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Chapter 2: Evidence

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CHAPTER 2

Evidence

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§2.1. Introduction. One should never force generalization upon the Survey year's random run of decisions, especially in the law of evidence. Still, a few cautious observations beckon from the 1973 season. The first is that the Massachusetts appellate courts seldom overturned the work product of a criminal trial by reason of evidentiary error. This pattern resulted not so much from the application of constitutional doctrine as from the more practical operation of curative jury instructions and the rule of harmless error beyond a reasonable doubt. A second tendency was the courts' readier willingness to reverse civil results in the area of tort liability for personal injury. Third, in both the civil and criminal setting, the state courts hewed closely to the literal text of evidentiary statutes, specifically those governing the admissibility of evidence for the commitment of sexually dangerous persons and the use of business records and official reports. Finally, on the federal side, one saw the advent of the Rules of Evidence for United States Courts and Magistrates and their substitution for state common law rules as a reference for the federal courts. It remains to be seen whether the Massachusetts courts will draw from the same rules for the modernization of their own common law of evidence.

I. CRIMINAL EVIDENCE

§2.2. Criminal identification evidence. The 1973 Survey year produced two decisions illustrative of the Supreme Judicial Court's respect for the judgment of the trial courts' admission of evidence of criminal identification.[1] Each upheld the admission of identifying testimony challenged on the basis of suggestive out-of-court confrontations.

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§2.2. [1] Commonwealth v. Leaster, 1972 Mass. Adv. Sh. 1533, 287 N.E.2d 122; Commonwealth v. Denault, 1972 Mass. Adv. Sh. 1703, 289 N.E.2d 863. For a critique of the Supreme Judicial Court's reluctance to disturb the trial judge's conclusions on questions

A brief synopsis of some of the more recent United States Supreme Court decisions will be helpful. The Court in *United States v. Wade*[2] held that a pretrial lineup was a "critical stage" of criminal proceedings and that the accused is therefore entitled to assistance of counsel within the meaning of the Sixth Amendment. In-court identification based upon a defendant's uncounseled lineup or show-up exposure was therefore considered inadmissible, unless the prosecution could show by clear and convincing evidence that the identification rested on a source independent of, and untainted by, the uncounseled viewing. In addition, *Gilbert v. California*[3] held that a witness's testimony that he had previously identified the accused at a lineup was excludible per se if it derived from an uncounseled lineup. More recently, in *Kirby v. Illinois*,[4] the Court drastically restricted the *Wade-Gilbert* doctrine to post-indictment confrontation and identification.

Stovall v. Denno[5] and *Simmons v. United States*[6] clarified the boundaries of general due process protection in other pretrial identification procedures not requiring the assistance of counsel, but which, by their circumstances, might be unnecessarily suggestive or conducive to "irreparable mistaken identification." A denial of due process turned on the totality of the circumstances.

Recent Massachusetts cases have shown that the exclusion of identification evidence under the Sixth Amendment doctrines of *Wade* and *Gilbert* or under the circumstantial due process rules of *Stovall* and *Simmons* will not be commonplace in this state. In *Commonwealth v. Leaster*,[7] the defendant was found guilty of murder in the first degree, armed robbery, and assault and battery by means of a deadly weapon. The charges arose from the robbery of a small variety store. At about 4:00 P.M. two men had entered the store; one had held a gun to the head of the proprietor's wife and, when the proprietor had come to her assistance from the back room, shot him. The two had then fled with

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of prejudicial confrontation and identification, see Liacos, 1972 Ann. Surv. Law §12.1. Professor Liacos observes the court's growing impatience with the stream of confrontation cases generated by the Supreme Court's decisions. If the volume of such cases influenced their outcome, the 1973 Survey year—the first for the new Appeals Court—offers only two full decisions and bodes a sharp reduction.

2 388 U.S. 218 (1967).

3 388 U.S. 263 (1967).

4 406 U.S. 682 (1972).

5 388 U.S. 293 (1967). In *Stovall*, it was held that the use of a hospital room identification by a witness the day after she had undergone major life-saving surgery for critical injuries inflicted by her assailant and who identified the defendant when he was shown to her alone and while handcuffed to police officers did not offend due process.

6 390 U.S. 377 (1968). In *Simmons*, it was held that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

7 1972 Mass. Adv. Sh. 1533, 287 N.E.2d 122.

proceeds from the cash register. A customer had been present in the store throughout the incident.

Police had arrived at about 4:25 P.M. and taken the husband to the hospital where he died at 4:30 P.M. A description of the two men obtained from the wife had been broadcast on police radio. At 5:15 P.M. the defendant had been arrested because he fitted the description. Arresting police had taken the defendant to the hospital and transferred him to another police vehicle in the parking lot. At that moment the wife had been leaving the hospital and had identified the defendant as the man who had shot her husband. Both the wife and the witnessing customer made in-court identifications of the defendant as the robber who had shot the husband. The defendant testified that he had been at home at the time of the crime, an alibi corroborated by a woman with whom he was living.

The trial judge excluded from evidence station house identifications made later in the evening by the wife and the witness, but admitted the wife's testimony of the hospital identification and the in-court identifications by both wife and customer.

The Supreme Judicial Court held that the hospital parking lot identification was not a confrontation denying the defendant assistance of counsel or due process of law under the *Wade-Gilbert* or *Stovall-Simmons* doctrines. The decision did not turn on the rule of *Kirby v. Illinois* limiting *Wade* and *Gilbert* to indicted defendants. Instead the court found the evidence on voir dire to support the finding that the parking lot meeting had been an accident resulting from a police effort at a legitimate bedside confrontation with a dying victim,[8] and that the accidental meeting simply had not been unfair or suggestive. Further, it characterized the confrontation, occurring within an hour and a half after the shooting as one "in the course of (or immediately following) a criminal episode" and therefore within a class of its cases consistently excepted from the *Wade-Gilbert* per se exclusionary rule because in the totality of the circumstances they did not threaten irreparable mistaken identification.[9]

In addition, it was held that the admission of the in-court identifications by both the wife and witness rested on the ground of their independent origin at the event of the crimes where both had had ample opportunity to observe and remember the defendant.[10]

In the second Massachusetts decision in the area of criminal identification, *Commonwealth v. Denault*,[11] the defendant was convicted of breaking and entering a dwelling house at night to commit larceny and of

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8 Id. at 1535, 287 N.E.2d at 124.
9 Id. at 1536, 287 N.E.2d at 125.
10 Id. at 1537-40, 287 N.E.2d at 126-27.
11 1972 Mass. Adv. Sh. 1703, 289 N.E.2d 863.

larceny of a purse. About 11:45 P.M. a man had entered the victim's bedroom, picked up her purse, then fled the premises through a pantry window, but not without affording his victim "a good look at him by the night light in the pantry."[12] The victim and a neighbor had followed the suspect outdoors and had been able to take the registration number of a suspected getaway car, summon police, and describe the intruder and the car. About 1:15 A.M. one of the police spotted the car, stopped it, and, joined by several other police, observed that the defendant matched the description, and placed all three occupants of the vehicle under arrest. Although the arresting police radioed that the victim be driven to the station, a cruiser instead drove her to the scene of the arrest where, without prompting, she identified both the car and the suspect. At the trial she again identified the defendant and testified to the arrest scene identification.

The court allowed the evidence from the out-of-court confrontation on multiple grounds. It reasoned that the confrontation an hour and three-quarters after the burglary, as part of a continuing police investigation immediately following the criminal episode, was not, amid the "totality of the circumstances," a denial of due process. Those circumstances included: first, the fact that the identification was spontaneous not prompted by police, and second, the general consideration that "[s]uch prompt meetings of victim and suspect are a routine and quite natural means of assuring reliable identification and preventing unjust detention of the innocent,"[13] so long as unabused by suggestive presentation. One additional point of significance was the admission of police testimony corroborating the victim's out-of-court identification, not for the truth of the identification but for confirmation of its occurrence only, a narrower purpose for which a "limiting instruction might have been appropriate . . . ."[14] The in-court identification had the independent source of the victim's view in the night light evidenced by her accurate description of the defendant.

In sum, then, the exclusion of identification evidence under the Sixth Amendment doctrines of *Wade* and *Gilbert* or the circumstantial due process rule of *Stovall* and *Simmons* will be unusual in Massachusetts because (1) the defendant has not been indicted within the meaning of *Kirby v. Illinois,* or (2) the in-court identification rests on an independent source, usually a confrontation at the time of the crime, or (3) the out-of-court confrontation and identification follows fast upon the crime for the avowed policies of reliable identification and elimination of the innocent suspect, or (4) the confrontation itself is simply not unfair in the totality of the circumstances. It will require a rare episode of abuse to defeat each and every one of these saving rationales.

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12 Id. at 1703, 289 N.E.2d at 864.
13 Id. at 1705, 289 N.E.2d at 865.
14 Id. at 1706, 289 N.E.2d at 866.

§2.3. Criminal confessions and admissions. The Massachusetts appellate courts on three occasions rejected claims that questionable confessions or admissions were sources of reversible error and, despite disapproval of their admission into evidence, found their impact either harmless beyond a reasonable doubt[1] or remedied by limiting instructions. The decisions suggest that the courts would have preferred the original exclusion of the evidence.

In *Commonwealth v. Masskow*[2] the defendant was convicted of murder in the second degree for the shooting of his brother-in-law. The defendant lived in the same house with his sister and brother-in-law, witnessed a number of regular wife beatings by the victim and had often asked him to stop. Masskow had a limited education, a long history of alcoholism and possible drug addiction. He kept guns as a hobby and had never had steady employment.

Shortly after the unwitnessed 1:30 A.M. shooting in the victim's bedroom, the defendant made spontaneous direct and inferential confessions to a neighbor and two police officers, and a further admission of the shooting to a third officer interrogating him after proper constitutional warnings. The testimony of the neighbor and all three police was admitted. Subsequent evidence brought into question the defendant's mental competency at the time of the shooting and confessions. The Supreme Judicial Court addressed the issue of the admissibility of a confession from one with questionable mental capacity as well as the remedial course for the trial judge.

First, on authority of the Supreme Court's decision in *Blackburn v. Alabama*,[3] it noted that "once it becomes apparent that the accused's mental condition is a factor that ought to be looked into in relation to the admissibility of his confession, the trial judge on his own motion should order a hearing on the defendant's capacity to make the confession."[4] Secondly, it applied, out of comity and anticipation of the federal habeas corpus remedy, the First Circuit's rule[5] that a trial judge facing substantial evidence of the defendant's insanity at the time of such spontaneous or responsive self-incriminations must create a record of "unmistakeable clarity" that he considered their character as "the product of a rational intellect."[6] This standard exacted more than the Massachusetts decisions would have, but the court nonetheless applied it

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§2.3. 1 "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). See also Milton v. Wainwright, 407 U.S. 371, 372 (1972); Schneble v. Florida, 405 U.S. 427, 432 (1972).

2 1972 Mass. Adv. Sh. 1817, 290 N.E.2d 154.

3 361 U.S. 199 (1960).

4 1972 Mass. Adv. Sh. at 1821, 290 N.E.2d at 157.

5 Eisen v. Picard, 452 F.2d 860 (1st Cir. 1971), cert. denied, 406 U.S. 950 (1972).

6 Id. at 863-65.

and found the admission of Masskow's statements erroneous. However, the evidence was harmless error beyond a reasonable doubt on the question whether the defendant had committed the shooting, since independent evidence in point was overwhelming. While the result was unaffected, the court nonetheless used the occasion to import the First Circuit's standard as its own.

In *Commonwealth v. Rembiszewski,*[7] the court restated and emphasized its "general wariness of adoptive admissions."[8] The defendant was charged with the murder of his wife in a wooded roadside area. His explanation to police and testimony at trial was that he and his wife had been kidnapped and attacked by two assailants intending to rob them; that his wife had been struck with an unknown instrument and that he had been beaten on the head with a stick. Police had found the defendant near the scene, received his story, and taken him to a hospital where an examining physician answered police, in Rembiszewski's presence, that x-rays revealed no head or facial injuries as claimed. The defendant remained silent. The episode came into evidence through the testimony of one of the officers. The court found its admission improper, but not materially harmful. It rejected the defendant's silence as an adoptive admission exception to the hearsay rule under these particular circumstances and under the general circumstance facing a defendant just given his *Miranda* warning of his right to remain silent. For an arrested and duly warned defendant, then, an adoptive admission by silence is practically impossible.

The Appeals Court, in *Commonwealth v. Deschamps,*[9] was similarly cautious of a defendant's inferential apology to the victim of rape and unnatural and lascivious acts. The victim's testimony of the defendant's subsequent account of his hard childhood, including time in reform schools, was sustained for its probative value as an implied apology for his coercion of the victim into acts of intercourse, fellatio, and cunnilingus. The Appeals Court characterized the apology as more probative as an admission of the forcible behavior constituting the crimes charged than prejudicial as a suggestion of past crimes. The court still relied upon a narrowing jury instruction to this effect as a safeguard against error.

§2.4. Discovery and use of exculpatory evidence. Two decisions of the Supreme Judicial Court and one of the federal district court involved the discovery and use of exculpatory evidence. In *Commonwealth v. Masskow,*[1] where the defendant's sanity was in issue, the court rejected the defendant's contention that evidence was suppressed by the prose-

7 1973 Mass Adv. Sh. 461, 293 N.E.2d 919.
8 Id. at 465, 293 N.E.2d at 923.
9 1973 Mass. App. Ct. Adv. Sh. 1, 294 N.E.2d 426.

