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Toward a Workable Civil Presumptions Rule in Louisiana

A presumption is like the poppy spread
You seize the flower and the bloom is shed
Or like snowfall on the river
A moment seen and then gone forever.¹

“Presumptions . . . may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.”²

Presumptions are like pitches in the strike zone which place the batter in peril of striking out, unless he hits a fair ball.³

Like Maeterlinck’s male bee, having functioned they disappear.⁴

“Presumption” is the slipperiest member of legal terms⁵

I. INTRODUCTION

All of the foregoing similes reveal that for some time now, authorities have experienced difficulty with the perceived ephemeral nature of the evidentiary device known as the presumption, as well as with its place and effect in a system of rules governing evidence. The debate has raged unabated and continues today.⁶

When Louisiana enacted the Code of Evidence,⁷ adopting for the most part the Federal model,⁸ no provisions on presumption were

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1. Mason Ladd, *Presumptions in Civil Actions*, 1977 Ariz. St. L.J. 275, 282 (substituting the word “presumption” for the word “pleasure” in Robert Burns’ poem, *Tam O’Shanter*).

2. *MacKowik v. Kansas City, St. J. & C.B.R. Co.*, 94 S.W. 256, 262 (Mo. 1906) (Lamm, J.) (quoting unattributed author).

3. 9 John H. Wigmore, *Evidence in Trials at Common Law* § 2491, at 305 n.4 (Chadbourn 1981).

4. Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. Pa. L. Rev. 307, 314 (1920).

5. 2 Charles T. McCormick, *Evidence* § 342, at 449 (4th ed. 1992).

6. Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Evidence* 301-01 et seq. (1991). Particularly note references at 301-14 to 301-15 and the myriad of state rules in ¶ 301[05]. For a simplistic analysis of the theoretical debate, see Ladd, *supra* note 1.

7. 1988 La. Acts No. 515, approved July 8, 1988, effective Jan. 1, 1989.

8. George W. Pugh et al., *The Louisiana Code of Evidence—A Retrospective and Prospective View*, 49 La. L. Rev. 689 (1989), reprinted from George W. Pugh et al., *Handbook on Louisiana Evidence Law* (1989) [hereinafter Pugh et al., *Handbook*].

addressed. Due to pressure on the advisory committee to present their projet to the legislature,⁹ the Louisiana Code of Evidence was left devoid of treatment of presumptions, as these provisions were "easily severable" from the remainder of the code, their effect not being interplayed with the other provisions of the code. However, this time pressure and its relation to the absence of any provisions on presumptions is a symptom of the real malady: the controversy and diversity of opinion surrounding presumptions and their evidentiary effect.¹⁰

Further, given that there exists no real agreement on presumptions in the body of evidence law developed under the evidentiary strictures of the common law, the problem becomes more confounded when such precepts are applied to a civil law system which regards presumptions as a form of "proof" and which historically contained no codified evidence law.¹¹

This, therefore, is the impetus of this work. What evidentiary rule should Louisiana formulate which will best solve any theoretical debate about the nature of presumptions? What rule will yield the best result in practice? What rule comports with a system which historically considers presumptions as "proof"? What effect is currently given to presumptions under the civil law? To attempt an answer could be a vain exercise, considering the almost one-hundred-year debate that has existed among common law authorities.¹²

This comment will review, in a cursory and perhaps perfunctory manner, the Louisiana law of presumptions and its origins. Then a

9. *Id.* at 692.

10. Gerard A. Rault, *An Overview of the New Louisiana Code of Evidence—Its Imperfections and Uncertainties*, 49 La. L. Rev. 699, 704 (1989).

11. See Bk. III, Tit. III, Ch. 5 of the Louisiana Civil Code. Specifically note La. Civ. Code arts. 1849-1852 which state:

Art. 1849. Presumption

A presumption is a consequence that the law or the court attaches to a known fact for the purpose of establishing the existence of another and unknown fact.

Art. 1850. Presumption established by law

A party whose interest is favored by a presumption established by law need not offer other proof.

