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The Meaning of the Term “Prima Facie”

An objection from an average stockbroker constitutes in itself a prima facie case for any social reform.

— George Bernard Shaw¹

I. INTRODUCTION

The term “prima facie” occurs in almost two hundred Louisiana statutes,² but it is not defined in any of them. There are a number of different uses for this term in Louisiana and in the common-law jurisdictions. In the next few pages this comment will examine the development and deterioration of the term “prima facie” in various disciplines, especially in the law, over many years. The goal is to discover the meaning that should be given the term “prima facie evidence,” so the confusion might be reduced. The Louisiana Code of Evidence seems to be the ideal place to put a standardized definition of this term. For this reason, a proposed definition for use in that code will be given.³

II. HISTORY OUTSIDE THE LAW

Logicians and metaphysicians were working with the concept of “prima facie evidence” long before lawyers. While one cannot rely solely on the works of philosophers, their insights into this subject are valuable. As with most concepts belonging to the realm of logic, the inquiry begins in ancient Greece.

The modern Greek equivalent of “prima facie” is *εχ πρωτηζ οψεωζ*, literally, “on/at first viewing.”⁴ The concept appears in the works of many prominent Greek philosophers.⁵ Because Roman thought developed and

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1. 12 *The Oxford English Dictionary* 470-71 (2d ed. 1989) (quoting George Bernard Shaw, *Androcles and the Lion* at lx (1916)).

2. See Index to Prima Facie Evidence, in George W. Pugh et al., *Handbook on Louisiana Evidence Law* (West 1994).

3. The only cases which are useful in trying to discover a meaning for the term “prima facie” are those which explicitly discuss definitions of the term. Cases which use the term without defining it are almost invariably confusing and inconsistent, primarily because the distinctions between its meanings are subtle. This comment avoids reliance on cases which would require tenuous extrapolation of a definition for two reasons. First, the leading cases on the term are, naturally, the ones which explicitly state its definition. Thus these are the cases cited most often by other courts and by scholarly authorities such as Wigmore. Second, it would be irresponsible and inefficient to prefer cases which require complicated and uncertain interpretations to cases which provide clear and explicit definitions.

4. *The Oxford Dictionary of Modern Greek* 247 (1982).

5. Aristotle, for example, argues information gained through the senses is true on its face, but can be “rebutted” by showing that the mind has somehow misread the information. Consider the following from Aristotle, *Posterior Analytics*, in 8 *Britannica Great Books of the Western World* 98

borrowed heavily from Greek thought following the death of Alexander the Great in 323 B.C., the concept probably found its way to Rome via Greece.⁶

The Latin term "prima facie" eventually appeared in the works of Roman and Medieval scholars of philosophy and law. From the earliest known Latin usages to the time it was adopted into other languages, the term was used in its literal meaning, "on/at first appearance." Consider the following from the *Digests*: "Quum *prima facie* quidem alienam, re vera suam obligationem suscipit." (When at first appearance the thing indeed belongs to another, a person is truly persuaded of the correctness of his suspicion that an obligation has arisen.)⁷

The author, Gaius, could have used any number of terms which mean "presume." *Sumere* and *credere* both mean "suppose," and each was as available to him as "prima facie."⁸ Why would he choose an unusual term like "prima

(G.R.G. Mure trans., 1952):

There is a difference between what is prior and better known in the order of being and what is prior and better known to man. I mean that objects nearer to sense are prior and better known to man; objects without qualification prior and better known are those further from the sense.

Like most passages from Aristotle, this one has many layers of meanings. What is important for our inquiry is Aristotle points out trustworthiness is a *continuum*, from very trustworthy to very untrustworthy. One might say that things experienced through the senses while in a lucid state are *presumed* valid (though this presumption can be rebutted, as with a mirage), solutions to complicated arithmetic are *prima facie* valid (the laws of arithmetic are correct, but my calculations may not be), things experienced through the senses while under the influence of hallucinogens (of which the ancient Greeks had many) are *prima facie* *invalid*, and the wild ramblings of a schizophrenic about abstract, non-earthly matters are *presumed* invalid.

In 1 Frederick Copleston, S.J., *A History of Philosophy* at pt. 4, 24-25 (1962), Father Copleston observes—with typical succinct brilliance—regarding the above passage from Aristotle:

Thus if a patient who suffers from *delirium tremens* "sees" pink rats, the senses as such do not err; error arises when the patient judges that the pink rats are "out there," as real extra-mentally-existing objects. Similarly, the sun *appears* smaller than the earth, but this is not an error on the part of the senses . . . Error arises when, through a lack of astronomical knowledge, a man *judges* that the sun is objectively smaller than the earth.

Because there are such subtle distinctions among cognitive evaluations of the trustworthiness of evidence, it is necessary to have precise terms for each gradation. "Prima facie" is such a term.

Though Aristotle was not the only Greek philosopher who worked with presumptions and prima facie evidence, he was the biggest Greek influence on Roman and Medieval law; indeed, he was called simply "The Philosopher," as if there were no other.

St. Thomas Aquinas was a tremendous influence on modern law, due to his enormous role in the establishment of Medieval Canon law. Part 1 of the second part of the *Summa Theologica*, questions 90-108, is entitled *Treatise on Law*. See 20 *Britannica Great Books of the Western World* 205-337 (Fathers of the English Dominican Province trans., 1952). Aquinas was an Aristotelian, and Aristotelian logic abounds in all his works. Although a discussion of Aquinas' logic is beyond the scope of this paper, the reader is encouraged to look at *Treatise on Law* and the numerous examples of presumptions and prima facie inferences located there.

