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# NOTES AND COMMENTS

## PRESUMPTIONS IN CIVIL CASES: PROCEDURAL EFFECTS UNDER MARYLAND LAW IN STATE AND FEDERAL FORUMS

*The author surveys the effects of presumptions in civil cases and examines the Maryland decisions on the subject. Observing the divergence between the "bursting bubble" theory of presumptions embodied in Rule 301 of the new Federal Rules of Evidence and the tendency in Maryland to accord presumptions a greater procedural significance, the author scrutinizes the federal-state choice of law question under Federal Rule 302.*

### INTRODUCTION

It is doubtful that any subject within the law of evidence has prompted more commentary, provoked more argument, or engendered more controversy than the subject of presumptions.<sup>1</sup> A primary source of confusion has been semantics—what a presumption is definitionally, what is included within the term, and what effect a presumption has when it appears in a case. As reporter for the Model Code of Evidence, Professor Morgan commented:

It would be easy to demonstrate that the law as to presumptions is even more in need of simplification than that relating to hearsay. The confusion in the cases is due in part to the use of inaccurate terminology and the consequent misapplication of precedents, in part to faulty analysis and careless presentation by counsel, and in part to the generally accepted assumption that all presumptions are to be given the same procedural effect.<sup>2</sup>

The problem is compounded by the enormous number of presumptions, the fact that presumptions are created, or are recognized, for different reasons,<sup>3</sup> and the fact that presumptions appear in a limitless variety of contexts.<sup>4</sup>

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1. See C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 345, at 826 (2d ed. 1972) [hereinafter cited as *McCORMICK*]; Gausewitz, *Presumptions*, 40 *MINN. L. REV.* 391 (1956); Gausewitz, *Presumptions in a One-Rule World*, 5 *VAND. L. REV.* 324 (1952).
  2. Morgan, *Forward*, *MODEL CODE OF EVIDENCE* 1, 52 (1942), quoted in Gausewitz, *Presumptions in a One-Rule World*, 5 *VAND. L. REV.* 324 (1952). Although written thirty-four years ago, these words are no less accurate today.
  3. Professor Morgan lists seven reasons for the creation of presumptions:
    1. To make unnecessary the introduction of evidence upon an issue made by the pleadings but not likely to be the subject of serious dispute. . . .

The Maryland decisions involving the application of presumptions in civil cases demonstrate several points valuable to a preliminary perspective. First, Maryland may be said to fall within a general rule that there is little variation from jurisdiction to jurisdiction as to which presumptions are recognized, and virtually no variation with respect to the more frequently-occurring presumptions, whether acknowledged by decision or statute.<sup>5</sup> Second, as a single jurisdiction, Maryland is not vulnerable to Professor Morgan's criticism. Maryland has never dogmatically embraced a one-rule approach on the effect of presumptions. Rather, the Maryland courts appear to have appreciated the complexity of the problem in following a case-by-case or presumption-by-presumption approach. This caution has avoided conflict in the cases but has resulted in a relative state of underdevelopment. Finally, as one of many, however, Maryland has contributed to the discord among the jurisdictions in the treatment of presumptions, for a line of Maryland cases has woven a thread of dissent in the fabric of traditional presumption law.

As a result of the *Erie* doctrine,<sup>6</sup> applicability in federal forums has become an important aspect of state presumption law. Among the recently enacted Federal Rules of Evidence<sup>7</sup> are two rules concerning presumptions in civil cases.<sup>8</sup> Rule 301 prescribes the effect to be given presumptions in cases governed by federal law.<sup>9</sup> Rule 302 prescribes

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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, "common experience shows the facts to be so generally true that courts may notice the truth." . . .

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 fact exists. . . .

7. To reach a result deemed desirable for a combination of two or more of the foregoing reasons. . . . E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 32-33 (1963).

4. As a consequence of these difficulties, those who would comment upon the law of presumptions, as distinguished from comment upon a single presumption, must reckon with this dilemma: it is at once meaningless to discuss the subject without reference to particular presumptions and practically impossible to do so with reference to all presumptions. A compromise is commanded: although generality necessitates exemplification, when distinctions are called for, they will be made.

5. The rule, however, is not without exception. For example, the Maryland legislature has abolished the common law presumption of death from proof of unexplained absence for seven years or more. MD. ANN. CODE, Cts. & Jud. Proc. Art., § 3-102 (1974).

6. *Erie v. Tompkins*, 304 U.S. 64 (1938).

7. Fed. Rules Evid., 28 U.S.C.A. (1975).

8. Although the Supreme Court promulgated a rule dealing with presumptions in criminal cases, the Congress deleted this rule. H.R. REP. NO. 650, 93d Cong., 1st Sess. 5 (1973).

9. Fed. Rules Evid. Rule 301, 28 U.S.C.A. (1975) [hereinafter cited as Rule 301]:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of

when state law controls the effect of presumptions in federal courts.<sup>10</sup> In federal court cases in which the potentially applicable state law has followed the traditional view on the effect of presumptions embodied in Rule 301, the choice of law is without significance. The Maryland cases, however, reflect a trend toward according presumptions a greater procedural effect than Rule 301. As a result, insofar as Maryland is concerned, the choice between state law and federal law, and thus the scope of Rule 302, may assume dispositive significance.