Art. 1851. Proof against a presumption established by law

Legal presumptions are rebuttable or conclusive. A rebuttable legal presumption is established in the interest of private parties and may be controverted. A conclusive legal presumption is established for reasons of public policy and may not be controverted.

Art. 1852. Presumption not established by law

A presumption not established by law is left to the discretion of the court. Unless an allegation of fraud is involved, that presumption may be admitted only when testimonial proof is admissible.

12. See *infra* discussion in Part III.

limited overview of the debate at common law will be provided. This debate has led to a number of modern views that also will be noted. Finally, a proposition is offered based on the California Code of Evidence's treatment of presumptions.

The overviews given in this comment to Louisiana law and common law are limited not because further exegesis would not lead to a better understanding, but rather because this paper could not hope to be fully comprehensive on these diverse topics. As a result, further elucidation should be garnered by reference to the sources cited herein.

II. PRESUMPTIONS IN LOUISIANA: PREDICTABLE CONFUSION?

The Louisiana law regarding presumptions does not exist in a system designed to rectify jury shortcomings in treatment of evidence as the law of presumptions does in the common law. Rather, the continental legal system which was a "model" for Louisiana law when first codified found no need for evidentiary rules. Therefore, no body of comprehensive evidence law was developed in continental countries such as France, upon which Louisiana law heavily relies in pattern and substance. The proposed reasons for the failure to develop rules of evidence are twofold: 1) the civilian methodology, which does not view litigation at the "heart of any definition of law," and 2) the combined effect of the absence of juries in civil cases and the "pre-vailing notion in French law expressed in the principle of 'intime conviction' of the judges."¹³ In a system which is not reliant upon the function of a jury, common law evidence rules are clearly inapposite, even unwarranted.¹⁴

Nevertheless, presumptions are created in Louisiana law, their regulation being a part of the Civil Code's treatment of Proof of Obligations.¹⁵ Even though one may trace the source of these articles

13. Rene David & Henry P. de Vries, *The French Legal System: An Introduction to Civil Law Systems* 73 (1958) ("intime conviction" is translated as "deep-seated conviction, devotion").

14. *Id.*

15. See *supra* note 11. Compare and contrast former La. Civ. Code arts. 2284-2288 (1870):

Art. 2284

Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown.

Art. 2285

Legal presumption is that which is attached by a special law, to certain acts or to certain facts; such are:

1. Acts which the law declares null, as presumed to have been made to evade its provisions, from their very quality.
2. Cases in which the law declares that the ownership or discharge results

to their counterparts in the Code Napoleon¹⁶ and other sources, such long-standing rules have not been without confusion.¹⁷ Notably, distinctions among types of presumptions created by the Code have not been clearly discernable.¹⁸ Additionally, the vast plethora of statutory presumptions has only added to the dilemma.¹⁹

Be that as it may, certain ideas fundamental to presumptions have substantial clarity. Under Louisiana law, a presumption is defined as "a consequence that the law or court attaches to a known fact for the purpose of establishing the existence of another and unknown fact."²⁰ Clearly there are two types of presumptions contemplated by that code definition. One, the legal presumption, is established by law by specific language of legislation.²¹ The Civil Code is a source of many such legal presumptions.²² The second, the presumption of fact, which is more commonly described as an inference,²³ are those pres-

from certain determinate circumstances.

3. The authority which the law attributes to the thing 2286

The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

Art. 2287

Legal presumption dispenses with all other proof, in favor of him for whom it exists.

No proof is admitted against the presumption of the law, when, on the strength of that presumption, it annuls certain acts, or refuses a judicial action, unless it has reserved the contrary proof, and saving what will be said on the judicial confession.

Art. 2288

Presumptions, not established by law, are left to the judgment and discretion of the judge, who ought to admit none but weighty, precise and consistent presumptions, and only in cases where the law admits testimonial proof, unless the act be attacked on account of fraud or deceit.

