Presumptions; Are They Evidence?

More than a third of a century ago John H. Wigmore, America's great scholar in the field of evidence, made the following observations respecting the future of this important branch of our law:

"That our law of Evidence can be improved upon, no one doubts. That the improvement must be gradual, yet unremitting, is equally certain,—at least if we believe, with Carlyle, that 'all Law is but a tamed Furrow-field, slowly worked out and rendered arable from the waste Jungle.' That the profession is interested, and that all practicable proposals for progress will have to come from or through the profession itself, must be conceded." 1

And the Supreme Court of the United States about five years ago, acting upon the faith of the principle so effectively stated by Wigmore, broke away from one of the most ancient rules of Anglo-American law respecting the competency of witnesses and held that a wife was a competent witness to testify for her husband in a criminal prosecution. Mr. Justice Sutherland, writing the opinion of the Court, said:

"The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of the truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule." 2

1 Wigmore, Evidence (2d ed. 1923) xviii. (From the Preface to the First Edition, September 16, 1904.)

2 Funk v. United States (1933) 290 U. S. 371, 93 A. L. R. 1136, and Note (1933) 23 Cal. L. Rev. 448. First pointing out that at present the old rule that the defendant could not testify on his own behalf in a criminal suit has been in the main abolished, Mr. Justice Sutherland made the following observations: "Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions, and in the light of such legislation and of modern thought, they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another."

Contrast the above reasoning with that of Coke on the same subject: "...it hath been resolved by the justices, that a wife...cannot be produced either against or for her husband..., qua sunt duae animae in carne und." Coke on Littleton (1853) 6b.
The purpose of this article is to invite an examination of the rule applied by some courts that rebuttable legal presumptions are evidence. It is the rule in California, Vermont, and elsewhere, that a rebuttable presumption is evidence which may be "weighed" by the jury or judge, with or against evidence, in order to determine or find an operative fact. Is this the better view? Is it a view that involves a mental operation that is possible? If an analysis of the problem shows that the law on this subject is in an unsatisfactory state, if this rule is not the best rule that leads "to the successful development of the truth," then there seems to be no sound reason why the rule should not be changed, in those jurisdictions that follow it, by judicial decision or by legislation, if legislation is deemed necessary. If our rules of law are irrational or are not the best rules that can be devised to promote the ends of justice, they should be changed. That they are all not perfect, all thinking persons fully understand. Too, the belief is held that no change of an existing rule of law should be made until it has been carefully examined in the light of modern knowledge


The expression "weigh evidence" used in this article is a shorthand term used to describe the process employed in fact finding. In a judicial proceeding the "facts" must be found by a judge or a jury. This means that a determination must be made as to what has occurred in the past. All that this proposition can mean is that a conclusion is reached by reasoning processes upon admissible evidence that an event probably did or did not occur. In civil actions this determination is based upon a lower degree of probability than is required from criminal prosecutions. See Michael and Adler, The-Trial of An Issue of Fact (1934) 34 Col. L. Rev. 1224. They say: "No proposition to be proved in judicial proof is ever proved to be more than probable to some degree; it is never proved to be true or false." Ibid. at 1239-40. "That a jury's verdict is interpreted as asserting certain propositions as true and their contradictories as false, is an intelligible convention, even though they were not proved to be more than probable to some degree and persuasion did no more than influence the jury's estimation of degrees of probability. If as a result of proof and persuasion the jury find that P is more probable than not-P, in a case in which no greater probability is required, and thereupon assert P as true, no violence is done so long as this conversion of values is strictly regulated by a convention. This is the case." Ibid. at 1255. "When proof is completed, it must be more probable than, less probable than, or as probable as its contradictory. If the probability thus determined could be given numerical definiteness by rules of numerical computation, the trial would necessarily be at an end. If a proposition had to be proved as having a certain degree of probability, let us say greater than .5, it would or would not possess that degree of probability when proved, and so clearly as to call for immediate decision by the judge. But this is not the case. The probabilities of propositions can never be made numerically definite, for two reasons. The more obvious one is that the calculation of probability values resulting from proof always presupposes the assignment of probability values, without calculation, to the probable premises which are assumed. As we have seen, these uncalculated values cannot be made more definite than low or high, or very low or very high. The rules for calculating the probabilities of probanda can do no more than similarly determine their probabilities. The resultant values are therefore relatively indeterminate." Ibid. at 1300.
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and a better rule has been suggested and formulated. Such is the attitude
with which this question is approached.

The law of Evidence was not developed at an early period in Eng-
lish law. This body of law, it is to be borne in mind, was made by the
courts of England during that period when a change was being made in
the character of the jury. Originally the jury was made up of laymen who
knew all the facts involved in the dispute of the litigants. Witnesses were
not summoned to appear and give testimony until the sixteenth century.
For a considerable period of time jurors had knowledge of the facts and
also heard the testimony of witnesses. Gradually, however, the jury came
to be composed of persons who did not know any of the facts. Witnesses
were then summoned to appear before them and testify to the facts. The
jury then became the triers of the facts upon the evidence produced before
them. The law of Evidence for the most part was developed during the
eighteenth and nineteenth centuries, when the jury knew none of the
facts. Because of this change in the character of the jury, from a body
of laymen who knew all or part of the facts to a body of laymen who knew
none of the facts, rules of evidence were made. Rules were developed
respecting the competency of witnesses and the admissibility of evidence
to the end that the operative facts might be ascertained by the jury from
the trustworthy witnesses and from data deemed safe for consideration
by a lay body. It was inevitable, in order to determine the facts—what
had happened—that concepts of inferences, and perhaps presumptions,
should have been employed by the courts. These concepts were employed
at an early date but they were neither precisely understood nor accurately
stated. No doubt the purpose of employing presumptions was to enable
the judges to control the findings of the jury as well as to make law or
modify existing rules of law.5

4 Bushell's Case (1670) 1 Vaughan (Common Pleas) 135, 124 Eng. Repr. 1006;
9 HOLDSWORTH, HISTORY OR ENGLISH LAW (1924) 126; THAYER, A PRELIMINARY
TREATISE ON EVIDENCE (1898) c. II; 1 WIGMORE, op. cit. supra note 1, §8; Morgan,
5 THAYER, op. cit. supra note 4, at 317. Morgan, Some Observations Concerning
Presumptions (1931) 44 HARV. L. REV. 906, 909.

Thayer gives as an example of the use of presumptions to control the findings
of a jury the seven years absence presumption. At first the absence was held suf-
ficient to support an inference of death; later the ruling was that when a litigant
had the duty to prove life, when a person had been absent seven years, that evi-
dence of life must be produced to warrant a finding of life. Finally the courts held
where the issue was life or death that a presumption of death existed after seven
years absence, etc., absent evidence to the contrary.

He gives as an example of the use of the presumption to modify existing rules
of law the doctrine of prescription. Originally it was said that after twenty years
adverse use a permissible inference might be drawn that there was a lost grant;
then a presumption was created that there was a lost grant; and later a rule of
property law was announced that rule existed. Wallace v. Fletcher (1855) 30 N. H.
434; Dalton v. Angas (1881) 6 App. Cas. 740; and see Lehigh Valley R. and Co. v.
McFarlan (1881) 43 N. J. L. 605.
A brief survey of the views of some of the leading commentators as to the nature of presumptions may explain some of the misconceptions which, it is believed, still exist.

Lord Coke, "oracle of the law," in his classic work, *Institutes of the Laws of England, or a Commentary upon Littleton*, published in 1628, discussed presumptions. He classified them into three groups: strong, or exceedingly probable; probable; and light, or rash. He explained his meaning in the following passage:

"But when the trial is by verdict of 12 men, there the judgment is not given upon witnesses, or other kinde of evidence, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict. And Bracton saith, there is *probatio duplex*, viz. *viva*, as by witnesses *viva voce*; and *mortua*, as by deeds, writings, and instruments. And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, *viz.* violent, probable, and light or temerary. *Violenta praesumptio* is manie times *plena probatio*; as if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and no other man was at that time in the house. *Praesumptio probabilis* moveth little; but *praesumptio levis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for a proofe, is continuall and quiet possession; for *ex diuturnitate temporis omnia praesumuntur solemniter esse acta*. Also the deed may receive credit *per collationem signillorum scripturae* *&c.* *et super fidem cartarum mortius testibus erit ad patriam de necessitate recurrendum.*"

The first textbook on Evidence was a treatise by Chief Baron Gilbert published in 1754 (after his death in 1726). It contains a chapter briefly discussing presumptions. He followed Coke and classified them as "violent" and "only probable" and observes that "light and rash presumptions weigh nothing" and hence should not be included in his classification. His text, with illustrations included, reveals that he too includes in his classification of presumptions situations that are now commonly recognized as situations that call for a determination of whether a specified combination of facts will support a particular inference of fact. He says, speaking generally of the subject:

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6 COKE ON LITTLETON, loc. cit. supra note 2.

7 THE LAW OF EVIDENCE, BY A LATE LEARNED JUDGE. Chief Baron Gilbert died at the age of fifty-two. In addition to a varied judicial career, he wrote the following treatises, all of which were published after his death: *Cases in Law and Equity; Law of Devises and Revocations; Historical View of Court of Exchequer; Treatise on Court of Exchequer; Court of Common Pleas; High Court of Chancery; Ejectments; Distresses and Replevins; Evidence; Executions; Uses and Trusts; Reports of Cases in Equity; Tenures; Rents;* also edited Bellewe's *Treatise of Equity, 3d ed.* See 8 Foss' *Judges of England* 31. His work on Evidence was praised by Blackstone as "a classic which is impossible to abstract or abridge without losing some beauty and destroying the chain of the whole."
"Having spoken of living and written Evidence, we now come to Presumptions; as it is defined by the Civilians, it is Conjectura ex certo signo proveniens quae alto adducto pro veritate habetur. When the Fact itself cannot be proved, that which comes nearest to the Proof of the Fact is, the Proof of the Circumstances that necessarily and usually attend such Facts, and these are called Presumptions and not Proofs for they stand instead of the Proofs of the Fact till the contrary be proved." 8

Illustrating his classification, he observes:

"Of violent Presumption, and that is when Circumstances are proved that do necessarily attend the Fact.

"As if a Man be found suddenly dead in a Room, and another be found running out in Haste with a bloody Sword. This is a violent10 Presumption that he is the Murderer, for the Blood, the Weapon, and the hasty Flight, are all the necessary Concomitants to such horrid Facts, and the next Proof to the Sight of the Fact itself, is the Proof of those Circumstances that do necessarily attend such Fact."

Generalizing, he says:

"Every Presumption is more or less violent according as the several Circumstances sworn do more or less usually accompany the Fact to be proved."

This textbook from the pen of a distinguished judge no doubt did much toward embedding in the minds of the English bench and bar a concept of presumptions that included to a great extent inferences or "presumptions of fact" as they were then often called.11

Time and space do not permit of an examination of all of the texts and many early English and American decisions discussing the nature of presumptions. Three texts, however, of considerable influence upon English and American law will be noticed briefly, namely, Greenleaf, the American book that appeared in 1842, Phillips, an English book that

8 Included in the Roman law classification of presumptions are presumptiones juris, where inferences of fact were to be drawn from evidence of certain other facts. 1 Austin's Jurisprudence (3rd ed. 1869) 507. My colleague, Professor Max Radin, in a conversation states that the translation of the Latin employed by Baron Gilbert is: "An inference is derived from a certain (i.e., established or unquestioned) indication which is regarded as true, when something also is added to it (?)." The clause "when ... it" seems to be wrong. The last sentence in the quotation from Gilbert suggests that there is a misprint in the Latin used by him and that some phrases like "non in contrariunw" has been omitted.


10 The word "violent" in the above example would not likely be used today to express the idea of a strong presumption or inference that seems almost certainly true. The Oxford Dictionary includes among the many meanings of the word "violent" the following: "Very or extremely great, strong or severe. In legal use, chiefly Sc(otch) of suspicion or presumption." 12 English Dictionary (1928) by Murray, and others, at 223.

11 In 1794 we find Chief Justice Eyre using the following language in a charge to the jury in Hardy's case: "The conspiracy to depose the king is evidence of compassing and imagining the death of the king, conclusive in its nature, so conclusive that it is become a presumption of law, which is in truth nothing more than a necessary and violent presumption of fact, admitting of no contradiction. Who can doubt that the natural person of the king is immediately attacked and attempted by him who attempts to depose him." (1794) 24 How. Sr. Tr. 1361.
first appeared in 1814, and Starkie, another English book that first appeared in 1824.

Phillips wrote of "presumptions of fact" and "presumptions of law." He says:

"A presumption of fact is, probably, an inference of that fact from other facts that are known; it is an act of reasoning. . . . A presumption then, is a probable inference which our common sense draws from circumstances usually occurring in such cases."\(^1\)

Later in the same chapter he discusses "presumptions of law," saying that they "may be . . . divided into two kinds, first, when the presumption admits of no proof to the contrary, and secondly, where it only affords a *prima facie* inference, which is conclusive only in the absence of proof to the contrary."\(^2\)

Starkie on Evidence also refers to presumptions of law and presumptions of fact and "presumptions of law and fact," which he says "admit of proof to the contrary but which cannot be applied by the court without the aid of a jury."\(^3\)

Finally, Greenleaf, whose work had great influence upon American courts for over half a century, observes that presumptions or "presumptive evidence" is "usually divided into two branches, namely, *presumptions of law* and *presumptions of fact.*"\(^4\) Though he perpetuated this unfortunate terminology, he does, however, make a distinction between presumptions of law and "presumptions of fact." His definition of presumptions of law is confusing. Though he states that presumptions of law consist of rules of law that certain facts, in some circumstances, are judicially declared to exist, yet he also includes the conception of drawing inferences or reasoning from the existence of one fact to the existence of another. He says of "presumptions of law":

"Presumptions of Law consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. The general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection, which leads to its recognition by the law without other proof; the presumption, however, having more or less force, in proportion to the uniformity of the experience. And this has led to the

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\(^2\) Ibid. at 441.
\(^3\) Ibid. at 404.
distribution of presumptions of law into two classes, namely, conclusive and disputable.16

Writing of “presumptions of fact” he says of their nature:

“They are, in truth, but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which are shown by experience, irrespective of any legal relations.”17

These references to the texts are obviously not made for the purpose of furnishing a correct concept of a rebuttable legal presumption and its procedural consequences. They are made merely to illustrate the general state of thought on this subject which perhaps has influenced our present day law, and may have led to the erroneous conclusion that presumptions of law are evidence.