### PRESUMPTIONS IN CIVIL CASES

The only statement which can be made about presumptions without contradiction or exception is that a rebuttable presumption of law<sup>11</sup> is an evidentiary rule of law which compels the finding of a particular fact (the presumed fact) upon proof of a basic fact or set of facts,<sup>12</sup> in the absence of evidence to the contrary.<sup>13</sup> Beyond this, reference must be made to the theoretical notions behind presumptions and to their operation, or treatment, in practice.

Every presumption recognized is founded upon one or both of two general values. A presumption may exist because of the inferential probative value of a standardized, basic set of facts. The most frequently occurring example of this type of presumption is the presumption of receipt arising from proof of proper mailing: "[T]estimony of a witness that he properly addressed, stamped and mailed a letter raises a presumption that it reached its destination at the regular time and was received by the person to whom it was addressed."<sup>14</sup> The inference of receipt is supported or bolstered by the regularity and reliability of the nation's mail service.<sup>15</sup> Some presumptions, on the

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the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

10. Fed. Rules Evid. Rule 302, 28 U.S.C.A. (1975) [hereinafter cited as Rule 302]:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

11. The term "presumption of fact" is often used to describe the rational inference which may arise from a particular fact or set of facts. If a rule of law respecting the allocation of the burden of proof attaches to the basic fact or facts, it is a presumption of law. If not, it is not a presumption at all. 9 J. WIGMORE, EVIDENCE § 2491, at 288-89 (3d ed. 1940) [hereinafter cited as WIGMORE]; Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 392 (1956). Whether or not "conclusive presumptions," often called "presumptions of law," should be embraced by the term, *id.* at 391, they are not dealt with here, for they are rules of substantive law, not of evidence. See *United Life & Accident Ins. Co. v. Prostic*, 169 Md. 535, 540, 182 A. 421, 423 (1936).

12. It is commonly said that a presumption arises upon proof of the underlying facts which give rise inferentially to the presumed fact. McCORMICK 820; WIGMORE § 2490 at 288. This, of course, assumes that all presumptions are founded upon a basic fact or set of facts which are circumstantially probative of the fact to be presumed. However, all presumptions are not of this sort, and some appear to arise without proof of any basic fact or facts. See p. 303-05 *infra*.

13. McCORMICK 820; WIGMORE § 2491, at 289.

14. *Kolker v. Biggs*, 203 Md. 137, 144, 99 A.2d 743, 746 (1953).

15. *Id.*, 99 A.2d at 747.

other hand, arise upon proof of the basic facts, not as a consequence of their probative value, but because of public policy. In many jurisdictions, when it is shown that a person has not been heard from by his relatives for seven years or more, despite efforts to locate him, in the absence of an explanation of the disappearance, there is a presumption that the person is dead.<sup>16</sup> "The presumption is arbitrary, connected with neither reason nor logic but founded upon a public policy that important social and property rights shall not remain indefinitely in abeyance because of the impossibility of proving by real evidence the life or death of such person upon whose life such rights depend."<sup>17</sup> Other presumptions which are primarily grounded in public policy are underpinned by a basic fact or set of facts which, at least as a matter of statistical probability, indicates the existence of the fact which public policy demands be presumed. By statute in Maryland, "[a] child born or conceived during a marriage is presumed to be the legitimate child of both spouses,"<sup>18</sup> and "a child born at any time after his parents have participated in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents."<sup>19</sup> Similarly, in actions for personal injuries caused by an automobile not driven by the owner, proof of ownership of the vehicle raises a presumption that the driver was a servant of the owner acting within the scope of his employment at the time of the accident.<sup>20</sup> This presumption is supported, in policy, by the assumed superior access of the owner to information concerning the operation of his car and by a preference that a vehicle owner should shoulder broader responsibility for harm caused by his instrumentality.<sup>21</sup>

There are presumptions which appear to arise without proof of any underlying facts. For example, "the law presumes that every person is sane and possesses the requisite mental capacity to execute [a legal instrument]." <sup>22</sup> The cases do not indicate that the person who would

16. *E.g.*, *Borzage v. Metropolitan Life Ins. Co.*, 6 Conn. Cir. 269, 270 A.2d 688 (1970). Although once recognized in Maryland, *Robb v. Horsey*, 169 Md. 227, 234-36, 181 A. 348, 351-52 (1935), this common law presumption has been abolished by statute. MD. ANN. CODE, Cts. & Jud. Proc. Art., § 3-102 (1974).

17. *Robb v. Horsey*, 169 Md. 227, 235, 181 A. 348, 351 (1935). The Maryland Court of Appeals made this observation before the legislative abolition of the presumption.

18. MD. ANN. CODE, Est. & Tr. Art., § 1-206(a) (1974).

19. *Id.* Both presumptions are made rebuttable by MD. ANN. CODE, Est. & Tr. Art., § 1-105(b) (1974).

20. *E.g.*, *Grier v. Rosenberg*, 213 Md. 248, 131 A.2d 737 (1957). In *Martin Furniture Corp. v. Yost*, 247 Md. 42, 49-50, 230 A.2d 338, 342 (1967), the court of appeals pointed out that this situation really involves two presumptions—a presumption of agency on behalf of the owner and a presumption that the agent was acting within the scope of his employment. Thus the presumption regarding the scope of employment operated against an admitted principal who had leased but did not own the car. *Id.* at 51, 230 A.2d at 343.

