

THE CALIFORNIA EVIDENCE CODE: PRESUMPTIONS

The California Law Revision Commission, authorized to consider whether the Uniform Rules of Evidence¹ should be adopted in California,² recommended instead the adoption of a new code which would differ substantially from the Uniform Rules of Evidence and would produce important changes in existing California law.³ As a result of the Commission's recommendations, the Evidence Code was adopted by the Legislature and will become effective January 1, 1967.⁴ Among the Code's most significant innovations is the novel treatment it accords presumptions.⁵ It is the purpose of this Comment to critically examine the Code's provisions regarding rebuttable presumptions⁶ in civil cases.⁷

Section 600(a) of the Evidence Code defines a presumption as follows: "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action"⁸

The first element of this definition is that certain base facts (to be called *B*) must be established before it is assumed that the presumed fact (to be called *P*) exists.⁹ The "presumptions" of innocence of a crime or wrongdoing,¹⁰ of due care,¹¹ and of sanity¹² do not satisfy this

¹ The Uniform Rules of Evidence were approved by the National Conference of Commissioners in 1953.

² Cal. Stats. 1956, Res. ch. 42, at 263.

³ 6 CALIFORNIA LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES (1964).

⁴ CAL. EVIDENCE CODE, Cal. Stats. 1965, ch. 299.

⁵ CAL. EVIDENCE CODE §§ 600-06, 630-68.

⁶ Conclusive presumptions are outside the scope of this Comment. A conclusive presumption is one that no amount of evidence can rebut; once the base facts giving rise to the presumption are established, the presumed fact must be assumed. CAL. EVIDENCE CODE § 620. While the conclusive presumptions in the California Code of Civil Procedure §§ 1962 (2)-(5) appear in Evidence Code §§ 620-24, the presumptions in the Code of Civil Procedure §§ 1962(1), (6), (7) are omitted. Unless indicated otherwise, sections of the California Code of Civil Procedure cited in this Comment have been superseded by the California Evidence Code, Cal. Stats. 1965, ch. 299, effective Jan. 1, 1967.

⁷ Presumptions in criminal cases are outside the scope of this Comment. Evidence Code § 607 deals with the effect of a presumption that establishes an element of a crime.

⁸ California Code of Civil Procedure § 1959 provides: "A presumption is a deduction which the law expressly directs to be made from particular facts." Similar definitions appear in UNIFORM RULE OF EVIDENCE 13 and in the MODEL CODE OF EVIDENCE rule 701 (1942).

⁹ MCBAIN, CALIFORNIA EVIDENCE MANUAL § 1283 (2d ed. 1960). A fact may be established by the pleadings, by stipulation, by judicial notice, by evidence that could compel a finding that the fact exists, or by a finding by the jury. Morgan, *Instructing the Jury on Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 61 n.3 (1933); see UNIFORM RULE OF EVIDENCE 13, comment.

¹⁰ CAL. CODE CIV. PROC. § 1963(1).

¹¹ CAL. CODE CIV. PROC. § 1963(4).

¹² The Comment to California Evidence Code § 522 indicates that this "presumption" is often referred to in the cases. See, e.g., *People v. Daugherty*, 40 Cal. 2d 876, 899, 256 P.2d 911, 925-26 (1953).

definition because they do not rest upon the establishment of base facts.¹³ The Evidence Code, unlike existing law, treats these matters separately from presumptions and thereby maintains the integrity of the definition of a presumption.¹⁴

The second element of the Code's definition is that a presumption is a mandatory assumption: That is, once *B* is established, the law *requires* the assumption that *P* is true.¹⁵ The central question on the subject of presumptions is when should the assumption of *P* be required. At some point, the assumption must cease to be mandatory, otherwise the presumption is conclusive rather than rebuttable. On the other hand, if the assumption is mandatory at all, it should be required where no one produces evidence refuting it.¹⁶ All courts and writers appear

¹³ It has been argued that the "presumptions" of innocence, of due care, and of sanity do rest upon basic facts, but that the basic facts are judicially noticed. Olshausen, *Evidence: Presumptions as Evidence—A Reply*, 31 CALIF. L. REV. 316, 317-18 (1943).

¹⁴ CAL. EVIDENCE CODE §§ 520-22:

520. The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

521. The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

522. The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

Sections 520-22 are found in Article 2 which is entitled "Burden of Proof on Specific Issues." By "burden of proof," the Commission means burden of persuasion as opposed to burden of producing evidence. CAL. EVIDENCE CODE §§ 115, 500.

Presumptions appearing in the Code of Civil Procedure §§ 1963(5), (6), (14), (18), (20), (22), (25), (27), (29), (30), (38) will be discontinued. The presumptions now appearing in §§ 1963(19), (28), (32), (33) will be moved to California Civil Code §§ 3545-48 and will be treated as "Maxims of Jurisprudence."

¹⁵ Similarly, under current California law a presumption requires an assumption of *P*'s existence. Section 1959 of Code of Civil Procedure provides: "A presumption is a deduction which the law expressly directs to be made from particular facts." Section 1961 of Code of Civil Procedure provides: "A presumption . . . may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption."

¹⁶ The mandatory effect accorded presumptions is the characteristic distinguishing them from inferences. An inference is only a permissible assumption. "The jury is not compelled to draw the inference . . . even in the absence of contrary evidence and may refuse to do so." *Blank v. Coffin*, 20 Cal. 2d 457, 461, 126 P.2d 868, 870 (1942). See CAL. CODE CIV. PROC. § 1958.

California Evidence Code § 600(b) provides: "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

Morgan indicates that in some instances the jury is permitted to find the existence of a fact "although the inference of the existence of the . . . fact from the existence of the basic fact would not, in the opinion of the court, be possible if the rules of logic were applied." *Foreword* to MODEL CODE OF EVIDENCE at 53 (1942). This is stronger than an inference in that something is added to the pure logical value of the basic fact, and is weaker than a presumption because it is permissive. Such quasi-presumptions are difficult to detect, however, because courts usually do not indicate that they are applying anything

to agree that a presumption should have at least this effect; that is, it should impose upon the adverse party the burden of producing some evidence contradicting the existence of *P*. The confusion and disagreement afflicting the subject have centered around the question whether presumptions should have any greater effect.

Under existing California law, presumptions not only have the minimum mandatory effect of imposing upon the adverse party the burden of producing evidence contradicting the existence of *P*,¹⁷ but, in addition, current California presumptions are regarded as evidence which must be weighed by the fact finder along with all the other evidence in the case.¹⁸ Most other jurisdictions,¹⁹ on the other hand, follow the view espoused by Thayer²⁰ and adopted by the Model Code of Evi-

more than the "rules of logic." McCormick would have such super-inferences called permissive presumptions. McCORMICK, EVIDENCE § 308, at 640 (1954). But see Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 392 (1956).

The "inference" of *res ipsa loquitur* is mandatory; that is, it requires a finding in accord with the "inference" in the absence of any controverting evidence. *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 691, 268 P.2d 1041, 1046 (1954); see Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949); Note, 43 CALIF. L. REV. 146 (1954); Note, 2 U.C.L.A.L. REV. 431 (1955).

¹⁷ Under current law, presumptions shift the burden of producing evidence to the opponent. Direct holdings that presumptions shift the burden of producing evidence are rare, however, because the opponent is generally able to come forward with credible evidence of *P*'s nonexistence. McCORMICK, EVIDENCE § 310, at 649 (1954). Even when the opponent fails to adduce such evidence, statements in the decisions that a presumption has imposed the burden of producing evidence upon him are frequently dicta because often the opponent has the burden of producing evidence regardless of the presumption. In cases of this type, the opponent has the burden of persuasion that *P* does not exist, and, as a result, he also has the initial burden of producing evidence on that issue. CAL. EVIDENCE CODE § 550(b); 9 WIGMORE, EVIDENCE § 2487, at 279 (3d ed. 1940). The fact that the proponent later establishes a presumption does not *shift* the burden of producing evidence to the opponent since the opponent already has that burden. See, e.g., *Black v. Meyer*, 204 Cal. 504, 507, 269 Pac. 173, 174 (1928). Direct holdings that presumptions shift the burden of producing evidence occur in cases in which the opponent does not have the burden of persuasion or the burden of producing evidence at the beginning of the case; but the presumption shifts this burden to him and, because he fails to produce evidence of *P*'s nonexistence, the court *holds* that *P* must be assumed to exist as a matter of law. See, e.g., *Citizens Nat'l Trust & Sav. Bank v. Brown*, 54 Cal. App. 2d 688, 693, 129 P.2d 466, 469 (1942) (error not to find in favor of presumption of regularity); *Moore v. Miller*, 51 Cal. App. 2d 674, 678-79, 125 P.2d 576, 578-79 (1942); (jury properly instructed that presumed fact was true); *Gibson v. Mailhebuav*, 96 Cal. App. 455, 459, 274 Pac. 566, 567 (1929) (presumption of death from probate and issuance of letter required directed verdict for plaintiff); *Ross v. Gentry*, 94 Cal. App. 742, 271 Pac. 1098, 1099-1100 (1928) (conclusive presumption that letter duly mailed was received).

¹⁸ See notes 164, 182-83 *infra* and accompanying text.

¹⁹ See CAL. EVIDENCE CODE § 601, comment; *Morgan, Presumptions*, 10 RUTGERS L. REV. 512, 516 (1956).

²⁰ Professor Thayer is the leading authority espousing the theory that the only function of a presumption should be to fix "the duty of going forward with proof." THAYER, PRELIMINARY TREATISE ON EVIDENCE 313-52 (1898). This has become known as the "Thayerian."

dence²¹ that presumptions should have no effect beyond the imposition of the burden of producing evidence upon the adverse party. Presumptions having only this effect will be referred to as Thayer presumptions in this Comment. The principal dissent from the Thayer doctrine has been the theory advocated by Morgan²² and approved by the Uniform Rules of Evidence²³ that presumptions should impose upon the adverse party the burden of persuasion as well as the burden of producing evidence. Presumptions having this effect will be referred to as Morgan presumptions in this Comment.

The Evidence Code rejects the current California treatment of presumptions as evidence and adopts a system whereby some presumptions will have a Thayer effect while others will be accorded a Morgan effect. This Comment examines the appropriateness of the Code's position. Part I of the Comment describes the operation of Thayer and Morgan presumptions and explains the Code's standard for classifying presumptions into either the Thayer or the Morgan category. The conclusion reached is that the Code's classification scheme poses serious administrative difficulties. It is suggested in Part II that two types of presumptions are unnecessary and that the Code should have given all presumptions a Morgan effect on the grounds that the Morgan theory avoids the possibility of directed verdicts which would frustrate the policy reasons behind presumptions and enables trial judges to give instructions which vindicate those policy reasons. The objections to

Doctrine." Chadbourn, *A Study Relating to the Uniform Rules of Evidence—Burden of Producing Evidence, Burden of Proof, and Presumptions*, in 6 CALIFORNIA LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 1047, 1053 (1964) [hereinafter cited as Chadbourn, *Law Revision Study*].

²¹ The Model Code of Evidence was approved by the American Law Institute in 1942. With the exception of the presumption of legitimacy, all presumptions under the Model Code shift only the burden of producing evidence to the adverse party. MODEL CODE OF EVIDENCE rule 704 (1942). The presumption that a child born during wedlock is legitimate shifts the burden of persuasion to the adverse party. MODEL CODE OF EVIDENCE rule 703 (1942).

²² Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933). Morgan is the leading spokesman for the theory that all presumptions should have the effect of shifting the burden of persuasion.

²³ UNIFORM RULE OF EVIDENCE 14 provides that all presumptions shift the burden of persuasion except those presumptions in which the base fact giving rise to the presumption has no probative value as evidence of the presumed fact shift merely the burden of producing evidence. The drafters of the Uniform Rules would have preferred to have all presumptions shift the burden of persuasion, but they felt that a presumption based upon no probative value which shifted the burden of persuasion might be unconstitutional. See note 142 *infra*. Moreover, presumptions with no probative value are rare. One example is the presumption that an employer who does secure payment of workmen's compensation insurance negligently caused his employee's injury. CAL. LAB. CODE § 3708; *cf.* Chadbourn, *Law Revision Study* 1047, 1084 n.16. Under UNIFORM RULE OF EVIDENCE 14, therefore, almost all presumptions shift the burden of persuasion.

the Morgan theory are discussed and rejected as being ill-founded. Part III concerns the Evidence Code's repudiation of the current California doctrine that presumptions constitute evidence. The Code's position is supported because the "presumption is evidence" doctrine prevents peremptory rulings against parties relying upon presumptions and because it causes anomalous instructions which tend to confuse and mislead juries. In Part IV, other aspects of the Code's treatment of presumptions are briefly considered.

I

THE TWO TYPES OF PRESUMPTIONS UNDER THE EVIDENCE CODE

Section 601 of the Evidence Code provides: "Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of . . . [persuasion]." A presumption affecting the burden of producing evidence (which will be referred to as a Thayer presumption)²⁴ exerts the minimum force, mentioned in the discussion above, that may be accorded a mandatory assumption. When the proponent—the term to be used in this Comment to designate the party seeking to rely upon a presumption—establishes *B*, the opponent—the term to be used to designate the party seeking to refute the presumption—is then obliged to introduce evidence sufficient to support a finding that *P* does not exist;²⁵ failure of the opponent to introduce such evidence entitles the proponent to a peremptory ruling that *P* exists.²⁶ The opponent has failed to meet the burden of coming forward with sufficient evidence and he loses the issue as a matter of law. All presumptions under existing California law and the Evidence Code shift the burden of producing evidence.²⁷ The unique feature of a Thayer presumption is that it has no further function; once the opponent satisfies the burden of producing evidence, the presumption vanishes and the action proceeds as if the presumption never existed.²⁸

²⁴ See note 20 *supra*.

²⁵ Sufficient evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), *cited with approval in* Roberts v. Trans World Airlines, 225 Cal. App. 2d 344, 353, 37 Cal. Rptr. 291, 296 (1964); *accord*, Blank v. Coffin, 20 Cal. 2d 457, 461, 126 P.2d 868, 870 (1942); Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 578, 93 Pac. 377, 379 (1907); see 9 WIGMORE, EVIDENCE §§ 2485, 2487 (3d ed. 1940).

²⁶ CAL. EVIDENCE CODE § 604.

²⁷ See note 17 *supra*.

²⁸ Evidence Code § 604 describes the operation of the Thayer presumption as follows: "Subject to Section 607 [dealing with presumptions in criminal cases], the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard

A presumption affecting the burden of persuasion, a "Morgan" presumption,²⁹ is more durable than a Thayer presumption. A Morgan presumption not only shifts the burden of producing evidence,³⁰ thereby giving the proponent the opportunity for a favorable peremptory ruling, but also imposes upon the opponent the burden of persuasion.³¹

In dealing with Morgan presumptions, it is important to distinguish between evidence produced by the opponent which contradicts the existence of *B* and that which contradicts the existence of *P*.³² When the opponent's evidence contradicts *B*'s existence but does not directly contradict *P*'s existence, the judge should instruct the jury that, if *B* exists, it must find *P* exists. This is because once the jury determines that *B* is established, the presumption arises unchallenged and requires a finding that *P* exists.³³ When the opponent's evidence contradicts the existence of *P* but not the existence of *B*, the presumption arises and shifts the burden of persuasion to the opponent so that the jury is instructed that the existence of *P* must be assumed until the jury is persuaded to the contrary by a preponderance of the evidence.³⁴ When the opponent di-

to the presumption. Nothing in this section shall prevent the drawing of any inference that may be appropriate."

²⁹ See note 22 *supra*.

³⁰ "If the evidence is not sufficient to sustain a finding of the nonexistence of the presumed fact, the judge's instructions will be the same as if the presumption were merely a presumption affecting the burden of producing evidence." CAL. EVIDENCE CODE § 606, comment.

³¹ CAL. EVIDENCE CODE § 606.

³² MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 439-40 (4th ed. 1957).

³³ See note 30 *supra*.

³⁴ CAL. EVIDENCE CODE § 606, comment, recommends this instruction. The instruction is criticized in note 111 *infra*.

Distinguishing between evidence that contradicts *B*'s existence and evidence which contradicts *P*'s existence may be crucial in some situations. For example, a plaintiff, suing as beneficiary of a life insurance policy, attempts to prove the insured's death by producing evidence which establishes that the insured has been absent for seven years without tidings. Defendant conclusively proves that the insured was a fugitive from justice. If the base fact giving rise to a presumption of death is *unexplained* absence without tidings, the defendant's evidence explaining the insured's absence refutes the existence of the base fact and prevents the presumption from arising. Without the presumption, the plaintiff would fail to survive a motion for a nonsuit if the judge rules that evidence of an explained absence for seven years does not support a finding that the insured is dead; even if the judge rules that the evidence is sufficient to avoid a nonsuit, the plaintiff would have the burden of persuading the jury that the insured is dead. On the other hand, under Evidence Code § 667, the presumption of death arises from proof of seven-years absence without tidings. Consequently the defendant's explanation of the insured's absence would not refute the existence of *B* and the presumption of death would arise. The presumption imposes upon the defendant the burden of producing evidence that the insured is alive, and, in order to satisfy this burden, the defendant has merely shown that the insured was a fugitive from justice. If the judge decides that the defendant's evidence is insufficient to support a finding that the insured is alive, the judge would grant a motion for a directed verdict against the defendant. Even if the defendant avoids a directed verdict, however, he would have the burden of persuading the

rectly contradicts the existence of both *B* and *P*, the jury is told that if it finds *B* exists, it must also find *P* exists unless persuaded to the contrary by a preponderance of the evidence.³⁵

The Evidence Code provides that "a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied" is a Thayer presumption.³⁶ If a presumption is also designed to "implement some public policy," it is a Morgan presumption.³⁷ Sections 630-68 classify a number of presumptions³⁸ leaving the rest to be categorized by the courts.

The test of whether a presumption was created only "to facilitate" the individual action is not clear.³⁹ One interpretation might be that a presumption belongs in the Thayer category if it does not reflect any policy consideration at all but rests entirely upon the probative value of *B* as evidence of *P*.⁴⁰ It seems, however, that such a probability-alone test would not accurately reflect the standard adopted by the Code. Section 603 itself does not mention probability.⁴¹ The comment to section 603 is ambiguous: While some of the language in the comment suggests that

jury that the insured is alive. Cf. MORGAN, MAGUIRE & WEINSTEIN, *op. cit. supra* note 32, at 439-40.

If the presumption of death were a Thayer presumption, the same result would follow except that the plaintiff would always have the burden of persuasion.

³⁵ CAL. EVIDENCE CODE § 606, comment; see note 111 *infra*.

³⁶ CAL. EVIDENCE CODE § 603.

³⁷ CAL. EVIDENCE CODE § 605.

³⁸ Evidence Code § 630 classifies the presumptions established by §§ 631-45 as Thayer presumptions. Section 660 classifies the presumptions established by §§ 661-68 as Morgan presumptions.

³⁹ All presumptions are rules of general application rather than individually addressed commands and, in this sense, are based on considerations beyond facilitating the particular action in which the presumption is applied.

⁴⁰ A probability-alone test may be implied by the comment to California Evidence Code § 603 which states that Thayer presumptions "are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. . . . The presumptions described in section 603 [Thayer presumptions] are not expressions of policy; they are expressions of experience."

The term, "experience," is misleading. The author of the comment was probably paraphrasing a statement made by Thayer that presumptions rest upon "common experience." THAYER, PRELIMINARY TREATISE ON EVIDENCE 326 (1898). (The statement is quoted in the comment to § 601 of the California Evidence Code.) Thayer does not use the term "common experience" to refer to the common man's estimation of probabilities; he refers rather to the process by which a holding in a case becomes precedent for later decisions and finally hardens into a rule of law. In this sense, the common law may be said to rest upon the common experience of different judges dealing with similar problems. The rule of law that has developed—the presumption—may reflect the judges' determination as to what is the best policy, though it may bear no relation to his estimation of what is probable. THAYER, *op. cit. supra* at 314, 340, 351-52. Therefore, the "expressions of experience" language in the comment to § 603 should not be relied upon as support for the probability-alone test.

⁴¹ See text accompanying note 36 *supra*.

