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Some Problems of Presumptions: The South Carolina Treatment

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SOME PROBLEMS OF PRESUMPTIONS: THE SOUTH CAROLINA TREATMENT

Due to the number and extent of the various presumptions a definitive work on the subject would be monumental. Therefore this note will be limited to three of the major problems in this area.

1st—What is a presumption? This question is not merely a problem in semantics but has arisen due to the loose language employed by the bench and the bar in describing and categorizing presumptions.

2nd—What effect does a presumption have if no evidence is introduced and what effect does the presumption have if rebutting evidence is introduced? In considering this problem we shall examine the rules adopted by the Supreme Court of South Carolina as well as those of other jurisdictions.

3rd—What, if anything, should the judge tell the jury about presumptions? This problem is an important one because it is the end product or result of the presumption. The South Carolina practice will be contrasted with the views of the text writers and of other jurisdictions.

What is a Presumption

A presumption, as defined by Professor McCormick, is a standardized practice, under which certain oft-recurring fact groupings are held to call for uniform treatment whenever they occur, with respect to their effect as proof to support issues.[1] A presumption is distinguished from an inference in that a presumption is the deduction which the law expressly directs or permits to be made from particular facts, while an inference is a deduction which may be made from any facts legally proved.[2]

Because of the variety of situations which give rise to presumptions many attempts have been made to break the word down into sub-classifications. One of the more common classifications used in South Carolina as elsewhere was that of presumption of law and presumption of fact.[3] Judge Whaley in his work[4] states the difference between the two as

1. 5 N.C.L. REV. 291 (1927).
2. 1 JONES, EVIDENCE 54-55 (2d ed. 1926).
3. McMillan v. General Am. Life Ins. Co. 194 S.C. 146, 9 S.E.2d 562 (1940); Lawrence v. So. Ry. 169 S.C. 1, 167 S.E. 839 (1932).
4. WHALEY, SOUTH CAROLINA EVIDENCE 162 (9 S.C.L.Q. 4A, 1957).

being that a presumption of fact is rebuttable while a presumption of law is irrebuttable. It is submitted that this distinction is unsound and adds unnecessary confusion. If a presumption is truly irrebuttable, such as a presumption of a lost grant[5] or the presumption that one intends the natural consequences of his acts,[6] then this is a rule of law and not a presumption at all. It is a rule of law in South Carolina that a child under the age of seven years cannot be guilty of contributory negligence.[7] Further there is a presumption that a child between the ages of seven and fourteen years is incapable of contributory negligence but this may be rebutted.[8] To call the former a presumption of law and the latter a presumption of fact appears to be clearly wrong. While both could be classified as presumptions under Professor McCormick's definition it is submitted that a presumption operates so that in certain situations detailed proof of the conclusion to be drawn is not required if the conclusion itself is not controverted by the opposing party. But if the judge will not allow evidence to be introduced to show that the conclusion is incorrect then the rule is an absolute one and the use of the term presumption is unnecessary.

The term presumption of fact is more commonly used to refer either to an inference[9] or to a presumption that is indulged in because of the probability of the presumed fact.[10] For the sake of clarity the term should not be used as a synonym for an inference as it is confusing when so used.[11]

5. Miller v. Cramer, 48 S.C. 282, 26 S.E. 657 (1896); Riddlehoover v. Kinard, 1 Hill Eq. (S.C.) 373 (1833).

6. So. Silica Mining & Mfg. Co. v. Hoefer, 215 S.C. 480, 56 S.E.2d 321 (1949); Rice v. City of Columbia, 143 S.C. 516, 141 S.E. 705 (1926).

7. Sexton v. Noll Constr. Co., 108 S.C. 516, 95 S.E. 129 (1916); Dodd v. Spartanburg Ry., 95 S.C. 9, 78 S.E. 525 (1913).

8. Cummings v. Lawrence, 87 S.C. 457, 69 S.E. 1090 (1910); Goodwin v. Columbia Mills Co., 80 S.C. 349, 61 S.E. 390 (1908).

9. State v. Goodson, 225 S.C. 418, 82 S.E.2d 804 (1954); Collins v. Merrimack Mut. Fire Ins. Co., 210 S.C. 207, 42 S.E.2d 67 (1947).

10. Strawhorne v. Atlantic Coast Life Ins. Co., 238 S.C. 40, 119 S.E.2d 101 (1961); Lawrence v. Southern Ry., 169 S.C. 1, 167 S.E. 839 (1932).

