Instructing the Jury upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301

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The role of presumptions in civil cases has long been subject to vigorous debate. The traditional view—that presumptions affect decision only in the absence of evidence tending to show the nonexistence of the presumed fact, and that they do nothing more than to force production of such evidence—is challenged in this article. Especially where presumptions serve substantive policies, the author believes that the long-advocated reformist view should prevail, under which presumptions play the larger role of affecting the burden of persuasion. The author recommends adoption of Uniform Rule 301 as preferable to Federal Rule 301, and examines the forms of jury instructions which each of the two Rules would require.

INSTRUCTING THE JURY UPON PRESUMPTIONS IN CIVIL CASES: COMPARING FEDERAL RULE 301 WITH UNIFORM RULE 301

Christopher B. Mueller

"[I]t vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone."

—Carroll, Alice in Wonderland

INTRODUCTION

The thought persists that in civil litigation presumptions should play but a modest and fleeting role. They should
vanish altogether, we are given to understand, where the party contesting the presumed fact produces evidence contradicting the fact sufficient to justify a finding of its nonexistence, and in such cases a jury should never hear of the presumption. The descriptive images become familiar: Presumptions "smoke out" the party contesting the presumed fact, making him produce sufficient evidence to avoid a directed verdict; when he does produce, the presumption is "put to flight." Presumptions, therefore, are "bursting bubbles"; they are "like bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts"; also like "Maeterlinck's male bee" ("having functioned they disappear").

There is a second persistent view, however, which holds that a presumption should be a device which allocates the burden of persuasion in civil cases. By this view, presumptions ought to control the decision on the presumed fact unless the party contesting the fact actually persuades the trier by a preponderance of the evidence (or by evidence satisfying whatever other standard may generally apply in the case) that the fact is untrue. Under this thinking, the presumption would not be "put to flight" when the opponent introduces sufficient evidence to support a finding of the nonexistence of the presumed fact: The presumption would still generate an instruction to the jury—one which says that the jury should find the presumed fact unless it believes by a preponderance of the evidence (if that is the standard applicable in the case) that the presumed fact is untrue.

The first of the abovementioned philosophies may be termed the "traditionalist" (or "bursting bubble") theory.

It is most often associated with the great names of Thayer and Wigmore, and it has behind it the weight of untold numbers of decisions from all over the country. The second may be called the "reformist" theory. It too is associated with great names—Morgan, Maguire, and McCormick, to list but a few—and it has the support of cases, though not nearly so many.

2. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAw 336-337 (1898) ("If, now, it be asked, What particular effect have rules of presumption in applying the law of evidence? The answer seems to be that they have the same effect (and no other), which they have in all the other regions of legal reasoning. Their effect results necessarily from their characteristic quality—the quality, namely, which imputes to certain facts or groups of fact a prima facie significance or operation. In the conduct, then, of an argument, or of evidence, they throw upon him against whom they operate the duty of meeting this imputation. Should nothing further be adduced, they may settle the question in one way; and so he who would not have it settled thus, must show cause. This appears to be the whole effect of a presumption, and so of a rule of presumption. . . . [T]he presumption . . . goes no further than to call for proof of that which it negatives, i.e., for something which renders it probable. . . . But beyond that, a presumption seems to say nothing. When . . . we read that the contrary of any particular presumption must be proved beyond a reasonable doubt, . . . we have something superadded to the rule of presumption . . . . And so, wherever any specific result is attributed to a presumption other than that of fixing the duty of going forward with proof. This last, and this alone, appears to be characteristic and essential work of the presumption"); 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940) ("[T]he peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule . . . ."). See also Laughlin, In Support of the Thayer Theory of Presumptions, 52 MICH. L. REV. 195 (1953) [hereinafter cited as Laughlin]. Most courts at least purport to follow the traditionalist view. See Annot., 5 A.L.R.3d 19 (1966).

3. See generally Morgan, Some Observations Concerning Presumptions, 44 HARV. L. REV. 906 (1931); Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 HARV. L. REV. 59 (1933); Morgan, Presumptions, 12 WASH. L. REV. 255 (1937); Morgan, Foreword to MODEL CODE OF EVIDENCE 62-65 (1942); Morgan, Further Observations on Presumptions, 16 S. CAL. L. REV. 245 (1943); Morgan, SOME PROBLEMS OF PROOF 74-81 (1956); Morgan & Maguire, Looking Backward and Forward at Evidence, 50 HARV. L. REV. 909 (1937); McCormick, Charges on Presumptions and Burden of Proof, 5 N.C. L. REV. 291 (1927); McCormick, EVIDENCE § 345 (2d ed. 1972).

See also Gausewitz, Presumptions in a One-Rule World, 5 VAND. L. REV. 324 (1952) [hereinafter cited as Gausewitz]; Cleary, supra note 1. And see, e.g., Privette v. Faulkner, 550 F.2d 404, 407 (Ne. 1976) (Where owner is an occupant of his car at the time of a collision, there is a presumption that he was driving; and by statute the burden of persuasion is upon the party opposing the presumed fact); Breeden v. Weinberger, 493 F.2d 1002, 1005-07 (4th Cir. 1974) (Discussion of presumption established under Social Security Act; suggestion that the presumption "serves the offering of contradictory evidence and thereafter may itself constitute substantial evidence . . ."); Pacheco v. United States, 409 F.2d 1234, 1238 (3rd Cir. 1969) (Presumption that driver was agent of defendant affects burden of persuasion under Virgin Islands law); Marks Mfg. Co. v. New York Central R.R., 448 F.2d 68, 71-72 (6th Cir. 1971) (Under Michigan version of UNIFORM COMMERCIAL CODE § 7-403 (1) (b), where bailor shows delivery of undamaged goods, and receipt of goods thereafter in
The occasion for this article is the enactment by Congress of the Federal Rules of Evidence, the adoption of these rules (with modifications) by six states, and the endorsement of these rules (again with modifications) by the National Conference of Commissioners on Uniform State Laws. It may come to be viewed as a historical accident, for so far as I can see nobody intended this result, but the advent of the Federal Rules has had the effect of increasing support for both the traditionalist and reformist views.

What happened is simply that the Congress enacted, as Federal Rule 301, a rule which requires federal courts to follow the traditionalist approach with respect to presumptions whose effect is determined by federal law. But the version of Rule 301 adopted in six states espouses the reformist philosophy, as does the version of Rule 301 now endorsed by the National Conference of Commissioners on Uniform State Laws. (The passage and terms of Federal Rule 301, and the terms of Uniform Rule 301 and the state counterparts, are discussed in Part III of this article.)


Other states, including Wyoming, are presently considering whether to adopt the Federal or Uniform Rules, and it is an open question whether these states, and others which may in time take up the issue, will elect to promote state-federal uniformity by following the federal model, or to promote interstate uniformity by adopting the version endorsed by the National Conference.

This article has two main purposes. One is to urge support of Uniform Rule 301 as preferable to Federal Rule 301 (see Parts II and IV, infra). The other is to urge what I call a “broad interpretation” of Federal Rule 301, both for the federal system and for any state which may hereafter adopt that version of the rule, as opposed to a “narrow interpretation” (see Part IV, Subpart A, infra). These aims are pursued after a brief exploration of the terminology and operation of presumptions, their reasons for being, and the generally accepted view that one rule should describe the operation of all presumptions in civil cases, all of which are taken up in Part I, infra.

The reasons for the superiority of Uniform Rule 301 over Federal Rule 301 are easily stated: On a purely practical level, traditionalist thinking has never achieved the aim of a uniform treatment for presumptions, and there is room to doubt that Federal Rule 301 will fare any better. As a matter of sound policy, the reformist view is preferable because it gives effect to the reasons in procedural and social policy which call presumptions into being in the first place, while what I call the “pristine version” of traditionalist thinking does not do so. (And it is precisely this reason, by the way, which has caused the traditionalist ap-

7. In Wyoming, the Permanent Civil Rules Committee and the Rules of Criminal Procedure Advisory Committee are considering the 1974 Uniform Rules and the Federal Rules of Evidence in order to formulate a recommendation whether either (or an amended version of either) should be adopted for use in Wyoming. The two Committees have met twice in joint session in Laramie, under the Chairmanship of Professor Frank J. Trelease.

The author has been advised by Frank F. Jestrab, Esq., Chairman of the Special Committee on Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws, that a number of other states are now considering adoption of Rules of Evidence along the lines of the Federal Rules and Uniform Rules. They include Montana, North Dakota, Washington, and Florida. I have also been advised that the question is now under consideration in Oklahoma, Minnesota, and Vermont.
proach to break down into many different rules.) These matters are discussed in Part II, infra. Finally, and once again on a purely practical level, the reformist view of Uniform Rule 301 is entirely simple to understand and to apply, and there is no reason to fear that nonuniformity with the Federal Rule would induce mistakes or difficulty for practitioners handling matters in both federal and state courts, for the difference between the two versions has little impact upon the conduct of trial—only on the circumstances under which a case can go to the jury, and on the instructions to the jury. (The proper form of instructions under Uniform Rule 301 is explored in Part IV, Subpart B, infra.)

My reasons for considering in some detail Federal Rule 301 are also easily stated. The Rule is there; it must be applied in federal court. Unfortunately, it is susceptible of two—perhaps more—interpretations. If interpreted broadly, it is only a little bit inferior to Uniform Rule 301; if interpreted narrowly, it will actually change accepted practice by reinstating with a vengeance the pristine version of the traditionalist thinking which has already been largely abandoned. (These two interpretations are the subject of Part IV, Subpart A, infra.)

I. PRELIMINARY CONSIDERATIONS

A. Presumptions and Inferences: Terminology and Operation

Problems of terminology bedevil the analysis of presumptions in civil cases. These have been explored extensively elsewhere, and little would be gained by reciting the long list of terms which are used and misused.8 Suffice it to say here that there seems to be a general consensus that the term “presumption” describes a requirement that when one particular fact (or set of facts) is established, another fact (or set of facts) must also be found to be true. By

useful convention, the operation of presumptions is described in terms of "basic facts" and "presumed facts": When the basic fact is established, then the presumed fact must be found to exist. As already indicated, consensus ends at the point of describing the conditions under which the presumption disappears—the situation in which there is no longer a requirement to find the existence of the presumed fact.

There is also a consensus that the term "inference" describes the mental process of concluding, from the establishment of one fact (or set of facts), the existence of another fact (or set of facts): An inference is a permitted, but not a required, conclusion. To sharpen the distinction between "presumption" and "inference," the former is sometimes modified by the word "mandatory," the latter by the word "permissive," but both modifiers are redundant: "Presumption" includes the thought "mandatory"; "inference" includes the thought "permissive."

A study of presumptions invariably leads to a consideration of inferences, and it is crucial to bear in mind several fundamental points about the relationship between the two terms:

First, inferences may be permitted wholly without regard to presumptions. The question whether the trier of fact will be allowed an inference arises in conjunction with circumstantial evidence of all descriptions, and invokes the concepts of "relevancy" and "sufficiency" of the evidence. If the matter to be proved is that car owner O gave permission to driver D to operate the car, and that D was acting within the scope of that permission when he collided with plaintiff, then the latter might introduce evidence that O owned the car and employed D. All would agree that this evidence is relevant on the questions of permission and scope; most would further agree that this evidence is also sufficient—that from it, standing by itself, a reasonable juror could infer the fact of permission and that D was in the scope thereof on the particular occasion. In other words, plain-
tiff's proof supports an inference to the desired conclusion, and the jury would be allowed to draw it.

Second, and this is a corollary to the first point, the basic fact underlying a presumption may similarly be sufficient to support an inference of the existence of the presumed fact even after the presumption has been dislodged. And it seems that even the pristine version of the traditionalist theory would not hold that the disappearance of a presumption by itself mandates the destruction of an inference. There are, for instance, two common presumptions operating in the area of the example described above. The basic facts of one, which we may call the "long-form" scope-of-employment presumption, are that O owned the car and employed D; the presumed fact is that D was acting within the scope of his employment on the occasion in question. The basic fact of the other, which we may call the "short-form" loaned automobile presumption, is simply O's ownership of the car; the presumed facts are that D had permission to drive and was within the scope of the permission (or agency) on the occasion in question. If, in either case, the

9. Cases applying this long-form scope-of-employment presumption include Erwin v. United States, 445 F.2d 1035, 1037 (10th Cir. 1971); Breeding v. Massey, 378 F.2d 171, 176 (8th Cir. 1967) (referring to Arkansas caselaw); and Rakowsky v. United States, 201 F. Supp. 74, 75 (N.D. Ill. 1961) (referring to Illinois caselaw). See also cases cited in McCormick, Evidence § 343, at 808 n.59 (2d ed. 1972); Annot., 96 A.L.R. 634 (1935); Annot., 5 A.L.R.3d 19, 66-69 (1966). Occasionally a related presumption has as its basic fact proof of ownership and proof that the driver was a member of the owner's immediate family. See O'Dea v. Amodeo, 118 Conn. 58, 170 A. 486 (1936).

10. Cases applying the short-form presumption include Tomack v. United States, 389 F.2d 350, 352 (2d Cir. 1966) (New York statutory presumption, arising upon proof of ownership, that the driver has the owner's permission, express or implied); Webb v. Moreno, 363 F.2d 97, 99-100 (8th Cir. 1966) (under Iowa caselaw, proof of car ownership amounts to prima facie case that the driver of the car was operating with the consent of the owner, or gives rise to a presumption or inference to that effect); and Smith v. Savannah Homes, Inc., 389 F. Supp. 384, 386 (W.D. Tenn. 1974) (Tennessee statutory presumption, arising upon proof of ownership of motor vehicle, that the vehicle is operated by owner or owner's servant for use and benefit of owner, phrased in terms of prima facie case).

A variant form of this presumption arises upon proof that the owner is present in the vehicle, and holds that this basic fact gives rise to a presumption that the owner was in control of the car, see Hansen v. Nicholas Moving & Storage, Inc., 451 F.2d 319, 322 (10th Cir. 1971) (presumption invoked in context of imputed negligence, but court finds presumption "overcome by the evidence"), or that the owner was himself driving, see Privette v. Paullner, 350 F.2d 404, 407 (Nev. 1976) (presumption invoked in attempt to hold estate of owner liable for injuries sustained by one passenger, where no witness could recall whether the owner, plaintiff, or another passenger was driving at the time).
presumption has been dislodged by counterproof, a further question to be considered is whether the basic fact supports an inference of the existence of the presumed fact, and at least in the case of the long-form presumption, the answer would seem to be that it does.¹¹

Third, it would be an oversimplification to conclude that when a presumption has been dislodged an inference will be permitted only if the basic fact is considered both relevant and sufficient evidence of the presumed fact. Though not acknowledged in such terms in the cases (at least the ones I have seen), it is apparent that a dislodged presumption often plays the residual role of giving to the basic fact an artificial probative strength, in effect protecting an inference from extinction.¹² In connection with the short-form presumption, it is problematic whether proof of O's ownership would alone be sufficient evidence to support an inference that D had O's permission to drive the car, and

See also the cases cited in McCormick, Evidence § 343, at 808 n.58 (2d ed. 1972).

Wyoming has a statutory presumption which somewhat resembles the short-form loaned automobile presumption here considered. Wyo. Stat. § 31-76 (1957) provides in part: "In any controversy respecting the identity or ownership or control of a motor vehicle, the registration number borne by it shall be prima facie evidence that it was owned and operated by the person to whom the certificate of registration therefor was issued." The statute is construed in Fox v. Fox, 75 Wyo. 390, 296 P.2d 252, 258 (1956), where the Wyoming Supreme Court remarked that the circumstantial evidence in the case supported a jury verdict that the owner of the car was driving, "at last in the absence of anything being shown to the contrary," and that there was "no merit" in the contention that the jury should not have been instructed to "take [the statute] into consideration in arriving at their verdict." The statute would appear to have far less utility than the common short-form loaned automobile presumption, and it would have far greater utility if the words "or by another with the permission of the owner" were added at the end of the quoted sentence.

¹¹ See Laughlin, supra note 2, at 215. See also Jack Cole Co. v. Hudson, 409 F.2d 188, 192-194 (5th Cir. 1969) (Where defendant's counterproof is not so "strong and clear" as to refute the presumption, "the issues of ownership and agency should go to the jury." Moreover, "it was within the province of the jury to weigh the evidence and to deliver a verdict consistent with a factual theory acceptable to reasonable men, and in doing so it was not required to believe the testimony of defendants' witnesses," which was far from 'invulnerable.'

¹² See, e.g., Gausewitz, supra note 3, at 333 ("If the basic fact of the presumption is one from which the presumed fact cannot rationally be found (the basic fact will not support an inference) and the party in whose favor the presumption operates has no additional evidence, there is nothing left to support his case when the presumption has been rebutted and a verdict should be directed or a nonsuit against him. . . . But sometimes [courts] seem to concede that the presumption has been rebutted, yet hold that the presumption will take the case to the jury, thus in effect transforming it into a 'permissive' presumption.").

And see the cases cited in the following footnote.
was acting within the scope thereof, but the presumption might support such an inference, even though the presumption itself no longer operated actually to control decision on the latter point.\(^{13}\)

Fourth, the effect of a presumption may of course be achieved without a presumption. If, for example, plaintiff proves \(O\)'s ownership of the car and his employment of \(D\), and it also appears that \(D\)'s regular job was to drive the vehicle, and that the collision occurred along the route which \(D\) regularly drove, and at a particular place and time which

\(^{13}\) In New York, the short-form loaned automobile presumption is "very strong," and can be overcome only by substantial evidence to the contrary; Blunt v. Zinni, 32 App. Div. 2d 882, 302 N.Y.S.2d 504, 506 (1969); Loetta v. Flessinger, 8 N.Y. 2d 449, 204 N.Y.S.2d 167 (1960). And even where such evidence is presented the question of the driver's authority is ordinarily for the jury to resolve; Reyes v. Sternberg, 27 App. Div. 2d 828, 278 N.Y.S.2d 167 (1967); Ryder v. Cue Car Rental, Inc., 32 App. Div. 2d 143, 302 N.Y.S.2d 17, 21 (1969). It has been suggested that even uncontradicted testimony by both the driver and the owner to the effect that there was no permission or that its scope was exceeded will not destroy the presumption (See Mandelbaum v. United States, 251 F.2d 748, 751 (2d Cir. 1958)), for the trier of fact may disbelieve the testimony of such interested witnesses, and if so the "prima facie proof" of the owner's control "remains unrebutted." Chaika v. Vandenberg, 252 N.Y. 101, 169 N.E. 103 (1929). But see Rachon v. Cheuvant, 37 App. Div. 2d 911, 325 N.Y.S.2d 452 (1971) (Testimony by owner and driver destroys the presumption).

In a famous opinion, Judge Learned Hand focused up nicely the question whether the New York presumption could take the case to the jury when there was counterproof, and he reluctantly concluded that the presumption could do so, even though Judge Hand believed that the basic fact "did not support an inference of consent" and was, in the case before him, "all the evidence on which any such conclusion could be based." Pariso v. Towse, 45 F.2d 962, 965 (2d Cir. 1930). For Judge Hand, the problem was all the more intractable, since he believed, and in another famous opinion so expressed the holding of the court, that the party bearing the burden of proof could not take his case to the jury when the only evidence on his side was that of the demeanor of witnesses, all of whom testified against him on the facts. In other words, while the jury might conclude that the witnesses were not speaking the truth, rejecting their testimony would not be a sufficient basis to infer that the converse of the testimony was the truth. Dyer v. MacDougal, 201 F.2d 265 (2d Cir. 1952). Under Judge Hand's view, then, the conclusion is inescapable that in some cases the operation of a presumption, which because of sufficient counterproof against the presumed fact no longer generates a direction to find the existence of the presumed fact, nevertheless protects an inference, and is alone the reason why a jury is allowed to draw an inference.