Thayer presumptions rest on no consideration other than probability,⁴² the comment also specifies that some Thayer presumptions are created for reasons other than probability—such as handicapping an opponent who has greater access to evidence concerning *P* than does the proponent.⁴³ Moreover, not all Thayer presumptions are supported by sufficient probative force to compel a directed verdict,⁴⁴ and since all Thayer presumptions require a directed verdict in the absence of conflicting evidence, they must be based on considerations other than probability alone.⁴⁵

A better interpretation is that the Code classifies presumptions according to the scope of the policies the presumptions are designed to implement. If the policy favoring the existence of *P* is relevant only to the parties' relationship but does not touch some broader social concern, the presumption falls into the Thayer category. For instance, where one party has greater access to proof of *P*'s nonexistence, it may be unfair to allow him to deny that *P* exists without producing evidence to that effect. The policy here affects only the parties; it does not reflect a determination that *P* is a socially desirable conclusion. Accordingly the comment to section 603 states that a presumption resting upon the access-to-proof policy falls into the Thayer category.⁴⁶

If a finding that *P* exists is in the interest of some public policy, the presumption belongs in the Morgan class. Section 605 states that the considerations giving rise to Morgan presumptions include "the policy in favor of the validity of marriage, the stability of titles to property or the security of those who entrust themselves or their property to the administration of others."

⁴² See note 40 *supra*.

⁴³ Thayer presumptions are used when "evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence." CAL. EVIDENCE CODE § 603, comment.

⁴⁴ The comment to California Evidence Code § 603 states that "*In some cases* the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence." (Emphasis added.) This implies that in other cases, the presumed fact of a Thayer presumption is not so likely to be true that the law would require it to be assumed on the grounds of probability alone.

⁴⁵ If *P*'s existence is not so likely that it must be assumed as a matter of law once *B* is established, then the assumption that *P* exists as a matter of law cannot rest solely upon the likelihood of *P*'s existence.

Laughlin asserts that all presumptions are, or should be, based on probability alone. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 219-21 (1953). But to assert that a presumption reflects only considerations of probability is to contend that its base facts have sufficient probative strength to require a finding, absent contrary evidence, that the presumed fact exists as a matter of law. If the base facts have such probative force, giving them the effect of a Thayer presumption adds no legal consequences whatever. See MISSOURI EVIDENCE CODE (Proposed) § 402(b)(2) (Mo. Bar 1948).

⁴⁶ See note 43 *supra*.

Classifying presumptions according to the policies they implement is, however, difficult because there is considerable debate as to what those policies are.⁴⁷ For instance, some authorities contend that the presumption of death from seven-years absence was designed to avoid an impasse when evidence of *P* is lacking⁴⁸—a policy meeting the criteria of a Thayer presumption.⁴⁹ The drafters of the Evidence Code, however, feel that the presumption reflects other considerations⁵⁰ and they place it in the Morgan category.⁵¹

It seems that presumptions rest upon an uncertain mixture of probability, convenience, and social policy.⁵² As the precise ingredients are unsettled, an imaginative trial judge could find some policy to underlie virtually any presumption. The comment to section 605 indicates that if a presumption serves the policy of settling titles to property, it should be classified as a Morgan type; on the other hand, the same policy could be said to apply to the Thayer presumptions concerning the authenticity of ancient documents,⁵³ the ownership of property from acts of ownership,⁵⁴ and the conveyance of property by a person duty-bound to convey.⁵⁵

⁴⁷ Attempts to classify presumptions have produced differing results. See, e.g., *Mutual Life Ins. Co. v. Maddox*, 221 Ala. 292, 128 So. 383 (1930); *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934); *Wolf v. N.Y. City & St. Louis R.R. Co.*, 347 Mo. 622, 148 S.W.2d 1032 (1941); *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934); *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907). See also *MISSOURI EVIDENCE CODE (Proposed)* 45-64 (Mo. Bar 1948); *McCORMICK, EVIDENCE* § 309 (1954); Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 313-21 (1920); Chafee, *The Progress of the Law*, 35 HARV. L. REV. 302, 310-11 (1922); Morgan, *Presumptions*, 12 WASH. L. REV. 255, 257-59 (1937); note 52 *infra*.

⁴⁸ MORGAN, *BASIC PROBLEMS OF EVIDENCE* 32 (1957).

⁴⁹ Comment to California Evidence Code § 603 states that a Thayer presumption may be created when "there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases."

⁵⁰ Comment to California Evidence Code § 605 states that "the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy" supports the seven-years-death presumption.

⁵¹ CAL. EVIDENCE CODE § 667.

⁵² *McCORMICK, EVIDENCE* § 309 (most presumptions are based upon a combination of several considerations); *McCormick, What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185, 188 (1938) (most presumptions based on a mixture of probability and independent procedural or social policy and the "ingredients are too mixed for the trial judge to detect by offhand taste the predominant flavor. . ."). See also *NEW JERSEY SUPREME COURT COMM., REPORT ON EVIDENCE RULE 14*, comment, at 48-49 (March 1963) (most presumptions involve social policy and to attempt to classify them would be impractical).

⁵³ CAL. EVIDENCE CODE § 643.

⁵⁴ CAL. EVIDENCE CODE § 638.

⁵⁵ CAL. EVIDENCE CODE § 642. This presumption may also implement a policy which,

Arguably, most of the presumptions accorded a Thayer effect by the Code promote the efficient conduct of business affairs by stimulating reliance upon the normal indicia of ownership and debt.⁵⁶

Because most presumptions reflect at least some public policy, the classification of presumptions may depend not upon the absence of any public policy, but upon the strength of that policy. Such a test will probably be difficult to administer as different judges assess the policy reasons for presumptions and the relative strength of those policies in different ways.⁵⁷

It may be helpful in classifying a presumption according to the public policy test to ascertain the probative value of *B* as evidence of *P*. To the extent that a presumption does not rest upon considerations of probability, it must have been created for policy reasons. Therefore, when the probative value is slight, the public policy is usually strong and the presumption will be a Morgan type.⁵⁸

The probative-value test alone, however, does not solve the classification problem.⁵⁹ The test is not useful when the probative value of *B* is

according to California Evidence Code § 605, should give rise to a Morgan presumption; that is, it protects "the security of those who entrust themselves or their property to the administration of others." CAL. EVIDENCE CODE § 605.

⁵⁶ See, e.g., CAL. EVIDENCE CODE § 635 ("an obligation possessed by the creditor is presumed not to have been paid"); § 637 ("the things a person possesses are presumed to be owned by him").

⁵⁷ For cases in which judges reached different conclusions in classifying presumptions, see note 47 *supra*. Opinions also differ as to the relative strength of policy considerations. For instance the presumption that the driver of a car was acting as the agent of the owner is considered by one writer to be supported by exceptionally strong policy considerations. Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1, 35-36 (1958). In California, however, the courts apparently do not feel that significant policy considerations support a finding that the driver is the owner's agent because they do not even allow the agency of the driver to be inferred, *Wilson v. Droege*, 110 Cal. App. 573, 294 Pac. 726 (1930), unless the driver is an employee of the owner or a member of the owner's family. *Halbert v. Berlinger*, 127 Cal. App. 2d 6, 17-18, 273 P.2d 274, 281 (1954); *Stewart v. Norsigian*, 64 Cal. App. 2d 549, 553, 150 P.2d 554, 556, *denying petition for rehearing of* 64 Cal. App. 2d 540, 149 P.2d 46 (1944).

⁵⁸ "[T]he lack of an underlying inference [a basis in logic and experience for allowing the existence of *P* to be found from proof of *B*] is a strong indication that the presumption affects the burden of . . . [persuasion]. Only the needs of public policy can justify the direction of a particular assumption that is not warranted by the application of probability and common experience to the known facts." CAL. EVIDENCE CODE § 605, comment. For instance, the seven-years-death presumption is usually deemed to rest on an insubstantial logical inference. Compare CAL. EVIDENCE CODE § 605, comment; *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934), with Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 216-17 (1953); *McBaine, Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 23 (1954).

⁵⁹ Opinions about the probability underlying various presumptions differ widely, indicating that varying degrees of probability are not readily apparent. Even the presumption that a letter mailed was received has, by one writer at least, been deemed

substantial, because the presumption may still implement a strong public policy and, therefore, belong in the Morgan category.⁶⁰ Moreover, the test is not always accurate, for even when the probative value of *B* is slight the presumption may not reflect a strong public policy; it may have been created because the opponent has greater access to proof of *P* or because such proof is unavailable to either party.⁶¹ Some Thayer presumptions, therefore, may be supported only by a tenuous logical connection.⁶²

Apparently, there is no easy standard for judges to use in classifying presumptions. The burden on judges is especially heavy since they must often classify a presumption in the heat of a trial.⁶³ In short, the

to have no probative value. Comment, 1945 WIS. L. REV. 374, 388. Chafee considers it to rest upon both probability and social policy. Chafee, *The Progress of the Law, 1919-1921*, 35 HARV. L. REV. 302, 312 (1922). Opinions differ as to the probative basis of the presumption of sanity. Compare McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 23 (1954), with McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 534 (1938).

Is the presumption against suicide based on probability alone? See, e.g., *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F.2d 724 (4th Cir. 1935); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 930 (1931). Or is it supported by only slight probability? *Waldron v. Metropolitan Life Ins. Co.*, 347 Pa. 257, 31 A.2d 902 (1943); MISSOURI EVIDENCE CODE (Proposed) § 404(b)(3) (Mo. Bar 1948). It may be based on public policy. See Laughlin, *The Location of the Burden of Persuasion*, 18 U. PITT. L. REV. 3, 23-24 (1956). In *Beers v. California State Life Ins. Co.*, 87 Cal. App. 440, 468, 262 Pac. 380, 392 (1927), it was held to shift the burden of persuasion.

⁶⁰ "Frequently, too, a presumption affecting the burden of . . . [persuasion] will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on the probability that most marriages are valid." CAL. EVIDENCE CODE § 605, comment.

⁶¹ See notes 43, 49 *supra*.

⁶² See note 83 *infra*. There may be a tendency, in view of procedural considerations discussed in notes 66-68 *infra* and accompanying text, to give a Morgan effect to every presumption which lacks an underlying inference. Such a standard of classification would be contrary to the classification scheme of the Evidence Code, which contemplates a distinction between Thayer and Morgan presumptions on the basis of policy, not probability. See text accompanying notes 81-85 *infra*.

⁶³ "It would be fatuous to expect . . . [a trial judge] to determine the reasons and objects of a presumption suddenly thrust at him in the hurry of a trial, with a demand to classify it and accord it appropriate effect." Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245, 254 (1943) (also indicating that a single rule, easily understood and capable of instant application at the trial, should be adopted). Morgan's statement that presumptions must be classified in the "hurry of a trial" may be misleading. A ruling upon a presumption is not like a ruling upon a motion regarding the admissibility of evidence which must be given immediately in open court. A trial judge generally has more time to consider how he should treat a presumption because he need not rule upon a presumption during the presentation of evidence. Such a ruling is required only at the pretrial conference, when a motion for a peremptory ruling is made, or in framing the instructions to the jury. The task of classification is, therefore, burdensome but not impossible.

The task of classification may be never-ending because there are numerous statutory and judge-made presumptions, because new presumptions are continually being created, and because each presumption must await an adjudication by the California Supreme Court before it is authoritatively classified. See MACUIRE, *EVIDENCE, COMMON SENSE AND COMMON LAW* 188 (1947); Morgan, *supra* at 254.

division of presumptions into classes presages serious administrative difficulties.⁶⁴

II

ARE TWO KINDS OF PRESUMPTIONS NECESSARY?

In order to evaluate the determination by the drafters of the Evidence Code that "the Thayer view is correct as to some presumptions, but . . . the Morgan view is right as to others,"⁶⁵ it is necessary to consider the practical differences between these two types of presumptions. There are essentially two differences. The first concerns directed verdicts. In some situations, a proponent relying upon a Thayer presumption will suffer a directed verdict against him, while if the presumption were a Morgan type he would reach the jury. The second difference concerns the judge's instructions to the jury. The jury may be told that the proponent of a Thayer presumption has the burden of persuasion that *P* exists; in the case of a Morgan presumption, however, the opponent always has the burden of persuasion that *P* does not exist.

A. Directed Verdicts

In the case of some Thayer presumptions, the opponent may win a directed verdict by producing evidence of the nonexistence of the presumed fact from which reasonable men could conclude that *P* does not exist. By producing the evidence, the opponent has met the burden imposed by the presumption and the presumption vanishes. The proponent can no longer rely upon the presumption. If he has introduced no evidence of *P*'s existence other than fact *B*,⁶⁶ if reasonable men could not conclude from proof of *B* alone that *P* exists, and if the proponent has the burden

⁶⁴ See Chadbourn, *Law Revision Study* 1047, 1083-84 (bifurcation would create uncertainty and complexity). The classification of presumptions would add "complexity to a mechanism already too complex for ready administration." McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291, 305 (1927).

UNIFORM RULE OF EVIDENCE 14, also classifies presumptions into Morgan and Thayer types. The standards of classification under Rule 14 differ markedly from the test set up by the Evidence Code. Under Rule 14, presumptions that "have any probative value" are Morgan presumptions, while those that "have no probative value as evidence of the presumed fact" are Thayer presumptions. The classification formula of Rule 14 (whether the basic fact of a presumption has probative value as evidence of the presumed fact) appears easier to apply than the test of the California Evidence Code §§ 603, 605 (whether the presumption is designed to implement some public policy or simply to facilitate the individual action). Even the test of Rule 14 has been criticized as being too complex. See Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 409 (1956); Augustus Hand criticizing a proposal similar to Rule 14 in 18 A.L.I. PROCEEDINGS 208-09 (1941).

⁶⁵ CAL. EVIDENCE CODE § 601, comment.

⁶⁶ The proponent could present such evidence either in his case in chief or in a rebuttal to the opponent's case in chief. LOUISELL & HAZARD, *CASES ON PLEADING AND PROCEDURE* 902-03 (1962).

of persuasion on the issue,⁶⁷ then the opponent is entitled to a directed verdict. This is so even though the jury might disbelieve his evidence, because the proponent has failed to show that *P* exists.⁶⁸ The presence of these three preconditions admittedly poses an extreme case and one that judges interpreting the Evidence Code will seek to circumvent by classifying as a Morgan presumption any presumption in which *B* lacks sufficient probative value to support a finding of *P* or by distorting the probative value of *B* as evidence of *P*. This problem of judicial avoidance will be discussed later in this Comment.⁶⁹

In the case of a Morgan presumption, however, the burden of persuasion shifts to the opponent. Even though the proponent has failed to show that *P* exists, the issue goes to the jury. If the jury is not convinced by the opponent's evidence that *P* does not exist, the opponent has not sustained the burden of persuasion and the jury must find for the proponent.⁷⁰

Is the Thayer rule desirable to the extent that the introduction of evidence sufficient to support a finding against a Thayer presumption may require a peremptory ruling that *P* does not exist? To answer this question one must determine whether the reasons for creating presumptions are satisfied by the production of such evidence.

It seems that evidence of *P*'s nonexistence which may be disbelieved by a jury should not rebut a presumption based on a public policy consideration. The Evidence Code may have given "public policy" presumptions a Morgan effect in order to avoid their rebuttal by such evidence. As noted above,⁷¹ however, several of the presumptions classified in the

⁶⁷ In the foregoing discussion it is assumed that the proponent always has the burden of persuasion, unless, by the operation of a Morgan presumption, this burden is shifted to the opponent. If the opponent already had the burden of persuasion (and, necessarily, the initial burden of producing evidence, see CAL. EVIDENCE CODE § 500 (b)) both Morgan and Thayer presumptions would be redundant and, therefore, would have no effect. See CAL. EVIDENCE CODE § 606, comment; Morgan, *Further Observations on Presumptions*, 16 SO. CAL. L. REV. 245, 260 (1942).

⁶⁸ See *Del Vecchio v. Bowers*, 296 U.S. 280 (1935) (presumption of death); *McIver v. Schwartz*, 50 R.I. 68, 145 Atl. 101 (1929) (presumption of agency); Chadbourn, *Law Revision Study* 1047, 1054 n.10; Morgan, *Instructing the Jury Upon Presumptions and the Burden of Proof*, 47 HARV. L. REV. 59, 80 (1933); Reaugh, *Presumptions and Burden of Proof*, 36 ILL. L. REV. 819, 822 n.168 (1942).

If less than all three of the conditions set forth in the text (proponent only produces evidence as to *B*'s existence, *B* does not have sufficient probative force to support a finding of *P*, and the proponent has the burden of persuasion) are present, the opponent will not be entitled to a peremptory ruling when he introduces evidence sufficient to support a finding of *P*'s nonexistence.

⁶⁹ See text accompanying notes 77-85 *infra*.

⁷⁰ See MORGAN, BASIC PROBLEMS OF EVIDENCE 18-19 (1957); 9 WIGMORE, EVIDENCE § 2485 (3d ed. 1940).

⁷¹ See text accompanying notes 52-56 *supra*.

Thayer category by the Evidence Code may also serve some public policy and, in these cases, that policy may be frustrated.

The comment to section 603 implies that the Thayer rule is adequate to deal with the reasons other than public policy which underlie presumptions. These reasons will be considered under the headings "access to proof," "procedural impasse," and "probability."⁷²

1. Access to Proof

A Thayer presumption may be established because the opponent has superior access to pertinent information as to the presumed fact. If a Thayer presumption rests upon the access-to-proof policy alone and if *B* is not probative of *P*'s existence, then the proponent having introduced no evidence other than *B* is subject to an adverse preemptory ruling upon the opponent's production of evidence that *P* does not exist. However, it seems that the opponent should not be awarded automatic victory for unconvincingly coming forward with evidence which, as the very basis of the presumption suggests, is easy for him to fabricate.⁷³

2. Procedural Impasse

If proof of a given type of fact is usually not available, the duty of proving the fact should not depend upon which litigant happens to be the moving party in court.⁷⁴ Consequently, a presumption is used to settle the issue in favor of the party seeking to prove that the fact exists. But if, as is the case when *B* is not probative of the existence of *P*, a scoreless tie is broken in favor of the proponent when there is no evidence, why should the same tie be decided against him when the opponent has introduced perjured or discredited evidence? The unknown fact is no nearer explanation because disbelieved testimony has been produced.⁷⁵

⁷² The Law Revision Commission feels that any presumption resting upon considerations of probability, access to proof, or procedural impasse should be a Thayer presumption. CAL. EVIDENCE CODE § 606, comment.

⁷³ "Such control and knowledge present too fruitful opportunities for fabrication to permit the mere introduction of uncredited testimony to destroy the presumption. To hold otherwise would be to give . . . [the presumption] but little effect other than as a mere regulation of the order of presenting evidence, and to defeat in great measure the very purpose of its creation." Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 927 (1931).

⁷⁴ Where money or property would remain undistributed unless the interested parties bring the matter to court, a rule which placed the burden of proving the testator's death upon the moving party would tend to discourage litigation and, therefore, prevent distribution of the property. This may account for the seven-years-death presumption. See MORGAN, MAGUIRE & WEINSTEIN, *CASES ON EVIDENCE* 441-42 (4th ed. 1957). However, the seven-years-death presumption shifts the burden of persuasion. See CAL. EVIDENCE CODE § 667.

⁷⁵ See Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 78 (1933).

3. Probability

The comment to section 603 of the Evidence Code states that, "In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence." A proponent relying initially upon a presumption based on probability would normally avoid a peremptory instruction against him, even though the opponent met the burden of going forward and dispelled the presumption. The probative value of the base fact is sufficient, without the presumption, to support a finding of the presumed fact and therefore the issue goes to the jury.⁷⁶ It would be irrational to rule as a matter of law that *P* is no longer probable merely because evidence which might be disbelieved disputes this probability.

4. Judicial Response to the Directed Verdict Problem

It appears then, that adverse evidence (unless it is so persuasive that it compels belief) cannot dispel presumptions whether based on public policy, access to proof, procedural impasse, or probability without defeating the purposes of their creation.⁷⁷ Many authorities support this view, arguing that Thayer presumptions are too easily rebutted.⁷⁸ Similarly, although most American jurisdictions are committed to the Thayer doctrine, they depart from the doctrine when asked to rule against a Thayer

⁷⁶ CAL. EVIDENCE CODE § 604, comment (when the presumption is rebutted, the jury may still weigh the inference underlying the presumption). See also THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 349 (1898); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 218 (1953).