11. An example of the confusion that might arise is found in the cases involving the suppression or withholding of evidence. The following cases hold that the suppression of witnesses or the withholding of data gives rise to an inference that such information would have been unfavorable to the person withholding the information. Davis v. Sparks, 235 S.C. 326, 111 S.E.2d 545 (1959); Wingate v. Postal Tel. & Cable Co., 204 S.C. 520, 30 S.E.2d 307 (1944); Cato v. Atlanta & C.A.L. Ry., 164 S.C. 123, 162 S.E. 239 (1931). However, Matthews v. National Fid. Ins. Co., 228 S.C. 124, 89 S.E.2d 95 (1955) and Collins v. Merrimack Mut. Fire Ins. Co., 210 S.C. 207, 42 S.E.2d 67 (1947) hold that such suppression or withholding of evidence gives rise to the presumption that such testimony if presented would be unfavorable to the person withholding such information.

Since presumptions based on probability have the same effect as rebuttable presumptions of law, the term "presumption of fact" is also unnecessary in the latter situation. Moreover many presumptions which are based partly on probability and partly on other grounds such as procedural convenience would defy classification and would produce unnecessary confusion.

An interesting question which is productive of much confusion in this area is when do certain facts give rise to an inference and when do the same fact groupings evolve into a presumption. In the case of *Tate v. Mauldin*[12] the Court quoting Professor McCormick states, "This general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a presumption." 1 WIGMORE, EVIDENCE § 772. It appears that where a certain fact grouping has been decided the same way a number of times but has never been declared a presumption in the jurisdiction now faced with the problem, the trial judge has the discretion to declare that the fact grouping gives rise either to a presumption or merely that an inference may be drawn from the facts and that his decision will be reviewable only for an abuse of discretion.[13] As a general rule it may be seen that it is the trial judge and not the appellate court who initially establishes the presumption in the particular jurisdiction.

Discarding then the presumption of fact and presumption of law classifications we are now faced with the problem of permissive and mandatory presumptions. Professor McCormick defines permissive presumptions as those which give the jury the permission to infer the offered conclusion while mandatory presumptions are those in which the jury is compelled to find in favor of the conclusion in the absence of proof to the contrary.[14] Although the distinction may be readily seen, it is seldom mentioned in the cases since seldom does the opponent fail to offer any proof of his case. Moreover, Thayer, [15] Wigmore,[16] and the American Law Institute[17]

12. 157 S.C. 392, 152 S.E. 431 (1930).
13. See Tate v. Mauldin, 157 S.C. 392, 152 S.E. 431 (1930) at page 404.
14. 5 N.C.L. REV. 291, 295 (1927).
15. THAYER, PRELIMINARY TREATISE ON EVIDENCE 317-326 (1898).
16. 9 WIGMORE, EVIDENCE § 2490 (1940).
17. UNIFORM RULES OF EVIDENCE 13 (1954) which states, "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action."

would abandon the term "permissive presumption" and say that only presumptions which have the compulsory effect are true presumptions. The Thayer-Wigmore rule is clearly the better rule since it is a more scientific approach and it produces a uniform result. Unfortunately, however, the denial of the existence of the permissive presumption does not coincide with actual judicial usage.

While the South Carolina Supreme Court has never recognized the permissive presumption as such, the Court in the case of *McBride v. Atlantic Coast Line R. R.*,[18] at page 274, in speaking of the presumption that the failure to give the proper signals at a railroad crossing is the proximate cause of the injury says, "The presumption merely establishes a prima facie case, which may be overcome by testimony, whether given for the plaintiff or for the defendant."[19] The Court has defined prima facie evidence as that evidence which is sufficient in law to establish the fact unless rebutted.[20] However, it is now established that a prima facie case means that the evidence is sufficient to justify, but not to compel, an inference of liability and furnishes evidence to be weighed, but not necessarily to be accepted by the jury or trier of fact.[21] South Carolina, therefore, appears to recognize that there are presumptions which standing alone, and where no rebutting evidence has been offered, the jury could properly find for the opponent of the presumption.

The problem is largely academic. It is the rare case in which the opposing party will offer no evidence and, as we shall see, if evidence is offered by the opponent the permissive presumption, with one distinguishing feature, will be handled in the same manner as the mandatory presumption. It must be borne in mind that the permissive presumption is a true presumption and not an inference since it performs the major task of a presumption, that is that the opponent will be unable to successfully demur to the case presented.