21. *McCORMICK* 822. This presumption may, as well, rest on the inferential value of the fact of ownership. See note 82 & p. 314 *infra*.

22. *Gordon v. Rawles*, 201 Md. 503, 512, 94 A.2d 465, 469-70 (1953).

rely upon the presumption need make any showing to raise it.<sup>23</sup> In personal injury cases, there is a presumption that a deceased or incapacitated person was in the exercise of due care at the time of the accident.<sup>24</sup> Unless death or incapacity be regarded as the triggering fact, this presumption also arises without proof of a prerequisite foundation.

As stated above, it is universally held that a presumption requires the trier of fact to find the existence of the presumed fact in the absence of contradictory evidence.<sup>25</sup> The confusion and discrepancies in the treatment of presumptions by different courts appear when contrary evidence is adduced by the party against whom the presumption operates.<sup>26</sup> Since the time of Professor Thayer's springboard work on the law of evidence,<sup>27</sup> and particularly since Wigmore promoted the doctrine<sup>28</sup> attributed to Thayer,<sup>29</sup> the law of presumptions has been thoroughly dominated by the "Thayer" or "bursting bubble" theory.<sup>30</sup> Under the doctrine, a presumption operates in favor of a party who has the burden of proof<sup>31</sup> by shifting to the other party the duty of going forward with the evidence on the issue.<sup>32</sup> In effect, this means that the party relying on the presumption can get past a motion for a directed verdict made at the close of his case without any direct proof of the presumed fact, and may succeed with respect to that issue if the other party does not come forward with evidence.<sup>33</sup> In its pure form, this is all that a bursting bubble presumption does. Once the other party produces evidence on the issue<sup>34</sup> sufficient to support a finding contrary to the presumed fact, the bubble is burst and the presumption

23. See, e.g., *Masius v. Wilson*, 213 Md. 259, 131 A.2d 484 (1957); *Gordon v. Rawles*, 201 Md. 503, 94 A.2d 465 (1953).

24. E.g., *Gresham v. Commissioner of Motor Vehicles*, 256 Md. 500, 260 A.2d 649 (1970); *Nizer v. Phelps*, 252 Md. 185, 249 A.2d 252 (1969).

25. P. 303 *supra*.

26. See McCORMICK 820.

27. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898).

28. WIGMORE §§ 2490-91.

29. Dean Gausewitz examined in depth Thayer's words on presumptions and concluded that Thayer did not intend that there should be a single rule for all presumptions, namely, the bursting bubble rule. Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 406-08 (1956).

30. McCORMICK 821.

31. Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 339 (1952). In dealing with presumptions, it is especially important to distinguish the two aspects of burden of proof: the burden of persuasion, or risk of nonpersuasion, and the burden or duty of going forward with the evidence. See 10 M.L.E., *Evidence* § 21, at 101 (1961).

32. McCORMICK 821; WIGMORE § 2491, at 288.

33. McCORMICK 820 & n. 33.

34. In the case of a presumption which arises upon proof of basic facts, the party against whom the presumption operates may attack the presumption by contrary evidence going to the existence of the basic facts as well as evidence going to the existence of the fact to be presumed. In such a case, the judge should instruct the jury that if they find in favor of the basic facts, they must find in favor of the presumed fact. McCORMICK 820. A Maryland case exposing this distinction is *Border v. Grooms*, 267 Md. 100, 297 A.2d 81 (1972), involving the presumption of receipt of mailed matter from proof of proper stamping, addressing and mailing.

no longer exists in the case.<sup>35</sup> Accordingly, there is a corollary proscription against mentioning the presumption or rule of law to the jury.<sup>36</sup>

The courts of practically every jurisdiction have, at one time or another, proclaimed adherence to the bursting bubble theory.<sup>37</sup> Nevertheless, courts have frequently departed from the dogma, on a "presumption by presumption basis."<sup>38</sup> According to Morgan, the cases reflect seven patterns of departure from or variation of the Thayer theory "as to the condition which must be fulfilled to prevent or modify or destroy the effect which the establishment of the basic fact would have if it stood alone:"<sup>39</sup> (1) if evidence has been presented which is sufficient to support a finding of the nonexistence of the presumed fact, the presumption has effect only if the trier of fact discredits that evidence; (2) if there is such evidence, the presumption lasts until the trier credits the evidence; (3) the presumption is taken out of the case altogether by substantial evidence to the contrary; (4) the presumption prevails unless the trier is persuaded that the nonexistence of the presumed fact is as likely as its existence; (5) once the basic facts are established, the risk of nonpersuasion as to the presumed fact moves to the other party; (6) in the case of a presumption founded upon the opponent's knowledge or access to information concerning the presumed fact, the risk of nonpersuasion as to the basic facts, but not as to the presumed fact, is shifted; (7) the presumption is to be treated as evidence.<sup>40</sup>

Emphasizing that a presumption may manifest itself at trial on motions for a directed verdict and in jury instructions,<sup>41</sup> McCormick dealt more specifically with the matter of possible deviations from the Thayerian rule against mentioning the presumption to the jury. The alternatives considered by him include instructing the jury that the

35. McCORMICK 821; WIGMORE § 2491, at 289. Even though the presumption disappears as a rule of law, in a case involving a presumption founded upon the probative value of the basic facts, the inference alone may be relied upon. McCORMICK 821. See *Border v. Grooms*, 267 Md. 100, 104, 297 A.2d 81, 83 (1972), but notice the confusion of terminology.