§2.4. 1 1972 Mass. Adv. Sh. 1817, 290 N.E.2d 154 (discussed supra, §2.2).

cution's failure to volunteer a prosecutor's psychiatrist's report reaching an opinion of criminal irresponsibility. The court was not satisfied that two of the three necessary criteria were present: first, while the omitted evidence may have been favorable to the defense, second, it had not in fact been suppressed after a request by the defense, and third, most tellingly, it would not have added "material" evidence since it merely corroborated the opinions of the only two testifying psychiatrists that the defendant was not responsible.[2] While the rules of evidence were not misapplied in this case, the resulting conviction of second degree murder is nonetheless remarkable in light of the three psychiatrists' unanimous opinion of the defendant's criminal irresponsibility. The court declined to set aside the verdict under its broader powers to prevent a miscarriage of justice since the charge was accurate, and since a psychiatric opinion on the issue of insanity is not conclusive by itself.[3]

In *Commonwealth v. Clark*,[4] the co-defendant charged with second degree murder assigned as error the trial court's denial of a motion to direct the prosecution to provide the criminal records and probation records of its witnesses. The court spelled out the defendant's rights with respect to such material:

> While it is clear that the defendant is entitled to the names of the Commonwealth's witnesses, and to access to criminal records under the direction of the court, in our view it is not required that the prosecution take affirmative steps in behalf of the defendants to collect their criminal records. This burden rests with the defendants. Furthermore, there is no general pre-trial right to see probation records of witnesses.[5]

In *United States v. Mello*,[6] the defendant, convicted of possession of goods stolen from an interstate railroad shipment, was denied a new trial because additional evidence corroborating his explanation in defense had been available at trial and culpably overlooked. In these circumstances the court felt it had no discretion to grant a new trial.

§2.5. Grand jury evidence. Two decisions, one from the Supreme Judicial Court and the other from the federal district court, dealt with access to grand jury evidence on the part of the defendant and the government, respectively. The first illustrates the defendant's qualified right to grand jury minutes and the second shows the government's qualified power to compel grand jury testimony.

In *Commonwealth v. Flynn*,[1] two co-defendants moved for permission

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2 Id. at 1824, 290 N.E.2d at 158.
3 Id. at 1825, 290 N.E.2d at 159.
4 1973 Mass. Adv. Sh. 637, 295 N.E.2d 163.
5 Id. at 642, 295 N.E.2d at 167-68.
6 469 F.2d 356 (1st Cir. 1972).

§2.5. 1 1972 Mass. Adv. Sh. 1579, 287 N.E.2d 420.

to use the transcript of grand jury testimony by an accomplice who had turned state's evidence. The court permitted counsel two hours to read the thirty-four page transcript, but denied their request for separate permanent copies. The court upheld the denial and reemphasized that defendants remain unentitled to individual copies of minutes as of right.[2]

In re Alperen[3] involved a motion by the government to hold a husband and wife in civil contempt for ongoing refusal to answer questions before a special grand jury on grounds of the husband-wife privilege. The court gave short shrift to the claim of interspousal privilege on multiple grounds of (1) the adequacy of a grant of transactional immunity to each; (2) the improbability of inculpatory evidence against either; (3) the government's avowed disinterest in such evidence; (4) and the availability of a subsequent motion to suppress. Affirming *per curiam,* the First Circuit stated simply that the statutory grant of transactional immunity was sufficient.[4]

§2.6. Conspiracy. *Commonwealth v. Flynn,*[1] mentioned above at §2.5. presented the Supreme Judicial Court with an appeal from the conviction of four defendants charged with coordinated acts of breaking and entering and of armed robbery of twenty-four victims engaged in gambling in the basement of a social club. The most significant evidentiary point of the decision is its reaffirmation and extension of the two stages with which the court allows for the development of evidence in conspiracy trials:

> "by allowing in the first instance as against each defendant separately evidence of such acts, knowledge and admissions as appear to affect the particular defendant and then, when sufficient evidence has accumulated to support a fair inference of the existence of a conspiracy, by removing the limitation, so that evidence of the acts, knowledge and admissions of all who are found to have joined in the conspiracy, during the course of and in pursuance of the conspiracy, becomes applicable against all the conspirators."[2]

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2 The court cited Commonwealth v. De Christoforo, 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 100, which confirms the rule requiring a defendant to show a "particularized need" to inspect the minutes. For critical analysis of this standard, see 1972 Ann. Surv. Mass. Law §§7.7 and 12.4.

Also, one defendant who wished to challenge inconsistencies and contradictions on cross-examination was permitted to confront the witness with the transcript after the trial judge examined the passages in question.

3 355 F. Supp. 372 (D. Mass. 1973).

4 478 F.2d 194 (1st Cir. 1973).

§2.6. 1 1972 Mass. Adv. Sh. 1579, 287 N.E.2d 420.

2 Id. at 1598, 287 N.E.2d at 436, quoting Commonwealth v. Benesch, 290 Mass. 125, 132-33, 194 N.E. 905, 909 (1935).

The court extended this rule of evidence "to cases where a conspiracy or common enterprise is shown to exist even though not charged,"[3] on the underlying principle that each co-venturer is agent for the others in furtherance of the common object. Consequently, the trial judge here did not err in removing the limitation on evidence at an appropriate point, even though conspiracy was not formally charged.

§2.7. Sexually dangerous persons. Perhaps the court's most definitive evidentiary decision of the Survey year was its statement of evidence admissible in a proceeding to commit an individual as a sexually dangerous person. Section 6 of chapter 123A authorizes the petition to commit; sections 4 and 5 deal with the sources and admissibility of evidence.

In the case of *Commonwealth v. Bladsa,*[1] two psychiatrists, as witnesses for the Commonwealth, rendered opinions that the defendant was sexually dangerous. They testified in detail as to numerous sex offenses, all of which information they had obtained from police reports and from "the official police version." The court held this testimony inadmissible hearsay lacking any statutory authorization. Since the trial judge had based his conclusion of commitment at least in part on the testimony, the error was held harmful and the commitment improper.

With special regard to the statutory provisions, the court construed section 4 as allowing examining psychiatrists only *access* to court records and certain described probation records and not as authorizing the admissibility of such records, and section 5 as authorizing the admissibility only of past criminal and psychiatric records of the defendant and any psychiatric report prepared for the commitment procedure:

> We conclude that the only evidence which is rendered admissible by the terms of G. L. c. 123A §§4, 5 and 6, is that described in § 5, viz: past criminal and psychiatric records of the defendant, and any psychiatric report filed under c. 123A.[2]

Psychiatrists, then, may not import other material into their testimony. In addition, the bases of psychiatric reports and opinions offered under chapter 123A are likely to be more rigorously tested for hearsay origins. While section 4 material may serve as clues for the direction of psychiatric investigation, the upshot of the decision is that psychiatric conclusions must rest on the independent process of the investigation itself.

§2.8. Expert opinion. In *Commonwealth v. Harris,*[1] the Appeals Court provided a thorough-going analysis of the use of expert opinion.

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[3] 1972 Mass. Adv. Sh. at 1598, 287 N.E.2d at 436.

§2.7. [1] 1972 Mass. Adv. Sh. 1675, 288 N.E.2d 813.
[2] Id. at 1676, 288 N.E.2d at 814.

§2.8. [1] 1973 Mass. App. Ct. Adv. Sh. 307, 295 N.E.2d 687.

The defendant had been found guilty of arson and of breaking and entering in the nighttime to commit arson. The trial judge had allowed the expert opinion of an officer of the Boston Fire Department's arson investigation squad to the effect that two independent fires had been set at the arson site. As the basis for these opinions, the expert testified that he had made a personal, three-hour investigation of the scene and found positive evidence of two distinct fires, and that he had found no satisfactory alternative explanation for two simultaneous and independent fires, other than that they had been set. The court upheld the admission of these opinions against several contentions. The expert opinion was appropriate: (1) because the subject matter need only be one " 'about which special knowledge beyond that possessed by the ordinary juryman will aid the jury in their deliberations . . .' ";[2] (2) because the opinion was based upon personal independent investigation, and not merely information from other sources; (3) because the expert did not usurp the function of ultimate factfinding from the jury so long as the basis of his opinion had been thoroughly examined and tested for his judgment; and (4) because an opinion based on an elimination of alternative possibilities does not reduce to mere conjecture so long as the elimination of alternatives is systematic. These criteria are instructive generally and authoritative particularly for the prosecution and defense of arson.

§2.9. Photographic evidence. In *Commonwealth v. Chalifoux*,[1] the defendant, charged with holding his erstwhile girl friend overnight and beating her with a metal club, was convicted of kidnapping, uttering a threat to kill, and assault and battery with a dangerous weapon. Several days after these events, the victim, at the suggestion of the police, had a friend take colored photographs of the multiple bruises which covered her body. On the same day a police matron examined her and took note of the bruises. The defendant appealed from the subsequent admission of the photographs at trial. The court's decision illustrates the usual considerations and the common result attending the issue of photographic evidence. Typically, as here, the defendant contends that the photographs are merely cumulative or redundant of oral testimony and that their prejudicial or inflammatory impact upon the jury outweighs any probative value. In response the prosecution stresses their relevance to an element of a substantive crime, here assault and battery with a dangerous weapon, and argues that the balance struck between evidential value and prejudice was not an abuse of the trial judge's discretion. In deciding, courts most often hold, as was held in this case, the photographic evidence will stand (1) because the government is entitled to prove and corroborate its case

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[2] Id. at 309, 295 N.E.2d at 690, quoting Lovasco v. Parkhurst Marine Ry., 322 Mass. 64, 67, 75 N.E.2d 924, 925 (1947).

§2.9. [1] 1973 Mass. Adv. Sh. 93, 291 N.E.2d 635.

more effectively or graphically than by mere oral testimony; (2) because the photographs will usually substantiate an element of an offense or refute a defense, here, for example, the contention that the victim had merely fallen down; (3) because the trial judge may curb prejudicial effect by instructions on the weight of the pictures; and (4) because as a matter of experience, the occasions for exclusion for prejudice "have been rare indeed,"[2] and seem likely to continue to be so.

§2.10. Burdens of proof. Two of the year's decisions clarify the allocation of burdens of proof, one with regard to the defense of an alibi, the other with regard to the offense of rape.

In *Commonwealth v. Leaster*,[1] discussed in §2.2 under the subject of criminal identification evidence, the defendant introduced an alibi defense, to the effect that he was at home, which defense was corroborated by a friend. The defendant appealed on the grounds that the charge on this point suggested to the jury an option to ignore the Commonwealth's burden to prove the offense beyond a reasonable doubt. The instruction was sustained. Its caveat that alibi evidence must be scrutinized carefully was coupled with a reminder that the Commonwealth retained the burden of proving every essential element of the crime beyond a reasonable doubt. There was no language burdening the defendant with proof of his alibi or thereby implying that the prosecution was relieved of its usual burden in the event of his failure to prove the alibi.

In *Commonwealth v. McKay*,[2] the defendant, convicted of assault with intent to rape, challenged the admission of evidence of the victim's virginity as part of the government's case in chief when the victim's consent and reputation for chastity had not been questioned by the defendant. The Supreme Judicial Court suggested that by itself such evidence would be gratuitous, prejudicial, and reversible error:

> Better practice would call for the introduction by the prosecution of any evidence concerning the witness's virginity only after the question of her consent had been raised on cross-examination, by the defendant's testimony or otherwise.[3]

Ironically, here, the error was retroactively cured by the defendant's subsequent introduction of the consent issue. In the future, however, the government may risk error by anticipation of the defense of consent.

Though admitting evidence of virginity, the court took pains to defend as rationally distinguishable its common law rule excluding evidence of specific prior events of intercourse. The two rules rest on

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2 Id. at 98, 291 N.E.2d at 639.

§2.10. 1 1972 Mass. Adv. Sh. 1533, 287 N.E.2d 122.
2 1973 Mass. Adv. Sh. 373, 294 N.E.2d 213.
3 Id. at 377, 294 N.E.2d at 217.

divergent ratios of proof to prejudice. Evidence of virginity is more probative of a victim's disinclination to consent than it is prejudicial to the defendant; evidence of previous intercourse is less probative of the victim's consent than it is prejudicial to her. Still, in one final refinement, the court noted that the defendant may introduce evidence of past intercourse to controvert evidence of virginity which the government has introduced against the defense of consent.

II. Civil Evidence

§2.11. Administrative proceedings. In *Western Massachusetts Bus Lines, Inc. v. Department of Public Utilities,*[1] the Supreme Judicial Court affirmed a general policy allowing agencies like the Department of Public Utilities (DPU) "wide latitude in the admission of evidence"[2] and it reaffirmed the particular evidentiary rule that " an administrative decision may be sustained if it is based on hearsay supported and corroborated by competent legal evidence."[3]

In this instance a petitioning bus proprietor had applied to the DPU for a license to engage in charter service for trips originating within the town of Easthampton. Western Massachusetts Bus Lines had been allowed to intervene in opposition. At a public hearing the applicant testified that members of various Easthampton civic groups had expressed an interest in bus service for elderly people and youth groups and had signed supportive petitions. The applicant offered the petitions, which the hearing examiner excluded from evidence but retained in the file for the DPU's discretionary use. The subsequent DPU findings relied, at least in part, on the excluded petitions. The intervenor urged that reliance on unsworn hearsay statements constituted reversible error. Rejecting that contention, the court reasoned that the applicant's testimony of various civic groups' attitudes, which was competent legal evidence, supplied the support necessary for the hearsay petitions.

§2.12. Personal injury evidence. The Survey year generated three notable opinions dealing, respectively, with (1) the admissibility of official weather reports, (2) the admissibility of police reports, and (3) the prima facie requirements for the foreign-substance species of the so-called "fall-down" case.

In *Crowe v. Ward,*[1] the dispositive question was the admission of the official weather report compiled seven and one-quarter miles away at Logan Airport on the day when the plaintiff's motor scooter collided

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§2.11. [1] 1973 Mass. Adv. Sh. 205, 292 N.E.2d 707.
[2] Id. at 207, 292 N.E.2d at 709.
[3] Id.

