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CHARGES ON PRESUMPTIONS AND BURDEN OF PROOF

CHARLES T. McCORMICK*

Presumptions¹ come into play chiefly at two stages in a trial, *first*, when a motion for a non-suit or for a directed verdict is presented, or, *second*, when the judge is called on to frame instructions to govern the jury in its consideration of the evidence.

I

With respect to the first occasion, the situation is, in theory, relatively simple. Let us suppose a vital issue in a trial is: was John Smith alive at the time the action was commenced? It is possible that at the end of the trial no evidence may have been introduced at all bearing upon this question. In that event, the judge, if requested, will obviously find or direct a finding against one of the parties *upon that issue*. The form of the finding may be an order of non-suit, a direction to the jury to answer a question in a certain way, or a direction of a verdict generally, against one party—according as the issue is involved in the claim or the defense. The party against whom this ruling has been made had the first duty to offer evidence, i. e., to “proceed,” “to go forward,” on the issue. He has not done so, and the duty is enforced by the penalty of an adverse peremptory ruling. This first duty of proceeding with evidence on an issue merely means the liability to an adverse ruling if when the case ends evidence on the issue is not produced.

Let us suppose that the plaintiff in the particular case is conscious that this first duty of offering evidence that John Smith was alive when action brought rests on him, the plaintiff. He seeks to fulfill this duty. To do this he may offer *direct* evidence, e.g., of witness Jones, that he saw Smith alive in the clerk's office while the writ in the action was being issued. From this the inference of the truth of the fact to be proved depends only upon the truthfulness of Jones.

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¹ The views presented in this article are not new, in the main. The writer's debt to such works as J. B. Thayer's *Preliminary Treatise on Evidence*, J. H. Wigmore's *Evidence* (2nd Ed.), C. F. Chamberlayne's *The Modern Law of Evidence*, and to suggestions derived from E. W. Hinton's *Cases on the Law of Evidence*, and John M. Maguire's edition of *Thayer's Cases on Evidence*, is very deep. This paper largely restates their conclusions with special emphasis upon their effect upon the form of the instructions to the jury.

Or, he may offer *circumstantial* evidence, which requires a weighing of probabilities as to matters other than merely the truthfulness of the witness. For example, he may secure the testimony of Jones to the effect that he, Jones, received a letter in the mail which was signed "John Smith" one month before the action was brought. Patently in this latter case, the tribunal may be satisfied that Jones is speaking the truth, and yet the tribunal may decline to infer the fact of Smith's being alive when the action began.

How strongly persuasive must the offered evidence be to satisfy the duty? Obviously it must be such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved. In case of *direct* evidence no difficulty occurs. It is sufficient, though given by one witness only, however negligible a human being he may be. But if the evidence be circumstantial, forensic disputes as to its sufficiency to warrant a jury to draw the desired inference often arise. Ordinarily the judge when called upon to rule on this question² must do so in the light merely of his own common sense and experience of human affairs. In the last analysis his ruling then rests on his individual opinion as to the limits of reasonable inference from the facts proven. However, certain situations constantly recur and give rise repeatedly to litigation, and a given judge, in his desire for consistency and the consequent saving of time and mental travail, will rule alike whenever the same situation is proved and its sufficiency to warrant a certain inference is questioned. Other judges follow suit and a standardized practice, ripening into a rule of procedure, results. Most of these rules are *positive* rather than negative. They announce that certain types of fact-groups are sufficient to enable the person who has the first duty to go forward with evidence to fulfill that duty, i.e., they enable him to rest after proving them without being subject to the penalty of an adverse ruling. Examples of such enabling fact-groups, as given in a recent North Carolina decision, are: delivery of goods to a carrier in good condition and delivery by the carrier in a damaged state, to show negligence; injury to neighboring prop-

²The test of sufficiency of circumstantial evidence is thus announced by Wigmore (*Evidence*, sec. 2494): "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" This is approved in *Lawrence v. Yadkin River Power Co.* (1925) 190 N. C. 664, 130 S. E. 735, 738, holding evidence as to origin of a field-fire sufficient to warrant inference that it was due to defendant's negligent maintenance of its power-line and right of way.

erty by fire set from passing locomotives, also to show negligence; and injury to passengers in a wreck or derailment, likewise to show negligence.³

Suppose the one who had the initial duty of offering evidence in support of the alleged fact, on pain of an adverse ruling, does produce evidence barely sufficient to satisfy that duty, so that the judge can just say, "A reasonable jury *could* infer that the fact is as alleged, from the circumstances proved." If the proponent then rests what is the situation? Has the duty of going forward shifted to the adversary? Not if we define that duty (as we did before) as the liability to a peremptory adverse ruling on failing to give evidence, for if at this juncture the original proponent rests and the adversary offers no proof, the proponent will not be entitled to the direction of a verdict in his favor on the issue, but rather the court will leave the issue to the decision of the jury. But it is frequently said that in this situation the duty of going forward has shifted to the adversary⁴ and this is unobjectionable if we bear in mind that the *penalty* for silence is very different here from that which was applied to the original proponent. If he had remained silent at the outset he would have irrevocably lost the case on this issue, but the only penalty now applied to his adversary is the *risk*, if he remains silent, of the jury's finding against him, though it *may* find for him. Theoretically he may have this risk still, even after he has offered evidence in rebuttal. It might be simpler to limit "duty of going forward" to the liability, on resting, to an adverse ruling, and to regard the stage just discussed (where the situation is that if *both* parties rest, the issue will be left to the jury) as one in which neither party has any duty of going forward.

In the situation just discussed the party who first had the duty, i.e., the necessity, of giving proof, has produced evidence which requires the judge to permit the jury to infer, as it chooses, that the fact alleged is or is not true. It is a *permitted*, but not a compulsory, inference. Is it possible for the original proponent of evidence to carry his proof to the stage where if he rests, he will be entitled to a directed verdict, or its equivalent, on the issue? Undoubtedly, with

³ See *Austin v. Seaboard Air Line R. Co.* (1923) 187 N. C. 7, 121 S. E. 1, 3. No doubt some of these examples would be treated by some courts as cases of mandatory presumptions and not mere permissible inferences.