6. See generally Copleston, *supra* note 5, at pt. 5, 123-28.

7. Dig. 16.1.13 (Gaius, Edictum 9) (translation by the author).

8. Cassell's Latin & English Dictionary 360 (1987).

facie"? The answer can only be that he did not mean "presume." Had he used a term meaning "presume" instead of "on/at first appearance," he would also have had to change "suscipit" (roughly, "a suspicion is warranted or acknowledged as reasonable") to something stronger, meaning "implied" or "presumed." Such changes would give the statement a completely different meaning.¹⁰

Throughout the history of the use of the term in Latin, "prima facie" means only the most cursory, initial impression. It retained that meaning upon its adoption into colloquial English. Today, in both logic and colloquial English, "prima facie" means nothing more than "upon an initial observation."¹¹

The term "prima facie" is used in the law both as an adjective and as an adverb. The term "prima facie case" is more common than the term "prima facie evidence." This comment is ultimately concerned only with the term "prima facie evidence" in Louisiana law. The common-law courts which developed the judicial meaning of "prima facie," however, often did not distinguish between the meanings of "prima facie case" and "prima facie evidence." This is because the terms are similar in meaning and because there is overlap in use between them. An example will illustrate. Murder is a conclusion of law with several discrete legal elements, including criminal intent. A note written by the accused that reads "I am going to kill Jimmy because I hate him" may properly be said to be, *in itself*, prima facie evidence of criminal intent. Its *introduction* may properly be said to establish a prima facie case of the single element of criminal intent, even though neither the note itself nor its introduction establishes a prima facie case of murder (because the note does not establish the other necessary elements of the legal conclusion of murder). Thus the overlap arises because prima facie case may properly refer *both* to a set of several elements *and* to a single element, even though prima facie evidence generally refers only to a *single* fact or element.

9. Oxford Latin Dictionary 1888 (1982).

10. The following passages from Roman and Medieval orators, philosophers, and legal scholars are also good examples of the use of the term "prima facie." The authors of each use "prima facie" to mean no more than "on/at first appearance": Seneca the Elder, *Controversiae*, Lib. 10 Praef 15 (c. 40 A.D.); Seneca the Younger, *Epistulae ad Lucilium* 87, 1 (c. 65 A.D.); Gaius, *Institutes* 4, 186 (c. 180 A.D.); Tertullianus, *Against Hermogenes* 35 p. 164, 22 (c. 220 A.D.); Pseudo-Seneca, *Epistulae ad Paulum* n.14, 11 (date unknown, but before Hieronymus, who died in 420 A.D.). See also *Incerti Opus Imperfectum in Matthaeum* (c. 400-500 A.D.) ("Putei . . . in prima facie uxores siunificantur" ("Growing flabby . . . indicates on its face that one has married") (translation by the author)). These works are all cited at 7 *Thesaurus Linguae Latinae* 55 (1912-1926) Lipsiae, in Aedibus B.G. Teubneri. The reader is encouraged to see that work for other citations to Latin works using the term "prima facie."

11. The Oxford English Dictionary, *supra* note 1, at 470-71 defines "prima facie" as: "At first sight; on the face of it; as appears at first without investigation; arising at first sight; based or founded on the first impression." The Random House English Dictionary 696 (1991) defines "prima facie" as: "At first appearance; before investigation; immediately plain or clear." The Harper Collins Dictionary of Philosophy 242 (2d ed. 1992) defines "prima facie" as: "at first view; so far as appears on the surface; on the first appearance."

Adding to the confusion is that sometimes a single piece of evidence can establish or appear to establish *all* the necessary elements of a conclusion of law, especially if that conclusion of law has few elements. For example, a marriage license may both be *prima facie* evidence that a marriage took place and be used by itself to establish a *prima facie* case of a marriage. Also, a videotape of Johnny yelling "I am killing you because I hate you" while he shoots Jimmy to death may be used by itself to establish a *prima facie* case of murder. However, whether it could properly be called *prima facie* evidence of murder is arguable, because one generally does not speak of a single piece of "evidence" establishing numerous facts or elements of law.

Nonetheless, if it can be determined with what degree of proof the term "prima facie" is associated, there is no reason to believe the degree would differ whether one is speaking of *prima facie* evidence, *prima facie* case, *prima facie* proof, or any other phrase incorporating the term.

Since the common-law courts did not usually distinguish between the meanings of "prima facie evidence" and "prima facie case" when they were developing their law on the subject, a proper discussion of the meaning of "prima facie evidence" must include some discussion of the law regarding the *prima facie* case. For these reasons the following section on the development of the term "prima facie" in the common-law jurisdictions discusses the meanings of both, even though the discussion of Louisiana law will be primarily limited to *prima facie* evidence.

III. MEANING AND HISTORY IN THE COMMON LAW

A. *The Two Distinct Meanings Most Widely Used*

American and English courts are not consistent concerning the meaning of "prima facie." Two quite distinct meanings are used, each one by many courts. In one use, "prima facie case" merely means having presented enough evidence to withstand a motion for directed verdict. This meaning will be discussed in part III.B. The other use equates "prima facie" with a presumption that a plaintiff is entitled to prevail on his cause of action.¹² This use dictates that if a plaintiff has made out a *prima facie* case, then the jury must find for him if no other evidence is presented to contradict his evidence.

While this distinction may seem subtle, the difference in effect is tremendous. Consider the following hypothetical: plaintiff sues on his cause of action for trespass. After plaintiff submits various evidence, the judge finds, as a matter of law, plaintiff has made out a *prima facie* case of trespass by defendant. Defendant, for whatever reason, chooses to submit no evidence (not likely, but exaggeration makes the example clearer). Under the second meaning of "prima

12. There are different types of presumptions. Where this paper says a court defines "prima facie" as equivalent to a presumption, a *mandatory* presumption is meant, unless otherwise noted.

facie," defendant automatically loses his case, because plaintiff is entitled (having established a prima facie case under the second meaning of that term) to a presumption that defendant committed a trespass which damaged plaintiff, and defendant has not rebutted that presumption.

Under the first meaning, however, the evidence presented goes to the jury. They may find plaintiff's evidence was not convincing, and thus defendant is not liable for trespass. Under one meaning of "prima facie," defendant must lose. Under the other, he may lose or he may win.

While not all courts realize that two distinct meanings of the term are in common use, many do. One American court said the following:

[T]here are two senses in which courts use [the concept of prima facie]. The first is in the sense of a plaintiff's producing evidence sufficient to render reasonable a conclusion in favor of the allegation he asserts. In the common instance of this use of the concept, it means plaintiff's evidence is *sufficient to allow his case to go to the jury*.