§2.12. [1] 1973 Mass. Adv. Sh. 231, 292 N.E.2d 716.

with the defendant's car. The plaintiff had claimed that the day was clear and dry; the defendant that it had been raining and that the pavement had been wet. The report's contents documented a clear, dry day. It had been excluded, and there had been a verdict for the defendant. The court held the exclusion to be reversible error and reasoned that it should have been admitted for the jury's common sense appraisal of proper speed under the circumstances. After canvassing the authorities in other jurisdictions, the court suggested that, whenever such reports are possibly relevant to conditions at the accident site, the better part of the trial judge's discretion is to admit them and leave their weight to the jury after any contradiction or cautionary instruction.

In *Kelly v. O'Neil*,[2] the Appeals Court overturned a verdict for personal and property damage suffered by the plaintiff as the result of a collision with the defendant's vehicle. There was conflicting evidence as to whether the defendant was driving under the influence of liquor and whether his headlights were on during the rainy night in question. The trial judge had admitted into evidence (1) a police officer's accident report containing conclusions ("operating under the influence", "operating without a license in possession") drawn from his own observations on the night of the accident and from the statements made to him by others in the course of his investigation; and (2) a plaintiff's accident report filed with the local police and containing the statement that defendant's lights were not on and that "he was in my opinion, under the influence of liquor."[3]

The trial judge admitted the officer's report apparently as a record made in the ordinary course of business under G.L. c. 233, §78, or as an official written statement under G.L. c. 90, §29. The Appeals Court found neither statutory exception to the hearsay rule applicable. The officer himself testified and therefore should have been limited to testimony of his own observations without the report. As to the second-level hearsay of others' statements, the court as a rule of first impression adopted its exclusion as the "better reasoned" policy in other jurisdictions.[4] With regard to G.L. c. 90, §29, the exclusion of second-level hearsay was already the rule of Massachusetts decisions. The court applied the same reasoning to the plaintiff's accident report with special emphasis on the fact that by no stretch could the plaintiff have made this record in the course of any regular business in which she was engaged. The fact that the police department maintained such reports on file in the regular course of its business was held not material.[5]

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2 1973 Mass. App. Ct. Adv. Sh. 361, 296 N.E.2d 223.

3 Id. at 366, 296 N.E.2d at 227.

4 Id. at 364, 296 N.E.2d at 225-26.

5 Id. at 366, 296 N.E.2d at 227. The Appeals Court also rejected as an adoptive admission testimony of the officer that the defendant did not respond to an accusation of drunkenness by an unidentified third person at the accident scene, citing Common-

Oliveri v. Massachusetts Bay Transportation Authority[6] is an instructive opinion. The plaintiff had slipped on a dirty, muddy hard substance and fallen down the remainder of an MBTA station staircase. Despite the fact that the substance had never been identified, the plaintiff won a verdict. The issue on appeal became the quality of evidence necessary to warrant an inference that the substance had existed for such a period of time that it should have been discovered and removed by the defendant.

Justice Hennessey organized the successful plaintiff's cases into three classes: first, those where the peculiar character or description of the substance supported an inference that the defendant or its employees either created or had actual knowledge of the condition; second, those involving particularly favorable evidence of the proximate location of defendant's employees or their duty stations; and third, those involving organic matter the condition or color of which permitted an inference of duration. The present case lacked evidence to satisfy any of these criteria, and judgment for the defendant was therefore required.

§2.13. Hearsay exceptions. In *M. S. Walker, Inc. v. Travelers Indemnity Co.*,[1] the First Circuit Court of Appeals, looking to the proposed Federal Rules of Evidence, expanded the common law hearsay exception of a declaration against interest by an unavailable witness. The plaintiff distiller sought over $151,000 from its insurer under a blanket crime coverage policy. Four of the distiller's former employees had previously signed statements detailing thefts and admitting complicity, then avoided subpoenas issued to compel their testimony. The trial judge had excluded the signed statements as hearsay. Relying upon proposed Federal Rule 804[2] and avoiding the older, restrictive Massachusetts

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wealth v. Rembiszewski, 1973 Mass. Adv. Sh. 461, 293 N.E.2d 919, discussed supra, §2.3 and adopting the Supreme Judicial Court's sceptical attitude towards this hearsay exception.

6 1973 Mass. Adv. Sh. 319, 292 N.E.2d 863.

§2.13. 1 470 F.2d 951 (1st Cir. 1973).

2 Rule 804, entitled "Hearsay Exceptions: Declarant Unavailable" defines "unavailability" in subsection (a) and enumerates hearsay exceptions for an unavailable declarant in subsection (b). Pertinent here were the following provisions:

(a) *Definition of Unavailability.*—"Unavailability as a witness" includes situations in which the declarant:

. . .

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

. . .

(b) *Hearsay Exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

(4) *Statement against Interest.*—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far

definition of a witness's "unavailability," the court found the written admissions certainly "against interest" and the writers' evasion of subpoenas sufficient unavailability. Old decisions disqualifying criminal confessions, or requiring an adverse property interest, or limiting unavailability to death were viewed as obsolete. The exclusion of the written statements therefore required a new trial.

§2.14. Massachusetts evidentiary statutes. Chapter 149 of the Acts of 1973 expedites the admission and affirms the weight of certain state laboratory reports of lead content. It adds the following sentence to G.L. c. 111, §195:[1]

> A copy of the report of said laboratory or any division thereof, certified as a true copy by the custodian of the records of said laboratory, shall be admissible in any judicial proceeding without further authentication by either the laboratory or by the agency for which said report was made and shall be prima facie evidence of the facts stated therein.

STUDENT COMMENT

§2.15. Loss of bailed goods by fire: Shifting of the burden of proof to the bailee: *Knowles v. Gilchrist Co.*[1] Pursuant to an agreement to reupholster and return certain articles of her furniture,[2] the plaintiff-bailor, Mary Knowles, delivered the items to Gilchrist's Department Store (Gilchrist's).[3] The following day, a fire in Gilchrist's warehouse

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tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. . . . 34 L. Ed. 2d at clxxvi-vii.

§2.14. [1] Section 195 currently orders the Commissioner of Public Health to establish, within the Bureau of Institute of Laboratories, a state laboratory specifically to analyze specimens, samples and tests for lead poisoning.

§2.15. [1] 1972 Mass. Adv. Sh. 1783, 289 N.E.2d 879.

[2] The bailment contract in this case was typical of such agreements. The furniture to be reupholstered included one French Provincial divan, two chairs and one ottoman. The stipulated cost to Mrs. Knowles was $535.60, of which a deposit of $100 had been paid at the signing of the agreement; the balance was to be paid upon completion and redelivery, six to eight weeks later. Report of Defendant to Appellate Division of the District Courts, Northern District; Knowles v. Gilchrist's Department Store, No. 7642 [hereinafter cited as Report of Defendant]; Brief for Appellant, Appendix "C", at ii, Knowles v. Gilchrist Co., 1972 Mass. Adv. Sh. 1783, 289 N.E.2d 879 [hereinafter cited as Brief for Appellant].

It is merely noted that the bailment contract contained an express disclaimer of liability for negligence, but this fact was never raised by either party.

[3] The items were, in fact, transported from Mrs. Knowles's home to Gilchrist's by Dean Transportation Co., co-defendant at the district court level. Brief for Appellant, supra note 2, Appendix "C", at ii.

destroyed the bailed furniture, thus preventing its return. In a bailment action brought both in contract and in tort, Mrs. Knowles sought to recover for the loss of her furniture by establishing a prima facie case of delivery and failure to return due to destruction by fire.[4] Gilchrist's relied upon what it assumed to be Massachusetts law in arguing that the fact of loss by fire was a sufficient explanation for failure to return, which fact rebutted the prima facie case, and put the bailor to her proof on the issue of negligence.

In the municipal court, there was a finding for Mrs. Knowles in the amount of $800 against Gilchrist's.[5] Upon a report claimed by the defendant,[6] the Appellate Division vacated the lower court ruling and found for Gilchrist's. The reversal was based upon Massachusetts decisional law to the effect that the *bailor* bears the burden of proof by a fair preponderance of the evidence that the bailee breached its bailment contract by negligently caring for the goods.[7] In the judgment of the court, the bailor had introduced no evidence to support a conclusion that the loss was due to the bailee's negligence, and the denial of the defendant's requests for rulings was consequently deemed prejudicial error.

The Supreme Judicial Court, in an opinion by Chief Justice Tauro, reversed the order of the Appellate Division, remanded the case for a new trial,[8] and HELD: In all cases of bailment for hire, where the bailee has exclusive control of the possessions at the time of destruction or damage, once the bailor proves delivery of the property to the bailee in good condition and failure to redeliver on timely demand, the burden of proof is shifted to the bailee to show by a fair preponderance of the evidence that he has exercised due care to prevent the property's loss or destruction.[9]

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4 See note 61 infra, discussing the tactical implications of the plaintiff-bailor's having presented the fact of destruction by fire as an element of her case.

5 1972 Mass. Adv. Sh. at 1783, 289 N.E.2d at 880. The municipal court found for the co-defendant, Dean Transportation Co. Id. at 1783 n.1, 289 N.E.2d at 880 n.1.

6 The report was claimed on the refusal by the trial judge to allow the following requests for rulings:

> (1) On all the evidence a finding for the bailee is required. (2) On all the law, a finding for the bailee is required. . . . (7) The evidence is insufficient to warrant a finding for the bailor as to the extent of her damages.

Id. at 1783, 289 N.E.2d at 880. The court allowed request (3): "On all the evidence a ruling for the defendant is warranted," but it ruled that the court did not so find. Report of Defendant, supra note 2, at iii.

7 Opinion, Appellate Division of the District Courts, Northern District; Knowles v. Gilchrist's Department Store, No. 7642 [hereinafter cited as Appellate Opinion]; Brief for Appellant, supra note 2, Appendix "D", at ii, citing Bean v. Security Fur Storage Warehouse, Inc., 344 Mass. 674, 677, 184 N.E.2d 64, 66 (1962). See text at note 89 infra.

8 J. Braucher dissented in part, on this point. 1972 Mass. Adv. Sh. at 1792, 289 N.E.2d at 885. See note 62 infra and accompanying text.

9 1972 Mass. Adv. Sh. at 1792, 289 N.E.2d at 885. The court took pains to limit the holding expressly to a "specific rule for a specific class of cases, bailment for hire." Id. at 1791 n.4, 289 N.E.2d at 884 n.4.

Rejecting what it termed as the long-abandoned notion of strict adherence to pleadings, the court espoused the policy of allocating the burden of proof on the basis of fairness to the parties. The justices also relied upon a doctrine found in many cases where negligence is an issue, that the burden of proof often rests with the party "peculiarly in the knowledge" of facts; they concluded that it was clear that a bailee has "greater access to the information needed to show negligence or due care."[10] The court further pointed to the fact that whereas placing the ultimate burden of proof of negligence on bailors was unfair in itself, this situation was even more pronounced when the bailor in a particular case happened to be a consumer. It was observed that unfamiliarity with commercial trade practices and customs too often compounded the difficulty of the consumer-bailor's task of carrying the burden of proof of negligence.[11]

The *Knowles* case is significant both for its result and for the reasoning behind the decision, particularly with regard to the court's examination of Massachusetts bailment law as it stood prior to this new rule. In the past, bailment cases of this nature were most often disposed of as a matter of law.[12] However, under the decision in *Knowles,* the trier of fact will always determine a contested issue of negligence. The newly promulgated *Knowles* rule holds that in actions brought in either contract or tort, where the bailor makes out a prima facie case—a showing of delivery and failure to return on timely demand—the *bailee* is saddled with the burden of pleading and proving due care as an affirmative defense.[13]

Also excluded from this new rule were cases where the bailee has contractually obligated himself irrespective of due care. Id. at 1792, 289 N.E.2d at 885. However, where there has been an agreement to the effect that liability is not to be predicated upon fault—but, for example, upon the existence and validity of the contract itself—negligence will not be an issue at trial; the *Knowles* rule would seem to be irrelevant on its face. For further discussion, see text at notes 117-19 infra.

10 Id. at 1791, 289 N.E.2d at 884.

11 Id. at 1790, 289 N.E.2d at 883-84. The court noted "that in a closely similar situation the Legislature long ago placed the burden of proof on the bailee." Id. at 1791, 289 N.E.2d at 885. This rule applied only when a warehouse receipt was issued, and came under the Uniform Warehouse Receipts Act, G.L. c. 105, §§15, 27, inserted by Acts of 1907, c. 582, §§9, 22, later subsumed under the Uniform Commercial Code, as enacted in G.L. c. 106, §7-403(1)(b).

12 According to the order of the Appellate Division in *Knowles,* the mere fact of a fire was in effect held to be a sufficient explanation for failure to deliver. Appellate Opinion, supra note 7, at ii. Under this reasoning, if a bailor could produce no facts, other than the prima facie case, from which an inference of negligence could be drawn, the showing that the goods were lost in a fire or other extraordinary event would excuse the bailee's performance and absolve him from liability. It is suggested, see text following note 97 *infra,* that this was not the prevailing view in Massachusetts at the time of the *Knowles* decision. This view is contrary to the holding of the Appellate Division and the conjecture of the Supreme Judicial Court in the instant case. See 1972 Mass. Adv. Sh. at 1788, 289 N.E.2d at 882-83.

13 Under ordinary rules of trial practice, an affirmative defense must be established

Accordingly, the bailee must now convince the finder of fact that it is more likely than not that he had exercised the proper standard of care owed as a "bailee for hire."[14] A failure to sustain the burden of proof on this issue of due care by a fair preponderance of the evidence will result in a judgment for the bailor.

