the defendant because of the public policy against the stigma of bastardy.[51]

In spite of the foregoing, Professor Fornoff makes a respectable argument in support of the Rule adopted by the Supreme Court:

> In support of the provision for casting the burden on the opponent, the Advisroy Committee relied upon the obvious inconsistency of a rule which would give conclusive effect to the presumption in the absence of substantial rebutting evidence, and yet cast the presumption entirely out of the case "upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed. . . ." Such a "bursting bubble" theory if "rejected as according presumption too 'slight and evanescent an effect.'
>
> More fundamental is the Advisory Committee's argument for consistency with the basic principles of trial procedure generally:
>
> > The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions.
>
> The acceptability of the Thayer doctrine not only in terms of inconsistency of results, but also the policy problems to be met, was raised over a decade ago by Dean Gausewitz. Writing first about the Model Code of Evidence, he raised the question as to whether the courts would stick to the Code provision incorporating Thayer's doctrine. His answer was that in at least eleven different situations, courts, after adhering to the Thayer doctrine, had departed from it "under pressure of powerful policy reasons" which had pushed them over the other rule, or further. Such a result has followed in Arkansas, Ohio, and Maine. The painstaking review of major presumption problems by the Maine court is not only illuminating reading, but also a potent argument for taking a fresh start.
>
> Gausewitz agreed with Morgan and Bohlen that it would be sounder doctrine to adopt for each presumption a rule as to effect which would be consistent with the ground upon which the presumption was founded, but he approved the later trend toward a single rule, concluding that the doctrinal appeal was offset by the disadvantage of "encumbering procedures with a confusing

51. Comment, *Judicial Notice and Presumptions Under the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 135, 161 (1969).

> phethora of rules." His conclusion was in favor of a single rule which shifted the burden of persuasion to the person against whom the presumption operated.
>
> Professor Morgan, in one of his last efforts at putting the presumption problems into work-a-day perspective, said:
>
> > Just as the courts have come to recognize that there is no a priori formula for fixing the burden of persuasion, so they should recognize that if there is a good reason for putting on one party or the other the burden of going forward with evidence—if it might not as well have been determined by chance—it ought to be good enough to control a finding when the mind of the trier is in equilibrium.[52]

There is much to be said for the foregoing view. A trend toward a single rule seems to be a trend in the right direction.

The basic effect of an ordinary presumption would be to shift the burden of persuasion. However, under the Federal Rule both Congress and the state legislatures could provide a different effect for any given presumption, if they had jurisdiction and so desired. Rule 301 provides the effect of a presumption only "in cases not otherwise provided for by Act of Congress" and Rule 302 specifically provides:

> In civil actions, the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision is determined in accordance with state law.

In support of the foregoing rule, the Advisory Committee refers to a series of Supreme Court decisions in diversity cases leaving no doubt about the relevance of *Erie Railroad Co. v. Tompkins*[53] to questions of burden of proof. State law controls where the burden of proof question has to do with a substantive element of the claim or defense.[54]

Although the Committee on the Judiciary was inclined to the view that there should be basically one rule, it could not accept the rule adopted by the Supreme Court. The Committee reported:

> With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgment implicit in the Court's version that the so-called "bursting bubble" theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee

52. Fornoff, *Presumptions—The Proposed Federal Rules of Evidence*, 24 ARK. L. REV. 401, 409-10 (1971).
53. 304 U.S. 64 (1938).
54. Dick v. New York Life Ins. Co., 359 U.S. 437 (1959); Palmer v. Hoffman, 318 U.S. 109 (1943); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939).

> believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced—a view adopted by only a few courts—lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.[55]

The Committee reported the following rule which was adopted by the House of Representatives on February 6, 1974:

> Rule 301. Presumptions in General in Civil Actions and Proceedings. In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposed on the party against whom it is directed the burden of going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of the facts.[56]

What the Senate will do with the House version of the Rule is hard to predict. The problems created by presumptions led Thayer long ago to remark that "among things too beset with ambiguity there is abundant opportunity for him to stumble and fall who does not pick his way and walk with caution."[57]

IV. THE NEBRASKA RULE

In October 1969, the Nebraska Supreme Court established a committee to "undertake a study of modernized and simplified rules of evidence for consideration by the bench and bar."[58] In the area of presumptions, the committee was unable to locate any modernized or simplified rules. However, the committee did have the benefit of studies made in connection with the Model Code, the Uniform Rules and the Federal Rules. These studies disclosed that at least eight effects have been accorded presumptions by courts. Three of these have merited extensive consideration over the years. Under the first view, the mere introduction of evidence which would warrant a finding of the nonexistence of the presumed fact dissipates the presumption.[59] According to the second