16. See Code Napoleon arts. 1349-1353 (London 1824). See also Vol 16 LSA Civil Code Comp. Ed. (1973) for a comparison of the different texts.

17. Stephen I. Dwyer, Comment, *Presumptions and Burden of Proof*, 21 Loy. L. Rev 377, 395 (1975) (referring to the use of presumptions in Louisiana as "predictable confusion"); 6 Dalloz, *Repertoire de Droit Civil—Prèsomptions* 1 (2d ed. 1992).

18. Peter E. Herzog & Martha Werser, *Civil Procedure in France* 313 (1967).

19. *Id.* See also Index to Statutory Presumptions in George W. Pugh et al., Handbook, *supra* note 8, at 457-61.

20. 1 Saul Litvinoff, *Obligations* § 12.121, at 410, in 5 Louisiana Civil Law Treatise (1992). See also La. Civ. Code art. 2279 (1870).

21. Litvinoff, *supra* note 20, § 12.122, at 411. See also 7 Marcel Planiol & Georges Ripert, *Traite Pratique de Droit Civil Francais* 1010 (2d ed. 1954). An argument could be made that the language could contemplate those created by *jurisprudence constante*. See La. Civ. Code arts. 1 and 3.

22. See, e.g., La. Civ. Code arts. 1890, 2480, 2340.

23. Herzog & Werser, *supra* note 18, at 313.

umptions not found in the law but inevitably derived by the mind from a known fact through logical reasoning.²⁴

Legal presumptions become binding upon the judge; they are not discretionary and are meant to be applied strictly without any expansion or detraction of their scope.²⁵ The Louisiana Civil Code gives probative force to legal presumptions, and such force is said to relieve the party in whose favor the presumption operates of the need for other proof, shifting the burden of proof.²⁶ Legal presumptions, therefore, are not "a means of proof . . . [but rather] a dispensation of the need to furnish proof."²⁷ This leads one to the conclusion that presumptions of this nature, under the experience of the Civil Code, are not "evidence." They are, rather, an evidentiary device which relieves a party initially bearing the burden of proof from the burden as to the presumed fact and places the burden of proof on the opposing party to prove its nonexistence. Legal presumptions effectively shift the burden of proof.²⁸

Further, legal presumptions are either rebuttable or conclusive.²⁹ Obviously, this means that some presumptions may be contradicted while others may not. This was the traditional distinction between presumptions *juris tantum* and presumptions *juris et de jure*.³⁰ Those presumptions *juris tantum* were allowed to be disproved as such presumptions were only "relative," while those *juris et de jure* were "absolute" and irrebuttable.³¹ However, even this distinction was not as exacting as it may seem. According to one source, even the absolute legal presumption could be contradicted by a form of proof which carried great weight, such as the judicial confession of the party whom the presumption *juris et de jure* favored.³² Nevertheless, some presumptions *juris et de jure* are accepted as irrefutable, such as the presumption that the minor was without capacity to contract or the

24. Litvinoff, *supra* note 20, § 12.125, at 415.

25. *Id.* § 12.122, at 412-13.

26. La. Civ. Code art. 1850. *See also* 13 Gabriel G. Baudry-Lacantinerie et al., *Traite Theorique et Pratique de Droit Civil—Des Obligations* 947 (2d ed. 1905). *See infra* text accompanying notes 53-57.

27. Litvinoff, *supra* note 20, § 12.123, at 413.

28. *Prudhomme v. DeSoto Professional Home Health Serv.*, 579 So. 2d 1167, 1172 (La. App. 2d Cir. 1991); *Thompson v. Woods*, 525 So. 2d 174, 177 (La. App. 3d Cir. 1988); *Central Bank v. Bishop*, 353 So. 2d 1109, 1112 (La. App. 2d Cir. 1977); *Ingram v. Freeman*, 326 So. 2d 565, 567 (La. App. 3d Cir.), *writ denied*, 329 So. 2d 755 and 329 So. 2d 757 (1976).

