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THE UNFULFILLABLE PROMISE OF ONE RULE FOR ALL PRESUMPTIONS

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Courts and legislatures have used the term "presumption" to describe a variety of relationships between sets of facts. Dean Broun defines a "true" presumption as "a rule of law which provides that if a particular group of facts has been established, another fact is deemed established." After examining other ways in which the term has been used, Dean Broun chronicles the unsuccessful search for a uniform presumption rule. This search has not been successful because the policy considerations behind presumptions may call for different procedural consequences. For example, varying policies may demand that some presumptions operate to shift the burden of producing evidence, while others operate to allocate the burden of persuasion. Instead of attempting to formulate yet another single rule to govern presumptions, Dean Broun concludes by proposing a statutory framework that expressly deals with their complexity.

The legal term "presumption" confuses almost everyone who has ever thought about it. That confusion is fully justified. Not only are the concepts represented by the term complex, but courts and legislatures have used the term in many different and often inconsistent ways.[1] Despite many well-written attempts to define and distinguish presumptions from related concepts,[2] this confusion continues.

Rather than attempting to provide yet another statement of the "correct" meaning and use of the term, this Article simply discusses the various ways in which the term has been used and suggests a statutory pattern that might rationalize the process of applying presumptions without confining courts or legislatures to a single definition or effect.[3] This discussion considers some of the

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This Article is based in part on Chapter 36 of C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (E. Cleary 3d. ed. 1984), of which Dean Broun is the author.

1. One author has listed eight senses in which the term has been used by the courts. *See* Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-207 (1953).

2. Some of the more recent scholarly efforts include Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981) [hereinafter cited as Allen, *Presumptions*]; Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecesary Ambiguity and a Proposal for Reform*, 76 NW. U.L. REV. 892 (1982) [hereinafter cited as Allen, *An Anatomy*]; Hecht & Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U.L. REV. 527 (1978); Ladd, *Presumptions in Civil Actions*, 1977 ARIZ. ST. L. J. 275.

3. This Article will deal only with presumptions in civil cases. Serious constitutional problems are involved with the operation of presumptions in criminal cases and, therefore, the topic requires special treatment. For recent discussions of presumptions in criminal cases, see C.

recent enactments, including the Federal Rules of Evidence, the revised Uniform Rules of Evidence, and some state variations on them, and indicates how these statutes may be exacerbating, rather than resolving, the dilemma.

The basic premise of this Article is that courts and legislatures will continue to use the term presumption in many different ways no matter how clear scholars make the problem. Furthermore, even with what most writers would call true presumptions, different procedural effects may be justified depending on the particular presumption involved. The attempts to provide one rule for all presumptions have been dismal failures; it is time to recognize the futility of the effort.[4]

I. USES OF THE TERM "PRESUMPTIONS"

A. The Standard Definition

All scholars seem to agree that a "true" presumption is a rule of law which provides that if a particular group of facts has been established, another fact is deemed established.[5] If the opposing party introduces no rebutting proof, the trier of fact must find the existence of the presumed fact. In other words, the establishment of facts sufficient to create a presumption shifts at least the burden of producing evidence to the opposing party. Such presumptions are sometimes referred to as "mandatory" presumptions.[6]

For example, a rule of law exists in North Carolina and elsewhere that the registration of a deed raises a presumption of its due execution, including both signing and delivery.[7] Once evidence sufficient for a jury to find registration is introduced, an opposing party who contends, for example, that the deed was never delivered must introduce evidence sufficient for the jury to find nondelivery.[8] In other words, the proponent of the deed has met his burden of producing evidence through use of the presumption. The presumption further operates to shift a burden of producing evidence to the opposing party to in-

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MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 346-347 (E. Cleary 3d ed. 1984); Allen, *Structuring Jury Decision-Making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980); Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

4. The situation in North Carolina illustrates the problem. Dean Henry Brandis, in H. BRANDIS, NORTH CAROLINA EVIDENCE § 218 (2d rev. ed. 1982), states that most commonly a presumption operates only to shift the burden of production, the Thayerian view discussed below. Statements in various judicial opinions support his view. *See, e.g.*, the discussion in Moore v. Union Fidelity Life Ins. Co., 297 N.C. 375, 255 S.E.2d 160 (1979), including the dissent by Copeland, J. Yet of the nineteen illustrative presumptions discussed by Dean Brandis likely to be applicable in civil cases, only three clearly operate in pure Thayerian fashion. Eight operate to assign the burden of persuasion and four operate as inferences of prima facie cases. The others have various or uncertain effects. H. BRANDIS, *supra*.

5. *E.g.*, Hecht & Pinzler, *supra* note 2, at 528; Ladd, *supra* note 2, at 277; Laughlin, *supra* note 1, at 207.

6. This was the terminology used in the first edition of C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 308 (1954).