In general, this note will consider the result reached by the court in the *Knowles* case in light of rules of evidence and prior Massachusetts law. In order to understand more completely the issues that were raised in the case, the first part of the note will review some fundamental concepts of the law of evidence. Then, after an examination of a number of Massachusetts decisions, specifically those relating to allegations of bailee negligence, it will be submitted that, as suggested by Justice Braucher's dissenting opinion, the *Knowles* case could have been disposed of on the basis of precedent,[15] and that the novel rule promulgated by the Supreme Judicial Court was not necessary to reach the desired result.[16] However, notwithstanding the difficulties raised by some aspects of the court's opinion, particularly in relation to its interpretation of and reliance upon past decisions, it will be concluded that the *Knowles* rule appears to be a fair and equitable solution to the problems encountered by a bailor in proving bailee negligence.

I. Some Preliminary Rules of Evidence

In Massachusetts,[17] as in most other jurisdictions, the burden of proof is comprised of two distinct elements, the burden of production[18] and the

by the party asserting it. See, e.g., R. Brown, Personal Property §87, at 373 (2d ed. 1955). As the matter will be discussed in regard to prior Massachusetts cases, an affirmative defense is a "confession and avoidance" of the proponent's assertions. It is an admission that the event transpired, but sets up new matter to avoid the effect of the allegation if established. See notes 63-70 infra and accompanying text.

14 A bailee for hire is bound to exercise that degree of care concerning the article bailed which under the circumstances a reasonably careful man would use with reference to his own property of a similar nature. Rourke v. Cadillac Automobile Co., 268 Mass. 7, 8, 167 N.E. 231, 232 (1929). The greater the value of the article bailed, the greater should be the vigilance of the bailee. Morse v. Homer's, Inc., 295 Mass. 606, 609, 4 N.E.2d 625, 627 (1936).

15 More specifically, Bean v. Security Fur Storage Warehouse, Inc., 344 Mass. 674, 184 N.E.2d 64 (1962). See note 62 infra and text at note 94 infra.

16 This "novelty" is exemplified by statements in such cases as Hanna v. Shaw, 244 Mass. 57, 60, 138 N.E. 247, 248 (1923) (disapproved of in Bean v. Security Fur Storage Warehouse, Inc., 344 Mass. 674, 676, 184 N.E.2d 64, 66 (1962)); Wylie v. Marinofsky, 201 Mass. 583, 584, 88 N.E. 448, 449 (1909) (espousing the general rule that the burden of persuasion never shifts). See W. Leach & P. Liacos, Handbook of Massachusetts Evidence 47, 53 (4th ed. 1967). The latter material may also be found in Leach & Liacos, Burden of Proof and Presumptions, 52 Mass. L.Q. 117 (1967).

17 See, e.g., Powers v. Russell, 30 Mass. 69, 76 (1832); City of Lawrence v. Commissioners of Public Works, 318 Mass. 520, 527-28, 62 N.E.2d 850, 854 (1945). See also W. Leach & P. Liacos, supra note 16, at 41.

18 The burden of production is also known as the burden of going forward with the evidence.

burden of persuasion.[19] The burden of production is the preliminary burden of persuading the *judge* that a jury could reasonably conclude that a certain fact exists.[20] The burden of production is sustained when the proponent has introduced sufficient evidence: first, to have the issue presented to the jury and thus escape a directed verdict;[21] and, second, to sustain a favorable finding by the jury upon subsequent review by the trial judge or on appeal.[22] The burden of persuasion is the burden of convincing the *jury* (or the judge in his capacity as the finder of fact) that the alleged fact is true.[23] In a normal civil case, the fact-finder must believe that the proponent's contention is more probable than not; in other words, the fact-finder must be convinced by a fair preponderance of the evidence.[24] Although a mathematical preponderance is not viewed as a favored method of determination,[25] it is clear that the trier must be persuaded by the evidence that it is at least fifty-one percent probable that the proposed fact is true.

An inference is a deduction, a result of the application of *rules of logic,* whereby a certain amount of legal force is derived from the essential probative worth of "basic facts" offered by the proponent.[26] An inference may be drawn only where the trier of fact has been convinced by the balance of reason that proof of the basic fact *A* logically permits the finding of fact *B*.[27] An inference is permissive in the sense that proof of fact *A* does not require the finding of fact *B*; in other words, if the basic fact *A* is established, the trier is merely *permitted* to infer the existence of fact *B*. It is essential to note, therefore, that an inference, once drawn, will always present a question of fact for the trier, and is thereby more durable than a true presumption.

A presumption, on the other hand, is a *procedural device* that assists a party in meeting his burden of production by requiring a finding of fact *B* once the basic fact *A* has been proved.[28] Policy considerations rather than logic are the moving force behind the development and use of these rules.[29] Unlike an inference, a presumption *requires* a finding of

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19 The burden of persuasion is also known as the risk of non-persuasion and, simply but imprecisely, the burden of proof.

20 C. McCormick, Evidence §336, at 783 (2d ed. 1972).

21 F. James, Jr., Civil Procedure 252-53 (1965). C. McCormick, supra note 20, §336, at 784.

22 W. Leach & P. Liacos, supra note 16, at 47-48.

23 C. McCormick, supra note 20, §336, at 784-85.

24 W. Leach & P. Liacos, supra note 16, at 42-43.

25 Id. at 42.

26 Cf. J. Maguire, J. Weinstein, J. Chadbourn, J. Mansfield, Evidence: Cases and Materials 1046 (6th ed. 1973) [hereinafter cited as J. Maguire]. The term is sometimes used interchangeably with "permissive or permissible inference," "presumption of fact," and even "presumption" itself. Understandably, confusion has been promoted and perpetuated by such imprecision and lack of consistency.

27 W. Leach & P. Liacos, supra note 16, at 62.

28 J. Maguire, supra note 26, at 1046-47.

29 One such policy is the attainment of a certain degree of uniformity by making

fact *B* in situations where the basic fact *A* is established and there is no countervailing evidence as to the presumed fact *B*.[30] A presumption is merely a procedural rule about evidence, and is not itself considered evidence.[31] It is ordinarily rebuttable by the introduction of relevant evidence by the opponent that warrants a finding contrary to the presumed fact.[32] If a presumption is successfully rebutted, it will lose its artificial compelling force. Nonetheless, where that presumption has arisen from the existence of certain basic facts having probative value—in contradistinction to one imposed by rule of the common law or by statute—those facts still retain their inherent probative worth, and thus provide an independent evidentiary value to be assessed by the trier.[33] If and when the compelling force of the presumption has "disappeared," the issue is then submitted to the trier to determine whether or not the probative value of the basic facts underlying the presumption is such that an inference may reasonably be drawn. In conclusion, it can be said that the most significant procedural effect of a presumption is that it shifts to the opponent the burden of producing evidence to rebut the presumed fact.[34]

Prima facie evidence is a term having special meaning in this jurisdiction. Essentially, prima facie evidence is a presumption that is based upon

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mandatory the conclusion that is normally drawn from certain facts; in a sense, then, logic is not totally absent as a consideration. Presumptions are also employed to bring about a particular substantive result, rather than merely to normalize probabilities. This type of presumption has been referred to as a "smoking out" presumption. W. Prosser, Handbook of the Law of Torts §38, at 210 (4th ed. 1971). Other of these underlying policies include: general fairness to parties, procedural convenience, superior access to information, and the handicapping of a disfavored contention. See C. McCormick, supra note 20, §343, at 806.

30 W. Leach & P. Liacos, supra note 16, at 53, citing Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E.2d 135 (1944).

31 Perry v. Boston Elevated Ry., 322 Mass. 206, 209, 76 N.E.2d 653, 655 (1948). Contra, Smellie v. Southern Pac. Co., 212 Cal. 540, 559, 299 P. 529, 537 (1931). But see McBaine, Burden of Proof: Presumptions, 2 U.C.L.A.L. Rev. 13, 21 (1954).

32 Jacquot v. Wm. Filene's Sons Co., 337 Mass. 312, 316, 149 N.E.2d 635, 639 (1958). Wigmore explains that "the presumption is not the fact itself, nor the inference itself, but the legal consequences attached to it." 9 J. Wigmore, Evidence §2491, at 288 (3d ed. 1940).

33 In the words of Professor Thayer, when the opponent comes forward with evidence,

> [a]ll is then turned into an ordinary question of evidence, and the . . . facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter.

J. Thayer, A Preliminary Treatise on Evidence at the Common Law 346 (1898). It should be noted that Professor Thayer suggested that a presumption was effectively rebutted upon the introduction of *any* evidence by the opposing party. See text at note 39 infra. See also W. Prosser, supra note 29, §38, at 210.

34 Epstein v. Boston Housing Authority, 317 Mass. 297, 302, 58 N.E.2d 135, 139 (1944). See also W. Leach & P. Liacos, supra note 16, at 53-54; 9 J. Wigmore, supra note 32, §2491, at 288; J. Maguire, supra note 26, at 1046.

logical probabilities.[35] It exhibits the artificial compelling force of a true presumption, while at the same time is founded upon underlying facts having sufficient probative worth that an inference will be warranted in every instance. Therefore, prima facie evidence is the sum total of a presumption and an inference.[36] For example, if the opponent comes forward to rebut prima facie evidence with a showing sufficient to warrant a finding contrary to the presumed fact, the artificial and compelling force "disappears." However, since the basic facts underlying the prima facie evidence have sufficient probative worth to give rise to an inference, this evidence will always remain viable and will present a question of fact in every case.[37]

In those cases where either a presumption or prima facie evidence is operating, the issue invariably presented has been one of the quality and quantity of evidence that is necessary to rebut the artificial and compelling effect of the presumption or prima facie evidence. This inquiry presents an issue of debate that is hardly settled in the law.[38] The pivotal question has been whether the evidence offered by the opponent must have a certain degree of probative weight before the artificial effect of the presumption is rebutted, or whether any evidence whatsoever on the presumed fact will cause the compelling force to "disappear." The concept of a disappearing presumption was first propounded by Professor Thayer in his book, A Preliminary Treatise on Evidence.[39] It was suggested therein that since a presumption was merely a rule about evidence, which was devised ostensibly to shift the burden of production to the opponent, the introduction by the opponent of *any* evidence relating to the presumed fact would rebut the artificial and compelling force of the rule.[40] If the underlying facts that remained had any probative value, the trier could then weigh and assess the evidence for conflicting probabilities.[41]

This theory of a disappearing presumption looked fine conceptually,

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35 W. Leach & P. Liacos, supra note 16, at 53-55.

36 Id. at 54.

37 Hobart-Farrell Plumbing & Heating Co. v. Klayman, 302 Mass. 508, 510, 19 N.E.2d 805, 807 (1939). See text at note 46 supra.

38 See, e.g., Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959).

39 J. Thayer, supra note 33.

40 Id. at 346. In Massachusetts, " '[p]resumptions are not indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.' " Duggan v. Bay State St. Ry., 230 Mass. 370, 378, 119 N.E. 757, 760 (1918), quoting Lincoln v. French, 105 U.S. 614, 617 (1881). It should be noted that *Duggan* incorrectly quoted *Lincoln;* the text should have read "presumptions *are* indulged . . . ." [Emphasis added.]

It is submitted that this strict Thayerian approach of a disappearing presumption has been modified subsequent to the *Duggan* case. See notes 46-52 infra and accompanying text.

41 See note 33 supra.

but had produced some strange results in its application. For example, a substantial number of jurisdictions hold that a presumption of bailee negligence arises upon the bailor's making out a prima facie case of delivery in good condition and a failure or refusal to return the bailed article.[42] In a jurisdiction adhering to the strict Thayerian approach, this presumption of bailee negligence theoretically could be rebutted by the mere factual showing that the items bailed were destroyed by fire.[43] Inasmuch as the fact of the conflagration would have been offered to rebut a presumption of the bailee's negligence, the fact of fire would essentially represent evidence of the bailee's due care; the absurdity of this result is apparent. After long-endured application of the doctrine and its variants, the occurrence of such "irrational results" prompted the displeasure of a number of writers. One spokesman, Professor Morgan, insisted:

> [I]t is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect. . . .
>
> The conclusion then is that most presumptions should . . . continue to operate unless and until the evidence persuades the trier at least that the non-existence of the presumed fact is as probable as its existence.[44]

Although the language is somewhat different, and the reasoning is not as directly persuasive, a line of Massachusetts decisions supports the contention that a presumption is not rebutted unless evidence is adduced *sufficient to warrant a finding contrary to the presumed fact.* For example, in *Hobart-Farrell Plumbing & Heating Co. v. Klayman,*[45] one of the principal Massachusetts cases dealing with prima facie evidence, the court explained:

> [A]s soon as evidence is introduced *that warrants a finding* that the

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42 See R. Brown, supra note 13, §87, at 363-65; Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941), cited in *Knowles,* 1972 Mass. Adv. Sh. at 1787-89, 289 N.E.2d at 882-83. Such a presumption arises in Massachusetts. See *Knowles,* id. at 1787-89, 289 N.E.2d at 882-83. See also note 92 infra.

43 Technically, this result could occur only in a jurisdiction adhering to a rule that the mere fact of fire is evidence from which an inference of due care may be drawn, which inference is *as persuasive* as the inference of negligence that might also be drawn. Again, it is noted that this is the conclusion suggested by the Appellate Division in *Knowles,* but contrary to the thesis propounded in this note. See particularly the discussion of the *Little* case, in text following note 96 infra.

44 Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82-83 (1933). He further concluded that "in situations where a presumption owes its origin to an important social policy, it should operate to fix the *burden of persuasion.*" Id. at 83 (emphasis added). It is noted that Professor Morgan was there speaking of presumptions generally, and not of the presumption of negligence in bailment cases directly. For a similar proposition, see C. McCormick, supra note 20, at 819-29.

45 302 Mass. 508, 19 N.E.2d 805 (1939).