⁴ For example, see *Hunt v. Eure* (1925) 189 N. C. 482, 127 S. E. 593, especially p. 597 (presumption of consideration from recital of value in non-negotiable note); and *Austin v. Ry. Co.*, *supra*, note 3.

a qualification to be noted, this is possible, and when it occurs there is a shifting to the adversary of the duty of going forward with the evidence, in the strictest sense. Such a ruling means that in the judge's view the proponent has not merely offered evidence from which reasonable men *could* draw the inference of the truth of the fact alleged, but evidence from which (in the absence of evidence from the adversary) reasonable men *could not help* but draw this inference. Thus, Lord Mansfield, in *Rex v. Almon*,⁵ told the jury that upon the issue of whether defendant had published a libel, proof of a sale of the book in defendant's shop was, being un rebutted, "conclusive," and Nash, J., in *State v. Floyd*,⁶ said: "Prima facie evidence is a rebuttable presumption of law, and if not rebutted, *the jury is bound in law to find their verdict in accordance with it, and if they refuse to do so, they violate their duty.*" Thus, in the case first supposed, if the plaintiff brought forward the *direct* evidence of Jones that Smith was alive when the writ was issued, and there is no contrary evidence at all, or where he brings forward *circumstantial* evidence (that is, evidence that Smith was seen alive in perfect health *ten minutes before the writ was issued*) which is, in the absence of contrary circumstances, irresistibly convincing, the jury should no more be left to refuse at will to draw the only rational inference, than they should be permitted to draw an inference from insufficient data, where the proponent has failed to sustain his initial duty of producing evidence enough to support the inference desired. Here again the ruling, from repeated occurrence of similar facts, may become a standardized one. The statement that one who has the duty of going forward can go forward far enough not merely to escape an adverse peremptory ruling himself, but to subject his opponent to one if the latter declines to take up the gage by producing evidence, has however, the following qualification. Obviously if the testimony were conflicting as to the truth of the facts from which the inference of the fact in issue is desired to be drawn, and the judge believes the inference (conceding the truth of the premise) is irresistible to rational minds, he can only make a *conditional* peremptory ruling. He directs the jury, if you believe the evidence that fact A is so then you *must* find fact B, the fact in issue. And in some jurisdictions, including North Carolina, if the party seeking the ruling has the ultimate burden of persuasion

⁵ 5 Burr. 2686 (K. B. 1770).

⁶ 35 N. C. 382, 386.

on the issue, meaning usually the party who has pleaded the fact, he can only get such a conditional ruling, though his witnesses are undisputed and unimpeached.⁷ But, in either event, if the *inference* is overwhelming, the judge does not permit the jury to cogitate over that, but only over the *truthfulness* of those who testify to the basic data.

We have seen something of the mechanics of the process of "proceeding" or "going forward" with evidence, viewed from the point of view of the *first* party who is stimulated to produce proof under threat of a ruling foreclosing a finding in his favor. He may pass in the process through three stages of judicial hospitality (a) where if he stops he will be thrown (*qua* this issue) out of court (b) where if he stops and his adversary does nothing, his reception will be left to the jury, and (c) where if he stops and his adversary does nothing, his victory (so far as it depends on having the circumstantial inference he desires drawn) is at once proclaimed. Obviously, whenever the first producer of proof stops, the adversary may go forward with evidence in turn, and he again may in his turn pass through the same three stages. *His* evidence again may be (a) insufficient to warrant a finding in his favor, (b) *sufficient* to warrant to finding, or (c) *irresistible*, if rebutted.

II.

What is the effect of a "presumption" upon this process of whipping up the respective parties to produce evidence, this "duty" which shifts from one side to the other like a tennis ball in play? One ventures the assertion that "presumption" is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof," of whom more anon. Agreement can be secured to this extent, however: a presumption is a standardised 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. Admittedly, as we have seen, proof of one class of type-situation (e.g., delivery of a shipment in good condition to a carrier, and its delivery by the carrier at destination in a damaged state) may by a rule of practice, be recognized as calling for a ruling that the

⁷ *Giles v. Giles* (1910) 204 Mass. 383, 90 N. E. 595; *Anniston Nat. Bank v. School Committee of Durham* (1897) 121 N. C. 107, 28 S. E. 134 (construing C. S. 564). In a majority of jurisdictions no such restriction exists, except as to instructions against the defendant in criminal cases. 5 Wigmore, *Evidence* (2nd Ed.) sec. 2495; 38 Cyc. 1574, 1575.

producer of the proof has gone forward far enough to "get to the jury" on the inference (damage by acts of the carrier) which is desired. Every judge in every case should so rule, and he is relieved of the usual necessity of critically considering the rational permissibility of the inference. But we have also seen that in another class of fact-groupings (e.g., the facts of the mailing of a letter properly stamped and addressed offered to show receipt by the addressee) the standardized practice to be automatically applied by the judge is to rule that the proof of the particular recognized group of facts is *conclusive*, that is, the inference is not to be weighed by judge or jury, but if the circumstantial facts are undisputed, or if disputed are found to be true, the conclusion follows as a matter of law provided no counter-proof is offered.⁸ Does a "presumption" give its beneficiary the right to the first of these rulings, the *permission* to the jury to infer, or to the second, the *compulsion* to find (in the absence of contrary proof) without weighing the inference? Very few of the decisions discuss this distinction, because very seldom does the adversary fail to produce some counter-proof so that the effect of the stark fact-groups, standing alone, seldom comes in issue. Thayer,⁹ Wigmore,¹⁰ and Chamberlayne,¹¹ the great triumvirate of law-writers on Evidence, unite in attributing to the "presumption" the (provisionally) *compulsory* effect. Many judicial definitions are in accord.¹²

⁸ *Bragaw v. Supreme Lodge* (1899) 124 N. C. 154, 32 S. E. 544 (presumption of receipt of letter duly mailed; the conflicting evidence raised a doubt only as to whether it was actually mailed. Held: a charge which left to the jury whether it was *received* was error; only the question whether it was *mailed* was for their consideration); cf. *Standard Trust Co. v. Bank* (1914) 166 N. C. 112, 81 S. E. 1074.