\(\text{See also Hoerr v. Hanline, 219 Md. 413, 149 A.2d 378, 381 (1959)}\) (Despite the complete absence of any proof that the driver of a truck was the agent of the owner, the presumption of agency, arising upon proof that defendant owned the vehicle in question, sufficed to take the question to the jury, where defendant's counterproof was inconclusive), and Hiscox v. Jackson, 127 F.2d 160, 161 (D.C. Cir. 1942) (Presumption of agency and scope disappears where there is "uncontradicted" evidence of the nonexistence of the presumed fact, but "doubts or contradictions" in the testimony of the owner and three of his witnesses, and testimony of a disinterested witness contradicting the owner's evidence, do not make defendant's case "so strong" as to destroy "all inferences and presumptions supporting plaintiff.").
coincide with D's regular schedule, etc., and if there were no counterproof on these points or on permission and scope, plaintiff's proof would not only be considered relevant and sufficient, but cogent and compelling, and the trial judge might direct the jury to find for plaintiff on the issues of permission and scope, or to grant a judgment notwithstanding the verdict if the jury came in against plaintiff because it did not so find. In other words, the evidence might be so compelling that no reasonable juror would not draw the inference of permission and scope. Of course the lastnamed result is the same one which the long-form presumption would achieve, and the presumption obviates many questions which would otherwise arise on a case-by-case basis: No need to ask whether the basic facts are either relevant or sufficient evidence of the presumed fact, and no need to ask whether establishment of the basic fact compels a finding of the presumed fact—at least in the absence of counterproof, it does.

B. Reasons for Presumptions

Obviously the role of presumptions in civil litigation should be a function of their purpose, and of their reasons for existence. Perhaps because there are enormous numbers of presumptions in more-or-less active service, there is no comprehensive analysis of their underlying rationales. (Another reason could be the sheer tedium which such a study would portend, both in the doing and in the reading afterwards.) For the most part, however, thanks to the work of Bohlen, Morgan, McCormick, and others, we have a good idea of the reasons underlying the more common presumptions, and have a fairly compact general list of underlying reasons:14

1. The high probative worth of the basic fact as evidence of the presumed fact. Where one particular fact is time and again shown in evidence as proof

of another fact, common sense and the sheer accumulation of judicial experience may cry out affirmative answers to the questions whether the evidence is relevant, sufficient, cogent and compelling. A presumption becomes appropriate, and the questions need not be asked and answered over and again.

2. Substantive policy considerations. It has been observed that the substantive law speaks in conditional imperatives: "If W, X, Y, and Z are true, then plaintiff is entitled to relief, etc." But such statements do not complete the description of the substantive law, and the description is enhanced in at least two different ways which are important from the standpoint of presumptions. First, the burdens of persuasion are allocated with respect to the various elements upon which relief is conditioned. The rights of a plaintiff are in a real sense greater if he bears such a burden only with respect to W, X, and Y, and defendant bears the burden with respect to Z (that is, defendant must prove non-Z), than they would be if that plaintiff bears the burden in connection with Z as well as the other elements. The decision whether an element more properly belongs to a claim or to a defense may be made for any number of reasons, but for immediate purposes the important point is that the decision can turn upon the answer to the question whether the policy of the substantive law is better served by making it easier for plaintiffs to recover or by making it easier for defendants to resist recovery. Second, as proof of a

16. A third way is to tinker with the standard or measure of persuasion which is required. For instance, in fraud cases it is well-nigh universal to require evidence of fraud to be "clear and convincing." See e.g., White v. Ogburn, 528 P.2d 1167, 1169 (Wyo. 1974) ("he who asserts fraud has the burden of proving the same clearly"); Norton Co. Carborundum Co. 530 F.2d 435, 444 (1st Cir. 1976) ("An allegation of fraud must be proved by clear, unequivocal and convincing evidence and not by a mere preponderance of the evidence which leaves the issue in doubt."). And see generally MCCORMICK, EVIDENCE § 340 (2d ed. 1972); JAMES, CIVIL PROCEDURE § 7.6 (1965).
17. That allocating the burden of persuasion is a function of substantive law has of course long been recognized in the context of the Erie doctrine, which requires federal courts applying state law to allocate the burden of persuasion in the manner required by state law; see Cities Service Oil Co. v.
particular element, circumstantial evidence may be accorded greater force than its intrinsic probative strength alone would warrant. For instance, proof of $U$ and $V$ could be treated as cogent and compelling evidence of element $W$, even though reasonable persons might not invariably find $W$ where $U$ and $V$ are established, simply because the substantive purpose of requiring proof of $W$ is better served in this manner than it would be if only actual (i.e., direct) evidence of $W$ were given such effect.\(^9\)

Obviously, a presumption may be used to fill out the description of substantive rights, and thus to implement substantive policy in the first sense noted above, only if the reformist philosophy be accepted. A presumption may add to that description in the second sense regardless whether it is traditionalist or reformist thinking which holds sway.

3. The greater accessibility of proof to one party. In the nature of things, proof of a particular fact may be more readily available to one party than another; if so, then a presumption may be enlisted to aid the party for whom the proof is relatively less accessible.

4. The inaccessibility of proof to all parties. Where in the nature of things proof of a critical fact is simply hard to come by, a presumption may avoid a

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\(^9\) Dunlap, 308 U.S. 208, 212 (1939); Palmer v. Hoffman, 318 U.S. 109, 117 (1943); Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959). The same truth is recognized in connection with litigation under federal statutes, where the burden of persuasion is allocated by reference to federal law, see Howard v. United States, 125 F.2d 986, 991 (5th Cir. 1942), even if the action is brought in state court, Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

18. In tort actions, proof that defendant violated a statute is sometimes considered as circumstantial evidence of negligence, and sometimes as establishing negligence \textit{per se}; sometimes such proof is treated as \textit{cogent and compelling} evidence of negligence, and the defendant can avoid being held negligent only by establishing an excuse for his violation of the statute. These are familiar devices to implement the substantive policies of tort law by accepting, and giving particular weight to, a kind of circumstantial proof, which may or may not itself have intrinsic probative worth sufficient to sustain a finding of "actual" negligence in the traditional common-law sense. \textit{See generally 2 Harper & James, The Law of Torts §§ 17.5, 17.6 (1956).} That the last of the abovedescribed results may be obtained through the mechanism of a presumption is apparent, as in fact it is in California. See Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 177 P.2d 279 (1947); Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 837 (1958). And see \textit{generally} Prosser, \textit{Handbook of the Law of Torts} § 36 (4th ed. 1971).
procedural impasse, serving mainly the interest of avoiding a deadlock.

A good example of a presumption resting principally upon the inherent probative worth of the basic fact as proof of the presumed fact is the presumption, arising upon proof of the proper posting of a letter, that the same was properly delivered in the ordinary course of the mails. Whatever the flaws in the postal service, experience teaches that in an overwhelming majority of cases when a letter is properly posted it is properly delivered in due course: Proof of proper posting is relevant, sufficient, cogent and compelling evidence of delivery in due course. If the presumption is invoked in favor of the sender and against the supposed recipient, another supporting reason is that direct evidence on the question of delivery is more accessible to the intended recipient than to the sender, even though the recipient would be saddled with proving the "negative."

The long-form scope-of-employment presumption rests in part upon the inherent probative worth of the basic fact, in part upon the relative accessibility to proof, and in part upon substantive policy. As previously noted, proof of O's ownership of the car and his employment of driver D would seem to support an inference that driver D had authority to

19. See, e.g., Rosenthal v. Walker, 111 U.S. 185, 193-94 (1884) (Quoting from a decision of the Massachusetts Supreme Court to the effect that the presumption is "founded on the probability that the officers of the government will do their duty and the usual course of business"); Hagner v. United States, 285 U.S. 427 (1932); In re Nimz Transp., Inc. 606 F.2d 177, 179 (7th Cir. 1974); United States v. Freeman, 420 F. Supp. 1080, 1082 (E.D. Wis. 1975). And see First Natl Bank v. Ford, 30 Wyo. 110, 216 P. 691, 699 (1923) ("It appears that the letter was received in due course of mail, and that it is in answer to a prior letter addressed to the defendant and received by him, and it is held that in such case a presumption arises that the later letter is the letter of the person whose name is signed thereto.").

20. 9 WIGMORE, EVIDENCE § 2510a (3d ed. 1940) (listing as reasons for the long-form scope-of-employment presumption "the relative facility of the proof as between the parties, the ordinary habits of owners of vehicles, and the wisdom of placing the risk of not obtaining evidence upon the person who owns a valuable and dangerous apparatus and therefore should take special precautions against its misuse by irresponsible persons" and noting that the facts of modern life "demand" that the presumption "be employed to improve the standard of care obeyed by vehicle-owners"); MCCORMICK, EVIDENCE § 343 (2d ed. 1972) (stating as the reasons behind both the long-form and short-form presumption "probability, fairness in the light of defendant's superior access to the evidence, and the social policy of promoting safety by widening the responsibility in borderline cases of owners for injuries caused by their vehicles"). And see notes 9 and 10 supra.
drive and was within the scope thereof on the occasion in question. Moreover, owner O will have better access to the true facts respecting D's authority than will the plaintiff. And finally, as a matter of policy it seems wiser, where ownership and employment are proved, to risk error on the side of recovery for plaintiff than on the side of nonrecovery: That is, where ownership and employment are proved, it is preferable to allow some plaintiffs to recover in the few cases where D lacked or exceeded authority, than to deny recovery in the greater number of such cases where D had authority and acted within it, but there was no evidence so indicating apart from the proof of ownership and employment.

The same three considerations would seem to support the common presumption, arising upon proof of bailment and of the return in damaged condition of an article previously undamaged, that the bailee was negligent.\footnote{21} Here, however, the presumption shifted the burden of persuasion, but it seems that this is a distinct minority view associated mainly with several decisions of the Minnesota Supreme Court. See Rustad v. Great Northern Ry., 122 Minn. 453, 142 N.W. 727 (1913); Nat'l Surety Corp. v. Todd County Dairy Co-op, 269 Minn. 298, 139 N.W.2d 511 (1964). This holding in Alliance seems to have been limited by a subsequent decision in the Second Circuit, which found that in Alliance the bailee's position had been "assimilated ... to that of a common carrier." Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745, 752 (2d Cir. 1960). Moreover, in the Commercial Molasses case, supra, the Supreme Court clearly held that the presumption "does not cause the burden of proof to shift." The Uniform Commercial Code § 7-408(1) provides that "The bailee must deliver the goods to a person entitled under the document ..., unless and to the extent that the bailee establishes ... damage to or delay, loss or destruction of the goods for which the bailee is not liable [, but the burden of establishing negligence in such cases is on the person entitled under
it would seem that the intrinsic probative worth of the basic fact as proof of the presumed fact is far more attenuated, for damage may occur for innumerable reasons unrelated to the care exercised by the bailee.

The presumption, arising upon proof of violent death, that the cause of death was accident rather than suicide, plainly rests upon intrinsic probability, the unavailability of other evidence, and social policy. The universal human
revulsion from suicide makes reasonable the supposition that death was not self-inflicted; in the typical case there will be little or no other proof; and clearly the human suffering imposed on the survivors by a judicial finding of suicide and the financial hardship which such a finding entails if the suit is against an insurance company for collection of death benefits both combine to suggest the strongest reason in substantive policy to find accident as the cause of death where the true facts may be uncertain.

The presumption of death after seven years' absence without tidings rests in part upon the inherent probative worth of the basic fact, in part upon the substantive policy favoring the settlement of estates and the compensation of dependents by insurance, and in part upon the absence of better proof.23

23. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 319-24 (1898) (describing in detail the evolution of this presumption from mere logical inference, supported by reference to statutes, to "an affirmative rule of law requiring that death be assumed under the given circumstances"); MCCORMICK, EVIDENCE § 343 (2d ed. 1972) (citing as reasons for the presumption "probability and the social policy of enforcing family security provisions such as life insurance, and of settling estates").

The presumption was roundly criticized by Wigmore as based on "an ancient rule-of-thumb (seven years) which has no relation to the facts of human experience in modern conditions" and as imposing "a single rule to different situations which require different treatment." Wigmore suggested that the presumption operates (1) in connection with claims upon a life insurance policy, to establish the death of the insured, (2) in proceedings brought by alleged heirs, beneficiaries of wills, or personal representatives, for the distribution of the estate of a person who has disappeared, to establish the fact of death, (3) in cases involving title to property, to establish the death of a prior holder or the happening of a condition affecting title, and (4) in cases in which the spouse of the missing person wishes to establish the validity of a later marriage, to establish the death of the missing spouse. He further suggested that the presumption should be replaced with a Uniform Act which would accord more detailed and flexible treatment to the fact of absence as evidence of death, without use of presumption. 9 Wigmore, EVIDENCE § 2631b (3d ed. 1940).

The Uniform Absence As Evidence of Death and Absentees' Property Act was proposed in 1939 by the National Conference of Commissioners on
It has been asserted that nearly all presumptions involve basic facts which have at least some probative worth as evidence of the presumed fact; it has even been asserted that in most cases the basic fact is sufficient evidence to support a finding of the presumed fact. Even if both assertions are correct, they have but limited significance. In the first place, it should not be overlooked that some important presumptions could not withstand rational analysis if intrinsic probability were the sole justification. The short-form loaned automobile presumption, for example, does not so qualify: If the evidence showed only that O owned the car and that D drove it, and if there were no other proof in the case having any bearing upon the probability that D had O's permission and was within its scope, it is doubtful that the basic fact would support an inference of permission and scope. Probability alone does not justify the presumption; it needs the added reasons that one party has better access to the proof, and that public policy ordinarily favors a finding of permission and scope. In the unfortunate cases in which there is an issue whether suicide was the cause of death, it is often true that the known circumstances are insolubly ambiguous—a gun lying on the floor, a bullet in the head, etc.—and in such cases it is hard to say that the mere fact of


24. See Uniform Rules of Evidence 14, comment (1953) (Referring to presumptions "based wholly or partly on probability," the comment states: "Nearly all presumptions are of this sort. Among the most common examples are the presumption against suicide, the presumption of death from seven years disappearance without tidings, the presumption that a vehicle driven by a regular employee was being driven in the course of the owner's business, and the presumption of due delivery to addressee of a letter properly addressed, stamped, and mailed.").

25. See Laughlin, supra note 2, at 213-14 (A presumption resting upon a basic fact lacking sufficient value as evidence of the presumed fact to support a finding of the presumed fact "would rarely, if ever, exist. . . . It is not contended that all presumptions involve the element of a rational inference. It is contended that nearly all presumptions involve that element."); In re Wood's Estate, 374 Mich. 278, 288, 132 N.W.2d 35, 42 (1965) ("Presumptions in the law are almost invariably crystallized inferences of fact.").

26. See notes 10 and 13 supra. Contra, Laughlin, supra note 2, at 215 ("It is far more common for a driver to obtain permission before using a vehicle of another than it is for the driver to take such a vehicle without permission.").
violent death would support a finding of accidental cause as the more probable if pure logic were the sole determinant.

In the second place, regardless whether logic alone would justify any particular presumption, in most instances far more actually underlies presumptions—more in terms of considerations of substantive or procedural policy. No wonder, then, that courts in fact speak as if the presumption survives the introduction of counterproof while purporting to follow traditionalist thinking, for doing so recognizes that there is more to the presumption than logic, and avoids the question whether logic alone would suffice.

C. One Rule or Many?

Since there are four underlying reasons for presumptions, and since any and each of these reasons may be present in widely varying strengths and proportions for the various presumptions, there is good reason to suppose that all presumptions should not behave alike. There is support for the proposition that presumptions should be treated on an individual basis, one behaving one way, another in a different way, yet another in still a different way. Presumptions could be a set of tools, rather than a single tool, and there is at least de facto recognition of exactly such variegated approaches in connection with some of the more important presumptions.

The problem is that such individualized treatment results in uncertainty: We lack an analysis of presumptions on a detailed and individual basis, and accordingly we lack a log-

27. O'Dea v. Amodeo, 118 Conn. 58, 170 A. 486 (1934) (seemingly drawing distinctions among (1) presumptions based merely on convenience, which obviate the need to present evidence upon facts not really in issue, (2) presumptions resting upon common experience and inherent probability, (3) presumptions based upon the fact that the circumstances in issue are peculiarly within one party's knowledge, and (4) policy-based presumptions; the affects assigned to these vary broadly, but the distinctions are not clearly drawn). This case is noted further below, text accompanying note 50 infra.

28. See the text accompanying notes 39-66 infra.
ical hierarchy for presumptions, from which we could deduce the role which each should play. Of course in related areas we live with such uncertainty: on a case-by-case and item-by-item basis, we allow the trial judge broad latitude in assessing the relevancy of evidence and its sufficiency, and whether the totality of the proof on a point is cogent and compelling, so as to permit a directed verdict.

But on the matter of presumptions, few jurisdictions purport to go so far. There are two different bifurcated approaches in existence, one prevailing in California, another in Kansas, Utah, the Virgin Islands, and the Canal Zone. Under California law, the pristine version of traditionalist thinking prevails with respect to presumptions whose sole purpose is "to facilitate the determination of the particular action," and the intent of this designation is to pick up the presumptions which rest principally on "an underlying logical inference." On the other hand, California follows reformist thinking with respect to presumptions which "implement some public policy other than to facilitate the determination of the particular action," whether or not such presumptions also rest in part upon probability or underlying logical in-

29. Maguire, Evidence, Common Sense and Common Law 188 (1947) ("There are, however, two sobering practical objections to any scheme of variable rebuttal burdens in connection with presumptions. Such schemes call for the classification of all the presumptions currently used, and classifying in any State can never be authoritative until the highest court has spoken. So long as society keeps up its continuity of change, there will inevitably be a lag between creation of presumptions and judicial classifying pronouncements about them. Beyond this, the difficulty of explaining a rebuttal classification to juries may not be ignored. Imagine a case containing three or four presumptions, all of different classes, and all assailed by rebuttal evidence."); Gausewitz, supra note 3, at 330 (A rule according separate and individual treatment to presumptions "would be difficult to administer if not to understand and keep somewhat uniform"); Morgan, Foreword to Model Code of Evidence 52 (1942) (noting that the approach of O'Dea, supra note 27, is "theoretically sound," but that it "has met with little favor, principally because of the practical difficulties of applying it at trial").

California, which follows a bifurcated approach to presumptions, sought to classify some twenty-five presumptions by statute, but it omitted classification for the loaned automobile and scope-of-employment presumptions, and for the presumption against suicide, and it created in effect a special third category for the res ipso loquitur doctrine, Cal. Evid. Code § 646 (West Supp. 1976). See also the discussion in the text accompanying notes 30-32, infra.

30. The first of the two quoted phrases is from the statute, CAL. EVID. CODE § 603 (West 1966); the second is from the accompanying Comment of the California Law Revision Commission, id.
ferences. And California has gone further, codifying a list of presumptions which belong in each category: A striking feature of California law, however, is its failure to come to grips with some of the most common presumptions—the ones relating to loaned automobiles, and the one that accident rather than suicide is presumed to be the cause of death, both of which would seem to be clearly in the latter of the two categories, although not so placed by California statute.

Kansas and Utah follow the bifurcated approach prescribed by the original Uniform Rules of Evidence in 1953, which proceed upon what seems to be very nearly the converse of the premise adopted in California. Under the origi-

31. CAL. EVID. CODE § 605 (West 1966). The accompanying Comment of the California Law Revision Commission cites the presumption of death from seven years' absence as one which implements “public policy” within the meaning of the statute: “[T]he presumption...exists in part to facilitate the disposition of actions by supplying a rule of thumb to govern certain cases in which there is likely to be no direct evidence of the presumed fact. But the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy (perhaps 30 or 40 years) that underlies the presumption indicates that it should be a presumption affecting the burden of proof.” The Comment pointedly observes that frequently a presumption will rest both upon an underlying logical inference and upon public policy, and that it is the presence of the latter basis which demands that the presumption be treated as affecting the burden of persuasion.

32. See CAL. EVID. CODE § 646 (West Supp. 1976), amending §§ 631-45 (West 1966) listing, inter alia, the following as presumptions affecting the burden of producing evidence: That a person possessing an order on himself for payment of money is presumed to have paid (§ 634); that things possessed are presumed to be owned by the possessor (§ 637); that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail (§ 641); that under certain defined circumstances a document at least 30 years old is presumed to be authentic (§ 643); and that under the usual circumstances of res ipsa loquitur the defendant is presumed negligent and his negligence is presumed to be the cause of the occurrence in question (§ 646). And see CAL. EVID. CODE § 669 (West Supp. 1976), amending §§ 661-68 (West 1966) listing, inter alia, the following as presumptions affecting the burden of persuasion: That a child born during marriage, “or within 300 days after the dissolution thereof,” is presumed to be “a legitimate child of that marriage” (§ 661); that a ceremonial marriage is presumed to be valid (§ 663); that an official duty has been regularly performed (§ 664); that a person not heard from in seven years is presumed to be dead (§ 667); and that under certain defined conditions the failure to exercise due care is presumed from the violation of a statute (§ 668).

