

Instructing the Jury upon Presumptions and Burden of Proof

Author(s): Edmund M. Morgan

Source: *Harvard Law Review*, Vol. 47, No. 1 (Nov., 1933), pp. 59-83

Published by: The Harvard Law Review Association

Stable URL: <http://www.jstor.org/stable/1332106>

Accessed: 05-06-2017 11:11 UTC

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <http://about.jstor.org/terms>



The Harvard Law Review Association is collaborating with JSTOR to digitize, preserve and extend access to *Harvard Law Review*

INSTRUCTING THE JURY UPON PRESUMPTIONS AND BURDEN OF PROOF *

BEHOLD, all is vanity and vexation of spirit. That which is crooked cannot be made straight." These words of the ancient realist might well furnish the text for any discourse upon charges to the jury in the vast majority of American courts. No extended experience at the bar or upon the trial bench is required to produce a vivid realization that only in the exceptional case is the jury decisively influenced by the judge's instructions. And in still rarer instances is its determination based upon the allocation of the burden of persuasion. Even the judges seem to be perplexed about presumptions. One ought, therefore, to have a particularly keen sense of futility in attempting to discuss the proper content of instructions dealing with presumptions and burden of proof.¹ And yet the books are full of cases in which the appel-

* This article will appear as one of the studies in *STUDIES IN LAW IN HONOR OF ORRIN KIP McMURRAY*, to be published in honor of Dean McMurray of the School of Jurisprudence of the University of California.

¹ No doubt it is easy to overemphasize this truth. It requires no extended search to find cases in which a requested charge has been successfully used by counsel as a trap in which to catch an unwary trial judge, or in which an appellate court has used the giving or failing to give a requested instruction as a device to control a trial judge or a jury in situations wherein the appellate court has strong convictions, or in which a trial judge has used the charge as an instrument for exercising a technically forbidden control over the jury. It would, however, require a heavy mass of data to buttress a conclusion that the chief or even the important function of the charge has come to be one of these or a combination of them. There is no procedural rule that cannot be made to serve exactly the same ends. A strong trial judge often imposes his will upon the jury so thoroughly throughout the trial that the instructions become a mere formality. The requests which the opposing counsel submit may be read in such a way as to have no influence. A determined appellate court may upset trial court and jury, without the slightest reference to the instructions and may uphold what it regards as a just result though the charge be a conglomeration of errors. That the charge may be put to such uses does not indicate that it does not also serve its legitimate purpose of furnishing to the jury a real guide for its task.

On the other hand, there can be little doubt that some appellate courts adopt a totally unrealistic attitude in construing instructions to the jury, and assume that jurors get not only the general impression which the words convey, but that they make a microscopic examination of each instruction in the light of the strict rules of grammar and rhetoric, with the result that trial judges in self-defense are com-

late courts purport to make the decision turn upon the charge to the jury; judges, trial and appellate, continue to insist that accurate instructions do perform the function of enabling the jury to make accurate application of the law to the facts disclosed by the evidence; and there are some uncertainties in the expression of the judicial doctrines concerning burden of proof and presumptions which seem to be capable of clarification. Consequently there may be some slight excuse for another attempt to suggest a practical and understandable solution of some of the problems with which the trial judge and the jury are compelled to deal in almost every litigated case.

Insofar as burden of proof is used to describe the burden which rests upon a party to produce sufficient evidence to avoid a directed verdict, there is no need of saying anything about it to the jury, except perhaps where a presumption comes into operation. But where the phrase indicates the burden of persuading the jury, an instruction cannot be avoided. Under the decisions there are three groups of issues, each requiring its own formula. As to some issues the proponent must satisfy the jury beyond reasonable doubt that his proposition of fact is true; for others he must establish it "by clear and convincing" or "by clear, satisfactory and convincing evidence"; with still others he need prove it only "by a preponderance of the evidence".² Where a presumption is involved, the problem may become more complicated, for the authorities exhibit a wide variety of views with reference to its effect. Each of the following opinions has some express judicial sanction. (1) A presumption puts upon the opponent the burden of producing evidence which would justify a reasonable jury in finding against the presumed fact; only this and nothing more.³

pelled to formulate charges so complex that no ordinary body of men could hope to understand them. Except in those benighted jurisdictions where the trial judge is obliged to give instructions in the language requested, if the requested instructions correctly state the law, it ought not to be difficult for the judge to state the applicable rules in plain and simple language. And this is particularly so, it is believed, as to charges upon the burden of persuasion. See Farley, *Instructions to Juries — Their Rôle in the Judicial Process* (1932) 42 YALE L. J. 194.

² See *First Nat. Bank v. Ford*, 30 Wyo. 110, 216 Pac. 691 (1923); *Groom, Proof of Crime in a Civil Proceeding* (1929) 13 MINN. L. REV. 556.

³ *Alpine Forwarding Co. v. Pennsylvania R. R.*, 60 F.(2d) 734 (C. C. A. 2d, 1932); *McIver v. Schwartz*, 50 R. I. 68, 145 Atl. 101 (1929). If A, the fact upon which the presumption is based, is established and the proponent rests without put-

(2) It places upon the opponent the burden of persuading the jury to believe so much of the evidence against the presumed fact as would justify a reasonable jury in finding against that fact. The effect upon the mind of the particular jury as to the existence or non-existence of the presumed fact is immaterial.⁴ (3) It places upon the opponent the burden of persuading the jury not to disbelieve so much of the evidence against the presumption as to leave the remainder insufficient to justify a reasonable jury in finding against the presumed fact. In other words, the presumption will lose all efficacy even though the jury positively believes none of such evidence, positively discredits a portion of it, and is unable to determine whether to believe or disbelieve the remainder of it, provided only that such remainder is of the requisite quantity and quality to justify a reasonable jury in finding the non-existence of the presumed fact. Again, the effect of the evidence upon the opinion of the particular jury as to the existence of the presumed fact is immaterial.⁵ (4) It puts upon the opponent the burden of persuading the jury that the existence of the presumed fact is so doubtful that the jury cannot determine whether it exists. Beginning with the assumption that the presumed fact does exist, the jury must by the evidence be put in such a state of mind that they cannot say whether it exists or not.⁶ (5) It puts upon the opponent the burden of persuading the jury

ting in evidence which would justify a finding against *B*, the presumed fact, the opponent will have the burden of producing such evidence; if, however, the proponent does introduce such evidence, then the opponent's burden created by the establishment of *A* has been satisfied before he has had need or opportunity to meet it. Thus it might, perhaps, more properly be said that the establishment of *A* puts upon the opponent of the presumption the risk of non-production of evidence which would justify a reasonable jury in finding that *B* does not exist. Of course *A* may be established for the particular case by (a) the process of judicial notice, (b) by the pleadings, (c) by stipulation, (d) by evidence which would compel a finding of *A*, or (e) by the finding of the jury.