One judge colorfully termed presumptions under the Thayer theory "bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." *Mockowik v. Kansas City, St. J. & C. B. R.R. Co.*, 196 Mo. 550, 571, 94 S.W. 256, 262 (1906) (Lamm, J.), quoted in McCORMICK 821 and WIGMORE § 2491, at 291 n. 6.

36. McCORMICK 821; WIGMORE § 2491, at 290; Fornoff, *Presumptions—The Proposed Federal Rules of Evidence*, 24 ARK. L. REV. 401, 405 (1971).

37. See cases and quotations collected at 9 J. WIGMORE, EVIDENCE § 2491, at 290 n. 6 (Supp. 1975). Maryland is exceptional. See p. 311-12 *infra*.

38. McCORMICK 826. As a matter of precedent, McCormick's characterization is certainly accurate, for in giving effect to a particular presumption which is in issue, a court does not prescribe the rule for any other presumption. McCormick's overall perception of presumption law, however, was more a catalogue of exceptions to the traditional rule than a catalogue of individual rules. *Id.* at 822.

39. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 34 (1963).

40. *Id.* at 34-37.

41. McCORMICK 819.

basic facts, if established, raise a presumption in favor of the presumed fact; that the presumption is evidence to be weighed with all of the other evidence admitted; that the presumed fact is to be taken as true unless the jury finds the evidence as to the existence or nonexistence of the presumed fact to be of equal weight, in which case the issue should be resolved against the party with the burden of persuasion; in a case in which the basic facts are circumstantially probative of the presumed fact, that where such basic facts exist, it is probable that the presumed fact is true.<sup>42</sup> In discussing the problems involved with each approach, McCormick saw difficulty in choosing words which would strike an appropriate balance between implying too much and conveying too little.<sup>43</sup> He saw the "best solution" as simply instructing the jury that it must find the presumed fact unless the party against whom the presumption operates establishes its nonexistence by a preponderance of the evidence.<sup>44</sup>

McCormick's "solution" was a product of his conviction that a presumption should fix the burden of persuasion on the party against whom it was directed, and complemented his contribution to the academic tug-of-war on whether or not there should be a single rule for all presumptions, and if so, what that rule should be.<sup>45</sup> To Professors Bohlen<sup>46</sup> and Morgan,<sup>47</sup> the most sensible approach would be to assign each presumption a procedural effect consonant with the policy behind it. Dean Gausewitz agreed, believing that this approach called for a different rule for different groups of presumptions.<sup>48</sup> Because of the practical difficulties in administering a number of different rules, however, Morgan<sup>49</sup> and Gausewitz<sup>50</sup> ultimately concluded that there should be one rule governing the effect of presumptions, and concurred with McCormick<sup>51</sup> that a presumption should shift the burden of persuasion on the issue. McCormick deemed the primary objection to such a rule as being the frequently stated dogma that the burden of proof is unalterably assigned at the commencement of the trial.<sup>52</sup> But the policies which underlie the allocation of the burden of persuasion<sup>53</sup> might be outweighed by those which give rise to presumptions, and, in

42. *Id.* at 825-26 & nn. 59-67.

43. *Id.* See also Fornoff, *Presumptions—The Proposed Federal Rules*, 24 *ARK. L. REV.* 401, 407 (1971).

44. *McCORMICK* 826.

45. See Gausewitz, *Presumptions in a One-Rule World*, 5 *VAND. L. REV.* 324 (1952); p. 306 & note 38 *supra*.

46. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 *U. PA. L. REV.* 307, 313 (1920).

47. See Morgan, *Presumptions*, 12 *WASH. L. REV.* 255, 281 (1937).

48. Gausewitz, *Presumptions in a One-Rule World*, 5 *VAND. L. REV.* 324, 330 (1952).

49. E. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 81 (1956).

50. Gausewitz, *Presumptions in a One-Rule World*, 5 *VAND. L. REV.* 324, 340-41 (1952).

51. *McCORMICK* 826.

52. *McCORMICK* 826-27. See *Fisher v. Baltimore Transit Co.*, 184 *Md.* 399, 401, 41 *A.2d* 297, 298 (1945).

53. See note 100 *infra*.



any event, the bursting bubble theory is simply inadequate to implement presumption policy.<sup>54</sup> Four by-products reflect this "Battle of Presumptions."<sup>55</sup> The 1942 Model Code of Evidence propounded a strict bursting bubble rule.<sup>56</sup> Under the Uniform Rules of Evidence proposed eleven years later, a presumption founded upon circumstantially probative basic facts shifts the burden of persuasion, otherwise a presumption has a Thayerian effect only.<sup>57</sup> The 1965 California Evidence Code reversed the formula of the Uniform Rules<sup>58</sup> shifting the burden of persuasion only with respect to presumptions founded on public policy and the new Federal Rules of Evidence returned to a straight bursting bubble theory in cases governed by federal law.<sup>59</sup>

### PRESUMPTIONS IN CIVIL CASES IN MARYLAND

In any given jurisdiction, presumptions have been the subject of far more dicta than *rationes decidendi*. As McCormick noted,<sup>60</sup> in order for an aspect of presumption law to be the ground for decision, the case must turn on trial rulings, on motions for directed verdicts or on instructions. With this caveat in mind, attention will now be focused on the treatment of presumptions in Maryland.

