PENNSYLVANIA AND THE UNIFORM RULES OF EVIDENCE: PRESUMPTIONS AND DEAD MAN STATUTES *

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THE BACKGROUND

"The best proof of progress in this branch of the law," Zechariah Chafee once said of evidence, "would be its virtual disappearance from our appellate courts." 1 Thirty years later the evidentiary atmosphere is still described as "[h]ellish dark, and smells of cheese." 2 The spate of judicial opinions continues unabated 3 while the commentators bemoan "the multiplicity of the rules and their unreality." 4 If, however, contemporary legal literature reveals no lack of criticism of the law that is, neither is it devoid of significant effort toward improvement. Ours is a reformation period in the history of adjective law and there is more optimism than pessimism in the statement that "evidence is now where

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2. The quotation is used by way of preface in Cleary, Evidence As a Problem in Communicating, 5 VAND. L. REV. 277 (1952).
3. Chafee used American Digest headnotes to judge volume of litigation. See supra note 1, at n.1. A comparison with recent equivalent entries reveals virtually no change. For discussion of trends in the volume of litigation over particular rules see Wigmore's preface to the third edition of his ten-volume treatise, op. cit.
 supra note 1, at vii. Cf. id. at xii: "It is a pity that the book has had to be so large. But if the Legislators will continue so copiously to legislate, and if Judges still refuse to justify with jejunity their judgments, shall not Authors continue assiduously to amass and to annotate these luciferous lucubrations for the benefit of the Bar, so long as the Bar incumently bears this burden"?
4. Cleary, supra note 2 at 277, where he adds: "Possibly the unreality is what causes the multiplicity."
the law of forms of action and common law pleading was in the early part of the nineteenth century."

The rate of recent change in matters of pleading and practice is too fresh in mind to need retelling here. Hardly more than fifteen years have passed since conformity, "as near as may be," passed from the federal courts to be replaced by a set of national rules which stimulated the beginnings of a new conformity by the states. That the Federal Rules sired so many others in their own image is, however, of secondary importance to the fact that they served, on a broad scale, as a potent catalyst to reexamination of procedure. New techniques, a willingness to experiment, and recognition of the need for developing a modern adjective law—these were the major contributions felt even in jurisdictions which rejected the particular conclusions of the federal draftsmen. Pennsylvania, no less than others, has been engaged in reexamination, and the results of a continuing, productive process continue to be promulgated by its supreme court.6

But what of evidence? That it can boast no comparable record of achievement is all too clear, yet since the early 1920's substantial quantities of time and energy, of coin and talent, have been dedicated to its improvement.7 There has been a variety of suggested changes and certainly our statute books do record some progress.8 Yet, without underestimating the significance of piece meal revision, it seems safe to assert that the key project of the period was the American Law Institute's Model Code and an understanding of the unusual course it ran may put in focus the far different proposal soon to be the subject of legislative debate.9

The Institute's Council had early determined against a Restatement of existing law for it found that the rules of evidence "in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it"; and since, as William Draper Lewis phrased it, "[a] bad rule of law is not cured

5. MORGAN, FORWARD TO MODEL CODE OF EVIDENCE 5 (1942).

6. See, e.g., the new and amended Pennsylvania Rules of Civil Procedure promulgated by the Supreme Court April 12, 1954, particularly PA. R. Crv. P. 4001 et seq. (effective July 1, 1954) governing depositions and discovery which were revised to reflect the experience of some three years under an earlier version.


9. The Pennsylvania Bar Association's Committee on Judicial Administration now has before it the recently promulgated Uniform Rules of Evidence. 25 PA. B.A.Q. 373 (1954). Judge Harold L. Ervin, formerly chairman of the Committee, heads the sub-committee on the Uniform Rules. J. Wesley McWilliams is currently chairman of the Committee. There is likewise substantial discussion in other states.
by clarification," the ALI set out to revise rather than restate. Financed by a Carnegie grant of $40,000, staffed by the highest order of legal talent serving as Reporter, Assistant Reporter, Advisers and Consultants, the project had an immediate impact. Interest ran high and expectations were not far behind. California promptly abandoned a local revision effort which had already made substantial progress. A monograph of the American Bar Association’s Special Committee on Improving the Administration of Justice spoke of “a compact, clear-cut, and authoritative statement” which “would alone be worthy of the effort of drafting a model code.” No wonder that the tentative drafts of the yet unfinished product were the subject of discussion at over thirty bar association meetings and institutes throughout the country.

Finally, in 1942 the American Law Institute formally promulgated its Model Code of Evidence. “As to the form of the Code,” wrote the Reporter, “it is so drafted that it can be adopted as a body of rules by those courts which have the power to regulate evidence and procedure by rule or can be enacted as a code of evidence by a legislature.” The draftsmen might have been spared their concern; there were no adoptions.

It would be fruitless at this juncture to reargue the merits of the Model Code, so highly praised and so roundly condemned. A consummate piece of scholarship, it fell prey to misinterpretation and misconstruction. Rightly understood, many of its provisions were highly controversial; misunderstood, they were impossible. Nor was the com-

11. Id. at ix. Professor Edmund M. Morgan served as Reporter, Professor John M. Maguire as Assistant Reporter and John H. Wigmore as Chief Consultant. The advisory committee included Judges Augustus N. Hand, Learned Hand, Henry T. Lummus, J. Russell McElroy, Robert P. Patterson; Charles E. Wyzanski, Esq., of the Boston Bar (now a Federal District Court judge); and academicians Wilbur H. Cherry, Laurence H. Eldredge, William G. Hale, Mason Ladd, Charles T. McCormick.
13. Ladd, supra note 7, at 218. This article was also published as a monograph by The Special Committee on Improving the Administration of Justice of the American Bar Association. See id. at 215, n.*
15. Morgan, supra note 5, at 69.
16. The Committee on Administration of Justice of the State Bar of California reported its conclusions: “[W]e earnestly recommend that the Bar should be on the alert to resist to its utmost at the coming or any succeeding session of the Legislature the enactment into law of the Code or any of the parts thereof.” Report, 19 Cal. S.B.J. 262, 283 (1944), discussed in Chadbourn, supra note 12, at p. 8, col. 3. Cf. Judge Gard in Panel on Uniform Rules of Evidence, 8 A. L. Rev. 44 (1953-54): “I think if any one broad criticism may be made of the Model Code it is that it is academically perfect.”
plex form of the Code’s structure, with its myriad cross references, an aid to general acceptance. Understandably, the Institute’s model soon passed from the limelight of active legislative consideration. No less understandably, however, this important piece of work, which did not fail of influence in the development of case law, became the starting point for a further attempt at codification.

In 1948 Pennsylvania’s William A. Schnader, a member of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, took the initiative in inducing that body to draft a suitable code of evidence. From the start it was thought that the Model Code would prove useful as “a basis from which to work” and the cooperation of the American Law Institute was solicited and forthcoming. In 1949 the project was approved and the task of drafting continued for four years. The product of this most recent effort, the Uniform Rules of Evidence, adopted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in August, 1953, and only this May endorsed by the American Law Institute itself, has now become the center of discussion and debate.

The details of the transition from Institute Code to Commissioner’s Rules are not without interest. They reveal that more transpired between the adoption of the former in 1942 and of the latter in 1953 than a change of venue, or even of forum. Above all they demonstrate that the two proposals must be carefully distinguished and that no plea of res judicata should be allowed to effect ready dismissal of the Uniform Rules. In a sense the Rules are a product of the profession’s resistance to the earlier proposal and a further glance at the resistance will prove rewarding. Of particular relevance is the Pennsylvania story.

Even before official promulgation of the Model Code the Pennsylvania State Bar Association took action “to determine the respects in which it is in accord with or differs from the Pennsylvania law of evidence.” The narrow task of comparison accomplished, in 1945 a

18. It was utilized in the preparation of a proposed code for Missouri, see Comment, 14 Mo. L. Rev. 251, 252 (1949) and its vitality in legal periodicals persisted. Beginning in 1945 and continuing through much of 1947, the Wisconsin Law Review ran a series of articles on various provisions of the Model Code, most of them under the general title, A Code of Evidence for Wisconsin? An oft-repeated introductory note emphasizes that “It is not a purpose either to promote or to discourage the adoption of [the Model] Code.” E.g., 1945 Wis. L. Rev. 192, 374, 593; 1946 Wis. L. Rev. 81, 147.
20. Id. at 92, 94. Cf. UNIFORM RULES OF EVIDENCE, PREFATORY NOTE 3 (1953).
21. Id. at 3-4.
22. 47 ANNUAL REP. PA. BAR ASS’N 281 (1941).
basic report was prepared by the subcommittee concerned evaluating the material. This report was unanimous in a number of important respects, divided in one. There was agreement that the Code as drafted should be disapproved. Most significantly, however, the members were unanimous in their "convictions that the Pennsylvania law of evidence was far from satisfactory; that it ought to be improved; and that it could be improved by the adoption of some of the provisions contained in the code." They were not agreed, however, on the best course of action to follow. A majority of four recommended that the subcommittee be provided with adequate professional assistance to draft a code, a revision of the ALI's model, with a view to ultimate legislative enactment; one member dissented. Problems of jurisdiction gave rise to delay, but two years later, in 1947, the sum of $500 was appropriated as an honorarium for the draftsman and work got under way.