It would be difficult if not impossible to set out which presumptions are permissive and which are mandatory. Suf-

18. 140 S.C. 260, 138 S.E. 803 (1927).
19. See also Tate v. Mauldin, 157 S.C. 392, 152 S.E. 431 (1930).
20. La Count v. General Asbestos & Rubber Co., 184 S.C. 232, 240, 192 S.E. 262 (1937).
21. Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944); Roosa v. Wickward, 90 Ohio App. 213, 105 N.E.2d 454 (1950); McCoy v. Courtney, 25 Wash.2d 956, 172 P.2d 596 (1946).

fice it to say that one who is likely to be faced with this situation should closely scrutinize the judicial pronouncements of the presumption to determine what relative weight the court is likely to give to it. Therefore we should recognize, at least academically, that there are two types of presumptions, permissive and mandatory. These will be lumped together and referred to collectively as presumptions for the balance of this note.

It would be proper at this point to state parenthetically that presumptions are not evidence and are not to be weighed as such. The roots of this misconception are found in the early case of *Joyner v. South Carolina Ry.*[22] wherein the Court, quoting from Greenleaf on Evidence states, "The legal presumption is to be regarded by the jury as a matter of evidence, to the benefit of which the party is entitled." In a later case[23] the Court seems to infer that the presumption is evidence when Mr. Justice Woods wrote ". . . the jury can not rest their verdict on the presumption alone, but must consider, not only the presumption, but all the evidence on the subject, and rest their verdict on the preponderance of the entire evidence." In *Baker v. Western Union Tel. Co.*[24] the Court says, ". . . it was proper for the jury to weigh the evidence of diligence against the presumption of negligence from long delay."

This misconception was finally cleared up in *McMillan v. General Am. Life Ins. Co.*,[25] wherein the Court, in considering the presumption against suicide stated:

> It cannot be held that these cases cited by plaintiff are authority for the proposition that the assumption (sic) against suicide has the force and effect of evidence, . . . If there be such holding in any of these cases, or other decisions of this Court, they are overruled.

At page 174 the Court says, "We think it was error for the trial judge to charge that such presumption has the weight and effect of evidence."[26]

22. 26 S.C. 49, 1 S.E. 52 (1886).
23. Griffith & Bro. v. Atlantic Coast Line R.R., 82 S.C. 252, 255, 64 S.E. 222 (1908).
24. 87 S.C. 174, 178, 69 S.E. 151 (1910).
25. 194 S.C. 146, 173, 9 S.E.2d 562 (1940).
26. The McMillan decision brings South Carolina in line with the majority view that the presumption is not evidence and is not to be considered as such. See 95 A.L.R. 878 (1935), 103 A.L.R. 185 (1936), 115 A.L.R. 404 (1938) and 31 C.J.S. *Evidence* § 119 (1942).

Effect of Presumptions

The next problem to be considered is what effect is there on the presumption when rebutting evidence is introduced. As we have seen, where no rebutting evidence is offered, the distinction between mandatory and permissive presumptions becomes critical. This distinction is of less importance in the normal situation where the opponent offers evidence to rebut the presumption.

To clearly understand the effect of rebutting evidence on presumptions we must analyze the mechanics of the presumption. Each presumption consists of certain basic facts (Fact A), which, if believed by the jury, give rise to the presumed fact (Fact B). For example the mailing of a letter properly addressed gives rise to the presumption that the letter was received.[27] If, however, the jury fails to believe that the proponent of the presumption ever mailed the letter then the presumption fails. Here the presumption has been overthrown, or to use a more descriptive phrase, the presumption has been undermined in that the basic fact on which the presumed fact rested has been removed.[28] In this case the court could quite properly award a non-suit or direct a verdict for the opponent even though the presumption be mandatory.[29] If the jury believes the basic fact then they must find the presumed fact. With regards to the permissive presumption, the jury can believe the basic fact that gives rise to the presumption and still find for the proponent. If, however, the jury accepts the presumed fact then the permissive presumption will be handled in the same manner as the mandatory presumption.

The more difficult problem comes where the basic fact is not controverted but the presumed fact is in dispute. It is well to note at this point that where both the basic fact and the presumed fact are in dispute that this is merely a combination of the two problems which must be divided and examined independently. In this instance the jury must first determine if the basic fact is more probable than not. If it

27. Keller v. Provident Life & Acc. Co. 213 S.C. 339, 49 S.E.2d 577 (1948); Calder v. Commercial Cas. Ins. Co., 182 S.C. 240, 188 S.E. 864 (1936).

28. 68 U. Pa. L. REV. 307, 312 (1920).

29. Long v. Metropolitan Life Ins. Co., 228 S.C. 498, 90 S.E.2d 915 (1956); Craig v. Clearwater Mfg. Co., 189 S.C. 176, 200 S.E. 765 (1938); Baker v. Western Union Tel. Co., 87 S.C. 174, 176, 69 S.E. 151 (1910).

is not then the presumption will fall. If the basic fact is accepted then the problem is of the latter class.