Whenever the phrase, "finding the existence of the presumed fact", or its equivalent is used herein without explanation, it must be understood as a convenient method of describing the required action of the jury in deciding issues of fact. As explained later, this may mean that the jury is convinced that the fact exists, or is convinced that the existence of the fact is more probable than its non-existence.

⁴ See *Clark v. Diefendorf*, 109 Conn. 507, 511, 147 Atl. 33, 35 (1929); *Gillett v. Michigan United Traction Co.*, 205 Mich. 410, 421, 171 N. W. 536, 540 (1919).

⁵ See cases cited in note 4, *supra*.

⁶ *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359 (1912); *Klunk v. Hocking Valley Ry.*, 74 Ohio St. 125, 77 N. E. 752 (1906).

that the presumed fact does not exist.⁷ (6) In addition to one of the foregoing, the jury must also consider the presumption as evidence or with the evidence in its process of determining whether or not the presumed fact exists.⁸ (7) Each of these six views assumes that a presumption compels the trier upon the establishment of a given fact to assume the existence of another fact. The term is sometimes used to express the idea that the trier will be permitted to deduce from the existence of a particular fact the existence of another, even though ordinary human experience as revealed in judicial experience might not justify such a deduction.⁹ (8) Finally the term is employed with the adjective "conclusive" to denote a positive rule of law, either substantive or procedural, which no evidence to the contrary can overthrow.¹⁰ Insofar as a presumption affects the activities of the jury in their consideration or decision of issues, it is essential that they be advised of its influence in intelligible language.

It may be well to begin by conceding that a lawsuit is merely a proceeding for the orderly settlement of a dispute and lacks many of the characteristics of an investigation for the ascertainment of truth. Even in the field of the exact sciences it is difficult, if not impossible, to get beyond a working hypothesis; and in judicial inquiries as to past events, concerning which there is a dispute, it is idle to hope to discover more than the preponderance of probabilities. That preponderance may be so very heavy as to produce in the mind of the trier a conviction strong enough to make him willing to act upon it as indubitable. It may be heavy enough to create an opinion upon which the trier feels himself abundantly justified in acting although he is willing to concede that he entertains a reasonable doubt against it. Or it may have only such weight as to convince him that although his deduction

⁷ *Page v. Phelps*, 108 Conn. 572, 143 Atl. 890 (1928); *Weber v. Chicago*, R. I. & Pac. R. R., 175 Iowa 358, 151 N. W. 852 (1916); *Bond v. St. Louis-San Francisco Ry.*, 315 Mo. 987, 288 S. W. 777 (1926); *Holzheimer v. Lit Brothers*, 262 Pa. 150, 105 Atl. 73 (1918).

⁸ *Mutual Life Ins. Co. of New York v. Maddox*, 221 Ala. 292, 128 So. 383 (1930); *Commonwealth v. Spencer*, 212 Mass. 438, 99 N. E. 266 (1912); *cf. Wilson v. Grace*, 273 Mass. 146, 153, 173 N. E. 524, 527-28 (1930).

⁹ See THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) 340, 351; *Legis. (1928)* 28 COL. L. REV. 489.

¹⁰ See the statutory presumption in *Heiner v. Donnan*, 285 U. S. 312 (1932); Compare that in *Brooks v. Blount*, [1923] 1 K. B. 257.

is open to considerable doubt, on the whole it is more probably true than not. Of course, it is not necessary to explain to the jury the impossibility of acquiring absolutely accurate knowledge concerning any fact of history. Judges and juries have for centuries gone upon the assumption that they find the facts as bases for declarations of the legal relations arising therefrom. And for all practical purposes men do and must act upon what appears to them to be the preponderance of probability.

I

Where proof beyond reasonable doubt is required, the charge should not be difficult to frame. Thus, in a criminal prosecution, when it is once determined what propositions of fact the prosecution has the burden of establishing, the jury may be instructed that they must acquit unless they are convinced beyond a reasonable doubt that each of such propositions is true. It is coming to be recognized that all attempts to define reasonable doubt by paraphrase or circumlocution tend only to obfuscate rather than clarify the concept.¹¹ Yet convictions are still being set aside because of refusals to charge in the high-sounding but meaningless phraseology of the *Webster* case.¹² This is the sort of conduct by courts of last resort which makes the request to charge a trap for the unwary trial judge. Where the judge specifies the particular facts to be proved by the state and then in plain language tells the jury that the state does not satisfy its burden of proving them unless the evidence convinces the jury beyond reasonable doubt of the existence of each of these facts, there is no danger that the average juror will fail to understand. If he is intelligent enough

¹¹ See Sherwood, J., in *State v. Robinson*, 117 Mo. 649, 661, 23 S. W. 1066, 1072 (1893); *State v. Sykes*, 248 Mo. 708, 713, 154 S. W. 1130, 1133 (1913); *People v. Ahrling*, 279 Ill. 70, 85, 116 N. E. 764, 771 (1917).

¹² *Commonwealth v. Webster*, 5 Cush. 295 (Mass. 1850). As examples of reversals for refusal to define reasonable doubt, see *Schencks v. United States*, 2 F.(2d) 185 (App. D. C. 1924); *Nanfity v. United States*, 20 F.(2d) 376 (C. C. A. 8th, 1927); *Davis v. State*, 46 Fla. 137, 35 So. 76 (1903).