⁹ *Preliminary Treatise on Evidence*, pp. 317, 321, 326.

¹⁰ *Evidence*, sec. 2490.

¹¹ *The Modern Law of Evidence*, secs. 1085 and 1087.

¹² Walker, J., in *Cogdell v. R.R.* (1903) 132 N. C. 852, 44 S. E. 618: "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." Quoted 5 Wigmore, *Evidence* (2nd Ed.), p. 450. In *re Bauer's Estate* (1869) 79 Cal. 304, 307, 21 Pac. 759, 760: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, but unless so controverted, the jury are bound to find according to the presumption."

On the other hand, many decisions which hold merely that the group of facts considered was *sufficient* to warrant the desired inference, describe the result as a "presumption." In this latter sense a presumption is the same as a "prima facie case."¹³ Probably the best practical treatment of the problem of nomenclature is to recognize the word "presumption" as a collective term embracing both varieties of procedural rules, but to distinguish the two as *permissive* presumptions, and *mandatory* presumptions.¹⁴ The recognition of permissive presumptions as true presumptions is a departure from the language of the text-books, but accords with actual judicial usage.

Thus far, we have been considering presumptions solely as they affect the problem which arises when the judge is asked to give a binding instruction, or decisive ruling, such as a compulsory non-suit, on the ground that an inference of a fact in issue desired by one of the parties is insufficiently supported by, or insufficiently opposed by, the evidence. The power of the evidence, adduced by the one side or the other, to elicit a favorable, or to avoid an unfavorable, ruling of this sort, is "the weight of the evidence," and it casts "the duty of going forward" upon one party or his opponent accordingly.

III.

It is sometimes asserted that presumptions have no efficacy except to elicit or avoid these peremptory rulings, and that if the evidence in its shifting course comes to an end at a stage where the conflicting inferences are for the jury that any presumptions which may have been available during the trial are now like spent balls, or, in the witty and oft-quoted phrase of a Missouri lawyer, like "bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts."¹⁵ In this view presumptions are simply rules directing the

¹³ *White v. Hines* (1921) 182 N. C. 275, 109 S. E. 31, 38: "In some of our decisions the expressions *res ipsa loquitur*, prima facie evidence, prima facie case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury." *Hunt v. Eure* (1925) 189 N. C. 482, 127 S. E. 593, 597: "A presumption of negligence, when establishing a prima facie case, is still only evidence of negligence for the consideration of the jury, and the burden of the issue remains on the plaintiff."

¹⁴ Permissive and mandatory, that is, as respects its effect on the jury.

¹⁵ Lamm, J., in *Mockowik v. Ry. Co.* (1906) 196 Mo. 550, 94 S. W. 256, 262, quoted in 5 Wigmore, *Evidence*, sec. 2491; compare Faris, J., dissenting, in *Reynolds v. Casualty Co.* (1918) 274 Mo. 83, 201 S. W. 1128: "The moment explanatory evidence comes into the case the presumption dissolves into thin air and becomes as wholly non-existent as though it never had had existence." Quoted in 23 Mo. Law Bulletin, 43.

judge when to drop, or refuse to drop, the final curtain on the drama of the jury trial,¹⁶ and they are nothing more. They would thus not need to be mentioned in the court's charge at all. Admittedly they do serve the purpose just described, but it is believed that they also have further functions in the trial's second stage mentioned in the opening sentence of this article, the stage of instructing the jury in *how* they shall arrive at their conclusions when it becomes their duty to decide between conflicting inferences.

May the judge in leaving fact-questions to the jury in his charge inform them of presumptions arising from the evidence, and under what circumstances may this be done?

One occasion for doing so has already been mentioned, and that is when the evidence raises a presumption of the mandatory type, but the adversary, instead of seeking to *evade* the inference by showing circumstances leading to a different conclusion, offers evidence *denying the premises*. Thus, in a jurisdiction where seven years' disappearance without news creates a mandatory presumption of death, upon proof of disappearance seven years before trial and no subsequent tidings, the adversary might offer evidence only that the first witnesses are mistaken, and that the person left home only six years ago. In such event, the judge should direct the jury that if they find seven years' disappearance without tidings, they must find the person to be dead.¹⁷ Even if the testimony of seven years' disappearance were undisputed, these jurisdictions which refuse to give directed verdicts, assuming the truth of undisputed evidence, for parties having the burden of persuasion, could give only such a *conditional* direction, and everywhere this would be the most that could be done if the prosecution were seeking the benefit of such a presumption in a criminal case.¹⁸ On the other hand, if the evidence creating such a mandatory presumption were countered by the adversary by proving fresh circumstances of an opposite trend, as where the adversary, instead of *denying* the seven years absence without news, showed that the disappearance was preceded by circumstances indicating an urgent necessity for the person's vanishing away mysteriously and continuing to "lie low" (such as a serious quarrel or an

¹⁶ *Swoboda v. Nowak* (1923) 213 Mo. App. 452, 255 S. W. 1079; *McCune v. Daniels* (1923, Mo. App.) 251 S. W. 458; *Railway v. Wise* (1917) 186 Ind. 316, 116 N. E. 299.

¹⁷ Victor H. Lane, *Presumptions*, 22 Michigan Law Review, 207, 213.

¹⁸ See note 7, *supra*

indictment),¹⁹ then the inference of death *vel non* being thrown open, a direction to find death if they find seven years absence without news would be wrong.