The project was short lived. Within a year work had stopped and debate was resumed; once again the question was whether or not a code was desirable after all. The special committee appointed to study the problem this time split four to three in favoring continued effort on a code. By 1949 the pro's and con's were published and the stage was set for a full dress debate at the annual meeting of the Association. That debate never took place. Commissioner Schnader, at the last minute, rendered the subject moot with his announcement that the Uniform Commissioners had undertaken the task. In any event, both sides agreed, the Pennsylvania bar would have the opportunity to examine and evaluate a superseding effort.

The anti-code position, however, remains of interest even though it was the minority view, for it is a brief against any attempt to reduce the law of evidence to the confines of a statute or set of rules. The major objection to a comprehensive formulation was that in a field "as broad and as relative as Evidence" any code must, of necessity, be too complex for ready use. There is certainly force to the argument in terms of the then available samples. No one has yet contended that the Model Code was simple and the tentative draft of a Pennsylvania version produced in 1947-48 seems to have been little improvement. The latter, wrote the dissenters, contains "over three hundred para-

24. Id. at 216.
26. Windolph, supra note 23; Wingerd, Rhoads and MacElree, A Code of Evidence—Contra, id. at 220 (the authors being the minority members of the special committee).
28. Wingerd, Rhoads and MacElree, supra note 26 at 221, 222.
graphs and sub-paragraphs. Many of these rules are interlocking, that is, they contain cross references of exceptions to inclusions and provisions found in other rules," and the random samples cited in support begin with a subsection which "refers to sixty-five other provisions." 29 This was not the worst. Going back a few years one would find that Wigmore's "pocket code" ran some 500 pages.30

But there are more techniques than one in the drafting of statutes. Wigmore strenuously urged upon the American Law Institute the continued use of a lengthy, complex listing of all conceivable situations.31 He redrafted a simple ten line rule on qualification of witnesses so that it ran five times that length and included in its text reference to "theodolite, chemical reagents, X-ray machine, etc." as well as "statistical sources of prices, products, [and] deliveries." 32 But the Institute would have none of this and its product marked an advance toward simplicity.

Further advance toward a readily usable set of rules was still to be achieved. It is true that the short-lived attempt at a Pennsylvania version made no progress toward simplification. This, however, is not surprising for the practical limitations imposed by the appropriation, no less than the terms of the original authorization to proceed with a draft, tied the end product fairly close to the prototype. When one considers that the Pennsylvania legislature has appropriated $190,000 for the work of the Procedural Rules Committee,33 that the American Law Institute began work on its evidence project with a $40,000 grant, and that ultimately it took the editorial committee of the Commissioners on Uniform State Laws four years to accomplish the precise task which Pennsylvania sought to do on $500 of professional assistance, it is understandable that substantial change was hard to come by. Study of the new Uniform Rules reveals that substantial change has now been achieved. The draftsmen set out "to avoid or materially reduce burdensome cross references," "to achieve further simplicity of expression" 34—and they have succeeded to a remarkable degree.

29. Id. at 222.


32. Id. at 112-14.


In other respects, too, the Rules represent a considered attempt to meet many, if not all, of the articulated objections to the Model Code. In the words of Judge Spencer A. Gard, chairman of the drafting committee, the Rules aim "to capitalize on the prestige of the Model Code of Evidence" but "to give it more of the slant of the practicing lawyer and the judge on the bench" and "most important of all, to overcome the rather strenuous opposition in many quarters to the Model Code's liberality, by the simple expediency of being less liberal." \(^{35}\)

In sum, then, working with the earlier Institute effort as a base and with a committee of the Institute actively cooperating, the Uniform Commissioners have drafted a new proposal. The changes which have been made are certainly deserving of careful analysis. No less should be accorded those provisions which, having survived without change, are presented to the profession with the added force of independent concurrence and the added prestige of as practical and successful an agency as the National Conference on Uniform State Laws.

**STRUCTURE AND METHOD**

*Herein of Relevance*

Structurally the Rules are simple enough. A few preliminaries aside, they open with a general abolition of "all disqualifications of witnesses, privileges and limitations on the admissibility of relevant evidence." \(^{36}\) In the words of the comment, Rule 7 "wipes the slate clean." But all the learning of yesteryear is not thus summarily discarded. The rule but expresses Thayer's conception that relevant evidence should be "prima facie admissible unless limitations are imposed by another rule." \(^{37}\) And "other rules" in abundance are included in the eight succeeding chapters, respectively entitled Judicial Notice, Presumptions, Witnesses, Privileges, Extrinsic Policies Affecting Admissibility, Expert and Other Opinion Testimony, Hearsay Evidence, and Authentication and Contents of Writings.

Thus, however broad Rule 7 may appear, its actual impact cannot be assessed without examination of the rules which follow and the limitations which they include. In some instances, notably in the area of privilege, the new limitations are broader and hence more restrictive of admissibility than under existing Pennsylvania law. In at least one instance, however, the breadth of Rule 7 does effect significant

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change. The restrictions of the so-called Dead Man Statutes are not reintroduced; hence, they are abolished.

A final word on the method of the draftsmen before considering the details of a few of the more significant provisions of the Uniform Rules. The Commissioners made no attempt to treat constitutional issues. They frankly recognize that a rule of admissibility may be rendered inoperative in a given situation by the requirements of due process or by application of some other constitutional provision. Users of the Rules are simply put on notice that resort must be had to other sources of the law in this important, developing area. Similarly, the draftsmen recognized that evidentiary precedents will continue of major importance in delineating details of the law. Instance the matter of relevance. About half of the nine volumes of Wigmore, suggests Judge Gard, are devoted to the problems of relevancy—to applying the rules to the particular fact situations presented by a myriad of cases. The Rules would have none of that. "The only test of relevance is logic. With this simple statement we must be content. Nothing could be gained in a code of rules by making it a thesis on the subject of logic. The courts will have to continue to decide what inferences might reasonably be drawn." The black-letter definition is, accordingly, confined to the statement that " 'Relevant evidence' means evidence having any tendency in reason to prove any material fact," a welcome relief from Wigmore's complicated concoction of which Professor Chadbourn wrote "This is certainly no dish of pabulum."

**Dead Man Statutes**

At least since 1927 these surviving relics of the earlier conception that interest renders a witness incompetent have been under heavy and sustained attack. Judges, lawyers and academicians condemned the legislative assumption that every witness, however slight his interest, must be "presumed to be incapable of resisting the temptation to perjury; and every judge and juryman [must be] presumed to be

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38. URE Prefatory Note 5; Rule 7, comment.
39. Privilege against self-incrimination is treated, Rules 23-25. Even here the draftsmen state "Constitutional immunities cannot, of course, be affected by this rule." Rule 23(3), comment. It is also true that judicial decision serves as the basis for the privilege in a very few jurisdictions. Rule 23(1), comment.
40. Gard, supra note 16 at 46.
41. Rule 1(2), comment.
42. Rule 1(2).
43. "... the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a more probable or natural, or at least a probable or natural, hypothesis, and when the other hypotheses or explanations of the fact, if any, are either less probable or natural, or at least not exceedingly more probable or natural." 1 WIGMORE 421 (3d ed. 1940).
44. Chadbourn, supra note 12, at p. 8, col. 4.
incapable of discerning perjury committed under circumstances peculiarly calculated to excite suspicion and watchfulness." 45 Solving the problem of perjury with a rule of exclusion exacted a heavy price from the honest litigant, and who could say that litigants dishonest enough to commit perjury would stop at suborning perjury? As has already been noted, Rule 7 serves to abolish the Dead Man Statutes.

Furthermore, the Rules do not propose adoption of some untried experiment. A long and successful history in England, Connecticut, Massachusetts and elsewhere bespoke change, as did the American Bar Association which considered the Dead Man Statutes a bar to minimal standards of judicial administration. 46 Dean William Green Hale of the University of Southern California recalled these successes to the bar of his own state and added a telling point which has since been echoed by lawyers and judges in Pennsylvania.

"[I]t is difficult to understand [the] wholly one-sided concern over the possible maintenance of an unfounded claim against the deceased and no concern for the actual losses sustained under these acts by survivors who find themselves unable to establish their valid claims against an estate. There should be some tears for the living as well as for the dead. I say this much on the general problem involved without pausing to point out the utter hodgepodge of illogicalness embraced by our own particular form of Dead Man's Statute." 47

Comment has not been lacking on some of Pennsylvania's own particular brand of shocking, albeit entirely correct, results 48 and two years ago the State Bar Association recommended reform in this area. 49

45. MORGAN ET AL., THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM 25 (1927) quoting from the second report of the English Common Law Practice Commissioners (1853) and to the same effect from the 1848 report of the New York Commissioners on Practice and Pleading. See also the discussion at 34-35.

46. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 334 et seq. (1949); MORGAN, op. cit. supra note 45 at 27-30; Hale, in PROCEEDINGS, FOURTEENTH ANNUAL MEETINGS, STATE BAR OF CALIFORNIA 153, 156 (1941).

47. Hale, in op. cit. supra note 46, at 157.


"To offset the disadvantages to the estate from the unavailability of the deceased, statements made by him relating to the transaction would be admissible under an exception to Rule 63, the hearsay rule." Gard, supra note 35, at 348. The recommendations of the Pennsylvania Bar Association, supra, also insure such safeguards.
Presumptions

Pennsylvania was early in the forefront of the attempt to treat presumptions in an intelligent, intelligible manner. This is no mean feat in an area which remains so consistently perplexing that some commentators even doubt the Pennsylvania rule to be law in Pennsylvania. Yet the view to which this state has lent its name, although a minority approach, has persevered to become the basis for what the Uniform Commissioners now propose, a solution which gives promise of being at once practicable and acceptable.

A slippery word, presumption has been used with a variety of meanings. Reams have been devoted to explaining that the presumption of innocence in criminal cases is no presumption at all, but an independent rule of criminal procedure masquerading under an assumed name. With even greater emphasis, text writers and judges have explained that the conclusive or irrebuttable presumption is neither kith nor kin of the true variety, but rather a rule of substantive law. Fortunately, there is virtually no controversy over the burden of proof in the particular case involving the presumption of innocence and litigants do not seriously attempt to refute the irrefutable. Hence the Uniform Rules wisely avoid these semantic disputes. Without sacrificing either analysis or clarity, the Commissioners have so drafted the provisions governing the effect to be given presumptions that the basic agreement over what shall be done is adequately expressed and

50. Quoting a discussion of presumption law which referred to "the Pennsylvania rule," Morgan felt impelled to note his doubt as to "whether Pennsylvania still retains this rule." Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 497 n.38 (1946). See also id. at 500; Morgan and Maguire, Cases and Materials on Evidence 113 (3d ed. 1951); Maguire, Evidence—Common Sense and Common Law 187 (1947): "Of later the Supreme Court of Pennsylvania has had an access of orthodoxy on the topic, but its decisions trying to harmonize the old and the new dispensations are not too simple or clear." See also Note, The Effect of Rebuttable Presumptions in Pennsylvania, 57 Dick. L. Rev. 234 (1953).

51. 1 Morgan, Basic Problems of Evidence 30-31 (1954); Model Code of Evidence, c. 8, Introductory Note at 306-09 (1942).


53. See, e.g., 9 Wigmore, Evidence §2492 (3d ed. 1940).

54. There has been dispute over the language to be used in charging the jury in the criminal case, particularly on the question of whether the "presumption" is or is not "evidence." See authorities cited note 52 supra; Ladd, Cases and Materials on the Law of Evidence 753-54 (1949). In civil cases there frequently is a genuine presumption of innocence of such crime as arson, bigamy, etc. Compare URE Rule 15, comment, with Rule 16, comment.

55. The definition of a presumption (Rule 13) can be read to include conclusive presumptions, but the text of Rule 14 on "Effect of Presumptions" specifically excepts the "conclusive or irrefutable" variety. Similarly, see the comment to Rule 16 discussing the presumption of innocence in criminal cases: "But for those who may look upon it as a presumption within the meaning of these rules . . . it may furnish assurance that the presumption of innocence is not intended to be disturbed."
the Model Code's multi-paged introduction on varying uses of the difficult word is avoided.

Of importance is the distinction between an inference and a presumption. The drawing of permissible inferences from proof of fact A to a finding of fact B is a problem in logic and need not concern us here. "A presumption," Rule 13 informs us, "is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts. . . ." 56 Or, as Professor Morgan has phrased it, presumption "means that when A is established, the trier of the fact must assume that B exists unless or until a specified condition has been fulfilled." 57 Any one of a thousand scraps of evidence may lead a judge or jury to infer, or refuse to infer, that Jones has died; it is only when the law says that proof of unexplained absence for a period of seven years requires the assumption of Jones' death that a presumption enters the picture. 58

Defining presumptions is relatively a simple task compared to deciding what to do with one after it has been identified. The major source of difficulty which has bedeviled the law and given rise to a plethora of competing doctrine is the fact that in some cases the basic facts which give rise to a presumption have a great deal of probative value as evidence of the existence of the presumed fact, while others have little. 59 This makes sense when one recognizes that in some cases the presumption is intended for little more than procedural convenience, or as a device to cast the burden of producing evidence on the party with more ready access to the proof, while in other situations presumptions are invoked because they represent conclusions "firmly based upon the generally known results of wide human experience" 60 and, in the particular instance being litigated, it is not likely that anyone can adduce proof of what had occurred. To give too little effect to the latter type or too great an effect to one of the former types would lead to unhappy results.

The need for a measure of flexibility seems apparent, and yet an attempt to classify presumptions, assigning to each a procedural

56. Italics added.
58. 9 WIGMoRE, Evidence §2491 (3d ed. 1940) points out that the term "presumption of fact" as distinguished from "presumption of law" is often used to mean "inference" and causes confusion, for which reason Wigmore concludes that the term "presumption of fact" should be discarded. Compare 2 HENRY, PENNSYLVANIA Evidence §651 (1953). For a discriminating exposition of how the term "presumption of fact" is properly used see Watkins v. Prudential Insurance Co., 315 Pa. 497, 500-01, 512, 173 Atl. 644, 646-47, 651 (1934).
59. See Morgan, op. cit. supra note 51, at 31-32.
effect commensurate with the strength of the reasons which induced its creation, has been termed an almost impossible task, a cure worse than the disease, and a solution more rational, but less to be preferred than that offered by a simple rule.\(^6\) The tradition has been to favor a one-rule world,\(^2\) although what that rule shall be is the subject of continuing dispute.

The classic approach of Thayer and Wigmore gave relatively little effect to presumptions; it merely placed a burden of going forward with contradicting evidence on the party against whom the presumption operated. The risk of non-persuasion did not shift, the burden of convincing the trier of the fact would remain on the party in whose favor the presumption ran if it was his without the presumption.\(^3\) Add only a rule that the jury need not even be informed of the existence of the presumption, and the impact is small indeed. As the Supreme Court of Oregon has so graphically described this view:

"when evidence is introduced to rebut the presumption—however weak the evidence may be\(^4\)—the presumption is overcome and destroyed. Some text-writers, law professors, and judges who have espoused the Wigmore doctrine have vied with one another in an effort to show how flimsy and unsubstantial a presumption of law really is. This 'phantom of the law' has been likened to bats 'flitting about in the twilight and then disappearing in the sunshine of actual facts,' and to a house of cards that topples over when rebutted by evidence. It remained for Professor Bohlen to head the class when he said a presumption of law was like Maeterlinck's male bee which, after functioning, disappeared." \(^5\)

**The Pennsylvania Decisions**

Pennsylvania had long held that a presumption was more than a bat or a bee. It was given the effect of shifting not only the burden of coming forward with evidence, but of shifting the risk of non-persuasion as well; if the trier of the fact be undecided let the decision be in favor of the existence of the presumed fact.\(^6\)

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64. Cf. *Model Code of Evidence*, Rule 704 (1942) where the quantum is expressed as evidence which would support a finding of the non-existence of the presumed fact.
66. Doud v. Hines, 269 Pa. 182, 112 Atl. 528 (1921) (presumption of negligence). "It is difficult to see how a presumption could be successfully rebutted except by a preponderance of the evidence." *Id.* at 185, 112 Atl. at 529; Holzheimer v. Lit
Then came Watkins v. Prudential Insurance Co.\textsuperscript{67} Plaintiff sued on an accidental death policy. His was the burden of proving that the carbon monoxide poisoning from which the insured had died was accidental, and he invoked the presumption against suicide to come to his aid. The trial court charged that the presumption "has the same probative force and effect as direct evidence of accidental death" and that unless "the jury find that the evidence of the defendant outweighs the presumption . . . the verdict must be for the plaintiff."\textsuperscript{68} The verdict was for the plaintiff and the supreme court reversed. Confusion in Pennsylvania law is alleged to have resulted.