At a glance it may be seen from the above extracts that progress was made in the understanding of the nature of presumptions during the two hundred odd years between the time of Lord Coke and that of Professor Greenleaf. One fact seems certain, namely, that though the old terms “presumptions of law” and “presumptions of fact” were current until the middle of the nineteenth century, yet the two terms at the time Greenleaf wrote were recognized to possess different meanings.

In 1898 there appeared A Preliminary Treatise on Evidence at the Common Law, the work of a profound American legal scholar, James Bradley Thayer. In that treatise he gives especial attention to the nature of presumptions and does much to clear up many existing obscurities. He makes clear the true meaning of the terms “presumptions of law” and “presumptions of fact,” and concludes that the former are rules of law made by the judges to accomplish certain purposes deemed desirable and that they are not evidence in any sense, while the latter term was used to describe the reasoning or fact finding process of the triers of the fact, the process of determining the existence of one fact from evidence of other facts. He says of “presumptions of law”:

“Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence. When the term is legitimately applied it designates a rule or a proposition which still leaves open to further inquiry the matter thus assumed. The exact scope and operation of these prima facie assumptions are to cast upon the party against whom they operate, the duty of going forward, in argument or evidence, on the particular point to which they relate. They are thus closely related to the

16 Ibid. at 21.
17 Ibid. at 49.
subject of judicial notice; for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine. Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both. It would be as true, and no more so, to say that an instance of judicial notice is evidence, as to say that a presumption is evidence. . . .

"The rule fixes the legal effect of a fact, its legal equivalence with another. And it makes no difference in the essential nature of the rule whether this effect is fixed absolutely or prima facie: it gives a legal definition. Such is the nature of all rules to determine the legal effect of facts as contrasted with their logical effect. To prescribe and fix a certain legal equivalence of facts, is a very different thing from merely allowing that meaning to be given to them. A rule of presumption does not merely say that such a thing is a permissible and usual inference from other facts, but it goes on to say that this significance shall always, in the absence of other circumstances, be imputed to them,—sometimes passing first through the stage of saying that it ought to be imputed." 18

As to "presumptions of fact" he writes:

"Presumption of fact has a totally different meaning from presumption of law; and refers not to propositions, but to arguments—not to assuming, but inferring. When evidence is offered which can only be brought to bear on the matter at issue by a process of reasoning, the inference is termed a presumption of fact. The statement on which this inference is founded is termed presumptive evidence. Presumptive evidence forms one of the branches of the division of evidence according to its direct or indirect bearing on the matter at issue." 19

Contrasting "presumptions of law" and "presumptions of fact" he states:

"...the two members of the above division of presumptions, namely, presumptions of law, and presumptions of fact, are not properly opposed to each other. Presumption means reasoning in the one, assumption in the other. Presumptions of law are propositions; presumptions of fact are arguments. Moreover, presumptions of fact belong to evidence, or statements, made by witnesses or contained in documents, offered to a court of justice: legal presumptions belong to the law of evidence, or the rules affecting those statements. They cannot, therefore, be species of a common genus." 20

Of course, this subject received treatment by Wigmore in his great treatise on Evidence that first appeared in 1904.21 He too mentions the terms "presumptions of law" and "presumptions of fact" and draws a

18 THAYER, op. cit. supra note 4, at 314-15, 317.
19 Ibid. at 546, 547. Speaking of the terms "presumptions of law" and "presumptions of fact" which he thinks were brought into English law through a misunderstanding of the Roman law, he says:

"The quite modern facility in using the contrasted phrases, presumption of law and presumption of fact, has been attended with some attempt to introduce into our system the niceties of the continental classification of the thousand and one assumptions, positions, presumptions,—on innumerable subjects,—which have a place among the civilians. It has been the old mistake of pouring new wine into old bottles, and old wine into new."

20 Ibid. at 548.
21 Dean Wigmore dedicated his book to Charles Doe of New Hampshire and James Bradley Thayer of Massachusetts. He pays high tribute to Professor Thayer in the preface.
distinction between them, saying that the former "are in reality presumptions" while the latter "are not presumptions at all," and that the term "presumptions of fact" should be "discarded as useless and confusing." He says:

"The distinction between presumptions 'of law' and presumptions 'of fact' is in truth the difference between things that are in reality presumptions (in the sense explained above) and things that are not presumptions at all. A presumption, as already noticed, is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it. But, the legal consequence being removed, the inference, as a matter of reasoning, may still remain; and a 'presumption of fact,' in the loose sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact, regarded as not having this necessary legal consequence. 'They are, in truth, but mere arguments,' and 'depend upon their own natural force and efficacy in generating belief or conviction in the mind.' They have no significance so far as affects the duty of one or the other party to produce evidence, because there is no rule of law attached to them, and the jury may give to them whatever force or weight it thinks best,—just as it may to other evidence. There may be a preliminary question whether the evidence is relevant and admissible as having any probative value at all; but, once it is admitted, the probative strength of the evidence is for the jury to consider. So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term 'presumption' to such facts, however great their probative significance. The employment here of the term 'presumption' is due simply to historical usage, by which 'presumption' was originally a term equivalent, in one sense, to 'inference'; and the distinction between presumptions of fact and of law was a mere borrowing of misapplied Continental terms. There is in truth but one kind of presumption; and the term 'presumption of fact' should be discarded as useless and confusing...

"It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary. For example, if death be the issue, and the fact of absence for seven years unheard from be conceded, but the opponent offers evidence that the absentee, before leaving, proclaimed his intention of staying away for ten years, until a prosecution for crime was barred, this satisfies the opponent's duty of producing evidence, removing the rule of law; and when the case goes to the jury, they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighed down with any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances. This much is a plain consequence in our mode of jury trial; and the fallacy has arisen through attempting to follow the ancient Continental phraseology, which grew up under the quantitative system of evidence . . . fixing artificial rules for the judge's measurement of proof." 23

What, then, is the true meaning of the term rebuttable "presump-

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22 Wigmore, op. cit. supra note 1, §2491.
23 Ibid. §2491.
tion of law"? 24 The core of the meaning of the phrase "rebuttable presumption of law" is about the same that exists when we use the term "presumption" in ordinary speech. In ordinary speech when the term "presumption" is used it means that a thing fairly may be taken for granted, that something is supposed or believed to be probable but not certainly true. 25 In a conversation that has no legal significance, Mary Smith of San Francisco might say that she presumes that her husband is dead if he has been continuously absent from home for seven years and has not been heard of by persons who normally would have received news from him. If she had the problem of determining whether she should leave San Francisco and establish a home in a foreign land, she might do so presuming that her husband is dead. If she said to a friend, "I presume that John is dead and I have decided to leave San Francisco. I have an opportunity to move to Lima, Peru, and live there with my only sister. I am sailing for Lima next week.", we would understand that she meant to tell her friend that she thought it was almost certain that John was dead and that she had decided to conduct her affairs upon that assumption. If her decision to move to Lima was based upon her conclusion that it was almost certain that her husband was dead, she would no doubt change her plans if a person in whom she had great confidence told her that he recently had seen John and that he sent a message to her saying he expected shortly to return. On the other hand, if someone in whom Mary had little or no confidence, who desired that she not leave San Francisco, told her that he had seen a letter from John, which he had destroyed, she would probably carry out her plan to go to Lima. In each instance, she could do nothing more than determine, by employing her reasoning faculties, whether she believed her informant to be correct as to his information about her husband's existence. In this situation no legal dispute may ever arise out of her assumption that her husband is dead, no problem for a court to solve, if she changes her place of residence from San Francisco to Lima.

But, suppose that instead of deciding to go to Lima she decides to marry again or suppose that she has a paid up life insurance policy upon John's life, payable at his death, and that she decides to present it to the life insurance company for payment. Legal consequences may follow. They have often followed in each of these situations. It is conceivable

24 "Conclusive presumptions" so called, are not being considered. There is no such thing as a "conclusive" presumption. The two terms are contradictory. This is only an awkward and confusing way of expressing a rule of substantive law, e.g., the conclusive presumption (by statute in California) that a "tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." Specification of Conclusive Presumptions, sub. 4, §1962 Cal. Code Civ. Proc.; 5 Wigmore, op. cit. supra note 1, §2492.

that if she marries again she may be prosecuted for bigamy. If she demands payment from the life insurance company of the sum promised upon John's death, the company may not pay her and she may bring a suit to recover the value of the policy. If this situation arises in court, a determination must be made whether John Smith is dead. A court today will no doubt (a) determine whether the law presumes that John is dead, and (b) fix the legal effect of such a presumption, in the event the court concludes that a legal presumption of death exists. The legal effect of the presumption must be determined by the court as a part of the judicial process.

The courts of England and America have from early times made use of the concept or device of presumptions. Originally presumptions were made by the judges. Thayer has pointed out in the passage quoted above that the courts have based the presumptions that they have made upon two grounds, *viz.*, (1) general experience or probability, (2) policy and convenience. Professor Morgan, who has written soundly and brilliantly on the subject, states more precisely that legal presumptions owe their existence to and are based upon four reasons, *viz.*, (1) to furnish an escape from a dilemma; (2) to force a litigant to whom certain information is more easily accessible to make it known; (3) to produce a finding of fact that is more likely to be in accord with the probabilities; and (4) to produce a finding that accords with judicial judgment of sound social policy.26

One of the best known and most frequently employed legal presumptions is the rebuttable presumption of death where one has been continuously absent from home for seven years unheard of by persons who would naturally have heard of the absentee had he been alive. If Mary sues the insurance company in the situation suggested above and offers evidence that John, her husband, disappeared from their home more than seven years ago and has been absent continuously without tidings, will the court rule that John is dead in the absence of evidence tending to prove that he is alive?

In this situation, all courts seemingly agree that the court will rule that the fact that John is dead has been judicially established. If the case is being tried before a jury, the jury will be told that John's death has been established and that they are not free to find otherwise.27

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then is the legal effect of this judicial determination or holding? It is submitted that the effect is that there is a rule of law in the jurisdiction that one absent for seven years, under the circumstances stated, is dead. If there is no other dispute in the case than that as to the fact of death, a judgment will be given against the insurance company. The same result will follow when any one of the other numerous presumptions aids a litigant. A presumption then is a rule of law that under certain circumstances a fact exists for the purpose of judicial action. Though a presumption accomplishes the purpose of evidence in this situation it does not follow that it is evidence. As Wigmore has well said in the section quoted from above,28 "The peculiar effect of a presumption of law [that is, a real presumption] is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent." Morgan has stated the matter in this way:

"First, however great the disparity of judicial definition of the word, courts and text writers agree that 'presumption' may properly be used to designate the assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone."29

If in our insurance case the only fact in dispute is the death of the insured, but there is no presumption or rule of law that seven years unexplained absence etc., is tantamount to death, the case will go to the jury to determine whether John is dead. If the evidence of his absence under the circumstances is regarded as sufficient30 to establish death in

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28 See Presumption of Death — A Proposed Statutory Codification (1938) 38 Co. L. REV. 322. (A brief history of common law presumption of death; discussion of tentative drafts of a uniform act upon absence as evidence of death by Commissioner on Uniform State Laws). Morgan, Some Observations Concerning Presumptions (1931) 44 Harv. L. Rev. 906. Smith v. Asbell (1846) 2 Strob. (S. C.) 141, 147: "Presumptions ... are artificial rules which have a legal effect independent of any belief, and stand in the place of proof until the contrary be shown." New York Life Ins. Co. v. Ross (C. C. A. 6th, 1928) 30 F. (2d) 80, 82: "A presumption is a rule of law, attaching to a given state of evidentiary facts certain procedural consequences as to the duty of the production of other evidence by the opponent."

Kidder v. Stevens (1882) 60 Cal. 414, 419: "...in other words, a presumption of law that is disputable, when not changed by evidence, becomes to the Court a rule undisputable for the case, and the Court is bound to apply it."

Mr. Justice Butler in New York Life Ins. Co. v. Gamer (1938) 303 U.S. 161, (dealing with a presumption of accidental death): "Upon the fact of violent death without more, the presumption, i.e., the applicable rule of law, required the inference of death by accident rather than by suicide."