Which brings us to a second problem as to how far the judge's charge shall inform the jury of presumptions. If the presumption be, as assumed in the example just given of seven years' disappearance, one originally *mandatory*, but with its mandatory sting removed by the proof of opposing circumstances by the adversary, throwing the door wide for inferences pro and con to be drawn by the jury, or if it be merely a *permissive* one which simply *authorizes* the jury from the circumstances shown, to make the finding desired, should the judge apprise the jury of the presumption in his charge?

This is a difficult and important question, of which there is little discussion in the decisions (so far as I have read them) which pierces through the particular problem to considerations of general application. In the first place, can we settle the question at once by banishing all such mention of presumptions from the charge, as a forbidden²⁰ comment on the weight of evidence? This is Chamberlayne's view.²¹ There are supporting expressions in the decisions, but it is believed that the prevailing view is that merely advising the jury of the existence of the presumption as a rule which *warrants or authorizes* them to find in accord with it, does not violate the statute.²² Certainly the practice of apprising the jury of presumptions is followed constantly in many states.²³ Moreover, it seems

¹⁹ *Insurance Co. v. Martin* (1900) 108 Ky. 11, 55 S. W. 694; *Thetford v. Modern Woodmen* (1925 Tex. Civ. App.) 273 S. W. 666, 671.

²⁰ Under the rule obtaining in most states but not in England nor in the Federal Courts.

²¹ 2 *Modern Law of Evidence*, sec. 1085.

²² Compare *Austin v. Seaboard Air Line* (1923) 187 N. C. 7, 121 S. E. 1, 3, where Hoke, J., said: "And in cases of the kind suggested on an issue of negligence of defendant, the burden of the issue is upon the plaintiff; but where it appears that goods have been shipped with a common carrier in good condition and have been lost or delivered in an injured condition, or where claimant's property has been destroyed or injured by fire communicated from defendant's engine or train, or where one a passenger or employee has been killed or injured by a collision or derailment of trains, and these basic facts are established by the greater weight of the evidence, a proper charge would be that they constitute or present a prima facie case, carrying the burden of liability to the jury on the issue and without more justifying the inference of negligence if the jury so find."

²³ Examples of such charges are seen in the following cases: *Pooler v. Smith* (1905) 73 S. C. 102, 52 S. E. 967, presumption of legitimacy; *Patterson v. Campbell* (1911) 136 Ga. 664, 71 S. E. 1117, presumption of payment from lapse of time; *McMahon v. Flynn* (1923) 154 Minn. 326, 191 N. W. 902, presumption of due care of victim of fatal accident. And see Branson, *Instructions to Juries*, Index, title "Presumptions."

not to offend the intention of the "comment" statutes for they are designed to prevent the particular judge's individual view of the fact-inferences to be drawn from the testimony from being known to the jury. This objection does not apply to the expression by the judge of presumptions which are legal rules to be announced in all similar cases, assessing the sufficiency of certain standard fact-groups as evidence of certain conclusions. A frequent error is the statement in the charge that from certain facts a certain presumption arises, when in truth no such presumption, i.e., standardized, regularized inference, is recognized for the particular fact-group by the courts of that jurisdiction. The so-called presumption is likely to be nothing more than an allowable inference from the particular facts selected by the judge, and his direction of the jury's attention to them and the possible inferences from them is regarded as an expression of the individual judge's opinion on the weight of the evidence, and hence as error.²⁴ This is an error very difficult for a

²⁴ These non-standardized fact-inferences were called in an older and now largely abandoned terminology, "presumptions of fact," as distinguished from "presumptions of law," i.e., true presumptions. See Jones, *Evidence* (Civil Cases), 3rd Ed., sec. 10, and Lockhart, *Handbook of Evidence for North Carolina*, sec. 228, approved in *Austin v. Ry. Co.* (1923) 187 N. C. 7, 121 S. E. 1, 3. Presumptions proper were to be enforced by the charge, but the bastard presumptions "of fact," or mere allowable inferences, were not to be mentioned in the instructions. *People v. Carrillo* (1879) 54 Calif. 63 (instruction that failure by tax collector to pay over money collected raised a presumption of felonious appropriation, unwarranted); *Herkelrath v. Stookley* (1872) 63 Ill. 486: "In that instruction the jury are told, 'if the mortgage was made by a father to two of his sons, in the night time, under suspicious circumstances, and at the same time the father transferred to said sons all his land and personal property, and the property in the chattel mortgage was subject to be consumed or destroyed in its use by the mortgagor, these are circumstances from which the jury may infer that the transaction was a fraudulent one.' . . . Another and fatal objection is, that while the circumstances named in the instruction may be suspicious, they do not raise a legal presumption of fraud. They are to be considered in connection with all the other evidence, and it is for the jury to determine, from the entire evidence, what inference is to be drawn, without being instructed by the court as to what weight they are to attach to any particular portion of it. When the court says that a certain inference may be drawn from certain facts, if proven, most juries would understand the instruction as meaning that it was their duty to draw such inference. The instruction would, at least, indicate that the court thought it highly proper the inference should be drawn. There are cases in which such an instruction would not be improper, but under our system of practice in this state, the court should not so instruct, except in cases where the alleged circumstances are of such a character that the law itself raises the presumption. Where one party proves certain facts which the other attempts to explain or overcome by the proof of certain other facts, the jury should be left to draw their own inferences, without any intimation from the court as to what it would be proper to infer from the evidence of either side"; *Life Ins. Co. v. Buchanan* (1884) 100 Ind. 63, 81; *Mitchell v. Stanton* (1911 Tex. Civ. App.) 139 S. W. 1033, 1036; *Stooksbury v. Swan* (1893) 85 Tex. 563, 22 S. W.

trial judge to avoid, for it is often nearly impossible to determine when the allowable fact-inference has crystallized into a judicially accepted permissive presumption. A group of facts may be treated in one state as merely the basis for a fact-inference, in another as creating a permissive presumption or *prima facie* case, and in still another as a full-fledged mandatory presumption.