Yet Mr. Justice Maxey's erudite discussion and, more particularly, the holding on the particular facts before him seem eminently sensible when read against the background of the period. That the suicide rate rises in periods of economic depression is well known. Less well known yet highly relevant is the fact that "[a]sphyxiation by carbon monoxide accounts for about 25\% of all suicides, and is the method of choice in urban centers" so that proof of death by this means "will usually stir the insurer to intensify a search for other extrinsic suicide evidence."\textsuperscript{69} Whatever the basis for a presumption against suicide in other situations, was there not reason for asserting that, as applied in Watkins, no "conclusion firmly based upon the generally known results of wide human experience" supported the assumption of accident?\textsuperscript{70}

\textsuperscript{67} Brothers, 262 Pa. 150, 105 Atl. 73 (1918) (presumption of agency); Vuille v. Pennsylvania R.R., 42 Pa. Super. 567 (1910) (presumption of injury by last carrier).

There are many cases which require submission to the jury of a disputed question of fact, e.g., Francis v. Prudential Ins. Co., 243 Pa. 380, 90 Atl. 205 (1914) (presumption of receipt of letter) and hence might be thought to show rejection of the Thayer view. However, it is essential to note that even for Thayer a jury question might arise as a result of the inference to be drawn from proof of the basic fact, and it is rare that appellate opinions spell out precisely which party has the risk of non-persuasion. Furthermore, in some cases which do appear to reject the Thayer view, the decisions may be supported on the basis of an intermediate view, lying between the complete shift of the burden of proof, known as the Pennsylvania rule, and Thayer's "bursting bubble" theory. See discussion in text following note 87 infra. This is particularly true in cases such as Williams v. Ludwig Floral Co., 252 Pa. 140, 97 Atl. 206 (1916), which emphasize that the credibility of the rebutting evidence is for the jury and have no need or occasion to specify where the risk of persuasion lies. All such cases, however, are consistent with the view that a presumption shifts the risk of non-persuasion and the commentators so classified Pennsylvania. See authorities cited supra note 50; Gausewitz, supra note 62, at 331.

Conmey v. Macfarlane, 97 Pa. 361 (1881) (presumption of consideration arising from a negotiable instrument) is early authority for the Thayer view. It does not, however, seem to have had any effect on presumption law in Pennsylvania. See discussion in text following note 89 infra.

\textsuperscript{68} Id. at 500, 173 Atl. at 646.

\textsuperscript{69} Id. at 500, 173 Atl. at 644.

\textsuperscript{70} It is noteworthy that the opinion goes into a statistical study of suicides compared to fatal accidents and Mr. Justice Maxey concludes that "it might easily
The Watkins case has been frequently cited on the effect to be accorded presumptions, yet it seems indisputably clear that Mr. Justice Maxey was holding that there was no presumption in the case which could have any effect; there was only an inference which the jury might, under appropriate instructions, choose or refuse to draw. Five times the opinion refers to the "so-called 'presumption against suicide'", repeatedly asserting that it "is merely an inference or argument" and not a presumption binding until disproved. As though there might yet be doubt, Mr. Justice Maxey, in a now-famous passage, proceeds to explain how presumptions arise, into what categories they fall, how the categories may be illustrated, and finally to demonstrate that the "so-called 'presumption against suicide'" is not of these: "It is merely a permissible consideration of the non-probability of death by suicide."

The case disposed of, Mr. Justice Maxey nevertheless felt impelled to go further and explain that, in any event, presumptions are not evidence and should not be spoken of as having the "same probative force and effect as direct evidence." On this there is substantial agreement even among those who disagree on other aspects of presumption law. But in the course of his extended treatment of these and other facets of presumption doctrine, Mr. Justice Maxey quotes copiously from Wigmore, a bat and bee man whose view Pennsylvania had not theretofore accepted, and thus includes in his opinion citable authority for the limited Thayer view. It is significant that the Watkins opinion contains no serious evaluation of the procedural consequences which might result from a genuine presumption. This lack in what is otherwise an erudite, well-documented discussion lends fur-

happen in some years" that the number of suicides will exceed the number of fatal accidents. 315 Pa. at 506, 173 Atl. at 649. The opinion (in the official report) also italicizes "death by carbon monoxide poisoning." Id. at 504.


72. The opinion recognizes that the term "presumption of fact" has been used as a synonym of inference, disapproves the usage and is careful to point out that such "presumptions" are not presumptions at all. See discussion and authorities, note 58 supra.

73. 315 Pa. at 505, 173 Atl. at 648. Mr. Justice Maxey also discusses three main causes of "confusion of thought and expression in the understanding and application of this so-called 'presumption against suicide,'" the first of which is "the treating of an ordinary permissible deduction as a compellable assumption, i.e., as a presumption, putting on the person on whom it operates the burden of coming forward with opposing evidence. . . ." Id. at 507, 173 Atl. at 649.

74. Id. at 513, 173 Atl. at 651.

75. Id. at 500-02, 173 Atl. at 646-47 and quoting Thayer at 503, 173 Atl. at 647-48.
ther force to the conclusion that Mr. Justice Maxey had no intention at that time of changing the Pennsylvania law as regards presumptions generally. Whatever his intention, however, the opinion and its successors put Pennsylvania squarely in the doubtful column.

The post-Watkins history has not been even. In 1942 the superior court had before it a workmen's compensation statute which exonerated the employer in case of suicide, but which placed the "burden of proof of such fact" upon him. The court found this provision "merely a recognition and declaration of the legal 'presumption' against suicide," and, most remarkably, cited Watkins as authority. A year later Watkins was cited more accurately and, more significantly, by Maxey himself, now Chief Justice. Speaking for a unanimous court, he held that "an even balancing of the evidence on the issue of death by accidental means, or death by suicide, denotes that plaintiff failed to sustain his burden of proof." The jury had found for plaintiff, but judgment on the verdict was reversed and entered for defendant. It is not surprising to find no discussion of a presumption against suicide, for Watkins had held there was none, but gone, too, is any consideration of the inference against suicide. Even evidence of the

76. One year earlier Mr. Justice Maxey, discussing the presumption of due care on the part of a deceased, had said: "We find no evidence in this case so conclusively overcoming that presumption as to justify the court below in declaring Morin negligent as a matter of law." Morin v. Kreidt, 310 Pa. 90, 97, 164 Atl. 799, 801 (1933). Certainly this was no attempt to follow a "bursting bubble," Thayer view of presumptions. For Mr. Justice Maxey's later views, see his treatment of presumptions in the MacDonald case, discussed in text at note 92 infra.

77. PA. STAT. ANN. tit. 77, § 431 (Purdon 1952).


79. Waldron v. Metropolitan Life Ins. Co., 347 Pa. 257, 31 A.2d 902 (1943). The quotation, from the headnote, is taken with slight change from Watkins, and was also included by Mr. Justice Maxey in Walters v. Western & Southern Life Ins. Co., 318 Pa. 382, 388, 178 Atl. 499, 501 (1935). The opinion in Walters is an emphatic reiteration of Watkins. The supreme court, however, affirmed despite the presence in the charge of sentences which, taken alone, would have constituted reversible error and warned that the use of the word "presumption" in the manner of the charge and as used by the superior court was not sanctioned. There is some emphasis in the opinion on the fact that the trial court had acted before the opinion in Watkins was handed down.

80. How strong such an inference must be to avail plaintiff is a difficult problem. There is language that accident, rather than suicide, must be shown to be "the reasonable and not a reasonable inference or probability", yet an analysis of the factual situations adjudicated do not readily fall into a satisfactory pattern. Taintor, supra note 71, at 195-97, discusses a number of the cases and concludes that since Watkins "a presumption against suicide, or some other unidentified rule of law" aids plaintiff in meeting this burden. Id. at 195. His argument is based, first, on his conclusion that in certain cases "it cannot be said that 'accident' was the reasonable inference: the most that can be said is that it was a reasonable inference." Id. at 196. This, it is respectfully submitted, does no more than demonstrate the inadequacy and perhaps inaccuracy of the "the-a" formula quoted above. Taintor argues further in support of a post-Watkins presumption against suicide from the cases which apply the workmen's compensation statutory assignment of the burden of proof, a conclusion which is highly debatable.

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cheerful spirits of the deceased shortly before the event is given short shrift with the comment that "In many cases suicide results from a sudden impulse. What motivates suicide," the court concludes in a philosophical vein, "is often a mystery." 81

This holding is certainly debatable, but the debate will advance our inquiry no further than to affirm or negate the desirability of a presumption against suicide in actions on this particular type of insurance policy. It is the broader context of what to do about recognized presumptions and the legacy of Watkins in this area which is our primary interest.