If the presumed fact is controverted there are at least five possible courses of action, of which there is some authority for at least three in South Carolina. The varying rules are 1) The presumption disappears and the basic facts remain as evidence throughout the trial. 2) The presumption disappears if substantial evidence is offered by the opponent. 3) The presumption acts to shift the burden of persuasion from the proponent[30] of the presumption to the opponent on that particular issue. 4) The presumption remains until the opponent offers enough countervailing evidence that the factfinder is persuaded that the balance of probabilities is in equilibrium. Note that under this rule the balance of persuasion does not shift from one party to the other. 5) Whether the presumption disappears or remains depends upon the strength of the presumption.

The first rule, the so called Thayer rule, has resulted in presumptions being described as bats of the law that flitter about in the twilight but disappear in the sunshine of actual facts.[31] This is probably the prevailing rule in South Carolina. In a recent case[32] the Court stated:

> It is true that where death by violent injury has occurred, unexplained, there is a presumption against suicide, but this is a presumption of law and not of fact. Where evidence as to the fact of suicide is introduced, the presumption against suicide vanishes and the question must be resolved on the evidence.

In comprehending the results of this holding it is necessary to examine the question of burden of proof. The burden of proof is made up of the burden of producing evidence and the burden of persuasion. This analysis is now accepted by all

30. It should be noted that where the burden of persuasion is on the opponent of the presumption that it is unnecessary for the presumption to attempt to shift the burden of persuasion. For example, where the defendant in a trial has the benefit of a presumption it is unnecessary to attempt to shift the burden of persuasion on this issue to the plaintiff, since the plaintiff already has this burden. As one writer has described it, this would be an attempt to cover with a handkerchief that which is already covered with a blanket.

31. Mockowik v. Kansas City, St. J. & C. B. RR., 196 Mo. 550, 94 S.W. 256, 262 (1906).

32. Strawhorne v. Atlantic Coast Life Ins. Co., 238 S.C. 40, 43, 119 S.E.2d 101 (1961).

courts, so much so that its reiteration is almost trite. Its recognition by legal scholars, however, was a landmark of legal analysis and it has had its effect on many diverse fields of the law.

When the analysis was recognized, many courts accepted it and distinguished between the two by saying that the burden of producing evidence shifted continuously during the trial but that the burden of persuasion never shifted. Some courts have since fallen back from this position but tradition dies hard and many courts still steadfastedly refuse to retreat from their original position. South Carolina appears to be one of these. Under the South Carolina view as found in many of the cases, presumptions affect the burden of producing evidence but the proponent still has the burden of persuasion. The most positive statement of this view is found in the case of *Long v. Metropolitan Life Ins. Co.*[33] In this case the plaintiff was suing to enforce a double indemnity clause for accidental death of her husband. The Court stated at page 510:

> . . . that although at the onset proof of death by violent injury, without more may have sufficed to shift to the Respondent the burden of offering credible evidence to the contrary, nevertheless when such evidence had been offered the burden of persuasion, as distinguished from the burden of going forward with the evidence, rested upon appellant to bring herself within the double indemnity provision.

This case appears to be incompatible with many early cases. In the case of *Joyner v. South Carolina Ry.*[34] the plaintiff's stock was killed by the defendant's train. The trial judge charged that where the facts were put in evidence the presumption of negligence disappeared. The Supreme Court reversed and remanded the case for trial holding that where the plaintiff established ownership and death caused by the railroad that this was sufficient to create the presumption of liability and that this created a prima facie case. The Court referred to the earlier case of *Danner v. South Carolina Ry.*[35] and stated:

33. 228 S.C. 498, 90 S.E.2d 915 (1956).
34. 26 S.C. 49, 54, 1 S.E. 52 (1886).
35. 4 Rich. (S.C.) 329 (1851).

> We think that when once this presumption is established, it remains of controlling force until the defendant's evidence overthrows it by showing either due care, unavoidable accident or something of that kind, the burden to show which, the *prima facie* case of the plaintiff, by operation of the rule in *Danner's* case, has thrown upon the defendant.

This doctrine was followed in several later cases[36] and last appears in the case of *McLane v. Reliance Life Ins. Co.*[37] In this case the Court quotes with approval 37 C. J. 618:

> . . . where the cause of the insured's death is unexplained and the circumstances are such that it might have resulted from accident, homicide, negligence, natural causes, or suicide the presumption is in favor of death by one of such other causes and against death by suicide. Therefore the burden of proving death by suicide is on the defendant.