Another example of such erroneous enunciation of the effect of presumptions is furnished by a form of charge once common but now generally disapproved. The charge referred to is that which not only instructs the jury of the existence of the presumption, but informs them that it is "evidence" and that it is to be weighed along with the other evidence, or equivalent language. The following passage from an early case sufficiently exposes the error in such instructions:

"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 question 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

963, 966, 967, charge that acts of public officers are presumed to be regular, held an improper comment. The opinion has an unusually extended and pertinent discussion of the limits of the judge's power to charge on presumptions: "It has been frequently held in this state that a charge which, in effect, informed the jury that the law presumes the existence of some fact from the existence of others, is a charge upon the weight of evidence, and therefore improper, unless it be in those cases in which the presumption is said to be one of law, and therefore conclusive, or one of fact, required by positive law, but rebuttable"; *White v. McCullough* (1909) 56 Tex. Civ. App. 383, 120 S. W. 1093, 1095; Branson, *Instructions to Juries*, 2nd Ed., sec. 13.

a preponderance of the evidence; if it did not, it was useless. A legal presumption is not evidence."²⁵

But a question cuts deeper than these, and it is, is there any *need* in the due administration of justice, for any mention of these permissive or rebutted presumptions in the court's charge?²⁶ Does the jury derive from them, as a rule, any aid in reaching verdicts conformable to law and fact? If not, simplicity of administration would demand that judge omit any mention of them, or at least that if he did not choose to mention them (even though requested to do so) this should not be ground for reversal. A statute, for example, says that proof of possession of liquor shall create a presumption of unlawful handling for gain.²⁷ The State proves the stark facts of possession of liquor by the defendant. The defendant offers no evidence. Is it good administration to submit these facts to the jury, with only the stock charge defining the offense of illegal handling for gain, and placing the usual burden on the State of convincing the jury of its case beyond a reasonable doubt? Such a charge would often result in the mystification of the jurors. There is no evidence

²⁵ Doe, C. J., in *Lisbon v. Lyman* (1870) 49 N. H. 553, quoted by E. W. Hinton in his *Cases on Evidence*, p. 79, note, where the learned editor adds this comment: "It is impossible, however, to understand the mental process involved in balancing or weighing a rule of law along with evidence. As Lord Justice Bowen expressed it, in *Abrath v. Railway* (1883) 11 Q. B. D. 440, when a jury is asked as to a plain question of fact, either they believe it or do not believe it, or can not arrive at a conclusion. But the general probability on which many presumptions are based might conceivably affect the conclusion reached by the jury. For example, the general probability that a person is more likely to be sane than otherwise, because the majority of individuals are sane, does not appear to furnish much aid in the determination of the mental condition of X., as to whose behavior there is ample evidence. While it is true that the majority of individuals are sane, it is equally true that the majority of sane individuals do not behave in certain unusual ways. On the other hand the probability that the scattering of fire by a locomotive is due to a bad condition or faulty construction may have considerable force as an argument in a given case, quite apart from any technical rule of presumption. When courts talk of weighing presumptions with evidence, they doubtless mean that such probabilities may be considered, but the expression is unfortunate, and apt to mislead a jury."

²⁶ It is just at this fundamental question that the decisions fail us. They discuss the correctness of particular instructions but not whether it would have been better to give no instruction on presumptions at all. Perhaps the assumption that presumptions should be charged may in some part be a survival from the era when it was thought that they shifted the burden of persuasion, as to which an instruction was necessary.

²⁷ See Vol. 3 Cons. Stat. N. C. sec. 3411j: "The possession of liquor by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article." See also Vol. I Cons. Stat. N. C. sec. 3379.

which would be popularly regarded as "proof" of the defendant's purpose in handling the liquor. They would be likely to feel that probably the defendant had the liquor for sale, but that the State (of whom they are adjured to demand unusual certainty of proof) had not "proved" it. Some of them indeed might infer that the judge would not have submitted the case to them at all, if they were not legally warranted in finding against defendant, but experience shows that this is not always understood. It certainly seems desirable, then, that in such case, the judge should inform the jury of the terms of the statute, so that they may know that the law does authorize them upon these scant facts to make an inference which, as a pure matter of experiential reasoning, might be too conjectural.

In other cases, the data which create the presumption may be so patently convincing of the existence of the issuable fact, that the connection would be apparent to the jury. Perhaps they would need, for example, no judge's word to tell them that they would be at liberty to infer from the mailing, properly stamped and addressed, of a letter, that it was received by the addressee, though this were disputed.²⁸ Evidence of possession immediately after the theft of stolen property, unexplained, likewise points so persuasively to guilt of the theft that probably the judge's explanation of its sufficiency to convict²⁹ would not ordinarily be needed by the jury. Certainly it is superfluous to explain that a highwayman's pistol is presumed to be loaded.³⁰ Presumptions, both permissive and mandatory, however, may be based on considerations of logic, experience, or probability, as we have seen, or they may be wholly or in part created to subserve some other legal policy than that of merely ascertaining the facts³¹. They may originate wholly or partly in considerations of fairness in apportioning the production of evidence, with the view of stimulating the party to whom the evidence is most familiar and most accessible, to produce it. Such is the presumption of damage by the last connecting carrier, where the presumption is supported by

²⁸ Compare *Bragaw v. Supreme Lodge* (1889) 124 N. C. 154, 32 S. E. 544, where these facts are held to create a mandatory presumption.

²⁹ Such an instruction was approved in *Sahlinger v. People*, 102 Ill. 241, 244; *State v. Rowe* (1923, S. C.) 115 S. E. 586; but in *State v. Lippard* (1922) 183 N. C. 786, 111 S. E. 722, the presumption is said to be one which is "to be warily pressed." Other courts would deny the existence of such a presumption. *Pearrow v. State* (1920) 146 Ark. 182, 225 S. W. 311. See Chafee, *Progress of the Law, Evidence*, 35 Harv. Law Rev. 302, 312, note 39.