29. La. Civ. Code art. 1851.

30. Litvinoff, *supra* note 20, § 12.124, at 413-14.

31. *Id.* *See also* the discussion in Edouard L. Bonnier, *Traite Theorique et Pratique des Preuves en Droit Civil et en Droit Criminel* 688-90 (2d ed. 1852).

32. Planiol & Ripert, *supra* note 21, at 1013-14.

implied error when a party has sold a thing for a lesionary price.³³ However, this categorization was sometimes erroneously applied.³⁴

Additionally, some presumptions not founded in express law were considered *juris et de jure* by the courts.³⁵ This was the result of the court's interpretation of Article 2287 of the Louisiana Civil Code of 1870.³⁶ The revision sought to clarify the rule with a line demarcating the rebuttable presumption from the conclusive.³⁷ Thus, according to Article 1851, "[a] rebuttable legal presumption is established in the interest of private parties and may be controverted," whereas "[a] conclusive legal presumption is established for reasons of public policy and may not be controverted." It becomes obvious that courts, although they may rely to some degree on past interpretations, will now need to clarify and delineate presumptions accordingly. Notably, those presumptions which are wholly irrebuttable take their place as part of the substantive law.³⁸

As a further complication, the Louisiana jurisprudence has made additional distinction between presumptions which may be rebutted freely and those which may be rebutted only by clear and convincing evidence.³⁹ The courts appear to be admitting to a weighing of policy considerations when they judge the effect of a particular presumption.

Presumptions of fact, on the other hand, are left to the discretion of the court.⁴⁰ Formerly, the Civil Code allowed for only those presumptions of fact, inferences if you will, to be admitted which were "weighty, precise and consistent."⁴¹ This is probably still correct but now impliedly left to judicial function.⁴²

33. Litvinoff, *supra* note 20, § 12.124, at 415. See, e.g., *Fernandez v. Wilkinson*, 158 La. 137, 103 So. 537 (1925).

34. See, e.g., *Gillies v. Gillies*, 144 So. 2d 893 (La. App. 4th Cir. 1962) (noting that the presumption of paternity is *juris et de jure*, yet susceptible to contrary proof).

35. See, e.g., *Barnett v. Barnett*, 339 So. 2d 495 (La. App. 2d Cir. 1976), *writ ref.*, 341 So. 2d 1127 (1977) (relying on the absence of a double declaration to hold that the presumption of community is conclusive); *Rhodus v. Allstate Ins. Co.*, 192 So. 2d 226 (La. App. 4th Cir.), *writ denied*, 250 La. 101, 194 So. 2d 99 (1966) (holding that the presumption that "a person saw a thing he should have seen had he looked" is a *juris et de jure* presumption).

36. See *supra* note 15.

37. Litvinoff, *supra* note 20, § 12.130, at 419. See La. Civ. Code art. 1850.

38. Herzog & Werser, *supra* note 18, at 316.

39. Litvinoff, *supra* note 20, § 12.125, at 415. See, e.g., *Succession of Hamiter*, 573 So. 2d 584, 585 (La. App. 2d Cir. 1991) (testamentary capacity); *Creditthrift of America No. 2, Inc. v. Jackson*, 571 So. 2d 168, 169 (La. App. 4th Cir. 1990) (sheriff's return of service is *prima facie* correct); *Dance v. Dance*, 552 So. 2d 658, 662 (La. App. 2d Cir. 1989) (presumption of community under La. Civ. Code art. 2340).

40. La. Civ. Code art. 1951.

41. La. Civ. Code art. 2288 (1870).

42. La. Civ. Code art. 1952.

As we have thus noted, legal presumptions are not a means of proof but rather a relief from the burden of proof. Presumptions of fact, on the other hand, are considered a "veritable means of proof . . . [and] [w]hen justified . . . are entitled to as much weight as any other means of proof."⁴³ This, of course, does not evince their place as "evidence" in a common law scheme, only their place as "proof to be weighed" in a civilian system.