33. KAN. STAT. ANN. §§ 60-413 to -416 (1964), UTAH RULES OF EVIDENCE 13-16, 9 UTAH CODE ANN. (Supp. 1975). The original Uniform Rules were also enacted for the Virgin Islands and the Canal Zone, see 9A U.L.A. 589 (1965). (I have been unable to determine whether the enactment by Congress of the Federal Rules of Evidence had any effect upon the Evidence law of either of the latter jurisdictions.) New Jersey too enacted the original Uniform Rules, see N. J. STAT. ANN. § 2A:84A-1 et seq. (Rules of Evidence) (1978), but New Jersey's counterparts to Uniform Rules 13 and 14 do not adopt a bifurcated approach to presumptions, and do not on their face indicate whether the traditionalist or reformist approach prevails in that state.
nal Uniform Rules, traditionalist theory prevails where the basic fact has "no probative value" as proof of the presumed fact; reformist thinking prevails where the basic fact has "any probative value" as proof of the presumed fact. Neither Kansas nor Utah prescribes by rule which presumptions belong in which category; the Comment which accompanies the Uniform Rule suggests that "[n]early all presumptions" rest at least in part upon probability, and it has been suggested that in effect the Uniform Rules approach simply adopts reformist philosophy, although there are cases applying the Rules which suggest otherwise.

34. Original Uniform Rule 14 provides as follows:

Effect of Presumptions. Subject to Rule 16 [which states in effect that if a special standard of proof, such as "clear and convincing evidence," is required by law in order to overcome a presumption, such requirement is not changed by the present Rule], and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

35. See the Comment to original Uniform Rule 14, quoted in part in note 24 supra.

36. Cleary, supra note 1, at 28 ("The classification [of presumptions attempted by original Uniform Rule 14, supra note 34] is a difficult one to apply, unless it be assumed that the reference to presumptions having nonprobative basic facts is no more than a placebo for the Thayerites and without real content."). It is interesting to note that Professor Morgan, who carried the torch for the reformist cause for many years, had proposed a rule identical in substance (although different in language) for adoption by the American Law Institute in its Model Code of Evidence in 1941. 18 ALI PROCEEDINGS 199-226 (1940-1941). Morgan's proposal was rejected by the Institute by a close vote after what has come to be seen as a classic debate between proponents of the reformist and traditionalist schools of thought, and the Model Code adopted the traditionalist approach. There is good reason to suppose that Morgan himself thought that his proposal would achieve the result of shifting the burden of persuasion in most instances; see Morgan, Some Observations Concerning Presumptions, 44 HARV. L. REV. 906, 931-32 (1931), and it seems that the major justification in the original Uniform Rules for excepting from reformist treatment these presumptions whose basic facts had "no probative value" was a fear that to do otherwise would offend due process. See Morgan, Basic Problems of Evidence 39 (1963). Morgan's reaction to his belated victory with the adoption of the original Uniform Rules in 1953 was restrained. See Morgan, The Uniform Rules and the Model Code, 31 Tul. L. REV. 145, 149 (1956) ("On the whole these [original Uniform] Rules [respecting presumptions in civil cases] seem to me more realistic than those of the Model Code. Simplicity in application is the fundamental argument in favor of the Thayer doctrine. Whether the Uniform Rule presents appreciably greater difficulty in application can be proved only by experience.").

37. Of the six decisions which I have found from Kansas and Utah considering
It seems clear that, with respect to presumptions in civil cases, most American jurisdictions at least purport to follow what Professor Gausewitz has called the policy of "procedural justice," rather than a policy of "particular justice." That is, most jurisdictions prefer to treat all presumptions alike, or to follow not more than two simple rules, rather than analyzing presumptions as highly individualized creations of the law, behaving in different ways in different cases, with all the attendant uncertainties.

the meaning of the original Uniform Rule 14, supra note 34, only one concludes that the presumption in question affects the burden of persuasion under Rule 14(a) because its basic fact has probative worth on the presumed fact. Four find the presumption in question to be covered by Rule 14(b), therefore meriting traditionalist treatment, because the basic fact lacks probative worth on the issue of the presumed fact. The other avoids the question.

See Koesling v. Basamakis, 559 P.2d 1043, 1045 n.4 (Utah 1975) ("Had the presumption [of partnership, arising from distribution of profits from a business] arisen, its effect would have been to shift the burden of producing evidence of the nonexistence of the presumed fact to the defendant since the facts from which the presumption is derived have probative value as evidence of the presumed fact. Rule 14, Utah Rules of Evidence." [This construction of the Rule fairly boggles the mind.]) ; Hurd v. Hall, 211 Kan. 46, 505 P.2d 786, 740 (1973) (presumption of "due care" on part of decedent is governed by Kansas' counterpart to Rule 14(b) [and therefore apparently receives traditionalist treatment]); State v. Duke, 205 Kan. 37, 468 P.2d 132, 135 (presumption in favor of validity of foreign judgment, and of truth of recitals in journal entry attached thereto, is governed by the Kansas counterpart to Rule 14(a) [and therefore apparently receives reformist treatment]); Akin v. Estate of Hill, 201 Kan. 306, 440 P.2d 585, 589 (1968) (presumption of "due care" on part of decedent is governed by the Kansas counterpart to Rule 14(b) [and therefore apparently receives traditionalist treatment]); Londerholm v. Unified School Dist. No. 500, 199 Kan. 312, 430 P.2d 188, 196 (1967) (implying that presumption of segregation by race, arising upon proof that almost all white employees are assigned to one group of schools, and almost all black employees to another, is a presumption governed by the Kansas counterpart to Uniform Rule 14(b) [therefore meriting traditionalist treatment]), and Prior v. Best Cabs, Inc., 199 Kan. 77, 427 P.2d 481, 483 (1967) (not deciding whether presumption of negligence, arising upon proof that a driver entered into intersection in the face of oncoming traffic which he did not see, should be classified as arising under the Kansas counterpart to Rule 14(a) or 14(b)).

38. Gausewitz, supra note 3, at 331 ("It is believed that the problems that arise in the use of the presumption device are not 'problems' because of difficulty in understanding and describing the rules, principles or facts involved in a particular case. They are problems because there is a conflict between two fundamental principles or policies . . . . The one policy is to do actual, concrete, substantial justice in each individual case; the other policy is to do formal, procedural justice by having a uniform rule that is easily administered regardless of its effect in the particular case. . . . The first of these conflicting policies can be called the 'particular justice policy' because it aims at actual justice in the particular, individual, case. The other can be called the 'procedural justice policy' because it aims at an easily understood and administered uniform rule that will probably result in justice in the average case or in most cases regardless of its effect in the individual case and also avoid injustices due to difficulties of administration. Almost everyone seems to agree, and always to have agreed, that the procedural justice policy should be followed in dealing with presumptions; that there should be one rule for all, or all but one or two or a very few presumptions.")
II. TRADITIONALIST AND REFORMIST THINKING COMPARED

A. The Traditionalist Approach:  
Out of One Rule, Many

Traditionalist thinking has failed to produce a single approach to presumptions. At least five different approaches may be discerned in the cases. First is the one implied by the traditionalist theory in its pristine form, which holds that the presumption disappears upon the introduction of counterproof sufficient to support a finding of the nonexistence of the presumed fact. Second is one which says that the presumption stays in the case until the opponent of the presumed fact introduces "substantial," "uncontradicted" or perhaps "disinterested" testimony of the nonexistence of the fact. In other words, the presumption imposes upon the opponent the burden of introducing counterproof of this calibre. Third is one which says that the presumption imposes upon the opponent of the presumed fact the burden of producing evidence of the nonexistence of the fact which is (i) sufficient to support a finding of the nonexistence of the fact, and (ii) actually believed by the jury. Fourth is one which says that the presumption imposes upon the opponent of the presumed fact the burden of producing enough evidence of the nonexistence of the fact to put the mind of the trier of fact at "equipoise" or "equilibrium," and that until the counterproof persuades the jury that the nonexistence of the fact is at least equally as probable as its existence, the presumption controls. Fifth is one which says that the presumption is "evidence" to be considered with all the other evidence in the case, and that the jury should be told to decide whether the presumed fact exists simply by weighing all the evidence in the case, including the presumption.

1. Traditionalist Theory in its Pristine Form.

Taking the bursting bubble theory at face value, a judge or lawyer can have little difficulty in understanding its operation. If the basic fact is established as a matter of law, or found true by the trier of fact, and if there is no evidence or insufficient evidence to support a finding of the non-
existence of the presumed fact, the presumption controls decision; otherwise, the presumption is out of the case altogether. Of course an inference may remain, if without regard to the presumption it happens that the basic fact is not only relevant evidence of the presumed fact, but sufficient as well; if so, proof of the basic fact may insure that the case will still go to the jury. The forms of instructions which this “pristine form” of the traditionalist theory requires are explored further below, under the heading “Rule 301 Narrowly Constrained.”

The pristine version of the traditionalist theory runs into deep trouble in cases in which (i) only a presumption can carry the issue to the jury, (ii) the opponent of the presumed fact introduces sufficient evidence of its nonexistence to support a finding thereof, thus dislodging the presumption, but (iii) this counterproof is disbelieved. A classic case, made especially poignant by the fact that events actually indicated that the jury disbelieved the counterproof, and for that reason vigorously attacked by Morgan, arose in Rhode

39. Nobody seems to argue that a presumption could be dislodged by counter-proof which is insufficient to support a finding of the nonexistence of the presumed fact. See Morgan, Basic Problems of Evidence 34 (1962); Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv. L. Rev. 59, 69 (1933); Cleary, supra note 1, at 18. In its statutory description of the effect of those presumptions which receive traditionalist treatment, California makes the point expressly: Such presumptions “require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its non-existence.” Cal. Evid. Code § 604 (West 1966). Just as it is sometimes (inadvisedly) said that it takes “substantial” evidence to create a jury question, and that a “mere scintilla” of evidence will not suffice, see 9 Wright & Miller, Federal Practice and Procedure, Civil, § 2524 (1971), so it is sometimes said in the context of presumptions treated by the traditionalist approach in its pristine form that it takes “substantial evidence to the contrary” to make the presumption disappear. See O'Brien v. Equitable Life Assurance Soc'y, 212 F.2d 383, 386 (8th Cir.), cert. denied, 348 U.S. 835 (1954) (the holding makes it entirely clear that the court would require exactly the same quality of proof to create a jury question as it would require to make a presumption disappear). In both contexts, the real question is whether the proof is of such quality that it would enable a reasonable and impartial person to reach a conclusion favorable to the proponent; if “substantial” is intended only to be a description for proof of this quality, and perhaps also to mean “more than a mere scintilla,” then the word does little harm and little good. See Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969); 9 Wright & Miller, supra. It should be noted, however, that usually when decisions talk of a requirement for “substantial evidence” in order to dislodge a presumption, the mean more than the kind of proof which is usually necessary to create a question for the jury to decide—a point which is brought home by the use of other adjectives, such as “uncontradicted,” and which is considered further in the text accompanying notes 43-47 infra.
It involved the long-form scope of employment presumption, arising from proof of defendant’s ownership of an automobile and his employment of the driver, that the driver was acting within the scope of his employment at the time of the accident in litigation. Plaintiff presented proof of the employment of the driver, but no evidence on the question whether the driver was acting within the scope of his employment on the occasion in question. Defendant testified that the driver was not within the scope of his employment at the time. Defendant’s motion for a directed verdict was denied; the case went to the jury, which found for the plaintiff. Defendant’s motion for a new trial was then denied too, but the Rhode Island Supreme Court thought defendant was entitled to a new trial:

The trial justice as well as the jury believed the defendant was not telling the truth when he testified that Riley, at the time of the accident, was not acting within the scope of his employment. However, the defendant did so testify, and the plaintiff produced no evidence to the contrary. The burden was upon the plaintiff to establish agency. He proved that the automobile was being driven by defendant’s employee. This raised a prima facie presumption that the driver was engaged upon the defendant’s business. ... This presumption, however, is operative only in the absence of any credible evidence to the contrary for the defendant. ... In such a case a presumption is not evidence. It is entitled to no weight as evidence. The presumption excuses the plaintiff from offering evidence on the question until defendant produces evidence of the non-existence of the facts which, until evidence to the contrary is produced, are presumed to exist. ... The plaintiff offered nothing to prove agency. The defendant’s failure to produce the driver of his automobile cannot be treated as direct evidence tending to prove agency. ... [A]s the plaintiff had nothing but a presumption to rely upon to establish agency, and as agency was denied, we think it was error to deny the defendant’s motion for a new trial. 41

The result and reasoning of the Rhode Island case are badly flawed. It is impossible to say why a presumption is strong enough to require a finding of the presumed fact where no counterproof has been adduced, and yet so weak that it cannot even carry the issue to the jury when the opponent of the presumed fact adduces testimony which nobody believes. If the presumption in question embodies a substantive policy, under which a court should rather err on the side of recovery than on the side of nonliability when ownership and employment are proved and the other critical facts are in doubt, then such a policy is disserved if it can be overcome by proof which nobody credits. If the presumption in question embodies a special procedural policy—one which says that the defendant should come forward with proof, since he has the better access to the underlying facts—then the policy seems hardly worth having if the opponent can overcome the presumption with unbelieved proof.

Too much can be made of the Rhode Island case, however, if it is put forward in favor of a policy which would give presumptions greater effect than the pristine version of the traditionalist theory would allow. While the result in the case could be corrected by increasing the effect of the presumption, probably the Rhode Island court simply erred in ignoring the possibility that the basic fact would support an inference of the existence of the presumed fact: It seems that most would agree that the basic fact in that case would support such an inference. However, as previously noted, there are presumptions which cannot be justified solely upon the strength of the underlying inference, and there are other examples of cases which could get to the jury only if the presumption were given a continuing role after counterproof had been introduced sufficient to support a finding of the nonexistence of the presumed fact.42

42. See O'Brien v. Equitable Life Assurance Soc'y of United States, 212 F.2d 383 (8th Cir.), cert. denied, 348 U.S. 835 (1954) (In suit for double indemnity on a life insurance policy, the trial court directed a verdict for the defendant insurance carrier. The issue was whether the insured, who had been killed by gunshot, had at the time been committing a felony or assault. If so, then plaintiff could recover only the face amount of the policy; if the insured had met his death by "accident," then plaintiff could recover double indemnity. Plaintiff bore the burden of proving accident. The Court of Appeals acceded to the view that when a violent death is
Quite apart from the question whether the only cure for such cases is to give greater effect to presumptions, the fact is that courts have chosen to cure the problem by this method. It may well be that the chosen method is a way of avoiding the question whether the underlying fact would, standing alone, support an inference; however, it is also a way of recognizing the force of the substantive policy underlying the presumption.

2. The “Substantial” or “Uncontradicted” Evidence Approach.  

The virtue of this approach is that it preserves for the jury the question whether the presumed fact exists, even where the opponent of the fact introduces sufficient evidence to support a finding of its nonexistence. The approach works this way: As is true of the pristine version of the traditionalist theory, the presumption controls decision on the presumed fact until the opponent introduces evidence sufficient to support a finding that the fact does not exist. Where the opponent does adduce proof which is sufficient, but not “sub-
stantial” or “uncontradicted,” the presumption is reduced to an inference. Unlike the pristine form of the traditionalist approach, however, this approach insures that the inference will be preserved: More precisely, the presumption lingers on to protect the inference from extinction, and the result in the Rhode Island case described above is prevented. When the opponent does introduce “substantial” or “uncontradicted” evidence, then the presumption vanishes; whether an inference remains now must be decided without reference to the presumption.44 An inference might remain because the basic fact is both relevant and sufficient evidence of the presumed fact; or there might be other proof in the case from which the presumed fact could be inferred.

McCormick saw in this approach something more: The jury, he thought, is not only left free to draw an inference of the presumed fact, but is advised that there is a presumption at work in the case, at least so long as the opponent’s counterproof was only sufficient and not “substantial” or “uncontradicted.”45

The following cases seem to combine the notion that the counterproof will dislodge the presumption only if it is “substantial” and “undisputed,” employing widely varying terminology: Gaither v. Myers, 404 F.2d 216, 219 (D.C. Cir. 1968) (“uncontradicted” and “conclusive”); E. L. Cheeney Co. v. Gates, 346 F.2d 197, 202 (5th Cir. 1965) (“clear, positive and substantially uncontradicted,” whether from “interested” witnesses or not); Smith v. Savannah Homes, 389 F. Supp. 384, 386 (W.D. Tenn. 1974) (“uncontradicted, unimpeached”); Caldwell v. Wilson Freight Forwarding Co., 322 F. Supp. 43, 45 (W.D. Pa. 1971) (quoting from a Pennsylvania decision that a presumption of employment and scope, arising from a showing that defendant’s name is on a commercial vehicle, “alone is sufficient under Pennsylvania law to take the case to the jury unless the evidence to the contrary is clear, positive, credible, uncontradicted and so indubitable in weight and amount as to justify the court in holding that a verdict against it must be set aside as a matter of law.”).

And see Jack Cole Co. v. Hudson, 409 F.2d 188, 192 (5th Cir. 1969), collecting from state and federal cases a list of terms describing the kind of proof which will cause rebuttable presumptions of ownership, agency, and scope of employment to disappear. The terms include “strong and clear,” “positive and unequivocal,” “uncontradicted or invulnerable,” “clear and undisputed,” and “so clear that reasonable minds can draw but one inference.”

44. The description coincides with one of Morgan’s. See Morgan, Foreword to Model Code of Evidence, at 56 (1942). In a later work, Morgan described the same approach differently; see Morgan, Basic Problems of Evidence 34-35 (1962) and note 47 infra. McCormick’s view seems to coincide with the description in the text above, although he added the thought that until “substantial” or “uncontradicted” counterproof was adduced, the trial judge should make express mention of the presumption to the jury; see McCormick, Evidence § 345 (2d ed. 1972) (“[M]any courts also hold that the special policies behind the presumption require that the jury be informed of its existence.” [Citation to Grier and Krisher, infra, this note]);
Most of the decisions endorsing this approach are affirmances of trial court judgments upon jury verdicts in favor of the party for whom the presumption operated. What the appellate court is saying to the appellant is this: "Your counterproof may have been sufficient to support a finding of the nonexistence of the presumed fact, but it cannot be said to be 'substantial' or 'uncontradicted.' Accordingly, the presumption was not 'put to flight,' and at least an inference remained in the case. The jury drew the inference, and you have no ground for complaint."\

McCormick, Charges on Presumptions and Burden of Proof, 5 N.C.L. REV. 291 (1972) (advocating an instruction to the jury upon the presumption, but concluding that "almost the only" form of instruction that "seems to make sense" is one under which the presumption affects the burden of persuasion—a view which is also advanced in the present edition of the McCormick treatise see note 3 supra). See Grier v. Rosenberg, 213 Md. 248, 131 A.2d 737, 739 (1957) (Plaintiff claimed to have been injured while a passenger on a bus which came to a sudden stop, allegedly as a result of the fact that defendant's car "suddenly cut across the front of the bus at great speed." There was evidence, stemming from proof of the license number of the offending vehicle, that the car in fact belonged to defendant, but no proof whatever as to the identity of the driver. To rebut the presumption of agency and scope arising from proof of ownership, defendant testified that he did not recall driving the vehicle at the time and place in question, and that none of his employees recalled doing so either. Taking the view that the defendant's counterproof was enough to preclude an instruction requiring the jury to find agency and scope, but not sufficient to require the contrary finding, the Maryland Supreme Court found that trial judge committed reversible error in refusing to instruct the jury that if it found that defendant owned the automobile, then there was a rebuttable presumption of agency and scope.) ; State of Maryland v. Baltimore Transit Co., 329 F.2d 738 (4th Cir. 1964) (In suit to recover for wrongful death of pedestrian, there was conflicting eyewitness testimony on the question whether decedent was in a pedestrian crosswalk with the light in his favor, or outside the crosswalk with the light against him, at the time he was struck by defendant's bus. Over a thoughtful dissent by Haynesworth, J., the majority, per Bell, C. J., applied Grier in concluding that the trial judge had erred in instructing the jury that a presumption of due care existed, but that the jury should not rely upon it in light of the counterproof, and that the jury should decide the case on the evidence alone. In dissent, Haynesworth argued that the jury should not be instructed on a presumption where there was no basic fact in the case having probative worth on the issue of the presumed fact if, as in this case, there was sufficient counterproof.) ; and Krisher v. Duff, 331 Mich. 699, 50 N.W.2d 332, 339 (1951) (Reversible error to refuse to charge the jury "that the defendant must come forward with evidence of a clear, positive and credible nature to refute the presumptions of knowledge or consent." No error, however, to refuse to mention to the jury the existence of the statute creating the presumption.).