The latest case in this area is that of *Strawhorne v. Atlantic Coast Life Ins. Co.*[38] wherein the plaintiff sued to collect on the insurance policy of his deceased wife. The insurance company set up suicide as a defense. The jury found for the plaintiff and the Supreme Court reversed and remanded the case with instructions to enter judgment for the defendant. Mr. Justice Taylor speaking for the Court stated:

> Where the defense of suicide is interposed by the insurer to defeat recovery under a policy of insurance, the burden is upon the insurer to prove the fact of suicide by a preponderance of the evidence. It is true that where death by violent injury has occurred, unexplained, there is a presumption against suicide, but this is a presumption of law and not of fact. When evidence as to the fact of suicide is introduced the presumption against suicide vanishes and the question must be resolved upon the evidence.

The Court appears to state the classical Thayer view that a presumption disappears upon the production of evidence but

36. Hutto v. Seaboard Air Line Ry., 81 S.C. 567, 62 S.E. 835 (1908); Griffith & Bro. v. Atlantic Coast Line R.R., 82 S.C. 252, 64 S.E. 222 (1908); Sullivan v. Charleston & W.C. Ry., 85 S.C. 532, 67 S.E. 905 (1910); Marsh v. Pioneer-Pyramid Life Ins. Co., 174 S.C. 59, 176 S.E. 878 (1934).

37. 192 S.C. 245, 251, 6 S.E.2d 13 (1939).

38. 238 S.C. 40, 43, 119 S.E.2d 101 (1961).

creates the rule that the defense of suicide by the insurer is an affirmative defense. Therefore the same result is reached through the burden of persuasion rule that was formerly achieved by means of a presumption. It should be pointed out that the *Long* case and the *Strawhorne* case may be distinguished. In the *Long* case the plaintiff brought the action to recover on a double indemnity clause and had the burden of proving death from external, violent and accidental means; whereas in the *Strawhorne* case the plaintiff was attempting to collect on a life insurance policy which contained a non liability clause for suicide. It is submitted, however, that in both cases the defendant raised the defense of suicide and that on this single issue the presumption against suicide should have operated with equal efficacy.[39]

Under the Thayer rule the presumption disappears upon the production of evidence but the basic facts remain as evidence for whatever value they may have. In the majority of cases involving presumptions, the basic fact does have some extrinsic value as evidence and the theory is an acceptable one. For example, proof of seven years continued and unexplained absence without tidings raises the presumption of death.[40] If the opponent offers in evidence testimony to explain the absence then the presumption disappears and the jury may resolve the issue on the evidence. But in cases involving the presumption against suicide the fact of the insured's death has no extrinsic value as evidence. In this case the Thayer rule is unworkable and some expedient must be adopted as was done in the *Strawhorne* case or the presumption must be completely disregarded no matter how minute the amount of evidence offered to controvert it. This is the most valid criticism of the pure Thayerian rule. It is unreasonable to say that a presumption should fail merely because the op-

39. This view is followed in the cases of Downing v. Metropolitan Life Ins. Co., 314 Ill. App. 222, 41 N.E.2d 297 (1941) and Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P. 2d 579 (1942). In the case of New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938), the United States Supreme Court in considering a case involving a double indemnity clause held that where evidence was offered to rebut the presumption against suicide that the presumption not being evidence could not act to shift the burden of persuasion. The Court, however, makes no attempt to differentiate between a policy involving a double indemnity clause and a policy containing a non-liability clause for suicide. Therefore while the case has often been cited as authority for distinguishing the two types of cases it appears that the Court would reach the same result in both cases.

40. Dill v. Sovereign Camp W. O. W., 202 S.C. 401, 25 S.E. 285 (1943); Duncan v. Duncan, 190 S.C. 211, 2 S.E.2d 388 (1939).

ponent offers evidence that is not believed by the factfinder even though such evidence might be credible.

To overcome this objection some courts have adopted the so called New York rule. Under this rule the presumption disappears in the face of substantial countervailing evidence and thereafter the case is in the hands of the jury free of any presumption.[41] There is some basis for this rule in Wigmore's work[42] but the rule is open to much criticism. In the first place the meaning of "substantial" is not always clear and the courts appear to have made no attempt to define it. Secondly, the rule encroaches on the jury's province as the finder of fact. Under this theory the judge may consider the weight of the evidence in each case and upon his determination of whether the evidence is substantial he will inform the jury as to whether the presumption stands or whether it has been overthrown. There does not appear to be any authority for this rule in South Carolina.