In the second sense of the concept, however, courts use "prima facie" to mean not only that plaintiff's evidence would reasonably allow the conclusion plaintiff seeks, but also that plaintiff's evidence *compels such a conclusion if the defendant produces no evidence to rebut it*.¹³

The Pennsylvania Supreme Court had earlier pointed out the disparity: "To say that a relationship is established 'prima facie' may mean *either* that enough had been shown to make a finding of the existence of the relationship *permissible or it may mean* that such a finding is *obligatory* in the absence of other evidence."¹⁴

However, some courts apply meanings of "prima facie" which do not fit neatly into either of the above two meanings. They blend the two together, or even invent their own meanings. These unusual definitions will be discussed in part III.D.

B. The Lighter Meaning: Meeting the Burden of Producing Evidence

In this sense, a party is said to have established a prima facie case when he has satisfied his burden of producing evidence. He is thus entitled to have the jury decide whether he has satisfied his burden of persuasion.¹⁵ This definition

13. *Husbands v. Pennsylvania*, 395 F. Supp. 1107, 1139 (E.D. Pa. 1975) (emphasis added).

14. *In re Fink's Estate*, 21 A.2d 883, 888 (Pa. 1941) (emphasis added).

15. The burden of proof is comprised of two elements, the *burden of producing evidence* (also called "the burden of going forward," "the burden of proceeding," and "the burden of evidence") and the *burden of persuasion*. Put simply, if a party has to satisfy his burden of proof as to fact X, he must do two things:

(1) He must put on some evidence of X, however unconvincing. Once this is done, he has produced evidence of X and has thus satisfied his *burden of producing evidence of X*. The judge alone decides whether a party has satisfied his burden of producing evidence. If the judge finds the

simply means that the plaintiff has made a sufficient showing to withstand a motion for directed verdict.

This sense of "prima facie" is the older of the two.¹⁶ It was articulated as early as 1832 by Justice Story in *Crane v. Morris*:¹⁷ "Whenever evidence is offered to the jury, which is in its nature prima facie proof . . . the law has submitted it to them to decide for themselves; and any interference with this right, would be an invasion of their privilege to respond to matters of fact."¹⁸ In other words, a prima facie case must go to the jury and the jury is free to decide either way (indeed, they have a "right" to do so); there is no presumption in favor of the party who has established the prima facie case.

Later, the court in *Speas v. Merchants' Bank & Trust Co.*¹⁹ articulated the very same standard, citing a number of cases as precedents:

[The party opposing] a "prima facie" case, or "prima facie" evidence . . . is not required as a matter of law to offer evidence in reply. He only takes the risk of an adverse verdict if he fails to do so. The case is carried to the jury on a "prima facie" showing, and it is for them to say whether the crucial and necessary facts have been established.²⁰

This standard is clearly identical to satisfying the burden of producing evidence:²¹ the case "is carried" to the jury who determine whether the cause of action prevails and who are not bound by any presumptions.

In 1934, after examining many prior cases, the Nebraska Supreme Court articulated a very similar definition with identical effects:

[A] prima facie case, that is, a case which has proceeded upon sufficient proof to that stage where it must be submitted to the jury and not decided against the plaintiff as a matter of law, does not shift the burden of proof or necessarily mean that the judgment goes in favor of the plaintiff as a matter of law, but the jury are still the judges of the

party has not satisfied his burden of producing evidence of X where X is a critical element of the party's case, then the judge cannot allow the case to go to the trier of fact and the case will be dismissed.

(2) If and only if a party has satisfied his burden of producing evidence of X, then the trier of fact must decide whether the evidence which was produced is convincing—i.e. the party must *persuade* the trier of fact his evidence of X is true. If he does so then he has satisfied his *burden of persuasion*, and thus his burden of proof as to fact X.

For a more detailed discussion, see 2 McCormick on Evidence §§ 336-341, at 424-48 (John W. Strong et al. eds., 4th ed. 1992).

16. See the discussion of *Muschamp v. Lancaster & P.J. Ry.*, 151 Eng. Rep. 1103 (1841), *infra* part III.C.

17. 31 U.S. (6 Pet.) 598 (1832).

18. *Id.* at 620.

19. 125 S.E. 398 (N.C. 1924).

20. *Id.* at 401 (citations omitted), *cited in* 9 John H. Wigmore, Evidence § 2487, at 296-97 (Chadbourn rev. 1981).

21. See *supra* note 15.

sufficiency of the showing, having in view the fact that the plaintiff has the burden of proof.²²

This definition explicitly rejects the notion of "prima facie" as presumption. The evidence to the contrary *may* be disregarded, but it need not be, and the jury is to determine the case as a matter of fact. The court may not, merely upon a prima facie showing, determine the case as a matter of law.

Somewhat more recent cases have also articulated this definition. In *White v. Abrams*:²³

A prima facie case . . . consists of sufficient evidence . . . to get plaintiff past a motion for directed verdict in a jury case or a motion to dismiss pursuant to Fed. R. Civ. P. 41(b) in a non-jury case. It is the evidence necessary to require a defendant to proceed with his case.²⁴

Again, "the evidence necessary to require the defendant to proceed with his case" is simply the burden of producing evidence.

*State v. Haremza*²⁵ also equates "prima facie" merely with the burden of producing evidence: "A prima facie evidence provision is nothing more or less than a rule of evidence which governs the sufficiency of the evidence to take the case for the jury."²⁶

Thus it is clear, in one widely accepted sense, "prima facie" is just equivalent to the burden of producing evidence. In this sense one presents a prima facie case when he has produced sufficient evidence, regardless of its weight, to withstand a motion for directed verdict.

C. The Heavier Meaning: Establishing a Mandatory Presumption

In the second sense, a party has established a prima facie case only when he has made such a strong showing that he is entitled to a presumption in his favor. This meaning of "prima facie" is virtually indistinguishable from at least one legal meaning of "presumption": If A has established a prima facie case, then his opponent B must *produce* some evidence to contradict the evidence already produced by A; if he does not, then the trier of fact must find for A. To put it another way, when "prima facie" is used in this sense, it switches the burden of proof *from* the party who has made the prima facie showing *to* his opponent.

Wigmore says the case which was the foundation for this meaning of "prima facie" is *Muschamp v. Lancaster & Preston Junction Railway Co.*²⁷ The real

22. *In re Hoagland's Estate*, 253 N.W. 416, 419 (Neb. 1934) (emphasis added).

23. 495 F.2d 724 (9th Cir. 1974).

24. *Id.* at 729.

25. 515 P.2d 1217 (Kan. 1975).

26. *Id.* at 1222.