A similar remark would be justified concerning charges as to the presumption of innocence. See particularly *Commonwealth v. Madeiros*, 255 Mass. 304, 151 N. E. 297 (1926), for the disastrous results of the laudable effort of Judge Lummus to inject common sense into the Massachusetts practice.

to sit upon a jury, he is intelligent enough to comprehend so simple an instruction. Where a court conceives itself to be helplessly bound by precedent to insist upon the repetition of incomprehensible formulae, the only relief lies in legislation.¹³

The trial judge may have more trouble in making his meaning clear where the law prescribes proof by a preponderance of the evidence or by clear, satisfactory, and convincing evidence. To be sure, he usually merely charges the jury that the party having the burden of proof upon a given proposition must convince them that it is true by evidence having the prescribed characteristics. For example, in a negligence case, he instructs that the plaintiff must satisfy the jury, or must establish, by a preponderance of the evidence, that the defendant was negligent and that his negligence was the proximate cause of the plaintiff's injury. He also explains that the preponderance of evidence does not signify the greater number of witnesses or the larger volume of testimony but denotes, rather, evidence of greater convincing force. But he goes no farther. He does not attempt to describe the state of mind of the jurors which the evidence must create as he does in criminal cases. All his emphasis is upon the means which call forth the state of mind. When is the juror to be "satisfied", or when is he to find that the plaintiff has "established", that the defendant was negligent?

Is the plaintiff to prevail if he has produced a preponderance of the evidence? Where he introduces evidence sufficient to justify, but not to require, a verdict that the defendant was negligent, and the defendant rests without offering any evidence, it is too clear for argument that the plaintiff has produced a preponderance of the evidence. He has presented more witnesses, he has introduced the heavier mass of testimony, and his evidence is of greater convincing power than no evidence at all, for by hypothesis it would support a finding of negligence. Yet the jury may properly find for the defendant. There is, therefore, a wide difference between producing a preponderance of the evidence and satisfying the burden of persuasion. And there may be a real danger that the jury will fail to appreciate this distinction unless it is pointed out to them.

¹³ See, *e.g.*, a safe, if not very acceptable method of protecting the trial judge. CAL. PEN. CODE (1931) §§ 1096, 1096a. See the vigorous dissenting opinion of Mr.

An exaggerated fear of this danger may be responsible for the Wisconsin rule. That requires the trial judge to tell the jury explicitly that to entitle the party having the burden of persuasion "to a finding in his favor his evidence must not only be of greater convincing power, but it must be such as to convince the jury of the truth of his contention. This idea, in some definite and certain form, must be given to the jury or the instruction will be incomplete and erroneous."¹⁴ Such an instruction makes it perfectly clear that something more than the production of a preponderance of the evidence is necessary to sustain the burden of persuasion. But does it convey to the jury an accurate idea as to the state of mind required to warrant a verdict or finding? Just as there is a difference between furnishing a preponderance of the evidence and satisfying the burden of persuasion, so there is a difference between convincing a juror that a proposition is true and convincing him that it is more probably true than not. Suppose that a jury should return a special verdict, saying, "We are convinced that it is more probable than not that the defendant was negligent, but we cannot say that we are convinced that the defendant was negligent." Would the Wisconsin court rule that the plaintiff must fail? Does it mean by its charge merely to insist that the jury shall be convinced of defendant's negligence and that the conviction shall be based on nothing less or other than a preponderance of the evidence? How can any juror be convinced by evidence which he does not regard as having greater convincing power than that opposed to it? Why, then, should the court bother about the preponderance of the evidence or go to the trouble of explaining its meaning? Why not merely tell the jury that to find for plaintiff it must be convinced of defendant's negligence by the evidence and that it is not allowed to base its verdict or finding upon anything else? And what distinction can there be between the requirement for an ordinary issue like that of negligence and that for an issue which is said to call for proof by

Chief Justice Wheeler in *Kotler v. Lally*, 112 Conn. 86, 90, 151 Atl. 433, 434 (1930), for the expression of a healthful judicial attitude toward procedural questions.

¹⁴ *Anderson v. Chicago Brass Co.*, 127 Wis. 273, 106 N. W. 1077 (1906). See also *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 599, 24 So. 921, 929 (1898); *Dunbar v. McGill*, 64 Mich. 676, 31 N. W. 578 (1887); *Brown v. Atlanta & Charlotte Air Line Ry.*, 19 S. C. 39 (1882).

clear, satisfactory and convincing evidence? How can a juror really be convinced by evidence which in his judgment is not clear, satisfactory and convincing; and what but his judgment is the determinant of the existence of these qualities? Indeed, it may be argued that if a juror is convinced of the truth of a proposition he cannot be more than convinced, and that to require such conviction is to put all issues in both civil and criminal cases in the same category. But granting that in the ordinary usage of words there may be properly said to be degrees of conviction or persuasion, the difficulty remains that neither the wording approved by the Wisconsin court nor that used in the ordinary instruction in civil cases attempts to describe the requisite degree, but emphasizes only the quantity and quality of the evidence necessary to create the conviction. And certainly it is implicit in most of the pertinent decisions in which it is not expressly so stated, that the court is intending to prescribe a different measure of persuasion for the different classes of issues.

Upon this special verdict the plaintiff would prevail in Connecticut.¹⁵ And so he should; moreover, the instruction to the jury should be phrased to convey that idea. While it is both unnecessary and inadvisable to explain to the jury the impossibility of obtaining in a judicial proceeding accurate knowledge of past events concerning which there is a dispute, it does not follow that it is unnecessary or unwise to instruct them in civil actions that their findings may be based upon a preponderance of probabilities. The truth is that they can be based upon nothing else. Then why not say so in language that will convey the idea clearly to the average mind? By phrasing the charge in terms of probability, the pertinent distinctions can be made easily understandable. If the trial judge tells the jury that the burden is upon a party to prove a specified fact by a preponderance of the evidence, he should explain that this means only that they must find that the fact does not exist unless the evidence convinces them that its existence is more probable than its non-existence. Indeed, there is no need for him to talk of burden of proof or of preponderance

¹⁵ *Sullivan v. Nesbit*, 97 Conn. 474, 117 Atl. 502 (1922); see also in accord, *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051 (1897); *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866 (1896); *Livanovitch v. Livanovitch*, 99 Vt. 327, 131 Atl. 799 (1925).