Language of all types abounds. A 1954 supreme court opinion repeats, quite unnecessarily, the old shibboleth that the "burden of proof" (as distinguished from the burden of going forward with the evidence) never shifts, 82 a palpably inaccurate statement which has been at the root of the view that a presumption therefore cannot shift the risk of non-persuasion. 83 Lest this be thought to represent a devoted return to Watkins it should perhaps be added that the opinion also states that the "effect of the presumption is the same as though direct evidence of payment had been introduced." 84 Because appellate opinions have their primary impact, if not function, in cases other than the one whose caption they carry, because they are studied with such thoroughness by bench and bar and constitute authority for what they say as well as for what they do, 85 there is utility in commenting even on the language of an appellate court, particularly one so highly regarded. Yet it is the holdings which must engage our major attention. These reveal that certain presumptions continue to shift the risk of non-persuasion in Pennsylvania. 86

83. See, e.g., discussion of this "troublesome cabala or mystic doctrine" in Maguire, op. cit. supra note 50 at 177, 186-87. Where a presumption of legitimacy is involved it seems clear that the risk of non-persuasion shifts, to instance but one indisputable situation. For a discussion of Thayer's analysis of such cases, see Morgan, Presumptions, 12 Wash. L. Rev. 255, 278 (1937).
85. Llewellyn, The Bramble Bush 68 (1951 ed.) discusses the use of a court's language, even "dicta which are grandly obiter" as authority, and concludes such use to be "recognized, legitimate, honorable."
86. Corn v. Wilson, 365 Pa. 355, 75 A.2d 530 (1950) (presumption of payment); Grenet's Estate, 332 Pa. 111, 2 A.2d 707 (1938) ("The presumption of payment arising from lapse of time . . . amounts to nothing more than a rule of evidence which reverses the ordinary burden of proof and makes it incumbent upon the creditor to prove, by preponderance of the evidence, that the debt was not actually paid." Id. at 113, 2 A.2d at 707-08); Obici Estate, 373 Pa. 567, 97 A.2d 49 (1953) (presumption of continuing domicile with indications in the opinion that the quantum of proof necessary to rebut may even be more than beyond a reasonable doubt); McNulty v. General Am. Life Ins. Co., 153 Pa. Super. 288, 33 A.2d 796 (1943) (presumption of death after seven years absence; non-jury case which ap-
There are, however, Pennsylvania cases which treat certain presumptions as of the Thayer variety. Yet even these did not follow Thayer all the way. For Thayer the introduction of rebutting evidence, without more, would cause the presumption to vanish. The burden of going forward having been met, the purpose of the presumption was apparently shifts total burden). As was pointed out in note 66 supra, it is often difficult to determine from a reading of the cases whether or not the risk of non-persuasion has been shifted, and no doubt in many of them there is no need for the court to meet so refined a point. Sefton v. Valley Dairy Co., 345 Pa. 324, 28 A.2d 313 (1942) (presumption of agency) is one of many cases entirely consistent with what is known as the Pennsylvania rule and cites with approval earlier authority (Holzheimer v. Lit Bros., supra note 66) which clearly applied that rule. Hence it is more than probable that such cases represent the shifted-burden view, although they are also consistent with other views discussed in the text at note 91 infra.

Instance, too, District of Columbia's Appeal, 343 Pa. 65, 21 A.2d 883 (1941) (presumption of parentage arising from presence of the child in the household at an early age). The court states without equivocation: “We hold that the presumption here involved may be rebutted by a fair preponderance of the credible evidence.” Id. at 77, 21 A.2d at 889. Yet earlier the opinion cites with approval not only Watkins but a Vermont opinion which was influenced by Watkins to adopt the Thayer position and, further, quotes from Wigmore to the effect that the presumption has vanished on the introduction of rebutting evidence “because its function was as a legal rule to cast upon the opponent the duty of producing evidence, and this duty and this legal rule he has satisfied.” Id. at 75-76, 21 A.2d at 889. Perhaps the key to the apparent difficulties lies in the assumption of the court that one side or the other will have persuaded the trier of the fact on the actual evidence and, in the absence of a jury to be charged, no consideration need be given to who prevails if the trier is undecided. Says the court: “It cannot be doubted that when all the evidence was presented in this case the presumption had been sufficiently rebutted and that it became necessary to weigh the evidence on both sides for the purpose of ascertaining where the preponderance lay.” Id. at 76, 21 A.2d at 889.

87. MacDonald v. Pennsylvania R.R., 348 Pa. 558, 36 A.2d 492 (1944) (presumption of negligence, discussed in the text at note 92 infra); Schell v. Miller North Broad Storage Co., 142 Pa. Super. 293, 16 A.2d 680 (1940) (presumption of liability-creating conduct by bailee, discussed in the text at note 127 infra); Henes v. McGovern, 317 Pa. 302, 176 Atl. 503 (1935) (presumption against a gift). The opinion by Justice Maxey in the last mentioned case places a great deal of emphasis on the fact that only the burden of going forward is shifted by a presumption and after pointing out that credibility of the rebutting witnesses is for the jury, concludes that the jury has apparently not believed them. This analysis is in accord with the discussion in the text at note 91 infra. It is doubtful, however, that the holding would have been any different if the risk of non-persuasion had been held to have been shifted. Geho's Estate, 340 Pa. 412, 17 A.2d 342 (1941) (presumption of validity of a will) follows the Thayer analysis, but on its facts represents no more than a holding that there was insufficient rebutting evidence.

The procedural effect of the presumption of negligence (MacDonald v. Pennsylvania R.R., supra) is not altogether free from doubt. After Watkins and before MacDonald the supreme court decided Norris v. Philadelphia Electric Co., 334 Pa. 161, 5 A.2d 114 (1939) in which they held that the doctrine of res ipsa loquitur was not applicable on the facts of that case. The court was persuaded to hold res ipsa loquitur inapplicable because the presumption of negligence to which it gives rise was "so strong," having the effect of placing on the defendant the "duty to establish a preponderance of the evidence that the accident occurred notwithstanding his exercise of care." Id. at 163, 5 A.2d at 115. Archer v. Pittsburgh Ry., 349 Pa. 547, 37 A.2d 539 (1944), decided only a few months after MacDonald, has been cited to the effect that the presumption of negligence shifts the "burden of persuasion." Brown, Pennsylvania Evidence 1 (1949). The case is not altogether free from ambiguity, as it might well be concerned with no more than the burden of going forward. See general discussion in Forrest, Trend of Application of the Doctrines of Res Ipsa Loquitur and Exclusive Control in Pennsylvania, 58 Dick. L. Rev. 363, 367-68 (1954). See also Note, 57 Dick. L. Rev. 234, 243 (1953) which concludes with the certainty of "doubt as to the effect of the presumption of negligence in Pennsylvania res ipsa loquitur cases."
accomplished and at that point it disappeared. This, too, was the Model Code position. No matter how lacking in trustworthiness the rebutting witnesses were, the presumption vanished on the introduction of their testimony. Not so in Pennsylvania. Cases which quoted Thayer and purported to follow him required more than the presence of rebutting evidence on the record. It was for the jury to believe or disbelieve evidence so introduced before a presumption might be dissipated. Could anything less, asks a recent commentator, be reconciled with the fundamental concept of the "bipartite constitution of the common law tribunal"? In effect, even while following Thayer, Pennsylvania accepted the modification of Professor Bohlen who had long before argued that "[i]t is the duty of him against whom any presumption operates to produce evidence, not merely witnesses, and therefore he must satisfy the jury of the credibility of his witnesses."

Let MacDonald v. Pennsylvania R.R. serve as illustration. Plaintiff administrator proved no more than that decedent was killed while a passenger in defendant's wrecked railroad car. This raised a presumption of negligence. Defendant introduced evidence tending to show sabotage and not negligence, evidence "of such a convincing character" that a verdict of no liability was "clearly called for." Under the Thayer view the presumption having been dissipated and there being insufficient evidence to support a verdict for plaintiff, judgment n. o. v. would be in order. This the lower court entered, only to be reversed: it is for the jury to believe or disbelieve the evidence of sabotage unless (1) it consists of incontrovertible physical facts or (2) comes from a witness of the plaintiff whose testimony is binding upon him.

In theory, as evidenced by the carefully selected language of the opinion, MacDonald is straight Thayer except for the "independent" problem of the jury's right to pass on the credibility of a witness, an area in which Pennsylvania doctrine of long standing has been

88. MODEL CODE OF EVIDENCE, Rule 704 (1942).
89. MAGUIRE, op. cit. supra note 50, at 189 et seq.
93. Id. at 563, 36 A.2d at 495.
94. Morgan, supra note 57, at 17, discussing the MacDonald case suggests that "the result might possibly be explained by arguing that a derailment of a passenger car carrying passengers on a regular route and schedule justifies an inference of negligence, but I believe this was not what Mr. Chief Justice Maxey intended to hold." Cf. Rennekamp v. Blair, 375 Pa. 620, 101 A.2d 669 (1954), discussed in Forrest, supra note 87, at 364. Also see discussion of collected authorities in Note, The Inference of Negligence in Pennsylvania, 24 TEMP. L.Q. 453, 454-55 (1951).
stringent to prevent incursions by the judge. In theory, at least, this is different from a determination that the risk of non-persuasion has shifted to the defendant. Nor are differences in theory to be minimized; they can and do result in differences in practice. In some cases plaintiff will not be able to reach the jury. In others the charge of the judge, informing the jury which side must convince them in

95. Two of the leading cases are Hartig v. American Ice Co., 290 Pa. 21, 137 Atl. 867 (1927) (opinion by Mr. Chief Justice von Moschzisker) and Nanty-Glo Boro v. American Surety Co., 309 Pa. 236, 163 Atl. 523 (1932) (Mr. Justice Schaffer dissenting, as he did in Hartig). The latter case does not involve presumptions at all and both are typical of many pre-Watkins decisions on the credibility problem.