46 See, e.g., Cravey v. J. S. Gainer Pulpwood Co., Inc., 128 Ga.App. 465, 197 S.E.2d 171, 173 (1973) (no error in refusing to direct verdict for defendant where the long-form scope-of-employment presumption was not overcome as a matter of law by "'clear, positive, and uncontradicted evidence' to the contrary"); Breeding v. Massey, 375 F.2d 171, 176-77 (8th Cir. 1967) (no error in refusal to instruct jury as a matter of law that driver was not acting within the scope of his employment, for the defendant-employer's counterproof did not overcome the presumption, since the jury was not bound to accept the testimony of interested parties); Webb v. Moreno, 363 F.2d 97, 99-101 (8th Cir. 1967) (proper to submit the issue of implied
It is hard to fault a court which deviates this far from the pristine version of the traditionalist approach to avoid the absurdity of a presumption which disappears altogether in the face of unbelieved counterproof. But this approach has its problems. First, it employs a disturbingly vague concept: We must try to recognize evidence which is "substantial" or "uncontradicted," and which is at once more than "sufficient" but less than "compelling." That is, we have now a kind of proof which is more than enough to create a jury question, less than enough to win a directed verdict (although many of the decisions seem to indicate that "sufficient" or "uncontradicted" really does mean "cogent and compelling"). Second, in light of its modest goal, the approach may be wholly unnecessary, at least in cases where the basic fact would support a finding of the presumed fact. Third, it is hard to imagine what a jury is supposed to think if it is told that there is a "presumption" in the case. Is the jury to find the presumed fact or not? And if lawyers have difficulty understanding the word "presumption," what is a jury to make of it? And fourth, although this seems more an academic than a practical problem, the whole approach is extraordinarily ambiguous. In the margin, I explore the various meanings which this approach could have if a trial judge actually decides that the counterproof is "sufficient" but not "substantial" or "uncontradicted," or that is "substantial" or "uncontradicted" but not "compelling," or that it is "compelling." The range of theoretical possibilities is disconcerting.

47. It seems that under the "substantial" or "uncontradicted" evidence approach, the counterproof could be of four different descriptions. Either (1) it is insufficient to support a finding of the nonexistence of the presumed fact (which includes the possibility that there is no counterproof at all), or (2) it is sufficient to support a finding of the nonexistence of the presumed fact but not "substantial" or "uncontradicted," or (3) it is "substantial" or "uncontradicted" but not of such "cogent and compelling" force as to require the jury to be directed to find that the presumed fact does not exist, or (4) it is "cogent and compelling," and the jury should be directed to find the fact. Only if the counterproof fits in categories 1 or 4 is it clear what the jury should be told. Here are all the possibilities:
1. No evidence of nonexistence of presumed fact has been introduced, or at most insufficient evidence to support a jury finding thereof:
   A. The presumption controls the issue, and the jury should be instructed that it must find the existence of the presumed fact. Here all would agree.

2. Sufficient evidence of the nonexistence of the presumed fact has been introduced to support a jury finding thereof, but not "substantial" or "uncontradicted" evidence:
   B. Presumption still controls. Jury should be instructed to find the existence of the presumed fact. When it is said that only only "substantial" or "uncontradicted" evidence can dislodge the presumption, what is meant is that the presumption operates with full force until counterproof of that calibre is added. This seems a doubtful interpretation, but see Morgan, Basic Problems of Evidence 34-35 (1962).
   C. Presumption no longer controls decision, but the jury should be instructed that a "presumption" exists, rather than told nothing about it, and rather than told only of an inference. See the cases cited in note 45, supra. When it is said that it takes "substantial" or "uncontradicted" evidence to dislodge a presumption, what is meant is that it takes counterproof of such calibre to destroy the presumption altogether. Evidence of lesser calibre, so long as it is "sufficient" to support a finding of the nonexistence of the presumed fact, will deprive the presumption of its "mandatory" effect, although the jury will still learn of the "presumption" as such.

D. Presumption no longer controls decision, but the jury should be allowed to draw an inference, and perhaps told that it may draw such an inference. Again, when it is said that it takes "substantial" or "uncontradicted" evidence to dislodge a presumption, what is meant is that it takes counterproof of such calibre to destroy the presumption altogether. Evidence of lesser calibre, so long as it is "sufficient" to support a finding of the nonexistence of the presumed fact, deprives the presumption of its mandatory effect. Even when such evidence is introduced, however, enough of the presumption survives to protect an inference from extinction. See Morgan, Foreword to Model Code of Evidence 56 (1942). And see the cases cited at notes 13 and 46, supra.

3. "Substantial" or "uncontradicted" evidence of the nonexistence of the presumed fact has been introduced, but not evidence which is so "cogent and compelling" as to require that the jury be directed to find that the presumed fact does not exist:
   E. Presumption no longer controls decision, but the jury should be instructed that a "presumption" exists, rather than told nothing about it, and rather than told only of an inference. When it is said that "substantial" or "uncontradicted" evidence will dislodge a presumption, what is meant is that evidence of such calibre will deprive the presumption of its mandatory effect. Even when such evidence is introduced, however, the judge will decide whether the evidence is of such calibre, and it is up to the jury to decide this. See Krisher v. Duff, 331 Mich. 699, 50 N.W.2d 332, 339 (1951), cited supra note 45.
   F. Presumption no longer controls, but the jury should be allowed to draw an inference, and perhaps told that it may draw such an inference. When it is said that "substantial" or "uncontradicted" evidence dislodges a presumption, what is meant is that such evidence of such calibre deprives the presumption of its mandatory effect. Even when evidence of such calibre is introduced, however, enough of the presumption survives to protect an inference from extinction. See Caldwell v. Wilson Freight Forwarding Co., 322 F. Supp. 43, 45 (W.D. Pa. 1971), cited supra note 43.
   G. Presumption no longer controls, but an inference may or may not remain, depending upon whether the basic fact of the pre-

The principal virtue of this variant from the pristine version of traditionalist theory is that it involves the jury in the assessment of the counterproof, allowing the presumption to have an effect if the counterproof is not believed. Under this approach, it is said that the presumption remains "in abeyance" until the jury decides whether it believes the counterproof, but that it will “still operate” if the jury disbelieves the counterproof.

The presumption has sufficient inherent probative worth to support an inference of the existence of the presumed fact. If such an inference does remain, perhaps the jury should be told that it may draw such an inference. See Morgan, Foreword to Model Code of Evidence, at 56 (1942).

H. Presumption no longer controls, and any underlying inference is destroyed too. When it is said that “substantial” or “uncontradicted” evidence dislodges a presumption, what is meant is that evidence of such calibre destroys the presumption altogether, and that means that any underlying inference is destroyed too.

4. "Cogent and compelling" evidence of the nonexistence of the presumed fact has been introduced:

I. Both the presumption and any underlying inference are destroyed. The jury should be instructed that it must find the nonexistence of the presumed fact. Here all would agree.

Assuming that there is a consensus that Situation 1 calls for Response A, and that Situation 4 calls for Response I, the question becomes what Response is appropriate in Situation 2, and what in Situation 3. Rationally, the path from A to I can traverse the intervening possibilities in any one of six different ways: (1) A, B, E, I; (2) A, B, G, I (which seems to have been Morgan’s choice at one time; see Morgan, Basic Problems of Evidence 34-35 (1962)); (3) A, B, H-I (where the jurisdiction treats “substantial” and “uncontradicted” evidence as equivalent to “cogent and compelling” evidence); (4) A, C-E, I (which seems to be what McCormick had in mind; see McCormick, Evidence § 343 (2d ed. 1972); and see the Grier and Krisher cases, supra note 45); (5) A, D, G, and I (which seems to have been Morgan’s choice at another time; see Morgan, Foreword to Model Code of Evidence 56 (1942)); and finally (6) A, D, H-I (where, once again, the jurisdiction treats “substantial” and “uncontradicted” evidence as equivalent to “cogent and compelling” evidence).

48. Gillett v. Michigan United Traction Co., 205 Mich. 410, 171 N.W. 536, 538-40 (1919) (In affirming a directed verdict for defendant in a personal injury case, the Court considered in dictum what effect a presumption of due care would have had in the case if the accident had caused death rather than injury. The Court concluded that the presumption would cease to operate upon introduction of “direct, positive, and credible” counterproof showing decedent’s negligence, but that if the jury were to believe that this counterproof “has been overcome by other evidence and should be disregarded, the presumption will . . . still operate.” And “[i]f, uninfluenced by the presumption [the jury reaches] the conclusion that the evidence tending to show decedent’s negligence is not entitled to credit and should be disregarded, the presumption may then be considered as remaining in force so far as may be necessary to establish the fact that the deceased exercised proper care in all respects not expressly established by the evidence. It was not entirely displaced, but remained in abeyance pending the jury’s reaching this preliminary decision as to the credence to be given the evidence on the particular point in which negligence was claimed.”).

49. For reasons which escape my understanding, Morgan once thought that the “believe-the-evidence” approach was actually two approaches. See Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47
In a particular and limiting context, the Connecticut Supreme Court seemingly endorsed this approach. The case involved a lawsuit arising out of a two-car accident, in which plaintiff sought damages from the owner of an automobile driven at the time by the owner's son. Plaintiff had no evidence that the son had the defendant's permission to drive on the occasion in question, and relied upon a statutory presumption, arising upon proof that the driver was in the immediate family of the owner, that the vehicle was a "family car" and that the driver had the owner's permission to drive and was acting within the scope of his authority on the occasion in question. Both the son and the father testified that the son did not have permission to drive, and the father testified that the car was not maintained for general use by family members. There was also proof that the son had taken the car while both his parents were at home, and that the father, upon hearing of the accident, "evinced no surprise," nor had he thereafter "upbraided the son for taking the car." The appellate court affirmed the jury verdict for the plaintiff:

We conclude that the intent of the statute is that the presumption shall avail the plaintiff until such time as the trier finds proven the circumstances of the situation with reference to the use made of the car and the authority of the person operating it to drive it, leaving the burden then upon the plaintiff to establish, in view of the facts so found, that the car was being operated at the time as a family car. . . . It is evident from the trial court's memorandum of decision that it did not construe the statute as we have done, because it stated that even if the testimony of these two witnesses was disbelieved the plaintiff would not be entitled to recover.

Harv. L. Rev. 59, 61 (1933) (Here he suggested these alternative views of the "believe-the-evidence" approach. Either: "[A presumption] places upon the opponent the burden of persuading the jury to believe so much of the evidence against the presumed fact as would justify a reasonable jury in finding against that fact." Or: "[A presumption] places upon the opponent the burden of persuading the jury not to disbelieve so much of the evidence against the presumption as to leave the remainder insufficient to justify a reasonable jury in finding against the presumed fact."). In the end he insisted on the distinction still, but seemed to suggest that it was not important to consider the possibilities, since "no court now actually applies such a theory." Morgan, Basic Problems of Evidence 40 (1962).

51. Id. at 488-89.
Other cases appearing to subscribe to this view are cited in the margin. Some pattern jury instructions seem also to take this approach.

This variant presents insuperable difficulties. In the first place, it seems to turn upon the notion that the counterproof will be circumstantial in character, so that putting upon the opponent the burden of convincing the jury that the facts offered in counterproof are true is not quite the same thing as putting on the opponent the burden of persuasion on the presumed fact itself. But what a tenuous distinction it is! Surely the opponent will always adduce the best counterproof he has, and if circumstantial evidence is the best he has, then it will be but cold comfort to assure him that he does not bear the burden of disproving the presumed fact if he does bear the burden of proving the circumstances which he thinks are favorable to his cause.

In the second place, this approach can only hope to work at all if the counterproof is relatively compact in nature.

52. Sutphen v. Hagelin, 32 Conn. 158, 344 A.2d 270 (1975) (indicating that “family car” presumption does not disappear upon introduction of counterproof tending to show that the car was not being used by an agent of the owner, but that the presumption applies if the jury disbelieves the counterproof; good collection of Connecticut authorities); Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 411 F.2d 88, 96 n.2 (3d Cir. 1969) (approving an instruction to the jury describing the presumption and emphasizing that the jury must decide whether it believes the owner’s counterproof), Clark v. Diefendorf, 109 Conn. 507, 147 A. 33, 34 (1929) (indicating that if the facts of the counterproof are themselves in issue, the jury should be instructed that the presumed fact “would be implied” from the basic fact if the jury finds the facts in the counterproof “not to exist”).

53. See WASHINGTON PATTERN JURY INSTRUCTIONS (Civil) § 24.03 (1967): [If you find] [Since] _________ (the basic facts), the law presumes ________ (the presumed fact). You must therefore find _________ (the presumed fact) unless you believe evidence which you find reasonably tends to prove that ________ (the presumed fact is not so). If you believe evidence which you find reasonably tends to prove that ________ (the presumed fact is not so), then you will disregard the presumption and decide from all the evidence, and all reasonable inferences therefrom, whether the [plaintiff] [defendant] has established by a preponderance of the evidence that ________ (the presumed fact is so).

And see 1 NEW YORK PATTERN JURY INSTRUCTIONS § 1:63 (1974) (presumption against suicide in suit to recover on accident or double indemnity policy, where plaintiff bears burden of proof on issue of accident); and Id., vol. 2, § 4.57 (presumption against suicide in suit upon life insurance policy where suicide means non-recovery).

54. Thus, in the passage from O’Dea quoted in the text above, the court makes it clear that when the facts of the counterproof are established, it leaves “the burden upon the plaintiff to establish” (emphasis added) the presumed fact.
the opponent's attack upon the presumed fact involves ten circumstantial facts, and if he bears the burden of persuading the jury to believe just enough of those ten facts to justify a finding of the nonexistence of the presumed fact, then the trial judge faces a stultifying task. He must determine, individually and in combination, the facts adduced by the presumption's opponent which would suffice to support a finding of the nonexistence of the presumed fact, and then devise a charge to the jury to the effect that it should find the presumed fact unless it believes those facts which would suffice to support the contrary finding. In other contexts, of course, the trial judge may have to determine just what facts the jury must find in order to support a verdict, but this approach would compel the judge to break down the evidence even further than is required in the preparation of interrogatories to the jury, and the charge upon the presumption will become unwieldy indeed.


Under this variant, the presumption will control the decision on the presumed fact unless, on the basis of all the evidence in the case, the jury finds that the nonexistence of the presumed fact is at least as probable as its existence. Like the "substantial" or "uncontradicted" evidence approach, this one allows the force of the presumption to keep the inference alive, even in the face of sufficient counterproof to support a finding of its nonexistence. But there is no need to puzzle the jury by using the word "presumption,"

55. See Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 69-71 (1933).
56. Opinions vary upon the merits of this approach. Morgan thought the approach posed no "serious" difficulty, Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 70 (1933), but that the only advantage of the approach was that it "does not violate the dogma that the burden of proof never shifts," Morgan, Foreword to Model Code of Evidence 57 (1942). McCormick termed the "equipoise" approach "[m]ore attractive theoretically" than the other variations of traditionalist thinking, but thought it "hard to phrase" an instruction embodying this approach "without conveying the impression that the presumption is itself 'evidence' which must be 'met' or 'balanced.'" He also thought that such an instruction would convey an "impression of futility" in that it "prescribes a difficult metaphysical task for the jury, and, in actual use, may mystify rather than help the average juror." McCormick, Evidence § 345 (2d ed. 1972). Cleary thought the approach "unduly refined and unrealistic when viewed within the framework of the actual trial," and complained that "it simply fails to give presumptions a sufficient effect." Cleary, supra note 1, at 29.
and no need to define a new category of proof called "substantial" or "uncontradicted" proof. Like the "belief" approach, this one involves the jury in the assessment of the strength of the counterproof, and allows the presumption to have continuing effect if the jury discredits the counterproof. But the nature of the instruction to the jury is compact and simple, and the approach in no way affects the burden of persuasion.

This approach was expressly endorsed in a number of decisions by the Supreme Court of Maine,57 there is support for it in opinions by Justice Blume in Wyoming;58 there is scattered support for the approach in other states.59


58. See First Nat'l Bank v. Ford, 30 Wyo. 110, 216 P. 691, 694 (1923) (carefully noting that the burden of proof always rests upon the party with the affirmative, but noting too that when such party establishes a prima facie case the opponent has the burden of producing evidence such that the prima facie case is "balanced," or "put in equipoise"); Hildebrand v. Chicago, B. & Q.R.R., 45 Wyo. 176, 17 P.2d 651, 653-655 (1933) (In a suit against a railroad to recover damages for the death of cattle run over by defendant's train, plaintiff claimed the benefit of a presumption, based upon a statute (now WYO. STAT. § 37-210 (1957)) requiring railroads to maintain adequate fences, gates, and cattle guards. Proof that defendant's trains ran over the cattle amounted to a "prima facie case," which the Supreme Court also referred to as a "presumption": "[M]erely some evidence on the part of the railroad company is not sufficient to cause the presumption to vanish, but it must be adequate to meet, that is to say, to balance, the prima facie case, unless, perchance, all the facts are shown in detail. A gentle tapping on a window pane will not break it; so a mere attempt to refute a presumption should not cause it to vanish, if it is of any value at all."); and Worth v. Worth, 48 Wyo. 441, 49 P.2d 629 (1935) (Alienation case brought by wife against parents of husband; held, the court should have instructed the jury on the presumption that parents advise their children in good faith. The judge is not the arbiter of the question whether the evidence suffices to make the presumption disappear and this question should be left to the jury unless the counterproof prevails as a matter of law. The opinion also quotes Morgan's description of the "equipoise" rule with apparent approval).

59. See, e.g., Klunk v. Hocking Valley Ry., 74 Ohio St. 125, 77 N.E. 752, 755 (1906) (Railroader injured by exploding pressure gauge makes a prima facie case for recovery under state statute by showing these facts. While such a showing does not cause the burden of proof to shift to the railroad, nevertheless: "[I]f upon the whole case defendant's negligence was not established by a preponderance of the evidence, or if upon all the evidence adduced upon that issue, the case was left in equipoise, the defendant was entitled to a verdict, and the jury should have been so charged."); Tresise v. Ashdown, 118 Ohio St. 307, 160 N.E. 898, 900 (1928) (Where plaintiff's own evidence raises a "presumption" of contributory negligence on his part, he need not overcome that presumption by a preponderance of counterproof, but must produce only "such proof as is sufficient merely to equal or counterbalance the evidence," citing Klunk, supra). Klunk and Tresise were followed, in the context of cases in which plaintiff's proof raised the possibility of contributory negligence on his part, in Batesole v. Stratford, 505 F.2d 804, 811 (6th Cir. 1974); New York Cent. R.R. v. Monroe, 188 P.
The leading decision in Maine is *Hinds v. John Hancock Mutual Life Insurance Co.*, which was a suit on a life insurance policy to recover double indemnity. There was no dispute over the fact of death, and the obligation of the carrier to the beneficiary in the amount of $9000. There was a question, however, as to whether the insured had died accidentally or by suicide, and plaintiff bore the burden of showing accident rather than suicide as the cause of death. The case went to the jury, which found in plaintiff's favor, but the Supreme Court of Maine reversed, finding that "there was an uncontradicted showing by strong evidence of physical facts drawn from disinterested witnesses presented by plaintiff that the death was self-inflicted and non-accidental." Although the holding made a discussion of the proper approach to presumptions strictly speaking unnecessary, the Court in *Hinds* discussed the proper effect to be given to the presumption against suicide which operated in plaintiff's favor:


Elsewhere, however, Ohio seems either to have ignored the *Klunk-Tresise* holdings (see *In re Guardianship of Breece*, 173 Ohio St. 542, 184 N.E.2d 386, 395 (1962)), to have held that a presumption affects the burden of persuasion (*see In re Walker's Estate*, 161 Ohio St. 564, 120 N.E.2d 432, 435 (1954)), or to have rejected *Klunk-Tresise* at least by implication (see *Ayers v. Woodard*, 166 Ohio St. 138, 140 N.E.2d 401, 405 (1957): presumption disappears upon introduction of counterproof, although burden is upon opponent to introduce "evidence of a substantial nature which at least counterbalances the presumption, [and] then it disappears" (emphasis added)). And see 1 Ohio Jury Instructions § 5.13 (1968) ("It has been mentioned that there is a presumption of law that . . . . This presumption does not apply in this case because evidence was introduced on this issue. . . . It may not be given any weight or considered for any purpose in reaching your verdict."). *However, see id.* § 9.11 (instruction entirely consistent with Tresise for situation in which plaintiff's own proof shows possibility of contributory negligence), and § 15.31 (Instruction on short-form loaned automobile presumption, where owner is an occupant of the car, to the effect that the presumption justifies a finding of the driver's agency unless "overcome" or "rebutted" by evidence to the contrary).