7. *See* Belk v. Belk, 175 N.C. 69, 72, 94 S.E. 726, 727 (1917); Perry v. Suggs, 9 N.C. App. 128, 175 S.E.2d 696 (1970).

8. *See* Merchants & Farmers Bank v. Sherrill, 231 N.C. 731, 732, 58 S.E.2d 741, 742 (1950).

troduce evidence of nondelivery. In this instance, the burden of persuasion remains on the proponent of the deed.

B. Inferences, Prima Facie Cases, and Permissive Presumptions

Sometimes the courts and legislatures will use the term presumption to mean that the establishment of one set of facts permits, but does not require, the jury to find the existence of another fact.[9] In other words, the basic facts are sufficient to satisfy the proponent's burden of producing evidence, but do not shift that burden to the opposing party. In such instances, even though the opposing party introduces no evidence, the matter is left to the jury, which may find for or against the plaintiff who has the burden of proof by a preponderance of the evidence. Such rules of law sometimes also are called prima facie cases or inferences. More precisely, an inference would simply refer to the logical tendency of a finding of one fact to prove the existence of another fact; a prima facie case best describes the situation in which a finding of one fact, standing alone, will permit, but not require, a finding of another fact.[10] Occasionally the term "permissive presumption" also is used to describe such rules.[11] In criminal cases, the Supreme Court has adopted expressly the term permissive presumption to signify a rule under which the establishment of one fact will permit, but not require, the finding of another fact.[12]

The doctrine of *res ipsa loquitur* provides the classic example of such a rule in civil cases. When an accident is proved and the accident is of a nature that it would not ordinarily occur in the absence of defendant's negligence, the doctrine of *res ipsa loquitur* may apply.[13] In most jurisdictions, under the *res ipsa* doctrine the plaintiff has satisfied his burden of producing evidence and the jury may, but does not have to, find in his favor.[14] Only a few jurisdictions give *res ipsa* the same effect as that of a "mandatory presumption" by shifting the burden of producing evidence.[15]

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9. *E.g.*, Griffin v. Pancoast, 257 N.C. 52, 54-56, 125 S.E.2d 310, 312-13 (1962); Flexlon Fabrics, Inc. v. Wicker Pick-up & Delivery Serv., 39 N.C. App. 443, 447-49, 250 S.E.2d 723, 725-26 (1979); *In re* McGowan's Estate, 197 Neb. 596, 602-04, 250 N.W.2d 234, 238-39 (1977).

10. See discussions in Henderson County v. Osteen, 297 N.C. 113, 117, 254 S.E.2d 160, 163 (1979); Cogdell v. Wilmington & Weldon R.R., 132 N.C. 852, 853-54, 44 S.E. 618, 619 (1903); and *In re* Estate of Wagner, 265 N.W.2d 459, 465 (N.D. 1978). Sometimes the courts will also refer to what is apparently a true presumption as a prima facie case. *See, e.g.*, Beck v. Wilkins-Ricks Co., 179 N.C. 231, 235, 102 S.E. 313, 315 (1920); Thermal Belt Sanitarium Co. v. Hartford Ins. Co., 157 N.C. 551, 556, 73 S.E. 337, 339 (1911).

11. *See* C. MCCORMICK, *supra* note 6, at § 308. The term "presumption of fact" is also sometimes used to describe the same rule. *See, e.g.*, Bradley v. S.L. Savidge, Inc., 13 Wash. 2d 28, 39, 123 P.2d 780, 785 (1942).

12. County Court of Ulster County v. Allen, 442 U.S. 140 (1979).

13. *See* W. PROSSER, LAW OF TORTS §§ 39, 40 (4th ed. 1971).

14. *E.g.*, Sweeney v. Erving, 228 U.S. 233, 240 (1913); Young v. Anchor Co., 239 N.C. 288, 292, 79 S.E.2d 785, 789 (1954); Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 251 (Tex. 1974).

15. *See, e.g.*, Florence Coca Cola Bottling Co. v. Sullivan, 259 Ala. 56, 65, 65 So. 2d 169, 177 (1953); Coca Cola Bottling Co. v. Mattice, 219 Ark. 428, 438, 243 S.W.2d 15, 21 (1951). *See also* the discussion in W. PROSSER, *supra* note 13, at § 40. North Carolina seems to follow the majority rule in holding that *res ipsa loquitur* operates to establish only a prima facie case. *See* Young v. Anchor Co., 239 N.C. 288, 292, 79 S.E.2d 785, 789 (1954); H. BRANDIS, *supra* note 4, at § 227. Occasional statements can be found to the contrary, however, even in relatively recent cases. *See*,