30 Obviously in every case where liability depends upon the establishment of a fact (e.g., death) the proponent of the proposition who has the burden of proof—the risk of non-persuasion—must produce sufficient evidence to convince the judge that it is reasonable for the jury to draw an inference that the fact exists. If the
the minds of a jury, the process that they will employ will be that of drawing an inference of the fact of death from the evidence introduced of continuous unexplained absence for a period of seven years and the other relevant evidence. Submission to the jury of the question of fact of death and a judicial ruling that death exists without reasoning about it in the particular case are totally different processes. The first process clearly involves reasoning or drawing inferences; the second, only the application of a rule of law to the evidence. Where there is a presumption of death, the courts will invariably conclude that death has occurred but where there is no such presumption, the jury in the particular case may or may not find that death has occurred. In one situation there is a judicial ruling that has the force of law that death has occurred, while in the other there is no such rule of law.31

But it may be suggested that the real test of whether a presumption is evidence can be made only when evidence is introduced by an adversary that contradicts the fact presumed. Obviously, the question is a

conclusion is that the evidence will not reasonably warrant the inference the case is not submitted to the jury but a non-suit is awarded or a verdict directed. Improvement Co. v. Munson (1872) 81 U. S. (14 Wall.) 442; Estate of Flood (1933) 217 Cal. 765, 21 P. (2d) 579, (1934) 22 Calif. L. Rev. 230; Bridges v. North London Ry. Co. (1874) 5 L. R. 7 (E and I) 213; 5 Wigmore, op. cit. supra note 1, §2494; Smith, The Power of the Judge to Direct a Verdict (1924) 24 Col. L. Rev. 111. In Thoe v. Chicago Milwaukee & St. Paul Ry. Co. (1923) 181 Wis. 456, 460, 195 N.W. 407, 409, it was said: "The various methods of testing the legal sufficiency of the evidence to sustain a judgment in favor of the party against whom the motion is made have this common characteristic: That the court is asked to determine whether or not, admitting all of the evidence against the party making the motion to be true, and drawing all inferences which may reasonably be drawn therefrom in favor of the opposite party, the evidence is sufficient in law to sustain a judgment against the moving party. It cannot be disputed that, from the earliest times, both under the common law of England and of this country, the right of a suitor to test the legal sufficiency of the evidence offered against him has been recognized, and the authority and power of the court to determine the matter has never been challenged."

31 Cogdell v. Wilmington R. R. (1903) 132 N. C. 852, 854, 44 S. E. 618, 619: "...the court was requested to charge that there was a presumption that the deceased had exercised care, which the court refused to give, but charged the jury that there was an inference that due care was exercised.... The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

If the evidence is submitted to the jury then their duty is one of fact finding. From the evidence submitted they exercise their reasoning powers and determine whether the fact does or does not exist. The same disposition of the problem is made where there is no jury and the trial is before the court. In reality he sits in a dual capacity of a judge to apply the law and a trier of the facts (a one man jury) to determine the facts.
pertinent one and the answer is important in the practical administration of justice.

In the supposed law suit of Mary Smith v. Life Insurance Company, we will assume that the company presents a witness who testifies that he saw John Smith in Australia about a year before the end of the seven year period of absence, upon which the presumption of death was based. How then should the case be disposed of? Should the presumption of death disappear from the case? Should it be weighed with her evidence and against the evidence of the witness for Life Insurance Company? Should the jury be given an opportunity to disbelieve the witness for Life Insurance Company, and if they disbelieve him should the presumption determine the case?

Before discussing a few decisions, dealing with the specific question whether legal presumptions are evidence, some general observations respecting presumptions may prove helpful. There are at least three possible ways of looking at rebuttable presumptions that have received considerable judicial sanction. (1) According to one way or theory—which has been designated the Thayer-Wigmore theory—the rebuttable presumption is dispelled upon the introduction of testimony contrary to the fact presumed. It disappears or goes out of the case, so to speak, when evidence is introduced to the contrary. Unless the litigant, then, who is aided by the presumption, and who has the burden of proof on the issue, thereafter produces evidence supporting that issue, which will warrant the jury in drawing an inference of the fact first presumed, he will be subjected to an adverse ruling on the part of the judge. For example, in the supposed case against the insurance company, where the plaintiff relies upon the presumption of death, if the defendant introduces evidence tending to prove that the insured is alive, the presumption of death disappears and a verdict will be directed for the defendant, or the plaintiff will be non-suited, if the plaintiff does not come forward with evidence tending to prove death. 3

While this theory of a presumption, or manner of solving the problem, may not be the best possible theory or solution, it does no violence to sound reasoning. It is readily understood and has the merit of simplicity. It is arguable, however, that it is not the wisest choice of the possible solutions that may be made.

(2) According to another theory, the evidence that gives rise to the rebuttable presumption and the presumption itself are submitted to the jury and they are told to consider the mass of the evidence and the

presumption and to arrive at a conclusion whether the fact in issue exists. For example, in our supposed case, if the defendant introduces evidence that John Smith is alive, the case goes to the jury. It is instructed to weigh the testimony that gives rise to the rebuttable presumption of death, and the presumption itself, against the evidence tending to prove that John Smith is alive, and arrive at a determination of whether he is dead or alive. This theory, or manner of solving the problem, is thought to be utterly unsound. It has, however, some judicial sanction. Obviouly it has the effect of giving more force or greater tenacity or vitality to rebuttable presumptions than is accorded to them by the first theory.

(3) A third theory, or way of disposing of the problem exists, which, it is believed, is based upon the conviction that presumptions should have more strength, tenacity or vitality than are accorded to them by the first theory, which is, as has been stated, that they are dispelled and disappear upon the introduction of evidence to the contrary. The reasoning that lies behind the third theory, no doubt, is that courts, and legislatures also, make presumptions to accomplish highly desirable objectives and that these objectives should not be thwarted easily. They are made, as has been stated: (a) to deal with a dilemma; (b) to force information from one of the litigants to whom it is more accessible; (c) to bring about a finding of fact in accord with the probabilities; or (d) to accomplish an end that is deemed to be socially desirable. These are important objectives; and it is evidently believed that rebuttable presumptions should not lose their entire force merely because a witness, or several witnesses for that matter, whom the jury may not believe, give evidence that is contrary to the presumption that has been created. For example, in our supposed case, where there is a presumption of death but no evidence warranting an inference of death, according to the third theory the presumption of death does not disappear upon the production of the testimony of a witness tending to prove that John Smith is alive. The case is sent to the jury to determine whether the witness speaks the truth as to the fact to which he testifies. If the jury disbelieves the witness, the presumption of death controls and the jury must find the issue of death favorable to the plaintiff. However, if the jury believes the testimony of the witness, tending to prove that John Smith is alive, then they must find that he is alive and render a verdict for the defendant. This theory is believed to be the proper theory of the procedural effect

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34 Morgan, op. cit. supra note 26.
of presumptions. It has considerable judicial support.\textsuperscript{35} It will be discussed in its broader features only because the main purpose of this article is to discuss the second theory, \textit{viz.}, that rebuttable legal presumptions are evidence.

Briefly stated, the following reasons bear strongly in favor of the view that most legal rebuttable presumptions should not disappear upon the appearance of testimony contrary to the fact presumed. The objectives sought by making presumptions could be defeated by the testimony of a witness, or several witnesses for that matter, that would not be believed by the jury or by the judge sitting as trier of the facts.\textsuperscript{36} Results that are deemed socially desirable might easily be thwarted by an untrustworthy or corrupt witness; escape from a dilemma, with which the courts are sometimes presented might be impossible if an interested or unreliable witness testified to the contrary; the determination of the existence of a fact according to the probabilities, which in reality is all that triers ordinarily do, could be prevented by the testimony of a witness whose powers of observation were very poor; and, the often desirable objective of forcing the party in possession of important information to produce it might be blocked by a witness who was highly prejudiced in favor of one of the parties to the law suit or a witness who was willing to commit perjury.

Legal presumptions are not all of the same quality. They were not all devised to perform the same function and hence it is arguable that all of them should not have the same tenacity or vitality. It is also demonstrable that many presumptions are based upon more than one ground, that is, some are based upon probability and the desire to find an escape from a dilemma, for example, the presumption of death after seven years continuous absence. Others are based on probability alone, for example, the presumption that all men are sane. Strong reasons exist then for differentiating between the tenacity or vitality that should be accorded to various presumptions, and generally speaking a reasonable conclusion seems to be that only rebuttable presumptions that are based upon probability alone, like the presumption of sanity, should be dispelled upon the introduction of testimony in conflict with the fact presumed.\textsuperscript{37}


\textsuperscript{36} Professor Morgan puts the proposition in this way: "If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing." \textit{Supra} note 26, at 82.

\textsuperscript{37} For an elaborate and critical discussion of this view of rebuttable presumptions, see Morgan, \textit{ibid.} He points out that there are no great difficulties involved
Perhaps the unfortunate term “presumption of fact,” which, as has been shown, was used constantly by textwriters and judges has led to the erroneous conclusion that presumptions of law are evidence for the jury to weigh. When a so-called “presumption of fact” existed—which was not a presumption at all—there was a task for the jury. It was a duty to weigh, a duty to draw inferences from the evidence produced. Acceptance of the faulty premise that the two “presumptions” are merely species of the same genus might easily have led to the conclusion that the jury should also draw inferences from legal presumptions, that they are evidence. \(^{38}\)

in framing proper instructions to the jury to guide them in considering the testimony contrary to the fact presumed. He concludes that a jury can be made to understand that the presumption prevails unless the party against whom it operates convinces them that it is as probable that the fact presumed does not exist. See also the helpful article, McCormick, Charges on Presumptions and Burden of Proof (1927) 5 N. C. L. REV. 291.

Nor shall I attempt, in this article, to discuss fully the important question as to which presumptions should have sufficient vitality to survive the introduction of contrary evidence. It is believed, tentatively, that all presumptions should have this vitality except those based upon probability alone. When a presumption is based only upon probability it seems reasonable to conclude when evidence to the contrary is introduced that it is dispelled because the fact presumed can no longer be thought to be probably true.

Professor Morgan has ably discussed this question. Obviously, if there are some presumptions that should disappear and some that should not, a new task will be imposed upon the courts. It is believed, however, that this is not a sound reason why this view should not be adopted.

\(^{38}\) Frost v. Brown (1798) 2 Bay (S. C.) 133, 137-8 (Discussion of whether a deed to land in dispute, alleged to be lost, ever existed): “There are two things to be considered. 1st. Whether such kind of evidence is legal, or not? 2d. Whether it was properly left to the jury or not? There can be no doubt as to the first point; it is very clear, that the existence and loss of a deed, may be presumed by a jury from circumstances; all the cases quoted on both sides, recognize the principle; and the only control which the judges have over the right of the jury, is, to require that there shall be some ground to raise the presumption upon; and that this ground shall not be a light and frivolous one.”

King and Mead v. Paddock (1820) 18 John (N. Y.) 141, 142-3 (Discussion of whether plaintiff was a widow.): “The long and continued absence of Reuben Paddock, from the United States, without any account of him for twelve years, under the circumstances of this case, furnished an irresistible presumption, from analogy to the statute of bigamy, and the statute concerning leases determinable upon lives, that he was dead. In the present case, the jury were authorized to presume his death in a much shorter period.”

Hazard v. Martin (1829) 2 Vt. 77, 87 (Discussion of whether an administrator made a valid deed to land occupied by persons other than deceased’s heirs for about thirty-two years.): “The doctrine of introducing presumptions to cure defective titles is founded on that substantial principle of justice, that, when a man’s rights have slept, till the assertion of them would spread destruction among the rights of others, they must sleep forever. That this doctrine is supported by the salutary rule of evidence, that, from a series of facts wholly inconsistent with the right set up, and these facts permitted long to exist, the jury presume that the right itself is in some way extinct, or has passed to those in possession of it, though the testimony which would show this cannot now be found.”

Danley v. Rector (1849) 10 Ark. 211, 50 Am. Dec. 242, 247 (Discussion of
A concrete illustration of the view that a rebuttable presumption is not evidence is found in a leading New Hampshire case, Lisbon v. Lyman, in which the opinion was written by Mr. Justice Doe. The action whether plaintiff misled the purchaser at an execution sale: "It is a rule of evidence which lies at the foundation of all presumptive evidence or deduction from facts, that the facts themselves from which these presumptions arise must be clearly and satisfactorily proven. For if such were not the case it would be but raising presumption upon presumption, whereas the very existence of presumptions depends upon their usual and necessary connection with known facts."

Ashbury v. Sanders (1857) 8 Cal. 62, 64 (Discussion of whether a fugitive from justice, who sailed from San Francisco aboard a ship, which, together with its passengers and crew had not been heard of for sixteen months, was dead): "This is one of those cases where a question of fact must be settled by presumption, without positive proof. Every system of law must, from necessity, indulge in presumptions in certain cases. The presumption may be arbitrary, but still indispensable. Questions must be settled, and all that can be done, is to adopt the most reasonable presumption that the case allows; and as presumptions must be indulged, in such cases, it becomes most important that some certain and consistent rule should be adopted."

Tanner v. Hughes (1866) 53 Pa. St. 289, 291 (Discussion of the effect of evidence that a letter, properly addressed, was posted): "A legal presumption is the conclusion of the law itself of the existence of one fact from others in proof, and is binding on the jury, prima facie till disproved, or conclusively, just as the law adopts the one or the other as the effect of proof. The learned judge was, no doubt, misled by the generality of the language of Mr. Greenleaf, in his Treatise upon Evidence, in relation to letters sent by mail, Vol. 1, §40."

Manning v. John Hancock Insurance Co. (1879) 100 U. S. 693, 697-8 (Discussion of whether renewal insurance premiums had been paid): "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved.... The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

State v. Kelly (1882) 57 Ia. 644, 11 N. W. 635, 646 (Discussion of whether possession of recently stolen property will support a conviction of larceny): "The recent unexplained possession of stolen property tends to establish the guilt of the person in whose possession it is found, and will authorize conviction, unless the inference of guilt is overcome by other facts tending to establish the innocence of the accused. This presumption may be overcome by testimony establishing facts inconsistent with guilt. Good character may be sufficient in some cases to overcome the presumption. The law holds that the presumption in question, unless overcome, will authorize conviction. It is a presumption recognized by the law, and may, therefore, be termed a presumption of law. The term presumption of fact implies that from certain facts the law will raise a presumption. Either of these terms, presumption of law or presumption of fact, may be used to express the same thought, for they are identical in meaning."