This is, in brief, the background upon which we now set forth to propose a reasoned rule for presumptions in the Louisiana Code of Evidence.

III. PRESUMPTIONS IN COMMON LAW: THE GLADIATORS ENTER THE RING

As noted in the introduction, the rules and theories about presumptions in the common law of evidence are unsettled, perhaps even perverse. Take the example of Stanley's words, "Dr. Livingston, I presume." Before we could ever decide upon a theory of evidentiary effect to be given to this conversational presumption, we must endeavor to know what is meant by "presume."⁴⁴ Standing in Stanley's shoes, is it "Dr. Livingston, the law has concluded, or the law only rebuttably presumes?" Or, "Dr. Livingston, I infer?" "I assume?" Do I surmise? Conject? Is it based on reason or probability? Must I infer? Were there sufficient basic facts warranting such a conclusion? Were there any facts controverting the presumption? And if the answer to this last question is "yes," may I no longer presume? Presumptions, unfortunately, are "a subject on which text writers, teachers of law, and authors of legal articles have written much and clarified little."⁴⁵

A recapitulation of the myriad works and cases would be useless as they do not provide a singular understanding and would occupy the reader's time needlessly. In the alternative, therefore, the following is a terse and cogent summary of the basic tenets of what has evolved into two main conflicting theories. The reader is invited to expand this further if desired.⁴⁶

43. Litvinoff, *supra* note 20, § 12.125, at 416, relying on *Truxillo v. Texas & Pacific R.R. Co.*, 7 Orl. App. 18 (La. App. 1909).

44. Remember, even under civilian theory, presumptions were of at least two types. The diversity is no less at common law.

45. *Te Poel v. Larson*, 53 N.W.2d 468, 470 (1952) (citations omitted).

46. Edmund M. Morgan, *Basic Problems of Evidence* 34-44 (1961); Edmund M. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 74-81 (1956); Wigmore, *supra* note 3, §§ 2490-2493; Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L. Rev. 843 (1981); Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary*

Presumptions are "universally agreed" to be "a rule of law which requires that the existence of a fact (presumed fact) be taken as established when another fact or other facts (basic facts) are established, unless and until a certain specified condition is fulfilled."⁴⁷

This definition leads to two conclusions. First, it does not comprehend the so called "conclusive presumption." The definition requires that a presumption may be overcome upon the happening of the specified condition. This is logically due to the notion that a "presumption" which may not be rebutted does not take on the character of an evidentiary rule, rather it is a matter of substantive law.⁴⁸ As such, under the common law of evidence, conclusive presumptions are properly distinguished from the rules affecting evidentiary presumptions. Second, such a definition does not include within its scope the logical inference, that is, the "presumption of fact."⁴⁹ Such inferences are not rules of evidence law but rather the "rational potency or probative value of the evidentiary fact[,] . . . mere arguments . . . depend[ing] upon their own natural force and efficacy in generating belief or conviction in the mind."⁵⁰ As one author noted, "The compulsive effect of an inference, if it has any, is based entirely upon logic and experience, not upon law."⁵¹

Accepting that, for the purposes of an evidentiary rule in common law, the above definition adequately describes the true theoretical definition of a presumption, the majority of the debate has centered upon the effect of such a presumption when the presumed fact is beset upon by contradictory evidence.

There are, as said before, two basic theories at issue, each dealing with the effect to be given a non-conclusive presumption at law. The first, known as the "bursting bubble" theory, is attributed to James Bradley Thayer.⁵² This theory, adopted by Wigmore,⁵³ basically pro-

Ambiguity and a Proposal for Reform, 76 Nw. U. L. Rev. 892 (1982); Bohlen, *supra* note 4; Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5 (1959); Alfred L. Gausewitz, *Presumptions in a One-Rule World*, 5 Vand. L. Rev. 324 (1952); Ladd, *supra* note 1.

47. 2 Michael H. Graham, *Modern State and Federal Evidence: A Comprehensive Reference Text* 786 (1989). Compare the text of La. Civ. Code art. 1849.