96. Morgan, in his recent, pithy text, presents eight separate positions to range the gamut from pristine Thayer to the "Pennsylvania rule." 1 MORGAN, op. cit. supra note 51, at 33-35.

97. A Pennsylvania litigant is bound by uncontradicted testimony introduced by him, even that of a witness called as on cross-examination, Scacchi v. Montgomery, 365 Pa. 377, 75 A.2d 535 (1950), so long as the trial judge does not find it incredible, or it is otherwise inherently improbable, Matthews v. Derencin, 360 Pa. 349, 62 A.2d 6 (1948); Marach v. Kooistra, 329 Pa. 324, 198 Atl. 66 (1938). Where such evidence conclusively rebuts a presumption, as for example, that of agency, nothing remains for submission to the jury regardless of which theory of presumptions applies. Kunkel v. Vogt, 354 Pa. 279, 47 A.2d 195 (1946) (alternative holding; opinion by Stern, J.) Instance, however, the following situation: plaintiff relies on the presumption of agency arising from defendant's name on a commercial vehicle. A witness for plaintiff, called as on cross-examination testifies that (1) the driver in question was under orders not to use the truck on Sundays (the accident having occurred on a Sunday) except for emergency situations and (2) that he, the witness, heard of no such emergency on the day in question, although he probably would have learned of one had it occurred. No question of credibility is involved. Following Thayer, there would seem to be no question for submission to the jury; defendant must prevail. Sufficient evidence has been introduced to support a finding for defendant, the presumption is thus dissipated, and there would seem to be insufficient strength from the inference which might be drawn from the basic fact to support a verdict for plaintiff, in view of all the testimony. If, however, the burden of persuasion was on the defendant to disprove agency, it would seem that the jury might well find that the testimony as to emergency, although sufficient to support a verdict for defendant, did not satisfy this jury by a preponderance. Cf. Readshaw v. Montgomery, 313 Pa. 206, 169 Atl. 135 (1933) (questioned in Brown, op. cit. supra note 87, at 302. Instance another situation: plaintiff contracts with defendant insurance company that "mysterious disappearance" of an article insured under the theft policy in question would be presumed due to theft. Plaintiff's evidence includes testimony from which the jury might legitimately infer non-felonious loss of the article. Credibility not being involved, and sufficient evidence to support a verdict for defendant having dissipated the presumption in Thayer's view, there would seem to be nothing to submit to the jury, unless one took the doubtful position that mere loss would create an inference of theft sufficient to sustain a verdict. Yet, the risk of non-persuasion placed on defendant might well allow a jury to find that the burden of establishing loss as distinguished from theft had not been met. Cf. Sigel v. American Guarantee & Liability Ins. Co., 173 Pa. Super. 434, 98 A.2d 376 (1953) where the court gave effect to the contractual provision discussed above, but appeared to treat the presumption as only one "of fact," in the sense of inference, despite its recognition that logically there was no inference. The trial court had charged that the jury might presume theft while yet emphasizing that the burden of proof was upon the plaintiff. Affirmance of an award of a new trial by the trial court en banc is discussed in note 98 infra.

Various additional hypothetical situations may be put. In situations involving presumptions of negligence, where the rebutting evidence tends to negate only one of various types of possible negligence, it is important to consider whether such evidence, even if believed, is broad enough to rebut the presumption, even under the Thayer view. See discussion of the "extensity" of presumptions in MAGUIRE, op. cit. supra note 50, at 184.
order to win, has a crucial impact. But the question remains: how significant is the difference in practice between MacDonald and what was long known as the Pennsylvania rule on presumptions? In most cases, having cleared the hurdle of getting to the jury, litigants will not be affected by the refinements. Wording a correct charge might have been thought a snare and a trap, but the Pennsylvania Supreme Court has repeatedly gone out of its way to affirm, even in the presence of incorrect charges on presumptions, if there is a basis for believing that the jury was fairly presented with an opportunity of choosing between the two versions of the dispute. Furthermore, competent judges have been known to avoid altogether informing the jury of the burden of persuasion in complicated presumption situations, preferring to state only the alternatives which the triers may find if they choose to believe the version of one or the other of the litigants.

Hence it seems fair to conclude that despite the vast amount of alleged confusion in Pennsylvania law and the differences in theoretical rationale between the various cases, in practice Pennsylvania's treatment of recognized presumptions has not been radically altered since pre-Watkins days.

In describing the law that is, there remains to be mentioned a further category of presumptions, those founded on a public policy so strong that the law requires a measure of persuasion greater even than a preponderance of the evidence to rebut them. The familiar presumption against illegitimacy, for example, must be met with proof that is not only clear, direct and satisfactory, but irrefragable as well.

Effect of the Uniform Rules

The Uniform Rules are much indebted to Pennsylvania law. The bulk of cases which may be expected to come under Rule 14, "Effect of

98. Even a correct charge may so over-emphasize and stress the burden of proof as to induce the lower court to grant a new trial because the jury may have been misled. In Sigel v. American Guarantee & Liability Ins. Co., 173 Pa. Super. 434, 98 A.2d 376 (1953) award of a new trial in such circumstances was affirmed. The verdict in De Reeder v. Travelers Ins. Co., 329 Pa. 328, 198 At. 45 (1938) is understandable in terms of a strong charge. See Morrisey, Tores 138 (1933) where, discussing the charge on allotment of burdens, the author concludes: "Unfortunately the fate of litigants may turn on such jury charges; laymen are skeptical about the value of circumstantial evidence and instructions on who has burden of conviction may prove crucial."


100. See the discussion in the text at notes 132-43 infra on the use of the term presumption in charging the jury.


Presumptions," will be decided in accordance with what was so long referred to as the Pennsylvania rule. The Uniform Rules do attempt, and to a great degree achieve, a balance between flexibility and certainty, allowing for differences in the treatment of different types of presumptions, yet preventing that total loss of predictability and certainty which would make the Rules impossible.

Specifically, they provide that, if the basic fact has probative value as evidence of the fact to be presumed, the burden of establishing the non-existence of the presumed fact is then on the litigant against whom the presumption operates—in short, the burden of proof, in the broader sense, is shifted. If, however, the presumption is one of the comparatively few in which the basic fact would not be evidence of the presumed fact, the presumption shifts no more than the burden of going forward with the evidence: rebutting evidence having been introduced, the presumption disappears. Finally, if the presumption is one which, by rule of law, may be overcome only by proof beyond a reasonable doubt or by clear and convincing evidence or by some other quantum greater than a mere preponderance, then the burden of producing that measure of proof is on the litigant against whom the presumption operates.

A corollary and immediate advantage of the Rules described above is to be found in the provision governing inconsistent presumptions. The Model Code stated simply that they cancelled each other, a result which followed logically from its espousal of the Thayer position. The desirability of that conclusion may, however, be questioned. Instance the case of the woman whose husband had been missing for less than seven years, long enough to induce her to marry another, yet not long enough for the law to presume death. Is she, years later, to be denied status as a widow of her second spouse because of a lack of capacity at the time of the second marriage? The New Jersey court held in the negative. Analyzing the problem as a conflict between the presumption of the continued existence of husband number one and the presumption of innocence which would validate the common

103. URE Rule 14(a). See Rule 1(4) for definition of "Burden of Proof" as used in the Rules.
104. URE Rule 14(b).
105. URE Rule 16.
106. MODEL CODE OF EVIDENCE, Rule 704(2) (1942).
law marriage to spouse number two, the opinion finds the latter presumption based on a public policy sufficient to outweigh the former. This is the approach of Uniform Rule 15 which provides that the judge shall apply that presumption which is "founded on the weightier considerations of policy and logic." If no such considerations are present, then both presumptions shall be disregarded. With this approach Pennsylvania appears to be in accord.108

In attempting to assess the impact which adoption of the Uniform Rules would have in Pennsylvania, we are met at the threshold with the question of how the courts will categorize existing presumptions. Which will be held to be based on facts which have "probative value as evidence of the existence of the presumed fact" and which not? Obviously, the categorization would be crucial under the proposed new formula. The comment provided by the Uniform Commissioners is of help in applying the standard: it makes clear that most presumptions are to be considered as based, at least in part, on facts with probative value.109 These, of course, shift the risk of non-persuasion. Some, such as the presumption that a letter mailed is received in due course, or the presumption of payment, are clearly in this category. They may be expected to raise no problems and to receive substantially identical treatment under the new rules.110 Others, such as the presumption of negligence in certain of the railroad cases or the presumption that the driver of a truck with defendant's name on it was within the scope of his employment at the time of the accident, are not free from doubt.111 There are indications, however, that even these may appropriately be considered as based in part on facts with probative value as evidence of the fact to be presumed.112 If so, then the treatment accorded them