United States v. Searcey (1885) 26 Fed. 435, 437 (A charge to a jury in a criminal prosecution): "There are presumptions of law and presumptions of fact. Presumptions of law are usually founded upon reasons of public policy, and social convenience and safety, which are warranted by the legal experience of courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only prima facie evidence, and may be rebutted. The court may always instruct a jury as to the force and effect of legal presumptions. Presumptions of fact must always be drawn by a jury; and every fact and circumstance which tends to prove any fact which is evidence of guilt is admissible in evidence on the trial of a case. Presumptions of fact result from the proof of a fact, or a number of facts and circumstances, which human experience has shown are usually associated with the matter under investigation."
was for the support of the pauper wife and children of one Volney C. The question was whether Volney had a settlement in Lyman by derivation from his father Isaac. The town of Lyman in 1854 was divided into two towns, namely Lyman and Monroe. Isaac resided in Lyman from 1833 to 1851. Volney was born in 1833 and moved with his father in 1851 to that part of the town which became Monroe in 1854, where his father continued to reside. He was absent from his father's house most of the time after 1852, was married in 1853, and during 1853 and 1854 spent considerable time in what later was Lyman. A statute of New Hampshire provided that a legitimate child took the settlement of his father unless he gained one of his own; and, in the event that a town should be divided, that one's settlement should be determined by his last dwelling place. The plaintiff produced evidence that Volney was emancipated before his father gave up his dwelling in Lyman. The jury that tried the case was instructed that there existed a presumption that an unemancipated minor has the dwelling place of his parents and that he cannot, so long as he remains unemancipated, acquire another dwelling place; and that, if the minor Volney was not emancipated, his dwelling place was in Monroe, the last dwelling place of his father. They were instructed that it was a question of fact for them to determine whether Volney had been emancipated before the division of the two towns. They were also instructed that there existed a presumption that children under twenty-one years of age are not emancipated, that this presumption was not a conclusive one, that the fact presumed may be shown to be otherwise and that in deciding the question of emancipation they should "take this presumption into account as one element of evidence, and weigh it in connection with all the testimony." The plaintiff had a verdict and the defendant excepted. Reversing the judgment for plaintiff the court held (a) that the burden of proof was upon plaintiff to establish that the last dwelling place of Volney was in defendant's territory and (b) that to do this the plaintiff must establish as an essential part of his case that Volney had been emancipated. It was said that without any evidence on emancipation, or if the evidence was evenly balanced, the plaintiff should lose. Disposing of the exception to that part of the instruction that told the jury to weigh the presumption of non-emancipation, Mr. Justice Doe said:

"If there was a presumption of law that minors are not emancipated, it amounted to no more than this, the plaintiff alleging emancipation had the burden of proof; and that was known without the assistance of a presumption. A legal presumption is a rule of law—a reasonable principle, or an arbitrary dogma—declared by the court. There may be a difficulty in weighing such a rule of law as evidence of a fact, or in weighing law on one side, against fact on the other. And if the weight of a rule of law as evidence of a fact, or as counterbalancing the evidence of a fact, can be comprehended, there are objections to such a use of it. In this case, on the ques-
tion of emancipation, if the scales holding all the evidence on both sides, were even, did the presumption when added to the defendant's side, incline them in his favor? If it did, it had no effect on the case, because it was not necessary for the defendant to produce a preponderance of the evidence; if it did not, the jury were instructed to weigh as evidence, that which had no weight. If the scales holding all the evidence on both sides, preponderated in favor of the plaintiff, did the presumption, when added to the defendant's side, restore the equilibrium? If it did, the plaintiff was required to produce something more than a preponderance of the evidence; if it did not, it was useless.

"A legal presumption is not evidence. In civil cases, it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative. When this is the case, the assignment of the burden of proof to one party, and the benefit of the legal presumption to the other, is a double and unjust use of one and the same thing. . . .

"The presumption against the freedom of minors, was not an element of evidence; could not be weighed as evidence; and it does not appear that any use could rightfully be made of it in the case. It was put into the scale with the defendant's evidence, where it would be likely to mislead the jury, and give the defendant a material advantage to which he was not entitled; but this is no cause for setting aside the verdict on the defendant's motion." 40

The conclusions which were reached were that the rebuttable presumption of non-emancipation was not evidence to be weighed along with the evidence tending to establish emancipation; that a rebuttable presumption is a rule of law that a fact is judicially deemed to exist under certain circumstances; that it is a mental impossibility to weigh a rule of law with evidence or against evidence; and that it is unfair—assuming that it can be weighed—to add its weight to the evidence that opposes the evidence of the litigant upon whom there has been placed the burden of proof—the duty to persuade the triers of the fact by a preponderance of the evidence.

In contrast with the ruling in *Lisbon v. Lyman*41 is the leading case in California on the nature of a rebuttable presumption, *Smellie v. Southern Pacific Co. et al.*42 This was an action for wrongful death of one Smellie due to the defendants' alleged negligence. The deceased was riding in a truck as the guest of one Ireland, who was the owner and driver. It was struck at a crossing by defendant railway company's train. Ireland also was made a defendant. One defense was contributory negli-

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40 *Ibid.* 553, 564. Though this instruction was held erroneous, it was not regarded as a ground for reversal, because it was too favorable to the defendant. The judgment for the plaintiff was reversed on another ground, namely, that the burden of proof was upon the plaintiff to establish the fact that Isaac had paid taxes in Lyman and that the trial court committed error in not so holding. The case is also a notable one for its penetrating analysis of the principles of the burden of proof.


42 *Supra* note 3.
PRESUMPTIONS: ARE THEY EVIDENCE?

gence. Plaintiff placed Ireland on the stand and on cross examination by defendant railway company's counsel he testified that both he and deceased looked before going over the crossing and that before he, Ireland, started the truck, the deceased, Smellie, said "It's all clear, let's go." His testimony as to this statement was not contradicted by that of any other witness. A verdict was directed for defendants. The judgment below was reversed. Upon appeal it was held that the case should have gone to the jury. It was concluded by a majority of the court (a) that there existed a statutory rebuttable presumption applicable to the case that deceased took ordinary care for his own safety, and (b) that this rebuttable presumption may "outweigh positive evidence adduced against it," and hence that error was committed in directing a verdict against the plaintiff on the theory that the deceased "as a matter of law" was guilty of contributory negligence. The court reviewed many earlier California cases and quoted passages from them to the effect that rebuttable presumptions are evidence. It was concluded that an earlier case, Mar Shee v. Maryland Assurance Corp., in which it was held that

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43 This case was before the supreme court four times: (1928) 76 Cal. Dec. 218, 269 Pac. 657; (1929) 77 Cal. Dec. 475, 276 Pac. 338; (1930) 79 Cal. Dec. 316, 287 Pac. 343; (1931) 212 Cal. 540, 299 Pac. 529.

On the first appeal (1928) 76 Cal. Dec. 218, 269 Pac. 657, the court held that the presumption of due care was rebutted by the testimony of Ireland, that it disappeared from the case, and cited Savings & Loan Society v. Burnett (1895) 106 Cal. 514, 39 Pac. 922 (this opinion is by Henshaw, J., and seems to be in point). The conclusion was reached that deceased Smellie was guilty of contributory negligence "as a matter of law" and hence the verdict was properly directed for defendants. This opinion was written by Mr. Justice Seawell for Department One of the Court. Curtis and Preston, J. concurred.

On the second hearing (1929) 77 Cal. Dec. 475, 276 Pac. 338, the court, in bank, adopted the opinion of Mr. Justice Seawell as the opinion of the full court. It was a per curiam opinion. Curtis, J. dissented.

On the third hearing (1930) 79 Cal. Dec. 316, 287 Pac. 343, a rehearing having been granted, the court, in bank, changed its position and reversed the ruling of the trial court. Curtis, J. wrote the opinion. The court then concluded: "That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state." He cited a list of cases headed by People v. Milner (1898) 122 Cal. 171, 54 Pac. 833. Seawell, J. concurred on the sole ground that the evidence showed that the driver stopped, looked and listened before attempting to cross the tracks and hence deceased was not guilty of contributory negligence "as a matter of law." Preston, J. also concurred on the ground that Ireland's testimony was not sufficiently clear to dispel the presumption. He also stated that he did not concur in the court's opinion that a presumption may not be dispelled by the testimony of an adverse party called by the other side by virtue of section 2035 of the California Code of Civil Procedure. Richards, J. dissented.

Again a rehearing was granted to give further consideration to the effect of a rebuttable presumption, it was said. The last or fourth opinion is the one above referred to in this article (1931) 212 Cal. 540, 299 Pac. 529.

44 CAL. CODE CIV. PROC. §1963, subd. 4.

45 (1922) 190 Cal. 1, 210 Pac. 269. This was an action by the beneficiary upon an accident policy issued to Fong Wing in which defendant agreed to pay in the event the assured was injured or died "directly through accidental means." It was
a rebuttable presumption was dispelled upon the introduction of testimony to the contrary—was not evidence—was distinguishable, because in that case the plaintiff's own evidence was contrary to the rebuttable presumption.

The court also placed considerable reliance upon certain code provisions deemed applicable and perhaps controlling. Reference was made to §1832 C. C. P.,46 defining "indirect evidence," as evidence "which affords an inference or presumption of its existence"; and to §1957 C. C. P.,47 classifying indirect evidence as being of two kinds, namely, inferences and presumptions. Reference also was made to §1959 C. C. P.,48 defining a presumption as a deduction which the law directs shall be made from particular facts and to §1961 C. C. P.,49 which provides that a presumption may be controverted by "other evidence," direct or indirect. The court also referred to §1963 C. C. P.,50 which enumerates forty rebuttable presumptions and provides as to all of them that they "may be controverted by other evidence," and also to §2061 C. C. P.,51 which provides that the jury are the judges of the effect of the evidence and particularly that they are not bound to decide in conformity with the testimony of any number of witnesses who do not convince them

46 CAL. CODE CIV. PROC. §1832. See infra note 83 where the text of this section is set forth.
47 Ibid., §1957. See infra note 82 where the text of this section is set forth.
48 Ibid., §1959. See infra note 84 where the text of this section is set forth.
49 Ibid., §1961. See infra note 85 where the text of this section is set forth.
50 Ibid., §1963. See infra note 87 where the text of this section is set forth.
51 Ibid., §2061. See infra note 73 where the text of the first paragraph and subdivisions 1 and 2 of this section are set forth.
against a less number "or against a presumption or other evidence satisfying their minds."

As to the nature of a presumption the court said:

"The question is, therefore, directly raised and presented as to whether this presumption, that the deceased exercised due care for his safety, has been overcome and dispelled as a matter of law by the testimony of Ireland. That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state." 52

It was also said:

"In this state the facts and circumstances of the killing must be in evidence. When in evidence they are aided by the statutory presumption as a species of evidence in behalf of the party relying upon it. When the presumption is invoked by a party and his evidence is not inconsistent therewith, it is in the case, provided, of course, the evidence sufficiently establishes a sphere or field within which the presumption can operate. Whether it does must, of course, be decided by the trial court as a question of law." 53

There are concurring and dissenting opinions in the case by two of the justices, in which the position was taken that rebuttable presumptions are not evidence. 54

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52 Smellie v. Southern Pac. Co., supra note 3, at 549, 299 Pac. at 532. The court cited eight or ten California cases beginning with People v. Milner (1898) 122 Cal. 171.

53 Supra note 52, at 555, 299 Pac. at 535. The opinion contains a lengthy discussion, as to the effect under §2055 C. C. P. of the plaintiff calling the defendant, Ireland, as a witness. The conclusion was reached that his testimony was not "really" the evidence of the party calling the witness and that his evidence did not dispel the presumption.

54 Mr. Justice Richards concurred and dissented. He was of the opinion that the trial court erred in directing a verdict. He based this conclusion upon the ground that the trial judge in directing the jury to return a verdict stated that he did so upon the ground that the testimony of Ireland was to be disregarded, and that this error was not cured by the jury's action in returning a verdict based upon other evidence that did not show contributory negligence "as a matter of law." He dissented, however, from that part of the opinion to the effect that the presumption was not dispelled. He states that a presumption may be dispelled by the testimony of an adverse party called as a witness whose testimony is neither contradicted nor impeached. He places emphasis upon sections 1961 and 1963 C. C. P., saying that section 1961 C. C. P. states that rebuttable presumptions "may be controverted" and that section 1963 C. C. P. provides that rebuttable presumptions "are satisfactory if uncontradicted" and that they "may be controverted by other evidence." He concludes that "controverted" and "contradicted" mean the same thing, viz., opposed, disputed, taken issue with. He concludes: "We are thus brought to the conclusion that a disputable presumption under the express terms of sections 1961 and 1963 of the Code of Civil Procedure, ceases to be satisfactory evidence, and as such no longer of binding effect in the case, when 'controverted', 'contradicted', 'disputed', 'opposed', 'denied', or 'taken issue with' by the production in the case of other evidence, direct or indirect. This means nothing more or less than that when such evidence as to the fact in issue appears and is presented, the presumption is dispelled and disappears." Ibid. at 566-567, 299 Pac. at 540.

He then considers earlier California cases beginning with Nieto v. Carpenter (1863) 21 Cal. 455, 487, which hold, he declares, that presumptions disappear upon the production of contrary evidence. He concluded that another line of cases orig-
In reality all that was decided was that a verdict should not have been directed for the defendants. There was evidence in the case that reasonably can be said to support the conclusion that, in spite of Ireland's testimony, deceased was not guilty of contributory negligence "as a matter of law." Presumably, however, the court's direction for a retrial

initating with People v. Milner (1898) 122 Cal. 171, 54 Pac. 833, are wrong and should not be followed. He next concludes that nothing in section 2055 C. C. P., providing for the calling of one's adversary as a witness, changes the rule that presumptions disappear when contrary evidence is introduced.