48. See generally Litvinoff, *supra* note 20, § 12, at 410-27. See also Wigmore, *supra* note 3, § 2492, at 308; McCormick, *supra* note 5, § 342, at 451; Gausewitz, *supra* note 46, at 326; Graham, *supra* note 47, at 796.

49. See Litvinoff, *supra* note 20. Wigmore, *supra* note 3, § 2491, at 304; Gausewitz, *supra* note 46, at 326. Graham, *supra* note 47, at 796.

50. Wigmore, *supra* note 3, § 2491, at 304 (in part, quoting from Simon Greenleaf, *Evidence* § 44 (1842)).

51. Gausewitz, *supra* note 46, at 327.

52. See James B. Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898).

53. Wigmore, *supra* note 3, § 2491(2), at 305.

poses that the effect of a presumption, as defined earlier, is to shift the burden to produce evidence upon the presumed fact from the one originally cast with that burden.⁵⁴ Upon introduction of evidence controverting the presumed fact, the presumption disappears, "without regard to whether the evidence is actually believed,"⁵⁵ and without regard, therefore, to the degree of controverting evidence. Thus:

A presumption under the Thayer "bursting bubble" approach is thus a procedural device that shifts the burden of producing evidence. Once a party has sufficiently established the basic facts that give rise to the presumption, the opponent must produce evidence to rebut the presumed fact or else, depending upon the nature of the fact presumed, either a verdict will be directed on the element or the jury will be instructed to find in favor of the presumed fact. If evidence is introduced sufficient to support a finding by a reasonable trier of fact contrary to the existence of the presumed fact, the presumption is rebutted and has no further effect at the trial. . . . [Only] the natural inference, if any, which flows from the basic facts remains to be considered.⁵⁶

The end result is that the burden of persuasion is permanently cast upon the party who initially bore it; merely the burden of producing evidence has been shifted.⁵⁷

This view was greatly criticized for its "arbitrary and unreasonable" assignment of "so slight and evanescent procedural effect to every presumption."⁵⁸ Although criticized, the theory has been incorporated in the Model Code of Evidence and the Federal Rules of Evidence.⁵⁹

The second theory, known as the Morgan theory, attempts to give efficacy to the variant policies behind the creation of presumption of law since, in many instances, these policies "may be just as strong as those that govern the allocations of burdens of proof"⁶⁰ This theory provides that

54. McCormick, *supra* note 5, § 344, at 462.

55. Graham, *supra* note 47, at 787.

56. *Id.* at 787-88.

57. *Id.*

58. Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937). See also Gausewitz, *supra* note 46, at 342.

59. Model Rules of Evidence 704(2) (1942). Fed. R. Evid. 301. See Weinstein & Berger, *supra* note 6, at 301-1 to 301-14.

60. McCormick, *supra* note 5, § 344, at 463. Morgan enumerated seven policies:

1. To make unnecessary the introduction of evidence upon an issue made by

[I]f the basic facts (A) are established, the jury is instructed that it must find the presumed fact (B) unless and until the proponent *persuades* the trier of fact that the nonexistence of fact (B) is more probably true than not true.⁶¹

The Uniform Rules of Evidence adopted such an approach to presumptions, as did the Supreme Court's draft of the Federal Rules of Evidence.⁶²

But this theory also is not without its critics. Basically, the criticism extends from the complexity in instructing the jury and the confusing terminology regarding what is actually a presumption under the rule and what policy its creation was based upon.⁶³

Thus, neither theory has gained preeminence. Difficulties in both have caused the states to adopt a number of differing approaches. Additionally, scholars have proposed a few more variant approaches. One suggestion has been to divorce the evidentiary law of presumptions from the burden of persuasion and replace it with a revised system of pleadings, a "process of allocating the elements of a case between parties in the form of prima facie case, affirmative defense, etc. . . ." ⁶⁴ Of course this would lead to other difficulties, probably greater than the difficulties it proposes to rid.⁶⁵ Another theory has advocated eliminating use of the term "presumption," but in the face of its prevalent use by courts, this theory is too reliant on an effort which could never be made a reality.⁶⁶

Neither of the two main theories is without its intellectual dilemma, but the Morgan theory has at least one major strong point. It compels one to reject the Thayer approach, as the Thayer theory gives no

the pleadings but not likely to be the subject of serious dispute. . . .