of evidence. He may well confine his instruction on this matter to a specification of the disputed propositions of fact and a direction as to which party must fail on each proposition unless the jury is convinced by the evidence that the truth of that proposition is more probable than its falsity. In like manner, if he charges that the burden is upon a party to prove a proposition by clear and convincing evidence, or by clear, satisfactory and convincing evidence, he should interpret this by saying that it requires the jury to be convinced not only that the truth of this proposition is more probable than its falsity, but also that its truth is much more probable than its falsity, though it is not necessary that the preponderance of probability of its truth shall be so great as to dissipate all reasonable doubt. Here too it is entirely unnecessary to use the orthodox phraseology, though it can do no harm if elucidated. As to issues which must be proved beyond reasonable doubt, there is no necessity for abandoning the familiar formula though there could be no rational objection to charging, instead, that the preponderance of probability must be so great as to banish all reasonable doubts. There is, of course, an objection to innovations in procedural rules which work reasonably well; but the ambiguities which the Wisconsin courts have discovered in the orthodox phraseology and those which their remedy in turn creates are sufficient both to justify and to demand a rephrasing which will convey a clear and distinct idea to the average mind.

II

To what extent will the interposition of a presumption complicate the problem? There seems to be no doubt that a presumption does not come into existence until the fact or group of facts upon which it is based has been established for the purposes of the particular lawsuit. Given *A* as a fact or group of facts, a presumption arises that *B* is a fact. In any case *A* alone may be in dispute, or *A* may be established and *B* alone be contested, or both *A* and *B* may be in issue. Thus, if *A* is seven years unexplained absence of *X* and *B* is the death of *X*, the evidence may be directed solely to the period of *X*'s absence and have no bearing upon his life or death after the date of his disappearance. Or unexplained absence for the requisite period may be established

and the conflict in testimony may be confined to the identity of a person shown to have been alive after the expiration of the period. Or the evidence may be such as to justify a finding either way both upon the period of *X*'s unexplained absence and upon his being alive at the commencement of the action.

If the only controversy concerns the existence of *A*, the presumption will not make the task of charging the jury appreciably heavier. The eight possible effects of a presumption reduce themselves to two. It makes no difference whether it be irrebuttable or whether it merely puts upon the opponent the burden of producing evidence of a prescribed quantity and quality, or whether it requires such evidence to have a specified influence upon the mind of the jury. In all these instances, the only question for the jury will be the existence of *A*. Once they find *A*, they must find *B*, for there is no evidence against *B*. If the effect of a presumption is only to authorize the trier to find the presumed fact, then the jury ought to be advised that in case they find *A* they will be justified in finding *B*. The only question is whether such an instruction will amount to an unwarranted comment upon the weight or credibility of the evidence. The rule which forbids such comment has never been thought to prevent the trial judge from laying down for the jury general rules of law to guide them in their evaluation of the evidence. For example, it is proper to instruct them of their power to disregard certain testimony of witnesses whom they believe to have given wilfully false evidence upon a material issue.¹⁶ So here, if ordinary human experience would not justify a jury in drawing the inference *B* from *A*, but the courts have ascribed to *A* an artificial quality which makes it proper for the jury to do so, then the court in so instructing is merely expounding an applicable rule of law to enable the jury to appreciate its legal power. Of course, if the presumption does not operate to create an artificial effect in *A*, and is used merely to describe a deduction which ordinary human experience would warrant any person in drawing from *A*, there is no reason for the judge to say anything about *A* which he would not say concerning any similar group of facts in any case.

¹⁶ See *Chicago & Alton R. R. v. Kelly*, 210 Ill. 449, 71 N. E. 355 (1904). See generally, cases collected in *SUNDERLAND, CASES ON TRIAL AND APPELLATE PRACTICE* (1924) 504-21.

Suppose, however, that *A* is established, and the contest is over the existence of *B*. This means that the presumption is not irrebuttable and that the evidence is such that a trier might reasonably find either the existence or the non-existence of *B*. If the effect of the presumption is solely to require the introduction of evidence sufficient to justify a jury in finding the non-existence of *B*, there is no need to mention it. Such evidence has been introduced and the presumption has ceased to have any effect whatsoever in the case. Of course, *A* is still in the case as one of the facts to be considered by the jury, but it is to be given its inherently logical value and no more. That value may be nil. If so, and if there is no other evidence of *B*, the judge must direct the jury to find that *B* does not exist. If *A* has some probative force, it requires no different treatment than any other similar item of evidence.

If a presumption operates to fix the burden of persuasion, it will make no more difficult either the judge's task in framing the charge or the jury's duty of applying it. If the party against whom the presumption works already has the burden of persuasion that the presumed fact does not exist, the charge will be entirely unaffected by the presumption. Thus, if the plaintiff in ejectment is claiming as tenant for the life of *X* and the defendant is holding as remainderman, the plaintiff begins with the burden of showing *X* alive; and if the defendant establishes the unexplained absence of *X* for seven years, the plaintiff's burden of persuasion is not thereby affected, that is to say, if the minds of the jury are by the evidence left in equilibrium on the question of *X*'s continued existence, they must find for the defendant. Assume however, that the action is upon a policy of insurance upon the life of *X*, plaintiff beginning with the burden of persuading the jury that *X* is dead, and his establishment of *X*'s unexplained absence for seven years having the effect of fixing upon the defendant the burden of persuading the jury that *X* is alive. Still the phraseology of the judge's charge will be precisely the same as if there had been no presumption in the case save only that the word defendant will be substituted for the word plaintiff. Obviously this change will not render harder or easier the work of the judge in composing the instruction or that of the jury in applying it.