Most courts now avoid use of the term presumption in connection with the doctrine of *res ipsa loquitur*, referring to it more precisely as an "inference" or "prima facie" case.[16] Yet, other rules of identical effect are consistently labeled presumptions. For example, a North Carolina rule provides that when a bailor introduces evidence sufficient to justify a finding that he delivered goods to a bailee who did not return them, or returned them in damaged condition, the bailor has made out a prima facie case of the bailee's negligence. The courts, in describing the effect of this presumption, make clear that the bailor's evidence is sufficient only to satisfy the bailee's burden of producing evidence and does not shift that burden.[17] Although the rule is usually referred to as a prima facie case, on other occasions the courts have used the term presumption to describe the rule and its effect.[18]

C. Conclusive Presumptions

Rules of law called "conclusive presumptions" describe the situation in which the finding of one fact is conclusive proof of the existence of another fact.[19] Under such rules, evidence of the nonexistence of the second fact is simply inadmissible. For example, in North Carolina workers' compensation proceedings a widow, widower, or child of a deceased employee is conclusively presumed to have been wholly dependent on the employee.[20]

Such rules describe the situation in which the substantive law has provided that the basic facts are all that need to be proved for a legal result to ensue. In the workers' compensation presumption referred to above, if the proof shows that the person is the widow or child of the worker, he or she is considered to have been wholly dependent on the deceased. There is no issue of dependency to be resolved with regard to such individuals. No rule of evidence or procedure is involved.

Despite the universal acceptance of this analysis of such rules, the label "conclusive presumption" remains in use and is unlikely to go away.

D. The Different Effects of Mandatory Presumptions

Even when the term presumption is used to describe the "mandatory" effect discussed above, courts will give widely different effects to the rules.

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e.g., Bowling v. City of Oxford, 267 N.C. 552, 559, 148 S.E.2d 624, 629 (1966) ("[*Res ipsa*] does not create a presumption that the defendant was negligent. It merely makes proof . . . sufficient to establish a prima facie case of injury by negligence so as to place upon the defendant the burden of going forward with evidence to explain the occurrence.").

16. *E.g.*, Sweeney v. Erving, 228 U.S. 233, 239 (1913); Young v. Anchor Co., 239 N.C. 288, 290, 79 S.E.2d 785, 788 (1954); Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 251-52 (Tex. 1974).

17. *See, e.g.*, Clott v. Greyhound Lines, Inc., 278 N.C. 378, 388, 180 S.E.2d 102, 110 (1971); Millers Mutual Ins. Assn. v. Atkinson Motors, Inc., 240 N.C. 183, 186, 81 S.E.2d 416, 418 (1954).

18. *E.g.*, Barden v. Am. Ry. Express Co., 181 N.C. 483, 485, 106 S.E. 462, 462 (1921); Flexlon Fabrics, Inc. v. Wicker Pick-up & Delivery Serv., 39 N.C. App. 443, 448, 250 S.E.2d 723, 726 (1979).

19. *See* 9 J. WIGMORE, EVIDENCE § 2492 (Chadbourn rev. ed. 1982).

20. N.C. GEN. STAT. § 97-39 (1979). *See also* Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935).

First, courts in most jurisdictions state that most presumptions operate only to shift the burden of producing evidence, but have no effect on the assignment of the burden of persuasion.[21] Furthermore, these same courts often state that, since only the burden of producing evidence is shifted, once that burden has been satisfied by the opponent of the presumption, the presumption drops out of the case entirely or "bursts."[22] This "bursting bubble" theory, attributed first to the great nineteenth century evidence scholar, Thayer,[23] is at least the prevailing, articulated rule about presumptions.

Using the example of the presumption considered above of due execution from registration of a deed, if the opponent of the deed introduces evidence sufficient to support a finding of nondelivery, theoretically the presumption of due execution drops out of the case. The case might still be sent to the jury on the strength of the natural inference arising from the fact of registration, but the presumption itself would be given no further effect.

Another, and very different, effect given to presumptions is to treat them as operating to assign the burden of persuasion. In other words, in the case of the presumption of due execution from registration of a deed, an opponent would have to do more than simply offer evidence sufficient to support a finding of nondelivery. He would have to persuade the jury by a preponderance of the evidence that there was in fact nondelivery. Most states, even those that follow the bursting bubble theory with regard to most presumptions, treat certain other presumptions as operating to assign the burden of persuasion. The best example is that of the presumption of legitimacy with regard to children born during a marriage.[24] Once the fact of birth during wedlock is established, courts almost universally require that the opponent prove the illegitimacy of the child. Indeed, many courts impose an even heavier burden on the party seeking to prove illegitimacy by requiring that the proof be by clear and convincing evidence.[25] North Carolina seems to require "irresistible evidence."[26]

The situation is made even more complex because courts often take the

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21. *See* Annot., 5 A.L.R.3d 19 (1966); Dec. Dig., *Evidence*, key nos. 85, 86, 89.