The most significant case on the Maryland presumption landscape is *Grier v. Rosenberg*,<sup>61</sup> in which the court of appeals reversed a judgment against a personal injury plaintiff upon a jury verdict for the defendant car owner, and ordered a new trial because the trial court refused to instruct the jury that "if the jury found as a fact ownership of the car in [defendant Rosenberg], there arose a rebuttable presumption that the automobile was being operated by [Rosenberg] or by his agent, servant and/or employee acting within the scope of the agent's, servant's and/or employee's employment."<sup>62</sup> The state of the evidence is crucial to an understanding of the significance of any case in the field of presumptions, which so intimately involves burdens of proof.

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54. See McCORMICK 822, 826-27; Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 404 (1956). As Morgan stated:

Just as the courts have come to recognize that there is no a priori formula for fixing the burden of persuasion, so they should recognize that if there is a good reason for putting on one party or the other the burden of going forward with evidence . . . it ought to be good enough to control a finding when the mind of the trier is in equilibrium. E. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 81 (1956).

55. *Wyckoff v. Mutual Life Ins. Co. of New York*, 173 Ore. 592, 595, 147 P.2d 227, 229 (1944).

56. MODEL CODE OF EVIDENCE Rule 704 (1942).

57. UNIFORM RULE OF EVIDENCE 14(a)-(b).

58. CAL. EVID. CODE §§ 603-06 (West 1966).

59. Rule 301.

60. P. 306 & note 41 *supra*.

61. 213 Md. 248, 131 A.2d 737 (1957).

62. *Id.* at 252, 131 A.2d at 738-39.

Grier had alleged personal injury caused to her by the sudden stop of a Baltimore City bus on which she was a passenger.<sup>63</sup> The testimony tended to show that the bus had to stop quickly to avoid a collision with an automobile owned by Rosenberg which darted into the path of the bus and then left the scene. The court of appeals synopsisized Rosenberg's rebuttal:

His only evidence relative thereto was his own testimony, which was to the effect that he knew nothing of the injury complained of until nearly six months after its occurrence; that he did not know or recall any activity, on the day in question, that would have involved his presence at the scene of the alleged injury; that there was a possibility that his car might have been there and some one from his office could have been driving it; that he had been treated at the Sinai Hospital, about six blocks from the scene, and still makes visits there for medical care; and that he had inquired among his employees and none of them recalled any occasion for driving his car on the day in question, or at that time being in the vicinity where the plaintiff received her injury.<sup>64</sup>

Grier contended that this state of the evidence entitled her to the instruction denied. Rosenberg responded that the subject presumption went out of the case with his testimony in reply.<sup>65</sup> The court of appeals held "the instruction . . . should have been given."<sup>66</sup> Although the defendant gave sufficient evidence to present a jury question and thus avoid a directed verdict,<sup>67</sup> the presumption did not disappear from the case. Judge Prescott formulated the rule for the court:

In cases of this nature, after the plaintiff has offered proof of the ownership of the automobile in the defendant, if the defendant does not offer any evidence on the issue of agency, the Court should instruct the jury that if they find as a fact that the defendant owned the car, they must find he is responsible for the negligence (if any) of the driver. If the defendant does present evidence to show that the alleged driver was engaged on business or a purpose of his own, it may be so slight that the Court will rule it is insufficient to be considered by the jury in rebuttal of the presumption, in which case the Court should grant the same instruction it would have granted if the

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63. The plaintiff also sued the Baltimore Transit Company and its driver, but the judgments upon jury verdicts in favor of these defendants were not appealed. *Id.* at 251, 131 A.2d at 738.

64. *Id.* at 252, 131 A.2d at 739.

65. *Id.*

66. *Id.*

67. *Id.* at 255, 131 A.2d at 740.

defendant had offered no evidence on the issue. The evidence may be so conclusive that it shifts the burden or duty of going forward with evidence back to the plaintiff, in which event the defendant would be entitled to a directed verdict, if the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant's evidence. . . . The evidence, however, may fall between the two categories mentioned above, in which event the issue of agency should be submitted to the jury.<sup>68</sup>

In terms of burden of proof, the court has said that a presumption shifts a special burden of going forward with the evidence: the party against whom the presumption operates must come forward with evidence to the contrary which is more than "slight" in the judgment of the trial judge.<sup>69</sup> If he does not meet this burden, the presumed fact must prevail if the basic fact is found. But even if that special burden is met, the party relying on the presumption is yet entitled to an instruction relative to it, unless the usual burden of producing evidence on the issue of agency is rebounded to him by "conclusive" evidence.

In mustering support for its decision, the court's rationale rang more of a defense of its anti-Thayerian tactics than the affirmative statement of policy which it was. Logically, Judge Prescott posed the question, "if the instruction be not granted, how is the jury to know of the presumption?"<sup>70</sup> The issue, however, is not "how" the jury should know of the presumption, but whether or not they should know of it, as a matter of jurisprudential policy. The court appeared to dabble in policy when it referred to the possible reluctance of the jury to find the owner liable if the presumption were not mentioned.<sup>71</sup> The court may have been implying that because of a policy of broadening the responsibility of vehicle owners for harm caused by their instrumentalities,<sup>72</sup> the inference of agency arising from ownership<sup>73</sup> needs a boost in the eyes of the jury. The court quoted extensively from McCormick, most notably his emphasis on the acceptance of the practice elsewhere, and his view that the presumption should be mentioned to impress upon the jury the law's attachment of special significance to the basic fact.<sup>74</sup>

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68. 213 Md. at 254-55, 131 A.2d at 740. To complete the rule, these words should be added at the end of the last sentence: "with an instruction as to the terms of the presumption."