If the establishment of *A* puts upon the opponent the burden of meeting or balancing the presumption without affecting the burden of persuasion, it may be a little less easy for the judge to put the matter clearly before the jury. Yet the difficulty is not serious. If the opponent already has the burden of persuasion, then there will be no occasion to mention the presumption. If, in our ejection case, the establishment of *X*'s absence by defendant did no more than require plaintiff to make the jury unable to determine whether *X* was dead, this would be less than the burden with which plaintiff began and would necessarily be comprehended within it. Consequently, to say anything to the jury about the presumption would be not only unnecessary but uselessly confusing. If the burden of persuasion rests originally upon the party in whose favor the presumption operates, it will still remain there. But it will be necessary to advise the jury as to the precise effect of the establishment of *A*. It can be done in comparatively simple language which anyone having sufficient intelligence to serve as a jurymen should readily understand. For example, in a jurisdiction which accepts the Connecticut-California doctrine the charge might be phrased as follows: "Since *A* is established, you must begin with the assumption that *B* exists. But that assumption may be destroyed by evidence. If from all the evidence you find either that the non-existence of *B* is more probable than its existence or that the non-existence of *B* is as probable as its existence, you will then find that *B* does not exist, otherwise you will find that *B* does exist." This clearly places upon the party against whom the presumption operates the burden of putting the jury in such state of mind that each jurymen is unable to determine the truth or falsity of the proposition, that the existence of *B* is more probable than its non-existence. In a jurisdiction adopting the Wisconsin view, the charge would be somewhat as follows: "Since *A* is established, you must begin with the assumption that *B* exists. But that assumption may be destroyed by evidence. If from all the evidence you find that *B* does not exist or that you are unable to determine whether *B* exists or not, you must render a verdict that *B* does not exist; otherwise your verdict must be that *B* does exist." This again is merely requiring the party against whom the presumption oper-

ates to put the jury in such state of mind that they cannot determine the truth or falsity of the proposition that *B* exists.¹⁷

If any other power is accorded a presumption than one of the three just discussed, greater difficulties are encountered. If the establishment of *A* requires the party asserting the non-existence of *B* to produce evidence thereof which will justify a jury in so finding and further to induce the jury to believe enough of it to support a verdict, or to induce the jury not positively to disbelieve so much of it as to leave the balance insufficient to support a verdict, the only case in which the charge will be simple will be one where, in order to rebut the presumption, the jury would have to believe, or at least, to fail to discredit, all of the evidence against *B*. If it be assumed that the evidence tending to show the non-existence of *B* is just enough to carry the issue to the jury, or, if more, is such that the jury must react toward it as a unit and cannot separate it into parts, then the judge may easily frame the charge by instructing the jury that if they credit such evidence or cannot determine whether to credit it or not, they must find that *B* does not exist, but if they disbelieve any part of such evidence, then they must find that *B* does exist. But where the evidence tending to show the non-existence of *B* consists of numerous items, and each of numerous combinations of the separate items would of itself be sufficient to take the issue to the jury, then two courses are open. The trial judge may either require the jury to answer a special question as to the existence of each fact which, by itself or in combination with any others that might be found from the evidence, would justify a reasonable jury in finding against the presumed fact. When he has these answers, he can easily determine whether the presumption has or has not been dissipated. If the existence or non-existence of the presumed fact is decisive of the lawsuit, then this plan will be workable. If the judge takes only these answers without a general verdict, his only question will be as to the conclusion of law which should follow

¹⁷ It may be objected that an instruction in the suggested phraseology requires a finding that *B* exists where some of the jurors are persuaded of its existence and others are persuaded of its non-existence. If this be so, it can readily be corrected by a specific direction that where such a disagreement exists as to any material issue, the jury shall not return a verdict for either party.

from the facts found. If he permits the jury to find a general verdict as well, no real difficulty is encountered, for, by hypothesis, the answers to the interrogatories are controlling and a judgment notwithstanding any unwarranted general verdict will be entered thereon. If, however, the existence of the presumed fact will be helpful but not decisive, either all the issues must be submitted as special interrogatories, or the judge will be unable to charge upon the general verdict without first knowing the jury's answers to the interrogatories. It is conceivable that the judge might take an interlocutory verdict by way of answer to the special questions, but such a procedure is unusual and would doubtless prove very cumbersome. The alternative is for the judge to determine each and every combination of evidential facts which the jury might find from the evidence and from which a reasonable jury would be justified in finding against the presumed fact, and instruct the jury that if they believe any such combination to exist, they must find against the presumed fact. If the evidence is complicated and there are numerous combinations of fact that the jury might find therefrom, some of which would and others of which would not warrant a reasonable jury in finding against the presumed fact, the task of both judge and jury may be practically impossible of satisfactory and intelligent performance. First, the judge must have in mind all the testimony so as to determine all the possible combinations of facts capable of being found. He would be in a much worse position than a demurrer to evidence under the strict common law, who had to specify all possible deductions that a jury might reasonably make against him from the evidence, but did not have to itemize the possible combinations of fact which would justify such deductions. The practical obstructions to a competent compliance with these requirements caused the demurrer to evidence to give way to the motion for a directed verdict. Again, judicial experience with charges in cases of malicious prosecution where the fact situations are complicated, and in cases involving the construction of oral contracts where the evidence is conflicting or uncertain, has made manifest the difficulty if not the impracticability of framing adequate instructions with numerous hypotheses. And granting that the judge by careful attention to the testimony and with the aid of counsel could discover and explain the pertinent combinations, what jury, charged orally,

could understand, remember and apply them? And even if the charge were written, what jury would examine each hypothesis with the care and attention necessary to an intelligent decision? Except, therefore, in simple cases, it is useless to propose the adoption of a theory which requires so intricate a performance by judge and jury. The same considerations apply to cause the rejection of the doctrine which makes the persistence of the presumption depend upon the failure of the jury positively to discredit various combinations of the items of evidence.