27. 151 Eng. Rep. 1103 (1841).

issue in this case was not whether one party had in fact made out a prima facie showing as required by a statute. Rather, the case involved the propriety of a judge's comment to the jury that a prima facie case had been established. It is the custom of English judges to express their own opinion on the weight of the evidence, and the judge in this case did so. The Court of Exchequer held the judge committed no error or misdirection by making such a statement to the jury. According to Wigmore, the judge was simply saying a sufficient case had been established to let the evidence go to the jury; liability was still a matter of fact to be decided by the jury.²⁸ However, the reporters misunderstood the case (or at least mis-stated the holding). Wigmore theorizes:

[T]he reporters who made the head note of the case [added] to a summary of the evidence this unfortunate statement: "Held, that [the defendants] were liable for the loss." If they had said "Held, by the jury, that the company were liable. Held, by the Court, that there was evidence competent to be submitted to the jury," they would have made a correct and useful statement of the case.²⁹

This mis-statement in the headnote was repeated and disseminated by practitioners reading the reports. The result was a widespread misconception, which has now been ratified through long-term use—when a court determines that a prima facie case has been made, the defendant is liable as a matter of law, and the jury may not find otherwise.³⁰ Thus the notion that "prima facie" is equivalent to presumption arose merely through the poor choice of words by a reporting editor. Very probably there was no such meaning of "prima facie" before 1841. This meaning is inconsistent with the meanings of the term in logic and colloquial English, as shown in part II.

On the other hand, any meaning that has been adopted by so many courts must have merit. No doubt, many courts simply adopted the *Muschamp* meaning through an over-deference to *stare decisis*, coupled with a poor understanding of the notion of "prima facie" and the subtle distinction between the two meanings. Some common-law courts, however, must have reasoned that the *Muschamp* meaning was a good idea. In any event, the sheer volume of cases using this meaning warrants giving it serious consideration as a possible meaning in the Louisiana Code of Evidence. The following prominent American cases are noteworthy.³¹

One of the earliest American cases to address the meaning of "prima facie" is *State v. Sattley*.³² That court said: "[P]rima facie evidence is such that raises

28. Wigmore, *supra* note 20, § 2494, at 379-81.

29. *Id.*

30. *Id.* (citing Joseph K. Angell, *Carriers* § 95 (1877)).

31. For citations to English cases other than *Muschamp*, see Wigmore, *supra* note 20, § 2494, at 379 n.3, 380.

32. 33 S.W. 41 (Mo. 1895).

such a degree of probability in its favor that it *must* prevail unless it be rebutted, or the contrary proved."³³

In 1938, the Oregon Supreme Court stated a "prima facie case is such as will suffice until contradicted and overcome by other evidence."³⁴ The rest of the opinion indicates by "suffice" the court meant "suffice to win the case," or "establishes conclusively the plaintiff's cause of action."³⁵

An Ohio appellate court said the following in 1941, in *State ex rel. Herbert v. Whims*:³⁶ "The words prima facie as used in statutes merely mean a fact *presumed to be true unless disproved* by some evidence to the contrary, but they always imply that the proper party shall have the opportunity of offering proof in rebuttal. . . ."³⁷

Herbert concerned a statute that stated a finding made by a specific commission constituted prima facie evidence of a certain state of facts. The court read that statute to mean the findings of the commission were presumed to be true in a court of law, but the defendant could rebut them.

Also in 1941, the court in *In Re Fink's Estate*³⁸ decided "prima facie" meant "a finding of the existence of [a certain set of facts] is obligatory in the absence of other evidence,"³⁹ after noting the two meanings common-law courts have given to the term.

In 1948, in *Delaware Coach Co. v. Savage*,⁴⁰ the court stated the following: "Upon the establishment of a prima facie case the burden of evidence or the burden of going forward with the evidence shifts to the defensive party. It then becomes incumbent upon such defensive party to meet the prima facie case which has been established."⁴¹

Although this case is cited as support for the proposition "prima facie" is equivalent to a presumption, that reading is not the only one possible. The burden of going forward with the evidence is usually said to be equivalent to the burden of producing evidence.⁴² By saying the burden "shifts" to the defensive party, the court implies the plaintiff has met his burden of producing evidence and can thus withstand a motion for directed verdict. The surrounding text in the case explained the burden of going forward with the evidence shifts back and forth during trial, and the party with the burden at any given time must establish a prima facie case. Still, the last clause of the above quotation, to the effect that a prima facie case makes it "incumbent" upon the defendant to meet the

33. *Id.* at 44 (emphasis added) (citing *State v. Buck*, 25 S.W. 573 (Mo. 1894)).

34. *Pacific Tel. & Tel. Co. v. Wallace*, 75 P.2d 942, 947 (Or. 1938).

35. *Id.*

36. 38 N.E.2d 596, 599 (Ohio Ct. App. 1941).

37. *Id.* at 599 (emphasis added).

38. 21 A.2d 883 (Pa. 1941).

39. *Id.* at 888.

40. 81 F. Supp. 293 (D. Del. 1948).

41. *Id.* at 296.

42. *See supra* note 15.

evidence, implies if the defendant does not meet the prima facie case, he loses. This meaning of "prima facie" is equivalent to presumption, but it is apparent that *Delaware Coach* is not clear on the exact meaning of "prima facie."

In the same year, however, another court explicitly said that language similar to the *Delaware Coach* quotation clearly creates a presumption in favor of the party who has established the prima facie case:

It has sometimes been said that when a party to an action has made a prima facie case, the "burden of proceeding" or the "burden of evidence" then shifts to his adversary. This is simply a way of saying that upon a prima facie case, a litigant is entitled to prevail if his adversary offers no evidence. The necessity of offering evidence to offset an adversary's prima facie case in no way shifts the burden of proof, which continues to rest upon the party which has it.⁴³

It is easy to see why courts equate "prima facie" with a presumption favoring the party who has established a prima facie case.