The third possible course of action where the presumed fact has been controverted is the method espoused by Professor McCormick. This rule has been widely acclaimed in the law reviews but has met with strong resistance in the courts. Under this view the presumption is a working hypothesis which acts by shifting the burden to the party against whom it operates of satisfying the jury that the presumed inference is untrue.[43] Here the presumption would act to shift the burden of persuasion on the particular issue from the proponent to the opponent. This has the definite advantage of being easily understood by the jury, and while it may be criticized as giving more efficacy to the presumption than that to which it is entitled, it is submitted that this provides the most suitable solution to the problem yet proposed. While South Carolina has not adopted this view with regard to all presumptions, certain presumptions do have this effect. Examples of this are the presumption against suicide,[44] the

41. Pariso v. Towse, 45 F.2d 962 (2d Cir. 1930); Chaika v. Vandenberg, 252 App. Div. 101, 169 N.E. 103 (1929).
42. 9 WIGMORE, EVIDENCE § 2491 (1940).
43. 13 WASH. L. REV. 185, 187-192 (1938).
44. Strawhorne v. Atlantic Coast Life Ins. Co. 238 S.C. 40, 119 S.E.2d 101 (1961); McMillan v. General Am. Life Ins. Co., 194 S.C. 146, 9 S.E.2d 562 (1940).

presumption of legitimacy[45] and other presumptions based on public policy.[46]

An intermediate position is that adopted by the Maine court in the case of *Hinds v. John Hancock Ins. Co.*[47] In this case which involved a suit to recover double indemnity on a policy of insurance, the court stated that a presumption persists until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium or stated otherwise, until the evidence satisfies the jury that it is as probable that the presumed fact does not exist as that it does exist. Under this rule if this test is met the presumptions vanish.

The court adopted this rule since there was precedent in Maine that the burden of persuasion never shifts and the court did not wish to overrule this precedent. The court was careful to point out that the presumption was not evidence and is not to be weighed as such.

The last rule to be considered is that the weight to be given to any presumption depends upon the reason upon which the presumption is based. This theory was advanced by Professor Bohlen in his article, "Rebuttable Presumptions of Law".[48] While Professor Bohlen gives only three reasons for the creation of presumptions it is generally agreed that there are at least four. They are 1) Probability 2) Procedural Convenience 3) Fairness in allocating the burden of first producing evidence upon the party who has superior means of access to the proof 4) Certain social and economic policies.[49]

In his article Professor Bohlen urges that where the fact is based on probability, for example, the presumption of death after seven years unexplained absence without tidings, that such presumption should have the effect of shifting the burden of persuasion since the presumption is based on data upon which the ordinary man would not hesitate to act even in his important personal affairs. Likewise the burden of persuasion

45. Peoples Nat'l Bank v. Manos, 226 S.C. 257, 84 S.E.2d 857 (1954); Russell v. Russell, 118 S.C. 420, 110 S.E. 791 (1921).
46. Tyson v. Weatherly, 214 S.C. 336, 52 S.E.2d 410 (1949); Oliver v. McWhirter, 112 S.C. 555, 100 S.E. 533 (1919).
47. 155 Me. 349, 155 A.2d 721 (1959).
48. 68 U. PA. L. REV. 307 (1920).
49. MCCORMICK, EVIDENCE 641 (West ed. 1954); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1955); Professor Edmund M. Morgan gives seven reasons for the creation of presumptions but these may be synthesized into the four given above. 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 32 (1961).

should shift where the presumption is based on procedural convenience such as the presumption of the correctness of official acts or the presumption of sanity. Here the opponent of this presumption should have the burden of disproving it (at least in civil cases) since to do otherwise would tend to unnecessarily lengthen the trial.

On the other hand, presumptions based on the fairness in allocating the production of evidence, for example, the presumption that the terminal carrier damaged goods that are received in a damaged condition by the consignee, should in an action involving several carriers act only to shift the burden of producing evidence.

To further complicate things there is a class of presumptions based on social and economic policies that do more than shift the normal burden of persuasion but which require that the presumption in order to be overthrown must be disproved by more than a mere preponderance of evidence. An example of this is found in the South Carolina case of *Peoples Nat'l Bank v. Manos*.[50] In this case the Court stated that where the husband and wife were legally married at the time of the birth of the child, there arose in favor of the child the presumption of legitimacy, ". . . which though rebuttable, is one of the strongest known to the law."[51] Furthermore, ". . . the burden of proof in such cases is upon the party impeaching the legitimacy." The Court went on to say that in attempting to establish illegitimacy, "Neither husband nor wife may testify as to non-access between them in any case where the legitimacy of a child born in wedlock is at issue."

This theory of weighing the relative weight of presumptions was adopted by the Supreme Court of Connecticut in the case of *O'Dea v. Amodeo*[52] wherein Chief Justice Maltbie stated, "No general rule can however, be laid down as to the effect of a particular presumption in the actual trial of a case, for this depends upon the purpose it is designed to serve."