If in attempting to determine the existence or non-existence of *B* the jury is required to use the presumption as evidence of its existence, or to weigh it with the other evidence, it will not be difficult to construct a charge so advising them. But will this not put upon them an impossible psychological task? How can one weigh a presumption against, or with, or as, evidence? Just what will be the mental process? Is the presumption to be treated as if a witness had testified directly to the presumed fact? Surely it cannot be meant that the presumed fact is to be weighed as evidence, for that would be treating it as a fact, and obviously the most that can be attributed to it is a tendency to establish the fact. Just as certainly it cannot mean that the jury is to treat *A* as evidence of *B*, for if it has any probative value on the existence of *B*, it is already in the case for what it is worth; and offering evidence against *B* doesn't destroy *A* as a fact; it tends only to hinder or destroy the process of drawing the inference *B* from *A*. Is telling the jury that the establishment of *A* raises the presumption that *B* exists and that the presumption is evidence of *B* effective to convey any intelligible idea to them? Is it not a conglomeration of words which will parse as a sentence and appears to say something, but which actually is "full of sound signifying nothing"? Suppose that a jury should ask the judge just what the instruction means; would he not be put to it even to give them an illustration of its application?¹⁸ It seems pretty clear that if such a doctrine serves the purpose of submitting to the jury a question which would otherwise be for the judge, it accomplishes

¹⁸ See, *e.g.*, the dilemma into which the Alabama Supreme Court was forced by counsel in *Mutual Life Ins. Co. of New York v. Maddox*, 221 Ala. 292, 128 So. 383 (1930). And just how could the Massachusetts court harmonize the pronouncements in the cases in note 8, *supra*?

the result in an unintelligible formula. It may be that it conveys to the jury a vague general notion that more evidence is required to find that *B* does not exist than would normally be the case, and that it, therefore, does no real harm. But most certainly such a practice should never be adopted so long as the charge is conceived to be a device for enabling the jury to act intelligently and accurately in evaluating the evidence. If the charge means what it says, the jury can give the presumption as much or as little weight as it chooses. Obviously, outside of the inherently logical value of *A*, there is no actual probative value in the presumption; and what justification can there be for giving the jury power to attribute as great or as little artificial power to an item of evidence as it deems fit in the particular case? Isn't such a rule without any justification save in those cases where the jury's emotions would lead them to the result which the court considers socially desirable?

If the effect of the establishment of *A* is merely to make the question of the existence of *B* one for the jury, the first inquiry is whether this gives any artificial quality to *A*. If not, the ruling is merely that *A* has sufficient inherent logical value to justify the inference that *B* exists; and there is no reason for singling it out from the other evidence for special treatment. If, however, the presumption is used as a device for endowing *A* with artificial powers of persuasion, it is necessary to know how long these powers persist. By hypothesis the jury is under no compulsion to draw the inference *B*. If, therefore, they refuse to draw it, there is no occasion to consider the presumption further.¹⁹ But if from *A* alone they would find *B*, it is essential to know what limitations or conditions are attached to their power to do so.

Will the power die when evidence is introduced which would justify a reasonable jury in finding that *B* does not exist? If so,

¹⁹ This seems to be what Mr. Chief Justice Wheeler had in mind in *Schiesel v. Poli Realty Co.*, 108 Conn. 115, 120, 122, 142 Atl. 812, 813-14 (1928): "Experience has demonstrated that when certain facts are proven, ordinarily a certain inference follows, and that in the absence of their explanation or rebuttal, reliance may be placed upon the probative strength of the inference, and from it a presumption of law attaching to it certain legal consequences will arise. The presumption is neither the fact nor the inference, but, as Thayer says, 'the legal consequences of it'. . . . The presumption stands or falls with the inference. . . . The legal consequence of such inference when drawn would cast upon the defendant the duty of explaining or rebutting this inference."

then the jury need be told nothing about the presumption, for it is assumed that such evidence is in the case. *A* will possess no power of persuasion beyond that which ordinary human experience would attribute to it. If it is the only evidence upon which its proponent is relying for a finding of *B*, the court must direct the jury to find against him on that issue; if there is other evidence of facts which in conjunction with *A* would furnish a reasonable basis for a finding of *B*, the issue is submitted like all other issues. The presumption has lived and died without the knowledge of the jury, and without affecting the judge's charge in any way.

May it not be given greater powers of endurance? May it not continue until other evidence in the case convinces the jury that its inference that *B* exists has been overcome or rendered doubtful? If from *A* alone the jury believes that *B* should be found, and if, under the law, that belief is justifiable, why should the jury not be permitted to continue in that belief until other evidence makes the non-existence of *B* at least as probable as its existence? To adopt this rule would not make the judge's task unduly difficult, although it would not be quite so simple as if the presumption ceased to operate upon the mere introduction of evidence. The charge would simply tell the jury that since *A* is established, they may, if they see fit, draw the inference therefrom that *B* exists, and if from *A* alone they would draw that inference, they may continue to assume the existence of *B* unless the entire evidence in the case convinces them that the non-existence of *B* is at least as probable as its existence, in which event they must find that it does not exist. Of course, it would involve the jury in inextricable confusion to make the continued existence of their power to draw this inference depend upon their believing or failing to believe any one of various combinations of the items of evidence tending to show the non-existence of *B*. Here, as in the case where the presumption operates as a compelled assumption, the choice must be between these three views: (1) that which decrees the destruction of the power upon the mere introduction of evidence of the requisite quantity and quality; (2) that which makes the power persist until the evidence puts the mind of the jury in equilibrium as to the existence of *B*; (3) that which causes the power to continue until the evidence persuades the jury that

B does not exist. The notion that the presumption, as distinguished from fact *A* itself, is here to be weighed with, against, or as evidence upon the question of the existence of *B*, has never been suggested and if thinkable is obviously impracticable.

Where both *A* and *B* are subjects of dispute under the evidence, such instructions as are given concerning the effect of the pertinent presumption must be conditioned upon a finding of the existence of *A* by the jury. Of course, if it be conceived that the presumption cannot operate in the presence of evidence that would justify a reasonable jury in finding the non-existence of *B*, the judge's charge will be exactly as if no doctrine of presumptions had ever been judicially recognized. Here as elsewhere, this doctrine is capable of application with a minimum of intellectual effort. Nor is any great mental exertion necessary to apply either the rule that makes the presumption disappear only when the evidence puts the mind of the jury in equilibrium upon the issue of the existence of *B*, or that which attributes to the presumption the function of fixing the burden of persuasion. For example, in an action for injuries alleged to have been suffered by a passenger in a railroad wreck, a court adopting the former, might well charge: "If you find that the train on which the plaintiff was a passenger was wrecked by derailment, you will find that the defendant was negligent, unless the evidence convinces you either that it is more probable that the defendant company used due care than that it was negligent or that it is as probable that the defendant company used due care as that it was negligent." A court which adheres to the latter rule would merely omit the latter alternative. In either case the practical difficulties of the judge in framing the instruction or of the jury in understanding it seem too slight to make them a considerable, much less a decisive, factor in determining the policy of adopting or rejecting such a rule. Even if the effect of the presumption is merely to justify the jury in finding *B*, the difficulty will not be greatly enhanced: the conditional clause will have to bear the addition, "and this causes you to find the defendant negligent," and the first portion of the conclusion will read, "you will adhere to that finding unless." But reasons of practicability will demand the rejection of both of the views which make the continuance or disappearance of the presumption depend upon the jury's finding or in-

ability to find the truth of any one of specified combinations of items of the evidence. Except in the simplest situations, both the trial judge and the jury would be intolerably burdened. To a less degree the same is true of the rule which gives the presumption evidential value. While the judge's task in framing the charge is easy, the obstacles to an intelligent or accurate application of it by the jury are insuperable.