³⁰ See *State v. Parr* (1909) 54 Ore. 316, 103 Pac. 434, 437.

no inherent probability at all.³¹ The *res ipsa loquitur* cases are based at least partly on this ground. A still broader social policy, however, may dictate the presumption, as a means of handicapping an anti-social contention, without absolutely outlawing it, as in case of the presumption that a child born in wedlock is legitimate,³² the presumption that a woman, even of advanced years, is capable of bearing offspring,³³ or the statutory presumption that smoking opium found in this country more than four years after the passage of the Act, was unlawfully imported.³⁴ In all these latter cases the presumption is of a technical or artificial cast, and if it is to be effectuated the jury must be advised that the law authorizes a finding from the grouped facts which, in following ordinary standards of probative value, they might not feel at liberty to reach. In such cases the jury does need an instruction informing them of the presumption. But a great many presumptions, if not most, are rooted in a mixture of the two soils, *probability* on the one hand, independent procedural or social *policy* on the other. Thus the presumption of death from seven years' disappearance, and of ownership from possession, are prompted both from probability, and by the policy of settling estates. Shall we require the trial judge to determine, at peril of reversal, whether the particular presumption is so predominantly based on common sense experience that the jury does not need to be told of it, but indeed if told might be likely to give artificial weight to the grouped facts, or whether on the other hand the presumption is a rule of art which might enable the jury to find in a way which they may desire, but may feel precluded from doing unless they are told of it? The very statement of the proposition reveals its impracticability. If certainty be sought by reducing the matter to rule, should the rule be that in case of conflicting inferences the presumption shall *never* be charged? In most states this would be contrary to a practice which would be hard to dislodge,³⁵ and would be undesirable in the type of cases where the presumption is an "artificial" one as above suggested. Shall we, then adopt the opposite extreme, that

³¹ Chafee, *op. cit.*, 35 Harv. Law Rev. 302, 311, 312.

³² *In re McNamara's Estate* (1919) 181 Calif. 82, 183 Pac. 552. *Presumption of Legitimacy of Child Born in Wedlock*, 33 Harv. Law Rev. 306.

³³ *Shuford v. Brady* (1915) 169 N. C. 224, 85 S. E. 303.

³⁴ See *Yee Hem v. United States* (1925) 268 U. S. 178, 45 Sup. Ct. 470, upholding the act creating this presumption.

³⁵ See note 20, *supra*.

it shall *always* be charged?³⁶ This would open up a wide avenue for reversals. The possibility remains of classifying each presumption, as one which should or should not be set out in the instructions. That is fatally objectionable as too rigid a jacket upon the judge in his control of the trial, and adding complexity to a mechanism already too complex for ready administration. The obvious solution for this (as for so many theoretically puzzling procedural problems) is to recognize a discretion in the trial judge to include or to omit in his instructions a statement of the presumption when an inference is to be left to the jury's determination. His decision, based on his judgment as to whether the statement would or would not aid the jury as indicated above, ought not to be reviewable unless in the rare case in which the upper court is able to see distinctly that the omission or inclusion of the statement in the instructions has contributed to a miscarriage of justice.

IV.

A rounded discussion of the treatment of presumptions in charges can hardly omit reference to the much-debated question, does the presumption shift the "burden of proof"? We have seen at the outset that the presumption clearly may operate to shift to the party against whom it works, the necessity of producing evidence to "rebut" the presumption, i.e., to avoid being "counted out" by a peremptory ruling of the judge, or to diminish the probability of an adverse jury finding. This is a practical exigency which faces the advocate in determining when to bring his proofs before the tribunal, but it is not something which the jury need concern itself with. It has faded into history when the case comes to be submitted to the jury.

But there is another exigency which may conceivably present itself to the jury and which the courts are careful, perhaps over-careful, to provide against in advance. Let us suppose the sole issue submitted is, Is X dead? If, as a result of the jury's deliberations, all of the twelve are not agreed on the issue, there is a mistrial. But suppose at the end of their deliberations all of the twelve are agreed that they are in *doubt* as to whether X is dead or not? It is unsatisfactory to base a decision upon such mental state of suspended animation, but the law does so. It says that in such event the finding

³⁶ The oft-cited case of *Cogdell v. Ry.*, *supra*, note 11, might at first glance be supposed to support the rule that a charge on the presumption must if requested always be given, but the court there was considering the case of a mandatory presumption not faced by any rebutting evidence, and it is clear that such a charge is necessary in that situation. See *supra*, note 16.

must be entered against one of the contending parties. It says that on every issue one of the parties has the burden of producing in the jury's mind a state, not merely of negative doubt, but of positive conviction in his favor.³⁷ This burden of persuasion³⁸ is usually determinable at the end of the pleadings, upon the basis that he who pleads a fact (as distinguished from one who denies a previous allegation) has the burden of convincing the jury of its truth. In the light of this analysis, made classic by Thayer and Wigmore, the procedural distinction between the duty of producing evidence at a given juncture in the trial, and the subsequent risk of the jury's halting in their deliberations at a state of doubt, is very clear.³⁹ Despite the existence of the distinction, the connection of the two is very intimate. The production of evidence produces the conviction. The same word "proof" is popularly and properly used to describe both steps, i.e., the offering of *evidence*, which *convinces*. Procedurally also, both duties center at the outset in the same party, for usually he who pleads a fact must first offer evidence to support his side of the issue. If by the operation of a presumption it becomes necessary for the adversary to offer "proof," it was easy to assume that this "proof" meant convincing and not merely doubt-producing evidence. Accordingly, and with no very disastrous results, courts, in stating the effect of presumptions, habitually instructed juries that the presumption cast upon the adversary the "burden of proof," meaning to include the burden of persuasion.⁴⁰

³⁷ The law requires a greater intensity of belief by the jury in criminal cases, i.e., "beyond a reasonable doubt," than in civil cases where the usual formula is belief "from a preponderance of the evidence." Wigmore, *Evidence*, secs. 2497, 2498. As to whether it is too stringent to direct the jury in civil cases that they must be "satisfied" from a preponderance of the evidence, there is dispute. *Moore v. Stone* (1896 Tex. Civ. App.) 36 S. W. 909 disapproves, whereas *Chaffin v. Mfg. and Power Co.* (1904) 135 N. C. 95, 47 S. E. 226 and *Pelittier v. R. Co.* (1894) 88 Wis. 521, 60 N. W. 250 approve such an instruction. In North Carolina a perhaps needless variation is introduced by prescribing that in criminal cases, though the defendant has the burden of persuasion upon affirmative defenses such as insanity or self-defense, he need not prove the plea beyond a reasonable doubt, nor even by a preponderance of evidence, but "simply to the satisfaction of the jury." *State v. Willis* (1868) 63 N. C. 26; *State v. Barrett* (1903) 132 N. C. 1005, 43 S. E. 832; *Hunt v. Eure* (1925) 189 N. C. 482, 127 S. E. 593.