Mr. Justice Seawell concurred in the dissenting opinion of Mr. Justice Richards. He states that the fact that an adversary is called as a witness does not place him in the class of impeached witnesses nor his testimony in the class of improbable testimony. He stated that he adhered to the views expressed in his opinion in Department One, saying: "I wish here to add my adherence to the first and original opinion rendered in this case and which was, upon rehearing, again adopted as the opinion of the court. The facts as they were therein claimed to be are fully and correctly set forth. The law as therein declared, founded upon the wisdom and experience of ages, has the approval and sanction of state and federal courts wherever the subject of the weight and effect of presumptions has been drawn to judicial attention. The authorities are too multitudinous to attempt citation." Ibid. at 569, 299 Pac. at 541.

Ireland testified that when they came to the crossing they stopped to permit a freight train to pass which was moving at a speed of five or six miles per hour. When the caboose had passed, Ireland started his truck and crossed the side-track and was struck by a passenger train on the main track, moving at a speed of about fifty-five miles per hour. The distance between the center line of the side-track and the center line of the main track was thirteen feet. He testified that he looked and listened before starting but that his view was obstructed by the freight train and he did not see the rapidly moving passenger train and did not hear it because of the noise made by the freight train. No signals were maintained at the crossing.

The court concluded that Ireland's testimony possessed some elements of weakness: first, because it was the testimony of an adverse party; second, because it was evidence of the statement of another person; and third, because the other person was dead and unable to refute the testimony. Mr. Justice Shenk observed: "To invoke a rule which would deprive a party of the right to have a jury pass upon the weight of evidence of this character would be contrary to an unbroken line of decisions of this court, and its effect would be in many instances to deprive a party to an action of the right, guaranteed to him by the law of this state, to a trial by jury." Ibid. at 560, 299 Pac. at 537.

Seemingly the court felt that only two choices were possible, viz., the view that the presumption disappeared or the view that it might be weighed as evidence. As has been pointed out, a third view is possible, viz., submission to the jury of the credibility of the testimony of the witness who testifies contrary to the fact presumed. A court that does not believe that a presumption should go out of the case upon production of evidence to the contrary is not thereby forced to take the unsound and indefensible position that the presumption is evidence. The California court, however, did not consider taking the view that the presumption should be retained if the jury disbelieves the witnesses who testify contrary to the fact presumed.

As was sagely observed by Bentham, the testimony of a witness may not produce conviction in the minds of the triers of the fact. "The fidelity of testimony, that is, its accuracy and completeness, depends on two things—the state of the intellectual faculties of the witness, and his moral disposition; his understanding and his will. The intellectual faculties are ordinarily comprised under four heads: perception, judgment, memory, imagination. The subject of which we are treating, requires the addition of a fifth—expression; by which I mean the faculty of repre-
of the case includes the determination that a rebuttable presumption is evidence. If this case goes to the jury all that they can possibly do, rationally, is to believe or disbelieve the testimony of Ireland. They can, of course, disbelieve it. It is impossible, however, for them to go through the mental process of weighing the rebuttable presumption of law that Smellie was exercising due care for his own safety against the testimony of Ireland, or other evidence before them, which tends to show that he did not exercise ordinary care for his own safety.

The burden of proof is upon the defendant in California to establish contributory negligence. If then the case goes to the jury there seems to be no significance in the proposition that there is a rebuttable presumption of due care on the part of the deceased because there has been imposed upon the defendant the burden of proving contributory negligence on the part of the deceased.

The proposition that a deceased person is presumed, in law, to have exercised due care is included in the broader proposition that the other party to the lawsuit has the duty of proving that the deceased was guilty of contributory negligence. Where the burden of proof is imposed upon the defendant the jury can rationally arrive at the conclusion that deceased was not guilty of contributory negligence by disbelieving Ireland or by believing him and concluding that under the existing circumstances the deceased was not contributorily negligent when he told Ireland to go ahead. No other mental operation is possible for them to perform and it is unjust for a court to invite a jury to consider the presumption as evidence and thereby set them free to give it whatever weight of effect they desire—outweigh, somehow, the testimony of witnesses whom they may believe.

The view that rebuttable presumptions are evidence is also applied in California in criminal cases. Recently it was applied in People v. Chamberlain, a prosecution for murder. Chamberlain filed a plea of not guilty and not guilty by reason of insanity. The jury returned a verdict of guilty of murder in the first degree and upon a subsequent trial on the issue of insanity they found that the defendant Chamberlain was sane. He appealed from that portion of the judgment finding that he was sane and contended that the evidence adduced on that issue was not sufficient to warrant the jury's verdict of sanity. Ten lay witnesses who knew him testified that he was insane at the time the crime was committed and

sentencing in language what passes in the mind." (A TREATISE ON JUDICIAL EVIDENCE by JEREMY BENTHAM, translated by M. Dumont, London (1825) 21.)

Dislike for a view that gives presumptions little effect leads the court to adopt a very harmful fallacy.


67 (1936) 7 Cal. (2d) 237, 60 P. (2d) 299.
"a reputable physician of long professional standing and experience, called as an expert, positively testified that he [defendant] was insane when he killed the deceased." Two alienists appointed by the court testified that defendant was insane at the time of the homicide. No witness, lay or expert, testified that the defendant was sane. He testified in his own behalf. The finding of sanity was upheld by the Supreme Court. One reason assigned for the conclusion reached was that there existed a legal presumption that the defendant Chamberlain was sane, which was evidence, and that this presumption of sanity in the minds of the jurors might have outweighed the direct evidence to the contrary. Chief Justice Waste said:

"In that case the court regarded the evidence for the defense as 'of very slight value.' We do not deem it necessary to discuss the question of the weight of the evidence, for the jurors were not bound to decide the issue of insanity in conformity with the declarations of any number of witnesses which did not produce conviction in their minds against a less number, or against a presumption or other evidence satisfying their minds. (Code Civ. Proc., sec. 2061, subd. 2.) Two recent decisions of this court contain exhaustive reviews of the question of the probative force of a presumption of fact when opposed by direct evidence of the same fact to the contrary of such presumption. (Mar Shee v. Maryland etc. Co., 190 Cal. 1 [210 Pac. 269], and Smellie v. Southern Pacific Co., 212 Cal. 540 [299 Pac. 529].)"

In this situation the burden of proof was upon the defendant to establish insanity. A jury empaneled to determine insanity may weigh the testimony of witnesses and other evidence and if the testimony of the witnesses and other evidence does not convince them of the defendant's "defense" of insanity, they may reject the defense. They can rationally do this and only this. They cannot rationally weigh a rule of law against the testimony of witnesses. To tell a jury to weigh a rule of law is to command them to do the impossible—to employ sophistry of the rankest kind. Further, such an instruction is highly unfair to a defendant

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59 The court states that the personal appearance and mannerisms of the defendant also were observed by the jurors, and the character of his testimony, all of which were matters that they might properly consider. Just what these factors were is not stated.
60 People v. Chamberlain, supra note 57, at 260, 60 P. (2d) at 300.
61 At the outset of the opinion the court stated that the burden of proof was upon the defendant to establish the defense of insanity by a preponderance of the evidence, citing People v. Williams (1920) 184 Cal. 590, 593, 194 Pac. 1019. This case was decided before 1927, that is, before the adoption of the procedure, existing at the time of the Chamberlain case, requiring a special plea and a separate trial on the issue of insanity. See Cal. Pen. Code §§1016, 1026. The rule seemingly is the same under later procedure, that is, that the burden of proof is upon the defendant to establish insanity by a preponderance of the testimony. See People v. Bradshaw (1935) 5 Cal. App. (2d) 528, 43 P. (2d) 317. Note (1936) 9 So. Calif. L. Rev. 284. Shepherd, Not Guilty By Reason of Insanity (1928) 2 So. Calif. L. Rev. 53; The Plea of Insanity Under the 1927 Amendments to California Penal Code (1929) 3 ibid. 1; (1932) 21 Calif. L. Rev. 65.
because the jury may give the legal presumption any weight they so desire. They may conclude that it outweighs the testimony of forty—any number—of witnesses of the highest character and the utmost knowledge possessed upon the subject by any living person. In what terms, it may be asked, would a trial judge frame an instruction for the guidance of a jury, that a presumption is evidence that may be weighed by them with or against all the evidence in the case? 62

A rebuttable legal presumption is only a rule of law that a fact is judicially decreed to exist absent evidence to the contrary. In the first place then, it should be constantly borne in mind that the fact is only presumed to exist; that is not a thing established as final, by judicial command. Nor is it something established by evidence. If it were an established fact, there would be no need to have further evidence. No problem of weighing would exist.

The evidence that has been introduced to give rise to the presumption unquestionably may be weighed by the jury but not the presumption also, for if this is attempted, there is attributed to the presumption some

62 The effect then of the ruling in the Chamberlain case is to add to the defendant's burden of convincing the jury that he is insane, the further burden of a presumption against him which the jury may weigh against the testimony of his witnesses. If they please, they may conclude that it outweighs the evidence given by all his witnesses. So far as we know from the opinion, the jury may accord great weight to the testimony of the witnesses [e.g., ten laymen and three qualified medical men] but they may conclude finally that the legal presumption outweighs all the testimony. They somehow may conclude that a ruling of law or an arbitrary assumption of fact outweighs the testimony of a great number of competent and credible witnesses. This is obviously not a correct solution of the problem. It is believed to be unfair to a defendant in a criminal case who interposes a plea of not guilty by reason of insanity.

The correct solution of such a problem is that the burden of proof is upon a defendant who pleads insanity to establish it by a preponderance of the testimony, that is, to persuade the jury by the greater weight of the evidence that he is insane. If the jury are not convinced that it is more probable that he is insane than it is that he is sane, then their verdict should be against him. Their verdict should be against him also if the minds of the jurors are in equilibrium. When the defense is disposed of in this manner, the jury can intelligently go about their task, namely, reasoning about the evidence that has been produced before them. The rule that there exists a rebuttable presumption of sanity is of no force or effect when the rule of major significance is adopted that the burden of proof is upon the defendant to establish insanity. Obviously, a problem is presented when a jury renders a verdict against the undisputed testimony of many witnesses who testify one way and there is no testimony to the contrary. Such a verdict ordinarily should be set aside by the trial judge, and if he fails to do so, an appellate court should carefully scrutinize the record and should overrule the trial judge if it is of the opinion that he has abused his discretion, that is, if he has reached an unreasonable conclusion even though his opportunities for forming a judgment were great.

In the course of the opinion in the Chamberlain case, the court referred to People v. O'Brien (1932) 122 Cal. App. 147, 9 P. (2d) 902, where a similar result was reached. The result was criticised and the opinion expressed that a new trial should have been awarded. Note (1932) 21 CALIF. L. REV. 65.
sort of weight or value that it does not actually possess. The presumption, it is repeated, is only a rule of law that, under certain circumstances, and in the absence of testimony to the contrary, a fact is deemed to be established. It is a mental impossibility to weigh this rule of law (made to dispose of a case where there is no evidence, or no credible evidence, that warrants an inference to the contrary) against the evidence that has a tendency to establish the fact. Rules of law cannot possibly be weighed with or against evidence to determine the existence or non-existence of facts.63

Nor is it possible to consider the situation as if the rebuttable presumption that is raised is considered to be the equivalent of evidence of the existence of a fact to be ascertained. If the phrase "equivalent of evidence" means that some unknown or unnamed person is of the opinion that the fact in dispute is probably true, it expresses an utterly worthless idea. If the phrase means anything, it means imposing upon the jury an arbitrary determination of fact made for them at the beginning of the case, that the probabilities are that the fact in dispute exists. No determination or decision should be made for them. It is their province to decide the facts—to determine what probably happened. Juries are not required—and never have been required—to accept as fixed for their deliberations, reasoning and decision, the restrictive premise that a fact in dispute, in a particular law suit, probably exists, and required to obey a judicial command that they are not free to think otherwise. They are not commanded to reason about the occurrence of events from prescribed premises. It was aptly stated many years ago that "The law has no mandamus to the logical faculty; it orders nobody to draw inferences—common as that mode of expression is."64

What is the result of treating a presumption as the equivalent of evidence when a litigant has the burden of proof and there is a legal presumption in his favor? The burden of proof may be placed upon a litigant to establish a fact. He may be aided by a presumption that the fact exists. If then he is further aided by a judicial fiat that it is probably true that the fact exists (regard a presumption as the equivalent of evidence) we have given to him an unfair advantage and started the law suit with contradictory positions. It is unfair to one of the litigants to say to him that "your opponent has the burden of proving that the fact he

63 HINTON, CASES ON EVIDENCE (2d ed. 1931) 42: "It is difficult to understand how a jury can consider a presumption along with evidence, because a presumption is a rule of law and evidence is matter of fact." THAYER, op. cit. supra note 4, at 576: "A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption—being a legal rule or a legal conclusion—is not evidence."