III

Which of the three practicable rules should be adopted? As elsewhere suggested,²⁰ that must depend upon the purposes to accomplish which presumptions were created. If the same purpose lies back of every presumption, then it seems reasonable to give to all presumptions the same procedural effect and the same powers of legal persistence. If, however, different classes of presumptions are originated as means for reaching different judicial objectives, their powers to survive attacks by evidence should be sufficient to enable them to perform the respective functions for which they were called into being. Why were judge-made presumptions invented?

The irrebuttable presumption is not a procedural device. The language of presumptions is used to clothe in an attractive or acceptable form a positive rule of substantive or procedural law. No evidence will destroy it, though evidence may disclose the facts to be such as to make it inapplicable.

The presumptions which operate to compel the assumption of *B* upon the establishment of *A* owe their existence to judicial demands for instruments (a) to furnish an escape from an otherwise inescapable dilemma or to work a purely procedural convenience, (b) to require the litigant to whom information as to the facts is the more easily accessible to make them known, (c) to make more likely a finding in accord with the balance of probability, or (d) to encourage a finding consonant with the judicial judgment as to sound social policy.²¹

²⁰ Morgan, *Some Observations Concerning Presumptions* (1931) 44 HARV L. REV. 906.

²¹ THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) 313-52; Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof* (1920) 68

Sometimes without the aid of a mandatory assumption a judicial problem would be insoluble. Usually, of course, judicial inability to reach a conclusion leaves the matter in *statu quo*, which means in the trial court a decision for the defendant. But where a fund has to be distributed by a court, a failure to make the distribution does not result in a decision for anybody. It simply leaves the problem unsolved, the fund on hand legally usable by no one.²² Thus, the presumption that a person who has been absent for seven years died immediately upon the expiration of the seventh year has no basis at all in human experience; it does not express a result which is deemed by the judiciary to be socially desirable; it serves only the purpose of purely procedural convenience. It enables the court, in the absence of evidence which would justify a reasonable trier in finding when the absentee died, to dispose of any fund the distribution of which depends upon the exact time of his death. Now suppose that the presumption vanishes upon the mere introduction of evidence which would justify a jury in finding the date of his death. If the jury disbelieves the evidence, or cannot make up its mind whether to believe it or not, the real trier has not been aided at all and the procedural device designed to provide a solution fails of its purpose. If the jury does believe it and is unable to draw the inference, the device, it is true, fails in this particular trial, but the inquiry has been advanced a step, and it does not follow that another jury will be unable to draw the inference. Consequently the device is not rendered entirely useless by the mere utterance of testimony upon the stand. If the presumption stands until the evidence makes the jury uncertain whether the absentee died at the time fixed by the presumption, it is still more effective for it will dispose of the issue in all except that particular and unusual situation. And if the presumption operates until the evidence actually persuades the jury, it will serve its purpose in all cases except where the evidence is such as to convince the jury that the death did not occur at the presumed time although they cannot fix the date upon which it did occur.

U. OF PA. L. REV. 307, reprinted in BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 636.

²² *Montgomery v. Bevans*, 1 Sawy. 653, Fed. Cas. No. 9735, at p. 633 (C. C. D. Cal. 1871); *In re Rhodes*, 36 Ch. D. 586 (1887); cf. *In re Aldersey*, [1905] 2 Ch. 181.

Such a presumption, then, will utterly fail of its purpose as to any issue to be decided by the jury if it vanishes upon the mere introduction of evidence which makes the issue one for the jury; it will best justify its existence if it persists until the evidence persuades the jury that the presumed fact does not exist or, at least, that its non-existence is equally as probable as its existence. There is no difficulty in framing or applying an instruction which will enable it to perform this most desirable office. Consequently, one of these two views should be adopted. If the oft-repeated formula which prohibits the shifting of the burden of persuasion is thought to have any applicable merit, the presumption should be held to disappear when the evidence puts the mind of the jury in equilibrium as to the existence of the presumed fact. If that formula be recognized for what it is really worth — a convenient rule applicable in the absence of a presumption — then the presumption should persist until the jury is persuaded by the evidence that the presumed fact does not exist.

If there be any presumption based solely upon inaccessibility of evidence, the same considerations are applicable. What is wanted is not the mere utterance of sounds or the production of writings in a court room; but sounds or writings which have some significance to the trier of fact.

Some presumptions the courts have created because the evidence which will establish the fact is peculiarly accessible to one of the parties. Thus, where a chattel in good condition is entrusted to a bailee for hire and he redelivers it in bad condition to his bailor, the damage is presumed to have been caused by the bailee's negligence. "The goods are entrusted to him. He has charge and control of them. He determines the manner of keeping them. He is in possession of such evidence as there is as to the circumstances attending the loss."²³ Is it reasonable to permit the presumption to be destroyed by the mere production of testimony which would justify a trier in finding due care but which in fact has no tendency to persuade the particular trier that such care has been used? It is true that in judicial

²³ Dibell, J., in *Rustad v. Great Northern Ry.*, 122 Minn. 453, 142 N. W. 727 (1913), given as reasons for putting the burden of persuasion upon the bailee, a warehouseman.