³⁸ This expression is suggested as simpler than Wigmore's phrase, "risk of non-persuasion," and perhaps more definite than the term "burden of the issue," often used in the North Carolina decisions.

³⁹ An especially lucid exposition of the distinction between the two burdens is contained in the opinion of Stacy, C. J., in *Speas v. Merchants Bank* (1924) 188 N. C. 524, 125 S. E. 398.

⁴⁰ Examples of such decisions are *Grant v. Raleigh & G. R. Co.* (1891) 108 N. C. 462, 13 S. E. 209; *Currie v. Ry. Co.* (1911) 156 N. C. 419, 72 S. E. 489; *Denny v. A. C. L. Ry. Co.* (1920) 179 N. C. 529, 103 S. E. 24.

The discovery of the long-overlooked double meaning of "burden of proof" was a triumph of legal analysis. The analysts and those who have followed their acute dissection have had so much intellectual pleasure in the process that they rather overlooked drab considerations of practical administration. Conceding that a sharp *distinction* exists between duty of going forward and burden of persuasion, and that *a priori* there is *no necessity* that the latter should shift when the former does, there still remained the question: in a jurisdiction where the practice was settled that judges should charge that a presumption shifts both burdens, is there any inconvenience in permitting such practice to continue? Certainly the process of changing the rule of practice was very inconvenient.⁴¹ But in most states the change was made, and it is now generally agreed that a presumption does not as a rule shift the burden of persuasion, and that ordinarily a charge which ascribes to a presumption the effect of shifting the "burden of proof" is erroneous.⁴² Doubtless, however, it is still too sweeping to say that the burden of persuasion *never* shifts. A few instances remain where on proof by the proponent of certain facts, the adversary has cast upon him the burden of persua-

⁴¹ Thus Calvert, J., was reversed in *Denny v. R. Co.*, *supra*, note 34, for failing to charge that the burden was shifted, and in *Bertie Cotton Oil Co. v. R. Co.* (1922) 183 N. C. 95, 110 S. E. 660 he was reversed for shifting it!

⁴² Wigmore, *Evidence*, sec. 2489; *Kay v. Metropolitan St. R. Co.* (1900) 163 N. Y. 447, 57 N. E. 751, presumption of negligence from escape of street car from control; *Railway Co. v. Myers* (1924, Tex. Civ. App.) 264 S. W. 151. A long line of decisions has been necessary in North Carolina to establish this principle. A partial list follows: *Winslow v. Hardware Co.* (1908) 147 N. C. 275, 60 S. E. 1130, derailment of train, Clark, C. J., dissenting; *State v. Wilkerson* (1913) 164 N. C. 431, 79 S. E. 888, presumption from possession of liquor, Clark, C. J., dissenting; *McDowell v. Ry. Co.* (1923) 186 N. C. 571, 120 S. E. 205, presumption of negligence from setting fire, Clark, C. J., dissenting; *Austin v. Ry. Co.* (1923) 187 N. C. 7, 121 S. E. 1, similar to last case, Clark, C. J., dissenting; *Ferrell v. Norfolk S. Ry. Co.* (1925) 190 N. C. 126, 129 S. E. 155, C. S. 3482 making killing of cattle prima facie evidence of negligence; *McDaniel v. Ry. Co.* (1925) 190 N. C. 474, 130 S. E. 208, prima facie case against carrier from evidence of shipment in good condition and arrival in bad condition; *Hunt v. Eure* (1925) 189 N. C. 482, 127 S. E. 593, recital of value in non-negotiable note held to create prima facie evidence of consideration, but error for trial court to charge that the defendants "must show to the satisfaction of the jury, and not by the greater weight of the evidence" the absence of consideration; compare note 32, *supra*. This is a careful opinion by Varner, J., who suggests that "burden of proof" should be used by trial judges only in the sense of "burden of issue," i.e., burden of persuasion. The same principle was clearly announced by Adams, J., in *White v. Hines* (1921) 182 N. C. 275, 109 S. E. 31, but he construed the charge which cast the "burden of proof" of absence of negligence on defendant in a derailment case as merely intended, in the light of its context, to shift the duty of going forward, as to which compare a similar holding in *Theiford v. Modern Woodmen* (1925, Tex. Civ. App.) 273 S. W. 666.

sion as to certain facts not pleaded by him. The classic instance is the presumption of legitimacy from proof of birth during wedlock. Here the adversary, to rebut, must not merely go forward with evidence, but must assume the burden of convincing the jury of illegitimacy.⁴³ And some courts ascribe this effect to proof of facts within the *res ipsa loquitur* range.⁴⁴ These are probably instances where the presumption is regarded as shifting the burden of persuasion. There are some other cases superficially similar, but probably falling in a different class. Such are cases where a party is allowed by his evidence to inject a wholly new issue into the case not suggested by his pleading, which may be merely a denial. Thus a defendant in a criminal case under a plea of "not guilty" may offer evidence of his insanity and under a widely accepted view has the burden of persuading the jury of his insanity. There is sometimes said to be a presumption of sanity which casts the burden of persuasion on the defendant. In truth, it is an affirmative defence which, exceptionally, the defendant is allowed to raise by proof without having pleaded it.⁴⁵ Similarly, in actions by remote holders of negotiable instruments, where the defendant pleads a personal defense, such as fraud, the plaintiff is not required to file a replication to the effect that his purchase was for value and without notice. Nevertheless, by the majority view, upon defendant's proof of fraud, the plaintiff must both go forward with evidence and ultimately carry the burden of persuasion on the facts of value and want of notice.⁴⁶