⁷⁷ Arguably, Thayer presumptions serve a discovery function; that is, they extract evidence from the opponent. Cleary notes, however, that modern discovery rules have not diminished the use of presumptions. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 18 (1959). Moreover, the presumption is an unsatisfactory discovery device to the extent that the opponent's evidence, though not conclusive, rebuts the presumption and subjects the proponent to an adverse peremptory ruling. Although in such a case the presumption may force the opponent to testify, thereby becoming subject to cross-examination discrediting his testimony, the verdict is nevertheless directed in his favor.

⁷⁸ See, e.g., authorities listed in Chadbourn, *Law Revision Study* 1047, 1055 nn.11-13; MAGUIRE, *COMMON SENSE AND COMMON LAW* 183 (1947); Chafee, *The Progress of the Law*, 35 HARV. L. REV. 302, 310-17 (1922); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 18 (1959); Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1 (1958); Shain, *Presumptions Under the Common and the Civil Law*, 18 SO. CAL. L. REV. 91 (1944). Chief Justice Traynor criticizes the Thayer rule because "the purpose of the presumption can be defeated by perjured testimony that is not believed by the trier of facts; the mere introduction of evidence, however unreliable, suffices to dispel the presumption." *Speck v. Sarver*, 20 Cal. 2d 585, 593, 128 P.2d 16, 20 (1942) (Traynor, J., dissenting).

Thayer's thesis is supported in: 9 WIGMORE, *EVIDENCE* §§ 2485-91 (3d ed. 1940); Chadbourn, *Law Revision Study* 1047; Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

presumption as a matter of law.⁷⁹ In fact, the California courts may have adopted the theory that a presumption is evidence in order to avoid this result.⁸⁰

Judges applying the Evidence Code may seek to avoid the directed verdict effect of Thayer presumptions by classifying only those presumptions based on an underlying logical inference⁸¹ as Thayer presumptions. Such a classification would, however, be difficult to justify since the Evidence Code does not use probability as the sole criterion for classification. It is doubtful, therefore, that courts will categorize presumptions strictly according to their probative value.⁸² As a result, there may be some Thayer presumptions in which the probative value of *B* is weak.⁸³ Courts

⁷⁹ For example, the Washington courts purport to follow the Thayer rule stating that the opponent's production of prima facie evidence rebuts the presumption. *Feldtman v. Russak*, 141 Wash. 287, 290, 251 Pac. 572, 573 (1926). That case indicates that when the presumption that an employee driving his employer's car was acting within the scope of his employment is rebutted, the proponent should not be able to reach the jury unless he adduces further evidence. *Ibid.* Nevertheless, it has been held that, in order to rebut the presumption of agency and require a directed verdict against the proponent, the prima facie defense must be established by an uninterested witness. *Barach v. Island Empire Tel. & Tel. Co.*, 151 Wash. 279, 285-86, 275 Pac. 713, 715 (1929). See also Gausewitz, *Presumption in a One-Rule World*, 5 VAND. L. REV. 324, 333, 337-38 (1952); Helman, *Presumptions*, 22 CAN. B. REV. 118, 122 (1944); Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 819, 822 n.170 (1942).

⁸⁰ See note 168 *infra*. The presumption-is-evidence doctrine is discussed in Part III of this Comment.

⁸¹ A presumption based on an underlying inference is a presumption in which *B* has sufficient probative value as evidence of *P* that, even if there were no presumption, proof of *B* would support a finding of *P*.

⁸² See text accompanying notes 41-62 *supra*.

⁸³ The base facts of some of the presumptions given a Thayer effect by the California Evidence Code may not have sufficient probative value to support a finding of *P*. For instance, the presumptions of ownership of things possessed and ownership of property by a person exercising acts of ownership, CAL. EVIDENCE CODE §§ 637-38, may be founded upon insufficient references. See MISSOURI EVIDENCE CODE (Proposed) § 404(b)(7) (Mo. Bar 1948). Most writers admit that presumptions usually have at least some probative basis. UNIFORM RULE OF EVIDENCE 14, comment; Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245, 253 (1943). However, the probative basis may constitute mere relevancy (evidence which tends to prove a fact, making its existence more likely than it would be without such evidence), or it may be strong enough to be considered probative sufficiency (evidence which makes the fact more probably true than false). MCCORMICK, EVIDENCE § 313, at 660 (1954); see *Yee Hem v. United States*, 268 U.S. 178, 184-85 (1925) (presumption of knowledge that opium had been imported from proof of possession of opium based on a logical connection which was relevant, but possibly not probatively sufficient to overcome presumption of innocence in criminal case). According to one view, the base facts of a presumption are relevant evidence of *P* but are not probatively sufficient evidence to make a conclusion that *P* exists rationally permissible. *Alpine Forwarding Co. v. Pennsylvania R.R.*, 60 F.2d 734, 736 (2d Cir. 1932) (Hand, J., stating that if presumptions were based upon rationally permissible inferences "there would be no need for . . . [presumptions] at all"). See also Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 340-41 n.35 (1952). Although the classification system in the

may still avoid giving peremptory rulings against proponents simply by treating the probative value of *B* as stronger than it really is. The line between relevancy and probative sufficiency is not so clearly drawn that courts cannot blur the distinction in deference to the policies underlying presumptions.⁸⁴ Courts may allow a merely relevant logical connection to carry the proponent to the jury.⁸⁵ If, by refusing to classify nonprobative presumptions in the Thayer category or by distorting the probative value of *B* in Thayer presumptions, judges mitigate the effect of Thayer presumptions upon directed verdicts, then the only substantial difference between Morgan and Thayer presumptions would involve the trial judge's instructions to the jury.⁸⁶

B. Jury Instructions

If a Morgan presumption is applicable in a given case, the jury is told that the opponent has the burden of persuading them that the presumed fact does not exist.⁸⁷ Under the Thayer doctrine, a proponent retains the burden of persuasion.⁸⁸ The advantage of receiving a favorable instruction on the burden of persuasion is questionable. Some writers insist that the importance of the charge is overrated because it seems to have little in-

Evidence Code is based upon Professor Bohlen's thesis, CAL. EVIDENCE CODE § 601, comment, Bohlen states that the base facts of Thayer presumptions do not have sufficient probative value to support a verdict of *P*. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 313-17 (1920).

⁸⁴ Judge Lummus called the distinction "much of a refinement." 18 A.L.I. PROCEEDINGS 203 (1941).

⁸⁵ Although a Thayer presumption is rebutted, a proponent may reach the jury if *B* gives rise to an inference of *P*. In California the term "inference" has a flexible meaning due to the practice of calling nonstatutory presumptions "inferences." See note 240 *infra*. Some nonstatutory presumptions may not be supported by an inference; that is, *B* may not have sufficient probative value to support a finding that *P* exists. For instance, there is authority that the fact that an employee was driving his employer's automobile does not support an inference that the employee was acting with his employer's permission. See *Pariso v. Towse*, 45 F.2d 962 (2d Cir. 1930); *McIver v. Schwartz*, 50 R.I. 68, 145 Atl. 101 (1929); MISSOURI EVIDENCE CODE (Proposed) § 606(b)(1) (Mo. Bar 1948); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 20 nn.111-12 (1954); Geraldson, *A Code of Evidence for Wisconsin: Presumptions and Their Effect*, 1945 WIS. L. REV. 374, 388; Note, 1941 WIS. L. REV. 521, 522. According to the California decisions, however, there is an "inference" that the employee had permission. *Blank v. Coffin*, 20 Cal. 2d 457, 117 P.2d 53 (1942). If the courts may treat this nonstatutory presumption as an inference, they may be willing to regard a rebutted Thayer presumption as an inference even though it is not supported by probative sufficiency. For a discussion of the anomalous results that this practice may produce see text following note 93, *infra*.

⁸⁶ A further difference between Morgan and Thayer presumptions concerning the availability of directed verdicts and nonsuits is discussed below. See notes 179-81 *infra* and accompanying text.

⁸⁷ See CAL. EVIDENCE CODE § 606, comment.

⁸⁸ See CAL. EVIDENCE CODE § 604, comment.

fluence with the trier of fact.⁸⁹ Arguably, the burden of persuasion affects few cases because it comes into play only when the fact finder cannot decide whether a proposition is more probable than not.⁹⁰ Since the susceptibility of Thayer presumptions to directed verdicts upon the introduction by the opponent of evidence that inconclusively contradicts *P*'s existence is unfortunate and may be avoided, the only remaining difference between Morgan and Thayer presumptions which might justify the bifurcation of presumptions into two classes is the instruction on the burden of persuasion. If the view is correct that the instruction has only a trivial effect, then the bifurcation is unnecessary.

In some cases, however, the instruction on the burden of persuasion may be a crucial factor in the jury's decision.⁹¹ For instance, the other instructions may be incomprehensible,⁹² or the evidence on both sides may be sparse or involved and confusing. The presumption may affect only one of several issues in a case and the proponent may have the burden of persuasion on those other issues. In this case, the jury would be told that the proponent has the burden of proving every issue other than *P*'s existence, and on that issue the opponent has the burden of persuasion that *P* does not exist. The jury may conclude from this instruction that *P* has unusual importance and this conclusion may affect the outcome of their deliberations.

Although the burden of persuasion should be considered only after the jury has weighed the evidence, it may in practice affect the weighing

⁸⁹ Morgan, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1946) ("Except where the allocation of either burden [the burden of producing evidence or the burden of persuasion] operates to change the respective functions of judge and jury, it plays but a small part in the actual disposition of the case by the trier of fact.") McCormick suggests that when trial judges find the facts in nonjury cases they rarely decide upon the basis of the burden of persuasion because to do so would "admit defeat in the search for truth," and that the jury is not "affected by the location of the burden of persuasion unless an attorney puts undue emphasis upon the burden in his argument. MCCORMICK, EVIDENCE § 322, at 686 (1954). See Markham, *Why a "Burden of Going Forward"?*, 16 N.C.L. REV. 12, 16 (1937) (the burden of persuasion is based upon a "remote and unusual contingency" because there is "no such thing as a tie score" in the minds of the jury).

⁹⁰ "As few cases, if any, are ever evenly balanced, the burden of proof has more theoretical than practical importance. Trial lawyers have more than a suspicion that the jury either does not understand the instruction or pays no attention to it, and that it is chiefly a device for getting error into the record." Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 218 (1949). See also McCormick, *Wigmore on Evidence: Third Edition*, 35 ILL. L. REV. 540, 543 (1941); Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 191 (1944). A poll of jurors showed that the instruction on the preponderance of the evidence was one of the most difficult instructions to understand. *Report of Proceedings on Trial by Jury*, 11 U. CINC. L. REV. 119, 195 (1937).

⁹¹ See Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 119-20 (1954). See also MORRIS, TORTS 138 (1952).

⁹² See *Scott v. Burke*, 39 Cal. 2d 388, 402, 247 P.2d 313, 321 (1952) (Traynor, J., dissenting). See also notes 204-05 *infra*.

process. The jury is told where the burden lies before it goes out to deliberate, and it may look at the evidence produced by the burdened party with more scepticism than it accords the evidence produced by the party not so burdened.⁹⁸

Assuming that an instruction concerning the burden of persuasion may be a significant handicap to the party who has the burden, it is arguable that a presumption appropriately shifts the handicap to the opponent.

In one situation, an instruction that the proponent has the burden of persuasion may confuse the jury and lead to undesirable results. The situation arises when a base fact giving rise to a Thayer presumption is in logic and experience insufficient to support a finding that *P* exists. When the opponent rebuts such a presumption by coming forward with evidence of *P*'s nonexistence, the court may avoid directing a verdict against the proponent by overvaluing the probative force of *B* and treating it as sufficient evidence of *P* to enable the proponent to reach the jury, instructing it only that the proponent has the burden of persuasion. Although the proponent has done nothing to sustain his burden of persuasion other than to introduce evidence that *B* exists and even though a reasonable man could not infer that *P* exists from proof of *B*, the jury is permitted to find that the proponent has proved his case; that is, it may infer from *B* that *P* exists.

Giving this instruction may produce any of four results: (1) The jury believes the opponent and refuses to draw the inference for the proponent; verdict for opponent. (2) The jury disbelieves the opponent and draws the inference for the proponent; verdict for proponent. (3) The jury believes the opponent, yet cannot understand why it is allowed to draw an inference which has no logical support, unless the inference is to be given some kind of artificial effect. The jury, therefore, finds that the opponent has not overcome this indefinite artificial additive; verdict for proponent. (4) The jury disbelieves the opponent and refuses to draw the inference for the proponent. The jury is not convinced by either party

⁹⁸ "[O]nce the members of the jury learn of the existence of the presumption, which, an instruction has indicated, possesses some mysterious relationship to certain facts, it is highly probable that the unusual importance of this fact-group will remain uppermost in their minds throughout the deliberations leading to a verdict . . ." Brosnan, *The Statutory Presumption*, 5 *TUL. L. REV.* 17, 178, 196 (1930). This bias could be avoided by not mentioning the burden of persuasion to the jury. The judge could instruct that if the jury is unable to decide which side of an issue is more probably true, it should return a "no verdict." When a "no verdict" is returned, the judge would find in favor of the party who did not have the burden of persuasion. See Gausewitz, *Presumptions in a One-Rule World*, 5 *VAND. L. REV.* 324, 342 (1952). One reason that this practice has not been adopted may be that the courts intend the burden of persuasion instruction to have a greater effect than merely to resolve the issue when the jury finds that the probabilities are evenly balanced.

and, because the burden of persuasion is on the proponent, the verdict is for the opponent.

The judge must have permitted the jury to decide the case because he felt that the policy behind the presumption was so significant that, if the jury disbelieves the opponent, it should find *P* exists. Certainly, if the jury is convinced by the evidence that *P* does not exist, it should not capriciously decide that *P* does exist. To sanction this result would be to enable the jury to disregard the facts and treat the presumption as conclusive. Therefore, only (1) and (2) are desirable results. The Morgan rule would avoid the confusion inherent in telling the jury that the proponent has the burden of persuasion and that it may find *P* exists even though the proponent, having produced almost no probative evidence of *P*'s existence, has made no showing which could satisfy his burden. Shifting the burden of persuasion to the opponent without instructing the jury that the opponent is aided by a presumption would permit (1) and (2), yet avoid (3) and (4).

In other situations, encumbering the opponent with the burden of persuasion is justified by the reasons for creating presumptions. It seems fair to handicap a litigant seeking to establish a fact that either goes against some public policy⁹⁴ or is peculiarly within his ability to prove.⁹⁵ Shifting the burden of persuasion is consistent with the procedural impasse policy as well: If an issue may properly be decided against a party where there is no evidence, surely it is equitable to rule against him when the evidence is evenly balanced. When considerations of probability are involved, it is reasonable that a party who attempts to show the unusual have the burden of proving it; that is, when the jury cannot decide whether the existence or nonexistence of a proposition is more probable, it is just to award victory to the proponent who has common experience on his side.⁹⁶ The comment to section 500 of the Evidence Code indicates

⁹⁴ EVIDENCE CODE § 605 provides that the presumptions which reflect public policy shift the burden of persuasion. See text accompanying note 46 *supra*. One reason the Law Revision Commission departed from Uniform Rule 14, was that presumptions which were weak in probative value were usually based upon strong policy considerations which would be frustrated if the presumption were rebutted by the mere production of contrary evidence. See CAL. EVIDENCE CODE § 601, comment (Tent. Draft, June, 1964); *cf.* Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 317-21 (1920); Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703, 721-22 (1942).

⁹⁵ See note 73 *supra*.

⁹⁶ See Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 82 (1933).

Laymen are reputed to be skeptical about the value of circumstantial evidence. The jury may "mistakenly suppose that the circumstantial evidence, especially if countered by direct testimony, could not be 'a preponderance of the evidence.'" McCORMICK, EVIDENCE

that a decision to shift the burden of persuasion should take into account these very considerations.⁹⁷

Some presumptions are created for the purpose of saving time at trial.⁹⁸ If an opponent does not normally challenge the existence of a given fact, it is a waste of time to require the proponent to produce evidence on the point. It may seem that once the opponent contests the issue by producing evidence, time can no longer be saved and the presumption should vanish. On the other hand, a presumption created for no other purpose than to save time is extremely rare. Not every operative fact of a cause of action or an affirmative defense is assumed until evidence is produced against it. Only certain fact groups are singled out for time-saving treatment; the selection is generally based upon public policy, access to proof, procedural impasse, or probability.⁹⁹ As noted

§ 316, at 668 (1954). Instructions that the opponent has the burden of persuasion may serve to offset this skepticism. McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185, 187 (1938).

⁹⁷ "In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or non-existence of the fact." CAL. EVIDENCE CODE § 500, comment. It is generally accepted that presumptions are based upon the same considerations which determine the allocation of the burden of persuasion. See Chafee, *The Progress of the Law, 1919-1921*, 35 HARV. L. REV. 302, 310-12 (1922); Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 819, 836 n.235 (1942). For a discussion of the reasons for presumptions, see Speck v. Sarver, 20 Cal. 2d 585, 591-92, 128 P.2d 16, 19 (1942) (Traynor, J., dissenting).

⁹⁸ See MORGAN, MAGUIRE & WEINSTEIN, *CASES ON EVIDENCE* 441 (4th ed. 1957), indicating that the presumption of sanity was created to avoid a waste of time. This "presumption" is given a Morgan effect by the California Evidence Code. CAL. EVIDENCE CODE § 522. Degnan indicates that many of the presumptions of the Uniform Commercial Code were constructed for the purpose of time saving. "These presumptions primarily serve the objective of convenience rather than policy, *i.e.*, they make the production of evidence on a possible issue unnecessary until it is shown that the issue is a real one. This is the principal role of Thayer presumptions." Degnan, *The Burden of Producing Evidence, The Burden of Proof, and Presumptions*, in 6 CALIFORNIA LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 1108, 1141 (1964) [hereinafter cited as Degnan, *Law Revision Study*]. While most of the presumptions in the original version of the Uniform Commercial Code were designed to have a Thayer effect, UNIFORM COMMERCIAL CODE § 1-201(31), this section is omitted from the California Commercial Code because it was felt desirable to await the definition of the California Evidence Code. This indicates that the draftsmen of the California Commercial Code did not regard the Thayer rule as the only possible treatment of presumptions under the Code. See CALIFORNIA SENATE FACT FINDING COMM. ON JUDICIARY, SIXTH PROGRESS REPORT 441 (1961) (report of Professors Harold Marsh, Jr. and William D. Warren).

⁹⁹ See, *e.g.*, UNIFORM COMMERCIAL CODE § 3-307(1)(b) (signature is presumed genuine or authorized except when the alleged signer has died or become incompetent). This presumption was clearly created to do more than save time, for § 3-307(1) accomplishes this purpose by allocating to the opponent the burden of pleading. The comment to this

above,¹⁰⁰ Morgan presumptions may properly be employed to enforce these considerations. In the rare case where none of these factors exist, time saving can be accomplished through the burden of pleading¹⁰¹ or at pretrial conference.¹⁰² It is unnecessary, therefore, to bifurcate presumptions to implement the policy of time saving.

C. *Objections to the Morgan Theory*

Presumptions have been used for a variety of reasons, other than public policy, access to proof, procedural impasse, probability, and time saving; most of the additional considerations served by presumptions are generally thought inappropriate.¹⁰³ Loose and unsettled usage accounts for much of the confusion concerning presumptions, and it is often suggested that a definite, uniform rule is necessary to eliminate this disorder.¹⁰⁴ The Thayer approach seems too weak to enforce many of the appropriate reasons for creating presumptions, while the Morgan thesis

section indicates that the presumption is founded on considerations of probability and access to the evidence. Other presumptions seem to be affected by considerations of probability, access, and public policy. See UNIFORM COMMERCIAL CODE §§ 3-304(3)(c), 3-503(2) (presumptions as to the reasonable time for giving notice). Most of the other presumptions in the Code deal with situations where the opponent challenges the authenticity of written instruments. It would seem that probability, access, and public policy all disfavor such a challenge. See UNIFORM COMMERCIAL CODE § 3-114(3) (date of a signed instrument presumed correct); § 3-414(2) (the order in which indorsers indorsed is presumed to be the order in which their signatures appear on the instrument); § 3-416(4) (words of guarantee presumed to mean guarantee); § 3-419(2) (in an action for conversion of an instrument, the measure of liability is presumed to be the face value of the instrument); § 3-510 (presumptions concerning dishonor and notice of dishonor).

¹⁰⁰ See notes 94-96 *supra* and accompanying text.