69. It would be difficult, if not impossible, to lay down a rule, that would apply in all cases, as to when the evidence is so slight that it is insufficient to be considered by the jury in rebuttal of the presumption of agency, or so conclusive as to require a directed verdict for the defendant. These matters must depend upon, and be decided by, the facts developed in each individual case. *Id.* at 255, 131 A.2d at 740.

70. *Id.* at 253, 131 A.2d at 739.

71. *Id.*

72. See p. 304 & note 21 *supra*.

73. See p. 312 note 82 & p. 314 *infra*.

74. 213 Md. at 253-54, 131 A.2d at 739-40.

Having made the threshold decision, in reliance on McCormick, to allow mention of the presumption despite the conflicting evidence, the court surely pondered the alternatives on instruction of the jury considered by him.<sup>75</sup> Possibly, the court might have approved another form of instruction had the judges been concerned exclusively with boosting the presumption at trial. Let us assume, nevertheless, that the court of appeals, independently of the pressure of the instruction before it, faced the secondary question of what to say to the jury, that is, how to inject the presumption into the jury's deliberations. The *Grier* injection was not clean. The instruction which should have been given was that "if the jury found as a fact ownership of the car in the appellee, there arose a rebuttable presumption that the automobile was being operated by the appellee or by his agent . . . acting within the scope of the agent's . . . employment."<sup>76</sup> The court said nothing whatever with regard to whether or not, or how, the jury should be told to deal with the presumption. The jury cannot simply divine what a presumption is and how it should affect the case, and thus are left free to do with it what they will. An individual juror might regard it as conclusive; as evidence to be weighed; as meaning that the party against whom it operates must disprove it; or he might not regard it at all. Yet these are all possibilities which the court must have considered. In a sense, then, the form of instruction approved is potentially self-defeating and may have been opted for by elimination. A rebuttable presumption is not conclusive; it is not "evidence;" to the *Grier* court, it should not shift the burden of persuasion; but it should be considered by the jury in some manner. Perhaps the jurors would know that a "rebuttable" presumption cannot be "conclusive." Perhaps they would perceive that weighing a procedural rule in the balance does violence to classical notions of evidence. Perhaps they would understand from the charge in its entirety where the ultimate risk of nonpersuasion lies. But perhaps they would not, and their task is difficult enough without having to be performed in a mire of supposition. More than a statement of the terms of the presumption is needed.<sup>77</sup>

*Grier* was the first appellate reversal based on the giving or refusal to give an instruction on the effect of a presumption. The only prior "presumption cases"<sup>78</sup> involving directed verdicts were cases in which the party against whom the presumption operated offered conclusive or uncontradicted evidence in rebuttal.<sup>79</sup> One thing, however, is perfectly clear—Maryland has never embraced the Thayer dogma. Although before *Grier* dicta construable as Thayerian are to be found,<sup>80</sup> the

75. The court of appeals relied on McCormick's 1959 edition, but the material there is substantially the same as pp. 8-9 *supra*.

76. 213 Md. at 252, 131 A.2d at 738-39.

77. See the instruction in *Phillips v. Cook*, 239 Md. 215, 210 A.2d 743 (1965).

78. Cases in which an aspect of presumption law was the *ratio decidendi*.

79. See, e.g., *Wagner v. Page*, 179 Md. 465, 20 A.2d 164 (1941).

80. See, e.g., *Gordon v. Rawles*, 201 Md. 503, 512-13, 94 A.2d 465, 470 (1953) (emphasis added): "Testimony in order to be legally sufficient to overthrow the presumption in

weight of the language falls heavily on the side of a stronger procedural effect, namely, imposition of a burden of proving the nonexistence of the presumed fact. Cases involving the presumption of the legitimacy of a child conceived or born during wedlock, the agency of the driver for the owner of a vehicle, and the invalidity of a gift between persons in a confidential relationship, indicate strongly that the person against whom the presumption is directed must respectively convince the trier of fact by a preponderance of the evidence that the child is illegitimate,<sup>81</sup> that the driver was not acting as a servant for the owner in the scope of employment,<sup>82</sup> and that the gift was voluntarily given.<sup>83</sup> Regardless of the tendency, it is not possible to say that Maryland has followed a one-rule approach; rather, the cases indicate a presumption-by-presumption approach with an emphasis on according presumptions a greater procedural potency than the bursting bubble theory and many of its deviations.