It has been suggested above that the trial judge be given a wide discretion to determine the advisability of charging on presumptions, and that the security of the judgment below cannot be profitably made to depend upon an appellate review of his discretion. So with respect to the burden of persuasion, it is thought that reversals because of inaccurate apportioning of that burden on various issues by the trial judge ought to be much less frequent than they are. The rules as to such apportionment are subtle and intricate and not

⁴³ See Bohlen, *Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 Univ. Pa. Law Rev. 307, 319. See also a note on "Presumptions of Legitimacy of a Child Born in Wedlock," 33 Harv. Law. Rev. 306.

⁴⁴ *Weber v. Ry. Co.* (1920) 175 Ia. 358, 151 N. W. 852, L. R. A. 1918A 626, note; and an excellent note in 12 Calif. Law Rev. 138, 141, n. 9.

⁴⁵ *Shepard v. W. U. Tel. Co.* (1906) 143 N. C. 244, 55 S. E. 704 (dictum).

⁴⁶ *Negotiable Instruments Law*, sec. 59 (No. Car. C. S. 3040); *Metropolitan Discount Co. v. Baker* (1918) 176 N. C. 546, 97 S. E. 495; *Glendo S. Bank v. Abbott* (1923) 30 Wyo. 98, 216 Pac. 700, 34 A. L. R. 294; *Negotiable Instr. Law Annotated*, Brannan, 4th Ed., pp. 521, 532.

well adapted to application at *nisi prius*.⁴⁷ With deference to the judicial statements that the incidence of the burden of persuasion is a matter of substantive and even of fundamental right, the writer begs leave to doubt whether it is not a mere matter of procedure and one of subordinate importance. In the absence of actual investigation, the assertion may be reckless, but the writer's observation of jurors leads him to believe that few of them ever give any weight in their deliberation to the charge on burden of proof, except possibly where absence of any other arguable contention leads some counsel to harp on it unduly in his speech. Still fewer jurors, probably, could accurately explain what "burden of proof by a preponderance of the evidence" really means.⁴⁸ "Preponderance of evidence" is a metaphor which suggests *quantity*, and most jurors would so understand it, whereas it means here merely evidence which actually convinces the jury.⁴⁹ In view of these considerations, it is submitted that a misdirection as to the burden of persuasion should be assumed by the upper court not to have influenced the verdict unless special reasons appear in the particular case to believe that it did.

V.

The conclusions suggested may be reduced to the following:

(a) Presumptions are the result of judicial customs crystallized into law, as to the sufficiency of proof of certain fact-groups to enable the party proving them to rest upon his proof and avoid an adverse ruling on the issue by the judge.

(b) If the party proving them would, upon resting, and upon the adversary's offering no evidence, be entitled to go to the jury on the question of whether the fact in issue is to be inferred, the presumption is *permissive*.

(c) If he would be entitled to a ruling by the judge directing the jury (either absolutely or conditioned upon their believing his evidence) to find in his favor, the presumption is *mandatory*.

(d) The term "prima facie evidence" is usually employed in the sense of a permissive presumption.

⁴⁷ "Practical experience, however, teaches us that these shades of meaning are not well suited to controversies in the trial courts, and that often they bring about prejudicial error," Varner, J., in *Hunt v. Eure*, *supra*, n. 36.

⁴⁸ *Hunt v. Eure*, *supra*, n. 36.

⁴⁹ "In the language now suggested as a substitute it is more than doubtful if the average juror could understand any difference between that and what is suggested as a more perfect language that could be used," Clark, J., dissenting in *Austin v. Ry. Co.*, *supra*, n. 36.

⁵⁰ See Wigmore, *Evidence*, sec. 2498.

(e) Where proof of facts raising a mandatory presumption are met only by evidence *negating* those facts, and not by evidence of *new* circumstances calling for a conflicting inference, it is necessary, to give effect to the presumption, for the court to instruct the jury that the presumption exists and that if they believe the evidence adduced by the party in whose favor the presumption works, they must find the truth of the fact presumed.

(f) The same result follows in some states (including North Carolina) where there is no contrary evidence, but the party claiming the benefit of the presumption has the burden of persuasion of the fact to be presumed.

(g) If the presumption be merely permissive, or if though originally mandatory it has been met by evidence of new circumstances raising conflicting inferences, the trial judge in submitting the issue to the jury should have a wide discretion to advise or refrain from advising the jury of the existence of the presumption as a rule of law permitting them to draw the particular inference from the particular facts.

(h) The effect of presumptions in enabling a party to claim a favorable or to escape an adverse peremptory ruling is called a shifting of the "burden of evidence," otherwise known as the "*burden of proceeding*" or "duty of going forward with the evidence."

(i) A distinguishable duty is that (borne usually by the party who first pleads on the issue) of ultimately *convincing* the trier of fact (judge or jury) of the truth of a proposition of fact. The party who has this burden will lose if the trier ends in a state of doubt on the issue. It may be called the "*burden of persuasion*."

(j) The term "burden of proof" was formerly a collective one meaning sometimes "burden of proceeding," sometimes "burden of persuasion," and sometimes both. It is now more usually used in the sense of "burden of persuasion."

(k) The burden of persuasion upon a contention of fact is cast normally upon the person upon whom was cast the burden of pleading the fact, and, apart from exceptional instances, this burden of persuasion does not shift during the trial.

(1) Hence, in most jurisdictions (including North Carolina) it is regarded as erroneous to instruct the jury that a presumption "shifts the burden of proof" whenever from the context that would be understood as meaning the burden of persuasion, but it is submitted that reversals for such errors in misplacing the burden of persuasion are rarely justified.