¹⁰¹ The plaintiff in a contract action has the burden of persuasion, but he may plead performance in general terms; unless the defendant specifically denies in his answer that the plaintiff performed certain conditions precedent, the plaintiff's performance is deemed admitted. When the performance of specific conditions is specifically denied, the plaintiff must prove performance. CAL. CODE CIV. PROC. § 457 (not superseded by the California Evidence Code). This rule of pleading appears to serve no purpose other than to save time since the considerations of probability, access, procedural impasse, or policy do not seem to apply.

¹⁰² See CAL. CODE CIV. PROC. § 575 (not superseded by the California Evidence Code); *De Castro & Co. v. Liberty Steamship of Panama, S.A.*, 186 Cal. App. 2d 628, 9 Cal. Rptr. 107 (1960) (defendant's failure to raise an issue at the pretrial conference held to foreclose him from raising it at trial). See also Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 660 (1952).

¹⁰³ The term "presumption" has been used to mean judicial notice, a reasoning principle, a permissible inference, prima facie evidence, a way of emphasizing the burden of persuasion, and simply an expression of the general disposition of the court. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195-206 (1953).

¹⁰⁴ See, e.g., Morgan, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 912-13 (1937).

gives effect to all the relevant considerations.¹⁰⁵ Nevertheless, a number of arguments advanced against the Morgan theory require discussion.¹⁰⁶

¹⁰⁵ Judge Lummas, addressing the American Law Institute, noted that between the Morgan and Thayer theories there is "no intermediate ground that is workable or possible." 18 A.L.I. PROCEEDINGS 175-76 (1941).

There are several theories respecting the nature of presumptions other than the Morgan and Thayer doctrines. See MORGAN, BASIC PROBLEMS OF EVIDENCE 33-35 (1957) (eight theories); Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 403 (1956) (there may be ten types of presumptions). Professor McBaine suggests the rule expressed in the following jury instruction: "Since . . . [B] is established, you must begin with the assumption that . . . [P] exists. But that assumption may be destroyed by evidence. If from all the evidence you find either that the non-existence of . . . [P] is more probable than its existence or that the non-existence of . . . [P] is as probable as its existence, you will then find that . . . [P] does not exist, otherwise you will find that . . . [P] does exist." (Emphasis added.) McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 28 n.35 (1954), quoting from Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 70 (1933). There are difficulties with this rule: (1) It is more complex than the Morgan rule, and it may confuse a jury. See McCORMICK, EVIDENCE § 317 (1954); McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185, 189 (1938) (it may lead the jury to weigh the presumption as evidence); Chadbourn, *Law Revision Study* 1047, 1078-81 (the instruction is only a complex way of stating that the proponent has the burden of persuasion). (2) It asks the jury to begin with an assumption. See note 111 *infra*. (3) If the rule were literally applied, the proponent would be as susceptible to a peremptory ruling as under the Thayer doctrine; for if the opponent has introduced evidence of *P*'s nonexistence, if the proponent has produced no evidence except *B*, and if *B* does not support an inference of *P*, then the evidence in the case is not sufficient to meet the proponent's burden of persuasion. The trial judge should, therefore, direct a verdict in favor of the opponent. Should he fail to direct a verdict, he would be authorizing the jury to give the proponent's evidence an artificial weight since he would be telling the jury that it may treat the proponent's insufficient showing as sufficient to support a finding of *P*'s existence. (4) The rule has no advantages over the Morgan rule. See MODEL CODE OF EVIDENCE 57 (1942).

The rule is similar to the present California treatment of presumptions except that the presumption is not evidence under the McBaine rule. See *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 691, 268 P.2d 1041, 1046 (1954) (the instruction given in this case is quoted in note 210 *infra*).

Chief Justice Traynor explained how he felt presumptions should be treated in *Speck v. Sarver*, 20 Cal. 2d 585, 596, 128 P.2d 16, 22 (1942) (dissenting opinion). His theory may be the same as McBaine's rule. Degnan indicates that treatment of *res ipsa loquitur* in *Burr v. Sherwin Williams Co.*, *supra*, coincides with the treatment advocated by Traynor for presumptions in *Speck*. Degnan, *Law Revision Study* 1108, 1132. On the other hand, it may add a step whereby the jury is first to regard only the evidence against *P* and to decide whether it believes such evidence; if it does, it is to weigh the evidence on both sides and apply the McBain rule to the results of the weighing process. If it disbelieves the evidence against *P* or (apparently) if it does not positively believe such evidence, it is to find *P* exists. This added step seems an unnecessary elaboration. See Malone, *Contrasting Images of Torts—The Judicial Personality of Justice Traynor*, 13 STAN. L. REV. 779, 793 (1961); Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245, 254 (1943).

¹⁰⁶ There are arguments beside the ones taken up in the text. For instance, Professor Chadbourn criticizes the Morgan theory because he feels it gives circumstantial evidence more force than direct testimony. He writes: "For example, if the issue is notice and the plaintiff's messenger testifies he delivered the notice to defendant in person, the burden

1. *Simplicity*

Professor Chadbourn defends the Thayer system on the basis of its simplicity.¹⁰⁷ Under the Thayer rule, the trial judge need concern himself with a presumption only if the opponent has failed to introduce sufficient evidence controverting *P*. Since controverting evidence does not normally rebut a Morgan presumption, the judge must remember that the presumption still exists when he instructs the jury on the burden of persuasion. Morgan presumptions do not, however, appear to make the judge's task unduly complex: The judge must give an instruction on the burden of persuasion in any case, and a Morgan presumption merely requires him to place the burden upon the opponent rather than upon the proponent.

Furthermore, courts in jurisdictions following the Thayer rule typically depart from it to avoid directing a verdict against a proponent when a presumption is rebutted by only slightly credible evidence.¹⁰⁸ Such departures detract from the simplicity of the Thayer rule.

Judicial application of Thayer presumptions is also complicated whenever *B* is probatively sufficient to raise an inference of *P*. Whenever the Thayer presumption is rebutted, the jury may fail to give the underlying inference due consideration if the judge does not mention the inference to them.¹⁰⁹ To avoid this hazard, the comment to section 604 of the Evidence Code seems to suggest that the judge authorize the jury to draw the inference.¹¹⁰ The instruction might then be that the proponent has the burden of proving the existence of *P*, but if the jury finds that *B* is true, it *may* infer that *P* exists. The Morgan instruction should be that, if *B* is true, the opponent has the burden of proving the nonexistence of *P*.¹¹¹ This latter charge seems as easy to understand as the Thayer

[of persuasion] does not shift. Should it shift when the messenger testifies he mailed the notice?" Chadbourn, *Law Revision Study* 1047, 1085-86. Chadbourn implies that under the Morgan doctrine the answer is yes. He is mistaken. The answer, regardless of the type of presumption used, is no. Testimony of mailing will not give rise to a presumption unless the fact of mailing is found to exist. If the mailing is believed, only the burden of persuasion would shift. If the delivery is believed, the issue, receipt of the letter, is conclusively proved. Direct testimony has the greater weight.

¹⁰⁷ Chadbourn, *Law Revision Commission* 1047, 1083.

¹⁰⁸ See note 79 *supra*.

¹⁰⁹ See note 96 *supra*. Of course, the proponent's lawyer may in his argument tell the jury that it is permissible to infer from *B* that *P* exists.

¹¹⁰ "If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict." CAL. EVIDENCE CODE § 604, comment; see 9 WIGMORE, EVIDENCE § 2498(a)(21)(b), at 340-41 (3d ed. 1940).

¹¹¹ The comment to California Evidence Code § 606 states that the judge should instruct that if *B* is true, then "the existence of the presumed fact is to be assumed until the jury is persuaded to the contrary by the requisite degree of proof (proof by a preponderance of the evidence, clear and convincing proof, etc.)." The suggestion that the

instruction. No great complexity would ensue even if it were considered desirable to mention the underlying inference in the case of a Morgan presumption.¹¹²

Chadbourn also feels that the Morgan rule results in a splintering of issues when several presumptions are involved in a case; that is, instead of having a burden of persuasion cover a whole cause of action or affirmative defense, each issue carries with it a special burden of persuasion necessitating a specific instruction.¹¹³ However, the current California practice is considerably more complex than the Morgan rule: The presumption must be mentioned to the jury and failure to do so is prejudicial error.¹¹⁴ The jury is told that the presumption constitutes evidence which is to be weighed along with the other evidence in the case.¹¹⁵ The jury may also be instructed that the opponent, while he does not have the burden of persuasion, must produce evidence which is at least sufficient to balance the proponent's evidence including the presumption.¹¹⁶ Therefore, each issue involving a presumption calls for a special burden and a specific

jury should begin with an assumption that *P* exists is unfortunate. It leads the jury to believe that the evidence supporting *P*'s existence should be given artificial weight. See notes 201-06 *infra* and accompanying text. The initial assumption of *P* is especially artificial where *B* has no logical connection with *P*'s existence. In that case, the jury is asked to assume something which has no evidential basis. See text accompanying note 213 *infra*.

The instructions outlined in the text are appropriate when the proponent introduces evidence of *B* which is sufficient to support a finding of *B*, but which does not conclusively prove *B* exists; and the opponent has produced sufficient, but not conclusive evidence of the nonexistence of *P*. Both *B* and *P* are, therefore, questions of fact for the jury.

Where *B* is established so that its existence is not a question of fact for the jury, the instructions would be similar to those outlined in the text except that the jury would be told that *B* is true.

There would be no difference between Morgan and Thayer presumptions in all other situations: (1) Where the proponent has failed to show *B*, no presumption would arise. See CAL. EVIDENCE CODE § 600. (2) Where the evidence of the nonexistence of *P* is conclusive, the opponent would probably be entitled to a directed verdict. See text accompanying notes 179-81 *infra*. (3) Where *B* is established and there is no evidence of the nonexistence of *P*, the proponent is entitled to a directed verdict. See CAL. EVIDENCE CODE §§ 604, 606, comments. (4) Where *B* is a question of fact for the jury, and there is no evidence of the nonexistence of *P*, the jury is told if it finds *B*, it must find *P*. See CAL. EVIDENCE CODE §§ 604, 606, comments.

¹¹² The comment to § 606 does not suggest that, in the case of Morgan presumptions, a judge should mention that *B* gives rise to an inference of *P*. Such a charge may, however, be appropriate if it is feared that the jury will be unduly reticent in drawing the inference. See note 96 *supra*.

¹¹³ Chadbourn, *Law Revision Study* 1047, 1083.

¹¹⁴ See note 195 *infra*.

¹¹⁵ See text accompanying note 183 *infra*.

¹¹⁶ See note 210 *infra*.

instruction. Despite the "splintering" of issues under existing law, no great confusion has resulted.¹¹⁷

The "splintering" effect of Morgan presumptions may be reduced by several factors. A charge concerning the duty of proving *P* need not be given where *P* is not an essential fact in a case but is merely relevant to the key issues.¹¹⁸ If the opponent already has the burden of persuasion as to other issues, shifting the burden as to *P* as well should cause no additional complexity. Presumptions may conflict, in which case one or both drop out.¹¹⁹ If a presumed fact is not controverted, it is deemed established and an instruction on the burden of persuasion is unnecessary. In the rare case where the instructions would become unduly complex, it may be advisable to allow the judge to simplify the charge by not mentioning some of the burdens.¹²⁰

The Morgan rule would certainly be easier to apply than will the Evidence Code, which incorporates both the Morgan and the Thayer rules. Such "bifurcation," Chadbourn himself says, will "create uncertainty and complexity."¹²¹

2. Change From Existing Law

One argument advanced against Morgan presumptions is that they would evoke significant changes in the substantive law.¹²² It appears, however, that the Morgan rule would cause less of a departure from the

¹¹⁷ The current California method of instructing juries that presumptions constitute "evidence" has been criticized because it tends to mislead juries, causing them to accord excessive weight to presumptions. See discussion in Part III, Section B of this Comment. The current instruction has not, however, been criticized on the grounds that it requires a splintering of issues.

¹¹⁸ Stone, *Burden of Proof and the Judicial Process*, 60 L.Q. REV. 262, 263 (1944).

¹¹⁹ See text accompanying notes 229-30 *infra*.

¹²⁰ See Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 20 (1954). Under existing California law, the failure to mention a presumption to the jury is reversible error. See note 195 *infra*. Since Morgan presumptions, unlike current presumptions, are not treated as evidence, CAL. EVIDENCE CODE § 600(a), they are no longer a factor to be considered by the jury as it weighs the evidence. See text accompanying note 90 *supra*. Consequently, California appellate courts may take a more liberal view toward the failure of the judge to give an instruction as to a Morgan presumption—especially when giving the instruction would tend to confuse the jury.

¹²¹ Chadbourn, *Law Revision Study* 1047, 1084 (Chadbourn is referring to the system proposed by the Uniform Rules of Evidence—a system which would be easier to apply than will the system of the California Evidence Code. See note 64 *supra*). The drafters of the Model Code of Evidence rejected the idea of having two types of presumptions because such a plan would be too difficult to administer. See *Foreword* to MODEL CODE OF EVIDENCE 52-65 (1942). The framers of the Uniform Rules of Evidence established two types of presumptions only because they felt that due process objections prevented the possibility of giving all presumptions a Morgan effect. See note 142 *infra*.

¹²² See McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 26-27 (1954).

current law of presumptions than would the Thayer doctrine. If an opponent introduces evidence sufficient to warrant a finding against *P*, a Thayer presumption disappears, but a Morgan or a current presumption survives;¹²³ as a result, proponents of Thayer presumptions are susceptible to peremptory rulings against them, but proponents of Morgan and current presumptions are immune from such rulings, unless a finding of *P*'s nonexistence is the only reasonable conclusion from all the evidence in a case.¹²⁴ Thayer presumptions do not affect the judge's charge to the jury, but Morgan and current presumptions require special instructions.¹²⁵

The change from the present California instruction that a presumption is "evidence" to an instruction shifting the burden of persuasion¹²⁶ would not give a marked advantage to either party. The imposition of the burden of persuasion on an opponent tends to be offset by the removal of the hardship that presumptions constitute evidence against him.¹²⁷ With Thayer presumptions, however, the proponent loses the presumption-is-evidence instruction and his only compensation is the chance that the judge may choose to instruct the jury that *B* gives rise to an inference of *P* as a matter of logic and experience.¹²⁸ The Thayer rule would, in short, change existing law more than the Morgan rule.¹²⁹

Moreover, as presumptions are currently given a uniform effect,¹³⁰ the operation of two types of presumptions under the Evidence Code will produce a pronounced departure from existing law.

¹²³ A current presumption is treated as evidence which must be weighed against the evidence produced by the opponent. See text at note 183 *infra*.

¹²⁴ The immunity of Morgan presumptions from peremptory rulings when the opponent has not shown conclusively that *P* does not exist is discussed in the text accompanying note 70 *supra*. The current California rule is that generally a presumption cannot be rebutted as a matter of law; therefore, even when the opponent's evidence conclusively establishes *P*'s nonexistence, the question of *P*'s existence must, except in extreme situations, go to the jury. See note 169 *infra*. It seems, however, that a peremptory ruling against a Morgan presumption is possible when the opponent's evidence is conclusive. See text accompanying notes 180-81 *infra*.

¹²⁵ For a discussion of the instructions given in the case of Morgan presumptions, see notes 34, 111 *supra*. Examples of the instructions currently given upon presumptions appear in the text accompanying notes 182-84 *infra*.

¹²⁶ *Ibid*.

¹²⁷ See notes 207-15 *infra*.

¹²⁸ See note 110 *supra* and accompanying text. See also note 190 *infra*.

¹²⁹ Some writers have suggested that Thayer presumptions rarely operate because the opponent is almost always able to meet the burden of producing evidence. See McCORMICK, EVIDENCE § 308, at 640 (1954); Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 178, 190 (1931). There are only a few California appellate decisions in which *P* has been established as a matter of law because the opponent has failed to produce evidence against *P*. See note 17 *supra*.

¹³⁰ A few presumptions in current California law have, however, been held to shift the burden of persuasion or to require clear and convincing proof to be overcome. See note 138 *infra*.

3. *The Burden of Persuasion Never Shifts*

The Morgan theory has been rejected by some scholars because it violates the dogma that the burden of persuasion never shifts.¹³¹ According to this dogma, the location of the burden of persuasion is determined at the pleading stage and cannot be relocated thereafter.¹³² There seems to be no good reason, however, why the burden of persuasion should be permanently fixed for an issue as soon as that issue is framed. Shifting the burden of persuasion does not make the lawyer's task of preparing for trial more difficult. The right to open and close, as well as the necessity of introducing evidence to avoid a directed verdict are all governed by the burden of producing evidence.¹³³ A lawyer does not normally introduce merely enough evidence to meet the burden of producing evidence and at the same time withhold further evidence necessary to persuade the jury that his allegation is true. As a result, he need not know where the burden of persuasion lies until final argument.¹³⁴ Similarly, the trial judge need not decide who has the burden until the evidence is completed.¹³⁵ Moreover, the burden of persuasion is merely a concept we use to control litigation in the interest of policy and fairness, and it appears that policy and fairness can be served more accurately if the burden is allocated after all the evidence has been presented rather than at the commencement of the action.¹³⁶ To say that the burden of persuasion must remain

¹³¹ This is apparently Roberts' major complaint with the Morgan theory. Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1, 33-34 (1958); see Chadbourn, *Law Revision Study* 1047, 1082.

¹³² When an issue comes up at trial which was not made out by the pleadings, the burden of persuasion, according to the dogma, should be fixed as if it were pleaded. MORGAN, *SOME PROBLEMS OF PROOF* 77-81 (1956) (criticizing the dogma); 9 WIGMORE, *EVIDENCE* § 2489 (3d ed. 1940). The following authorities state that the burden of persuasion does not shift: THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 365-66, 370, 378-79 (1898); 9 WIGMORE, *op. cit. supra*; Laughlin, *The Location of the Burden of Persuasion*, 18 U. PITT. L. REV. 3, 24-26 (1956). The dogma has been acknowledged by California courts. See, e.g., *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871 (1889); cases collected in WITKIN, *CALIFORNIA EVIDENCE* § 53 (1958).

¹³³ MORGAN, *op. cit. supra* note 132, at 79-81. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 911-12 (1931).

¹³⁴ Morgan, *Further Observations On Presumptions*, 16 SO. CAL. L. REV. 245, 255 (1943).

¹³⁵ Morgan states that the trial judge need not decide where the burden of persuasion lies until he frames his charge to the jury. Morgan, *Some Observations Concerning Presumptions*, *supra* note 133, at 912. In one situation, however, the location of the burden of persuasion controls the location of the burden of producing evidence, and this latter burden affects the question of whether the judge should give a peremptory ruling. This situation arises when the opponent produces evidence of *P*'s nonexistence. If the presumption has shifted the burden of persuasion, the proponent is immune from a peremptory ruling unless the evidence of the opponent is conclusive. The proponent is susceptible to such a ruling, however, if the presumption does not shift the burden of persuasion. See text accompanying notes 66-68 *supra*.

¹³⁶ Morgan, *Some Observations Concerning Presumptions*, *supra* note 133, at 912; see MAGUIRE, *EVIDENCE, COMMON SENSE AND COMMON LAW* 187 (1947).

fixed, even though the relevant policies would best be served by shifting the burden, is to allow conceptual categories to become the master rather than the servant of those policies.¹³⁷

Since some current California presumptions have been held to shift the burden of persuasion,¹³⁸ the dogma that the burden never shifts is not even accurate.¹³⁹ The Evidence Code discards the dogma by adopting the Morgan view for some presumptions.

4. Constitutional Objections

The Supreme Court of the United States has ruled that a Morgan presumption violates due process if there is no "rational connection" between *B* and *P*.¹⁴⁰ This constitutional objection influenced the framers

¹³⁷ Cf. Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in FULLER, *THE PROBLEMS OF JURISPRUDENCE* 653 (1949). Of course, Thayer recognized that the burden of producing evidence may shift; there appears to be no logical necessity for asserting that the burden of persuasion may not shift also. "The difference between . . . a shift of the burden of going forward, and a shift of the true burden of . . . [persuasion], is from a realistic point of view of human psychology often a slight one indeed, however elaborate its verbal formulation Is the game of drawing this verbal distinction worth the candle?" Louisell and Williams, *Res Ipsa Loquitur—Its Function in Medical Malpractice Cases*, 48 CALIF. L. REV. 252, 263-64 (1960).