55. H.R. REP. No. 650, 93d Cong., 1st Sess. 7 (1973).
56. 120 CONG. REC. H546, H570 (daily ed. Feb. 6, 1974).
57. THAYER at 352.
58. Order of the Nebraska Supreme Court appointing Committee on Practice and Procedure, October, 1969.
59. MODEL CODE rules 701-04; THAYER at 313-52; WIGMORE §§ 2487, 2491; Cleary, *Presuming and Pleading: an Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959); Laughlin, *The Location of the Burden of*

view, the artificial effect remains unless evidence of the nonexistence of the presumed fact convinces the jury that its nonexistence is at least as probable as its existence.[60] Finally, under the third view, the artificial effect remains until the jury is convinced that the nonexistence of the presumed fact is more probable than its existence.[61]

A. Civil Cases

For civil cases in general, the Nebraska committee has adopted the third view following the final draft of the Federal Rules approved by the Supreme Court. Nebraska Rule 301 states:

> Presumptions In General. In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Although the Nebraska proposal was completed and submitted to the Nebraska Supreme Court prior to the adoption of the House version of Rule 301, the Nebraska committee probably would not have adopted the House version which makes the presumption "sufficient evidence of the presumed fact to be considered by the trier of fact;" since a presumption is not evidence in Nebraska[62] and the only presumption in Nebraska which even approaches the House version is the rather anomalous presumption applied in *res ipsa loquitur* cases.[63] The Nebraska Rule is substantially identical to the Pennsylvania Rule which is a long standing, workable and time tested rule for civil cases.

B. Criminal Cases

The Nebraska rule applicable to criminal cases is similar to the federal rule adopted by the Supreme Court of the United States. Nebraska Rule 303 provides:

> (a) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common

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Persuasion, 18 U. PITT. L. REV. 3 (1956); Laughlin, *In Support of the Thayer Theory of Presumption*, 52 MICH. L. REV. 195 (1953); Morgan, *Further Observations on Presumption*, 16 S. CAL. L. REV. 245 (1943).

60. McBaine, *Burden of Proof—Presumptions*, 2 U.C.L.A.L. REV. 13 (1954).
61. UNIFORM RULE 14(a); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man's Statutes*, 103 U. PA. L. REV. 1, 20-24 (1954); Morgan, *Presumptions*, 10 RUTGERS L. REV. 512, 513-14 (1956).
62. *In re* Estate of Drake, 150 Neb. 568, 35 N.W.2d 417 (1948).
63. Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954).

law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to Jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(c) Instructing the Jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

There is authority in Nebraska for the rule requiring a finding of guilt beyond a reasonable doubt with respect to the presumed fact.[64] The proposed rule meets the constitutional limitations of *Gainey*. Although there is merit to the House decision to postpone study and adoption of the Federal Rule until consideration of the Revised Federal Criminal Code, the Nebraska Supreme Court committee anticipated this possibility and made the following comment:

> The Final Report of the National Commission on Reform of Federal Criminal Laws Sec. 103(4) and (5) (1971) contains a careful formulation of the consequences of a statutory presumption with an alternative formulation set forth in the Comment thereto, and also of the effect of a prima facie case. In the criminal code there proposed, the terms "presumption" and "prima facie case" are used with precision and with reference to these meanings. In the federal criminal law as it stands today, these terms are not used with precision. Moreover, common law presumptions continue. Hence it is believed that the rule here proposed is better adapted to the present situation until such time as the Congress enacts legislation covering the subject, which the rule takes into account. If the subject of common law presumptions is not covered by legislation, the need for the rule in that regard will continue.[65]

64. Shellenberger v. State, 99 Neb. 370, 156 N.W. 777 (1916); Ballard v. State, 19 Neb. 609, 28 N.W. 271 (1886).
65. PROP. NEB. R. EVID. 303, Comment.

One final comment seems essential. The effect of a presumption under the Nebraska Rule will only be effective to the extent not otherwise provided by the legislative body having authority to act. Thus, if Congress wants a presumption to have a different effect in Nebraska for a federal cause of action being enforced in state courts, Congress can so provide and under Nebraska Rule 302, such federal law will control. Likewise, under Rules 301, relating to civil cases, and 303, relating to criminal cases, the Legislature can provide that in a particular case, there will be a specific type of presumption which is to have a statutorily specified effect different from that provided in the rules. Such a legislatively defined presumption will, by the terms of the Rules, supercede the Rules. The Rules then, are a reasonable beginning, not an arbitrary end.

Current studies to modernize the existing rules of evidence began with the Model Code more than thirty years ago. Twenty years have elapsed since the Uniform Rules were drafted. Study of the Federal Rules is more than thirteen years in process. Yet, to date there are no codified rules applicable in either state or federal courts in Nebraska. It seems that the time to begin is now; and the place to begin is here.