64 THAYER, op. cit. supra note 4, at 314n.
asserts is true but we declare to you at the outset that what he asserts to be true is probably true." An assertion, for example, in one breath that the burden of proof is upon the plaintiff to establish in the minds of the jury the existence of death by a preponderance of the evidence and an assertion in the next breath that it is judicially determined and will be declared to the jury at the outset that the probabilities are that one shown to have been continuously absent for seven years is dead, involve a contradiction in premises. It is reasonable to take the position that the burden of proving death by a preponderance of the evidence is upon the plaintiff. This position is no doubt taken because of the general belief that the litigant who asserts facts that impose legal liability upon his adversary should not receive the judgment unless the evidence is convincing that the fact he asserts is more probably true than not true. Such a litigant is asking favorable judicial action and he should establish the facts upon which liability depends. He should bear the risk of not persuading the jury or the judge of the existence of the facts upon which liability depends. If the judicial belief or attitude should be that it is highly probable that the person who has been continuously absent for seven years is dead, then the burden of proof or risk of non-persuasion should be placed upon the litigant who asserts that the absentee is alive. Faulty and contradictory reasoning is employed, though, if we say, first, that the burden of proof is upon a plaintiff to prove that the insured is dead, but due to his absence, etc., we will start from the premise fixed by judicial command that the probabilities, in fact, are that he is dead. Unfair advantage is given to the plaintiff if we say that he has the burden of establishing death but at the outset a determination of fact has been made, which must be accepted by the jury, that the absentee is probably dead.

What is the result of treating the presumption as the "equivalent of evidence" when a litigant has the burden of proof and there is a legal presumption to the contrary? Sometimes it is said that there is a legal presumption contrary to the fact which a litigant has the burden of proving. If we regard the presumption as the equivalent of evidence, the result is shocking. To consider it as evidence here would impose upon the litigant an unreasonable and unjust burden of persuasion. The court properly may say to a litigant that "you have the burden of convincing the jury that the proposition you assert is true. You lose your law suit unless you convince them that what you assert is more probably true than not true." But if the court goes further and says to the litigant that "the law of the state also has determined that the probabilities are that what you assert is not true (consider a presumption as the equivalent of evidence) and that even though your evidence convinces the jury that your contention, as to the existence of the fact is true, still the jury is free to
conclude that it is not true”—the litigant has been commanded to do something that may be impossible for him to do. For example, if by rule of law in State A the burden is imposed upon a defendant in a criminal case to establish insanity and there exists a presumption of sanity that is deemed to be the equivalent of evidence—that is, it is declared as a fact that he is probably sane—the defendant may never be able to carry, successfully, the burden that has been placed upon him. The fiat of probability of sanity, that has been made, may be such that no evidence that he can produce will be regarded by the jury of sufficient persuasive force to overthrow the factual command of the law that he is probably sane. The degree of probability in fact is not fixed and cannot be fixed by any conceivable process of the human mind. No jury can be told the degree of probability that has been fixed by the law and so they may fix the probability as they please and may fix it so high that the defendant’s evidence will not overcome it. So then neither in the situation where the presumption is in favor of the litigant with the burden of proof nor when the presumption is against the litigant with the burden of proof is it reasonable or fair to treat the presumption as evidence.

Juries can go through the mental process of weighing evidence, that is reasoning from it and arriving at a conclusion whether a fact exists or does not exist, whether it is probably true or not, but they cannot possibly determine whether it does or does not exist by being told that there is a rule of law made for their guidance to the effect that there is a rebuttable presumption that the fact exists or a judicial fiat that it probably exists and that they should (a) weigh the rule of law or (b) reason from an arbitrary premise that the fact is probably true. To use a common figure of speech, you cannot place in one scale-pan of the scales of justice evidence that shows that a fact exists and in the other scale-pan place a rule of law that the fact is presumed to exist, absent evidence to the contrary, or a legal fiat that a fact is probably true, and thereby determine which side outweighs the other.

It is also probable that courts that take the position that presumptions are evidence have seized upon this erroneous idea because they were not convinced of the wisdom of the view that presumptions go out of the case upon the appearance of evidence contrary to the fact presumed. Perhaps no other choice appeared to be available. That there is another choice has been pointed out. Presumptions, rationally, may be given sufficient force and vitality to survive against contrary evidence that the jury does not believe. An argument then for abandonment of the rule that presumptions are evidence does not lead back to a view that makes them of slight effect. It leads to a view that gives to them all the effect that they rationally can have. This view assigns to the jury a normal duty—the duty to reason about evidence and believe it or disbelieve it.
The conclusion is then: (1) that there exist sound reasons why many legal rebuttable presumptions should not disappear upon the introduction of contrary testimony and for holding that juries should be free to disbelieve evidence contrary to the fact presumed; (2) that in the application of this rule proper understanding should exist and correct application should be made of the principles of burden of proof; (3) that legal rebuttable presumptions are not evidence; 65 (4) that it is unjust

65 For a masterful historical and analytical exposition of the proposition that rebuttable presumptions are not evidence see Thayer, op. cit. supra note 4, Appendix B, 551. This material was taken by the learned author from the Storrs Lectures delivered by him at the Yale Law School for 1896. In this appendix he considers the question in great detail and particularly the statements in Coffin v. United States (1895) 156 U. S. 432, in which the view was expressed that the presumption of innocence is evidence in a criminal prosecution. Later the Supreme Court, in Agnew v. United States (1897) 165 U. S. 36, held no error was committed in refusing an instruction stating that the presumption of innocence is evidence. And in 1910, in Holt v. United States (1910) 218 U. S. 245, the court in an opinion by Mr. Justice Holmes made it perfectly clear that the presumption of innocence is not evidence in a criminal case. He said: "Another exception was to the refusal to give an instruction that 'the presumption of innocence starts with the charge at the beginning of the trial, and goes with [the accused] until the determination of the case. This presumption of innocence is evidence in the defendant's favor,' etc. The judge said: 'The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence. And in order to overcome the legal presumption, as I have already stated, the evidence must be clear and convincing, and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty,' with more to the same effect. This was correct, and avoided a tendency in the closing sentence quoted from the request to mislead. Agnew v. United States ( ) 165 U.S. 36, 51, 52." See also 4 Wigmore, op. cit. supra note 1, §2511.

See also the following cases to the effect that legal presumptions are not evidence: New York Life Insurance Co. v. Gamer, supra note 29; Beggs v. Metropolitan Life Ins. Co., supra note 35; Watkins v. Prudential Ins. Co. of America (1934) 315 Pa. 497, 173 Atl. 644, 95 A. L. R. 859; Note (1935) 95 A. L. R. 878, citing cases from many American jurisdictions.

New York Life Ins. Co. v. Gamer, supra, was an action on a life insurance policy which provided for payment of $10,000, upon proof of death regardless of cause and $20,000 upon proof of death due to accident. The insured died from a gunshot wound. Plaintiff, the beneficiary, sued in a Montana state court for $20,000 alleging death by accident. The case was removed to the Federal Court because of diversity of citizenship. The complaint alleged accident and that death did not result from suicide. The answer set up that insured did not die from accident but that he took his own life. At the first trial a verdict was directed for defendant. Upon appeal this judgment was reversed (76 F. (2d) 543). At the second trial plaintiff produced evidence as did defendant. Defendant's motion for a directed verdict was denied. The case went to the jury with an instruction that the law presumes that death was not voluntary and that the burden was upon defendant to prove that the insured voluntarily took his own life. Plaintiff had a verdict of $20,000. Defendant appealed. The Circuit Court of Appeals affirmed the judgment below (90 F. (2d) 817). Certiorari was granted by the Supreme Court (302 U. S. 670). The Supreme Court concluded that the instruction given was erroneous; that there was evidence which would support a verdict for either party. The evidence recited by the court
and unfair to one of the litigants to so hold; (5) that the fiat that rebuttable presumptions are evidence is a fallacy—an "absurd and mischiefful fallacy"—"made of such stuff as dreams are made on"; (6) upon the first appeal fully justifies this conclusion (76 F. (2d) 543.). It was concluded that the burden of proof was upon plaintiff to establish accidental death. The Court said plaintiff was aided by a presumption that the insured did not take his own life and that upon production by defendant of evidence of suicide the presumption was dispelled. Mr. Justice Butler said: "The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence." (The citation of many Federal cases is omitted.) 303 U. S. at 171. Closing the opinion he states: "In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties. "The challenged instructions cannot be sustained. Judgment reversed." Ibid., at 172.

Mr. Justice Black dissented. He states that the majority opinion applies the rule of a presumption of accidental death existing in Montana, where the case was tried, but refused to apply the Montana rule that legal presumptions are evidence and followed the Federal rule that rebuttable presumptions go out of the case upon the appearance of contrary evidence.

He concludes that this method of dealing with rebuttable presumptions is erroneous and that when applied, the litigant aided by the presumption is deprived of a jury trial guaranteed him by the Seventh Amendment to the Constitution of the United States. It is not clear whether he is of the opinion that legal presumptions are evidence, or of the opinion that the existence of the presumption had the effect of placing the burden of proof upon defendant to prove suicide, probably the former. He says:

"Under Montana law the presumption that violent death was accidental and not suicidal continues and does not disappear unless the evidence 'all points to suicide... with such certainty as to preclude any other reasonable hypothesis'; and the presumption continues for the jury's consideration except '... when the evidence points overwhelmingly to suicide as the cause of death.'

"Contrary to this clear statement by the Montana Supreme Court is the different rule clearly announced by the majority here in holding that the presumption disappears after the insurance company introduced evidence merely 'sufficient to sustain a finding that the death was not due to accident.'...

"Proof of death by external and violent means has uniformly been held to establish death by accident. The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances. While it has been said that this proof of accidental death was based on 'presumption,' in reality—whatever words or formulas are used—what is meant is that a litigant has offered adequate evidence to establish accidental death. To attribute this adequacy of proof to a 'presumption' does authorize or empower the judge to say that this "adequate proof" (identical with legal 'presumption') has 'disappeared.' If the evidence offered by plaintiff provides adequate proof of accidental death upon which a jury's verdict can be sustained, mere contradictory evidence cannot overcome the original 'adequate proof' unless the authority having the constitutional power to weigh the evidence and decide the facts believes the contradictory evidence has overcome the original proof." Ibid., at 173-176. His position, however, upon the question whether
that a command to the jury that they are evidence distracts their minds from their duty of exercising their reasoning faculties and invites arbitrary action on their part; (7) that judicial decisions to the effect that rebuttable presumptions are evidence are utterly unsound and hence should be overruled; (8) that if statutes exist in jurisdictions making rebuttable presumptions evidence they should be declared in violation of the due process clauses; and finally, (9) that if such statutes are not declared unconstitutional, they should be repealed by legislative enactment.

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A presumption should disappear upon the production of evidence to the contrary is not left in doubt. Concluding his dissent, he says: "This took from the jury the right to decide the weight and effect of this subsequent contradictory evidence. Such a rule gives parties a trial by judge, but does not preserve, in its entirety, that trial by jury guaranteed by the Seventh Amendment to the Constitution. I cannot agree to a conclusion which, I believe, takes away any part of the constitutional right to have a jury pass upon the weight of all of the facts introduced in evidence. "I believe the judgment of the court below should be affirmed." Ibid. at 177.

The passage first quoted in Mr. Justice Black's opinion was taken from Nicholas v. New York Life Insurance Co. (1930) 88 Mont. 132, 292 Pac. 253, a similar case, which he cites. In that case the court held that the presumption of accidental death was dispelled and that the trial court erred in not directing a verdict for the defendant.

Whether a presumption should or should not disappear was of no significance in this case because the mass of the evidence would support a verdict for either party. The burden of proof being upon plaintiff to establish accidental death, it would, as has been pointed out, be unfair to defendant to weigh the presumption itself along with plaintiff's evidence of accidental death or against defendant's evidence of suicide.

66 See Keaton, Statutory Presumptions; Their Constitutionality and Legal Effect (1931) 10 Tex. L. Rev. 34; Morgan, Federal Constitutional Limitations Upon Presumptions Created by State Legislation, Harvard Legal Essays, 1934; Note (1929) 43 Harv. L. Rev. 100. See Manley v. State of Georgia (1929) 279 U. S. 1; (1929) 17 Calif. L. Rev. 569; (1929) 42 Harv. L. Rev. 1076; (1929) 27 Mich. L. Rev. 951; (1929) 38 Yale L. J. 1145; Western and Atlantic R. R. Co. v. Henderson (1929) 279 U. S. 639, 643-644. (A Georgia statute creating a presumption of negligence and attributing to it the force of evidence was held unconstitutional. Mr. Justice Butler: "The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. Gulf, M. and N. R. Co. v. Brown, 138 Miss. 39, 66, et seq. Columbus and G. Ry. Co. v. Fondren, 145 Miss. 679. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

"The presumption raised by §2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment. Manley v. Georgia, supra, [279 U. S. 1]. McFarland v. American Sugar Co., 241 U. S. 79. Bailey v. Alabama, 219 U. S. 219.)" See also Morrison v. California (1934) 291 U. S. 82, notes (1934) 22 Calif. L. Rev. 420; (1934) 48 Harv. L. Rev. 102; People v. Murguia (1936) 6 Cal. (2d) 190, 57 P. (2d) 115 (holding unconstitutional a statute providing that upon the trial of a person charged with committing a felony against another while armed with a pistol, etc., without having a license to carry the same, the fact that he was armed shall be prima facie evidence of his intent to commit a felony.)
APPENDIX—THE CALIFORNIA RULE FURTHER CONSIDERED

A detailed and critical review of California decisions upon the question whether legal rebuttable presumptions are evidence which may be weighed with or against evidence will not be made in this Appendix. This work has been well done in two comments that have heretofore appeared in this Review to which the learned reader is referred. "Until the decision in Smellie v. Southern Pacific Company," there existed conflicting lines of decision in this state on this question.

Notes (1930) 18 Calif. L. Rev. 418; (1931) 20 Calif. L. Rev. 189 (written shortly after the last opinion in Smellie v. Southern Pacific Co.)