¹³⁸ See, e.g., *Dragna v. White*, 45 Cal. 2d 469, 471, 289 P.2d 428, 430 (1955) (arrest without warrant presumed unlawful); *Estate of Smith*, 33 Cal. 2d 279, 201 P.2d 539 (1949) (validity of ceremonial marriage); *Estate of Duncan*, 9 Cal. 2d 207, 217, 70 P.2d 174, 179 (1937) (community property presumption); *Olson v. Olson*, 4 Cal. 2d 434, 437, 49 P.2d 827, 828 (1935) (owner of legal title presumed to own beneficial title); *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 344, 187 Pac. 996, 1001 (1919) (presumption of innocence of a crime or fraud); *Beers v. California State Life Ins. Co.*, 87 Cal. App. 440, 456-57, 468, 262 Pac. 380, 387, 392 (1927) (presumption against suicide must be overcome by clear and convincing evidence and every reasonable hypothesis besides suicide must be excluded). See also *George v. Bekins Van & Storage Co.*, 33 Cal. 2d 834, 205 P.2d 1037 (1949) (proof that undamaged goods were delivered to bailee imposes burden on bailee to prove that he did not lose or damage the goods); *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (plaintiff proved injury from a bullet fired by one of defendants' guns; burden of persuasion shifted to each of the defendants to exculpate himself from responsibility); CAL. EVIDENCE CODE § 601, comment; CAL. COMMERCIAL CODE § 7403.

¹³⁹ The burden of persuasion may be said not to shift only in the limited sense that its location is not determined until submission of the case to the fact finder. See McCORMICK, *EVIDENCE* § 307, at 639 (1954); MORGAN, *SOME PROBLEMS OF PROOF* 79-81 (1956).

Before Thayer, presumptions were thought to shift the burden of persuasion. See BEST, *A TREATISE ON PRESUMPTIONS OF LAW AND FACT* 42 (1845); Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703, 710 (1942); Shain, *Presumptions Under the Common and the Civil Law*, 18 SO. CAL. L. REV. 91, 93-95, 103, 105 (1944). Thayer himself said that some presumptions shift the burden of persuasion; he simply insisted that some unnamed additive, not the presumption, did the shifting. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 336, 575 (1898). It has been argued from this that the Thayer rule is based only on a distinction of terminology. Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 328 (1952); Marder, *Presumptions—Their Effect Upon the Law of Evidence and the Determination of Cases*, 68 N.J.L.J. 321, 329 (1945); MORGAN, *op. cit. supra* note 132, at 77, 78; Reaugh, *supra* at 821-22.

¹⁴⁰ *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929). The "rational correc-

of the Model Code of Evidence,¹⁴¹ and is the only reason that the drafters of the Uniform Rules of Evidence did not give all presumptions a Morgan effect.¹⁴² The framers of the California Evidence Code, however, apparently considered these constitutional fears unfounded, for they placed in the Morgan category the very presumptions that lack an underlying inference.¹⁴³

The position of the California Evidence Code draftsmen seems well taken for several reasons. The "rational connection" test has been severely criticized,¹⁴⁴ and recent decisions of the Supreme Court indicate that the test will not be strictly applied: Even a tenuous logical connection seems sufficient to satisfy the test,¹⁴⁵ and the Court may look to criteria other

tion" text was reaffirmed in *Tot v. United States*, 319 U.S. 463 (1943); however, that case was a criminal action and, therefore, involved the right of the defendant to be found innocent until proven guilty beyond a reasonable doubt as to the elements of his alleged crime. See note 148 *infra*.

¹⁴¹ See Morgan, *Foreward to MODEL CODE OF EVIDENCE* at 60 (1942). See also A.L.I., *CODE OF EVIDENCE, TENTATIVE DRAFT, No. 2*, at 216-23 (1941).

¹⁴² UNIFORM RULE OF EVIDENCE 14(b) provides: "If the facts from which the presumption arises have no probative value as evidence of the presumed fact" the presumption has a Thayer effect.

This section was included only because it was feared that a presumption in which *B* does not tend to prove *P*'s existence would be unconstitutional if it were accorded a Morgan effect. See Morgan, *Presumptions*, 10 *RUTGERS L. REV.* 512, 513 (1956).

¹⁴³ See note 58 *supra*.

¹⁴⁴ See, e.g., McCORMICK, *EVIDENCE* § 313 (1954); 4 WIGMORE, *EVIDENCE* § 1356 (3d ed. 1940); Brosman, *The Statutory Presumption* (pts. 1, 2), 5 *TUL. L. REV.* 17, 178 (1930); Hale, *Necessity of a Logical Inference to Support a Presumption*, 17 *SO. CAL. L. REV.* 48 (1943); Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 *TEXAS L. REV.* 34, 41-50 (1931); Morgan, *Federal Constitutional Limitations Upon Presumptions Created by State Legislation*, in *HARVARD LEGAL ESSAYS* 323 (1934); Note, 55 *COLUM. L. REV.* 527, 538-39 (1955) (there is no logical necessity that either the plaintiff or the defendant should have the burden of persuasion on a given issue).

¹⁴⁵ It appears that a presumption will satisfy the due process requirement even though *B* does not have sufficient probative value to support a verdict of *P*. The Court has indicated that "rational connection" requires only that *B* be relevant evidence of *P*'s existence. See *Yee Hem v. United States*, 268 U.S. 178, 185 (1925) (presumption of knowledge that narcotics imported from possession of narcotics—relevant connection satisfactory); *United States v. Gainey*, 380 U.S. 63, 75, 79 (1965) (Black, J., dissenting on other grounds, states that only relevancy should be required); *Tot v. United States*, 319 U.S. 463, 468 (1943) (something less than probative sufficiency required). Compare dissenting opinions of Justices Harlan and Clark in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 200 (1962) with the opinions of Justices Stewart and White, dissenting in the same case, *id.* at 218. In *United States v. Gainey*, *supra* at 67-68, the Court indicated Congress has greater access to empirical data than the judiciary, and, therefore, is more competent to decide whether a presumption is rationally supported. The Court in *Gainey* appeared to be applying the test of whether there are reasonable grounds for concluding that the presumption has a rational connection and not the test of whether the Court itself would find a rational connection. The California Supreme Court upheld the constitutionality of the presumption that a person who possesses a firearm with identification markings which had been altered did himself alter the markings, *DANGEROUS WEAPONS*

than probative value, such as fairness and access to proof, in determining the constitutionality of a presumption.¹⁴⁶ Almost all presumptions in California have at least some rational connection and the few that do not seem to rest upon strong policy considerations.¹⁴⁷ Since the courts apparently consider redeeming policy considerations, it seems that even the non-logical Morgan presumptions will survive constitutional attack.

Although presumptions have been held invalid in a few civil cases, most of the constitutional decisions involve the use of presumptions in criminal trials; the standard of constitutionality may be more relaxed in civil actions than in criminal cases.¹⁴⁸

CONTROL ACT § 13, Cal. Stats. 1923, ch. 339, p. 702 (this presumption, as amended, appears in CAL. PENAL CODE § 12091); the court stated: "The rational connection required between a proved fact and a presumed fact must be distinguished from the relation between a proved fact and an alleged fact that warrants a jury's inferring the one from the other An inference must be justified by the circumstances of the particular case. A statutory presumption, however, . . . is justified by the likelihood that the unpredictable circumstances of other cases will fall within the same pattern. The presumption may be invoked if the proved fact is 'at least a warning signal' . . . and . . . 'has at least a sinister significance' [of the presumed fact]." *People v. Scott*, 24 Cal. 2d 774, 779-80, 151 P.2d 517, 520 (1944). Thus, something less than probative sufficiency is required. See also Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245, 265 (1943); Morgan, *Presumptions*, 12 WASH. L. REV. 255, 257 (1937). Note, 38 YALE L.J. 1145 (1929) ("The courts are often reluctant" to find irrationality.); Note, 55 COLUM. L. REV. 527, 535-38 (1955).

¹⁴⁶ Justice Cardozo indicated that the test should be comparative convenience—that is, fairness and access to proof—in *Morrison v. California*, 291 U.S. 82, 89, 90-91 (1934) (dictum). This test was said to apply only when the rational connection test has been satisfied, *Tot v. United States*, 319 U.S. 463, 469 (1943), but it has shown vitality in more recent decisions. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 524 (1958); *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U.S. 61, 81 (1953); *United States v. Fleischman*, 339 U.S. 349, 361-62 (1950); *People v. Payless Drug Store*, 25 Cal. 2d 108, 114-15, 153 P.2d 9, 13 (1944).

In *United States v. Gainey*, 380 U.S. 63 (1965), the Court held that the presumption of carrying on an illegal distilling business from unexplained presence at an illegal still satisfied the logical connection test. The Court considered the "practical impossibility of proving . . . actual participation." *Id.* at 65. See also Comment, 55 COLUM. L. REV. 527, 537 (1955) (the "actual decisions seem more realistic than the language which supports them").

¹⁴⁷ The only California presumption which seems to have no logical connection is that contained in CAL. LAB. CODE § 3708 (presumption that if an employer fails to secure payment of workmen's compensation to an employee injured on the job, then the employee was injured as a result of the employer's negligence). Comment to California Evidence Code § 605, suggests that the seven-year-death presumption may not have any logical value. See, e.g., Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 925 (1931). However, it seems that absence for seven years at least tends to make death more probable. See UNIFORM RULE OF EVIDENCE 14, comment; Chadbourn, *Law Revision Study* 1047, 1084 n.16; MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 185 (1940); McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 534 (1938).

¹⁴⁸ Justice Black, dissenting in *United States v. Gainey*, 380 U.S. 63, 74, 78-79 (1965), says the test is not as strict in civil as in criminal cases. Justice Douglas dissented in that case on the grounds that the presumption, used in a criminal case, violates the privilege against self-incrimination. *Id.* at 71. See *Morrison v. California*, 291 U.S. 82, 96-97 (1934). See also *Morissette v. United States*, 342 U.S. 246, 273-76 (1952) (presumption may not

The Morgan theory appears less objectionable, from a due process standpoint, than existing California law that a presumption constitutes evidence.¹⁴⁹ If a presumption is evidence even though *B* has no inherent value as circumstantial evidence of *P*, the jury is authorized to determine *P*'s existence arbitrarily. The jury may assign to the presumption any evidential value it chooses and, in California, it may find that *P* exists even when, on the basis of the evidence presented in the case, no reasonable man could so conclude.¹⁵⁰ The burden of persuasion, on the other hand, is designed to operate only when the reasoning process is completed and the mind of the trier of fact is in equilibrium. The location of the burden of persuasion involves policy considerations that do not necessarily reflect the logical connection between *B* and *P*.¹⁵¹ The requirement of a rational connection between *B* and *P* should be more apposite, therefore, if a presumption constitutes evidence than if it shifts the burden of persuasion. Since presumptions in California have survived the constitutionally questionable treatment as evidence, there is little reason to suspect that they will be held invalid when the Morgan rule is put into effect.

Recent decisions dealing with the constitutionality of presumptions have not distinguished between the Thayer and Morgan rules.¹⁵² This suggests that the authors of the Uniform Rules of Evidence were mistaken

supplant proof of intent in a criminal case because government must prove each element of a criminal offense). Degnan suggests that presumptions in criminal cases may have to satisfy the "rational connection" test but he does not suggest that presumptions in civil cases must meet this standard. Degnan, *Law Revision Study* 1108, 1131-33, 1136. But see *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929) (national connection test applied to a presumption in a civil case).

¹⁴⁹ See Hale, *Necessity of Logical Inference to a Presumption*, 17 So. CAL. L. REV. 48, 49-50 (1943); McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 551 (1938); Morgan, *Tot v. United States, Constitutional Restrictions on Statutory Presumptions*, 56 HARV. L. REV. 1324, 1328-29 (1943); Comment, 43 HARV. L. REV. 100 (1929). See also Black, J., dissenting in *United States v. Gainey*, 380 U.S. 63, 74, 85 (1965) (while Congress may prescribe procedural rules, it may not prescribe what constitutes sufficient evidence to sustain a criminal conviction). The Court in *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639, 641, erroneously concluded that because the presumption shifted the burden of persuasion, it was to be weighed as evidence of *P*'s existence by the jury. The error in interpreting the effect of the presumption as evidence appears to have influenced the Court's decision that the presumption was unconstitutional because it lacked a rational connection. *Id.* at 642-44. See Morgan, *Federal Constitutional Limitations Upon Presumptions Created by State Legislation*, in HARVARD LEGAL ESSAYS 323, 340-45 (1934).

¹⁵⁰ See notes 169-73, 183 *infra* and accompanying text.

¹⁵¹ See note 97 *supra*.

¹⁵² The Court in *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639, 643-44 (1929), distinguished *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35 (1910) because in the *Henderson* case the presumption was a Morgan type while in the *Turnipseed* case a similar presumption operated as a Thayer type. Since *Henderson*, no Supreme Court decision has made this distinction, although Justice Frankfurter mentions in *Automatic Canteen v. FTC*, 346 U.S. 61, 82 (1935) (dictum), that there may be such a distinction.

in assuming that Thayer presumptions would satisfy due process requirements where Morgan presumptions would not. Without this assumption, the Uniform Rules would have adopted the Morgan rule for all presumptions.¹⁵³

For these reasons, the Evidence Code seems justified in risking the "bare possibility"¹⁵⁴ that Morgan presumptions resting on policy considerations rather than on a logical link between *B* and *P* will be held unconstitutional.

5. *Presumptions as a Vehicle for Shifting the Burden of Persuasion*

Professor Cleary suggests that the allocation of the burden of persuasion should not be accomplished by the use of presumptions.¹⁵⁵ Although the same general considerations that lead to the creation of presumptions are also pertinent in fixing the burden of persuasion, presumptions, operating in the limited sphere of circumstantial evidence, may distort these considerations. Cleary argues that the burden of persuasion should be allocated at the pleading stage, when each compartment of the substantive law can be dealt with separately.¹⁵⁶

Cleary's thesis would entail "a complete revision of the normal and usual concept of pleading,"¹⁵⁷ as well as radical changes in the pattern of judicial¹⁵⁸ and legislative thought.¹⁵⁹ Presumptions have served as con-

¹⁵³ See note 142 *supra*.

¹⁵⁴ NEW JERSEY SUPREME COURT COMM., REPORT ON EVIDENCE Rule 13, comment, at 50 (March 1963) (the report recommends giving all presumptions a Morgan effect).

¹⁵⁵ Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

¹⁵⁶ LADD, CASES ON EVIDENCE 751 (1949) (eliminate presumptions and allocate the burden of persuasion "on substantive grounds"); Cleary, *supra* note 155; Laughlin, *The Location of the Burden of Persuasion*, 18 U. PITT. L. REV. 3, 10 (1956) (presumptions arise from estimations of probabilities and the burden of persuasion is allocated according to policy considerations; the two should not be confused); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 26 (1954) (if presumptions were discarded, then various segments of the substantive law could more easily be kept separate and appellate litigation might also be reduced); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 259, 267 (1936) (in *res ipsa loquitur* cases, the burden of persuasion should be shifted directly, not through presumptions which are rules applying only circumstantial proof).

¹⁵⁷ Bohlen, *The Effect of Rebuttal Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 313-14 (1920).

¹⁵⁸ Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 339-40 (1952). The California legislature rejected a draft of §§ 500 and 510 which provided that the burden of producing evidence and the burden of proof, would be allocated according to considerations of probability, public policy, ease of proof and peculiar knowledge. Preprint, Cal. Senate Bill No. 1, §§ 500, 510 (1965) (proposed draft). Presumptions are based on the same criteria. The draft of these sections may have been rejected because it was feared that it would unsettle the established judicial "pattern" for allocating the burdens and would lead to confusion.

¹⁵⁹ Few statutes allocate the burden of pleading or persuasion directly, see Degnan,

venient vehicles for the expression of policy and for the growth of the substantive law,¹⁶⁰ using them to shift the burden of persuasion produces no evil sufficient to warrant such a wholesale reform.¹⁶¹

It is suggested, therefore, that the drafters of the California Evidence Code were justified in choosing Morgan presumptions to implement public policy considerations. On the other hand, it is unfortunate that the drafters failed to adopt the Morgan rule for all presumptions; such a system would give proper effect to the reasons for creating presumptions—access to proof, procedural impasse, and probability as well as public policy—and would simplify a confused body of law. Since the Thayer rule is “too slight and evanescent” when measured against the considerations which give rise to presumptions,¹⁶² judges applying the California Evidence Code should avoid the Thayer rule by classifying presumptions, wherever possible, in the Morgan category.

III

THE PRESUMPTION-IS-EVIDENCE DOCTRINE

Section 600(a) of the Evidence Code states, “A presumption is not evidence.”¹⁶³ This provision is a substantial departure from existing

Law Revision Study 1108, 1114-25, 1129-30, while the number of statutes creating presumptions is too great to list.

¹⁶⁰ See Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 910 (1931).

¹⁶¹ Louisell & Williams, *Res Ipsa Loquitur—Its Future in Medical Malpractice Cases*, 48 CALIF. L. REV. 252, 266 (1960) (stating that “probably if we could start afresh in an ideal world” we should allocate the burden of persuasion without using presumptions, but since we cannot start afresh, presumptions are the best devices available for allocating the burden).

It has also been suggested that using presumptions to allocate the burden of persuasion has allowed judges to “overcome the taboo” that only the legislature can change the law, and, therefore, presumptions give judges flexibility to “make the law livable under changed conditions.” Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 311 (1920); see Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 911-12 (1931).

¹⁶² Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 18 (1959).

¹⁶³ While the California Evidence Code itself fails to provide explicitly that inferences are not evidence the comment to § 600 states “. . . an inference is not itself evidence; it is the result of reasoning from evidence.” Also, the treatment of inferences as evidence would be inconsistent with the definition of evidence provided in CAL. EVIDENCE CODE § 140. See note 165 *infra*. It should be noted that a presumption differs conceptually from an inference. An inference constitutes the logical reasoning process from *B* to *P*. The term “presumption” merely describes certain procedural effects such as shifting the burden of producing evidence or the burden of persuasion. In theory, an inference should influence the jury in deciding whether a fact probably exists; a presumption should either prevent the jury from deciding at all (as when the burden of producing evidence has not been met) or it should determine the consequences when a jury has reached a given state of conviction (as when the burden of persuasion operates because the mind of the jury is in a state of equilibrium). *Cf.* 9 WIG-

California law, under which a presumption is treated as evidence.¹⁶⁴ Section 600(a) is consistent with accepted ideas about the nature of evidence. According to the traditional definition, only observable things that can be seen or heard such as testimony, documents, objects, or the demeanor of witnesses are evidence.¹⁶⁵ The reasoning process from these evidential facts is not evidence under this view. For example, testimony that a letter was mailed is evidence tending to prove that the letter was received by the addressee. However, the logical inference connecting the mailing with the receipt should not be considered evidence.

By treating presumptions as evidence, current California law departs from the traditional definition.¹⁶⁶ One reason for the departure is that several sections of the Code of Civil Procedure describe a presumption as "indirect evidence."¹⁶⁷ Probably more important to the adoption of the

MORE, EVIDENCE § 2491, at 288 (3d ed. 1940). A presumption may, and often does, rest upon an underlying inference and perhaps herein lies the confusion. See Chadbourn, *Law Revision Study* 1047, 1096.

¹⁶⁴ The leading case for the doctrine that a presumption is evidence is *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931). The doctrine has been consistently followed since the *Smellie* decision.

¹⁶⁵ "Evidence, then, is any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of an inference in ascertaining some matter of fact." Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 143 (1889). See also McCORMICK, EVIDENCE § 317, at 669 n.5 (1954); 1 WIGMORE, EVIDENCE § 1, at 3 (3d ed. 1940). California Evidence Code § 140 defines evidence as "testimony, writings, material objects, and other things presented to the senses that are offered to prove the existence or nonexistence of a fact." *But see* CAL. CODE CIV. PROC. § 1823: "Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."