109. "Nearly all presumptions are of this sort." URE Rule 14, comment.
110. Treatment would be identical where current law shifts the risk of non-persuasion, Grenet's Estate, 332 Pa. 111, 2 A.2d 707 (1938) cited note 86 supra. For discussion of the presumption of delivery of a letter mailed see note 66 supra. But see Teitelbaum v. Board of Revision of Taxes, 65 D. & C. 619 (1947) for a review of authorities on the scope of the presumption and on its effect. The case does recognize that the presumption is "[f]ounded in common experience." Id. at 628. For problems in the scope of rebuttal, see Wagman v. Paradise Mutual Fire Ins. Co., 79 D. & C. 72 (1951).
111. "Certainly it could hardly be seriously contended that the mere fact that defendant's name was painted on a truck was the basis of a justifiable inference that the driver at the time of the accident was defendant's servant acting in the scope of his employment." Morgan, supra note 57, at 17. Viewing the problem statistically, and without any further evidence in the case, is this objection well taken? See note 112 infra.
112. See Mr. Justice Musmanno in Fullerton v. Motor Express, Inc., 375 Pa. 173, 176, 100 A.2d 73, 74 (1953): "The most elementary rules of logic . . . demand that the law" recognize the presumption of agency. The comment to Rule 14 includes this presumption among those which are based on a rational inference.
under the Rules will either be identical with present law, or involve changes of little significance, for, as was developed above, treating a presumption as disappearing only after the jury has passed on the credibility of the rebuttal witnesses does not involve differences of far-reaching consequence compared to the view which shifts the risk of non-persuasion. Whatever changes may appear in the treatment of the vast bulk of presumptions which do have the “probative value” required by Rule 14(a) will, at most, prove a simple price to pay for the new simplicity which the Uniform Rules would introduce.

There may develop presumptions which would be categorized as based on facts without “probative value.” There have been instances in the past of presumptions of convenience so clearly without inference value, as, for example, a presumption of the first, or last carrier having been negligent in the handling of goods. If the text of Rule 14(b) be followed, these will disappear “when evidence is introduced” which would rebut them. Credibility of such evidence would not necessarily go to the jury, so long as the judge found that such evidence was sufficient to “support a finding of the non-existence of the presumed fact,” unless the text of the Rule were changed or “interpreted” severely.

A further variable is deserving of attention. What a court will choose to recognize as a presumption is neither immutable nor fixed. On the contrary it is very much subject to change and, in attempting to predict the effect the Uniform Rules, it is important to recognize that the very adoption of new formulae may act as a stimulus. The presumption against suicide is an example. No doubt adoption of the Uniform Rules would give rise to an attempt to have this presumption recognized in the insurance cases inasmuch as the comment to Rule 14 refers to it as one of the common examples of a presumption based on probability. This change would seem to be to the good, even though “carbon monoxide in a depression” may cause occasional dif-
ficulty. Certainly some of the cases discussed earlier appear doubtful in result. Yet a decision either way on this particular presumption would not go to the warp or woof of our law. It is cited here simply as an example of a possible change in the roster of recognized presumptions.  

Phrased in more general terms, the question presented is: What roster of presumptions would the court continue to recognize after adoption of new rules? If additions may be made to the present list, deletions are no less possible. If the court would find that the Uniform Rules would change the result in a particular situation so long as the analysis bears the “presumption” label, will the court change the label to insure no change in the law? This may prove a perfectly proper and desirable result with a basis in the precedents. There has in fact been a history of the use of the “presumption” label to develop a rule of law in Pennsylvania followed by retention of the rule after all mention of presumptions has ceased. This is not difficult to understand, for the briefest reflection on as typical a case as MacDonald will demonstrate that precisely the same conclusions can be reached without reference to the presumption of negligence, talking only of the right to get to the jury, the risk of non-persuasion and the burden of going forward.

Interrelationship with the Substantive Law

To understand such changes in terminology as have been occurring and to evaluate their implications, it is necessary to consider the role of presumptions in the development of the substantive law and the role of the substantive law in the development of presumptions. Particularly is this true in the tort area. Mr. Justice Musmanno only a year ago explained the function of one of the Pennsylvania presumptions, commonly invoked in accident cases, in terms of its impact on “correlative social responsibility.” This is neither startling nor novel: Bohlen called attention to the role of the rebuttable presumption in allowing courts to go half-way on the road to a redefinition of substantive law, in making for “a compromise between the modern theory

117. See text at note 79 supra et seq.
119. See text following note 126 infra.
of tort liability as based exclusively on fault and the more modern renaissance of the ancient concept that every one must answer for the harm done even by his most innocent acts.”

The rebuttable presumption, Bohlen continues, is often a device for allowing courts to adjust the rights of the litigants “as though the fact assumed did exist” while they yet refuse definitively to change the substantive rule by holding the fact in question legally irrelevant. “And the common law,” he concludes, “has never shrunk from such compromise if by the sacrifice of logic and symmetry it could reach a workable rule.”

Modern appellate opinions on presumptions leave one with no less of a feeling that once again the substantive law is developing within the “interstices of procedure.” This is not only true with respect to the presumption of negligence, of due care by a deceased, of a servant having acted within the scope of his employment if the truck he drove had defendant’s name on its side, but with respect to other presumptions as well.

What is important, however, is that having developed a particular rule aided by presumption analysis, it has been possible for the courts to continue it unchanged while abandoning talk of presumption law and analysis of presumption precedents. Instance treatment of the bailor-bailee situation. Presumptions played their role in developing a rule which finally provided that on a showing of the bailment, demand and failure to return, plaintiff bailor had established a prima facie case. Thereafter it was for defendant to explain the cause of loss, his being the burden of going forward with the evidence. When the problem came to the supreme court in 1950, a lucid opinion describes the various burdens and the procedural risks without any mention of presumptions. Half a century earlier, there had been much the same experience with respect to the presumption of consideration in a suit on

122. Bohlen, supra note 91, at 316.
123. Id. at 317.
124. Id. at 318.
125. The phrase is taken from Maine who wrote that “substantive law has at first the look of being gradually secreted in the interstices of procedure.” Quoted in Maitland, The Forms of Action at Common Law 1 (1936 ed.). Perhaps it is important to recognize that if substantive law has developed in the interstices of presumption, so has presumption law developed in the interstices of substantive considerations.
126. See Ladd, op. cit. supra note 54, at 751: “A more realistic consideration of the problem may be to eliminate the thought of presumption as shifting the burden and test the proper placement of the obligation of establishing proof upon substantive grounds.”
a negotiable instrument and only a year ago an opinion dealing with negligence of a railroad found no need for presumption talk.

Many of the rules developed by way of presumptions thus may be expected to persevere as equitable solutions of the procedural problems of negligence law, agency law or family law, or to serve as the bases for further refinements within the framework of those subjects. This is all to the good. Clarity, and conceivably some small measure of economy from a reduction in appellate litigation, may result. Furthermore, a measure of additional flexibility may be achieved when a judge or attorney dealing with carriers or marked trucks is emancipated from concern over the suicide cases or the procedural impact of reputation and cohabitation.

So much is true without reference to new rules and changed formulations. It is not hard to see that a proposed change in the treatment of presumptions may accelerate the process. Thus if we were to conclude that the Uniform Rules would make some difference in the law governing the presumption of negligence, it is not altogether unlikely that the court, if it thought the present result a desirable one, would allow it to remain unchanged. Nor is it improbable that the court, faced with the obligation of interpreting and applying new provisions not tailored especially for the negligence situation, might find appealing the suggestion of Dean Mason Ladd and "test the proper placement of the obligation of establishing proof on substantive grounds."

129. First Nat. Bank of Bangor v. Paff, 240 Pa. 513, 87 Atl. 841 (1913) which cites Conmey v. Macfarlane, 97 Pa. 361 (1881) and follows it—the last-mentioned case having been decided on a presumption rationale, but the Paff opinion not even mentioning the term. The problem is currently governed in Pennsylvania by the provisions of the Uniform Commercial Code, Pa. Stat. Ann. tit. 12A, §§ 3-306, 3-307, 3-408 (Purdon 1954). In view of the fact that the UCC was developed by the National Conference of Commissioners on Uniform State Laws and the American Law Institute as a joint project, and the same two bodies cooperated on the drafting of the Uniform Rules of Evidence and approving them, it is interesting to contrast the treatment of presumptions in the two proposals. The UCC provides in § 1-201 (31) that "'Presumption' or 'presumed' means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence." The important thing, however, is that the UCC was drafted with this definition in mind, other terminology being available to express the risk of non-persuasion. See definition of "Burden of establishing" a fact, § 1-201 (8).