And *see Diller v. Northern California Power Co.*, 18 Cal. App. 426, 123 P. 359 (1912) (approval of instruction to jury that a presumption of defendant's negligence, arising from proof that a live electric wire was down across the road, is overcome if defendant produces sufficient evidence to balance it); and Speck v. Sarver, 20 Cal. 2d 585, 128 P.2d 16, 20 (1942) (Traynor, J., dissenting, and arguing that a presumption continues until the party against whom it operates introduces evidence persuading the jury that the nonexistence of the presumed fact is as probable as its existence).

*Cf. Beggs v. Metropolitan Life Ins. Co.*, 219 Iowa 24, 257 N.W. 445 (1934) (when evidence is in equipoise, the presumption should turn the decision in favor of the existence of the presumed fact).
[Professor Morgan], while suggesting that [presumptions] should be permitted to shift the burden of persuasion, sees no serious or insurmountable objection to the establishment of a single procedural rule that a disputable presumption persists until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium, or, stated otherwise, until the evidence satisfies the jury or factfinder that it is as probable that the presumed fact does not exist as that it does exist. We view the adoption of such a rule as a practical solution of a confusing procedural problem. In establishing the vanishing point for presumptions, it provides more certainty than do the varying definitions of "substantial countervailing evidence". It has also the virtue of reserving to the factfinder decisions as to veracity, memory, and weight of testimony whenever they are in issue. In essence, the proposed rule recognizes that when an inference has hardened into a presumption compelling a finding in the absence of contrary evidence, it has achieved a status which should not vanish at the first "tapping on the window pane." It recognizes that "surely the courts do not raise such a presumption merely for the purpose of making the opponent of the presumption cause words to be uttered." We agree with Mr. Morgan that our objective should be to devise a "simple, sensible and workable" plan for the procedural use of disputable presumptions and are satisfied that the suggested rule achieves that end.

Such a rule gives to the presumption itself maximum coercive force short of shifting the burden of persuasion. Although we are keenly aware that there is severe criticism by respected authority of the widely accepted rule that the burden of persuasion on an issue never shifts, that rule has been thoroughly imbedded in the law of this state. An unbroken line of judicial pronouncements to this effect are to be found in our opinions. We would be most reluctant to make a radical change in the accepted rule unless forced to do so by some compelling logic. We feel no such compulsion here. . . . [It does not seem] to us necessary, in order to bring some order out of chaos, to overrule all precedent and permit the presumption to shift the burden of persuasion.
from him who first proposes the issue and seeks to change the status quo. These considerations prompt us to adopt the foregoing rule which seems to us a satisfactory middle course.

The rule for which we have expressed preference does not, as we interpret it, mean that the persistence or disappearance of a disputable presumption may never be resolved as a matter of law. Whenever no countervailing evidence is offered or that which is offered is but a scintilla, or amounts to no more than speculation and surmise, the presumed fact will stand as though proven and the jury will be so instructed. On the other hand, when the contrary evidence comes from such sources and is of such a nature that rational and unprejudiced minds could not reasonably or properly differ as to the nonexistence of the presumed fact, the presumption will disappear as a matter of law. Where proof of the presumed fact is an essential element of the plaintiff's case, he would suffer the consequence of a directed verdict. Such would ordinarily be the result, for example, when evidence effectively rebutting the presumption is drawn from admissions by the plaintiff, evidence from witnesses presented and vouched for by the plaintiff, or from uncontroverted physical or documentary evidence.61

5. The Presumption-As-Evidence Approach.

Under this variant form, a presumption is treated as a kind of evidence, to be "weighed" against and in the light of the other evidence in the case. A standard work on jury instructions for the federal courts appears to equate presumptions with evidence, endorsing the following language:

A presumption continues to exist only so long as it is not overcome or outweighed by evidence in the case to the contrary; but unless and until outweighed, the jury should find in accordance with the presumption.62

61. Id. at 730-32.
62. 2 DeWitt & Blackmar, Federal Jury Practice and Instructions § 71.04 (2d ed. 1970). In addition to treating the presumption as if it were evi-
Treating a presumption as evidence does not really define an approach, but is rather a technique which could be used in conjunction with one of the other approaches described above.

The problem with treating a presumption as evidence is that it results in a directive to compare factual data with a legal rule, or a prescribed way of looking at data, and then to weigh the data and the rule against one another. Where the basic fact underlying the presumption is itself at least sufficient evidence of the presumed fact, without regard to the presumption, then it is only inaccurate to describe the presumption as evidence, and the inaccuracy may not be too serious; where the basic fact is not established, or is not itself sufficient as evidence of the presumed fact, then equating the presumption with evidence is not only inaccurate, but it must also truly confound and confuse anybody who thinks hard about the directive. There are still courts which treat evidence, the instruction quoted above seems to shift the burden of persuasion. The realization of the latter fact seems to have struck home in Colorado. See Colorado Jury Instructions (Civil) § 3:5 (1969):

“Presumptions” are rules based upon experience or public policy and established in the law to assist the jury in ascertaining the truth. Presumptions take the place of evidence unless and until outweighed by evidence to the contrary. In this case the law presumes that (insert a description of the presumption).

Unless and until the presumption is outweighed by evidence to the contrary, you must find in accordance with the presumption. In accompanying “Notes on Use,” there is an admonition that the above-quoted instruction should only be employed with “rebuttable presumptions which shift the burden of proof as well as the burden of going forward.” See id. (Supp. June, 1976). A new instruction, “to be used with rebuttable presumptions which shift only the burden of going forward and do not shift the burden of disproving the presumed fact,” has been proposed for Colorado, and it adopts the traditionalist approach in its pristine form. See id. § 3:5A (Supp. June, 1976).

63. See Gausewitz, supra note 3, at 333-34 (“‘[P]resumption’ means a rule of law about the effect of evidence that merely fixes the burden of producing evidence. This rule of law cannot be evidence for the reason that it is psychologically impossible to weigh a rule of law against evidence. But... the basic fact may be evidence and this criticism applies only to cases in which the courts have found both (1) that the basic fact will not support an inference, and (2) that the presumption has been rebutted.”); McCormick, Evidence § 345 (2d ed. 1972) (“Another solution, formerly more popular than now, is to instruct the jury that the presumption is ‘evidence,’ to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.”); and Memorandum prepared by the Standing Committee on Rules of Evidence, submitted to the Senate Judiciary Committee by letter from Judge Roszel C. Thompson to Senator James O. Eastland, May 22, 1974, Hearing on H.R. 5483 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., at 54, 56 (1974) (“Presumptions are not evidence but ways of dealing with evidence. This basic difference is not susceptible of being eliminated by legislative fiat.”).
presumptions as evidence, though the number seems to be declining. The practice was rejected by statute in California, which had previously followed it; the manner of the enactment of Federal Rule 301 makes it entirely clear that the Congress intended to disapprove the presumption-as-evidence rule for the federal courts. (And of course there would be no sense at all in treating a presumption as evidence under Uniform Rule 301, since the latter gives to presumptions the effect of allocating the burden of persuasion.)

Perhaps here is the place to call attention to the quotation set out at the beginning of this article. Under any of the last four variant modes of traditionalist thinking, it seems that the behavior of presumptions resembles that of "bursting bubbles," "bats of the law," or "male bees" not nearly so much as that of the Cheshire cat. Under the approaches described above the presumption too leaves behind something of itself; it too leaves behind something which cannot be viewed without reference to that which had been there before; it too disappears only slowly, and in stages, and not suddenly or all at once.

In sum, traditionalist thinking has not produced anything like a "one-rule world" for presumptions, nor has it served well the supposed "procedural justice" ideal of providing certainty with respect to the operation of presumptions. What it has produced is a myriad of approaches, all striving to give more effect to presumption than the pristine version of traditionalist theory would allow, while clinging still to the dogma that the presumption does not affect the burden of persuasion.

B. The Reformist Approach: Full Effect for Underlying Policies

At the heart of reformist thinking is the conviction that if a presumption has force enough to control decision upon

65. See note 97 infra.
66. See Gausewitz, supra note 3, passim.
the presumed fact in the absence of counterproof—and of the truth of this one point all seem convinced—then it must be strong enough to require a finding of the existence of the presumed fact when counterproof has been adduced, but upon all the evidence the trier of fact is unable to say yea or nay on the existence of the presumed fact. Put in fewer words, the reformist view holds that a device which breaks a deadlock in the absence of proof should also indicate which side should prevail where an abundance of proof fails to persuade the trier of fact either way.

The reformist view is supported by the weight of both practical and theoretical considerations.

Implicitly, at least, the practical considerations have already been explored.67 Time and again courts have refused to follow the pristine version of traditionalist thinking, restoring instead to any one or more of the four different ways around it explored previously. The result is that traditionalist thinking only pretends to provide us with a one-rule world, and instead gives rise to a many-rule world, and each variant from the pristine version of traditionalist thinking is harder to apply and think about than the reformist view. After all, the idea of a burden of persuasion is entirely familiar, easy to understand, and applied day after day in cases upon cases which are submitted to juries.

As a matter of sound theory, the reformist view is the better one, despite some oft-mentioned practical objections. Whenever a presumption rests upon public policy in whole or in part, that policy is underserved if the presumption disappears in the face of unbelieved counterproof in such manner that nothing of the strength of the policy is carried forward to the jury in the judge’s charge—in other words, if the presumption does less than affect the burden of persuasion. Quite possibly the same is true where the only underlying reason for the presumption is the special procedural policy arising from the relative accessibility of the proof as between the parties, or the absence of proof; perhaps the

67. See the text of Part II, supra.
same is also true where the only underlying reason for the presumption is the intrinsic probative worth of the basic fact as evidence of the presumed fact, although in this instance the need to give effect to reformist thinking is considerably reduced. If these ideas sound impractical, or if they seem to reek of the ivory tower, I submit that it can be so only for two reasons. First, the profession (bench, bar, and particularly law professors) has lost track of the reasons for allocating, in the first instance, the burden of persuasion to one party or another—and these turn out to be identical to the reasons for creating presumptions. Second, the profession is unduly impressed with the notion that the burden of persuasion never “shifts”—a principle resting upon two underlying reasons (that the litigants should know from the beginning who bears the burden of persuasion on what issues, and that jury instructions should be kept simple), neither of which would be undermined by the reformist approach.

Consider in more detail the second of the abovementioned arguments—that less effect than the reformist view would require diserves the policy basis of presumptions. Assume a suit upon a policy insuring against accidental death, or one upon a policy of life insurance providing for double indemnity if the insured dies by accidental rather than natural causes. In the first instance, suicide typically means no recovery, and often it is plaintiff who bears the burden of proving accident as the cause of death. In the second case, suicide bars double indemnity, though maybe not recovery of the face amount of the policy, and again the plaintiff bears the burden of persuasion on the issue of suicide as the cause of death.

68. Sometimes a life insurance policy contains a clause exempting the carrier from liability in the event of suicide by the insured, in which case suicide is generally considered an affirmative defense, and the burden of persuasion on this issue rests upon the insurance carrier. See 19 COUCH, INSURANCE § 79:454 (2d ed. 1968); 21 APPLEMAN, INSURANCE LAW AND PRACTICE § 12151 (1962). In the absence of such a clause, it seems that suicide does not prevent recovery on a life insurance policy. See 1 APPLEMAN, supra § 367. Where suicide is advanced as a defense to recovery on a life insurance policy, there is no sense in invoking the presumption against suicide: Allocating to the carrier the burden of proving suicide already accomplishes everything that the presumption could accomplish—more, if the presumption is handled in the traditionalist manner. Sometimes, however, the significance of this fact is overlooked. See 21 APPLEMAN, supra, § 12155; and see Worth v. Worth, 48 Wyo. 441, 49 P.2d 629 (1935) (in another context, presumption instruction should be given even though the presumption works against the party bearing the burden of persuasion). And see note 106,
In each case, plaintiff has benefit of a presumption against suicide, if it be established (as it usually can be) that the insured met his death in a violent manner. If defendant introduces counterproof sufficient to support a finding of suicide—perhaps proof that the deceased was despondent, or “tired of it all,” or perhaps just proof from the physical circumstances surrounding the death, which may even come in through plaintiff’s own witnesses—then by the pristine version of the traditionalist theory the presumption is gone altogether, and perhaps the case will not even go to the jury. If it does, then the jury will be instructed that plaintiff bears the burden of proving by a preponderance of the evidence that accident rather than suicide was the cause of death, and that if the proof should fail by preponderance of the evidence to show that death was accidental, then the jury should find in favor of defendant.

The jury instruction described above in no way carries forward the serious policy of the law to minimize the number of instances in which a judicial determination of suicide will impose human suffering upon the family of the decedent, nor the policy which favors the financial protection of the beneficiaries through payment of insurance rather than the frustration of such preplanned protection. These policies—and the probability that violent death is accidental when the physical circumstances are consistent with either accident or suicide—control decision in the absence of sufficient counterproof to support a finding of suicide. How are these policies served if a jury faithful to the charge of the trial judge must find suicide where it believes that the evidence in the case is insolubly ambiguous—that all the evidence considered, it is simply unable to say that the proof preponderates in either direction? The answer is that the policies are not served at all, for traditionalist thinking lets slip away,

infra. It is in suits to recover double indemnity, where such recovery depends upon proof of death by accident, and in suits to recover on policies which insure against accidental death or injury (as opposed to life insurance policies) that the presumption of accidental death, or the presumption against death by suicide, comes into play, and here it is useful because it works on behalf of the party who bears the burden of proof. See generally 19 COUCH, supra § 79:319, and 21 APPLEMAN, supra §§ 12157, 12158.
out of sight, the instrument which serves these policies. Unduly impressed with "bursting bubble" imagery, with thought that the burden of proof never "shifts," and with the belief that the burden of proof is on him who bears the "affirmative," we forget the purpose behind the presumption altogether.

A second example is in order. Plaintiff bailor demonstrates for the trier of fact that he bailed goods with defendant bailee, and that upon retrieving the goods plaintiff found them damaged. On these facts arises a presumption that it was the negligence of the bailee which caused the damage. If bailee introduces counterproof sufficient to support a finding that he exercised due care, probably the case will still go to the jury, but once again under traditionalist thinking the jury will be advised that it is plaintiff who bears the burden of persuading the jury by a preponderance of the evidence that it was negligence of the defendant which caused the damage. If a preponderance does not show negligence, then the jury should find for the defendant and against the plaintiff. Again, nothing in the instruction carries forward the policy of the law to require the bailee to explain what happened—a policy based on the premise that in the typical case the bailee alone will have access to the proof and that in many cases we would prefer to make the bailee accountable on a fairly strict standard of care. These policies have not vanished when the counterproof has been adduced—and remember that they were considered strong enough to control decision in the absence of counterproof showing due care—but again they have slipped out of sight, and the instrument by which the policies were enforced has been allowed, by the "bursting bubble" mentality, to vanish altogether from the case.

If it seems peculiar that because of an underlying substantive policy a presumption should be allowed to cast upon one party or another the burden or persuasion, it seems so only because we have lost sight of the reasons by which the burdens of persuasion are allocated in the first instance. An

69. See note 21 supra, and accompanying text.
Evidence and Civil Procedure teacher should at this point feel a sense of embarrassment: The fact is that the real reasons for allocating the burdens of persuasion are often unarticulated, untaught, and forgotten. Truisms abound: The party with the "affirmative" bears the burden of proof; plaintiff must prove the "elements" of his claim, defendant the "elements" of his defense. Both statements true, neither helpful: The problem is to decide what is the "affirmative" and why a particular "element" belongs in a claim rather than a defense or vice versa. There are also some circular rules of thumb: The McCormick text on Evidence—a fine, penetrating work, worthy of its high reputation—states correctly enough that it is the pleadings which provide guidance on the question of who bears the burden of persuasion;\(^7\) a standard casebook in Civil Procedure states, also correctly, the converse—that it is the allocation of the burden of persuasion which determines who must plead what.\(^7\)

Of course both the burden of persuasion and the burden of pleading are actually allocated, as both McCormick and the casebook authors were aware, not by a circular reference to one another, but by considerations of substantive policy, probability, relative accessibility of proof as between the parties, and relative availability of proof—exactly the same factors which underlie presumptions.\(^2\) We may begin with

\(^7\) McCormick, Evidence § 337 (2d ed. 1972) ("In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well. The pleadings therefore provide the common guide for apportioning burdens of proof.").

\(^7\) Cound, Friedenthal & Miller, Civil Procedure, Cases and Materials 417 (2d ed. 1974) ("The burden of pleading an issue usually is assigned to the party who has the burden of producing evidence on that issue at trial.").

\(^7\) Compare 9 Wigmore, Evidence § 2488 (3d ed. 1940) ("For one burden (the risk of non-persuasion of the jury [as opposed to the burden of going forward with evidence]) the substantive law and the pleadings, primarily, serve to [allocate it among the parties], and, subsidiarily, a rule of practice, within the stage of a single pleading, may further apportion the burden; but this apportionment depends ultimately on broad considerations of policy, and for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases.").

\(^7\) Gausewitz, supra note 3, at 330; Cleary, supra note 1, at 21; James, Civil Procedure § 7.9 (1965) ("What... are the bases upon which courts or legislatures will create presumptions? For the most part they are the same kinds of reasons that influence the allocation of the production burden generally, and these may be summed up as reasons of convenience, fairness, and policy.") [hereinafter cited as James].
the idea that plaintiff bears most burdens because it is he who would alter the status quo, and who seeks the aid of a public authority to do so. A court should not interfere in the lives of citizens unless there is good reason to do so, and the party who seeks relief should bear the "risk or nonpersuasion"—that is, of inaction by the court where the proof on each side is of equal strength. We may add the thought that most citizens pay just debts most of the time, and where evidence to the contrary fails to convince, we should assume that there is no just debt, and that due care was exercised, for all of these propositions seem more probable than their converse propositions.

Such general statements express substantive policy and an assessment of probability; they provide rough and general answers to the question of who should bear the burden of persuasion. They indicate that in contract cases plaintiff should prove the contract, the occurrence of conditions precedent (including plaintiff's performance, in many instances), defendant's breach, and the kind and amount of resultant damages. They indicate that in negligence cases plaintiff should prove defendant's negligence, proximate cause, and the kind and amount of resultant damages.

More subtle questions remain. In a contract action, does "nonpayment" amount to an element of plaintiff's claim, or is "payment" an element of defendant's defense? In a negligence case, should plaintiff's "due care" be an element of the claim, or should the converse (contributory negligence) be an element of the defense? We all know the answer to these questions: Rules, books and decisions tell us. But what is forgotten is that, in the contract case, we relieve plaintiff of the burden of persuasion on the issue of payment because defendant usually has better access to convincing proof of payment, if payment has in fact been made (a re-

73. See, e.g., THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 369, 376-77 (1898).
74. JAMES, supra note 72, § 7.8; Cleary, supra note 1, at 11-14.
75. JAMES, supra note 72, §§ 3.1 (elements of negligence claim) and 3.12 (elements of contract claim). And see 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE (Civil) §§ 1235 (contract claims) and 1249 (negligence claims) (1969).
receipt, a cancelled check, voucher or withdrawal record). Accordingly, while plaintiff bears "most of the burdens," proof of nonpayment is not among them. Could it also be that we assume a different perspective on the underlying probabilities in this instance? While most persons discharge their obligations, can we say with confidence that most of the defendants sued for nonpayment have paid?^{6}

In negligence cases, while plaintiff bears "most of the burdens," generally he need not prove his own due care, for the burden is usually cast upon defendant to prove plaintiff's contributory negligence. This allocation accords with the balance of probabilities, if it be assumed that most persons exercise due care most of the time. It serves a sound procedural policy, in that (i) it satisfies a generally-held sense of fairness, inasmuch as plaintiff's burden is heavy even without requiring him to show due care, and (ii) it recognizes that evidence of due care may be hard for plaintiff to come by, either because the injured party is dead or, when plaintiff seeks recovery for his own injuries, because accidents happen quickly and unexpectedly, and plaintiff may know little of what actually happened. Finally, it adds to the substantive cast of the law (i.e., it expresses a substantive policy) by lessening somewhat the chances that an injured party will come away empty-handed.^{77} Of course departures from this scheme are not unknown. It seems that jurisdictions which require plaintiff to prove care are also expressing a substantive view—one which emphasizes the notion that a person should not profit from his own wrong, and one which is more willing to allow injured parties to walk away without relief.^{78}
Presumptions represent attempts to implement, in the context of particular issues rather than lawsuits, the same reasoning and policies which lead to the allocation of the burdens of persuasion. Sometimes for reasons of substantive policy it is preferred that, when the basic fact is established, the presumed fact be found. In other cases for reasons of probability it is believed that, when the basic fact is established, then the presumed fact probably exists. In still other cases because the party on one side of a fact question has better access to the evidence, when the basic fact is established it is believed that the party with such better access should establish the truth. Finally, in some cases because proof is hard for all to come by, when the basic fact is shown it is preferred consistently to reach one result, rather than reaching none at all or conflicting results.