¹⁶⁶ Despite the general rule that presumptions are evidence, the California courts do not always treat presumptions as if they were evidence. For instance, a presumption vanishes if a proponent or his witnesses give testimony which refutes the existence of the presumed fact. *Mundy v. Marshall*, 8 Cal. 2d 294, 65 P.2d 65 (1937); *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, 210 Pac. 269 (1922); *Embry Foods, Inc. v. Paul*, 230 Cal. App. 2d 687, 697, 41 Cal. Rptr. 365, 372 (1964); *Ringo v. Johnson*, 99 Cal. App. 2d 124, 221 P.2d 267 (1950). The cases emphasize that to produce this result the proponent's evidence must be wholly irreconcilable with the existence of the presumed fact; partial contradiction is insufficient. *Chakmakjian v. Lowe*, 33 Cal. 2d 308, 313, 201 P.2d 801, 803 (1949). *Anthony v. Hobbie*, 25 Cal. 2d 814, 819-20, 155 P.2d 826, 829-30 (1945). Also, if, in a personal injury action, a party or his witnesses testify concerning his conduct just prior to or at the time of the accident, he loses the advantage of a presumption of due care. *Laird v. T. W. Mather, Inc.*, 51 Cal. 2d 210, 331 P.2d 617 (1958); *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 38, 297 Pac. 884, 886 (1931). These rules are inconsistent with the doctrine that a presumption constitutes evidence, because evidence does not disappear from a case simply because a party produces other evidence bearing upon the point. (See Note, 2 STAN. L. REV. 559 (1950). However, the rule that a presumption is excluded by the proponent's testimony may be considered an exclusionary rule, and thereby consistent with the treatment of presumptions as evidence. *Olshausen, Evidence: Presumptions As Evidence—A Reply*, 31 CALIF. L. REV. 316, 322-23 (1943).

¹⁶⁷ CAL. CODE CIV. PROC. §§ 1832, 1957. Section 1961 states: "A presumption . . . may

presumption-is-evidence doctrine was the courts' desire to avoid the Thayer rule that a presumption does not survive the opponent's production of evidence.¹⁶⁸ By treating a presumption as evidence, the judge can make a presumption more durable than it would be under the Thayer rule in two respects: He can avoid the necessity of a peremptory ruling against the proponent, and he can instruct the jury to consider the presumption in their deliberations. The presumption-is-evidence doctrine has, however, produced unsatisfactory results in both these areas.

A. Peremptory Rulings Against Proponents

Under current California law, an opponent cannot win a nonsuit or a directed verdict by producing evidence contrary to the presumed fact.¹⁶⁹ This result is caused by the combined effect of the presumption-is-evidence doctrine and the rule for granting a peremptory ruling. The rule is that a peremptory ruling may be granted only when the judge determines that there is no evidence sufficient to support a finding in favor of the threatened party, and, in determining the sufficiency of the favorable evidence, conflicting adverse evidence must be disregarded.¹⁷⁰ This rule is

be controverted by other evidence . . ." It has been argued that these sections do not compel the rule that presumptions are evidence. See Richards, J., in *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 564, 299 Pac. 529, 539 (1931) (concurring and dissenting opinion); Traynor, J., in *Speck v. Sarver*, 20 Cal. 2d 585, 594-96, 128 P.2d 16, 21-22 (1942) (dissenting opinion). See also McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 557-61 (1938). Before *Smellie v. Southern Pac. Co.*, *supra*, despite the wording of the above sections, California courts were divided as to whether presumptions should be treated as evidence.

¹⁶⁸ Chadbourn, *Law Revision Study* 1072-75; McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 542-43 n.55 (1938).

¹⁶⁹ In *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931), the court reversed the directed verdict of the trial court on the ground that a presumption is not dispelled as a matter of law by evidence produced by the opponent, even when that evidence is so strong that no reasonable man could find, from all the evidence in the case, that *P* exists. See also *Leonard v. Watsonville Community Hosp.*, 47 Cal. 2d 509, 517, 305 P.2d 36, 40-41 (1956) (dictum); *Engstrom v. Auburn Auto. Corp.*, 11 Cal. 2d 64, 70, 77 P.2d 1059, 1063 (1938) (dictum). *But see* *Estate of McConnell*, 6 Cal. 2d 493, 499-500, 58 P.2d 639, 642 (1936) (presumption of consideration rebutted by testimony of the proponent's assignor who was called by the opponent); *Purtell v. Pacific Elec. Ry.*, 124 Cal. App. 106, 12 P.2d 106 (1932) (presumption of due care rebutted by opponent).

The court in *Smellie* qualified the rule, however, indicating that when the opponent's evidence is absolutely conclusive—as when a man presumed dead walks into court—the presumption is rebutted as a matter of law. *Smellie v. Southern Pac. Co.*, *supra* at 552, 299 Pac. at 534 (1931). See also *In re Goldberg*, 203 Cal. App. 2d 402, 410, 21 Cal. Rptr. 626, 630-31 (1962) (presumption of dissolution of marriage absolutely overcome by evidence of opponent that no annulment had been recorded in the domicile of the spouses).

¹⁷⁰ A full statement of the rule is that a directed verdict may be granted "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient sub-

applied in all cases except those in which the threatened party relies upon an inference. To distinguish the general rule from the rule applied in inference cases, the general rule will be referred to as the presumption-rebutting rule.

Generally, the presumption-rebutting rule prevents a directed verdict against *P*'s existence when a presumption of *P* is treated as evidence. Since the presumption is sufficient evidence to support a verdict that *P* exists,¹⁷¹ the proponent is almost invulnerable to an adverse peremptory ruling. The opponent, even if he produces evidence which conclusively demonstrates *P*'s nonexistence, cannot rebut the presumption as a matter of law because the presumption raises a conflict of evidence and, according to the rule for peremptory rulings, the opponent's evidence must be disregarded.¹⁷² The jury, therefore, must decide if the showing of the opponent is sufficient to rebut the presumption.¹⁷³

In most cases, it seems proper to allow the jury to decide the issue of *P*'s existence. As suggested in Part II of this Comment,¹⁷⁴ a presumption should not be rebutted as a matter of law by evidence which a reasonable man might find unpersuasive. A peremptory ruling seems appropriate, however, when the opponent's evidence is so persuasive that a reasonable man could not fail to be convinced of *P*'s nonexistence. To permit the jury to reject such compelling evidence is to invite them "to decide capriciously."¹⁷⁵ While the presumption may have been created because a

stantiality to support a verdict in favor of the plaintiff if such verdict were given." *Estate of Lances*, 216 Cal. 397, 400, 14 P.2d 768, 769 (1932); *accord*, *Seneris v. Haas*, 45 Cal. 2d 811, 821, 291 P.2d 915, 921 (1955); *Estate of Flood*, 217 Cal. 763, 769, 21 P.2d 579, 581 (1933); see, e.g., cases cited in 2 WITKIN, CALIFORNIA PROCEDURE, *Trial* §§ 125-27 (1954).

¹⁷¹ See, e.g., *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 552, 299 Pac. 529, 533 (1931). *Estate of Vinson*, 212 Cal. App. 2d 543, 547, 28 Cal. Rptr. 94, 97 (1963).

¹⁷² *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 559, 299 Pac. 529, 537 (1931). California Code of Civil Procedure § 2061(2) provides that the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against . . . a presumption . . ." This section does not affect the availability of peremptory rulings because it only deals with instructions to the jury—not taking the case from the jury. See also *McBaine, Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 559 (1938).

¹⁷³ While the judge may be obliged to submit the case to the jury, he can order a new trial on the application of the opponent if the jury returns a verdict in favor of the proponent and the judge determines that the verdict is against the weight of the evidence. *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal. 2d 305, 163 P.2d 689 (1945). In ruling upon a motion for a new trial, the judge may weigh all the evidence in the case and assess the credibility of the witnesses. *People v. Sarazzawski*, 27 Cal. 2d 7, 161 P.2d 934 (1945). See CAL. CODE CIV. PROC. § 657(6) (not superseded by the California Evidence Code).

¹⁷⁴ See text accompanying notes 73-76 *supra*.

¹⁷⁵ *McBaine, Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 545 n.62 (1938). *But see* Note, 22 CALIF. L. REV. 230 (1933) (judges should not weigh the evidence except when ruling upon a motion for a new trial); *cf. Arais v. Kalensnikoff*, 10 Cal. 2d 428, 74 P.2d 1043 (1937) (blood test held not to constitute conclusive proof of nonparentage of

finding of *P*'s existence is desirable from the standpoint of public policy, such a finding should not be permitted when the evidence unquestionably establishes the contrary. The proper question for the jury is whether *P* exists and not whether the policy favoring *P*'s existence overcomes proof that *P* does not exist.¹⁷⁶ Nevertheless, the current rule is that a presumption is sufficient evidence to prevent an adverse peremptory ruling irrespective of the strength of the opponent's contrary evidence.

The presumption-is-evidence doctrine would not preclude directed verdicts if a more liberal test for granting peremptory rulings were applied. Such a test is used for directed verdicts against inferences, which, like presumptions, are treated as evidence.¹⁷⁷ Under this formula, which will be called the inference-rebutting rule, a peremptory ruling can be granted only when, considering all the evidence (rather than, as under the presumption-rebutting rule, disregarding that which is unfavorable to the inference), the judge determines that the nonexistence of the inferred fact cannot rationally be disbelieved.¹⁷⁸ The inference-rebutting rule does not disturb the notion that an inference, viewed by itself, is sufficient evidence

defendant in paternity case because such evidence was not declared conclusive by the Code of Civil Procedure as required by the Code of Civil Procedure § 1978; *accord*, *Berry v. Chaplin*, 74 Cal. App. 2d 652, 664-65, 169 P.2d 442, 451 (1946).

¹⁷⁶ In *Sparf v. United States*, 156 U.S. 51 (1895), the United States Supreme Court established the rule that juries should decide questions of fact, not law. See Note, 74, *YALE L.J.* 170, 190 (1964). McBaine states: "It is [the juries'] . . . province to decide the facts—to determine what probably happened." McBaine, *supra* note 175, at 546.

¹⁷⁷ CAL. CODE CIV. PROC. §§ 1832, 1957 describe inferences as "indirect evidence." See *Scott v. Burke*, 39 Cal. 2d 388, 397, 247 P.2d 313, 319 (1952) (*res ipsa loquitur*); 2 CAL. JURY INSTRUCTIONS, CIVIL [hereinafter cited as B.A.J.I.] 639-40, No. 206-B (4th rev. ed. 1956). On the other hand, it has been stated that an inference is not evidence but is a mere process or reasoning. *Blank v. Coffin*, 20 Cal. 2d 457, 460, 126 P.2d 868, 870 (1942). The decision is defended by Professor McBaine in *Inferences: Are They Evidence?*, 31 CALIF. L. REV. 108 (1942).

¹⁷⁸ In *Leonard v. Watsonville Community Hosp.*, 47 Cal. 2d 509, 514-17, 305 P.2d 36, 39 (1956), the court stated that the test which is generally used for directing verdicts and which is used in the case of presumptions is qualified when the party moved against relies on an inference. The inference test is that when "either party [rather than only the party moved against] produces evidence of the nonexistence of the fact that is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the nonexistence of the [inferred] fact is established as a matter of law." *Id.* at 515, 305 P.2d at 39; *accord*, *Hicks v. Reis*, 21 Cal. 2d 654, 660-61, 134 P.2d 788, 791 (1943) (dictum) (the court also stated that the trier of fact may not believe impossibilities); *Blank v. Coffin*, 20 Cal. 2d 457, 461, 126 P.2d 868, 870 (1942) (dictum). *But see Meyer v. Blackman*, 59 Cal. 2d 671, 381 P.2d 916, 921, 31 Cal. Rptr. 36, 41 (1963) (applying the presumption-rebutting rule in reversing a nonsuit against a plaintiff relying upon the "inference" that an employee driving his employer's car was acting within the scope of his employment); *Nash v. Wright*, 82 Cal. App. 2d 467, 471-72, 186 P.2d 686, 689 (1947) (dictum) (the inference-rebutting rule should apply only to a motion for a new trial). See also, e.g., McBaine, *Inferences: Are They Evidence?*, 31 CALIF. L. REV. 108 (1942); Note, 45 CALIF. L. REV. 207 (1957).

to support a finding of the inferred fact. The rule merely requires the judge to consider the inference in the light of the opponent's evidence controverting the existence of the inferred fact; when the opponent's evidence is so persuasive that no reasonable man could conclude from all the evidence in the case that the inferred fact exists, the inference is rebutted as a matter of law and the opponent is entitled to a favorable peremptory ruling.¹⁷⁹

The Evidence Code does not specify what circumstances justify granting peremptory rulings against presumptions. Nevertheless, the effect of the Code, at least in the case of Thayer presumptions, seems clear. Upon the opponent's motion for a directed verdict, the judge will look at the opponent's evidence to determine if it is sufficient to support a finding of *P*'s nonexistence. If it is, the presumption is rebutted and the proponent should be treated as any party who is *not* aided by a presumption. Thus, if *B* does not raise an inference of *P*, the judge should apply the general rule for directing verdicts (the presumption-rebutting rule). He should consider only the evidence favorable to the proponent and determine if that evidence would support a finding of *P*'s existence. Since *B*, even considered alone, does not support such a finding, the proponent should suffer an adverse peremptory ruling. If *B* raised an inference of *P*, the inference-rebutting rule should apply. Even then, however, the proponent would be vulnerable to a peremptory ruling, for, if a rational man could not find from all the evidence that *P* exists, the opponent would win as a matter of law.

Peremptory rulings should also be available against proponents of Morgan presumptions under the Evidence Code. When an opponent moves for a nonsuit or directed verdict against the proponent of a Morgan presumption, the judge should apply the presumption by shifting the burden of persuasion to the opponent, and having accorded the presumption its

¹⁷⁹ In *Leonard v. Watsonville Community Hosp.*, 47 Cal. 2d 509, 305 P.2d 36 (1956), the court held evidence that the plaintiff was injured by a foreign object which had been unintentionally left in her abdomen while she was undergoing an operation was sufficient to raise an inference of negligence under the doctrine of *res ipsa loquitur*. As to one of the defendants, however, the inference was rebutted as a matter of law, by clear and uncontradicted evidence that the defendant had not operated on the portion of the plaintiff's body where the foreign object was later found. See also, *e.g.*, *Engstrom v. Auburn Auto. Sales Corp.*, 11 Cal. 2d 64, 77 P.2d 1059 (1938) (directed verdict: inference that owner gave driver permission to operate an automobile rebutted by testimony that owner had entrusted the automobile to the driver for a limited period which had expired at the time of the accident); *Crouch v. Gilmore Oil Co., Ltd.*, 5 Cal. 2d 330, 54 P.2d 709 (1936) (nonsuit: inference that driver of truck was acting as defendant's agent because the truck was painted with defendant's insignia was dispelled by evidence that the driver was the employee of a third party who owned the truck); *Teich v. General Mills, Inc.*, 170 Cal. App. 2d 791, 339 P.2d 627 (1959) (inference of copying dispelled by conclusive contrary evidence).

full effect, he should give it no further consideration. Therefore the judge should treat the proponent of a Morgan presumption as he would any party *not* having the burden of persuasion and *not* aided by a presumption.¹⁸⁰ The judge should first consider only the opponent's evidence to

¹⁸⁰The test for granting a peremptory ruling in favor of the party who has the burden of persuasion was set forth in *Walters v. Bank of America*, 9 Cal. 2d 46, 49, 69 P.2d 839, 840 (1937). In that case the plaintiff had the burden of persuasion and moved for a directed verdict. The court said that "a motion for directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant." *Accord*, *Southern Cal. Tel. Co. v. Carpenter*, 75 Cal. App. 2d 336, 343, 171 P.2d 142, 147 (1946); *Kolin v. National Film Corp.*, 60 Cal. App. 112, 117, 212 Pac. 207, 209 (1922). Although the court in the *Walters* case said that the cause of action alleged by the moving party must be merely "supported," it is evident that the cause of action must be proved conclusively. See, *e.g.*, *Pacific Coast Cheese, Inc. v. Security-First Nat'l Bank*, 45 Cal. 2d 75, 79, 286 P.2d 353, 356 (1955) ("a directed verdict may not be sustained on the basis of an affirmative defense unless it appears from the record that the defense was established as a matter of law"); *Sanan v. Schoenborn*, 47 Cal. App. 2d 366, 368, 117 P.2d 731, 732 (1941) (evidence which does not rationally compel a conclusion in favor of the moving party, even if uncontradicted, does not warrant a peremptory ruling in that party's favor).

Under this test, the judge may not direct a verdict against a party if the allegations of that party are supported by the evidence. In assessing the support for the allegations of the threatened party, it is not clear whether the judge should consider all the evidence in the case or whether he should consider only the evidence favorable to the threatened party's allegations and disregard the unfavorable evidence. The test set forth in the *Walters* case may be read in two ways: (1) The judge is to consider "the whole evidence" in deciding both whether the allegations of the moving party are supported and whether the allegations of the threatened party are supported; or, (2) the judge is to consider the "whole evidence" only in deciding whether the allegations of the moving party are supported.

If the first reading is correct, then the rule for directing verdicts in favor of the party with the burden of persuasion is the same as the inference-rebutting rule. Chadbourn supports this view. Chadbourn, *Law Revision Study* 1047, 1065-66. See *Kolin v. Nat'l Film Corp.*, *supra* at 119, 212 Pac. at 210, where the court affirmed a directed verdict against the plaintiff because had the jury been allowed to decide the case and had it returned a verdict in favor of the plaintiff, the trial judge would have been obliged to order a new trial.

While the decisions in this area are characteristically vague, it appears that the second reading of the *Walters* test is correct; that is, the judge should weigh all the evidence in determining whether the moving party has sustained his burden of persuasion, but he should apply the presumption-rebutting standard in determining whether the threatened party has supported his allegations. Any other conclusion produces the anomalous result that a party's chances of securing a directed verdict would be greater if he had the burden of persuasion than if he did not have the burden. Moreover, the court in *Walters* quoted the presumption-rebutting rule and stated that it applies with equal force when the moving party has the burden of persuasion. *Walters v. Bank of America*, *supra* at 49, 69 P.2d at 840. In *Wiswell v. Shinnors*, 47 Cal. App. 2d 156, 161, 117 P.2d 677, 680 (1941), the court affirmed a directed verdict in favor of the defendants on the issue of contributory negligence but stated that "evidence both direct and circumstantial, favorable to . . . defendants, . . . must be eliminated from consideration by the court for the purpose of ruling upon a motion for a directed verdict." In *Smellie v. Southern Pac. Co.*, 212 Cal.

determine whether it conclusively establishes the nonexistence of *P*. If it does, the judge should then consider the proponent's evidence—*B*—to determine if it supports a finding of *P*'s existence. If it does not, he should, under the presumption-rebutting rule, direct a verdict in favor of the opponent. On the other hand, if *B* raises an inference of *P*'s existence, the judge should apply the inference-rebutting rule; that is, he should direct a verdict against the proponent if the only reasonable conclusion that could be drawn from all the evidence in the case is a finding of *P*'s nonexistence.

Another possibility, however, is that the judge will decide that when an opponent moves for a peremptory ruling against a proponent relying exclusively upon a Morgan presumption in which *B* raises an inference of *P*, the presumption-rebutting rule rather than the inference-rebutting rule should be applied. He may reach this conclusion by the following reasoning: A Morgan presumption, unlike a Thayer presumption, is not automatically rebutted by the opponent's production of evidence which is merely sufficient to support a finding of *P*'s nonexistence; at the time the opponent moves for a peremptory ruling, therefore, the Morgan presumption remains in the case and the rule for directing verdicts against parties relying upon presumptions (the presumption-rebutting rule) should be applied. The presumption-rebutting rule applied in this situation might preclude peremptory rulings. Since a verdict may be directed under the presumption-rebutting rule only when there is no evidence which, regarded separately, supports a verdict for the proponent, the judge may refuse to direct a verdict against the proponent when *B* raises an inference of *P*.¹⁸¹

540, 552-53, 299 Pac. 529, 534 (1931), the court held that testimony of defendant's witness must not be considered for the purposes of ruling upon the defendant's motion for a directed verdict on the issue of contributory negligence though the defendant had the burden of persuasion as to that issue.

¹⁸¹ The evidence conflicting with the inference of *P*'s existence would be disregarded and the inference, standing alone, would be sufficient to support a verdict that *P* exists. Therefore, under the presumption-rebutting rule, the proponent would reach the jury.