D. Less Common Meanings

The term "prima facie" has been given other meanings. McCormick says:

[A]ssume that a party having the burden of producing evidence of fact A, introduces proof of fact B. The judge, using ordinary reasoning, may determine that fact A might reasonably be inferred from fact B, and therefore that the party has satisfied its burden, or as sometimes put by the courts, has made out a "prima facie" case.⁴⁴

McCormick is less clear than usual here. At first blush, McCormick appears to think, if a party has established a prima facie case, then he has merely met his burden of producing evidence. This assumes the second, unqualified, use of "burden" refers to the burden of producing evidence mentioned earlier in the passage. This would be essentially the first meaning discussed in part III.B. However, McCormick's following discussion indicates he thinks "prima facie" is equivalent to presumption, which would suggest McCormick leans to the second meaning, discussed in part III.C. He then states "[a]lthough some courts have described such a standardized inference as a presumption, most legal scholars have disagreed."⁴⁵ The passage may indicate an intention on McCormick's part to reduce confusion in the courts by blending the two meanings, as some courts appear to have done.⁴⁶ This is perhaps the best

43. *Miller v. Kruggel*, 195 P.2d 597, 599 (Kan. 1948) (emphasis added).

44. McCormick, *supra* note 15, § 342, at 450.

45. *Id.* (footnotes omitted).

46. "Prima facie evidence means evidence which, standing alone . . . warrants the conclusion . . . [i]f it is not rebutted . . . and if it relates to the decisive issue in the case, a decision is required in

explanation for such a shift by a prominent scholar of evidence law—almost mid-sentence—of his meaning of this important term.

In addition to McCormick, courts have invented or blended their own meanings of “prima facie.” In *Reddy v. Johnson*,⁴⁷ the court stated:

When a plaintiff has made a prima facie case by evidence, or a presumption given him by law, the defendant must meet it with countervailing proof or suffer whatever judgment the prima facie proof will support. The burden of proof remains with the plaintiff to establish her right to recover by a fair preponderance of all the evidence, not by “clear and convincing evidence,” and if this is not done, and there is no preponderance on either side, the plaintiff cannot recover.⁴⁸

This is certainly curious language. In the first sentence, the court says a prima facie case establishes a presumption, but the second sentence says the burden of proof remains on the plaintiff even after the prima facie case has been established. The surrounding text is equally confusing and allows a number of different interpretations, none of which is entirely satisfactory.⁴⁹

As shown, there is nothing even approaching uniformity in the common-law jurisdictions; there are two major uses of the term “prima facie” and a number of other minor ones.

IV. LOUISIANA

A. Jurisprudence

Before 1936, there are no Louisiana cases discussing the meaning of the term “prima facie evidence.” None of the three series of *The Louisiana Digest Annotated* (reporting the very earliest Louisiana decisions and not to be confused with West Publishing Company’s *Louisiana Digest*) directs the researcher to even one case defining “prima facie evidence.” Two cases reported therein discuss legal presumptions in general, but neither applies the discussion to statutes using the term “prima facie evidence.”⁵⁰ Planiol, in his treatise on French Civil Law, is also silent upon the subject of the term “prima facie.”⁵¹

accordance with its effect.” *Cincotta v. Dupuy*, 1 N.E.2d 182, 182 (Mass. 1936) (emphasis added).

47. 293 P.2d 945 (Idaho 1956).

48. *Id.* at 948.

49. See also *Godesky v. Provo City Corp.*, 690 P.2d 541, 547 (Utah 1984).

50. *Dugas v. Estiletts*, 5 La. Ann. 559 (1850); *Succession of Tilghman*, 7 Rob. 387 (La. 1844).

51. Marcel Planiol & George Ripert, *Treatise on the Civil Law* (Louisiana State Law Institute trans., West 1959) (1939). The index to Planiol’s work has no entry for “prima facie evidence,” nor is there such a listing in the index under the topics “evidence” and “proof.” Planiol does discuss the difference between factual and legal presumptions, but he makes no reference to “prima facie.” He further discusses legal presumptions and their effects without discussing the term “prima facie.” 2 Planiol & Ripert, *supra*, §§ 9-54(A)(7), at 9-40.

A number of Louisiana cases decided between 1887 and 1936 use the term "prima facie evidence" or quote a statute using that term, but not a single case defines the term or discusses its meaning.⁵²

The absolute absence of early Louisiana cases discussing the term is curious, considering many common-law jurisdictions at that same time were deciding cases where the meaning of the term was of importance. In the original *Corpus Juris*, the section entitled "Prima Facie"⁵³ and Section 1735 of the chapter

52. A detailed description of the author's WESTLAW searches will illustrate this point. First, in the Louisiana case law database (LA-CS), the writer searched for the term "prima facie evidence" in all cases decided before *Martin v. Breaux*, 165 So. 743 (La. App. 1st Cir. 1936), discussed *infra* notes 62-66 and accompanying text, the earliest Louisiana case which the various digests cite as discussing the meaning of the term "prima facie evidence." Thus the search was: "'prima facie evidence' & da(bef 2-20-36)." This first search yielded one hundred fifty-eight cases.

The writer then ran a second search for all cases decided before *Martin v. Breaux* in which the term "prima facie evidence" appeared in the same paragraph as words beginning with the letters "M-E-A-N" (such as "means," "meaning," "meant," etc.) or with the letters "D-E-F-I-N" (such as "define," "defines," "defined," "definition," etc.). Thus this second search was: "'prima facie evidence' /p (mean! defin!) & da(bef 2-20-36)." This search yielded twenty-five cases, none of which discussed the meaning of "prima facie evidence" or defined that term.

These twenty-five cases may be broken down as follows: Fourteen cases had an unrelated use, in the same paragraph as "prima facie evidence," of a word such as "means" or "meant." Often, the use was non-definition-related, such as "an illegal means of procuring liquor." Seven cases had an unrelated use, in the same paragraph as "prima facie evidence," of a word such as "definite," "defines" or "definition." One case referred to 1914 La. Acts No. 209, describing what was "prima facie evidence of intent to defraud within the meaning of this act." In that statute, the "meaning" discussed was the meaning of "defraud." The court did not elaborate on the meaning of "prima facie evidence," although it did hold the statute in question did not remove the defendant's presumption of innocence. *State v. Elkin*, 177 La. 427, 148 So. 668 (1933). One case discussed 1894 La. Acts No. 166, which dealt with "prima facie evidence of fraudulent intent within the meaning of this act." That court did not discuss the meaning of "prima facie evidence." *State v. Ackerman*, 51 La. Ann. 1213, 26 So. 80 (1899). In one case, a dissenting judge said, in passing: "The court [today] could not have intended to hold . . . that a tax deed was not prima facie evidence of the title or that prima facie proof does not mean that the party who has made it may rest until his adversary has rebutted it." *Lisso & Bros. v. Giddens*, 117 La. 507, 515, 41 So. 1029, 1034 (1906). The main decision does not discuss prima facie evidence at all, and the dissenting judge does not elaborate on the above statement. Thus, *Lisso* is useless in trying to discover early Louisiana law on the subject. Furthermore, the statement in the dissent has no precedential value. In one case the headnote to an unrelated discussion of a statute with the term "prima facie evidence" referred the reader to the West digest Words and Phrases publication, discussing "definitions." *Owen v. Tangipahoa Bank & Trust Co.*, 180 La. 747, 157 So. 549 (1934).