130. Mack v. Reading Co., 173 Pa. Super. 296, 98 A.2d 399 (1953), aff'd, 377 Pa. 135, 103 A.2d 749 (1954). In the latter opinion Mr. Chief Justice Stern also talks in terms of burden of going forward, etc., but explains that the result follows even though there is no presumption of negligence. That the case talked "exclusive control" is not significant for our purposes, nor would differences between the doctrines of exclusive control and res ipsa loquitur affect the conclusion in the text. See also the treatment in such cases as Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953) and Commonwealth v. Montour Transport. Co., 365 Pa. 72, 73 A.2d 659 (1950).

131. See note 126 supra.
The Uniform Rules may also be expected to resolve another controversy of long standing with respect to presumptions, and to resolve it in a manner entirely consistent with Pennsylvania practice. One school of thought, associated primarily, but not exclusively with Thayer theory,\textsuperscript{132} would proscribe the word presumption from the judge’s charge, banning the term from within earshot of the jury. Contrary minded are those who believe that “the jury needs guidance in this situation if they are to give due effect to the probabilities and frequently the substantive policy”\textsuperscript{133} on which a particular presumption is based. Although the text of Rule 14 is silent on the subject of what to tell the jury about presumptions, the comment thereto makes it abundantly clear that the Commissioners do not favor the policy of silence. They refer with approval to the “common-sense practice of charging the jury as to certain presumptions having a substantial backing of probability.”\textsuperscript{134}

What the jury is told about presumptions is particularly important in situations where the person against whom the presumption operates already has the burden of proof in its fullest sense. Instance the presumption that one killed in an accident was exercising due care.\textsuperscript{135} When plaintiff administrator brings suit, the burden of proving contributory negligence is already on defendant.\textsuperscript{136} The presumption affects neither the duty to go forward nor the obligation to convince the trier of fact.\textsuperscript{137} Indeed, it has been likened to a “handkerchief thrown

\textsuperscript{132} URE Rule 14, comment. Cf. Judge Lummus during the American Law Institute debate: “The judge never ought to use the word ‘presumption’ to the jury under either rule.” 18 PROCEEDINGS A.L.I. 211 (1941) quoted in Falknor, supra note 34 at 987 n.145.

\textsuperscript{133} URE Rule 14, comment. Urging that the judge should charge in terms of presumptions in appropriate circumstances is McCormick, What Shall the Trial Judge Tell the Jury About Presumptions? 13 WASH. L. REV. 185 (1938), criticized in Falknor, Notes on Presumptions, 15 WASH. L. REV. 71, 80-81 n.26 (1940).

\textsuperscript{134} URE Rule 14, comment.


\textsuperscript{136} See Bernstein, supra note 135, at 27, 28 and authorities cited. In Rennekamp v. Blair, 375 PA. 620, 101 A.2d 669 (1954), the presumption of due care was invoked, not on the issue of contributory negligence (and thus in “aid” of plaintiff), but rather on the issue of negligence (for the “benefit” of defendant). Deceased was the pilot of defendant’s plane which had crashed and the opinion states that he would be presumed to have exercised due care, thus exculpating defendant in the absence of proof of negligence. Inasmuch as the burden of establishing negligence was on the plaintiff in the first instance, once again no change has been effected. However, this use of the presumption of due care may give rise to a problem in conflicting presumptions should it be invoked in a case where the relationship of carrier and paying passenger gave rise to a presumption of negligence.

\textsuperscript{137} For which reason Falknor, supra note 133, argues that the presumption should be abolished. Of course, a different situation is presented in jurisdictions which consider freedom from contributory negligence plaintiff’s burden. See LADD, op. cit. supra note 54, at 748. Not to be confused with this problem are the cases in which plaintiff’s evidence makes clear that the deceased was guilty of contributory negligence as a matter of law, thus leaving no room for operation of a presumption. Basel v. Pittsburgh, 350 PA. 545, 39 A.2d 582 (1944).
over something covered by a blanket.”138 Yet, the presumption may well have a significant impact on the jury if they are told of its existence in the law.139 True, a presumption is not evidence nor may it be weighed with evidence, but reference to it serves as a permissible form of comment on the evidence, pointing up in significant manner the inference potential of the human instinct for self-preservation and the weight which may properly be attached to it.140

Charging in terms of presumptions is a practice of long standing in Pennsylvania.141 There is even supreme court language which would appear to make such a charge mandatory in some situations.142 While it may well be doubted that an adequate submission of the issues without use of the term would constitute reversible error,143 it seems clear that the Uniform Rules would effect no change in current law, serving only as a preventive to possible recrudescence of the argument on silence.


139. See Falknor, supra note 133, at 77 n.21.

140. See McCormick, supra note 133, at 187-88; for a listing of the minority of jurisdictions in which comment on the evidence by the trial judge is allowed (including Pennsylvania) see VANDERBILT, op. cit. supra 46 at 229. Although the need for use of the term presumption is greater where there is no right of comment, and it is certainly true that a judge may accomplish virtually the same thing by discussion of the inference, charging in terms of "presumptions" may, in many cases, prove a ready means of conveying to the jury the judicial recognition accorded to the particular inference.

141. See, e.g., Watkins v. Prudential Insurance Co., 315 Pa. 497, 173 Atl. 644 (1934); Walters v. Western & So. Life Ins. Co., 318 Pa. 382, 178 Atl. 499 (1935). In Susser v. Wiley, 350 Pa. 427, 431, 39 A.2d 616, 618 (1944) Mr. Justice (now Chief Justice) Stern refers to a charge in terms of the presumption of due care as "the form ordinarily employed." This practice is understandable as Pennsylvania had not accepted Thayer theory, and no less so post-Watkins and MacDonald in view of the Pennsylvania position that a presumption disappeared only after the jury had passed on and accepted the rebutting evidence. As pointed out earlier in the text at note 100 supra, some judges avoid the term, preferring to rely on alternative formulations. See note 140 supra.

142. "The jury should have been instructed that, from the testimony adduced, a prima facie legal presumption arose that the appellee was negligent in the operation of its trolley car and that the burden was upon it to disprove that presumption." Archer v. Pittsburgh Ry., 349 Pa. 547, 549, 37 A2d 539, 540 (1944). For discussion of the ambiguity in the term "burden" see note 87 supra.

143. But cf. "Perhaps, as a purely procedural matter, plaintiff would have been entitled to an instruction as to the presumption of due care, had request therefor been made. . . ." Needleman v. Lloyd, 55 D. & C. 581, 586 (1946). The court goes on, however, to point out that in the particular case the judge would have been bound to couple such a charge with the statement that "the question of contributory negligence of the deceased would have to be decided on the evidence produced directed to that question and not on the presumption." Id. at 587. The case holds that in the absence of a request, failure to charge on the presumption was not the basis for a new trial. The supreme court has so held: Susser v. Wiley, 350 Pa. 427, 39 A.2d 616 (1944). It is difficult to conceive that a court would find prejudicial error and reverse for failure to use the term presumption in the charge, if the burdens and the issues had been adequately presented in other terminology.
In sum, then, the Uniform Rules present a rational, practicable approach to presumptions. In large measure, they have promulgated for general acceptance the view to which Pennsylvania long adhered as a minority of one.\textsuperscript{144} However practical and satisfactory Pennsylvania holdings are in this area, the "law" is somewhat complex and there is ample evidence that a measure of relief from the complexity would prove a boon to the bar. Judge Learned Hand made the point in striking fashion when he said of presumption law: "Judges have mixed it up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't care much what it is."\textsuperscript{145} Certainly the Rules would appear to meet the criteria about which Judge Hand does care. They may be expected to effect some changes in Pennsylvania law, although these would hardly be termed radical. There may, in fairness, be some expenditure of time and money to accomplish the transition. The net result, however, is likely to be a product more readily understood and more easily applied. If this be so, the price of the change will have proved worthwhile.

(to be concluded)

\textsuperscript{144} 18 PROCEEDINGS A.L.I. 211 (1941).

\textsuperscript{145} Id. at 217-18. \textit{Cf.} Judge Augustus Hand speaking at the same session of the American Law Institute which was discussing which provision to adopt as the Model Code rule: "I have been converted, reconverted, unconverted, deceived, disillusioned and had all sorts of things done to me in this field . . . and I really believe, as I feel now—I may change in five minutes—in this confusing subject. . . ." 18 PROCEEDINGS A.L.I. 208-09 (1941), quoted in Falknor, \textit{supra} note 34, at 987 n.145. The Institute vote was 59 to 42 on the question of which rule to adopt. 18 PROCEEDINGS A.L.I. 226 (1941). \textit{Cf.} 9 Wigmore, \textit{Evidence} \S 2498(a), p. 335 (3d ed. 1940); "No one who has recorded his views upon this subject has expressed contentment with the present condition of the law."