It is possible, however, that the inference-rebutting rule and the presumption-rebutting rule are the same. This conclusion results from the following reasoning: Under the presumption-rebutting rule, the judge must disregard the evidence which *conflicts* with the evidence produced by the party against whom a motion for a directed verdict has been entered. Since presumptions are currently treated as evidence sufficient to raise a *conflict*, a proponent relying upon a presumption is entitled to have the evidence conflicting with the presumption disregarded when the opponent moves for a peremptory ruling. Some courts have stated that an inference does not raise a conflict with opposing evidence. See, e.g., *Gurcic v. Nelson Display Co.*, 19 Cal. App. 2d 46, 55, 64 P.2d 1153, 1158 (1937) (affirming directed verdict in favor of plaintiff despite the possible existence of an inference that the plaintiff was contributorily negligent); *Landstrath v. Industrial Acc. Comm.*, 77 Cal. App. 509, 516, 247 Pac. 227, 229 (1926) (dictum). If so, the party who relies upon an inference raises no conflict and the judge will consider all the evidence

In view of the possible confusion regarding peremptory rulings the Evidence Code should have included a section on directed verdicts to clear the air.

B. Instructing the Jury on Presumptions as Evidence

The most serious problem created by the presumption-is-evidence doctrine is that of jury instruction; instructions on the doctrine generally tend to confuse and mislead the jury. Since the concept that a presumption constitutes evidence is inherently illogical, the problem of jury instruction seems insolvable without repudiating the doctrine itself.

Under the current practice, the trial judge describes the presumptions that have arisen in the case and instructs the jury as follows: "This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence."¹⁸² The exact effect of the presumption "is to be determined by you, not by the court; [it is] to be weighed and considered by you in the light of and in connection with all of the other evidence, and you are to give [it] . . . such weight as you deem proper."¹⁸³

These instructions may be preceded by an instruction defining a presumption as a requirement that a fact be assumed in the absence of contrary evidence.¹⁸⁴ This definition is deficient because it does not state that the presumption has any force once contrary evidence is adduced. If the definition be interpreted literally, it states that the sole effect of a presumption is to require a conclusion of *P*'s existence in the absence of evidence of *P*'s nonexistence; since the opponent has necessarily introduced such evidence at the time the instruction is given,¹⁸⁵ the jury

upon a motion for a peremptory ruling against that party. Under this reasoning, the presumption-rebutting rule and the inference-rebutting rule are consistent.

If the two rules are consistent, then, under the Evidence Code, Morgan presumptions will be subject to adverse peremptory rulings. This is because the Evidence Code abolishes the doctrine that presumptions are evidence. Consequently, even though the base facts of a Morgan presumption raise an inference of *P*'s existence, a proponent relying exclusively upon such a presumption would have produced no evidence conflicting with the opponent's evidence of *P*'s nonexistence and the opponent's evidence would not be disregarded. If the opponent's evidence is conclusive, *P*'s nonexistence would be found as a matter of law.

¹⁸² *Gigliotti v. Nunes*, 45 Cal. 2d 85, 95 n.3, 286 P.2d 809, 815 n.3 (1955).

¹⁸³ *Scott v. Burke*, 39 Cal. 2d 388, 393, 247 P.2d 313, 316 (1952). See note 210 *infra*.

¹⁸⁴ As a preliminary instruction, the jury may be told: "A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption. The court will inform you of any presumption that may become applicable in this case." 1 B.A.J.I., 73-74, No. 24 (optional addition) (4th rev. ed. 1956). This instruction would seem to lead a jury to believe that only a decisively convincing showing by the opponent would warrant a finding that the presumed fact does not exist.

¹⁸⁵ Otherwise, the verdict would be directed against the opponent because he would not have met the burden of producing evidence imposed by the presumption.

is required to weigh something which no longer has any effect—a quantity of zero—as evidence.¹⁸⁶ This seems absurd, yet no other definition of “presumption” is given the jury.

Possibly, the jury will assume that a presumption is to be treated as direct evidence of *P*—as if a witness had testified that *P* exists. Such “evidence” is difficult to evaluate. The typical jury activities of assessing the credibility of testimony or the authenticity of documents would be ineffectual.¹⁸⁷ Further, it seems impossible to determine the probability of *P*'s existence by weighing concrete evidence against evidence of a fictional nature.¹⁸⁸

The jury may interpret the instruction that a presumption is to be weighed as evidence as meaning no more than that the base fact has probative value tending to prove the presumed facts; that is, the evidence produced by the opponent that *P* does not exist is to be weighed against the circumstantial evidence (*B*) that *P* does exist.¹⁸⁹

Were this interpretation generally adopted, the presumption-is-evidence doctrine would be similar to the Thayer rule in that a presumption would reach the jury only in the form of an inference. It is doubtful, however, that many juries so interpret the instruction. Moreover, it seems that such an interpretation would be incorrect.

If the trial judge means only to tell the jury that it should evaluate *B* as circumstantial evidence supporting the likelihood of *P*, he should say so. There are more accurate means of pointing to the inferential value of certain facts¹⁹⁰ than telling the jury that there is a presumption

¹⁸⁶ “The jury [under the current presumption-is-evidence instruction] is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and to determine which ‘evidence’ is of greater probative force.” CAL. EVIDENCE CODE § 600, comment.

¹⁸⁷ Justice Traynor states: “It is a mental impossibility to weigh a presumption as evidence. . . . A rule of law that the fact will be presumed to exist in the absence of evidence cannot assist . . . [the jury] in determining from an examination of evidence whether or not the fact exists. It is impossible to weigh a rule of law on the one hand against physical objects and personal observations on the other in order to determine which would more probably establish the existence or non-existence of a fact.” Speck v. Sarver, 20 Cal. 2d 585, 594, 128 P.2d 16, 21 (1942) (dissenting opinion).

¹⁸⁸ A rule of law “can no more be balanced against evidence than ten pounds of sugar can be weighed against half-past two in the afternoon.” Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 225 (1949) (quoting an unidentified English judge).

¹⁸⁹ Professor Prosser indicates that probably “no more is meant than that . . . [the presumption's] weight still depends on the strength of the facts which give rise to it as compared with the strength of the rebutting evidence. So stated, the California decisions make a considerable amount of sense.” *Id.* at 226.

¹⁹⁰ Since comment on the evidence is permitted in California, CAL. CONST. art. VI, § 19, the judge may explain the “allowable circumstantial inferences” and overcome the normal reluctance of the jury to give the circumstantial evidence of *P* its proper weight.

which must be weighed as evidence, that it is mandatory in the absence of other evidence,¹⁹¹ and that it is controlling unless overcome by substantial evidence.¹⁹² The use of that terminology would seem to indicate that some greater effect is intended.

Other indications point to the same conclusion. If the presumption-is-evidence instruction is intended only to insure that the inference underlying the presumption be given the same consideration due any inference, a similar instruction should be given whenever there is an inference to be drawn.¹⁹³ Instructions on inferences are not comparable, however, to those on presumptions.¹⁹⁴ If charging the jury on a presumption merely points up circumstantial facts already in evidence, it would seem that refusal to give the instruction would not be prejudicial; yet such a refusal has been held reversible error.¹⁹⁵ There is generally no error in failing to instruct the jury that certain facts in evidence have an inferential value.¹⁹⁶ If two presumptions conflict, it would seem that the probative value of the basic fact of both presumptions should be called to the jury's attention; yet, in some cases, only the presumption supported by stronger policy considerations is the subject of an instruction.¹⁹⁷ If

McCORMICK, EVIDENCE § 317, at 670 (1954). The power to comment on the evidence is, however, rarely used in California. See Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456 (1962) (courts would rather use form-book instructions and avoid reversals than be understandable). Bal indicates that "no California judge has been heard to comment on the evidence in a civil case." Bal, *Trial By Jury*, 32 CAL. S.B.J. 313, 325 (1957). *But see* Kahn v. Commercial Union Fire Ins. Co., 16 Cal. App. 2d 42, 46-47, 60 P.2d 177, 179 (1936); Comment, 25 CALIF. L. REV. 212, 218-19 (1937). The California courts are willing, however, to mention to the jury that certain inferences may be drawn (perhaps Bal does not consider this commenting on the evidence). See, e.g., Leming v. Oilfields Trucking Co., 44 Cal. 2d 343, 353, 282 P.2d 23, 29 (1955), where the following charge was approved: "you are not compelled to draw this inference, but you may do so if your reason and discretion so dictate; and if you draw such an inference, you are not required to abandon it in the face of any contradictory evidence. . . ." See also, e.g., 1 B.A.J.I. 138-39, No. 54-E (9th rev. ed. 1956). See note 10 *supra*.

¹⁹¹ See notes 182-84 *supra*.

¹⁹² See note 182 *supra* and note 210 *infra*.

¹⁹³ See Hale, *Evidence—Presumptions*, 17 So. CAL. L. REV. 384, 388 (1943).

¹⁹⁴ Compare text accompanying notes 181-84 *supra*, with the instruction as to an inference in Leming v. Oilfields Trucking Co., 44 Cal. 2d 343, 353, 282 P.2d 23, 29 (1955). This instruction is quoted in note 190 *supra*.

¹⁹⁵ E.g., Gigliotti v. Nunes, 45 Cal. 2d 85, 94, 286 P.2d 809, 815 (1955); Hoyt v. Southern Pac. Co., 6 Cal. App. 2d 49, 52, 44 P.2d 363, 364 (1935); cf. Chadbourn, *Law Revision Study* 1047, 1090. Similarly, if a presumption merely emphasized circumstantial facts already in evidence, giving an instruction on a presumption which has been rebutted should not constitute prejudicial error; but it has been so held. See Laird v. Mather, Inc., 51 Cal. 2d 210, 222, 331 P.2d 617, 624 (1958).

¹⁹⁶ *Res ipsa loquitur* is an exception to this rule, yet the "inference" is actually a quasi-presumption. See Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 691, 268 P.2d 1041, 1046 (1954); Degnan, *Law Revision Study* 1108, 1131-33; McCoid, *Negligence Actions Against Multiple Defendants*, 7 STAN. L. REV. 484 (1955); note 16 *supra*.

¹⁹⁷ Presumption of validity of second marriage (innocence of crime or wrong) cancels

the evidence of the opponent is conclusive, an inference is rebutted as a matter of law; conclusive evidence does not rebut a presumption, however, and the jury is allowed to find that the presumed fact exists.¹⁹⁸ Here it is clear that the jury is permitted to give the presumption more weight than is warranted by the underlying inference. Finally, when a presumption is based on facts which do not have sufficient probative strength to warrant a finding of the presumed fact, the instruction that the presumption is sufficient evidence of the presumed fact necessarily requires the jury to award the presumption some significance greater than the logical force of the underlying inference. It appears from all these considerations that the jury, whenever it is told to weigh a presumption as evidence, is to accord *B* more than its probative value.¹⁹⁹

To the extent that a presumption is grounded on an important policy, it is arguable that the jury should give the presumption artificial weight.²⁰⁰ The presumption-is-evidence instruction, however, is an inefficient and confusing way of enforcing the underlying policy. The jury is not told to value the presumption according to its assessment of the policy behind it; it is simply told that the presumption is evidence, and it may interpret this to mean that it should arbitrarily assume *P* exists regardless of the reasons for doing so. Even if the jury is inclined to weigh the policy underlying the presumption, it is left to speculate as to what that policy is—a process open to the widest variation.²⁰¹ In addition, the instruction does not tell the jury what weight it should accord legal policy;²⁰² to the extent that it considers the law to be on the side of the proponent, it may feel unduly constrained to find in his favor.²⁰³ The jury has even

out the presumption of the continued validity of the first marriage (presumption that a thing, once proved to exist, continues to exist). *Estate of Smith*, 33 Cal. 2d 279, 281, 201 P.2d 539, 540 (1949); *Wilcox v. Wilcox*, 171 Cal. 770, 773-75, 155 Pac. 95, 97 (1916); *Hunter v. Hunter*, 111 Cal. 261, 267, 43 Pac. 756, 757 (1896); see note 229 *infra*.

¹⁹⁸ See text accompanying notes 169-73 *supra*.

¹⁹⁹ "[T]here is attributed to the presumption some sort of weight or value that it does not actually possess." McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 545-46 (1938).

²⁰⁰ "It may be that [the presumption-is-evidence instruction] . . . conveys to the jury a vague, general notion that more evidence is required to find . . . [*P*] does not exist than would normally be the case, and that it, therefore, does no real harm . . ." Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 74 (1933); see Chadbourn, *Law Revision Study* 1047, 1092-93 (the charge would be proper if it were interpreted as a "sort of frame of reference for appraising the defendant's credibility").

²⁰¹ See text accompanying notes 47-56 *supra*.

²⁰² Morgan, *supra* note 200, at 74.

²⁰³ See, e.g., *People v. Chamberlain*, 7 Cal. 2d 257, 60 P.2d 299 (1936), where the defendant produced thirteen expert witnesses testifying that he was insane; the prosecution relied entirely upon the presumption of sanity and cross-examination of the defendant's witnesses. Judgment of guilty affirmed. Apparently the presumption-is-evidence instruction was responsible for the result. It allowed the jury to "somehow . . . conclude that a

been required to determine *P*'s existence by choosing between two conflicting presumptions, neither of which had any substantial logical value.²⁰⁴ Apparently it was to assign its own estimate of legal policy to each side of the issue and to award the verdict to the side supported by the weightier policy.²⁰⁵ In this situation, the jury is finding law not fact.²⁰⁶

The most confusing aspect of the presumption-is-evidence instruction is that it conflicts with a charge that the proponent has the burden of persuasion.²⁰⁷ A presumption does not, under current law, shift the burden of persuasion to the opponent.²⁰⁸ Thus, the opponent wins if he produces a balance of the evidence, whereas the proponent must make out a preponderance.²⁰⁹ If the presumption-is-evidence instruction does

ruling of law or an arbitrary assumption of fact outweighs the testimony of a great number of competent and credible witnesses." McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 545 n.62 (1938). *Chamberlain* was overruled in *In re Dennis*, 51 Cal. 2d 666, 674, 335 P.2d 657, 661 (1959). See also cases cited in Chadbourn, *Law Revision Study* 1047, 1097 n1.

²⁰⁴ *Scott v. Burke*, 39 Cal. 2d 388, 247 P.2d 313 (1952). The judge in that case instructed the jury as follows: "[T]hese instructions direct your attention to two conflicting rebuttable presumptions relating to the conduct of the defendant (one) that he exercised due care at the time of the accident which presumption arises in the event that you find that as a result thereof he is unable to remember the facts pertaining to the same, and (two) that he was negligent if you find that he was driving on the wrong side of the road, or that he permitted the automobile to leave the road in question entirely, or that he fell asleep at the wheel. If you find the facts to exist which give rise to these presumptions, then these conflicting presumptions constitute evidence, the effect of which is to be determined by you, not by the court . . . and you are to give to them, and each of them, such weight as you deem proper . . ." *Id.* at 393, 247 P.2d at 316. From this instruction, the presumption of due care appears to rest upon proof of amnesia, yet there is no rational relationship between the two facts. "Accordingly the jury could not assume that when the court described the presumption as evidence, it intended only to call the jury's attention to the various logical inferences it might draw from the evidence." *Id.* at 405, 247 P.2d at 323 (Traynor, J., dissenting).

²⁰⁵ The jury "could only assume that it must consider two new items of conflicting evidence whose nature it could not understand." Traynor, J., dissenting in *Scott v. Burke*, *supra* note 204, at 405-06, 247 P.2d at 323; *cf. Danner v. Atkins*, 47 Cal. 2d 327, 332, 303 P.2d 724, 727-28 (1956).

²⁰⁶ See note 176 *supra*.

²⁰⁷ "[W]hen a presumption treated as evidence is applied in favor of the party with the burden of proof, the results are incongruous." *Speck v. Sarver*, 20 Cal. 2d 585, 594, 128 P.2d 16, 21 (1942) (Traynor, J., dissenting). See also *Black v. Partridge*, 115 Cal. App. 2d 639, 649, 252 P.2d 760, 766 (1953) (such a charge may indicate to laymen that the burden of proof shifts to the opponent); Hale, *Evidence—Presumptions*, 17 So. CAL. L. REV. 384, 386 (1944).

²⁰⁸ See, e.g., *People v. Hardy*, 33 Cal. 2d 52, 63-64, 198 P.2d 865, 871-72 (1949); *Scarborough v. Urgo*, 191 Cal. 341, 216 Pac. 584 (1923); *Valente v. Sierra Ry.*, 151 Cal. 534, 91 Pac. 481 (1907); *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871 (1889). There are exceptions to the rule that the burden of proof does not shift. See note 138 *supra*.

²⁰⁹ MORGAN, *BASIC PROBLEMS OF EVIDENCE* 18-19 (1957); 9 WIGMORE, *EVIDENCE* § 2485 (3d ed. 1940); see, e.g., *Patterson v. San Francisco & S.M. Elec. Ry.*, 147 Cal. 178, 183, 81

not lead the jury to add artificial weight to the probative value of the proponent's evidence, then it would not affect the requirement that the proponent produce a preponderance of the evidence. Even if no artificial effect be given the presumption, however, the particular phrasing of the instruction, emphasizing the opponent's burden to overcome the presumption, may confuse the jury and offset the instruction that the proponent has the burden of persuasion so that the jury is uncertain which side should win a verdict when the probabilities are evenly balanced. For instance, the jury may be told that while the defendant has the burden of persuasion as to the issue of contributory negligence,

[t]he presumption that plaintiffs were not guilty of contributory negligence is, in itself, a species of evidence which continues with the said plaintiffs throughout the trial of this action and unless and until overcome by evidence to the contrary. This presumption in favor of said plaintiffs must prevail until and unless it is overcome by satisfactory evidence to the contrary.²¹⁰

As has been suggested, the jury may reasonably tend to interpret the

Pac. 531, 533 (1905) ("if [the opponent] . . . introduces sufficient evidence simply to balance . . . a presumption without overcoming it by a preponderance of the evidence, the presumption is overcome"); cf. Chadbourn, *Law Revision Study* 1047, 1079-81. The cases cited by Chadbourn at 1079 n.4 (with the exception of the *Patterson* case, *supra*) upheld instructions that the burden of persuasion shifted to the opponent apparently because the charge was not greatly different from the correct rule that the opponent has the burden of balancing the evidence.

²¹⁰ This instruction was given by the trial judge and approved by the California Supreme Court in *Speck v. Sarver*, 20 Cal. 2d 585, 587, 128 P.2d 16, 17 (1942). Similar instructions have been given in other cases. See, e.g., *Westberg v. Willde*, 14 Cal. 2d 360, 364, 94 P.2d 590, 593 (1939); *Anderson v. Southern Pac. Co.*, 129 Cal. App. 206, 212, 18 P.2d 703, 706 (1933). See also *Bonneau v. North Shore R.R. Co.*, 152 Cal. 406, 411, 93 Pac. 106, 108 (1907) (instruction that presumption casts the "burden of proving" the contrary upon the opponent held to be not erroneous because instruction did not say that opponent had the burden of proving the contrary by a preponderance of the evidence). In *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 688, 268 P.2d 1041, 1044 (1954), the court approved the following instruction on the "inference" of *res ipsa loquitur*, which appeared in *Hardin v. San Jose City Lines*, 41 Cal. 2d 432, 435, 260 P.2d 63, 64 (1953), and in 1 B.A.J.I. 321, No. 206-B (3d ed. 1943): "That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence . . ." See WITKIN, CALIFORNIA EVIDENCE § 80, at 101 (1958).

Proper instructions may, however, avoid confusion between the burden of persuasion and the burden of overcoming the presumption. For example, in *Patterson v. San Francisco & S.M. Elec. Ry.*, 147 Cal. 178, 183, 81 Pac. 531, 533 (1905), the court approved the following instruction: "the presumption . . . need not be overcome . . . by any preponderance of evidence. If the railroad company introduces sufficient evidence simply to balance such a presumption, without overcoming it by a preponderance of evidence, the presumption is overcome." See 1 B.A.J.I. 70, No. 22-B (4th ed. rev. 1956).

presumption-is-evidence instruction as requiring them to give the presumption more than its natural probative value.²¹¹ Whenever this occurs, the burden of persuasion, as a practical matter, shifts to the opponent. The opponent will not win the case even if the probative value of his evidence balances the probative value of the proponent's evidence; the opponent must have additional probative weight to equal the artificial weight given the presumption. As a result, the opponent must show more than a balance of probability; he must show a preponderance and, therefore, he has the burden of persuasion.²¹²

An anomalous situation arises when the presumption is supported by such slight probative connection that no reasonable jury could find that *P* exists from proof of *B*. Such a presumption is created by section 3708 of the Labor Code which provides that proof that an employer failed to secure payment of workmen's compensation to an injured employee gives rise to the presumption that the injury suffered by the employee was the result of the employer's negligence. In a suit by the employee against the employer, the employee would have the burden of persuasion that the employer was negligent. If the employee relies entirely upon this presumption to prove the employer's negligence, and if the employer meets the burden of producing evidence that he was not negligent, then the issue should not be submitted to the jury: The employee has merely produced evidence that the employer did not secure payment of workmen's compensation and this showing could not possibly persuade a reasonable jury that the employer negligently caused the employee's injury. The employee has not, therefore, sustained his burden of persuasion. Under current law, however, the issue goes to the jury with an instruction that the proponent has the burden of persuasion.²¹³

When a presumption works against the party with the burden of persuasion, the presumption-is-evidence instruction enlarges that party's burden.²¹⁴ It is doubtful that the policy reasons for more than a few

²¹¹ See text accompanying notes 190-99 *supra*.