Whether *Grier*, then, was one step in a chronological progression toward giving presumptions a weightier significance or merely a gap-filler in established law, it was not a turning point. Nevertheless, *Grier* did, especially in conjunction with the cases which followed it, give more form and substance to a somewhat amorphous area of Maryland law. In view of the pre-*Grier* cases suggesting that presumptions, or certain presumptions, shift the burden of persuasion and the language used by the court of appeals in *Grier* to the effect that the presumption shifts only the burden of going forward with the evidence,<sup>84</sup> the question naturally arises as to who should receive a verdict when the mind of the trier of fact is in equipoise, the party relying on the presumption or the party against whom the presumption operates. In *Phillips v. Cook*,<sup>85</sup> a 1965 case involving personal injury to the plaintiff as the result of an automobile accident, the evidence was conflicting as to whether the driver of the car was acting in furtherance of partnership business so as to render his partner liable for his negligence, if any. After presenting the issue of agency to the jury and

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favor of a person's sanity and capacity . . . must tend to show that he was incompetent at that particular time." Even if the language in *Gordon* on the presumption of sanity calls only for rebuttal evidence sufficient to support a finding of incompetence, a case decided shortly after *Grier* in 1957 is contradictory: "The presumption that a person is sane . . . lasts until the contrary is established." *Masius v. Wilson*, 213 Md. 259, 268, 131 A.2d 484, 488 (1957).

81. See *Clark v. State*, 208 Md. 316, 320, 118 A.2d 366, 367 (1955); *Scanlon v. Walshe*, 81 Md. 118, 134, 31 A. 498, 501 (1895). This presumption may involve special problems of proof. See MD. ANN. CODE art. 16, § 66F(b) (1957).
82. See, e.g., *Erdman v. Henry S. Horkheimer & Co.*, 169 Md. 204, 206-07, 181 A. 221-22 (1935). Other cases indicate, however, that the inferential probative value of proof of ownership may be the key to getting to the jury. See, e.g., *Fowser Fast Freight v. Simmont*, 196 Md. 584, 588-89, 78 A.2d 178, 179-80 (1951).
83. See, e.g., *Tribull v. Tribull*, 208 Md. 490, 507, 119 A.2d 399, 408 (1956); *Farmer v. Associated Professors of Loyola College*, 166 Md. 455, 472, 171 A. 361, 368 (1934); *McGill v. Nichols*, 157 Md. 287, 294, 145 A. 773, 776 (1929).
84. Pp. 309-10 *supra*.
85. 239 Md. 215, 210 A.2d 743 (1965).

informing them that firm ownership of the car raises a presumption that it was being operated on firm business at the time of the accident, the lower court instructed:

When I say it is a rebuttable presumption, what do I mean? . . . [I]t becomes the duty of the defendant . . . to go forward with the evidence to establish to your satisfaction by a fair preponderance of the evidence that the car was not at that time being operated on partnership business.<sup>86</sup>

Despite the confused terminology respecting burden of proof, there can be no doubt that this instruction cast the risk of nonpersuasion upon the defendant partner. The court of appeals found "no error in this regard."<sup>87</sup>

The first test of the *Grier* rule in the context of another presumption occurred in 1964 in a federal forum. *Maryland v. Baltimore Transit Co.*<sup>88</sup> was a diversity action brought for the death of plaintiff's decedent who was hit and killed by a bus of the defendant company. The evidence as to the decedent's due care was conflicting. The district court judge refused a requested instruction that the jury could consider the presumption of due care in the deceased's favor in reaching its verdict, and instructed the jury: "[W]here as here, evidence has been offered to show that the decedent failed to exercise ordinary care in a number of respects, you shall consider the proof which has been offered . . . and you are not to rely on the presumption."<sup>89</sup> The Fourth Circuit Court of Appeals, applying Maryland law, reversed the judgments for the defendants and remanded. In the face of a strong dissent by Judge Haynesworth, who argued that Maryland would not apply the *Grier* formula to the presumption at issue and noted that *Grier* took Maryland "out of the main stream of the prevailing current of thought,"<sup>90</sup> the majority relied on *Grier*, applying its rule for the first time to another presumption—the presumption of due care.

Judge Haynesworth proved wrong. In subsequent cases, the Maryland Court of Appeals applied *Grier* to the presumption of due care.<sup>91</sup> The court stated in *Bratton v. Smith*:<sup>92</sup> "While recognizing that *Grier* dealt with the presumption of agency, nevertheless its holding . . . is apposite to the principle underpinning the use of presumptions."<sup>93</sup> One question which *Grier* left open has been answered—the rule there announced has application to at least one other presumption.

86. *Id.* at 222, 210 A.2d at 748.

87. *Id.*

88. 329 F.2d 738 (4th Cir. 1964).

89. *Id.* at 739.

90. *Id.* at 745.

91. *E.g.*, *Gresham v. Commissioner of Motor Vehicles*, 256 Md. 500, 260 A.2d 649 (1970); *Bratton v. Smith*, 256 Md. 695, 261 A.2d 777 (1970).

92. 256 Md. 695, 261 A.2d 777 (1970).

93. *Id.* at 702-03, 261 A.2d at 781.