Throughout this article most of the examples have involved presumptions which express substantive policy—those which relate to loaned automobiles, suicide or accident as the cause of death, and the negligence of bailees. This selection was by design, for in these cases a failure to carry forward the policy of the law in jury instructions would be hardest to fathom. Where the presumption arises because of underlying probabilities alone—as is usually true in the case of the mailed letter presumption—it seems doubtful that traditionalist theory can do much damage: If the basic fact has probative worth with respect to the presumed fact, the jury will have sense enough to realize it, and give the basic fact the weight it deserves. If the presumption exists because of procedural policy alone—the relative accessibility of proof to the parties, or the unavailability of any proof—it is difficult to assess the effect of traditionalist thinking. (In some instances, however, the conclusion is inescapable that in fact considerations of substantive policy also underlie the alloca-
tion of the burden of persuasion in cases where proof seems simply more accessible to one party than to another, or simply unavailable to any party; and even where such substantive considerations seem absent—e.g., the situation with respect to proving payment as an affirmative defense in a contract action—these procedural policy considerations have been thought sufficient to affect the burden of persuasion.)

In any event, given a reasoned decision to keep a "one-rule" approach to presumptions, by far the wiser approach is the reformist approach of Uniform Rule 301. (The instructions which such an approach would generate are explored in Part IV, infra). Nothing less than the reformist approach adequately deals with presumptions resting in whole or in part upon considerations of substantive policy. And, with respect to presumptions resting in whole or in part upon considerations of procedural policy, this approach is at least unlikely to give presumptions too great an effect, and the same may be said of presumptions resting in whole or in part upon logical considerations.

And what of the notion that the burden of persuasion never "shifts"? It seems that there are two underlying ideas here, and these (both together and separately) are not enough to justify the survival of the traditionalist approach to presumptions. First, it is thought that the expectations of the parties should be protected, and that both plaintiffs and defendants should know from the pleading stage forward who bears the burden of persuasion on what issues. Second, it is thought that jury instructions should be simple and straightforward, and that attaching conditions will unduly complicate matters.

As to the first of these underlying reasons, there are two good answers. In the first place, the pleadings are not now invariably a reliable guide to who must prove what. In contract cases, for instance, we require plaintiff to plead

79. THAYER, PRELIMINARY TREATISE ON THE COMMON LAW OF EVIDENCE 378 (1898) ("[T]he burden of going forward with evidence may shift often from side to side; while the duty of establishing his proposition is always with the actor, and never shifts."); and 9 WIGMORE, EVIDENCE § 2499 (3d ed. 1940).
nonpayment, but defendant bears the burden of proving non-
payment, and it is defendant who must plead the nonoccur-
rence of specific conditions, but plaintiff who must prove
the happening of these same conditions; in a libel case, it is
plaintiff who must plead untruth, but defendant who must
prove truth. There are good reasons for these discrepancies
between the burdens of pleading and proving, but the point
is that the pleadings do not now provide wholly reliable guid-
ance on the burden of persuasion which will operate in the
lawsuit. Moreover, it is doubtful that the traditionalist ap-
proach to presumptions affords to litigants any greater cer-
tainty upon the conduct and the realities of a trial than would
the reformist approach to presumptions, particularly inasm-
much as the traditionalist approach means so many different
things.

In the second place, to draw upon the persuasive argu-
ment which Professor Cleary made some twenty years ago,\(^80\) there is no good reason why the pleadings could not continue
to be as reliable as they have been on the question of which
party bears the burden of persuasion on what issues. For
example, both the burden of pleading and the burden of per-
suasion could be allocated in the following manner: In suits
to recover double indemnity or for accidental death, plaintiff
to plead and prove death by violence, defendant to plead and
prove suicide as the cause of death; in suits against the owner
of an automobile, plaintiff to plead and prove ownership (and
perhaps the employment of the driver, or his family relation-
ship to the owner), defendant to plead and prove lack of driv-
er's authority, or authority exceeded; in suits against a bailee
for damages to goods caused by negligence, bailor to plead
and prove bailment of sound goods and return of damaged
goods, bailee to plead and prove that the causes of damage
were beyond his control; and so on. Cleary suggested that
it is asking too much for presumptions to achieve these re-
forms: In his words, "Presumptions are a one-ton truck
carrying a ten-ton load."\(^81\)

\(^80\) Cleary, supra note 1, at 21-23.
\(^81\) Cleary, supra note 1, at 22.
But I would add—with apologies for the abrupt change in metaphor—that it is the tail wagging the dog if we refuse to make adjustments in the burden of persuasion because that would undermine the pleading rules. Presumptions are here to stay, and to deny to them the effect called for by their underlying rationale because our pleadings follow a different pattern is to be fooled by labels and truisms.

The other underlying reason—keeping jury instructions simple—is unquestionably valid. But jury instructions are necessarily fairly complicated, as is the substantive law they reflect: Jurors seem to go about their tasks with open eyes and good sense in part despite the instructions they receive, and only in part because of them, even in states which (like Wyoming) allow or require the written instructions themselves to be physically taken to the jury room. There is nothing unusual about conditions—“if” clauses—in jury instructions, and since the very essence of our laws is expressed in conditions, it is hard to imagine jury instructions taking any other form. The only difference which reformist thinking would make in the complexity of jury instructions is that, where the basic fact of the presumption is disputed, the jury would be told that if it found the basic fact to be true, then the party opposing the presumed fact bears the burden of proving its nonexistence. Is this really so much more complicated than what we now tell juries with respect to the issues in the case in general? I doubt it. And who can say that such an instruction would be more complicated than the instructions which even the pristine version of the traditionalist theory requires? Those instructions are conditional too, if the basic facts are disputed. Finally, can it not be said that reformist thinking would actually simplify jury instructions over any of the variant modes which the traditionalist approach has spawned?

82. See note 15 supra.
83. Consider, for instance, the standard kind of res ipsa loquitur instruction, in which the jury is instructed that if it finds cause, and if it finds that the implement in question was under defendant’s exclusive control, and if in the ordinary course of events such an accident would not happen without negligence, then it may find that the defendant was negligent. 2 DEVITT & BLACKMAR, FEDERAL JURY INSTRUCTIONS (Civil) § 73.08 (1970). And consider the last clear chance instruction. Id. at § 73.25.
III. FEDERAL RULE 301,
ITS STATE COUNTERPARTS, AND UNIFORM RULE 301

A. Federal Rule 301

The manner in which the Federal Rules of Evidence struggled into existence is a story in itself, but not for the telling here. Suffice it for our present purposes to note the four following points:

First, the preparation of the Federal Rules of Evidence spanned the decade from 1965 to 1975, and went forward in two phases. From 1965 through late 1972, the project was largely in the hands of an Advisory Committee, which was expertly assisted in the enormous task of draftsmanship by its Reporter, Professor Edward W. Cleary of Arizona State University. This was the rulemaking phase. From early 1973 through mid 1975, the project was in the hands of Congress, which studied, amended, and ultimately enacted a changed version of the Rules. This was the legislative phase.

84. See note 85, infra.
85. Chief Justice Warren announced the appointment of the Advisory Committee on Rules of Evidence on March 8, 1965, see 1965 Jud. Conf. Ann. Rep. 19, and in June of that year the work of drafting the Rules began, with Professor Cleary shouldering the actual task of putting the Rules down on paper, see the letter from Albert E. Jenner, Esq., to the Honorable Albert B. Maris, January 30, 1969, 46 F.R.D. 161, 173-81 (1969). Previously, a Special Committee, with Professor Thomas F. Green of the University of Georgia Law School as Reporter, had prepared a Preliminary Study which had concluded that Federal Evidence Rules were "both feasible and desirable." 30 F.R.D. 73, 114 (1962). The Advisory Committee's final draft of the Rules was transmitted to the Supreme Court in November, 1971, see the testimony of Judge Maris, Hearings on H.R. 5468 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., at 41 (1974), and one year later, in November, 1972, the Supreme Court authorized the transmittal of these Rules to the Congress, see 34 L.Ed. 2d i7v (1972). The Rules were actually transmitted to Congress with the letter from Chief Justice Burger to the Senate and House of Representatives, February 5, 1973, see H.R. Doc. No. 93-46, 93d Cong., 1st Sess. iii (1973). The Rules were first taken up by the House of Representatives, where they were assigned to the House Special Subcommittee on the Reform of Criminal Laws, which held hearings between February 7 and March 15, 1973. See Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 2 (with Supp.) (1973). The House passed an amended version of the Rules one year and one day after the Rules had arrived at that body. See 120 Cong. Rec. 570 (daily ed. Feb. 6, 1974). The Senate received the Rules on the next day, February 7, 1974, and retained them for more than nine months. The Senate Judiciary Committee held hearings on the Rules in June, 1974, see Hearings on H.R. 5468 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974). The Rules, again in amended form, passed the Senate on November 22, 1974. 120 Cong. Rec. 19908-19915
Second, anybody observing from the sidelines the birth of the Federal Rules could take comfort in the fact that one principle remained constant throughout both the rulemaking and the legislative phases. It was always clear that a distinctly federal rule on presumptions would be adopted only for limited purposes. It was always believed that a distinctly federal rule would not apply as to a presumption respecting any fact amounting to "an element of a claim or defense as to which state law supplies the rule of decision." It was assumed that in such cases the Erie doctrine would require federal courts to apply state-created presumptions, and it was always proposed that in such cases state law would determine the "effect" of such presumptions. And when would the federal treatment of presumptions prescribed in the rule hold sway? In all other cases, unless some special rule or Congressional enactment provided otherwise, which meant basically that federal presumptions and the treatment thereof prescribed in the rule would be applied with respect to (i) any fact whose legal consequence would be determined by federal law, and (ii) any fact amounting to something less than "an element of a claim or defense" governed by state law. What exactly is meant by the latter category is itself something of a mystery, but it need not detain us here.

Third, a sideline observer of the birth of the Federal Rules might reasonably have thought, from about March, 1969 through October 10, 1973, that the federal treatment of presumptions would follow the lines of reformist thinking. During all this time an observer would have seen an evolving set of federal rules which always described the up-and-coming federal treatment for presumption in the following terms:

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86. The quoted language is from Rule 302, and this language did not change from the first published draft of the Rule, see 46 F.R.D. 161, 211 (1969), to the time of final enactment by the Congress.

87. The matter is considered in 1 LOUISELL & MUELLER, FEDERAL EVIDENCE §§ 74-77 (forthcoming).
A presumption imposes on the party against whom it directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

The commitment of the Advisory Committee to the reformist cause throughout the rulemaking phase was displayed in not less than three published drafts of the rules. And in the first of these drafts, in March, 1969, the Committee went so far as to provide a detailed road map on the instructions which a judge should give to a jury to implement the reformist philosophy of the rule, indicating in clear language the appropriate form of instructions, depending upon the condition of the evidence at the close of the proofs. 88

Fourth, a sideline observer would see the first signs of discord on the question of presumptions on October 10, 1973, when, well into the legislative phase, a House committee print of the Rules appeared. 89 In this print, the Subcommittee on Criminal Justice of the House Judiciary Committee proposed a compromise between traditionalist and reformist thinking, under which a presumption would affect only "the burden of going forward with the evidence," but would nevertheless be "sufficient proof of the fact presumed to be considered by the trier of the facts." In effect, this version of the Rule 301 converted the presumption into evidence. A year later, on October 11, 1974, a sideline observer would have seen a clear sign that the Senate would balk at the presumption-as-evidence rule which the House had

88. See the Draft of March, 1969, 46 F.R.D. 161, 212 (1969) (wherein the Rule is numbered 3-03, and wherein the "road map" on jury instructions is set forth), the Draft of March, 1971, 51 F.R.D. 315, 336 (1971), and the Court-promulgated Draft of November, 1972, 56 F.R.D. 183, 208 (1973) (in which Rule 301 remains unchanged from the form in which the Advisory Committee had transmitted the Rule to the Court).

89. The Committee Print of October 10, 1973 is set forth in full in Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 2 (Supp.) at 357 (1973). A truly close watcher of Congress might have seen the beginning of opposition to the Advisory Committee's version of Rule 301 in the testimony of James F. Schaeffer, Esq., who spoke on behalf of the Association of Trial Lawyers of America, and filed a written statement with the House Subcommittee, both opposing the reformist philosophy and supporting the traditionalist view. Id. at 295-296, 305-306.
What the Senate did, however, was not to return to the reformist position taken by the Advisory Committee, but instead to adopt the traditionalist position. The Senate version prevailed, and Federal Rule 301 now provides:

In civil actions and proceedings 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 going forward with evidence to meet or rebut the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion which remains throughout the trial upon the party on whom it was originally cast.

B. State Counterparts and Uniform Rule 301

At this writing in October, 1976, at least six states had adopted their own versions of the Federal Rules of Evidence, including Arkansas, Maine, Nebraska, Nevada, New Mexico, and Wisconsin. The versions of Rule 301 in force in these states differ considerably in detail, but they are as one in adopting the reformist approach. In other words,

91. See note 5 supra.
92. Perhaps the easiest way of demonstrating the point made in the text above is to set forth here in full view the new Uniform Rule 301. Arkansas has adopted this Rule verbatim, see Ark. Stat. Ann. § 28-1001 (Supp. 1976) (Arkansas Uniform Rule 301). I have indicated in Italicics the language in new Uniform Rule 301 which is common to the language in the counterparts of the Rule now in effect in the states of Maine, Nebraska, Nevada, New Mexico, and Wisconsin:

Rule 301. [Presumptions in General in Civil Actions and Proceedings.]
(a) Effect. In all actions and proceedings 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.
(b) Inconsistent Presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 918 (1974) (wherein the bracketed title is also Italicized). The italicized words in the above-quoted passage are found in the Maine Rules of Evidence, Rule 301, set forth at the end of Title 14 (Court Procedure—Civil) in Me. Rev. Stat. Ann. (Supp. 1975) (the Maine version differs from the above-quoted Rule only in that Maine's version (i) expressly includes statutory definitions of "prima facie evidence" within the ambit of the term "presumption," and (ii) refers to "weightier considerations of policy and logic" in its counterpart to subdivision (b) of the Uniform Rule). The italicized words in the above-quoted passage are also found in Neb. Rev. Stat. § 27-301 (Supp. 1975) (the Nebraska counterpart reads
they are in accord with the view of the Advisory Committee and at odds with the view of Congress, and they would seem to insure for the moment a conflict between state and federal practice.

The dates of adoption in three states—Nevada, New Mexico, and Wisconsin—suggest the possibility (although I have no inside information) that part of the motivation in following the reformist view was to secure uniformity with federal practice. The dates of adoption in Arkansas, Maine and Nebraska, however, tend to foreclose such a possibility.38

in full exactly as the Uniform Rule 301(a) reads, except that Nebraska uses the word "cases" instead of "actions and proceedings"). The Italicized words in the above-quoted passage are also found in Nev. Rev. Stat. § 47.180(1) (1973) (the Nevada provisions on presumptions are far more elaborate, however, including a road map on appropriate instructions which is patterned after, though different in certain respects from, the original proposal of the federal Advisory Committee, see note 114, infra). The Italicized words in the above-quoted passage are also found in N.M. Stat. Ann. § 20-4-301 (Supp. 1975) (like the Nebraska counterpart, the New Mexico provision differs from the wording of Uniform Rule 301(a) only insofar as New Mexico substitutes the word "cases" for the phrase "actions and proceedings"). The Italicized words in the above-quoted passage also appear in Wis. Stat. Ann. § 903.01 (1975) (but the Wisconsin provision specifically refers to statutory and common law presumptions, including "statutory provisions that certain basic facts are prima facie evidence of other facts," and also makes clear that the party relying upon the presumption bears the burden of persuading the trier of the existence of the basic facts). The Italicized words in the above-quoted passage are also found in all three of the Advisory Committee’s versions of Federal Rule 301, which in its entirety tracked Uniform Rule 301(a), except in referring to “Acts of Congress” instead of “statute,” and except in using the word “cases” instead of “actions and proceedings.” See the text following note 90 supra.

There are now decisions construing the above-noted provisions of Nevada and Wisconsin law. See Privette v. Faulkner, 550 P.2d 404 (Nev. 1976); In re Estate of Malnar, 243 N.W.2d 435, 439-45 (Wis. 1976) (While proponent of a will is entitled to benefit of presumption that decedent knew the contents of a will, if it is shown that the will was duly executed, and “the burden of persuasion shifts to the opponent to bring forth evidence indicating that the nonexistence of the presumed fact (knowledge of contents) is more probable than its existence,” nevertheless the opponent of the will is entitled to a presumption of undue influence upon showing a confidential relationship between the principal beneficiary and the decedent. At that point “the burden of persuasion shifted [back] to the proponent... to introduce sufficient evidence to rebut the presumption. [The proponent] had the burden of proving that the nonexistence of the presumed fact (undue influence) was more probable than its existence.” [Court cites Wis. Stat. Ann. § 903.01 (1975) which was in effect at the time of the trial.]).

The dates of adoption in Nevada (1971, effective date July 21, 1971), New Mexico (April 26, 1973, effective date July 1, 1973), and Wisconsin (1973, effective January 1, 1974) all apparently preceded the earliest congressional draft (that of October 10, 1973) which made alterations in the Rule as adopted by the Supreme Court, see note 89 supra. The dates of adoption in Arkansas (1975, effective date July 1, 1976), Maine (May 13, 1975, effective date February 2, 1976) and Nebraska (1975, effective date August 24, 1975) followed the date when the Congress first began to tinker
In August, 1974, the National Conference of Commissioners on Uniform State Laws adopted the new Uniform Rules of Evidence, tracking closely the federal rules, except in the areas of privileges and presumptions. The version of Rule 301 endorsed by the Conference espouses the reformist philosophy, and the Conference has apparently passed up for at least one year the opportunity to conform its version of Rule 301 to the one passed by the Congress.  

IV. INSTRUCTING JURIES ON PRESUMPTIONS

A. Instructions Under Federal Rule 301

The enactment and the very terms of Federal Rule 301

with the Supreme Court’s draft in earnest, although all three states actually adopted the Rules before the Congress enacted the final federal version in December, 1975. See note 85 supra.

94. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 144-45 (1974) (resolution of August 8, 1974, adopting the new Uniform Rules), and HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 93 (1975) (noting that the Special Committee on Uniform Rules “advocates that certain amendments be adopted by the Conference,” and that the Committee “had recently met to consider changes in the Uniform Rules which would conform them in some respects to the Federal Rules”) and 125 (noting that the Conference had provided a proposal in the Uniform Rules governing evidentiary privileges, since “Congress bypassed” this area). The Chairman of the Special Committee on Uniform Rules of Evidence, Frank F. Jestrab, Esq., advised the author by telephone on October 9, 1976, that he was not aware of any recommendation or plan to amend Uniform Rule 301 so as to conform it to Federal Rule 301.

95. It seems that nobody argues that a presumption may not generate an instruction to the jury when there is no counterproof tending to show the nonexistence of the presumed fact. Even Thayer and Wigmore conceded this much, see THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 326 (1898) (quoted in note 2 supra); and 9 WIGMORE, EVIDENCE § 2487 (3d ed. 1940). In such circumstances, the presumption generates either a simple direction to the jury to find the presumed fact or a conditional direction to the jury, if the basic facts are in dispute. It seems that nobody today would assert that the results would be any different where the opponent of the presumed fact introduces counterproof insufficient to support a finding of the nonexistence of the presumed fact. See also note 39 supra. Accordingly, the instructions described in paragraphs 1 and 2 in the discussion of Federal Rule 301 “narrowly construed (Subpart A(1) of this Part, infra) are elementary, noncontroversial, and would be common to all rational approaches to presumptions, from the pristine version of the traditionalist approach to the reformist approach.