²¹² "Faulty and contradictory reasoning is employed . . . if we say, first, that the burden of persuasion is upon a plaintiff to prove that the insured is dead, but due to his absence, etc., we will start from the premise fixed by judicial command that the probabilities, in fact, are that he is dead." McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 547 (1938). *But see* McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 28 (1954); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 70 (1933) (the jury may properly be told to begin with the assumption that *P* is true).

²¹³ In *Goss v. Fanoie*, 114 Cal. App. 2d 819, 824-25, 251 P.2d 337, 340-41 (1953), the court held that though the plaintiff-employee adduced other evidence that the defendant-employer was negligent, the presumption created by California Labor Code § 3708 was "in itself," sufficient evidence to allow the plaintiff-employee to reach the jury.

²¹⁴ "The burden of proof may well be impossible for a litigant to sustain if a presumption is applied as evidence against him." *Speck v. Sarver*, 20 Cal. 2d 585, 594, 128

presumptions justify increasing this burden. Even where the quantum of proof should be increased, the presumption-is-evidence instruction is an unsatisfactory means of doing it. The instruction does not define the degree of conviction the opponent must induce to dispel a presumption, and, therefore, the jury is left to decide, without restriction, what the required quantum of proof should be.²¹⁵ Subjecting the opponent to this uncertain and possibly insurmountable handicap seems unfair.

For these reasons, the presumption-is-evidence doctrine is incomprehensible in application; its use has become a "solemn farce."²¹⁶ By eliminating this doctrine, the Evidence Code has cleared the way for an understandable treatment of presumptions.

IV

OTHER ASPECTS OF THE EVIDENCE CODE

In addition to creating two types of presumptions and eliminating the presumption-is-evidence doctrine, the Evidence Code treats a number of anomalous aspects of the current law of presumptions. While the Code's treatment of these problems is generally constructive, it fails to deal explicitly with several matters warranting attention. The effect of the Code in these peripheral areas of the law of presumptions will be discussed briefly.

A. Mentioning Presumptions to the Jury

The Evidence Code changes the rule that the jury must be informed of all presumptions involved in a case. The comments to the Evidence Code indicate that the judge should not mention the term "presumption" to the jury.²¹⁷ Although there is a split of authority on the question,²¹⁸ the rule of the Evidence Code is clearly preferable. The term "pre-

P.2d 16, 21 (1942) (Traynor, J., dissenting). See also Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71, 80-82 (1940); Weinstock & Chase, "The Presumption of Due Care" in California, 4 HASTINGS L.J. 124 (1953); Comment, 14 B.U.L. REV. 440, 445 (1934); Note, 41 CALIF. L. REV. 748 (1953); Note, 2 STAN. L. REV. 559 (1950).

²¹⁵ McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519, 548 (1938) ("the degree of probability in fact is not fixed and cannot be fixed by any conceivable process of the human mind"). Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 475, 488 (1959).

²¹⁶ 9 WIGMORE, EVIDENCE § 2498(a), at 336 (3d ed. 1940).

²¹⁷ Thayer presumptions are rebutted where *P* is a question of fact for the jury and, therefore, no instruction concerning the departed presumption should be made. CAL. EVIDENCE CODE § 604, comment. When a Morgan presumption is applicable and *P* is a question of fact for the jury, the instruction is that if the jury finds *B*, they "must also find [*P*] . . . unless persuaded of the nonexistence of . . . [*P*] by the requisite degree of proof. CAL. EVIDENCE CODE § 606, comment. Hence, there is no need to mention the term "presumption."

²¹⁸ A presumption should be mentioned: *Worth v. Worth*, 48 Wyo. 441, 460-61, 49

sumption" is apt to mislead a jury because it may feel the presumption should be accorded some indefinite measure of artificial weight.²¹⁹ To the extent that the jury is free to determine the amount of artificial weight to be accorded, it is given the power to make a policy decision rather than a factual determination.²²⁰ Where it is felt necessary to compensate for the reluctance of juries to give due respect to circumstantial evidence, the judge may mention that *B* creates a permissible inference of *P*—or some other form of comment on the evidence.²²¹

B. Clear and Convincing Proof

Under current law, a party has the burden to establish some matters by clear and convincing proof.²²² The Evidence Code continues this practice, for certain Morgan presumptions impose this increased burden of persuasion upon an opponent.²²³ The jury is told that if it finds *B* exists, it is to find *P* exists unless persuaded otherwise by clear and convincing proof.²²⁴ The instruction is not supposed to affect the process of weighing the probative value of the evidence; but once the weighing process has been completed, the instruction is designed to increase, to an ascertainable degree, the measure of conviction required for a finding of *P*'s nonexistence.²²⁵ The "clear and convincing" instruction, though vague,²²⁶ may adequately convey this idea to the jury.

P.2d 469, 656 (1935) (jury must be told to start with an assumption of *P*); UNIFORM RULE OF EVIDENCE 14, comment (the jury needs guidance to give effect to the substantive policy underlying the presumption); McCORMICK, EVIDENCE § 316, 317 (1954); 9 WIGMORE, EVIDENCE § 2498(a) (21) (b), at 340-41 (3d ed. 1940). Reaugh argues that not only the presumption but also the policy reasons for the presumption should be mentioned to the jury. Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 819, 832-50 (1942).

A presumption should not be mentioned: *Brown v. Henderson*, 285 Mass. 192, 196, 189 N.E. 41, 43 (1934) (Lummas, J., concurring); *Rose v. Pendergast*, 353 Mo. 300, 182 S.W.2d 307 (1944); *Foreword* to MODEL CODE OF EVIDENCE at 55-57; 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 1085 (1911); NEW JERSEY SUPREME COURT COMM., REPORT ON EVIDENCE Rule 14, comment, at 51 (March 1963); Falknor, *supra* note 214, at 76-83.

²¹⁹ See Morgan, *Further Observations on Presumptions*, 16 SO. CAL. L. REV. 245, 264 (1943). Morgan feels that the term "assumption" would not mislead the jury. The comment to California Evidence Code § 606 adopts this notion. The instruction suggested in the comment is criticized in note 111 *supra*.

²²⁰ See note 176 *supra*.

²²¹ See notes 110, 190 *supra*.

²²² See, e.g., *Estate of Duncan*, 9 Cal. 2d 207, 217, 70 P.2d 174, 179 (1937) (community property presumption); *Estate of Nickson*, 187 Cal. 603, 203 Pac. 106 (1921) (community property presumption).

²²³ The presumption of legitimacy and the presumption of ownership of legal title from ownership of beneficial title require clear and convincing proof to be rebutted in a civil action. CAL. EVIDENCE CODE §§ 661, 662.

²²⁴ CAL. EVIDENCE CODE § 606, comment.

²²⁵ See McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 16-18 (1954).

²²⁶ The comment to § 606 of the California Evidence Code states that clear and con-

It appears that the "clear and convincing" rule should affect the standard for directing verdicts. If the evidence would support a finding that *P* is probable but would not warrant a finding that *P* is highly probable, the judge should not submit the issue to the jury. As the law stands, however, a party has no grounds for reversal if the trial judge fails to direct a verdict in this situation.²²⁷ The Evidence Code is silent on this matter.

C. *Conflicting Presumptions*

The Evidence Code is also silent on the rather complex subject of conflicting presumptions. For example, a "clear and convincing" presumption would seemingly rebut a Morgan presumption which in turn would cancel out a Thayer presumption. Apparently, two Thayer presumptions would neutralize one another.²²⁸ When two "clear and convincing" presumptions conflict, it would seem that the trial judge must decide which presumption is supported by the weightier policy and he must apply that presumption alone. He should have the same duty when two Morgan presumptions conflict.²²⁹ When the policies behind two

vincing proof should be "sufficiently strong to command the unhesitating assent of every reasonable mind." This comes disturbingly close to the beyond-a-reasonable doubt test of criminal cases, or the reasonable-men-could-not-conclude-otherwise test for directing verdicts in civil cases.

Morgan says that a proposition must be convincing to be persuasive and it must be clear to be convincing. He suggests that the test should be a "firm belief in the degree of preponderance of probability . . ." Morgan, *Presumptions*, 10 *RUTGERS L. REV.* 512, 522 (1956). McBaine suggests the "highly probable" test. McBaine, *supra*, note 225, at 17-18; *accord*, *Stromerson v. Averill*, 22 Cal. 2d 808, 818, 141 P.2d 732, 737 (1943) (Traynor, J., dissenting); see *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 444-46, 159 P.2d 958, 975-76 (1945) ("Clear and conclusively" held erroneous instruction). Since an instruction as to "clear and convincing" evidence does not appear in the California Evidence Code itself, judges may choose different ways of describing the burden to the jury.

²²⁷ See *Stromerson v. Averill*, 22 Cal. 2d 808, 141 P.2d 732 (1943). *But see* dissent of Traynor, J., *id.* at 817, 141 P.2d 737. The various views on this issue are presented by McNaughton, *Burden of Producing Evidence: A Function of the Burden of Persuasion*, 68 *HARV. L. REV.* 1382 (1955).

²²⁸ MODEL CODE OF EVIDENCE rule 704(2); THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 338 (1898); Alexander, *Presumptions: Their Use and Abuse*, 17 *MISS L.J.* 1, 3 (1945); Morgan, *Some Observations Concerning Presumptions*, 44 *HARV. L. REV.* 906, 916-17 (1931) ("If the sole effect of a presumption is to fix the burden of producing evidence, it is a necessary corollary that conflicting presumptions are legal impossibilities. Certainly if a presumption operates only to fix the burden of producing evidence to avoid a directed verdict, that burden can not be put upon both parties at the same time as to the same issue.").

²²⁹ There is strong authority in California for selecting the presumption supported by the weightier policy considerations and disregarding the other presumption. See *People v. O'Brien*, 130 Cal. 1, 7, 62 Pac. 297, 299 (1900) (presumption of chastity overcome by presumption of innocence of a crime—rape). See also WITKIN, *CALIFORNIA EVIDENCE* § 108 (1958). Chadbourn, *Law Revision Study* 1047, 1099 n.6. The task of selecting the proper

conflicting "clear and convincing" presumptions or two conflicting Morgan presumptions are of equal strength, the judge apparently must treat the presumptions as cancelling each other out.²³⁰ None of these rules follow necessarily from the nature of presumptions or from the case law.²³¹

Difficult problems may arise when a statutory presumption conflicts with one of the nonstatutory presumptions which are generally called "inferences," or with the quasi-presumption of *res ipsa loquitur*.²³² The task of the trial judge would be more burdensome if the conflicting presumptions have not been classified into Thayer, Morgan, or "clear and convincing" categories. He must first classify each presumption and then decide whether one should cancel the other out. Although presumptions do not often conflict, some guidelines for the harried trial judge should have been included in the Evidence Code.

presumption may be a confusing one. See *People v. Burke*, 43 Cal. App. 2d 316, 110 P.2d 685 (1941), noted in 15 So. CAL. L. REV. 112 (1941); cf. UNIFORM RULE OF EVIDENCE 15.

²³⁰ See UNIFORM RULE OF EVIDENCE 15. McBaine says that there is no authority in the California decisions for this rule. McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 29 (1954). This may be explained by the current treatment of presumptions as evidence which generally must be mentioned to the jury. See note 195 *supra*.

²³¹ Logically, Morgan presumptions should cancel each other out. See the quotation from Morgan, *supra* note 225 (the same reasoning would apply to the burden of persuasion as well as the burden of producing evidence). Chadbourn feels that Thayer presumptions should not automatically cancel each other out but should be subjected to the weightier-policy test. Chadbourn, *Law Revision Study* 1047, 1100-01. Wigmore seems to indicate that the presumption which arises earlier in a case may be said to give way to a presumption arising later. 9 WIGMORE, EVIDENCE § 2493 (3d ed. 1940). Another "solution" is that specific presumptions override general ones. See *Rader v. Thrasher*, 57 Cal. 2d 244, 252, 368 P.2d 360, 364-65, 18 Cal. Rptr. 736, 740 (1962) (presumption of consideration from a writing overcome by presumption of no consideration when a fiduciary gains a special advantage). It is difficult, however, to distinguish between general and specific presumptions. Still another tactic has been to submit both presumptions to the jury. See *People v. Hewlett*, 108 Cal. App. 2d 358, 239 P.2d 150 (1951); *People v. Van Wie*, 72 Cal. App. 2d 227, 231, 164 P.2d 290, 292 (1945). *Scott v. Burke*, 39 Cal. 2d 388, 247 P.2d 313 (1952). There are other problems. For instance, what happens when a presumption conflicts with one of the sections of the Evidence Code allocating the burden of persuasion as to specific issues? See CAL. EVIDENCE CODE §§ 520-22. If the specific issue section wins out, then certain presumptions would be virtually eliminated. For example, § 520 (innocence of crime or wrong) would nullify the presumption that a fiduciary used undue influence when he attained a special advantage. Another problem is what should be done when the base facts of one or both conflicting presumptions are questions of fact for the jury. The California Evidence Code is silent as to these matters.

²³² *Res ipsa loquitur* is a special kind of inference which operates in a way similar to presumptions. See Degnan, *Law Revision Study* 1108, 1131-33. The subject of *res ipsa loquitur* is beyond the scope of this comment. However, it should be noted that the California Evidence Code does not indicate what effect this quasi-presumption should be given. See notes 16, 196 *supra*.

D. *Prima Facie Evidence*

Professor Degnan points out that the meaning of prima facie evidence is unsettled in California. Section 1833 of the Code of Civil Procedure provides: "Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence."²³³ This definition suggests that the term "prima facie evidence" is used to designate evidence of *P*'s existence that is sufficient to avoid a peremptory ruling. As Degnan indicates, however, the Code Commissioners intended prima facie evidence to do more than merely allow the jury to find *P* exists; for the Commissioners felt that a new trial must be granted if the jury fails to find in accord with uncontroverted prima facie evidence.²³⁴

Under existing law, prima facie evidence does not merely enable the proponent to reach the jury; it requires the opponent to produce evidence to overcome the prima facie showing in order to avoid a nonsuit or directed verdict. Some decisions have indicated that prima facie evidence imposes upon an opponent a greater burden than even the burden of persuasion.²³⁵

The Evidence Code removes some of the uncertainty about prima facie evidence. Section 602 of the Code states that prima facie evidence has the same effect as either a Morgan or a Thayer presumption. Nevertheless, the Code leaves to the courts the task of deciding whether the term "prima facie evidence" as used in a given statute should be treated as a Thayer presumption or as a Morgan presumption.²³⁶ A better plan

²³³ Originally, the legislature may have used the term to designate evidence of *P*'s existence that is sufficient to avoid a peremptory ruling. If the prima facie evidence inherently has the requisite probative force to support a verdict that *P* exists, then a statute designating it as sufficient evidence is unnecessary (though it would save judges the trouble of deciding the sufficiency of the evidence in every case). If the prima facie evidence is not sufficiently probative to support a verdict of *P*'s existence, then a statute which authorizes the jury to find *P* exists would give that evidence artificial force. This is inadvisable. See text between notes 93 and 94 *supra*.

²³⁴ Degnan, *Law Revision Study* 1108, 1144. Degnan cites the Code Commissioner's Notes in CAL. CODE CIV. PROC. § 1833 (West 1955).

²³⁵ *People v. Mahoney*, 13 Cal. 2d 729, 732, 91 P.2d 1029, 1030-31 (1939) (dictum); *Miller & Lux, Inc. v. Secara*, 193 Cal. 755, 770-71, 227 Pac. 171, 176 (1924) (dictum). The language in these cases suggests that the party relying upon prima facie evidence may be entitled to a favorable peremptory ruling even when the adversary has adduced evidence which normally would meet the burden of producing evidence but which, in the opinion of the judge, does not have greater probative force than the prima facie evidence; that is, the adversary loses as a matter of law unless he persuades the judge that his contentions are probably true. It is doubtful, however, that prima facie evidence has this effect under current law. See Degnan, *Law Revision Study* 1108, 1145-48.

²³⁶ CAL. EVIDENCE CODE § 602, comment.

would have been to specify that, in every instance, prima facie evidence is to have the force of a Morgan presumption.²³⁷

Degnan suggests that the legislature may have designated certain matters as prima facie evidence in order to create a hearsay exception.²³⁸ If prima facie evidence serves only to avoid the hearsay rule, it may be improper to treat such evidence as a rebuttable presumption. The Evidence Code could have solved this problem by determining when prima facie evidence is used solely as a hearsay exception and by declaring that, in these instances, such evidence is to be admissible, but is not to be given any special effect.

E. Nonstatutory Presumptions

At one time it was assumed that a presumption must be created by the legislature.²³⁹ As a result of this notion judge-made presumptions are frequently called inferences.²⁴⁰ The Evidence Code clearly recognizes that presumptions may be either statutory or nonstatutory.²⁴¹ Thus, the term "presumption" may be applied to all rules of law of similar effect whether they are created judicially or legislatively; and the term "inference" may be used to describe merely the existence of a probative connection between two facts which is sufficient to allow a reasonable man to conclude that because one fact exists, another fact probably exists also. Hopefully, this will clarify the distinction between presumptions and inferences.

CONCLUSION

The Evidence Code will simplify and improve the California law of presumptions. The Code's most important contribution is the abolition of the confusing rule that presumptions constitute evidence. Certain undesirable features of the current law will probably disappear with that

²³⁷ See discussion in Part I, section A *supra*.

²³⁸ Degnan, *Law Revision Study* 1108, 1140.

²³⁹ The idea that a presumption must be statutory was derived from the language of California Code of Civil Procedure § 1959 defining a presumption as a "deduction which the law expressly directs to be made." (Emphasis added.) See Kidd, *Judicial Notice, Presumptions and Burden of Proof*, 13 CALIF. L. REV. 472, 476-79 (1925). Nonstatutory presumptions have, however, been recognized by the California Supreme Court. See *People v. Agnew*, 16 Cal. 2d 655, 663, 107 P.2d 601, 605 (1940). *But see Wolstonholme v. City of Oakland*, 54 Cal. 2d 48, 52, 53, 351 P.2d 321, 323-24 (1960) (dissenting opinion by Gibson, C.J., joined by Peters, J. and Traynor, J.) (no presumption should be judicially created unless there are compelling reasons for doing so).

²⁴⁰ See WITKIN, CALIFORNIA EVIDENCE §§ 98, 101 (1958). Degnan, *Law Revision Study* 1108, 1134; Kidd, *supra* note 239, at 478.

²⁴¹ The Code does not define a presumption as something "the law expressly directs." See CAL. EVIDENCE CODE § 600. The comments to Evidence Code §§ 601, 620, 630 indicate that nonstatutory presumptions are authorized. Three nonstatutory presumptions are specifically classified. CAL. EVIDENCE CODE §§ 635, 662, 664.

change, including the practice of mentioning the term "presumption" to the jury, the charade of "weighing" conflicting presumptions, and the impossibility of directing verdicts against proponents of presumptions even when conclusive evidence is produced contradicting the existence of the presumed fact.

By applying the Morgan rule to presumptions created for public policy reasons, the Evidence Code effectively implements those policy considerations. Nevertheless, the Code's classification of presumptions into two types is undesirable. If all presumptions were given the effect of shifting the burden of persuasion, simplicity would be achieved and all the considerations giving rise to presumptions would be properly recognized.

The plan of the Evidence Code, while not ideal, does provide a sensible framework for dealing with presumptions. Any system which is workable and which can be understood should be a welcome innovation in this confusing area of the law.

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