> letter failed to reach its destination, the artificial compelling force of prima facie evidence disappears, and the evidence of non-delivery has to be weighed against the likelihood that the mail service was efficient in the particular instance, with no artificial weight on either side of the balance. That was the case here. The evidence presented a pure question of fact.[46]

In *Hale v. Hale,*[47] the court actually indicated that it had engaged in the weighing of evidence: "The recitals . . . could be contradicted *but we are of opinion that the evidence fell far short of doing so.* . . . This did not rebut the presumption or inference of regularity raised by the certificate."[48] Similarly, in the case of *Iantosca v. Iantosca,*[49] it was held:

> The burden was on the petitioner to prove that the deed was ineffective to pass title and, although he testified that he never acknowledged the deed, *the judge could disbelieve him* and find proper acknowledgement from the evidence of the certificate alone.[50]

Since a presumption will have no operative effect unless it assists the party bearing the burden of proof,[51] and given the Massachusetts cases mentioned above, it seems fair and reasonable to conclude that the evidence offered to rebut the presumption in this jurisdiction must have sufficient probative value to warrant a finding contrary to the presumed fact—that the evidence must be not only credible, but actually believed by the trier of fact.[52]

This conclusion finds further support, by implication, from Professor Morgan in his Foreword to the Model Code of Evidence,[53] where set out are the four main views on the question of what quantum of evidence

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46 Id. at 510, 19 N.E.2d at 807 (emphasis added).

47 332 Mass. 329, 125 N.E.2d 142 (1955).

48 Id. at 333, 125 N.E.2d at 144 (emphasis added). Of course, the implication here is that if the evidence is to be weighed, it must meet a certain standard of worthiness. Such weighing would not be indulged in if any evidence whatsoever would rebut the presumption.

49 324 Mass. 316, 86 N.E.2d 59 (1949).

50 Id. at 321, 86 N.E.2d at 61 (emphasis added). Whether it was a presumption or an inference operating in *Iantosca* is discussed in the *Hale* case, 332 Mass. at 333, 125 N.E.2d at 144. Another case of interest is Duarte v. Kavanagh, 340 Mass. 640, 641-42, 165 N.E.2d 746, 747 (1960), where the court held that even in dealing with a presumption created by statute, the presumption was rebuttable and, by implication, would continue to operate only until evidence had been introduced that would warrant a finding contrary to the presumed fact.

51 Epstein v. Boston Housing Authority, 317 Mass. 297, 302, 58 N.E.2d 135, 139 (1944).

52 324 Mass. at 321, 86 N.E.2d at 61. See text at note 49 supra. For a more extensive discussion of the question of what evidence is required to rebut a presumption, see Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 356-66, 155 A.2d 721, 727-31 (1959).

53 Model Code of Evidence 53-57 (1942).

is required to cause a presumption to disappear. The first is the pure Thayerian approach, whereby any evidence on the presumed fact will rebut that fact, whether or not the evidence is believed by the judge or jury. The second theory requires "substantial evidence," a somewhat indefinite quantum ranging from more than enough evidence to justify a finding, to that amount of proof that would always require a directed verdict. Third is the view that the evidence offered in rebuttal be of such a quantity and quality that the finder is convinced that the nonexistence of the presumed fact is at least *as probable* as its existence. The fourth and final view suggests that the presumed fact is not rebutted until the trier is convinced that its nonexistence is *more probable* than its existence.[54] It is submitted herein that prior to *Knowles,* Massachusetts decisional law adhered to the second view—that the evidence need be "substantial" and believed by the trier—but that the court in *Knowles* clearly adopted the fourth view as specifically pertaining to bailments for hire.[55]

II. Bailment Law in Massachusetts Prior to the *Knowles* Case

Upon an examination of the opinion and the result in *Knowles,* it appears that the court promulgated a new rule that was not necessary on the basis of the facts of the instant case and decisional law in this jurisdiction.[56] It is submitted that prior to *Knowles* when a bailor made out a prima facie case in bailment—delivery in good condition and a failure to return—a presumption of negligence arose, allocating to the bailee the burden of production of evidence on the presumed fact of negligence. However, the bailor retained the ultimate burden of persuasion as to the issue of negligence by a fair preponderance of the evidence.[57] To rebut the presumption of negligence, the bailee was required to submit sufficient evidence of the circumstances surrounding the failure to return so that the trier could reasonably conclude that it was *as probable* as not that he had exercised due care.[58] Now, as a result of the decision in

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54 See notes 121-26 infra and accompanying text.

55 See generally text at notes 9-11 supra.

56 This is not to suggest disagreement with the rule announced in *Knowles.* To the contrary, it is submitted herein that the result reached in *Knowles* was necessary to promote fairness to bailors. See text following note 131 infra.

57 Although it was not a common understanding among practitioners that either a presumption or prima facie evidence of negligence arises upon completion of the prima facie bailment case, the *Knowles* court did state that at least a presumption arises. 1972 Mass. Adv. Sh. at 1787-88, 289 N.E.2d at 882, citing Bean v. Security Fur Storage Warehouse, Inc., 344 Mass. 674, 184 N.E.2d 64 (1962). See note 92 infra.

58 To avoid confusion as to whether this statement is inconsistent with the previous assertion in text at notes 53-55 supra, it is noted that at this point the reference is to a presumption based upon probabilities—prima facie evidence—whereas above the reference was to a mere presumption. See note 76 infra.

Knowles, both the burden of production *and* the burden of persuasion are shifted to the bailee once the bailor makes out a prima facie case.[59] Since the bailee now bears the risk of non-persuasion on the issue of due care, his evidence must convince the trier that it was *more probable* than not that he had exercised due care in control of the bailed items.[60]

The question of whether or not the shifting of the burden of persuasion was necessary to reach the desired result in the *Knowles* case turns on the legal significance of the fact that the bailed items were destroyed in a fire.[61] The ultimate issue presented is whether the mere fact of destruction of the bailed items by a fire is sufficient explanation to rebut the presumption of negligence, and thus put the bailor to the task of establishing negligence by means of other evidence. It is submitted that the mere fact of fire should have been insufficient to rebut the presumption of negligence, and that Gilchrist's thereby failed to sustain its burden of production.[62] Thus, it was not altogether necessary to shift the burden of persuasion, and the Supreme Judicial Court could have reached the same result in the principal case by simply adhering to past precedent, as a review of the more important Massachusetts cases discussed in *Knowles* will indicate.

In the case of *Cass v. Boston & Lowell R.R.*,[63] the plaintiff-bailor brought an action in contract against a railroad as bailee to recover damages for property stolen from its warehouse. With a strong dissent by Justice Bigelow,[64] the court held that in an action for breach of contract,

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59 1972 Mass. Adv. Sh. at 1792, 289 N.E.2d at 885.

60 Note that since the prima facie case stands as prima facie evidence of negligence, a fact issue will be presented to the trier even when the presumption underlying the prima facie evidence has been rebutted.

61 The fact of the loss in a fire was conceded by the bailor. 1972 Mass. Adv. Sh. at 1784 n.2, 289 N.E.2d at 880 n.2. However, Mrs. Knowles made a tactical error in so admitting to the loss of her furniture by reason of a fire. If Gilchrist's had been required to establish the fact of the loss on its own, it might have offered evidence from which the trier could have drawn an inference of negligence, over and above that inference arising from the plaintiff's evidence (i.e., the prima facie case). In support of their cause of action in negligence, it appears that counsel for Mrs. Knowles felt compelled to show the existence of the fire, the destruction of the articles, and the surrounding circumstances to the best of their knowledge.

It is noted further, that as the case was litigated, Gilchrist's rested its defense on a rule of law and made no showings of fact at trial.

62 This result was espoused by Justice Braucher in his dissent. 1972 Mass. Adv. Sh. at 1792-93, 289 N.E.2d at 885 (dissenting opinion). Concurring in the shifting of the burden of proof in this case to the bailee, Justice Braucher dissented from the decision insofar as it ordered a new trial. He believed that the trial judge's finding was warranted on the basis of the holding in *Bean,* 344 Mass. at 676, 184 N.E.2d at 66. See discussion in text following note 95 infra.

63 96 Mass. 448 (1866).

64 Id. at 454-62 (dissenting opinion). The Bigelow dissent was to afford the basis of the court's reasoning in Willett v. Rich, 142 Mass. 356, 7 N.E. 776 (1886), the effect of which was to overrule *Cass,* as was noted by the *Knowles* court. 1972 Mass. Adv. Sh. at 1786, 289 N.E.2d at 881. Justice Bigelow was also the author of a prior opinion in

a prima facie case was made out by establishing the facts of delivery and failure to return. The court reasoned that on the basis of the pleadings negligence was not an essential element of the bailor's case. Impossibility of performance due to the theft of the goods was thought to be in confession and avoidance, and if the bailee in that case was to relieve himself of liability for the loss, he would have to carry the burden of proof on the issue of negligence.[65] The court concluded:

> There may have been conflicting evidence as to how the loss . . . occurred, if there was a loss; but the plaintiff did not admit that any loss had happened. The breach of the contract was not denied; the issue was upon the existence of a sufficient excuse for it. If the defendants indeed prove that the goods are stolen or lost, *without direct fault on their part,* so that performance is impossible, then if the plaintiff charges that the loss occurred through negligence, he must prove it, and the burden of proof shifts upon him to do so. But until some excuse for the breach of contract is shown by the defendants, the plaintiff has nothing to prove on the subject.[66]

The *Cass* case thus held that in a bailment action pleaded strictly in contract the bailee would be required to answer impossibility as an affirmative defense and prove, by a fair preponderance of the evidence, that he had exercised due care. On the other hand, if the bailor had sued in tort, thereby founding his action upon negligence, the court posited that he would have been obligated to carry the burden of proof on that issue.[67] The *Cass* decision therefore stood for the proposition that in bailment cases pleaded in contract, the burden of persuasion as well as the burden of production was upon the defendant-bailee to show his due care.

Lamb v. Western R.R., 89 Mass. 98, 99 (1863), where the bailor failed to introduce any facts "which tended to prove any neglect or omission of duty by the defendants." Id. The court in *Cass* distinguished *Lamb* on the fact that that case was pleaded in tort as well as in contract. 96 Mass at 453.

65 For a more detailed discussion of impossibility as an affirmative defense in this jurisdiction, see notes 106-10 infra and accompanying text.

66 96 Mass. at 452 (emphasis added).

67 In the words of the court,

> the defendants contend that this [culpable omission of duty] is the issue necessarily involved in this suit, and that the burden of proof is on the plaintiff throughout. If proof of negligence is an essential part of the plaintiff's case, this would be so; and the burden of proof would not shift.

Id. at 452.

Absent in *Cass* was any discussion by the court of presumptions. Although the prima facie case of delivery and failure to return was evidence of breach of contract, negligence was not deemed a part of the bailor's case. No suggestion was made with regard to a presumption or inference arising from the prima facie case. Nor was it discussed whether such a case could have arisen in tort without an element of negligence affirmatively pleaded and proved.

The distinction between actions pleaded in contract and those actions pleaded in tort that was promoted in *Cass* was subsequently abandoned in *Willet v. Rich*,[68] where the court adopted Justice Bigelow's argument in his earlier dissent in *Cass*. Reasoning that a bailee was not an insurer of goods and would be liable for loss or destruction only if he failed to exercise due care while possessing the bailed articles,[69] the court held that in actions sounding in either contract or tort it was incumbent upon the *bailor* to plead and carry the ultimate "burden of proof"—more precisely, both the burden of production and the burden of persuasion—on the issue of negligence. Negligence was deemed to be the decisive fact issue in an action for breach of contract; accordingly, a denial of negligence, such as an answer of impossibility, was found not to be an affirmative defense of the bailee, but rather was regarded as placing that issue of due care before the trier of fact as an element of the plaintiff-bailor's case.[70] But note the admission by the court that

> [w]hatever the form of declaration is, he is required to prove a breach of the contract. It may be that, where there is a refusal to deliver, the plaintiff may make out a *prima facie* case, upon proving this fact, *because such refusal, if unexplained, is some evidence of the breach of the contract.* But this does not shift the burden originally on the plaintiff to prove a breach of contract.[71]

This contradictory language prompts the question of what the court was actually holding with regard to the elements of the prima facie case. On the one hand, the court asserted that negligence was the principal issue in a bailment case involving a breach of contract and that negligence must be alleged as an element of that cause of action; consequently, negligence was to become a part of the prima facie case. But, on the other hand, the court suggested that a prima facie case could be made upon a mere showing of delivery and an "unexplained refusal" to return, inasmuch as this refusal was "some evidence" of a breach of the bailment contract. It is

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68 142 Mass. 356, 7 N.E. 776 (1886).

69 The court found that, absent an express provision to the contrary, implied in every bailment for hire was the stipulation that a bailee would be liable only upon proof of his failure to exercise due care; there was no agreement to keep and return the property unconditionally. Id. at 359, 7 N.E. at 778. But see cases cited in note 119 infra.

70 Id. at 358, 360, 7 N.E. at 777-78.

71 Id. at 359-60, 7 N.E. at 778 (emphasis added). Explaining the facts in *Cass*, the *Willett* court concluded:

> [T]hat the goods were stolen without its fault, was not a matter in discharge or avoidance of the plaintiff's case. It did not admit a breach of contract, and set up new matter to excuse or avoid the effect of such breach. On the contrary, the evidence went to show that there had been no breach of the defendant's contract . . . but [the evidence] denied the plaintiff's case.

Id. at 360, 7 N.E. at 779. See Justice Bigelow's dissent in *Cass*, 96 Mass. at 455, which formed the basis for this decision.

only reasonable to conclude that, while the court did not find that a full-blown presumption of negligence was operating here, it did believe that at least an inference of negligence could be drawn.[72]

This apparent inconsistency was further confused by the court's use of the phrase "unexplained refusal." Was it attempting to make some distinction between a *failure* to return and a *refusal* to return, the latter being the only instance when this inference might be drawn?[73] And why even suggest that the prima facie case would not be complete if there was some sort of an explanation? Assuming that no evidence was offered in explanation, would a completed prima facie case *require* or merely *permit* a finding for the bailor? And if there was some evidence offered as an explanation, how much and of what quality would this evidence need be to explain the refusal to deliver?