22. *E.g.*, Hinson v. Hinson, 356 So. 2d 372, 376 (Fla. Dist. Ct. App. 1978); *In re* Estate of Martinez, 96 N.M. 619, 623, 633 P.2d 727, 731 (N.M. Ct. App. 1981). *See also*, Moore v. Union Fidelity Life Ins. Co., 297 N.C. 375, 255 S.E.2d 160 (1979) (particularly dissent by Copeland, J.); H. BRANDIS, *supra* note 4, at § 218.

23. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 314, 336 (1898). Thayer, however, seems not to have had in mind a rule of law as inflexible as the doctrine that bears his name. He at least recognized the possibility of different rules for different presumptions. See Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 406-408 (1956) in which the "Thayer" doctrine, but not Thayer's scholarship, is criticized.

24. *E.g.*, Bernheimer v. First Nat'l Bank, 359 Mo. 1119, 225 S.W.2d 745 (1949); Wright v. Wright, 281 N.C. 159, 172, 188 S.E.2d 317, 325 (1972); *In re* Estate of Findlay, 253 N.Y. 1, 7, 170 N.E. 471, 472-73 (1930).

25. *E.g.*, *In re* Davis' Estate, 169 Okla. 133, 135, 36 P.2d 471, 473 (1934) ("strong, satisfactory and conclusive"); State *ex rel.* Walker v. Clark, 144 Ohio St. 305, 311, 58 N.E.2d 773, 776 (1945) ("clear and convincing"); *In re* Jones' Estate, 110 Vt. 438, 451, 8 A.2d 631, 636 (1939) ("beyond a reasonable doubt").

26. Rhyne v. Hoffman, 59 N.C. 260 (6 Jones Eq.) 335 (1862); H. BRANDIS, *supra* note 4, at § 246.

middle road between a reassignment of the burden of persuasion and a bursting bubble effect. They hold that the presumption operates only to shift the burden of producing evidence, but that the bubble does not totally burst upon the introduction of contrary evidence. The presumption is given some continuing effect through an instruction to the jury. The instruction may take many forms. Some courts simply tell the jury of the existence of the presumption;[27] others tell the jury that there was a presumption and the presumption is "evidence of the fact established."[28] In still other instances, the jury is instructed that the presumption is to stand accepted, unless they find the facts upon which the presumed inference rests are met by evidence of equal weight.[29] The judicial reasoning behind such instructions is not difficult to discern. Courts feel, often with considerable justification, that the existence of the presumption evidences policy considerations that should not be disregarded simply because a prima facie case has been presented by the opponent. The problem is not so much in the theory, but in finding an instruction that accurately and clearly conveys the policy of the presumption to the jury without giving the rule more or less weight than it deserves. All of the instructions referred to above either are likely to be unclear to the jury or are likely to give the rule greater than the appropriate effect.

II. THE SEARCH FOR A SINGLE RULE GOVERNING THE EFFECT OF PRESUMPTIONS

Considering the confusion engendered by the courts' application of various presumption rules, it is not surprising that the past fifty years of scholarly writing on this subject have consisted largely of a search to find a single rule for all presumptions.

Many writers adopted the view that the better rule for all presumptions would provide that anything worthy of the name has the effect of fixing the burden of persuasion on the party contesting the existence of the presumed fact.[30] Certainly, such a rule is easier to apply than the current set of rules and avoids the difficult problem of what to do when the opponent introduces rebutting proof. One of the leading proponents of the rule allocating the burden

27. *E.g.*, Radius v. Travelers Ins. Co., 87 F.2d 412 (9th Cir. 1937). *See also* NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES 735.10 (1975).

28. This was the practice in California prior to 1965. *See, e.g.*, Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529 (1931). *See also* Overcash v. Charlotte Elec. Ry., Light & Power Co., 144 N.C. 572, 57 S.E. 377 (1907).

29. *E.g.*, Klunk v. Hocking Valley Ry., 74 Ohio St. 125, 133, 77 N.E. 752, 754 (1906).

30. *See, e.g.*, 56 F.R.D. 183, 208 (1972) (Draft of Proposed FED. R. EVID.); E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 74-81 (1956); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324 (1952). The rule that a presumption operates to fix the burden of persuasion has been called the Pennsylvania rule. If the rule ever had general application in that state, however, it certainly no longer does. *See, e.g.*, Allison v. Snelling & Snelling, Inc., 425 Pa. 519, 229 A.2d 861 (1967); Waters v. New Amsterdam Casualty Co., 393 Pa. 247, 144 A.2d 354 (1958).

of persuasion as the universal rule was Professor Edmund Morgan.[31] Although Professor Morgan was unable to have such a provision included in the Model Code of Evidence, for which he served as reporter,[32] he was considerably more successful in his drafting of the original Uniform Rules of Evidence. Uniform Rule 14 had provided that when the facts upon which the presumption was based had "probative value," the burden of persuasion was assigned to the adversary; when there was no such probative value, the presumption had only a bursting bubble effect and died when met by contrary proof.[33]