2. To avoid a procedural impasse in a situation where evidence as to the presumed fact is lacking. . . .

3. To avoid such an impasse created by the impossibility of securing legally competent evidence of the presumed fact. . . .

4. To produce a result in accord with the preponderance of probability. . . .

5. To require the party having peculiar means of access to the facts and evidence of the facts to make them known to the court. . . .

6. To reach a result deemed socially desirable wherever the basic facts exist. . . .

7. To reach a result deemed more desirable for a combination of two or more of the foregoing reasons.

Morgan, *supra* note 46, at 32-33.

61. Graham, *supra* note 47, at 791.

62. Weinstein & Berger, *supra* note 6, at 301-1 to 301-3.

63. McCormick, *supra* note 5, at 463-64; Graham, *supra* note 47, at 794.

64. Cleary, *supra* note 46, at 21.

65. Wigmore, *supra* note 3, §§ 2485-2486.

66. Allen, *supra* note 46. See the criticism contained in Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. Rev. 697, 707 (1984).

treatment to the underlying policies of presumptions, something we noted earlier which permeates their legislative enactment.⁶⁷

IV. THE CALIFORNIA MODEL: AN ATTEMPT AT THE BEST OF BOTH WORLDS

In 1965, as the culmination of a thirty-year debate, California adopted a new evidence code.⁶⁸ The California Code of Evidence adopted a new approach, one which sought to overcome the weaknesses of the Thayer and Morgan approaches while combining portions of each system. The system chosen, in effect, is a codification of the criticisms offered by Professor Bohlen of the University of Pennsylvania in 1920.⁶⁹ In essence, Professor Bohlen averted to the realization that even where courts were stating that they adhered to the Thayer theory, they did not in practice follow the doctrine to which they claimed adherence. Since all presumptions are "created by some policy of law which requires . . . abnormal weight to be given [to the basic facts] to meet some judicially felt need or to accomplish some purpose judicially recognized as desirable," then, as stated by Professor Bohlen, "the force of each presumption and its effect, as shifting the burden of overcoming the inertia of the court or of only shifting the burden of producing evidence, depends upon the nature of the need or purpose which has led to the recognition of that presumption."⁷⁰

The California Code of Evidence, therefore, treats presumptions in a pluralistic manner.⁷¹ It divides the subject matter into three

67. See *supra* notes 59-60.

68. 1965 Cal. Stat. c. 299, § 600 et seq. For a history of the debate, see Wigmore, *supra* note 3, § 2493(i), at 341-42. See also John R. McDonough, *The California Evidence Code: A Precis*, 18 *Hast. L.J.* 89 (1966).

69. Bohlen, *supra* note 4. See Wigmore, *supra* note 3, § 2493(b).

70. Bohlen, *supra* note 4, at 313.

71. The pertinent provisions read as follows:

§ 600. Presumption and inference defined

(a) 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. A presumption is not evidence.

(b) 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.

§ 601. Classification of presumptions

A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

§ 602. Statute making one fact prima facie evidence of another fact

A statute providing that a fact or group of facts is prima facie evidence of

categories: conclusive presumptions, rebuttable presumptions, and inferences.⁷² It then divides the procedural effect according to the underlying motivation in the creation of the presumption. The determination of whether a rebuttable presumption is established for reasons of policy or for the benefit of a party is not left to the court.⁷³

V. CAN LOUISIANA LAW COMPORT WITH A CALIFORNIA MODEL?

When comparing the Louisiana Civil Code provisions on presumptions with the California Code of Evidence, one is immediately struck with certain conceptual similarities. California extracts inferences from presumptions just as the Louisiana Civil Code treats presumptions of fact differently from presumptions of law. The California model provides that conclusive presumptions of law are irrebuttable, just as Louisiana holds that they may not be controverted. Then the California Code divides those presumptions which may be rebutted into two categories: those created for public policy and those which are made in the interest of a party. At this point, the California Code would seem to run afoul of the Louisiana Civil Code, which has established that rebuttable presumptions are created in the interest of

another fact establishes a rebuttable presumption.