Analysis of the other one hundred thirty-three cases found in the first search confirmed what the second search suggested: none of those one hundred thirty-three cases discussed the meaning or definition of the term "prima facie evidence."

This exhaustive WESTLAW research strongly suggests no cases before *Martin v. Breaux* give a definition of the term prima facie evidence. This conclusion is bolstered both by the fact that no later cases refer to any early Louisiana cases on the subject, and by the other research discussed in this section.

53. 49 C.J. *Prima Facie* 1346-47 (1920).

entitled "Evidence," specifically discussing "prima facie evidence,"⁵⁴ cite a total of seventy-two cases, with not one coming from Louisiana.

Further, the indices to all issues of the Louisiana, Tulane, and Loyola Law Reviews indicate that in the history of all three, only one article, by Paul Brosman, has been published that includes a discussion of the meaning of "prima facie evidence."⁵⁵ While Brosman cites many cases from around the country, he does not discuss Louisiana law on the subject.⁵⁶ Brosman devotes over a quarter of the article specifically to the subject of "The Prima Facie Presumption."⁵⁷ In that section he cites no less than three hundred eleven cases. Of the three hundred eleven, only two are Louisiana cases, and neither is useful in this comment's inquiry.⁵⁸

Moreover, later Louisiana cases do not refer to early Louisiana decisions defining or discussing the meaning of "prima facie evidence."⁵⁹ The dearth of early Louisiana cases on the subject at a time when other jurisdictions were addressing the issue is curious. It could be explained by the absence of the term "prima facie" in the Louisiana Civil Code.⁶⁰ While Louisiana's history of statutory law, most notably the Civil Code, dates back to the state's earliest beginnings, other jurisdictions began developing statutory law comparatively recently. Thus the American common-law jurisdictions were likely to include commonly used legal terms such as "prima facie evidence" in statutes covering areas of the law that Louisiana's Civil Code already covered without use of such terms. Still, many Louisiana legislative acts in that period used the term.⁶¹

54. 23 C.J. *Evidence* 9 (1921).

55. Paul Brosman, *The Statutory Presumption*, 5 Tul. L. Rev. 17 (1930). See also A.E. Ralston, Jr., Note, *Evidence—Statutory Prima Facie Presumptions—Rational and Natural Relation to the Principal Fact*, 14 Tul. L. Rev. 297-99 (1940) and the cases cited therein (discussing the constitutionality of statutes using the term "prima facie," although not discussing the term's definition).

56. Brosman wrote the article while he was at Yale working with W.F. Dodd and Robert Maynard Hutchins.

57. Brosman, *supra* note 55, at 41-54.

58. *State v. Wilson*, 141 La. 404, 75 So. 95 (1917); *Learned & Koontz v. Texas & P. Ry.*, 128 La. 430, 54 So. 931 (1911) (mis-cited by Brosman as "*Learner v. Texas & P. Ry.*"). *Learned* does not even use the term "prima facie," but merely discusses a general statutory legal presumption. *Wilson* concerns the constitutionality of a statute using the term "prima facie" (Act No. 40 of 1908) and the lower court's misunderstanding of the statute's operation, but the appellate opinion does not discuss possible definitions for the term.

59. See, e.g., *State v. Lindsey*, 491 So. 2d 371 (La. 1985); *State v. Williams*, 400 So. 2d 575 (La. 1981); *Martin v. Breaux*, 165 So. 743 (La. App. 1st Cir. 1936).

60. La. Civ. Code art. 1836 is the only current article using the term "prima facie," and that term was not added until 1984. (The Index to Prima Facie Evidence in Professor Pugh's Handbook on Louisiana Evidence Law cites the reader to Civil Code articles 55 and 3062, but while these two articles do include presumptions, they do not use the term "prima facie.") Further, Article 1836 does not discuss "prima facie evidence" as such. Rather, it uses "prima facie" as an *adverb*, stating that "[a]n act under private signature is regarded prima facie as the true and genuine act."

61. See *supra* note 52. See also the discussion of *Martin v. Breaux*, 165 So. 743 (La. App. 1st Cir. 1936), *infra* notes 62-66.

In 1936, the Louisiana First Circuit Court of Appeal decided *Martin v. Breaux*.⁶² The statute at issue stated: "[W]henver [an automobile driver attempts to overtake another] the responsibility therefor shall rest prima facie upon the driver of the vehicle doing the overtaking or passing."⁶³ Both the trial court and the court of appeal gave this language an effect whereby the fact car X was passing was prima facie evidence of the driver's fault, but he could rebut whatever presumption was raised.

However, the case gives no indication whether the driver of car X *must* put on evidence if he is to prevail. Although, when read literally, the statute says the passing driver is guilty as a matter of law when there is an accident, the court did not give such a construction. It examined the specific facts and found that although the driver was indeed passing, he had "rebutted, by competent evidence, his responsibility for the accident."⁶⁴

More significantly, the court did not refer to a single Louisiana case to define "prima facie"—because, as seen earlier, there were none defining "prima facie" or "prima facie evidence." Rather, the court looked to the "Prima Facie" section of the *Corpus Juris* mentioned earlier in this paper.⁶⁵ That work defines the words "prima facie" as follows: "They import that the evidence produces for the time being a certain result; but that that result may be repelled."⁶⁶ This meaning is identical to the *Muschamp* meaning: prima facie evidence stands unless and until it is rebutted.