The Uniform Rules of Evidence, although commendable, presented problems.[34] Obviously, contrary to Morgan's desires, they did not provide for a single rule regarding presumptions. Different courts could give different answers to the question whether a particular presumption has probative value. Possibilities of inconsistency and confusion, although reduced by rule 14, were still present. Further, the distinction made was a thin one that disregarded the existence of strong social policies behind some presumptions that lacked probative value. Certainly if a presumption is not based on probability, but is based solely on social policy, there may be more, and not less, reason to preserve it in the face of contrary proof. A presumption based on social policy may need an extra boost to ensure that the policy is not overlooked in the face of some explanation given by the opponent. Morgan apparently recognized the weakness of the distinction made by rule 14 and seemed to have agreed to it only to allay fears that a provision giving to all presumptions the effect of fixing the burden of persuasion might be unconstitutional.[35]

An approach almost directly opposite to the one taken in the Uniform Rules of Evidence was taken in California's Evidence Code, adopted in 1965. Under the California Code, presumptions based upon "public policy" operate to fix the burden of persuasion;[36] presumptions that are established "to implement no public policy other than to facilitate the determination of a particular action" are given a bursting bubble effect.[37] The California approach makes more sense in terms of the policy behind presumptions, but is still not satisfactory. The line between presumptions based on public policy and those that are not may not be easy to draw.[38] Furthermore, the California distinction is not completely convincing. The fact that the public policy giving rise to a pre-

31. E. MORGAN, *supra* note 30, at 81:

> Just as the courts have come to recognize that there is no a priori formula for fixing the burden of persuasion, so they should recognize that if there is a good reason for putting on one party or the other the burden of going forward with evidence—if it might not as well have been determined by chance—it ought to be good enough to control a finding when the mind of the trier is in equilibrium.

32. *See* Morgan, *Foreward* to MODEL CODE OF EVIDENCE at 54-65 (1942). The Model Code takes a rigid Thayerian position. *See* MODEL CODE OF EVIDENCE Rule 704 (1942).

33. UNIF. R. EVID. 14 (1942) (amended 1974).

34. See the criticisms in Cleary, *supra* note 30, at 28; Gausewitz, *supra* note 23, at 401-10.

35. *See* Morgan, *Presumptions*, 10 RUTGERS L. REV. 512, 513 (1956).

36. CAL. EVID. CODE, §§ 605-606 (West 1966).

37. *Id.* §§ 603-604.

38. *See* Note, *The California Evidence Code: Presumptions*, 53 CALIF. L. REV. 1439, 1445-50 (1965).

sumption is one that is concerned with the resolution of a particular dispute, rather than the implementation of broader social goals, does not necessarily mean that the policy is satisfied by the shifting of the burden of producing evidence and that it should disappear when contrary proof is introduced. California asks the wrong question about the policy behind presumptions. The inquiry should not be directed to the breadth of the policy, but rather to whether the policy considerations behind presumptions are sufficient to override the policies that tentatively fix the burdens of proof at the pleading stage.

The Federal Rules of Evidence, as adopted by the Supreme Court and submitted to the Congress, took the approach advocated by Morgan. Proposed rule 301 provided that "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."[39] The draft did not survive congressional scrutiny, however, and rule 301, as enacted, states:

> In all 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 rebut or meet 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.[40]

Despite the failure to adopt the Morgan approach, federal rule 301 could have served as the basis for a single rule governing all presumptions in all cases. It has not had that effect. First, the exact meaning of the rule is far from clear. On its face, it seems to dictate a bursting bubble effect. Yet, some legal scholars have argued convincingly that the rule does not require the destruction of the presumption in the face of rebuttal proof. The language of the rule can be interpreted as permitting instructions that alert the jury to the strength of the rational inference or public policy underlying a presumption, even though evidence contrary to the existence of the presumed fact has been introduced.[41] Such an interpretation may well be correct and, at least in instances in which the policy behind the presumption might otherwise be defeated, would constitute a useful judicial gloss on the rule. No guidance is given by the rule, however, and none has been given by the courts, either regarding when such instructions should be given to the jury or regarding the

39. *See* FED. R. EVID. 301, 56 F.R.D. 183, 208 (Proposed draft submitted by Supreme Court to Congress in 1972).