While all courts tacitly acknowledge that presumptions concerning legitimacy are to be given more weight than others,

50. 226 S.C. 257, 278, 84 S.E.2d 857 (1954).

51. An interesting case which points up the amount of evidence needed to sustain the presumption of legitimacy is that of *Russell v. Russell*, 118 S.C. 420, 429, 110 S.E. 791 (1921). In that case the Court upheld the presumption stating, "The facts and circumstances attending the living together of James L. Russell and Eliza Russell were at least sufficient to create a reasonable inference of presumption that they were lawfully married, and that their children were born in lawful wedlock."

52. 118 Conn. 58, 170 Atl. 486 (1934).

the theory as set forth in the *O'Dea* case has not been generally followed. While the theory undoubtedly has merit it can be seen that it would be extremely difficult for the trial judge to attempt to determine the purpose for which each presumption is created. This problem becomes more complicated where the judge is faced with a presumption which is created for two or more reasons.

South Carolina appears to have a split of authority in that the burden of persuasion appears to have shifted in cases involving the presumption of legitimacy[53] and matters concerning public policy[54] and also in some of the suicide cases[55] while the Thayer rule is the prevailing rule in the majority of cases.[56] It should be pointed out that the reason for the confusion inherent in the use of presumptions is that courts of one jurisdiction adopt presumptions from other jurisdictions where the presumption has a different procedural effect. While this problem cannot be eliminated, it should be recognized and some attempt should be made to deal uniformly with presumptions within a particular jurisdiction. It is felt that a clarification by the South Carolina Supreme Court of its stand on presumptions would be most helpful.

53. Peoples Nat'l Bank v. Manos, 226 S.C. 257, 84 S.E.2d 857 (1954); Russell v. Russell, 118 S.C. 420, 110 S.E. 791 (1921).

54. Tyson v. Weatherly, 214 S.C. 336, 52 S.E.2d 410 (1949; Oliver v. McWhirter, 112 S.C. 555, 100 S.E. 533 (1919).

55. Strawhorne v. Atlantic Coast Life Ins. Co., 238 S.C. 40, 119 S.E.2d 101 (1961); McMillan v. General Am. Life Ins. Co., 194 S.C. 146, 9 S.E.2d 562 (1940).

56. The Thayer theory has the virtue of uniformity and early won the approval of the American Law Institute. See MODEL CODE OF EVIDENCE rules 703 and 704 (1942). However, the American Law Institute and the American Bar Association rejected this theory in 1954 by adopting Rule 14 of the Uniform Rues of Evidence. Rule 14 draws a distinction between presumptions based on probability and those where the presumption has no probative value as evidence. The rule which so far remains virtually untried (it does not appear that any state has adopted these rules although tentative drafts have been submitted for adoption in New Jersey and Utah) is as follows:

Rule 14. *Effect of Presumptions.*

Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist *and the burden of establishing the non-existence of the presumed fact* is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced *which would support a finding of the non-existence of the presumed fact,* and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved. (Emphasis added)

Charging the Jury

The final question dealt with in this note is how much, if anything, should the trial judge tell the jury about presumptions. In the early South Carolina cases the judges merely stated the presumption in their charge and left the application of the presumption to the jury. Thus in the case of *Pooler v. Smith*,[57] the trial judge charged the jury as follows:

> As to the legitimacy of a child, if you bring up that question, it is simply a question of fact; but the law in this State is, for the peace and repose of families, and for the good of society, that a child, the issue of a man and a woman lawfully married to each other, are presumed to be legitimate children and that presumption prevails. It may, however, be rebutted, where you bring positive proof to show that the child could not be the lawful child of a man and his wife.

The defendant contended that this constituted a charge on the facts and was in violation of the South Carolina Constitution, Article 5, Section 26.[58] The Supreme Court affirmed the decision, holding that the charge stated a correct proposition of law.

While the origin of most presumptions are shrouded in antiquity, they serve an extremely useful purpose in that they allow the trial judge to state a legal opinion on a certain fact grouping. This is important in many states such as South Carolina where the trial judge is forbidden by the Constitution or by statutes from conveying his opinion either expressly or impliedly on any question of fact at issue.[59] Because of this the judges have not hesitated to set forth the presumptions in their charges even though at times it is not clear what weight the jury is expected to give the presumption.[60] This position may be criticized in that it implies too much or as one jurist has complained the presumption amounts to a hint from the court that they should find the presumed fact.[61] It