The question has always been to define what, if anything, should be said to the jury when sufficient counterproof has been introduced to support a finding of the nonexistence of the presumed fact. See generally McCormick, Charges on Presumptions and Burden of Proof, 5 N.C.L. REV. 291 (1926); Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 HARV. L. REV. 59 (1933). This question simply raises in a new format the same question previously considered—that is, should the traditionalist approach to presumptions be followed, or some variant mode thereof, or the reformist approach?

One new question, peculiar to the context of jury instructions, is this: Should the word “presumption” be used? I can see no reason ever to use
makes wholly clear the following points:  

Presumptions governed by the Rule (i) do affect the burden of production but do not affect the burden of persuasion, (ii) are not evidence, and should not be treated as evidence in instructions to the jury, and (iii) operate separately and independently from underlying inferences, and therefore the disappearance of a presumption does not preclude the giving of an inference instruction.

Whether the Rule mandates the pristine version of the traditionalist approach, or some other, is not so clear. Under the heading “Rule 301 Narrowly Construed,” I explore the meaning of this approach in the context of jury instructions. Under the heading, “Rule 301 Broadly Construed,” I explore what I believe to be a preferable alternative.

96. Federal Rule 301 is set forth in full in the text accompanying note 90 supra.

97. In rejecting the language of the House-passed version of Rule 301, the Senate Judiciary Committee expressly noted that under the House version “presumptions are to be treated as evidence,” and in its Report the Judiciary Committee clearly indicated its intent to reject this approach altogether:

The [Senate Judiciary] committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: “Presumptions are not evidence, but ways of dealing with evidence.” This treatment requires juries to perform the task of considering “as evidence” facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in Speck v. Sarver and was repealed after 93 troublesome years.

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

Another solution, formerly more popular than new, is to instruct the jury that the presumption is ‘evidence’, to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence.

98. See the text accompanying note 99 infra.
1. Rule 301 Narrowly Construed

**Presumption Instructions.** Regardless which alternative is followed, a selection of the proper jury instruction turns upon an appraisal of the condition of the evidence at the close of the proofs with respect to (i) the existence or non-existence of the basic fact underlying the presumption and (ii) the existence or nonexistence of the presumed fact. These two factors may combine in any one of three ways which are consequential from the standpoint of presumption instructions, if Rule 301 be narrowly interpreted as adopting the traditionalist approach in its pristine form. It is convenient to consider these three possibilities both generally and with reference to the short-form loaned automobile and long-form scope-of-employment presumptions:

1. **Basic Fact Established; Presumed Fact Uncontested or Insufficiently Contested.** If the basic fact is established as a matter of law, and the party against whom the presumption operates has introduced either no evidence contradicting the presumed fact or insufficient evidence to support a jury finding of its nonexistence, then the jury should be instructed that it must find the presumed fact:

   Where it is established as a matter of law that \( O \) is the owner of the automobile, and there is either no evidence or insufficient evidence to support a jury finding that \( D \) did not have \( O \)'s permission to drive the car or that he was not acting within the scope of his agency on the occasion in question, the jury should be instructed that it must find that \( D \) was acting within the scope of his agency on that occasion. (An instruction on the longer-form scope-of-employment instruction would be similar.)

2. **Sufficient Evidence of Basic Fact; Presumed Fact Uncontested or Insufficiently Contested.** If there is sufficient evidence to support a finding of the basic fact, but not so cogent and compelling as to require such a finding, and the party against whom the presumption operates has introduced either no evidence contradicting the presumed fact or insufficient evidence to support a jury finding of its nonexistence, then a
conditional instruction is called for. The jury should be told that it must decide upon the evidence whether the basic fact exists or not, and that if it finds the existence of the basic fact, then it must find the presumed facts:

With reference to the loaned automobile presumption, where there is sufficient evidence upon which to base a finding that O owned the automobile, and there is either no evidence or insufficient evidence to support a jury finding that D did not have permission to drive it or was not acting within the scope of his agency on the occasion in question, then the jury should be instructed that the question of ownership is for it to decide on the evidence, and that if it finds that O owned the car, then it must find that D was acting within the scope of his agency on the occasion in question. (With reference to the longer-form scope-of-employment presumption, the instruction would be similar.)

3. Basic Fact Established or Supported by Sufficient Evidence; Presumed Fact Contradicted by Sufficient Evidence. If the party against whom the presumption operates introduces evidence sufficient to support a jury finding of the nonexistence of the presumed fact, then the presumption is spent, and no presumption instruction, couched in mandatory terms, may be given. This result obtains regardless of the strength of the evidence underlying the basic fact (which may be conclusively established by the evidence or by stipulation or only supported by evidence sufficient to support a finding of its existence), and regardless whether the judge or the jury actually believes the evidence contradicting the presumed fact. Thus, where the opponent of the presumption introduces sufficient evidence to support a finding that driver D did not have permission to drive or was not acting within the scope of his agency on the occasion in question, the jury must not be given the instruction set forth under (1) above even though the evidence conclusively demonstrates that O owned the car, and the jury must not be given the instruction set forth under (2) above even though there is sufficient evidence to support a jury finding that O owned the car. Whether the jury should be instructed in permissive terms that it may, but need not, find that D was acting
within the scope of his agency on the occasion in question, based upon evidence that Ow owned the car, is taken up immediately below. (The same points are true with respect to the longer-form scope-of-employment presumption.) By the narrow interpretation of Rule 301, here explored, it would be improper to instruct the jury that, by law, proof of the basic facts is strong evidence of the presumed fact, that the jury should find the presumed fact unless upon all the evidence it believes that its non-existence is at least as probable as its existence, or in any way to urge upon the jury a finding of the presumed fact. This matter accounts for the principal difference between the narrow interpretation of Rule 301, and the broader interpretation explained below in this section.

Inference Instruction. As indicated above, where the opponent of the presumption introduces sufficient evidence as to the nonexistence of the presumed fact to support a jury finding thereof, the presumption as such is spent under the narrow construction of Rule 301, and a presumption instruction is improper. Even under this narrow construction, however, it does not follow that a permissive inference instruction is improper. In fact, the Report of the House/Senate Conferees clearly suggests that in many such cases an inference instruction would be entirely proper:

If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts. 99

Whether an inference instruction should in fact be given in a particular case is a matter addressed neither by the Rule on its face, nor in the legislative history, nor by the post-Rule decisions to the time of this writing. In state courts, though not in the federal system, the answer may turn upon the condition of state law on the question of judicial comment upon the evidence; there is considerable authority to the ef-

fact that specific instruction by the judge, which singles out a particular fact or array of facts shown by the evidence, and advises the jury that it may on the basis of such fact or facts draw a particular inference, is in effect a comment on the evidence, and therefore not allowed. ¹⁰⁰ This rule is not followed in federal courts, however, and in many states it does not prevail. ¹⁰¹ (The question of a res ipsa

100. See Lappin v. Lucurell, 13 Wash. App. 277, 534 P.2d 1038, 1043 (1975) ("Inferences can get a party past a nonsuit, but ordinarily a jury should not be instructed on them. . . . [W]hile trial courts have traditionally been permitted in the proper case to instruct juries on established presumptions, instructing on matters of inference treads dangerously close to commenting on the facts and so invading the province of the jury." [citations omitted]); Taylor v. Murphy, 6 Mich. App. 398, 149 N.W.2d 210, 213 (1967) ("It is elementary that the judge may not instruct the jury what inferences of fact to draw. [Instructions, examined "as a whole," were not reversed]."); and Thiel v. Dove, 229 Ark. 601, 317 S.W.2d 121, 124 (1958) ("On the one hand, it is permissible for the court to instruct the jury that a certain fact, such as the possession of recently stolen goods, goes to the jury for its consideration in connection with the other evidence as tending to show the guilt of the accused. . . . On the other hand, it is clearly improper for the court to tell the jury that a specific fact in evidence is sufficient to support an inference of guilt, negligence, or the like. [citations omitted] It is for the jury to say whether the particular inference should be drawn from all the proof in the case, and consequently the court comments on the weight of the evidence when it declares that a certain inference may be drawn from a specific fact."). But see Jefferson, California Evidence Benchbook § 46.3 at 806 (1972) ("[A] party may request an instruction as to drawing inferences from the basic facts of a presumption [affecting the burden of producing evidence, when the presumption has been dislodged because the opponent has produced sufficient evidence of the nonexistence of the presumed fact to support a jury finding thereof] . . . . Although not required to comply with such a request, the trial judge may wish to grant such a request. Should so, the trial judge should tailor an instruction to encompass the two points required for the res ipsa loquitur instruction." [These are that the jury may, but is not required to, draw the inference, and that the jury can only draw the inference if it believes, after weighing all the evidence in the case, that it is more probable than not that the fact to be inferred exists.]).

101. See Cal. Const. art. VI, § 10 ("The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case."); Mich. Gen. Court Rules of 1963, Rule 516.1 (1976) ("The court may make such comments on the evidence, the testimony, and the character of the witnesses as in its discretion the interests of justice require."); and 9B Md. Code Ann., Rule 554(b) (1971) ("In its instructions to the jury, which may be given either orally or in writing or both, the court, in its discretion . . . May sum up the evidence, if it instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses."). Compare New Mexico's Rule 51.1(4) N.M. Stat. (1953) ("It shall no longer be proper practice for a trial judge in instructions to a jury in a civil action or proceedings to hypothesize facts within the evidence which if found by a jury to be true or untrue will justify or require a verdict for or against a party. All rules of practice, whether by judicial decision or otherwise, which permit or require the giving of such instructions are hereby revoked. Hereafter the trial judge shall merely instruct the jury on the applicable rules of law and leave to counsel the application of such rules to the facts according to their respective contentions."). (h) Comment on evidence. The judge, in so instructing the jury, may make such fair comment on the evidence and the testimony and credibility of any
loquitur instruction generally receives special treatment, and is not generally subject to the bar noted here.\textsuperscript{102}

There are two other factors to consider. The first is the inherent probative value of the basic fact, if established as a matter of law or supported by sufficient evidence to justify a finding of its existence, plus any other evidence so established or supported in the case, as proof of the presumed fact. If, without regard to the presumption (which has vanished from the case in traditionalist "bursting bubble" fashion), there is insufficient factual evidence in the case to support a finding of the presumed fact, then an inference instruction is foreclosed. The other factor is the strength of the adversary's evidence of the nonexistence of the presumed fact. Obviously, if this evidence is not only sufficient to allow, but also so cogent and compelling as to require, a jury to find the nonexistence of the presumed fact, then a permissive inference instruction would be foreclosed.

Assuming that a permissive inference instruction is proper, then the form of the instruction will turn upon the condition of the evidence of the underlying facts (including

\footnotesize{\textsuperscript{102} See North Central Gas Co. v. Bloem, 376 P.2d 382, 384 (Wyo. 1962) ("[T]here was substantial evidence presented which fully warranted the trial court in instructing upon the doctrine [of res ipsa loquitur] and submitting the matter to the jury for final determination on the subject."). See also CAL EVID. CODE § 646 (West Supp. 1976) (The statute provides, in subsection (c): "If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury [that it may infer that the proximate cause of the occurrence was defendant's negligence, but that it shall not so find unless it believes this to be more probable than not]").

And see 2 HARPER & JAMES, THE LAW OF Torts § 19.11 (1956) ("The jury should be told (on the issue of negligence) that plaintiff can recover only if they find that defendant was more probably negligent than not; that in the case at bar the circumstances of the accident afford a basis for an inference, which they may but need not draw, that defendant was negligent; and that in determining this matter they should consider the explanation and rebuttal (if any) offered by defendant."); 2 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (Civil) § 78.02 (1970).

But see Zukowsky v. Brown, 79 Wash. 2d 585, 488 P.2d 269, 279 (1971) ("Res ipsa is properly treated the same as other circumstantial evidence in instructions to the jury. The remaining question is whether, instead of or in addition to these instructions, the so-called 'res ipsa instruction' should be given. We are aware of the opinion that such instructions should not be given. To do so is to emphasize one particular inference over others. . . .")}
the basic fact of the vanished presumption), and the instruction will bear some resemblance to the presumption instructions set forth in paragraphs 1 and 2, above. Looking at the scope-of-employment presumption, and assuming (i) that the basic fact of the presumption (that \( M \) owned the car and employed \( S \) to drive it) constitutes a sufficient basis to find that \( S \) was acting within the scope of his employment in driving the car on the occasion in question, and (ii) that there was sufficient evidence that \( S \) was not acting within the scope of his employment to permit a jury so to find, but not enough evidence to require a such finding as a matter of law, then the inference instruction would take either of the following forms:

1. **Underlying Facts Established.** Where the facts that \( M \) owned the car and employed \( S \) to drive it are conclusively established, the jury may be instructed that it must decide on the evidence whether \( S \) was acting within the scope of his employment, and that it may but need not conclude that he was so acting on the basis of the facts that \( M \) owned the car and employed \( S \) to drive it.

2. **Sufficient Evidence of Underlying Facts.** Where there is sufficient evidence upon which to base a finding that \( M \) owned the automobile and employed \( S \) to drive it, then the jury may be instructed that it must decide on the evidence whether \( S \) was acting within the scope of his employment, and that if the jury finds that \( M \) owned the car and employed \( S \) to drive it, then it may but need not find on that ground that \( S \) was acting within the scope of his employment on the occasion in question.

Whether either of these instructions will be given depends further, of course, upon whether an instruction is properly requested.\(^{103}\) It seems that the matter is well within the discretion of the trial judge, and seldom will a refusal

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103. *See Fed. R. Civ. P. and Wyo. R. Civ. P. 51* (“At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.”).
to give an inference instruction, even when properly re-
quested, be reversible error.

2. Broader Interpretation of Federal Rule 301

The vice in the narrow construction of Rule 301 is that it would enfeeble any presumption whenever the opponent intro-
duced evidence sufficient to support a jury finding of the nonexistence of the presumed fact. In any such case the narrow reading would allow at best the inference instruction considered above, which carries forward nothing of the force in logic or policy which called the presumption into being in the first place—and even the inference instruction would be allowed only where the judge thought it clear, without any reference to the presumption, that the underlying facts were alone sufficient to support a jury finding of the presumed fact. The narrow construction would, in short, pose an "either/or" dilemma: Either the presumption controls the jury's deliberations with respect to the presumed fact, or it has no affirmative influence at all.

Preferable to the narrow reading of Rule 301, at least so long as it remains true that presumptions cannot affect the burden of persuasion, would be a middle ground position possible under a broader reading of Rule 301. From the congressional rejection of the presumption-as-evidence ap-
proach, it seems doubtful that even a state-adopted version of Federal Rule 301 could be read as allowing such an approach, unless there were a specific contrary indication in accompanying legislative or judicial Comments. The other three variant modes of the traditionalist approach, previously explored, might be considered still available. The only one of these which seems relatively problem-free is the "equi-
poise" approach adopted in Maine.

The "equipoise" approach would generate instructions in the following forms: Where the presumption rests mostly or entirely upon substantive or procedural policy grounds,

104. For presumptions based mostly or entirely upon grounds of substantive or procedural policy, slightly different phraseology is suggested from that for presumptions based mostly or entirely upon grounds of logic or probability.
the jury should be told that upon finding the basic fact it should also find the presumed fact unless upon all the evidence in the case it finds that the nonexistence of the presumed fact is at least as probable as its existence. Where the presumption rests mostly or entirely upon inherent logic or probability the jury should be told that the basic fact is strong evidence of the presumed fact, and that upon finding the basic fact it should therefore find the presumed fact to exist unless upon all the evidence it believes that the nonexistence of the presumed fact is at least as probable as its existence. Such instructions do not equate the presumption with evidence; they do not run afoul of the express bar in Rule 301 against imposing upon the party against whom the presumption operates "the burden of proof in the sense of the risk of non-persuasion." 105

The reason for the distinction is to increase candor with the jury, by avoiding any suggestion that the basic facts are evidence in the former case, while emphasizing that same suggestion in the latter case. Little else turns upon this distinction. Both forms of instruction serve the fundamental purpose of imparting to the jury the idea that the basic fact should have special weight as a basis for finding the presumed fact. Little damage could be done in choosing either phraseology if the presumption in question does not easily fit either of the suggested molds of if an error were made in choosing one form of language rather than the other.

105. Professor Morgan, who did not distinguish between presumptions based upon logic or probability and presumptions based upon substantive or procedural policy, at least in the context of the wording of jury instructions, suggested the following language: "Since [basic fact] A is established, you must begin with the assumption that [presumed fact] B exists. But that assumption may be destroyed by evidence. If from all the evidence you find either that the non-existence of B is more probable than its existence or that the non-existence of B is as probable as its existence, you then will find that B does not exist, otherwise you will find that B does exist." Morgan commented: "This clearly places upon the party against whom the presumption operates the burden of putting the jury in such a state of mind that each jurymen is unable to determine the truth or falsity of the proposition, that the existence of B is more probable than its non-existence." Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 70 (1933). See also id. at 75-76.

106. By the approach recommended here, if plaintiff P bears the burden of persuasion on the question whether driver D had owner O's permission to drive O's car, and was acting within the scope of the agency thus established, P will still have that burden or persuasion even if he proves the basic fact of the loaned automobile presumption—that O owned the car. That is, if the presumption is given the effect recommended here, the jury must find against P on the agency issue if the evidence that D did not have O's permission or was acting beyond its scope is so strong as to leave the mind of the jury in equilibrium so that it simply cannot decide the question. This is entirely consistent with Rule 301's directive that the presumption does not affect the burden of persuasion.

If the presumption operates in favor of the party who bears the burden of persuasion on the issue of the existence of the presumed fact, then the approach taken under the broader construction of Rule 301 achieves the aim of giving to presumptions greater effect without shifting the burden of persuasion to the opponent of the presumption. If the presumption operates in favor of the party who does not bear the risk
Such instructions do carry forward a sense of the strength in policy or logic which called the presumption into existence in the first place. Finally, such instructions could be given without the need to determine whether the facts (including the basic fact) are sufficient evidence of the existence of the presumed fact to support a jury finding thereof: The approach here taken assumes a continuing presence of the presumption in the case, and there is no occasion to question the strength of the basic fact as a basis to find the presumed fact without reference to the presumption as would be necessary with the inference instruction; the presumption itself provides an affirmative answer to that question.

The form of instructions to the jury, under the broader interpretation of Rule 301, is determined, as before, by the condition of the evidence at the close of the proofs with respect to (i) the existence or nonexistence of the basic fact underlying the presumption, and (ii) the existence or nonexistence of the presumed fact. Under this broader construction, there are five possibilities to consider:

1. **Basic Fact Established; Presumed Fact Uncontested or Insufficiently Contested.** The form of instruction is exactly the same as the one set forth in paragraph 1, under the heading “Rule 301 Narrowly Construed.” In this situation, it makes no difference whether the Rule be narrowly or more broadly construed.

2. **Sufficient Evidence of Basic Fact; Presumed Fact Uncontested or Insufficiently Contested.** The instruct-
tion is exactly the same as the one set forth in paragraph 2, under the heading “Rule 301 Narrowly Construed.” In this circumstance it once again makes no difference whether the Rule be narrowly or more broadly construed.