40. FED. R. EVID. 301.

41. *See* Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings,* 63 VA. L. REV. 281 (1977); Mueller, *Instructing the Jury Upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301*, 12 LAND & WATER L. REV. 219 (1977). Certainly, given the federal judge's ability to comment on the evidence, the jury may be instructed that it may infer the existence of the presumed fact from the basic facts. Louisell and Mueller go further and argue that, depending upon the nature of the presumption, the jury may be instructed either (1) that upon finding of the basic facts it also should 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; or (2) that the basic facts are strong evidence of the presumed fact. Louisell, *supra*, at 314; Mueller, *supra*, at 285-86.

contents of such instructions. Considering the ambiguous language of the rule and the uncertainty that results even when the rule is interpreted as permitting instructions to the jury with regard to presumptions, the opportunities for confusion and inconsistent rulings are all too present.

Judicial treatment (or nontreatment) of rule 301 has added further to the confusion. Some important decisions on presumptions simply have ignored the rule entirely, even though reaching results consistent with it.[42] Other courts have cited the rule and essentially followed it, but have found that, under the circumstances, it was not really applicable.[43] More significantly, still other courts have not only not relied upon rule 301, but have held that a statutory presumption operated to assign the burden of persuasion. For example, one court found that the Carmack Amendment operated to assign to the carrier the burden of persuasion with regard to damage to shipped goods.[44] Another court found that, in the case of the presumption of validity of a patent, the party challenging the validity must bear the burden of persuasion on that issue.[45] Both of these instances involved statutory presumptions. In *James v. River Parishes Co.*,[46] the court dealt with the admiralty law presumption of fault in the owner of a vessel adrift in a river that strikes a moored vessel. The court held that the presumption not only was sufficient to establish a prima facie case of negligence against the moving vessel, but that the burden of persuasion on the issue of non-negligence was on the party whose vessel was adrift. The court found that rule 301 did not apply. It noted that "[t]he weight and effect of such a presumption is determined, as a matter of substantive law, in the light of the consideration that prompted its adoption, [and that the presumption] long antedated adoption of the Federal Rules of Evidence."[47] Holdings such as these, regardless of their wisdom, do not operate to create a single rule of presumptions.

The matter is complicated further by the adoption in many states of codes of evidence based upon the Federal Rules of Evidence.[48] The Revised Uniform Rules of Evidence contain a rule 301 almost identical to the rule submitted to the Congress—the burden of persuasion is allocated based upon the existence of the presumption.[49] Many of the states enacting a code based on

42. *E.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982).

43. *E.g.*, Reeves v. General Foods Corp. 682 F.2d 515 (5th Cir. 1982); Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982); Beth Isr. Hosp. & Geriatric Center v. NLRB, 677 F.2d 1343 (10th Cir. 1981), *modifying* Presbyterian St. Luke's Med. Center v. NLRB, 653 F.2d 450 (10th Cir. 1981). See also NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1978) in which the court not only found rule 301 inapplicable to the same presumption involved in *Beth Israel* and *Presbyterian St. Luke's*, but also held that the presumption operated to assign the burden of persuasion to the opposing party.

44. Plough, Inc. v. Mason & Dixon Lines, 630 F.2d 468 (6th Cir. 1980).

45. Solder Removal Co. v. United States Int'l Trade Comm., 582 F.2d 628 (C.C.P.A. 1978).

46. 686 F.2d 1129 (5th Cir. 1982).

47. *Id.* at 1133. For another case reaching the same result about essentially the same admiralty presumption, see Bunge Corp. v. M/V Furness Bridge, 558 F.2d 790 (5th Cir. 1977).

48. See compilation of state adaptations of federal rule 301 in J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE T-24 to -30 (1983).

49. UNIF. R. EVID. 301(a) (1974) provides: "In all actions and proceedings not otherwise

the Federal Rules of Evidence have chosen to adopt the Uniform Rule with regard to presumptions.[50] Several others have taken entirely different courses and created new rules in attempts either to improve on the Federal or Uniform Rules of Evidence or to reflect state policies. For example, the Florida rule is very similar to the California code and categorizes presumptions based on whether the presumption has been established primarily to facilitate the determination of a particular action or whether it exists to implement public policy. If established primarily to facilitate the determination of a particular action only the burden of producing evidence is shifted; otherwise the presumption operates to allocate the burden of persuasion.[51]

North Carolina is illustrative of states that have taken an entirely different approach. The North Carolina rule, adopted in 1983 and effective in 1984, provides:

> In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet 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. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact.[52]

Thus, seemingly in North Carolina most presumptions will operate to shift the burden of producing evidence. The statute recognizes, however, that presumptions may be given other effects not only by the legislature but by judicial decisions as well. Thus, the courts are fully free to give presumptions greater or lesser effect in accordance with the dictates of the policy behind the existence of the presumptions and the particular substantive law involved. Furthermore, although the North Carolina rule purportedly contemplates that most presumptions will operate only to shift the burden of producing evidence, the new rule specifically prevents a bursting of the presumption. The rule provides that once the opponent has introduced evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist, the

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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."