In Biddle Boggs v. Merced Mining Co. (1859) 14 Cal. 279, 375, we find Chief Justice Field expressing the view that presumptions are dispelled upon ascertained facts: "Presumptions are indulged to supply the absence of facts, but never against ascertained and established facts. That there has been no grant from the government is certain, for its records and legislation are public and open to examination, and its forbearance as to the public lands would not, as we have observed, avail against the assertion of its claims, much less confer rights capable of enforcement in reference to other lands."

He expressed a similar view in Nieto v. Carpenter (1863) 21 Cal. 455, 489: "Presumptions are only indulged to supply the absence of facts. There can be no presumptions against ascertained and established facts. Here the original entry and subsequent occupation of Manuel Nieto were under a mere permission to graze cattle, and not under any grant of title, and his children continued the occupation under the same permission. This is clear from the evidence, and is found as a fact by the Court."

And Mr. Justice Henshaw nearly twenty-five years after he had asserted in People v. Minner, supra, that a presumption is evidence, which may outweigh the positive testimony of witnesses against it, declared in Larrabee v. Western Pacific Ry. Co. (1916) 173 Cal. 743, 747, 161 Pac. 750, 751-2, that the presumption that deceased, killed at a railroad crossing, was then exercising ordinary care for his own safety, should not be allowed to have the effect of evidence. He said: "But touching the presumption that the deceased exercised ordinary care, it is to be noted that that presumption is given weight only in the absence of evidence on the subject of the deceased's conduct. It has been declared to be 'an artificial presumption of so weak a character that it is not to be allowed to have the effect of evidence before the jury where the undecorated evidence of the circumstances attending the accident overthrows it.' (Thompson on Negligence, sec. 401.) In this case the positive and uncontradicted evidence discloses that the deceased did not exercise ordinary care, for if he had done so he could easily have escaped his fatal accident."

Counsel for plaintiff had argued, so the opinion states (ibid. at 746, 161 Pac. at 751), that by virtue of subdivision 4 of section 1963 of the California Code of Civil Procedure, creating the rebuttable presumption that one has taken ordinary care for his own safety, that the jury were at liberty to conclude that deceased was not guilty of contributory negligence. The above statement was made to dispose of this contention.

Mr. Justice Henshaw then stated that the engineer and fireman, and a Miss J, a disinterested witness, all testified that the whistle was sounded for the crossing "and its noise was a loud screech." He observed that the contention that weeds near the track obstructed deceased's view was unsound because, he said, the engineer testified that he saw deceased approaching the crossing, when he was a quarter of...
People v. Milner,\textsuperscript{70} a criminal case decided in 1898, and Sarraille, Adm'r v. Calmon,\textsuperscript{71} a civil suit decided in 1904, have been cited in later cases as establishing the present rule that legal presumptions are evidence. The former case, and perhaps the parent case of this line of decision, in reality does not rest or depend upon the proposition that legal presumptions are evidence. In this case the defendant was convicted of manslaughter. Upon appeal he contended, among other things, that the court below committed error in not directing a verdict for him of not guilty. He admitted the killing of the deceased but testified to facts which, if true, showed that he took the life of the deceased in his own necessary self-defense. It was said that his testimony as to what occurred was not discredited by any direct or positive evidence in the case. After stating the facts the court at once referred to section 1105 of the California Penal Code\textsuperscript{72} which in substance provides that upon a trial for murder, when the commission of the homicide by the defendant has been proved, that the burden of proving justification is upon the defendant. The court concluded that the effect of this provision prevented the trial court from directing a verdict of not guilty which, of course, would have discharged the defendant. With this ruling no fault can be found. Later in the

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\textsuperscript{70} (1898) 122 Cal. 171, 54 Pac. 833.
\textsuperscript{71} (1904) 142 Cal. 651, 76 Pac. 497.
\textsuperscript{72} CAL. PEN. CODE §1105. "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."
opinion Mr. Justice Henshaw stated that at the close of the state's case a presumption arose that defendant had committed an unlawful homicide, which presumption was not overcome by the presumption that he was an innocent man, and that the presumption of guilt by virtue of the terms of subdivision 2 of section 2061 of the California Code of Civil Procedure was evidence which might outweigh positive testimony against it. He said:

"In this [subdivision 2, section 2061, C. C. P.] is a distinct recognition of the facts: 1. That a presumption is evidence; and, 2. That it is evidence which may outweigh the positive testimony of witnesses against it." 74

73 CAL. CODE CIV. PROC. §2061. "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;
2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds; . . ."

74 People v. Milner, supra note 70 at 179, 54 Pac. at 837. The California court notwithstanding its acceptance of the doctrine that legal presumptions are evidence—and in this case that "a presumption of guilt was evidence"—has refused to give its approval to the rule that the "presumption of innocence" is evidence in a criminal prosecution. See People v. Moran (1904) 144 Cal. 48, 59, 77 Pac. 777, 782. In that case Chief Justice Beatty said: "The defendant's requested instructions 16 and 28 were refused by the court on the ground that they were covered by the charge. They related to the presumption of innocence, and contained nothing beyond what was fully, and with some repetition, included in the charge of the court, except that they stated that the presumption of innocence was 'an instrument of proof' and was 'evidence' in favor of the defendant. It is true that law writers and judges in discussing the foundation of the doctrine that persons accused of crime are presumed to be innocent until proven guilty, have sometimes said that the presumption is in the nature of evidence, or an instrument of proof, but it has never been deemed necessary to go into a disquisition upon the foundation of the doctrine in instructing a jury."

In the same year when error was assigned by a defendant convicted of robbery because the trial judge struck out of an instruction the statement that the presumption of innocence was evidence in his favor, the court held there was no error. McFarland, J., writing the opinion, observed that whether it would be correct to include it "as a mere question of judicial literature" in an instruction dealing with presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt, need not be determined as the law was correctly stated when the instruction given informed the jury that defendant "must be treated as innocent throughout the entire case until his guilt has been proved beyond a reasonable doubt." People v. Linares (1904) 142 Cal. 17, 19, 75 Pac. 308, 309.

Clearly the view taken by the court in the Moran case was correct. The burden of proof is upon the prosecution to establish guilt beyond a reasonable doubt. Nothing is added to the prosecution's burden or given to the defendant's defense, by saying that he is presumed to be innocent of the crime charged. The rule that the state must prove guilt beyond a reasonable doubt includes—swallows up—the rule that defendant is presumed to be innocent. 5 Wigmore, Evidence (2d ed. 1923) §2511. (So far, then, as the presumption of innocence adds anything, it is merely a warning not to treat certain things improperly as evidence). There is no statement
Obviously the statement by Mr. Justice Henshaw that presumptions are evidence was a dictum of no effect as it was made after a determination had been reached that the trial court had committed no error in not directing a verdict in favor of the defendant.\textsuperscript{75}

\textit{Sarraille, Adm'x v. Calmon},\textsuperscript{76} the civil suit referred to above, was an action on certain notes delivered to plaintiff's intestate in his lifetime. Action was begun upon them in the lifetime of the intestate. The finding in the trial court was for plaintiff. Payment was set up as a defense to two of the notes. The contention upon appeal was that the finding below of non-payment should not be permitted to stand. This contention was denied and the judgment below was affirmed. The court held that the burden of proof was upon the defendant to establish payment and that it had not been sustained. In upholding the finding and judgment of the trial court the Supreme Court cited \textit{People v. Milner},\textsuperscript{77} and stated that there existed a presumption of nonpayment which "was evidence that they [the notes] were not paid and produced a conflict with the evidence of defendant's witnesses." The court then referred to the fact that it could not view the defendant's evidence from the advantageous viewpoint of the trial judge who saw and heard the witnesses. It then referred to certain improbabilities in the evidence produced to sustain the defense of payment, observing that defendant's conduct in one respect

that the presumption of innocence is evidence in section 1096 of the California Penal Code, which deals with the presumption and the proof required in criminal prosecutions. This section states that the only effect of the presumption is to place the burden on the state to prove guilt beyond a reasonable doubt.

The California court, as this ruling shows, is not completely dominated by the dogma that presumptions are evidence. It has been held that section 1105 of the California Penal Code does not impose upon a defendant the burden of establishing justification by so much as a preponderance of the evidence. The requirement of the statute that defendant must go forward with evidence after the prosecution has proved the killing by him, prevents him from claiming a directed verdict in his favor where the prosecution proves no more than an intentional killing. It also forbids a directed verdict for him when he goes forward with evidence that shows justification or excuse. \textit{People v. Madison} (1935) 3 Cal. (2d) 668, 46 P. (2d) 159, note (1936) 9 So. Calif. L. Rev. 405.

\textsuperscript{75} See Woolmington v. The Director of Public Prosecutions (1935) H. of L., L. R. A. C. 462. In this decision of the House of Lords the ruling was upon common law principles that a verdict should not be directed for a defendant when the prosecution has proved a homicide as the result of the defendant's voluntary act. The opinion contains no discussion of presumptions as evidence. Viscount Sankey, L. C., said: "When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted." \textit{Ibid.} at 482.

\textsuperscript{76} \textit{Supra} note 71.

\textsuperscript{77} \textit{Supra} note 70.
was contrary to the business methods of men of ordinary prudence. Again, obviously, there was no need to assert that legal presumptions are evidence. The burden of proof was upon defendant to establish payment and good reasons existed, according to the opinion, for the failure of the defendant to persuade the trial judge that the notes had been paid.

The California courts, it is submitted, should not, upon the flimsy foundation of these two cases, base and continue to support an indefensible rule prevailing in a minority78 of American jurisdictions that presumptions are evidence which may be weighed with or against evidence. Adherence to this unsound premise recently led the court to commit the judicial solecism of holding that each of two opposing litigants was aided by a presumption of due care, that presumptions were evidence to be weighed with and against evidence, and presumably weighable against each other.79 Presumably, a presumption that plaintiff exercised

78 See note (1935) 95 A. L. R. 878, where many American cases are cited and discussed.

79 Hoyt v. Southern Pacific Co. (1935) 6 Cal. App. (2d) 49, 52, 44 P. (2d) 363, 364, Sup. Ct. hrn'g den. June 6, 1935. The action was one for damages for destruction of a trailer struck by defendant's train at a railway crossing. The trial court gave an instruction to the jury that it was presumed that plaintiff's servant in charge of the trailer was exercising due care at the time of the collision and that this presumption was evidence in the case to be weighed against other evidence in determining whether the servant was guilty of contributory negligence. The court below refused to give a similar instruction which defendant offered to the effect that its servants also were presumed to have exercised due care on the occasion in question, which presumption was evidence in the case. The judgment below for plaintiff was reversed because of this ruling. Said Edmonds, J., pro tem [after quoting from Tyson v. Burton (1930) 110 Cal. App. 428, 294 A. L. R. 750]: "The court also said in that case: 'It would seem that both parties would be equally entitled to the presumption of taking ordinary care for his own welfare, and also that he was obeying the law.' This appears to us to be the only logical conclusion which can be reached."

What could the trial judge tell the jury if the jurors requested information as to how to weigh these two presumptions? In Downing v. Southern Pacific Co. (1936) 15 Cal. App. (2d) 246, 59 P. (2d) 578, a wrongful death case arising out of an accident at a railroad crossing, the court held that it was proper for the trial court to give an instruction that deceased was presumed to have exercised ordinary care for her own safety, which presumption was evidence, and to refuse a similar instruction for the defendant respecting the conduct of its agents. All persons in the automobile in which deceased was riding were killed except one who was injured and remembered nothing of the occurrence. Defendant's agents testified that the crossing signals were given. The unsound view that there can exist presumptions of due care in favor of each of the litigants, which may be weighed as evidence, was voided by the holding that the presumption of due care existed in favor of the deceased only.

Smellie v. Southern Pacific Co. was not mentioned. In that case, it is to be remembered, a presumption of due care upon the part of the deceased Smellie was the focal point of the decision. No question was raised as to the existence of the presumption, though there were eye witnesses to the deceased's conduct, namely the witness Ireland.

Compare Rogers v. Interstate Transit Co. (1931) 212 Cal. 36, 297 Pac. 884, a personal injury case where the automobile in which plaintiff was riding was struck
due care for his own safety is to be weighed against a presumption that defendant also exercised due care on the occasion in dispute. What, it is proper to inquire, can a jury—a body of laymen whose primary duty is to determine what happened—do with such an assignment?

It is not believed that the California courts must hold that rebuttable legal presumptions are evidence because of the force and effect of any of the provisions of the Code of Civil Procedure relating to evidence which were adopted in 1872. Various provisions of the California Code of Civil Procedure relating to presumptions have been referred to in the main portion of this article in connection with the discussion of Smellie v. Southern Pacific Company, and they are set forth in the footnotes to the Appendix.

by defendant's bus. The court condemned an instruction to the effect that plaintiff was presumed to have exercised due care for his own safety. It was concluded, however, that the error did not warrant a reversal of the judgment for the plaintiff. The court said that because there were eye witnesses "there was no room for any presumption." [Application to the Supreme Court of the United States for certiorari was denied.]

Opportunity exists for sound judgment on the part of the courts in determining when the statutory presumptions should apply, e.g., Rogers v. Interstate Transit Co., supra (no presumption of due care upon plaintiff's part when there were eye witnesses to the accident).