In the fifty or so years following *Martin*, Louisiana courts have occasionally spoken on the meaning of "prima facie evidence."⁶⁷ However, no clear line of thought developed a single definition, and as with the common-law jurisdictions, courts have often given little thought to the meaning or have applied inconsistent definitions. Two cases decided in the last fifteen years, *State v. Williams*⁶⁸ and *State v. Lindsey*,⁶⁹ have so completely supplanted any earlier judicial reasoning that this paper will not analyze the earlier cases.

Many of the battles in the Louisiana Supreme Court centered around whether, under Louisiana Revised Statutes 14:32 and 14:39,⁷⁰ violation of a statute or ordinance was a conclusive, irrebuttable presumption of negli-

62. 165 So. 743 (La. App. 1st Cir. 1936).

63. Rule 7(c), contained in 1932 La. Acts No. 21, § 1. When the Louisiana Revised Statutes were enacted in 1950, this statute became La. R.S. 32:233. The reference to "prima facie" was omitted in 1962 when the statute was replaced with its current predecessor, La. R.S. 32:73 (1963).

64. *Martin*, 165 So. at 745.

65. See *supra* text accompanying notes 53-54.

66. *Corpus Juris*, *supra* note 53, at 1346.

67. See, e.g., *Louisiana State Bar Ass'n v. Connolly*, 201 La. 342, 9 So. 2d 582 (1942); *Smith v. Richland State Bank*, 9 So. 2d 327 (La. App. 2d Cir. 1942).

68. 400 So. 2d 575 (La. 1981).

69. 491 So. 2d 371 (La. 1986).

70. Both statutes provide, in pertinent part: "The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence." La. R.S. 14:32, :39 (1986 & Supp. 1994).

gence—i.e., negligence per se—or was merely some evidence of negligence.⁷¹ However, *Williams* and *Lindsey* have heightened the tension.

In 1981, the Louisiana Supreme Court handed down *State v. Williams*.⁷² The court took the *Muschamp* view that “prima facie” (and “presumptive evidence”) meant a mandatory presumption: “The term ‘presumptive evidence’ is literally synonymous with ‘prima facie evidence.’ Each is defined as evidence sufficient to establish a given fact and which, if not rebutted or contradicted, will remain sufficient.”⁷³

Four years later, however, the court retreated from this position. In *State v. Lindsey*,⁷⁴ Justice Dennis said the court now questioned their reasoning in *Williams*—that the legislature’s failure to include the word “only” in a statute converts a presumption from permissive to mandatory:

[I]t seems equally reasonable if not more reasonable to conclude that the legislature intended “presumptive evidence” and “prima facie evidence” to signify only permissible inferences. . . . [W]e only question the interpretations of “presumptive evidence” or “prima facie evidence.” After consideration of [a number of Louisiana criminal statutes], our earlier cases, and jurisprudence from other jurisdictions, we conclude that words such as “shall be presumptive evidence” create only a permissive inference, not a mandatory presumption.⁷⁵

Nevertheless, lower Louisiana appellate courts seem to have ignored *Lindsey*. Some still quote language similar to *Williams*.⁷⁶

Although *Williams* and *Lindsey* are criminal cases, in neither opinion did the Louisiana Supreme Court limit its definition of “prima facie evidence” to criminal cases. Further, many courts deciding civil cases cite *Williams* as the standard definition for “prima facie evidence.”⁷⁷ A reason may be that the Shepard’s citators do not list *Lindsey* as overruling *Williams*, but merely as questioning it. That is an erroneous conclusion. Although *Lindsey* reaffirmed *Williams*’ statements about constitutional law, it clearly fixed a new standard for evidence law regarding permissive presumptions and prima facie evidence.

71. See *State v. Lollar*, 389 So. 2d 1315 (La. 1980); *State v. Hammontree*, 363 So. 2d 1364 (La. 1978); *State v. Nix*, 211 La. 865, 31 So. 2d 1, cert. denied, 332 U.S. 791, 68 S. Ct. 100 (1947).

72. 400 So. 2d 575 (La. 1981).

73. *Id.* at 579 (citing *State v. McCoy*, 395 So. 2d 319 (La. 1980)).

74. 491 So. 2d 371 (La. 1986).

75. *Id.* at 375.

76. *W. Handlin Marine, Inc. v. Gulf States Marine, Inc.*, 624 So. 2d 907, 910 (La. App. 5th Cir. 1993), writ denied, 631 So. 2d 1166 (1994); *Guzzardo v. Town of Greensburg*, 563 So. 2d 424, 427 (La. App. 1st Cir. 1990); *Guilbeau v. C & D Reprographics-Lafayette, Inc.*, 568 So. 2d 206, 212 (La. App. 3d Cir.), writ denied, 571 So. 2d 653 (1990); *Humphries v. Louisiana Dep’t of Pub. Works, Div. of Transp.*, 545 So. 2d 610, 616 (La. App. 3d Cir.), writ denied, 548 So. 2d 1249 (1989).

77. See, for example, the cases cited in *supra* note 76.

The case law in Louisiana on the meaning of "prima facie evidence" is, at best, confused, and the history of the meaning in the Louisiana jurisprudence does little to help formulate a "proper" meaning. This discussion shall turn now to Louisiana statutory law.

B. Statutes

Earlier it was noted that the terms "prima facie evidence" and "prima facie case" differ in meaning. "Prima facie evidence" refers to a single piece of evidence which tends to establish a single fact or a single conclusion of law. A "prima facie case," on the other hand, generally means that one side has produced some evidence of *each of several* elements of a conclusion of law.⁷⁸ The Louisiana statutes using the term "prima facie" reflect the distinction between prima facie evidence and prima facie case. Most use terminology in one of the following two forms:

- 1) X shall be prima facie evidence of Y.⁷⁹
- 2) X shall result if and/or only if a prima facie case of Y has been established.⁸⁰

This discussion is only concerned with the first construction.⁸¹ As noted, though, there is a strong connection between both uses. This connection causes

78. See *supra* part II.

79. See, e.g., La. Const. art. VII, § 25(A) (stating a tax deed by a tax collector is prima facie evidence of a valid sale); La. R.S. 2:2.1(A) (1987) (stating registration of aircraft is prima facie evidence of its use in this state); La. R.S. 3:740(B) (1987) (stating certified copy of recordation, renewal, or transfer is prima facie evidence of ownership of the animal); La. R.S. 3:3225(F) (1987) (stating a certificate of state chemist performing analysis is prima facie evidence of facts stated therein); La. R.S. 3:4278.2(E) (Supp. 1994) (stating failure to comply with statute is prima facie evidence of intent to commit theft); La. R.S. 15:424 (1992) (stating published statutes and digests of other states are prima facie evidence of those states' statutory laws); La. R.S. 15:427 (1992) (stating a certified act of protest for non-payment of commercial paper is prima facie evidence of facts recited in that act).