50. *E.g.*, ARK. EVID. R. 301; ME. EVID. R. 301; WYO. EVID. R. 301. *See also* Martens v. Metzger, 524 P.2d 666 (Alaska 1974); Privette v. Faulkner, 550 P.2d 404 (Nev. 1976); Trujillo v. Chavez, 93 N.M. 626, 603 P.2d 736 (Ct. App. 1979).

51. FLA. R. EVID. 301 to 304.

52. N.C.R. EVID. 301.

court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact. In other words, if the opponent satisfies his burden of producing evidence, the presumption is given the same effect as an inference or prima facie case.

III. THE FUTILITY OF THE SEARCH FOR A SINGLE RULE

Despite the best efforts of legal scholars to establish one rule to govern all presumptions and all proceedings, the law of presumptions is in some ways more confusing than it was before the Federal Rules of Evidence were adopted.[53] Neither Morgan's view that all presumptions operate to assign the burden of persuasion nor the Thayerian concept of a disappearing presumption has yet to win the day.

The problem may be inherent in the nature of the concept of a "presumption." At least one author has argued that the concept is an artificial one, and attempts to do through a legal fiction what courts should be doing directly.[54] The author, Professor Ronald Allen, argues that the term "presumption" should be eliminated from legal usage and that the functions which it served be replaced by direct allocations of the burdens of producing evidence and persuasion and by judicial comment accurately describing the logical implications of certain facts.[55] In some ways, Allen's suggestion is an attractive one. Courts should indeed be talking about the propriety of allocating the burden of proof, rather than the technical application of a presumption.

There is at least one conceptual problem with Allen's suggestion. As Allen recognizes, there are instances in which the evidence introduced at trial may give rise to a rule of law that shifts or reassigns the burden of proof. Allen calls this a "conditional imperative" and he recognizes that in such a case the allocation of the burdens of proof cannot be made prior to trial.[56] While the term "conditional imperative" may be just as good as "presumption," it is not better, and the same set of problems that exist with regard to presumptions are just as likely to occur regardless of the label attached.

More significantly, however, Allen seeks to deal with the problem of judicial misuse of the term presumption by wishing the term away. The problem is that the legislatures and the courts are likely to continue using the term, regardless of the wisdom of dispensing with it. They are also likely to continue using the term in different and often confusing ways, and there does not seem to be much that can be done about it. The term presumption, like so many other legal concepts, includes within it many variables and its applica-

53. The problem is made even more complex by FED. R. EVID. 302, which provides: "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law."

54. Allen, *An Anatomy*, *supra* note 2; Allen, *Presumptions*, *supra* note 2.

55. Professor Edward Cleary also suggested the elimination of the concept of a presumption, at least with regard to presumptions that transfer one of the burdens of proof with regard to an element of a case. Cleary, *supra* note 30.

56. *See* Allen, *Presumptions*, *supra* note 2, at 850-51.

tion in a given case will depend upon the context and the substantive law. The resistance of courts and legislatures to a universal rule of presumptions reflects that there are policies of varying strength behind different presumptions and therefore a hierarachy of desired results. In one instance, the policy may give rise only to a standard inference or prima facie case, for example, *res ipsa loquitur*. In another instance, the policy can be strong enough to compel a directed verdict in favor of the party presenting the basic fact and the shifting of the burden of producing evidence to the opposing party, but not strong enough to reassign the burden of persuasion.[57] The presumption of due execution from registration of a deed in North Carolina is a good example.[58] In still another instance, the policy may be strong enough to reassign the burden of persuasion. The presumption of legitimacy provides the classic example of such a rule. In each of these examples, the term "presumption" is likely to be used.

It would be useful if legislatures and courts would accurately label all presumptions or inferences when they are enacted or articulated. But history has shown that such legislative or judicial precision is not likely. We are only likely to achieve consistency within the law relating to particular presumptions, not with regard to presumptions across the board. Because the statutes and common law did not provide us with terms that immediately tell us the procedural effect of a particular presumption, courts will have to continue to determine the precise effect of something labeled a presumption on an individual basis.

Attempts to categorize presumptions according to policy considerations have been thoughtful and well meaning. Unfortunately, they have fallen short of the mark, largely because of the inherent difficulty of the task. Each presumption is created for its own reasons—reasons that are inextricably intertwined with the pertinent substantive law. The substantive considerations have a considerable impact on the procedural effect desirable for particular presumptions. The diversity of considerations simply defies useful categorization.