An especially unfortunate application of the rule that presumptions are evidence is to be found in United States Fidelity etc. Co. v. Industrial Accident Commission (1919) 181 Cal. 147, 148, 183 Pac. 540, where the question was whether an award of compensation to the heirs of J. M. should stand. It could not stand if J. M. when killed, according to the majority opinion, was driving an automobile in violation of the Motor Vehicle Act—the speed laws. The evidence that he was was circumstantial, viz., the power and condition of the capsized automobile, skid marks, etc. Experts testified that the car must have been going in excess of the speed limit. The court held that it could not conclude that the award was not supported by evidence "in view of the presumption of law that deceased was not committing a crime, viz., violating the Motor Vehicle Act." Shaw and Olney, JJ., concurred in the result on the ground that the heirs were entitled to an award though the deceased may have violated the provisions of the Motor Vehicle Act respecting speed. How much wisdom or reality is there in the proposition that a legal presumption exists that one has not violated speed laws which may outweigh evidence that he has violated them? This decision drew the following comment shortly after it was rendered: "The majority opinion resorts to the unfortunate and illogical process of weighing presumptions, though the reference was wholly unnecessary to the decision." Orrin K. McMurray, A Review of Recent Cases, etc. (1920) 8 Calif. L. Rev. 95, 101.

These provisions were taken from the report of the Commissioners on Practice and Pleading of New York. See The Report of Arphaxed Loomis, David Graham and David Dudley Field. New York Code of Civil Procedure, 1850, Albany. Their recommendations as to evidence were not adopted.

See notes 73, 82, 83, 84, 85, 87. The classification of evidence as direct and indirect is too general to be of value. Wigmore's lucid classification (1 Wigmore, op. cit. supra note 1, §3) does not contain the term—nor is it included in his index of topics found at the end of volume 5. "General and abstract ideas furnish the source of our greatest errors," a famous philosopher once truly said.
It is possible to contend that section 1957 C. C. P. states, when literally read, that a presumption is evidence. This section, however, only purports to be a broad classification of indirect evidence. A general statement that indirect evidence is of two kinds, namely inferences and presumptions, should not be made the basis of an absurd rule of law when other provisions of the Code of Civil Procedure expressly define the effect of a legal rebuttable presumption. Section 1832 C. C. P. defines indirect evidence but it does not provide either expressly or by implication that a presumption is evidence. It describes an inference and in the description uses "inference" and "presumptions" as synonyms. It gives as an example of indirect evidence the situation where a witness testifies to an admission of one of the parties to a fact in dispute and states that, if the testimony of the witness as to the admission is believed, the jury may draw an inference of the existence of the fact in dispute. As has been pointed out in the main body of this article, the leading textbooks of this period used these terms interchangeably and often failed to distinguish between legal presumptions and inferences of fact. Certainly no sound argument can be made that this provision compels acceptance of the proposition that presumptions are evidence. The section does not state that they are evidence but, as has been pointed out, merely misuses the term "presumption" as a term having the same meaning as the term "inference."

Section 1959 C. C. P. purports to define a presumption. This section provides that a presumption is a deduction which the law expressly commands shall be made from particular facts. This provision is a general statement that is in no way inaccurate so far as it goes. It is true in Anglo-American law that under certain conditions the legal effect of a presumption is that a particular fact exists. This section then does not provide either expressly or impliedly that presumptions are evidence and it is to be borne in mind that in this section we have a definition of a presumption.

Section 1961 C. C. P. has a more definite bearing than the pre-
vious sections on the question under consideration. The subject matter of this section is the question whether presumptions may be controverted and when. This section provides in plain language that a presumption may be controverted by evidence direct and indirect and specifically provides that unless a presumption is controverted the jury are bound to find according to the presumption. No doubt the purpose of this section was to codify a well known rule relating to rebuttable presumptions. As was stated in the main portion of this article, practically all courts recognize that if a presumption exists that a fact is true, such fact is deemed to be true if there is no evidence produced to the contrary. Here then is a specific provision respecting the effect of a rebuttable presumption and there is no statement in it expressly made or contained therein by implication that a presumption is evidence which may be weighed with or against evidence.

Section 1963 C. C. P. is the section that deals with and provides for forty disputable or rebuttable presumptions. It specifically provides that they may be controverted. The term "controverted" is also used in section 1961. This term means "opposed," "disputed" or "denied," and the term "controverted" cannot possibly be said to mean that the presumption itself must be weighed as evidence in the case.

Finally, no language can be found in section 2061 C. C. P. which leads to the conclusion that presumptions, by legislative command, are evidence which must go to the jury. That section is a general section on the province of the judge and the jury. It embodies several well known rules respecting jury trials. The provision therein that the jury are the judges of the evidence, except when it is declared to be conclusive, states Hornbook law. Its provision that the judge shall instruct the jury on all proper occasions that, in judging the evidence, they should not exercise their power arbitrarily but discreetly, and in accord with the rules of evidence, expresses the universal rule in Anglo-American law. The legislative command that the judge may instruct the jury that they are not bound to decide a case according to the testimony of any number of witnesses that do not convince them against a less number, states a well settled common law principle. The legislative command that the judge on proper occasions shall instruct the jury that they are not bound to decide in conformity with the declarations of any number of witnesses "against a presumption" does not state or impliedly mean that a pre-

88 *Ibid.,* §1963. "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: ..."

87 See *supra* note 54, where the observations of Mr. Justice Richards may be found which he made in his separate opinion rendered in Smellie v. Southern Pacific Co.

88 *Supra* note 73.
sumption is evidence. This section does not state that a presumption is evidence and this meaning should not be given to it because to give it such a meaning is to require of the jury a mental impossibility. This section can be given a reasonable meaning that will not destroy it but on the contrary will give it all the effect it can rationally bear and it is a well settled principle of statutory construction that statutes should be given an interpretation that is rational as opposed to one that is irrational. This statute can and should be held to mean that none of the rebuttable presumptions specified shall disappear or go out of the case upon the introduction of contrary evidence which the jury may reasonably decide to disbelieve. The provision of this section is given full effect, that is, that a jury is not bound to find "against a presumption" if they remain free to act upon a presumption which is opposed by the testimony of witnesses or other evidence which does not carry conviction to their minds.

It is to be remembered that the California courts have held and adhere to the holding that juries are not free to act arbitrarily upon presumptions. In *Mar Shee v. Maryland Assurance Corporation* the court held as to rebuttable presumptions that a jury is not free to act upon a rebuttable presumption against "a proved fact" which was held to mean a fact established by the testimony of the plaintiff's own witnesses. The California courts have often held that a verdict may be directed for the party with the burden of proof. Acceptance of this

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80 People v. Turner (1870) 39 Cal. 370, 379; San Joaquin etc. Irr. Co. v. Stevinson (1912) 164 Cal. 221, 128 Pac. 924; Robbiano v. Bovet (1933) 218 Cal. 589, 24 P. (2d) 466. In San Joaquin etc. Irr. Co. v. Stevinson, *supra*, at 229, 128 Pac. at 927, Mr. Justice Shaw said: "Where a statute 'is fairly susceptible of two constructions one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted.' (In re Mitchell, 120 Cal. 386, [52 Pac. 800].) 'A construction should not be given to a statute, if it can be avoided, which will lead to absurd results, or to a conclusion plainly not contemplated by the legislature.' (Merced Bank v. Casaccia, 103 Cal. 645, [37 Pac. 649].) The section is also subject to the rule that its provisions are to be liberally construed, with a view to effecting its objects and to promote justice. (Code Civ. Proc., sec. 4.)"

For additional cases from many American jurisdictions see *Black, Interpretation of Laws* (2d ed. 1912) 129.

81 Walters v. Bank of America etc. Ass'n (1937) 9 Cal. (2d) 46, 69 P. (2d) 839. There the court said (p. 49): "The trial court, in a proper case, may direct a verdict in favor of a party upon whom rests the burden of proof, in this case the plaintiff. ... In passing on the propriety of the trial court's action in directing a verdict, the doctrine of scintilla of evidence has been rejected in this state. (Estate of Baldwin, 162 Cal. 471 [123 Pac. 267].) A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant. (Kohn v. National Film Corp., 60 Cal. App. 112 [212 Pac. 207]; 24 Cal. Jur., p. 915, sec. 163.)"

See also Chesapeake and Ohio Ry. Co. v. Martin (1931) 283 U. S. 209; (1931)
proposition means that jurors in this state are not free to act arbitrarily and from whim or caprice disbelieve testimony from the mouths of unimpeached witnesses whose testimony is in no way incredible. Implicit then in this holding is a recognition of the proposition that jurors may only disbelieve impeached or interested witnesses or testimony inherently incredible. A rule that permits a jury to decide that a presumption outweighs credible testimony from disinterested and unimpeached witnesses is inconsistent with a rule that gives to the trial court the power to direct a verdict, in favor of the party with the burden of proof, \( i.e. \), to prevent a jury from disregarding evidence that should be believed.

As has been pointed out in the main body of this article, there is considerable judicial support for a view of rebuttable presumptions that gives them vitality or tenacity sufficient to survive, and hence be acted upon, where the fact presumed is opposed by the testimony of witnesses or other evidence which a jury may rationally disbelieve. This view is a sound one and seems to be what is meant in section 2061 C. C. P. by the statement that jurors are not bound to decide "against a presumption."

Whether there is sound reason for the adoption of this rule as to the forty presumptions enumerated in section 1963 C. C. P. may be open to some question, but if such is the policy of the people of this state as expressed through their legislative representatives, it should be carried out unless it violates the Constitution of this state or the Constitution of the United States. The conclusion is that as no difference has been made as to the forty presumptions enumerated, though they are based upon various grounds, they should be treated alike and none of them should be dispelled by merely introducing evidence to the contrary which may come from interested witnesses or be inherently improbable.\(^\text{92}\) No

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\(^{92}\) In O'Dea v. Amodeo (1934) 118 Conn. 58, 66, 170 Atl. 486, 488, 489, the Connecticut court dealt with a statute to the effect that proof that the operator of a motor vehicle was the son of the owner creates a presumption that the vehicle was being operated as a family car by authority of the owner. The court disallowed the contention of the defendant father, and owner of the vehicle, driven by his son that the presumption disappeared upon their testimony that the car was not in reality being operated with the father's consent. It held that the jury should pass upon the testimony of the father and son and, if they disbelieved it, act upon the presumption. The court was of the opinion that the statute in question did not put the burden of proof upon the defendant to establish that the automobile was not being operated by his son with his consent but did impose upon him a burden of rebutting the pre-
logical grounds exist against carrying out the legislative policy of the state. Trial courts can apply this rule and give juries instructions with respect to it which they can understand. In applying it they should, of course, bear in mind sound principles relating to the burden of proof which, as has been pointed out in the main body of this article, may sometimes make unnecessary any reference to a presumption. They can submit to the jury in appropriate situations the question whether the testimony of a witness or other evidence convinces them that the fact presumed is as probably not true as it is true. They can be instructed in simple language that by law a certain thing is presumed to be true—that they must act upon it—unless the testimony or other evidence produced against it convinces them that the fact presumed is probably not true or persuades them that it is as probable that the fact presumed is not

sumption. It was said that in view of the presumption the jury was not compelled to accept as true the testimony of the father and son. Consistency with the proposition that the burden of proof was upon the plaintiff to prove that the car was operated with the consent of the father required that the defendant be not compelled to persuade the jury that it is more probable that the car was not being operated by the son with the father's consent than otherwise. It should be sufficient for the defendant to rebut the presumption that he produce testimony that brings the minds of the jurors to a state of equilibrium—makes it as probable that the car was not being operated with the father's consent as otherwise. Chief Justice Maltsie said: "From this it would follow that if the plaintiff offered no evidence upon the issue and the trier disbelieved the testimony offered by the defendant for the purpose of showing the circumstances of operation to have been such that it was not a family car, the plaintiff would be entitled to recover."

For a detailed discussion of the proper instruction to be given, see Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, supra note 26, at 70. The learned author states that an instruction may be put in the following language: "Since A [the facts upon which the presumption rests] is established, you must begin with the assumption that B [the facts presumed] exists but that assumption may be destroyed by evidence. If from all the evidence you find either that the non-existence of B is more probable than its existence or that the non-existence of B is as probable as its existence, you will then find that B does not exist. Otherwise you will find that B does exist." This instruction does not place the burden of proof upon the litigant against whom the presumption operates. If the burden of proof is placed upon this litigant, there is no need to aid his opponent by a rebuttable presumption.

In Klunk v. Hocking Valley Ry. Co., supra note 35, at 136-7, 77 N. E. at 155, a personal injury case, the court dealt with a statutory presumption of negligence, and an instruction telling the jury of its effect. The burden of proof was held to be upon plaintiff to establish negligence but he was aided by a statutory presumption of negligence. The instruction given below imposed upon defendant the burden of overcoming the presumption by a preponderance of the evidence. It was held erroneous. Crew, J., said: "And if upon the whole case defendant's negligence was not established by a preponderance of the evidence, or if upon all the evidence adduced upon that issue, the case was left in equipoise, the defendant was entitled to a verdict, and the jury should have been so charged. Instead, the jury was instructed by the trial judge that to overcome the presumption or inference of negligence raised against it by the statute, the defendant company 'was required to satisfy you by a preponderance of the evidence that it was not negligent.' This, we think, for the reasons above stated, was clearly misleading and erroneous."
true as it is that it is true. Such instructions will not confuse or bewilder a jury. They will contain similar language and express similar ideas to those contained in instructions respecting the burden of proof which are customarily given.

This method of dealing with presumptions does away with the fallacious and unjust rule that legal presumptions are evidence which is to be weighed with or against evidence. Sophistry and metaphysics have no place in our law today. It is possible to assign to juries tasks that they can perform. Guides for decision should not be given to them which require them to do the impossible, namely, weigh rules of law, nor should they be commanded to proceed from a purely arbitrary premise, as has been pointed out in the main body of this article. Propositions of law that cannot be explained so that they can be understood by men of intelligence are sources of danger. There is certainly no room in the legal system of this state for a rule of law which must be communicated to a jury but which is not and cannot be explained to them so that they may have a sensible guide for the important task they are called upon to perform.

J. P. McB.