3. Basic Fact Established; Sufficient Evidence of Non-existence of Presumed Fact To Support a Jury Finding Thereof, but Not to Require Such a Finding. Here it makes a difference whether Rule 301 is construed narrowly or more broadly, for under the narrow construction there would be no presumption instruction, as in paragraph 3 under the “narrow construction” heading. Under the broader interpretation of Rule 301, there should still be a presumption instruction when the presumption in question operates in favor of the party who bears the burden of persuasion on the issue of the presumed fact, as it ordinarily does in the case of the loaned automobile and scope-of-employment presumptions. If the basic fact is established as a matter of law, and the party against whom the presumption operates has introduced evidence which is sufficient to support a jury finding of the nonexistence of the presumed fact, but not so cogent as to require that the jury be directed to find its nonexistence, then the jury should be instructed either (a) that it should find the existence of the presumed fact unless it finds on the basis of all the evidence in the case that the nonexistence of that fact is at least as probable as its existence (this form being designed for presumptions which rest mostly or entirely upon the ground of public policy), or (b) that the basic fact is strong evidence of the presumed fact, so that the jury should find the presumed fact to exist unless upon all the evidence it believes that the nonexistence of that fact is at least as probable as its existence (this form being designed for presumptions which rest mostly upon logic or probability):

With respect to the loaned automobile presumption, which appears to rest mainly upon policy, the jury should be told that it should find that $D$ was acting within the scope of his agency on the occasion in question unless the jury finds on the basis of all the evidence that it is at least as probable that $D$ was not acting within the scope of his agency as it is that he was so acting. With respect to the longer-
form scope-of-employment presumption, which seems to rest heavily upon probability, the jury should be told that the fact of M's ownership of the car and his employment of S to drive the car is strong evidence that S was acting within the scope of his employment on the occasion in question, and that the jury should so find unless on the basis of all the evidence in the case the jury finds that it is at least as probable that D was not acting within the scope of his employment as it is that he was so acting.

4. Sufficient Evidence of Basic Fact; Sufficient Evidence of Nonexistence of Presumed Fact to Support a Jury Finding Thereof, but Not to Require Such a Finding. Here again it makes a difference whether Rule 301 be construed narrowly or broadly, for under the narrow construction there would once again be no presumption instruction, as in paragraph 3 under the "narrow construction" heading, above. Under the broader interpretation, there should still be a presumption instruction when the presumption in question operates in favor of the party who bears the burden of persuasion on the issue of the presumed fact, as it ordinarily does in the case of the loaned automobile and scope-of-employment presumptions. If there is sufficient evidence to support a finding of the basic fact, and the party against whom the presumption operates has introduced evidence which is sufficient to support a jury finding of the nonexistence of the presumed fact, but not so cogent as to require that the jury be directed to find its nonexistence, then the jury should be instructed either (a) that if it finds the existence of the basic fact, then it should also find the existence of the presumed fact, unless it finds on the basis of all the evidence in the case that the nonexistence of the latter fact is at least as probable as its existence (this form being designed for presumptions which rest mostly or entirely upon the ground of public policy), or (b) that if it finds the existence of the basic fact, then it should consider that fact to be strong evidence of the presumed fact, and it should find the presumed fact to exist unless upon all the evidence it believes that the nonexistence of the latter fact is at least as probable as its existence (this form being designed for presumptions which rest mostly or entirely upon logic or probability):
With reference to the loaned automobile presumption, which appears to rest mainly upon policy, the jury should be told that if it finds that $O$ owned the car, then it should find that $D$ was acting within the scope of his agency unless on the basis of all evidence it believes that it is at least as probable that $D$ was not acting within the scope of his agency as it is that he was so acting. With reference to the longer-form scope-of-employment presumption, the jury should be told that if it finds that $M$ owned the car and employed $S$ to drive it, then it should consider those facts to be strong evidence that $S$ was acting within the scope of his employment on the occasion in question, and that it should so find unless on the basis of all the evidence the jury finds that it is at least as probable that $S$ was not acting within the scope of his employment as it is that $S$ was so acting.

5. Nonexistence of the Presumed Fact Conclusively Established. Where the party against whom the presumption operates introduces evidence of the nonexistence of the presumed fact which is so cogent as to require a finding of its nonexistence as a matter of law, the presumption is entirely dislodged. There should be no instruction on the presumption, and the jury should be told to find the nonexistence of the presumed fact.

3. Which Construction Is Correct?

The narrow construction of Rule 301, adopting the traditionalist approach in its pristine form, is supported by the following: First, when the Senate Judiciary Committee first proposed the language which the Congress ultimately enacted and which is found in the present version of Rule 301, Professor Cleary made known his views as to the meaning of that language. In concise and definite terms, he (quite reasonably) asserted that Rule 301 in that form “adopts a straight bursting bubble rule” under which “the presumption vanishes as a presumption upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact even though not a single person in the
court room actually believes it.”

Faced with this construction of the Rule under consideration, the House/Senate Conference nonetheless made no change, and the Congress enacted Rule 301 in the form to which Professor Cleary referred.

Second, the Report of the House/Senate Conference may well be read as indicating an intent to disallow a presumption instruction where the opponent of the presumption has introduced evidence sufficient to support a jury finding of the nonexistence of the presumed fact. That Report states in pertinent part:

[A] presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The last two sentences in the quoted passage may well mean that the Conference intended to disapprove a presumption instruction where the opponent introduces evidence sufficient to find the nonexistence of the presumed fact, and to allow only a permissible inference instruction, phrased in terms of "may infer," "may find," or the like.

The broader construction of Rule 301 is also supportable, however. First, it should not be overlooked that the

107. Memorandum of October 31, 1974, prepared by Professor Cleary on behalf of the Advisory Committee on Rules of Evidence and the Committee on Rules of Practice and Procedure, commenting upon the Senate changes in House-passed version of Rule 301 at 1-5.

And see Usery v. Turner Elkhorn Mining Co., ___ U.S. ___, 96 S. Ct. 2882, 2898 (1976) (Citing Fed. R. Evid. 301 in conjunction with a discussion of presumptions created by federal regulations promulgated pursuant to federal statute, the Court noted: "Each presumption is explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator.").

above-quoted language is badly confused about the nature of the problem. It is doubtful that a federal judge would or should instruct a jury that it "may presume" the existence of the presumed fact if it finds the basic facts where there is no evidence contradicting the presumed fact. The language in the Report confuses the presumption instruction with the inference instruction. It is reasonable to discount, at least in some degree, a Report which misapprehends the very issue to which it is addressed. (The Report would make better sense if the phrase "must find," or its equivalent, were substituted for the phrase "may presume" in both the second and third of the above-quoted sentences.)

Second, a careful reading of the language indicates that the Report neither prohibits the kind of instruction suggested under the "broader construction" heading, nor mandates the kind of instruction which the "narrow construction" would require. Closely read, the Report disapproves giving to the jury the very same instruction, where there is evidence sufficient to support a finding of the nonexistence of the presumed fact, that the judge would give where there is no such evidence. I agree with that proposition. While the judge should instruct the jury that it "must find" the existence of the presumed fact if it believes the basic fact and there is no evidence contradicting the presumed fact, certainly the judge should not give that same instruction where there is sufficient evidence to support a finding of the nonexistence of the presumed fact. Nothing in the "broader construction" described above implies otherwise.

Third, the "broader construction" of Rule 301 represents a sounder approach, for it recognizes the underlying logic and policies as the narrow construction does not. It is therefore more consistent than the "narrow construction" with the mandate of Federal Rule 102, which directs that the Rules "be construed to secure . . . promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."109

The reformist view of presumptions generates a set of instructions to the jury which are both simple and, in general, couched in the familiar terminology by which the burden of proof is explained to the jury. As is true under both interpretations of Federal Rule 301 explored in Part V of this article, the proper form of instructions to the jury pursuant to Uniform Rule 301 and state-adopted counterparts to the Federal Rules turns upon the condition of the evidence at the close of the proofs with respect to (i) the basic fact and (ii) the presumed fact. There are four significant combinations:

1. **Basic Fact Established; Presumed Fact Uncontented or Insufficiently Contested.** Again, the instruction will be identical to the one set forth in paragraph 1 in the discussion of the narrow construction of Federal Rule 301, supra. If the basic fact is established as a matter of law, and the party against whom the presumption operates has introduced either no evidence contradicting the presumed fact or insufficient evidence to support a jury finding of its nonexistence, then the jury should be instructed that it must find the presumed fact. In this situation, it makes no difference whether the traditionalist theory (in whatever form) or the reformist theory applies.

2. **Sufficient Evidence of the Basic Fact; Presumed Fact Uncontented or Insufficiently Contested.**

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110. The form of instruction suggested here corresponds to that recommended by the Advisory Committee in the March, 1969 Draft of Federal Rule 3-03 (c) (1) (A) and 3-03 (c) (2) (B), see 46 F.R.D. 161, 212-213 (1969). It also corresponds to the form of instruction suggested by Nev. Rev. Stat. §§ 47.190(1) and 47.200(2) (1973). See also Jefferson, California Evidence Benchbook § 46.6 (1972) (author's black letter rule (a)).

111. The form of instruction suggested here is similar to that suggested by the Advisory Committee in the March, 1969 Draft of Federal Rule 3-03 (c) (1) (C), see 46 F.R.D. 161, 212 (1969), and to that suggested by Nev. Rev. Stat. § 47.190 (3) (1973). See also Jefferson, California Evidence Benchbook § 46.4 (1972) (author's black letter rule (b)). However, none of these sources makes note of the fact that the burden of persuasion on the issue of the existence of the basic fact rests upon the party in whose favor the presumption operates. See Wis. Stat. Ann. § 905.01 (1976), expressly noting that "the party relying on the presumption" bears "the burden of proving the basic facts ...." While I doubt the wisdom of complicating the instructions to the jury in this way if the presumption is to have only the effect which the traditionalist theory would allow,
again, the instruction is identical to the one previously explored for this situation in paragraph 2 of the discussion of the narrow construction of Federal Rule 301, supra. If there is sufficient evidence to support a finding of the basic fact, but not such cogent and compelling evidence as would require such a finding, and the party against whom the presumption operates has introduced either no evidence contradicting the presumed fact or insufficient evidence to support a jury finding of its nonexistence, then a conditional instruction is called for. The jury should be told that it must decide upon the evidence whether the basic fact exists or not, and that if it finds the existence of the basic fact, then it must find the existence of the presumed fact.

3. Basic Fact Established; Sufficient Evidence of the Nonexistence of Presumed Fact to Support a Jury Finding Thereof, But Not to Require Such a Finding. Here it makes a difference whether a court is applying Federal Rule 301 (regardless whether that Rule be broadly or narrowly construed) or Uniform Rule 301. Under Uniform Rule 301, the trial judge should instruct the jury that the party against whom the presumption operates bears the burden of persuasion on the question of the existence of the presumed fact, and therefore that if the jury finds that said party has not shown by a preponderance of the evidence that the presumed fact does not exist, the jury should find that the presumed fact does exist:

With respect to the short-form loaned automobile presumption, the jury should be told that the burden

112. The form of instruction suggested here is similar to that suggested by the Advisory Committee in its March, 1969 Draft of Federal Rule 3-03 (c) (2) (C), see 46 F.R.D. 161, 213 (1969), and to that suggested by NEV. REV. STAT. 47.200(3) (1973). See also JEFFERSON, CALIFORNIA EVIDENCE BENCH-BOOK § 46.4 (1972) (author's black letter rule (c)). However, the cast of the wording suggested in these sources tends somewhat more to favor a finding of the presumed fact than does the wording I suggest here. These sources seem to imply an instruction in this form: “O bears the burden of persuasion on the question whether D was O's agent acting within the scope of his authority, and you should so find, unless you find from all the evidence that it is more probable than not that D was not O's agent, in which event you should find that D was not O's agent, or unless you find from all the evidence in the case that it is more probable than not that D exceeded his authority, in which event you should find that he exceeded his authority.”
of persuasion on the question whether $D$ was $O$’s agent acting within the scope of his agency rests upon $O$, and that if the jury finds that $O$ has not shown by a preponderance of the evidence that $D$ was not $O$’s agent or that $O$ has not shown that $D$ exceeded the scope of his agency, then the jury should find that $D$ was $O$’s agent acting within the scope of his agency.

4. Sufficient Evidence of Basic Fact; Sufficient Evidence of Nonexistence of Presumed Fact to Support a Jury Finding Thereof, But Not to Require Such a Finding.\footnote{113} Here again it makes a difference whether a court is applying Federal Rule 301 (regardless whether that Rule be broadly or narrowly construed) or Uniform Rule 301. Under Uniform Rule 301, the trial judge should give a conditional instruction. He should instruct the jury that the party for whom the presumption operates bears the burden of persuasion on the question of the existence of the basic fact, and that if the jury finds that said party has not shown by a preponderance of the evidence that the basic fact exists, then the jury should find that the basic fact does not exist. (In many instances, it will be appropriate to instruct the jury at this point that if it finds that the basic fact does not exist, it should return a verdict in favor of the party opposing the presumption.) However, the jury should also be instructed that if it finds that the basic fact does exist, then the party against whom the presumption operates bears the burden of persuasion on the question of the existence of the presumed fact, and therefore that if the jury finds that said party has not shown by a preponderance of the evidence that the presumed fact

\footnote{113} The form of instruction suggested here is similar to that suggested by the Advisory Committee in its March, 1969 Draft of Federal Rule 3-03(c)(3), see 46 F.R.D. 161, 214 (1969), and to that suggested by NEV. REV. STAT. § 47.220(3) (1975). See also JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 46.4 (1972) (author’s black letter rule (d)). Once again, however, none of these sources makes note of the fact that the burden of persuasion on the issue of the existence of the basic fact rests upon the party in whose favor the presumption operates. See WIS. STAT. ANN. § 903.01 (1975), quoted in note 111 supra. And again, though I doubt the wisdom of complicating matters by mentioning this burden to the jury if the presumption is to have only the effect which the traditionalist theory in its various forms would allow, it might be wise to convey this information to the jury if the presumption shifts the burden of persuasion. Language designed to achieve this end is added in paragraph 4 above. It could also be added in paragraph 2, see note 111 supra. And once again, the cast of the wording suggested in these sources seems somewhat more to favor a finding of the presumed fact than does the wording I suggest here. See note 112 supra.
does not exist, the jury should find that the presumed fact exists:

With respect to the short-form loaned automobile presumption, the jury should be told that the plaintiff bears the burden of persuasion on the question whether O owns the automobile in question and that if plaintiff has not shown by a preponderance of the evidence that O owned the automobile, then the jury should find that O did not own it. (In this instance, it will probably be appropriate to instruct the jury that if it finds that O did not own the automobile, then the jury should return a verdict in O's favor, although there could conceivably be cases in which O could be liable for D's negligence even if O did not own the car, in which case such an instruction should not be given.) The jury should also be instructed that if it finds that O owned the automobile, then O bears the burden of persuasion on the question whether D was O's agent acting within the scope of his agency, and that if the jury finds that O has not shown by a preponderance of the evidence that D was not O's agent or that O has not shown that D exceeded the scope of his agency, then the jury should find that D was O's agent acting within the scope of his agency.

It seems appropriate to emphasize here that nothing in the reformist approach to presumption embodied in Uniform Rule 301 implies that the court can never take the issue of the presumed fact from the jury by directing the jury to find the nonexistence of the fact, which may as a practical matter mean a directed verdict in favor of the party against whom the presumption operates. Just as it is possible to direct a verdict in favor of plaintiffs as well as against them, so it is possible to direct the jury to find the nonexistence of the presumed fact as well as its existence. In other words, nothing in the reformist view or in Uniform Rule 301 implies that a presumption is in any way conclusive.

The road map which is contained in the Advisory Committee's March, 1969 Draft of the federal rule on presumptions in civil cases marks out the route in the situation in
which there is insufficient evidence to support a finding of the basic fact—I have not covered that situation, since obviously no presumption instruction would be called for at all, and in any event the March, 1969 Draft was in error in its prescription for that situation, and the State of Nevada in its statute perceived the error and corrected it nicely.\textsuperscript{114} The road map in the March, 1969 Draft also covered the situation in which the evidence of the nonexistence of the presumed fact was so cogent and compelling as to require a jury to be told to find its nonexistence—again I have not covered that situation, since again it is obvious that no presumption instruction would be called for at all.\textsuperscript{115}

\textsuperscript{114} See the Draft of March, 1969, Federal Rule 3-03(c) (1), 46 F.R.D. 161, 212-213 (1969), which provides in part: “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: ... (B) If reasonable minds would necessarily agree that the evidence does not render the existence of the basic facts more probable than not, the judge shall direct the jury to find against the existence of the presumed fact....” The same provisions appear in Nev. Rev. Stat. § 47.190(2) (1973). However, these provisions convey only a half-truth: The trial judge should instruct the jury to find against the existence of the presumed fact in such circumstances only if there is insufficient evidence in the case to support a finding of the existence of the presumed fact, and the presumed fact may well be proved, or supported by evidence sufficient to find its existence, even if the basic facts are not proved.

Consider the mailed letter presumption. If the party seeking to prove delivery of a letter introduces evidence of proper posting which the trial judge deems to be insufficient to support a jury finding of proper posting, that party could still conceivably prove delivery in due course. If he could produce a witness who saw the addressee having the letter in his possession and reading it, there may well be sufficient evidence to sustain a jury finding of delivery of the letter, even though conceivably there was not sufficient evidence to support a finding of proper posting.

The discrepancy in Proposed Rule 3-03 is corrected by Nev. Rev. Stat. § 47.210 (1973): “When reasonable minds would necessarily agree that the evidence does not render the existence of the basic facts more probable than not, but direct evidence is introduced concerning the existence of the presumed fact, the judge shall submit the matter to the jury with an instruction to determine the existence of the presumed fact from the direct evidence without reference to the presumption.”

\textsuperscript{115} See the Draft of March, 1969, Federal Rule 3-03(e) (2), 46 F.R.D. 161, 212-214 (1969), which provides in part: “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....” See also Nev. Rev. Stat. §§ 47.190(1), 47.220(1) (1973) (authorizing a direction to find the existence of the presumed fact if reasonable minds would necessarily agree that the evidence so indicates, where the evidence on the basic facts could be resolved either in favor of or against their existence) and 47.220(2) (authorizing a direction to find the nonexistence of the presumed fact if reasonable minds would necessarily agree that the evidence so indicates, where the evidence on the basic facts could be resolved either in favor of or against their existence).
CONCLUSION

McCormick long ago observed that "‘presumption’ is the slipperiest member of the family of legal terms, except its first cousin, ‘burden of proof.’" McCormick's motion has been seconded, considered and carried: Men of extraordinary ability routinely apologize for writing about presumptions, and despair of bringing anything like a rational order out of a perceived chaos.

Slippery or not, the problem of presumptions calls for a solution, not only in Wyoming, but in the other states presently considering whether to adopt the Federal Rules (or the Uniform Rules, or a blend of the two). Six states have decided to take the reformist approach in adopting the new Rules; the National Conference of Commissioners on Uniform State Laws endorsed this approach; so did the Advisory Committee on the Federal Rules of Evidence, with Supreme Court approval. Congress decided otherwise, and the traditionalist approach is entrenched in federal courts, although the Federal Rules will not apply in diversity cases with respect to state-created presumptions which bear upon any "element of a claim or defense" governed by state law.

By themselves, most of the cases are not much help in deciding between the traditionalist and reformist approaches. In the first place, usually the decisions are extraordinarily hard to decipher: Where the proponent of the presumed fact did not get his case to the jury, did the presumption have little effect? (Not necessarily; even the reformist approach does not preclude a directed verdict.) Where the proponent did get his case to the jury, did the presumption play a greater role? (Not necessarily; even the pristine version of the traditionalist philosophy would allow the jury to draw logical inferences from the basic facts after the presumption has disappeared.) In the second place, few decisions achieve any kind of perspective upon the problem of presumptions; there are any number of ways by which the language of presumptions can rationalize a decision to send or not to send a ques-

tion to the jury, and the larger picture seldom emerges in the decided case.

But the cases are nevertheless revealing: They tend to reinforce the notion that in today's world presumptions are very much *ad hoc* creations, behaving in a bewildering variety of ways, and unpredictably as well. The cases, in short, add fuel to the drive to simplify.

Given a decision to follow but one rule for presumptions, Uniform Rule 301 is sounder than Federal Rule 301. The reasons in substantive and procedural policy which call presumptions into being do not disappear with the introduction of counterproof; if those reasons are sound enough to control decision in the absence of proof, they are sound enough to tip the balance in favor of the presumed fact where an abundance of proof leaves the issue in doubt.

Broadly construed, Federal Rule 301 is only slightly inferior to Uniform Rule 301. So construed, the former calls for an instruction that the jury should find the existence of the presumed fact unless the counterproof makes its nonexistence *at least equally likely*, while the latter calls for an instruction that the jury should find the existence of the presumed fact unless the counterproof makes the nonexistence of the presumed fact *more likely*. Narrowly construed, however, Federal Rule 301 is vastly inferior to Uniform Rule 301; so construed, the Rule would actually turn back the clock and substantially alter common practice. Regardless of how Federal Rule 301 is construed, Uniform Rule 301 is preferable to Federal Rule 301 in that it better serves the underlying policies of presumptions and generates jury instructions which speak the simple and familiar language of burden of persuasion.