The North Carolina rule is an improvement over both the Federal and Uniform Rules of Evidence as well as over the attempts to categorize presumptions in states such as California and Florida. Somewhat greater certainty about the effect of presumptions is provided, yet the state is not tied to a rigid one-rule approach. Furthermore, the rule expressly deals with the most troublesome aspect of presumptions that only shift the burden of producing evidence: what to do with the presumption once the opponent has introduced sufficient rebuttal evidence. The new rule, however, is not the ideal legislation

57. There are, of course, various problems that remain even when a presumption clearly falls into this category. For example: If sufficient evidence contrary to the presumed fact is introduced, should the proponent of the presumption survive a renewed motion for directed verdict? What, if anything, should the jury be told either about the existence of the presumption or about the strength of the basic facts? The answers to these questions may also vary among various presumptions and with regard to the evidence introduced in each case.

58. *See supra* notes 7-8 and accompanying text.

on the subject. The rule fails to recognize the various ways in which the courts and legislature have used the term presumption. Although no limitation is made on the ability of the courts to give a rule labeled a presumption an effect different from that prescribed for the ordinary presumption, no guidance is given for such action.

IV. A Proposed Statutory Framework for Dealing with Presumptions

Rather than attempting to provide a single rule for all presumptions, a task that has proved futile, the draftsmen of future evidence codes should instead provide clear guidelines for the appropriate but various effects a presumption may have on the burdens of proof. Courts and legislatures should then be given the option of selecting the most appropriate effect to be given to a particular presumption. Such a rule might read as follows:[59]

Proposed Rule 301. Presumptions in General in Civil Actions and Proceedings

(a) General Rule. The court shall determine whether the term "presumption," whenever it is used in a statute or case law, means an inference, a prima facie case, a conclusive presumption or a presumption. That decision by the court shall be made on the basis of existing and future common law and statutes and will be a reviewable question of law.

(b) Definitions. As used in this Rule:

(1) "Inference" describes the logical tendency of a finding of one fact to prove the existence of another fact. A finding of the first fact need not be sufficient, standing alone, to permit a finding of the second fact.

(2) "Prima facie case" describes the situation in which a finding of one fact, standing alone, will permit, but not require, a finding of another fact.

(3) "Conclusive presumption" describes the situation in which a finding of one fact is conclusive proof of the existence of another fact, and evidence of the nonexistence of the second fact will not be received.

(4) "Presumption" describes the situation in which a finding of one fact (the basic fact), while not conclusive proof of the existence of another fact (the presumed fact), has a stronger tendency to prove the existence of the presumed fact than a mere "inference" or "prima facie case." Upon such proof of the basic fact as would justify a finding of its existence, a presumption will impose upon the opponent of the presumption one of two burdens: either (A) the burden of going forward with the evidence or (B) the burden of persuasion on the issue of the nonexistence of the presumed fact. The court will decide which burden a particular presumption imposes on the basis of existing and

59. The author is deeply indebted to Dean Henry Brandis who initially drafted this rule during the North Carolina General Assembly's consideration of rule 301, and to U.N.C. Law Professor Walker Blakey and Stephen Rose of the North Carolina legislative staff for their helpful amendments. The credit for the proposal of the rule should go to them, the blame for its dissemination to this author.

future common law and statutes and this decision will be a reviewable question of law.

(c) Procedure if Presumption Imposes a Burden of Going Forward with Evidence. The burden of going forward with evidence will be satisfied by evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If such evidence is not forthcoming, the jury shall be instructed that if it finds the existence of the basic fact it shall also find the existence of the presumed fact. If such evidence is forthcoming, the jury shall be instructed that the proponent has the burden of proving existence of the presumed fact by the measure of proof appropriate in the particular case.[60] When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact.

(d) Procedure if Presumption Imposes Burden of Persuasion. If the opponent is assigned the burden of persuasion on an issue of the nonexistence of the presumed fact, such issue shall be separately submitted, to be passed upon only if the existence of the basic fact is conceded or found, and the jury shall be instructed that, considering all the evidence and giving the basic fact such logical tendency as it has to prove existence of the presumed fact, the opponent has the burden of proving the nonexistence of the presumed fact by such measure of proof as is appropriate in the particular case.

(e) Language of Jury Instructions. All instructions contemplated herein may be given in terms of the relation between the respective facts, without mention of "basic," "presumed," or "presumption."

The proposed rule in essence provides that each presumption be handled individually, without reference to a single rule. Such a rule would not prove too onerous for either the bench or the practicing bar. First, the rule merely describes explicitly the situation that in fact exists today, despite the best of efforts to create a single rule. Furthermore, courts and lawyers are accustomed to considering the dictates of the substantive law in determining the initial allocation of the burdens of proof. The task should not be any more difficult in connection with the operation of presumptions, which, after all, simply operate to reallocate those burdens during the course of the trial.

The term presumption is likely to be with us forever; it is highly likely that different presumptions will always be viewed as having different procedural effects. We can only hope to ensure that the concept which the term "presumption" embodies will be applied consistently and rationally.

60. The measure of proof ordinarily will be by a preponderance of the evidence. Occasionally, however, it will be by a different measure, such as "clear and convincing" evidence.