Reasoned conjecture suggests that much of this confusion resulted from the *Willett* court's having to justify overruling its prior holding in *Cass.* If the application of *Willett* in subsequent cases is a fair indication of the import of that decision,[74] it may be seen that a showing of delivery and failure to return on demand has constituted the prima facie case, and that an inference of negligence could be drawn upon the completion of the prima facie case. A finding for the bailor has not been required by law when the refusal remained unrebutted, but has been permitted if the logical persuasiveness of the evidence adduced at trial so predominated.

It would be advantageous at this juncture to consider what might have transpired had the *Willett* case gone to the trier of fact and had the case involved destruction by fire.[75] In its final determination, the trier need only have been convinced by the bailee that it was *as probable as not* that he was exercising due care in control of the bailed items.[76] Since the

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[72] It seems an unavoidable conclusion that either an inference or a presumption was at work here. How else could a mere showing of delivery and refusal to return complete the prima facie case, especially since negligence was deemed the central issue in the bailment case? See Hunter v. Ricke Bros., 127 Iowa 108, 111, 102 N.W. 826, 827 (1905), where, by implication, the court assumed that it was a presumption operating in *Willett.*

[73] No discernable distinction can be drawn between a refusal to deliver and a failure to deliver upon demand. In both instances, the bailee does not return the property upon a request by the bailor.

[74] See, e.g., Stevens v. Stewart-Warner Speedometer Corp., 223 Mass. 44, 46, 111 N.E. 771, 772 (1916) (citing *Willet* to support proposition that the theft of the car could, on the evidence, be found as the natural and probable result of defendant's negligence); Murray v. International S.S. Co., 170 Mass. 166, 167-68, 48 N.E. 1093 (1898) (where plaintiff had the burden of proof to show that defendant-warehouseman was negligent).

[75] In *Willett,* the bailed articles were damaged as a result of the collapse of the warehouse. 142 Mass. at 357, 7 N.E. at 776.

[76] As a point of clarification, in a normal civil case the proponent of an issue must convince the trier of fact by a fair preponderance of the evidence, in other words, that it is more probable than not that his proposition is true. To dissuade the fact-finder

bailor would have retained the ultimate burden of proof on the issue of negligence, he would have been required to carry that burden by a fair preponderance and show that it was *more* probable than not that the bailee was negligent. For the bailee to prevail, he would only need to introduce evidence raising sufficient doubt in the mind of the trier, so that it would conclude that the balance of probabilities was equal; in other words, that it merely was *as* probable as not that the bailee had exercised due care. Although there is nothing particularly out of the ordinary in the discussion to this point, it seems that much of the conceptual difficulty surrounding *Willett* and its subsequent application devolves from the central fact that the holding was applied to cases where refusals to return were explained by the fact of destruction of the bailed items in a fire. At the time of the *Willett* decision, the showing by a bailee that the loss was occasioned by a fire or similar extraordinary event was sufficient explanation to rebut the prima facie case in a predominant number of jurisdictions.[77] This result was possible due to a widely-held belief that fires were not uncommon occurrences, and that in the great majority of instances the origin and cause were not known to anyone. Therefore, it was generally held that it was at least as likely that the fire was due to some cause other than bailee negligence, and an inference of negligence was not permitted to be drawn from the mere fact of a fire.[78]

In those rare situations where a bailor had been able to make showings of fact as to the surrounding circumstances of the fire sufficient for a reasonable mind to conclude that bailee negligence was more probable than not, the issue would have gone to the trier. In such a case, the

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from being so convinced, the opponent must cause sufficient doubt to be raised as to the predominance of that proposition. Since a preponderance can be viewed as a probability of greater than 51%, the opponent would want to show that the likelihood that the fact is not true is better than 49%, or that it is at least 50% probable that the proponent's assertion is false.

[77] See, e.g., Southern Ry. v. Prescott, 240 U.S. 632, 640 (1916); Liberty Ins. Co. v. Central Vt. R. Co., 19 App. Div. 509, 516, 46 N.Y.S. 576, 580 (1897). Contra, Clemenson v. Whitney, 238 Ill. App. 308, 313-14 (1925). See, e.g., Cox v. Central Vt. R. Co., 170 Mass. 129, 135, 49 N.E. 97, 100 (1898), where the language of the court impliedly supports the contention that no inference of negligence may be drawn from the mere fact of a fire, but that the plaintiff has had to satisfy the jury as to where and how the fire originated; absent such proof, a finding for the defendant was required since the bailor would thus have failed his burden of proof. Cf. Little v. Lynn & Marblehead Real Estate Co., 301 Mass. 156, 159, 16 N.E.2d 688, 690-91 (1938). But see discussion in text following note 96 infra. See also R. Brown, Personal Property 369-72 (2d ed. 1955); Annot., 71 A.L.R. 767 (1931); Annot., 9 A.L.R. 559 (1920).

[78] See, e.g., Metropolitan Elec. Serv. Co. v. Walker, 102 Okla. 102, 103-05, 226 P. 1042, 1043-45 (1924). But if the bailee had been allocated the burden of producing evidence to explain the loss because of a presumption arising from the prima facie case, a developing rule was that the bailee's disclosure must offer collateral facts from which an inference of due care could be drawn. See McCord v. Atlantic Coast Line R.R., 76 S.C. 469, 471, 57 S.E. 477, 478 (1906); Davis v. Tribune Job-Printing Co., 70 Minn. 95, 98, 72 N.W. 808, 809 (1897). See generally Annot., 9 A.L.R. 559, 561 (1920).

bailee would have been unwise to point to the mere fact of the fire without other circumstances more positively indicating his due care.[79] A bailee who established nothing more than the naked fact of destruction by fire, introducing no supporting evidence from which an inference of due care could be drawn, would be facing the possibility of an adverse judgment. This follows principally because he would have placed the trier of fact in the position of having to weigh the bailor's evidence of bailee negligence against the bailee's mere showing that it could be found to be equally probable that his negligence was not involved in the event.

Without a more definite indication as to the import of its holding in *Willett* regarding the aforementioned presumption/inference problem, the court left itself open for the confusion that did, in fact, result from subsequent application of the case.[80] An excellent example of this general confusion is the case of *Hanna v. Shaw*,[81] where the bailor sought recovery for an automobile, the motor of which was allegedly damaged while in the possession of a garage-keeper as bailee. The court there held:

> We are unable to agree with the contention of the plaintiff that, when goods have been delivered to a bailee and have been either lost or damaged and the bailee's liability depends upon his negligence, *the fact of negligence may be presumed,* thereby placing upon him the duty of producing evidence of some other cause of loss or injury. . . . This result is in accord with our own decisions and those of many other jurisdictions, although there are contrary authorities.[82]

Seemingly, then, the *Hanna* court disagreed with any possible construction of *Willett* to the effect that a presumption (or an inference, for that matter) is raised from the prima facie case. But the court went further, stating:

> We are of opinion that the plaintiff in the circumstances here disclosed *did not make out a prima facie case* merely by showing

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79 The *Knowles* court discussed the trend of requiring this additional information regarding the circumstances of the fire. 1972 Mass. Adv. Sh. at 1788-89, 289 N.E.2d at 883.

80 See Gibbs v. Farmers' & Merchants' State Bank, 123 Iowa 736, 741, 99 N.W. 703, 705 (1904), where the court specifically pointed to this difficulty of ambiguity regarding presumptions, citing Willett v. Rich, 142 Mass. 357, 7 N.E. 776 (1886). See also Hunter v. Ricke Bros., 127 Iowa 108, 102 N.W. 826 (1905).

81 244 Mass. 57, 138 N.E. 247 (1923).

82 Id. at 61, 138 N.E. at 249 (emphasis added). Note the less than precise use of language here. Does the court mean delivery in good condition? And, if the court is referring to a true presumption, should it not use the phrase "will be presumed" to convey the mandatory nature of the rule?

that he left the machine in the defendant's garage in good condition, and that it was in a damaged state the next morning. [83]

In light of the fact situation and the evidence adduced at trial in *Hanna,* it should be stressed that the language in that case ought not to have been given too sweeping an application.[84] The court there found that the evidence tended equally to support two inconsistent propositions: that the inference of bailee negligence was no more persuasive than the inference that it was the *bailor* who had damaged the auto *before* delivery.[85] The prima facie case could not be sustained, because at issue was the very fact of delivery in good condition; the court stated that "it does not appear that the condition may not have existed when the car was left at the garage . . . ."[86] It is therefore submitted that the particular fact situation in *Hanna* and not a rule of law determined the court's holding in that case. Since the bailor could not show *delivery in good condition,* he failed to make out a prima facie case, and no presumption arose, nor could an inference of negligence have been drawn.[87] Consequently, the result in this case *is* consonant with the previously-stated conclusion that a prima facie case may be made out by proof of delivery in good condition and failure to return, inasmuch as an inference of negligence may be drawn from the simple fact of a breach of contract.[88] Again, there was no mention of the quality and quantity of evidence required of the bailee to explain his excuse for non-performance. Examination of the case reveals, however, that the defendant there was able to establish a substantial doubt that either he or his servant had been the proximate cause of the damage. Accordingly, *Hanna* does not deviate from the conclusion here offered regarding *Willett,* as much as it presents a distinguishable fact situation and an overly broad statement of the holding in that case.

The court continued to perpetuate confusion in this area of law, however inadvertently, in its opinion in *Bean v. Security Fur Storage*

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83 Id. at 60, 138 N.E. at 248 (emphasis added).

84 This language was specifically disapproved of in *Bean.* See note 89 infra and accompanying text.

85 The court reasoned that:

> [t]he inference that the engine had been overheated before the car was left at the garage by the plaintiff, is equally consistent with the inference that it had been run and the engine overheated after the car was left there.

244 Mass. at 60, 138 N.E. at 248.

86 Id. at 59, 138 N.E. at 248.

87 Although not within the scope of this note, it is suggested here that proof of delivery in good condition by circumstantial evidence could well present a problem in subsequent efforts to build upon it another inference, that of bailee negligence.

88 The *Hanna* case has been similarly distinguished by some courts. See Butler v. Bowdoin Square Garage, Inc., 329 Mass. 28, 31, 105 N.E.2d 838, 839 (1952); National Dock & Storage Warehouse Co. v. United States, 27 F.2d 4, 8 (1st Cir. 1928).

Co.[89] There, in an action "in tort or contract" [*sic*], the bailor sought to recover for the loss of a mink coat while in the possession of the bailee for the purpose of cleaning and storage. Sustaining an exception of the defendant on the admission of certain interrogatories and remanding, the court indicated its views on questions that would arise on retrial:

> While the burden of proving negligence would continue to rest upon the plaintiff, the receipt of the coat by the defendant and its disappearance while in the possession of the defendant, which offers no explanation of the disappearance, *would permit a finding that the defendant was negligent.* Regardless of whether one uses the phrase disapproved in *Hanna v. Shaw,* 244 Mass. 57, 61, that "the fact of negligence may be presumed" . . . this means that the burden of going forward with the evidence falls upon the defendant.[90]

The use of the phrases, "which offers no explanation" and "would permit a finding" again presents the dual questions of whether this is a presumption or an inference at work, and what quantity of evidence is necessary to explain the disappearance or loss of the bailed item. If a defendant has been allocated the burden of going forward with the evidence (the burden of production) on a showing of delivery and failure to return, it is a *presumption* of negligence that has arisen upon completion of the prima facie case.[91] A mere *inference* would not shift the burden of producing evidence in a technical sense; in effect, however, an inference once drawn and uncontradicted by *persuasive* evidence by the bailee ordinarily results in a verdict for the proponent on the balance of logical probabilities. Although it is difficult to conclude that it is a presumption at work, since a true presumption would *require* (and not simply permit) a finding of negligence, this somewhat indefinite language might have been used simply because the court was merely "indicating its views" and was not affirmatively disposing of the case. An additional omission was that no indication was given as to whether or not the prima facie case stands as prima facie evidence of negligence.[92] Notwithstanding these very basic ambiguities, it is submitted that *Bean* should be read as raising both a presumption and an inference of negligence, thus prima facie evidence, as this would seem to be the most logical result of the case; this conclusion is offered in spite of the fact

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89 344 Mass. 674, 184 N.E.2d 64 (1962).

90 Id. at 676, 184 N.E.2d at 66 (emphasis added). The court continued:

> We do not believe that the statements in the next to last paragraph of the opinion in the *Hanna* case . . . were intended to convey any contrary impression but, to any extent that they do, they are not accurate statements of our law nor of the prevailing view elsewhere.

Id.