57. 73 S.C. 102, 104, 52 S.E. 967 (1905).
58. S.C. CONST. art. 5 § 26 reads as follows, "Judges shall not charge juries in respect to matters of fact, but shall declare the law."
59. State v. Simmons, 209 S.C. 531, 41 S.E.2d 217 (1947); Jackson v. Jackson, 32 S.C. 591, 11 S.E. 204 (1890).
60. Gardner v. Kirven, 184 S.C. 37, 191 S.E. 814 (1936); Nimmer v. Northwestern, 116 S.C. 190, 107 S.E. 479 (1921).
61. Alexander, *Presumptionss Their Use and Abuse*, 17 MISS. L. J. 1 (1945).

appears that the current practice is for the trial judge to state the presumption to the jury informing them that the presumption is rebuttable by the evidence. This, coupled with a charge on the burden of proof, appears to be sufficient.[62] However, one case has held that a failure to charge on the burden of proof is not reversible error if no objection is interposed.[63]

Another position, which was formerly popular in South Carolina as elsewhere, was for the judge to instruct the jury that the presumption is evidence and is to be weighed as such. This position was adopted in the case of *Joyner v. South Carolina Ry.* [64] and was implied in several later cases.[65] As pointed out earlier this position was overruled in the case of *McMillan v. General Am. Life Ins. Co.*[66]

Another possibility would be for the trial judge to instruct the jury that they should find in accordance with the presumption unless they find that the opponent's evidence is of equal weight and their minds are in equipoise, then they should find against the party having the burden of persuasion. This charge would be given in a jurisdiction following the *Hinds* rule.[67] It can be seen that this balancing of the probabilities would be an extremely difficult task for any jury to perform. Moreover it inevitably conveys the impression that the presumption must be weighed as evidence.

Two other possibilities remain. The first, advanced by Professor Edmund M. Morgan is that the presumption acts to shift the burden of persuasion in some cases and that the jury should be instructed as to which party has this burden.[68] Professor Morgan feels that the word presumption should only be used in states such as California, where the trial judge is required by statute to instruct the jury that the presumption is evidence of the presumed fact. Professor Morgan goes on to say, ". . . its use (presumption) should be avoided wherever possible, because it is likely to be misunderstood."

62. LIDE, JUDGE LIDE'S NOTEBOOK 231-232.
63. Dubose v. Durham Life Ins. Co., 197 S.C. 1, 14 S.E.2d 349 (1941).
64. 26 S.C. 49, 1 S.E. 52 (1886).
65. McKendree v. Southern Life Ins. Co., 112 S.C. 335, 99 S.E. 806 (1919); Baker v. Western Union Tel. Co., 87 S.C. 174, 69 S.E. 151 (1910); Griffith & Bro. v. Atlantic Coast Line R.R., 82 S.C. 252, 65 S.E. 222 (1908).
66. 194 S.C. 146, 9 S.E.2d 562 (1940).
67. 155 Me. 349, 155 A.2d 721 (1959).
68. 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 43 (1961).

The error in this theory is that it leaves the jury up in the air. They are told that one party has the burden of persuasion but undoubtedly many jurors are aware of the general rule that the plaintiff has the burden of proving his case. A statement by the trial judge that the defendant has the burden of persuasion on a particular issue may tend to mystify them. Furthermore, telling the jury that one party has the burden of persuasion without telling them why would be a suggestion by the judge that they find a particular way. If the jury were told that the burden of persuasion had shifted due to a presumption, this could be understood, but a statement that the burden had shifted with no explanation would convey the impression that the judge had shifted the burden because of some secret evidence that was available to him but unavailable to them. Feeling that they were not in possession of all the facts, or worse yet, that the judge had gleaned some important fact from the testimony which they in their ignorance had missed, the jurors would tend to vote against the person having the burden of persuasion.

The last and most satisfactory possibility is the position advanced by Professor Charles T. McCormick.[69] This view assumes that the presumption works by shifting the burden of persuasion to the party against whom it operates of satisfying the jury that the presumed inference is untrue. Here the trial judge would instruct that the presumption stands until the jury is persuaded to the contrary. As stated by Professor McCormick this instruction has the advantage in that it makes sense. It does not require the jury to perform some metaphysical feat of balancing the probabilities nor is it confusing.

This theory was followed in South Carolina in some of the early cases[70] before South Carolina became wedded to the proposition that the burden of persuasion does not shift and it is submitted that this earlier position should be re-examined when the question is next presented to the Court.

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69. 13 WASH. L. REV. 185, 187-192 (1938).
70. Sullivan v. Charleston & W. C. Ry., 85 S.C. 532, 67 S.E. 905 (1910); Hutto v. Seaboard Air Line Ry., 81 S.C. 567, 62 S.E. 835 (1908); Joyner v. South Carolina Ry., 26 S.C. 49, 1 S.E. 52 (1886).