§ 603. Presumption affecting the burden of producing evidence defined

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

§ 604. Effect of presumption affecting burden of producing evidence

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

§ 605. Presumption affecting the burden of proof defined

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the establishment of a parent and child relationship, 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.

§ 606. Effect of presumption affecting burden of proof

The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

Cal. Evid. Code §§ 600-606 (West 1966 & Supp. 1993).

72. Compare with La Civ. Code arts. 1849-1852.

73. See comment to Cal. Evid. Code § 602 (West 1966 & Supp. 1993).

the parties and conclusive presumptions are created for policy reasons. However, it must be remembered that this is only a generalization. There are obviously variant policies behind rebuttable legal presumptions in Louisiana law. In fact, if one were to compare those presumptions considered by the California Code of Evidence to be created for reasons of public policy,⁷⁴ one realizes that they substantially comport to rebuttable presumptions recognized by the Louisiana law. The difference is that the public policy addressed in Louisiana Civil Code article 1851 is the strongest of policies, admitting no contrary evidence and established for the greater good or public order. All rebuttable presumptions in Louisiana law, though created for the interest of the parties, have an underlying policy as to why the law would give such a party an interest. Therefore, the California model is adaptable.

VI. THE PROPOSAL OF A LOUISIANA RULE

To avoid duplication of definitions, a Louisiana rule need merely reference the Civil Code provisions. Additionally, the rule will have to delineate that rebuttable presumptions under Louisiana law are created for various policy reasons, the procedural effect being determined by what policy the presumption was created to further, in addition to the fact that it was created in the interest of a particular party. A proposed rule could be:

- a. A presumption is not evidence.
- b. Every rebuttable presumption is either:
 - (1) a presumption affecting the burden of producing evidence, or;
 - (2) a presumption affecting the burden of persuasion.
- c. A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.
- d. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.
- e. The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the

74. See Cal. Evid. Code §§ 620-624 (West 1966 & Supp. 1993).

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

f. A presumption affecting the burden of persuasion is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied.

g. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

This rule is an incomplete copy of the California model. Merely the definitions have been omitted, since Louisiana's definitions are contained in the Civil Code. The key to effecting the proposed article is to understand that shifting the burden of proof and shifting the burden of persuasion are fundamentally distinct concepts. The burden of proof simply requires the opposing party to go forward with sufficient evidence to enable reasonable minds to conclude that the presumed fact does not exist. When the burden of production is met, the court may then instruct the jury that it may, but is not required to, infer the existence of the presumed fact. The burden of persuasion requires the opponent to persuade the trier of fact, who must now take the presumed fact as established, that the probability of its existence is less than the degree of persuasion required by the particular action. This means that the opposing party now bears the burden of persuasion not as regards the presumed fact, but facts which tend to cause a trier of fact not to find for the proponent.

As a further requirement, Louisiana courts would have to examine the classifications already made to presumptions existing in Louisiana law to determine what effect to ascribe to each.

VII. CONCLUSION

If we accept that there must be given to presumptions some greater effect in some cases than merely to require a party opposing a presumption to come forward with some evidence to the contrary, we need to create a rule quite different from the federal model. California has made a reasoned attempt. Louisiana courts, which have wrestled with presumptions for hundreds of years, should have no problem applying such a rule. The rule will serve to implement the legislative intent behind the sundry presumptions prescribed. The remaining ques-

tion? Are the court's determinations of which rebuttable legal presumptions are created for greater public policy reviewable?

Geoffrey J. Orr