91 See note 34 supra and accompanying text.

92 See text at note 35 supra.

that subsequent cases are not truly indicative of the correctness of this or any contrary conclusion.[93]

Regardless of the seemingly contradictory language utilized in the various opinions, it is submitted upon the holdings in the cases and their subsequent application, and a review of some fundamental rules of evidence, that the state of Massachusetts bailment law directly prior to *Knowles* can be summarized as follows: (1) In either contract or tort, the bailor must show delivery in good condition and failure to return on demand to establish a prima facie case. An answer by a bailee of impossibility of performance is not an affirmative defense, but puts the fact of negligence into issue before the trier. (2) Where the bailor makes out a prima facie case, a presumption arises that shifts the burden of production to the bailee to "explain" the reason for such a failure. Where the bailee does not rebut the presumption of negligence, the rule *requires* a finding for the bailor.[94] (3) Even though a presumption only shifts the burden of production of evidence, the presumption will persist unrebutted until the bailee introduces evidence that is believed by the trier of fact and is of sufficient probative worth that it would warrant a finding contrary to the presumed fact. (4) A prima facie case of bailment stands as prima facie evidence of negligence. This means that even in the event that the presumption is rebutted, the issue of negligence will go to the fact-finder, nonetheless, for a weighing of the probative value of the

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[93] See Hale v. Massachusetts Parking Authority, 358 Mass. 470, 471-72, 265 N.E.2d 494, 495 (1970), where the court seems to have disregarded the words "without explanation" in the *Bean* case, and focused on the issue of sufficiency of the evidence upon which to base the jury's finding of negligence. See also Fireman's Fund Am. Ins. Co. v. Capt. Fowler's Marina, Inc., 343 F. Supp. 347, 350 (D. Mass. 1971); the court there cited *Bean* in support of its statement that a presumption of negligence "may be both equitable and necessary" in cases where the goods are not returned and the bailee offers no *reasonable* explanation. Id. Finding that there was knowledge as to the cause of the fire, but nothing was known as to its place of origin, the court distinguished this case from *Bean*. For further discussion of *Bean*, see 9 Ann. Surv. of Mass. Law §21.2, at 280 (1962).

Finally, it should be noted that the *Knowles* court impliedly assumed that *Bean* has stood for the imposition of a presumption of negligence all along. It is silent, however, on the question of whether the prima facie case is prima facie evidence of negligence. 1972 Mass. Adv. Sh. at 1787-88, 289 N.E.2d 882-3. This seemingly innocuous and off-handed statement by the court is quite remarkable in itself, given the apparent belief among practicing members of the bar in this jurisdiction that no such presumption existed based on *Bean*. See generally Brief for Appellee, Knowles v. Gilchrist Co., 1972 Mass. Adv. Sh. 1783, 289 N.E.2d 879, supporting such a belief by implication.

[94] Note that before any finding is required, the trier must find the basic facts to be true. Attention is also directed to the proposition that even if the *Knowles* court were only dealing with an inference, the case should nevertheless have been presented to the trier for a weighing of the evidence. The issue would then have come down to the balancing of an inference of negligence drawn from the bailor's prima facie case, against defendant-bailee's reliance on a technical rule of law to the effect that the fact of a fire is sufficient to meet his burden of producing evidence to rebut the prima facie case.

underlying inference of negligence drawn from the facts of the breach of contract.

III. Disposing of *Knowles* on the Basis of Precedent

If this summary of bailment law as it existed at the time of the *Knowles* case is correct, it is necessary to go only one step further to reach the conclusion that *Bean v. Security Fur Storage Warehouse* should have controlled, as Justice Braucher suggested.[95] The obvious question at this point is whether or not evidence of destruction of bailed articles in a fire would have been evidence sufficient to rebut the presumption of negligence. It is submitted that it is nothing less than absurd to suggest that an answer of impossibility due to fire could, in effect, stand as evidence of due care; the prevailing law in other jurisdictions would support the absurdity of such a suggestion.[96] However, the Supreme Judicial Court in *Knowles* seems to have concluded that although such a result was irrational, it was technically possible in Massachusetts on the basis of its prior holding in *Little v. Lynn & Marblehead Real Estate Co.*[97] This supposition, that a fire would stand as evidence of due care, was offered as one of the main justifications for the court's ultimate holding that shifted the entire burden of proof, comprising both the burden of production and the burden of persuasion, to the bailee.[98] A brief examination of *Little* will indicate that the court misread the import of that case and that its fears of an "irrational result" were somewhat exaggerated.

The *Knowles* court cited to the *Little* case as suggesting that to rebut successfully the presumption of negligence arising upon completion of the prima facie case, a bailee in this jurisdiction could simply answer that the bailed articles were destroyed by fire; this answer of fire would in effect stand as evidence of the bailee's due care. In the words of the court,

> [u]nder this rule, since the bailor has the burden of proving the bailee's negligence, the bailee can simply plead impossibility as a defence, introduce evidence of a fire and rest as the bailee did in

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95 1972 Mass. Adv. Sh. at 1792, 289 N.E.2d at 885.

96 See 8 Am. Jur. 2d Bailments §§306 et seq. (1963), where offered as a possible reconciliation of the cases dealing with loss by fire is the suggestion that in establishing the mere fact of loss, the bailee has ordinarily made disclosures from which an inference of due care could be drawn. 8 Am. Jur. 2d Bailments §320, at 1209-10, and cases cited therein. See, e.g., Frissell v. John W. Rogers, Inc., 141 Conn. 308, 106 A.2d 162 (1954); Agricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 286-87, 58 N.E.2d 658, 664 (1944); Clemenson v. Whitney, 238 Ill. App. 308 (1925). Cf. Liberty Ins. Co. v. Central Vt. R. Co., 19 App. Div. 509, 516-17, 46 N.Y.S. 576, 581 (1897).

97 301 Mass. 156, 16 N.E.2d 688 (1938), cited in *Knowles*, 1972 Mass. Adv. Sh. at 1786, 289 N.E.2d at 882.

98 1972 Mass. Adv. Sh. at 1786-87, 289 N.E.2d at 882-83.

> the instant case, even though the bailee may be the only party with access to the facts surrounding the loss.[99]

It is submitted that the court mistakenly applied the *Little* case here, and that the further suggestion that impossibility was available as a defense to the bailee in *Knowles* is similarly questionable. With respect to the *Little* case, the negligence action there was not between a plaintiff-bailor and a bailee as defendant, as the *Knowles* court so stated,[100] but was rather an action by a bailor and bailee as co-plaintiffs, against the owner of an adjoining building as defendant.[101] While the entire fact situation raises doubts as to similarity, the two most striking and pertinent differences are that: (1) the fire originated in the adjoining building belonging to defendant and then spread to plaintiffs' building; and (2) plaintiffs ultimately alleged negligence on the part of defendant not as to the cause of the fire, but as to his failure to contain the fire properly once it had begun.[102]

The *Knowles* court pointed to language in the *Little* case as indicating the problem faced by the court in fixing the burden of proof on the bailor. It said:

> The fact that the fire originated in the defendant's premises is not evidence that it was started by the defendant; nor is it evidence that the fire was caused by any negligence on its part. . . . The defendant is liable if its negligence caused the fire, "but until its cause is known or fairly found from the evidence [the fire] cannot be said to be due to [the defendant's] negligence."[103]

However, it is noted that *Little* involved a pure negligence issue, not a case in bailment; there was no presumption arising nor an inference drawable upon the completion of a prima facie case of delivery and failure to return. The plaintiffs and defendant made very substantial showings of fact as to the circumstances of the fire and the ultimate issue

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99 Id., 289 N.E.2d at 882.

100 The court explained:

> One serious problem created by fixing the burden of proof on the bailor is *well illustrated* by this court's decision in [*Little*] . . . . In a case with *very similar facts* to those in the instant case, the *bailor sued the bailee* after a fire in the bailee's premises destroyed the bailor's property.

Id. at 1786, 289 N.E.2d at 882 (emphasis added).

101 See Little v. Lynn & Marblehead Real Estate Co., 301 Mass. 156, 157, 16 N.E.2d 688, 689-90. It should be noted that for the purposes of this inquiry, the fact that the complaining parties happened to be in a bailment situation is of no practical consequence here, inasmuch as none of the technical rules as to presumptions and shifting burdens would have been operative.

102 Brief for Plaintiff at 14, Brief for Defendant at 4, Little v. Lynn & Marblehead Real Estate Co., 301 Mass. 156, 16 N.E.2d 688 (1938).

103 1972 Mass. Adv. Sh. at 1786, 289 N.E.2d at 882, quoting *Little*, 301 Mass. at 159, 16 N.E.2d at 690-91 (citations omitted).

of a failure to properly contain the fire. Even most broadly, the *Little* case should be read as only holding that the burden of proof in a negligence action, on facts substantially similar to that case, imposes a requirement upon the bailor to show by a fair preponderance that the defendant failed to exercise due care with respect to the origin, cause and subsequent containment of the fire; the mere fact that a fire originated in defendant's premises could not be held as evidence of negligence.

The factual and procedural situation in *Knowles* would thus seem to preclude the application of the holding in *Little*. The bailor in *Knowles* had established a prima facie case and a presumption of negligence should have arisen on the authority of *Bean*. The bailee, having been allocated the burden of production of evidence to show his due care, answered that the bailor's goods were destroyed in a fire; the actual fact of the fire and the loss was stipulated by the bailor.[104] Arguably, on the basis of *Little*, the fact of a fire in the defendant's premises would not stand as evidence of negligence—*in and of itself*. But the fact of bailee negligence was presumed on completion of the prima facie case, and the bailee had the burden of coming forward with sufficient evidence to rebut this presumed fact.[105] *Little v. Lynn* does not hold that the fact of a fire in the defendant's premises can stand as evidence of due care, nor does it even hint of the possibility of this "irrational result."

The *Knowles* court also suggested that the introduction of evidence of a fire would be sufficient to constitute a plea of impossibility of performance, again relying on *Little*.[106] In point of fact, that answer was not available to the bailee because such a defense was not technically raised in its answer.[107] Even if it had been alleged in the answer, impossibility of performance is normally an affirmative defense for which the bailee must sustain the full burden of proof as to the constituent elements;[108] the trier would have to be convinced that it was *more* probable than not that the bailee was without fault. Furthermore, the defense of impossibility entails the requisite showing by the defendant that the loss in question was *without the fault of either party*.[109] Again, even if it could

104 1972 Mass. Adv. Sh. at 1784 n.2, 289 N.E.2d at 880 n.2.

105 The very purpose of a presumption is to aid the proponent in sustaining its burden of proof. See text at note 34 supra.

106 1972 Mass. Adv. Sh. at 1788, 289 N.E.2d at 882-83.

107 Brief for Appellant, Knowles v. Gilchrist Co., 1972 Mass. Adv. Sh. 1783, 289 N.E.2d 879 [hereinafter cited as Brief for Appellant]; Answer by Defendant, "Appendix B," at ii, Knowles v. Gilchrist, Co., 1972 Mass. Adv. Sh. 1783, 289 N.E.2d 879. However the gist of the second paragraph of the defendant's answer does imply a "confession and avoidance."

108 See R. Brown, supra note 77, §87, at 373.

109 "[T]he contract is to be construed not as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the *accidental perishing of the thing without the fault of either party*." Hawkes v. Kehoe, 193 Mass. 419, 423, 79 N.E. 766, 767 (1907) (emphasis added; citations omitted). See also Boston Plate & Window Glass Co. v.

be applied to this situation, the *Little* case does not hold that the fact of a fire on the defendant's premises is evidence of his due care. Since the defendant has the burden of showing that fact by a preponderance, Gilchrist's would have failed in merely showing the fact of a fire. It is therefore concluded that *Little v. Lynn* is not applicable, that impossibility was not available in its usual sense, and that the *Knowles* court erred in propounding the use of the case as a defense.[110]

IV. Other Noteworthy Considerations in *Knowles*

In addition to relying upon the *Little* case, the *Knowles* court offered a second major justification for shifting the burden of proof in cases of bailment for hire, namely, the position of a typical bailee of being in the peculiar knowledge of the facts.[111] While the theory of shifting the burden of production through the use of a presumption seems to be founded, in part, upon this "better access" problem, caution should be exercised by the courts in extending this theory to allow for the shifting of the burden of persuasion as well.[112] In fact, the court itself presaged potential problems involved in the use of the "peculiar access" theory, by noting that an expansion of pre-trial discovery could minimize the dilemma resulting from a lack of access to information.[113]

Despite the apparent simplicity of the new principle of law established by the *Knowles* decision, there are a number of areas in the court's opinion that may engender some measure of controversy in the future application of the case as precedent. First, the holding of the case was strictly limited to bailments where the bailee has exclusive control over the property at the time of destruction or damage.[114] This limitation is

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John Bowen Co., 335 Mass. 697, 700, 141 N.E.2d 715, 717 (1957) (citing *Hawkes*); S. Williston & G. Thompson, Selections From Williston's Treatise on the Law of Contracts §1946, at 919 (1938).

110 The *Knowles* court made no mention of its prior holding in *Willett* to the effect that impossibility of performance was not an affirmative defense, but put the fact of negligence into issue before the trier. See *Willett*, 142 Mass. at 358, 360, 7 N.E. at 779; Cass v. Boston & Lowell R.R., 96 Mass. 448, 455 (1866) (dissenting opinion). See also text at notes 63-70 supra. Since an answer by a defendant that he could not deliver according to the terms of the contract *technically* amounts to an answer of impossibility, the court may have been aware of, but merely confused by, the import of the holding in *Willett*. This suggestion is supported by the fact that the practical effect in both situations is the same. However, it is not seen why the court confused the matter by use of the term "impossibility."

111 1972 Mass. Adv. Sh. at 1791, 289 N.E.2d at 884.

112 "This consideration [of one party being in the peculiar knowledge of the facts] should not be overemphasized. Very often one must plead and prove matters as to which his adversary has superior access to the proof." C. McCormick, Evidence §337, at 787 (2d ed. 1972).

113 1972 Mass. Adv. Sh. at 1791 n.4, 289 N.E.2d at 884 n.4.