80. See, e.g., La. Code Civ. P. arts. 4904 and 4921 (stating a plaintiff may obtain a judgment of default only if he established a prima facie case); La. Code Crim. P. art. 795(C) (Supp. 1994) (stating if defendant makes out a prima facie case that a prospective juror has been excluded by the state solely on the basis of race, then the court may demand a race-neutral explanation from the state); La. R.S. 9:345(B) (Supp. 1994) (stating the court shall appoint attorney to represent child's best interests if a prima facie case of abuse by parents has been made out); La. R.S. 46:236.4(F)(2) (Supp. 1994) (stating a support obligor's possible objections become limited once a prima facie case of non-payment has been established). A number of statutes also recite what types of proof shall constitute a prima facie case with respect to the issue covered by the statute.

81. Brosman, *supra* note 55, categorizes these types of statutes in even more detail. He divides them into: (1) Those attached to proof of some document, which can be further subdivided into (a) those making the document prima facie evidence of the truth of the facts recited in it, (b) those making the document prima facie evidence of the correctness and regularity of proceedings prior to it and not necessarily reported therein, and (c) those making the document prima facie evidence of

the definition of each term to influence the other. If a "prima facie case" means that one party is entitled to a legal presumption in his favor, rather than merely a permissive inference, then he *must* win in the absence of other evidence. Similarly, under this definition, "X is prima facie evidence of Y" means that if X is established, then a legal presumption of Y arises, and Y *must* be accepted in the absence of other evidence.

Given the history in the common-law jurisdictions, the meaning of "prima facie evidence" in colloquial English, and Justice Dennis' reasoning in *Lindsey* that many criminal statutes will be unconstitutional otherwise, this comment proposes the best meaning of "prima facie evidence" for Louisiana to adopt would be the following one—almost identical to a permissive inference:

If a set of facts is "prima facie evidence" of another set of facts or a conclusion of law, then from the first set of facts alone the trier of fact may conclude that the second set of facts or the conclusion of law has been established, but the trier of fact is not compelled to so conclude, even in the absence of other evidence. (An exception may be made for statutes where such a construction gives a patently absurd meaning.)

A Louisiana Code of Evidence article, containing this definition, would provide for Louisiana law the best, most historically and colloquially consistent meaning of "prima facie evidence": the presumption which has been raised does not even need to be rebutted by the opposing party. This meaning is virtually identical to "permissive inference"; it does not create a presumption which needs to be rebutted (although, of course, the opposing party will usually want to rebut the inference).

V. PRACTICAL EFFECTS AND JURY INSTRUCTIONS

Is the above construction helpful at all? How would it be applied in jury instructions? Weinstein states presumptions should not be mentioned to the jury.⁸² This is a wise policy. How does one then "sneak" the legal effect into jury instructions? Consider the following: Louisiana Revised Statutes 14:81.1(C) reads: "Possession of three or more of the same photographs, films, videotapes, or other visual reproductions shall be prima facie evidence of intent to sell or distribute."⁸³ This is a common statutory use of prima facie evidence,

some other fact-set than those in (a) and (b); (2) Those attached to proof of some set of facts (other than a document), which may be divided into those making (a) proof of some fact prima facie evidence of ultimate guilt, (b) proof of some fact prima facie evidence of some other fact than ultimate guilt, and (c) proof of some fact evidence of the state of mind of a person at a given time (e.g., intent to distribute); (3) Those establishing the policy of the law on a subject (e.g., the victim in a rape case is presumed to be of chaste character; such a statute probably would not use the term "prima facie"). Brosman, *supra* note 55, at 43-49.

82. 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 301[02], at 31-32 (1975).

83. La. R.S. 14:81.1(C) (1986).

because states of mind such as intent are virtually impossible to prove. A proper jury instruction involving the above construction of prima facie evidence might be as follows: "If you find, beyond a reasonable doubt, that the defendant possessed three or more copies of an article of pornography involving juveniles, then you may conclude, without more, that the defendant intended to distribute those articles of pornography, but you do not have to so conclude."

Of course, this would not be the entire jury instruction. It would only be the part relating to whether the prosecution had established the necessary element of intent to distribute. This instruction, however, would be helpful.

The meaning of "prima facie evidence" proposed above may be less helpful in cases involving documentary evidence. Consider Louisiana Revised Statutes 9:397.3(B), which reads, in pertinent part: "[T]he certified report [of a blood or tissue sampling taken for the determination of paternity] shall be admitted in evidence at trial as prima facie proof of its contents."⁸⁴

A proper jury instruction would be to the effect that the jury could find, from the copy of the report alone, that X was the father of Y, but they are not required to find that. This is a helpful jury instruction, but in a different way from the first example. Rather than authorizing the jury to find fact W, it reminds them that they are not compelled to find fact W.

A plainly incorrect statement would be, because the certified copy has been introduced, the jury must find that X is the father of Y unless X has shown some facts to the contrary.

VI. CONCLUSION

In the last few pages, it has been shown that an unfortunate error due to the imprecision of a reporter in *Muschamp* has created a rift in the jurisprudence. This rift has caused confusion, great inconvenience, and no doubt some injustice. To create uniformity in Louisiana statutory law, to bring lower courts in line with the Louisiana Supreme Court decision in *Lindsey*, to create a legal meaning close to the meaning in other fields, and to protect the constitutionality of our statutes using the term, "prima facie evidence" should be read as creating a permissive inference only, and nothing more (unless such a reading makes the given statute patently absurd). As demonstrated, jury instructions may utilize such a meaning without suffering in clarity. An article in the Louisiana Code of Evidence adopting this meaning would be a positive step and would put Louisiana leagues ahead of both the federal system and the other state systems in this area of law.

Georg Nils Herlitz

84. La. R.S. 9:397.3(B) (1991).