discussions of rules of evidence and procedure the dangers of perjury and the supposed efficacy of legal rules to prevent it are greatly overemphasized. Still, is it not true that a doctrine which allows a party to escape liability by merely producing evidence regardless of its actual convincing power is a real incentive to perjury? For example, if in cases like *McIver v. Schwartz*²⁴ or *Pariso v. Towse*²⁵ the owner of an automobile can by his bare denial escape the effect of the presumption that it was being operated with his authority or consent by the negligent driver, and thereby escape also liability, in how many such cases will such denial be wanting? In the former case, both the jury and the trial judge seem to have thought the defendant's testimony false, and their conclusion was buttressed by the failure of the defendant to call the driver as a witness; and yet the necessary effect of the court's opinion was that this totally worthless testimony prevented the case from going to the jury. In the latter, had the court felt itself free to adopt what it thought the proper doctrine, it would have given the same effect to the testimony of the defendant and the driver, although the jury discredited it, and not without reason. Surely the courts do not raise such a presumption merely for the purpose of making the opponent of the presumption cause words to be uttered; its premise is that the opponent knows the facts; for him to produce what the trier believes to be other than the information he really possesses, in no way fulfills the object of the presumption. It is conceded that practical difficulties prevent the adoption of a rule which makes the duration of the presumption depend upon belief or disbelief of specified items of evidence, and if the choice were between that and a rule which makes it disappear upon the mere introduction of the evidence, the latter might be preferred. But no real practical obstacles have ever been shown to exist to hinder or prevent the adoption of the doctrine which continues the presumption in effect until the evidence puts the mind of the jury in equilibrium as to the existence of the presumed fact. The same is true as to the rule which attributes to such a presumption the function of fixing the burden of persuasion, although this rule does run counter to the dogma which prohibits a

²⁴ 50 R. I. 68, 145 Atl. 101 (1929).

²⁵ 45 F.(2d) 962 (C. C. A. 2d, 1930), (1931) 44 HARV. L. REV. 861.

shifting of the burden of persuasion. It is, therefore, entirely reasonable to insist that where a presumption is created to compel the disclosure of the facts by the litigant to whom the evidence of them is peculiarly accessible, it should not be destroyed until the evidence persuades the jury at least that the non-existence of the presumed fact is as probable as its existence.

Sometimes the presumption has its origin in the judicial opinion that it expresses the balance of probability. Thus, it is presumed that a person found to have met his death by violence did not commit suicide. This is not due to any supposed difficulty of procuring evidence as to the facts, which will or may result in impossibility of an answer to a litigated question. It does not express any result which the court deems socially desirable. The conception back of it may be merely that nonsuicidal death is so usually the case that in the absence of evidence it must be taken for granted. It will not be enough merely to raise the question in the pleadings. It will be necessary to raise it also in the evidence. But once evidence is produced which makes it a question for the jury, the presumption has fulfilled the object of its being. If so, it ought then to vanish from the case. Since there is no difficulty in the application of such a rule, it should be adopted.

On the other hand, a court may well believe that the party who is alleging the happening of an unusual event, an event against the balance of probability, should prove it. Thus while the plaintiff seeking to recover under a policy of insurance against death by accident normally has the burden of showing accident, it might well be thought reasonable to require the defendant to prove that a death shown to have been caused by violence was suicidal. In a case of this sort, the effect to be given to the presumption should depend upon the court's judgment as to the reasons which called for the creation of the presumption. If they be anything more than the idea that until the query is raised in good faith the usual will be taken for granted, there is no reason in ruling that the presumption must die with the introduction of the evidence. The reason for putting this burden on the plaintiff in the first instance is that it is ordinarily fair to require a person who desires the *status quo* to be changed to show cause therefor. If it is to be changed upon the happening of an accident, he must show the accident; but as soon as he has proved a situation of which acci-

dent is the usual concomitant, there is no reason why his opponent should not be required to make it appear that in the particular case the unusual happened. And certainly it is hard to find a justification for not requiring him at least to make a showing which leaves the issue of accident or suicide in equilibrium.

If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing. And if the judicial desire for the result expressed in the presumption is buttressed by either the demands of procedural convenience or is in accord with the usual balance of probability, it is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect. Indeed, the only purpose which the reception of such credible but discredited evidence can ever accomplish is to demonstrate that in the particular case the proposition that the presumed fact exists is legally disputable, and the only situation in which such a purpose can furnish a justification for creating a presumption is one where the presumption expresses a balance of probability not potent enough to overcome the burden which must normally be borne by the litigant seeking to overcome the inertia of the court.

The presumptions which have the function of authorizing a jury to draw an inference which ordinary judicial experience would deem unjustifiable may owe their creation to a realization that the generalizations which judicial experience would ordinarily condemn have been demonstrated to be warrantable in the pertinent repetitive situations, or to a conviction that the judgment likely to be exercised by a jury in such situations will produce a result which the court deems socially desirable. If the former, the court is merely proclaiming that from the basic fact *A* any trier may reasonably deduce the presumed fact *B*; if the latter, it is giving an artificial effect to an item of evidence in order that a desirable result may be reached. Insofar as *A* is logically potent to produce the inference *B*, its power should not be destroyed except by evidence which persuades the jury that the inference should not be drawn. Insofar as *A* is given artificial power to produce that effect for the purpose of attaining a socially desirable objective, its power ought to persist until evidence

is produced which has an appreciable influence upon the mind of the trier.

The conclusion then is that most presumptions should, where applicable at all, continue to operate unless and until the evidence persuades the trier at least that the non-existence of the presumed fact is as probable as its existence. This would not interfere with the accepted dogma prohibiting the shifting of the burden of persuasion. It is suggested that that dogma has not the slightest foundation in reason when applied to situations where a presumption is involved, and should be entirely disregarded where the question arises as to the effect of evidence upon the persistence of a presumption. And in situations where a presumption owes its origin to an important social policy, it should operate to fix the burden of persuasion.

It doubtless requires a presumption unknown to judicial language to waste so much good white paper in an attempt to propose and expound a plan for making simple, sensible, and workable devices which the courts have been using for generations as if they were simple, sensible, and workable. But, after all, the attempt will pass unnoticed except by the few. And will the passing notice of the few serve to divert the current of judicial decision into less muddy channels? Hardly. "Vanity of vanities, saith the Preacher, vanity of vanities: all is vanity. . . . Then I looked on all the works that my hands had wrought, and on the labor that I had labored to do; and behold, all was vanity and vexation of spirit."

Edmund M. Morgan.

HARVARD LAW SCHOOL.