114 Id.

obviously in line with the basic rationale of the holding, since only in cases in which the bailee has exclusive control should he be regarded as being in the peculiar knowledge of the facts. The concept of "exclusive control," however, was not explicitly defined in the text of the opinion. It is certainly conceivable that a bailee would attempt to argue non-exclusive control so as to remove his case from the ambit of *Knowles*. For example, should a sub-bailment fall within this non-exclusive category? Secondly, there is language in the opinion indicating that the court was swayed in its decision by the fact that the bailor in this case was a consumer;[115] the holding, nevertheless, was not expressly limited to consumers. Will the *Knowles* rule apply to bailors who are businessmen or others who fall outside the class of consumers? The issue here comes down to whether or not a businessman's knowledge of general trade practices and the conventional application of rules regarding bailee liability and risk of loss would outweigh the likelihood that the bailee would have access to more facts and thus exempt these non-consumers from the rule. The higher probability that a businessman will be aware of more facts—if only because of the greater value of goods involved—would seem to provide a legitimate argument against shifting the burden of persuasion to a bailee who might have no greater actual knowledge of these surrounding circumstances than any other party involved. These ultimate questions of "who knows what" and "who should know what" present a difficult problem where there is no information available to either party.[116] The fundamental policy question here seems to be whether the bailee can justifiably be allocated the burden of producing evidence merely because it is *more likely* that he would know these surrounding circumstances. Although the *Knowles* court definitely opts for this solution to the "access of information" dilemma, there does not seem to be any clear-cut reason to support this selection—other than a general public policy to protect unwary consumers—where the bailee, in good faith, pleads ignorance of the material circumstances.

Another important consideration is the retroactive application of *Knowles*. It is not unreasonable to expect bailors to claim that, since *Knowles* promulgates a new rule of procedure only, the rule should pertain to *all cases* regardless of when the bailment agreement was consummated. Inasmuch as the court did not increase the liability of the bailee by imposing any greater duty of care, it is not seen how a due process argument by a bailee could defeat an argument for retroactive application. It seems that the only feasible approach would be to hypothesize as to the undue burden that such application might place on

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115 Id. at 1790, 289 N.E.2d at 883-84.

116 See Fireman's Fund Am. Ins. Co. v. Capt. Fowler's Marina, Inc., 343 F. Supp. 347, 350 (D. Mass. 1971). Notice that where the bailor retains the ultimate burden of persuasion on the issue of negligence, it is most advantageous to the bailee's position that little or no information as to the circumstances of the fire be disclosed.

the court in terms of the number of cases that could potentially be litigated. However, it is submitted that the very fact that the rule was promulgated in the first instance is a fairly good indication that one intention of the court was to open up such avenues of litigation. It is thus apparent that the *Knowles* rule should be given retroactive effect.

In limiting the scope of its holding, the court expressly excluded cases where the bailee has contracted himself "irrespective of due care."[117] As was mentioned earlier,[118] this exception must be viewed as surplusage to the holding in the case. First, as was convincingly argued by the plaintiff-bailor in her brief, three Massachusetts cases could well have supported the contention that an implied contract existed in *Knowles* so as to bring the case within the ambit of those prior decisions upholding strict liability on the contract in spite of the absence of precise words.[119] With this in mind, it seems that the *Knowles* court has disregarded these cases and would not accept such an obligation arising by *implication*. If this is the case, the exception would seem to have little or no practical application for the following reason. Under most bailee insurance policies, the insurer disclaims responsibility for any loss sustained by the bailee where he has bound himself, by contract or other agreement, to a standard of care in excess of that which is applied by the courts of that jurisdiction. Bailees in Massachusetts are bound to exercise reasonable due care.[120] Thus, assuming that most bailees will regulate their contractual obligations in light of insurance coverage, it is highly improbable that they would enter into express contractual commitments even hinting of strict liability. One can only wonder whether the stated exclusion is meant to provide a means of accepting an implied obligation at some point in the future.

It is nonetheless an inescapable conclusion that where the contractual liability is not founded upon fault, the *Knowles* case would not apply in any event. This second reason for viewing this exception with some doubt is even more devastating in a practical sense. Inasmuch as the essential issue in *Knowles* was proof of negligence, where proof of negligence is not at issue, the case is inapplicable. If a bailee has contractually committed himself irrespective of due care, he has bound himself to strict liability; fault is of no consequence on the basis of that agreement. Therefore the *Knowles* rule would not directly apply to litigation ensuing between those contracting parties.

In moving from a review of some of the more pertinent substantive and conceptual difficulties with the *Knowles* opinion itself, it is advantageous

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117 1972 Mass. Adv. Sh. at 1792, 289 N.E.2d at 885.

118 See note 9 supra.

119 Brief for Appellant, supra note 107, at 2, citing Drake v. White, 117 Mass. 10 (1875); Perrault v. Circle Club, Inc., 326 Mass. 458, 95 N.E.2d 204 (1950); Industron Corp. v. Waltham Door & Window Co., 346 Mass. 18, 190 N.E.2d 211 (1963).

120 See note 14 supra.

at this point to consider two arguments that the court might have advanced in support of its final result, these in addition to the reasoning regarding possession and control of the bailed items, the almost exclusive access to information, and the very existence of the presumption. The first is an identifiable trend in dealing with presumptions, especially those with a strong basis in public policy. As presented by Professors Morgan[121] and McCormick,[122] the theory would cast upon the bailee not only the burden of going forward with the evidence, but the burden of persuasion as well. Usually, when the bailor has retained the burden of persuasion on the issue of negligence by a preponderance of the evidence, with only the burden of production shifting, he has lost the case where the contrary proposition of due care has been equally persuasive; in other words, the plaintiff-bailor only convinced the trier that negligence was *as* probable as not. However, both writers have advocated the shifting of the burden of persuasion as well, inasmuch as the existence of a reason substantial enough to put the bailee to producing his evidence should also control a finding against him where the fact-finder has a reasonable doubt.[123] In modified form, this theory of a less easily rebutted and more durable presumption has been accepted in the Uniform Rules of Evidence,[124] in the Federal Rules of Evidence,[125] and in the courts of a number of jurisdictions.[126]

It is worth mentioning at this point that the Supreme Judicial Court would have done well to view the *Knowles* case as an opportunity to clarify some of the problems raised earlier in this note regarding the use of presumptions in this jurisdiction.[127] This is especially important in light of the fact that much of the court's discussion offered to justify the

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121 Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 83 (1933).

122 C. McCormick, supra note 108, §345, at 826.

123 In responding to the assertion that it is settled law that the burden of persuasion *never* shifts, Professor McCormick has answered that this burden of convincing the jury need not be fixed until the evidence is to go to these fact-finders. Recognizing that the weight of authority firmly supports the allocation at the commencement of trial, he concluded that the policy behind presumptions is stronger than that of setting the requirement of proof at the outset of the proceedings. Id. at 827. Contra, 9 J. Wigmore, Evidence §2486 (3d ed. 1940).

124 Rule 14 proposes that if there is probative value to the underlying evidence, the burden of showing the nonexistence of the presumed fact would be allocated to the opponent. If the underlying facts have no probative value, the factual determination would be made as if no presumption had been involved.

125 Rule 301 provides in part: "[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." But note that Rule 302 holds that state law will govern a presumption regarding an element of a claim or defense.

126 See, e.g., Frissell v. John W. Rogers, Inc., 141 Conn. 308, 312, 106 A.2d 162, 164 (1954).

127 For an example the court might have followed, see Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959).

shifting of the burden of proof specifically in bailments for hire could similarly apply in many other situations where presumptions have arisen on the basis of policy or probabilities. A general rule dealing with the broader problems involved would, in the long run, have been much more beneficial than approaching the issue, as the court did, in piecemeal fashion.

The other argument devolves from what can be described as an emerging theory in the field of negligence, particularly in those areas where the culpability of the defendant has been less than the primary concern.[128] In their attempts to make the plaintiff "whole" again, some courts have focused upon the question of which of the parties would be the best conduit of the loss. The theory is not completely akin to the "deep-pocket" theory in master-servant liability, in that it does not necessarily seek out the party with the greatest assets. Rather, the court has looked to the party best able to indemnify for the loss immediately and then pass the cost back to others (usually the consumer). Under the typical bailment situation, the bailor's goods are not covered independently under any type of homeowner's insurance. The bailee could insure the goods while in his possession, and then recoup this minor expenditure by an equalizing increase in cost per item; the burden should not be onerous for either party.[129] This consideration should be given thought, since the practical effect of the *Knowles* rule is to make the bailee an insurer in those situations in which he has been without fault, but cannot produce information sufficient to prove his own due care. Now that the bailee has the risk of non-persuasion on that issue, *he* would receive the adverse verdict, not the bailor.

In this general regard it should be noted that in the concluding language of the case, the court stated that the bailee must show "that he has exercised due care to prevent the property's loss or destruction."[130] It is

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128 Cf. Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 440, 191 N.E.2d 81, 85, 240 N.Y.S.2d 592, 598 (1963) (dissenting opinion).

129 This statement should be qualified to the extent that a bailee with a large warehouse who stores vast amounts of highly valued goods will not be able to afford liability insurance in most instances. The *Knowles* case puts such bailees in the position of having to absorb potential losses on their own, which result seems unfair at first glance. However, balanced against this apparent unfairness is the plight of the many consumers who have found themselves without legal recourse to recover for lost goods. Given the bailor's lack of access to information, the potential benefit to be derived from assisting these bailors greatly outweighs the problems that might ensue in these isolated situations.

Another consideration is the effect upon warehousemen of the Uniform Commercial Code, as enacted in G.L. c. 106, §7-403(1)(b), providing that bailees must plead and prove due care when warehouse receipts have been issued. Note the possible application of the *Knowles* court's statement that "[i]t is in the interest of simplicity and uniformity that the same rule apply whether or not a warehouse receipt is issued." 1972 Mass. Adv. Sh. at 1792, 289 N.E.2d at 885.

130 *Knowles*, 1972 Mass. Adv. Sh. at 1792, 289 N.E.2d at 885.

clear from this language that the court has imposed upon the bailee a weighty burden to prove non-negligence. The bailee must come forward with information as to "what actually happened to the goods and what safeguards existed both before and after the precipitating event . . . ."[131] Litigators are aware, of course, of the evidentiary problems posed by having to prove a negative fact, which is here an absence of negligence.

CONCLUSION

The rule enunciated in the *Knowles* case—that the bailee will now bear the risk of non-persuasion on the issue of negligence in bailments for hire where a prima facie case has been made—appears to be a just and equitable solution to the problems encountered by a bailor in proving that bailee negligence was the cause of his loss. Fairness dictates that a person who has entrusted his possessions to another for their mutual benefit generally ought to be compensated for loss of or damage to the possessions while in the control of the bailee. The unfortunate result of having a bailor sustain the risk of loss in many instances has resulted from his lack of access to information regarding the loss. Since the bailor has had to bear the ultimate burden of persuasion as to bailee negligence, he has most often been unable to sustain his case. To aid the bailor in meeting this burden of persuasion, negligence has been presumed upon the making of a prima facie case of delivery and failure to return. It is simply incongruous that the policy giving rise to the presumption in the first place—that of obtaining information from the bailee—should not keep the artificial compelling effect of the device operative until the bailee has come forward with sufficient facts to show that due care is at least *as probable* as not. And the better rule, given the fact of possession and control of the articles by the bailee, the balance of probabilities in favor of the bailor, and the bailee's near exclusive access to facts of the loss itself, is that the bailee be allocated the burden of affirmatively proving due care by a fair preponderance of the evidence. This is the rule adopted in *Knowles,* making due care an affirmative defense to be pleaded and proved by the defendant-bailee, and presenting a question of fact for the trier in all cases where negligence is contested.

While the *Knowles* rule itself should be hailed as a positive step in solving the problem of a bailor's having to prove negligence when few if any facts are known to him, it ought to be recognized that the court was not compelled by the facts of the case to go as far as it did to reach a result favorable to Mrs. Knowles; the ultimate burden of persuasion could have remained with the bailor and the same result reached. In effect, then, the Supreme Judicial Court "legislated" a new rule of law

[131] Id. at 1791, 289 N.E.2d at 884.

in bailment situations for mutual benefit. And the question of whether or not this new rule can withstand future attacks because of the "judicial law-making" aspects of the case certainly depends on the logical persuasiveness of the opinion itself.[132]

If the discussion, clarification and criticsms presented herein can be deemed essentially correct in substance, the reasoning offered by the *Knowles* court in the decision could well detract from its future application. On the debit side of the argument, the lack of clarity in dealing with the various evidentiary concepts as well as prior case law, the confusion with regard to an answer of impossibility of performance, and the mistaken application of *Little v. Lynn* are the most striking examples of weaknesses in the court's position. To its credit, however, is the fact that the problem of bailor proof was in need of a solution, and the one selected in *Knowles* is not much different than a statutory rule that has been imposed in a very similar situation.[133] It seems that the most fundamental problem with the opinion is that the court did not deal with the focal issue of destruction by fire in the most direct and forthright manner possible.

Unless bailees for hire can be expected to assume this "new" burden of proving due care by a preponderance without some measure of resistance, it is unfortunate, but foreseeable, that the Supreme Judicial Court will be faced with the proposition of further discussion and clarification of the opinion and the holding in *Knowles*.[134]

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132 This is not to suggest that the courts should not legislate when a remedy is necessary. Rather, it is merely submitted that whereas legislative enactments receive their ultimate legitimacy through the ballot box, a judicial rule must essentially rely upon the logical persuasiveness of the supporting opinion for acceptance.

133 See notes 11 & 129 supra.

134 Consider the following situation: a jury is presented a question of fact, to determine whether a corporate bailor should be compensated for the loss of $20,000 worth of merchandise while in the possession of a self-employed bailee-warehouseman. These very facts were presented in the recent case of Lorillard Corp. v. Federal Warehouse, Inc., Civil No. 70-18-F (D. Mass., June 6, 1973), appeal docketed, No. 73-1212, 1st Cir., June 18, 1973, where the jury found the defendant "not guilty." The judge had charged as to the *Knowles* rule, and from the circumstances shown at trial regarding the loss, it was almost certain that the bailee had been negligent. It may be that the ultimate effect of *Knowles* will be to allow the jury a more free hand in responding to their visceral "feelings" about who is right or wrong. Inasmuch as a fact issue is always presented on the completion of the prima facie case, the jury will be less constrained in considering "fairness" in a particular case and entering judgment as justice dictates, regardless of who is the bailor and who is the bailee.