The court of appeals has neither prognosticated nor suggested in the cases applying *Grier* how far its rule will be extended.<sup>94</sup> The presumption of agency for which the rule was originally fashioned may be said to be founded upon both the public policy of enlarging the sphere of responsibility of owners for their vehicles and the circumstantial value of the fact of ownership.<sup>95</sup> The presumption of due care cannot claim this double distinction, for the fact of death does not suggest that the decedent was exercising the prudence of a reasonable man when he met his fate. Although it is often said that the presumption issues from the instinct of survival,<sup>96</sup> it is probably more akin to giving the benefit of the doubt to one who cannot speak for himself, which is a matter of the policy of the law. The common denominator of public policy is certainly an indicator, but it is not a mechanistic formula. The court of appeals will undoubtedly decide on a presumption-by-presumption basis which ones merit the *Grier* effect. All presumptions founded on some public policy should not be accorded that effect, nor should all presumptions not primarily based on public policy be denied it. Consider, for example, the presumption of death from absence for seven years or more. The policy of preventing property rights from being held in abeyance<sup>97</sup> is, in some measure, counterbalanced by the drastic nature of declaring someone dead. Even non-conclusive evidence that the person is not dead, or that he has not been seen or heard from for some reason should remove the presumption altogether, and require direct evidence to support the finding. The Maryland legislature implied as much and more when it abolished this common law presumption in these terms:

If the death of a person or the date of his death is at issue, he is not presumed dead . . . merely because he has been absent from his place of residence and not heard about for any stated period of time. The issue shall go to the court as one of fact to be determined upon the evidence. . . .<sup>98</sup>

Even if the legislature had not abrogated the presumption, the same rationale by the judiciary might well have excluded it from the embrace of the *Grier* rule.

A presumption arising solely as a matter of inference, on the other hand, such as that of receipt from proof of proper mailing, might well deserve the *Grier* procedural effect by probability alone. But the problem here is more in name than substance. "[O]ne may slip from presumption to inference and back again too quickly for the eye, ear,

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94. In *Grier*, the court prefaced its general formulation, pp. 309-10 *supra*, with the words "in cases of this nature." 213 Md. at 254, 131 A.2d at 740.

95. See p. 312 note 82 & p. 310 *supra*.

96. See, e.g., *Baltimore Transit Co. v. State*, 194 Md. 421, 434, 71 A.2d 442, 447 (1950).

97. P. 304 *supra*.

98. MD. ANN. CODE, Cts. & Jud. Proc. Art., § 3-102 (1974).

or mind to detect. . . . [A]fter rebuttal of the presumption the inference remains and may be treated as doing the same work as the presumption even though the presumption is gone."<sup>99</sup>

What the court of appeals has wrought by *Grier* and its progeny is a judgment that the values underlying presumptions, or at least some presumptions, are not adequately supported by the law which banishes them upon the appearance of non-conclusive contradictory evidence. To the extent that the burden of persuasion is moved, even temporarily, this judgment rests by necessity upon a determination, though *sub silentio*, that the policies dictating the original allocation of burden of proof in the action have been countermanded.<sup>100</sup> In effect, the *Grier* rule has struck a balance between the bursting bubble extreme and that called for by Morgan and McCormick<sup>101</sup>—a final shifting of the burden of persuasion. The boundaries of the *Grier* holding, however, have yet to be drawn. The door is open to the Maryland attorney who relies upon a presumption not yet assigned this effect, to persuade the court that, in view of the nature of the presumption, the probative value of the basic facts, the underlying policies, and, more specifically, the *Grier* rationale,<sup>102</sup> the presumption depended upon deserves such significance.

#### FEDERAL RULE 301

To promote uniformity in federal court practice, in February, 1973, the Chief Justice of the United States reported to Congress proposed rules of evidence for use in federal courts and before federal magistrates.<sup>103</sup> As submitted by the Supreme Court,<sup>104</sup> Rule 301, governing the effect of presumptions in cases controlled by federal law, read:

In all cases not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.<sup>105</sup>

99. Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 401 (1956).

100. MCCORMICK 826. For a discussion of the policies involved in the original allocation of burden of proof, *see id.* § 337.

101. P. 307 *supra*.

102. Pp. 310 *supra*.

103. The rules were recommended by an Advisory Committee on Rules of Evidence, and subsequently approved by the Judicial Conference Standing Committee on Rules of Practice and Procedure and by the Judicial Conference of the United States.

104. The Supreme Court promulgated three rules dealing with presumptions: Rule 301, governing the effect to be given presumptions generally; Rule 302, prescribing when state law as to the effect of presumptions was to be applied; and Rule 303, excepting from the general rule presumptions operating against an accused in a criminal case. 41 U.S.L.W. 4023 (Nov. 21, 1972). Rule 303 was deleted by the Congress. *See note 3 supra*.

105. 41 U.S.L.W. 4023 (Nov. 21, 1972). Rule 302 "otherwise provides" for the applicability of state law in certain cases. Pp. 318-21 *infra*.



The Advisory Committee Note on Rule 301 explained simply that the proposed rule shifting the risk of nonpersuasion was based upon a determination that, in view of the policy considerations underlying the creation of presumptions, the bursting bubble theory gave presumptions "too 'slight and evanescent' an effect."<sup>106</sup> The Advisory Committee, however, gave no indication whatsoever as to whether, in its view, the proposed rule worked a change in existing federal law or was simply a continuance of the manner in which federal courts were then treating presumptions. The reason may be that the federal treatment of presumptions was in a state of disarray.<sup>107</sup> At the time the Supreme Court's proposed rule was under consideration, it was said both that it rejected the prevailing view of the federal courts<sup>108</sup> and that it was "nothing more than a summary of existing law as to the treatment to be given to presumptions by the Federal Courts."<sup>109</sup> Nevertheless, the Court's rule did not survive long, Congress working its will initially through the House of Representatives.<sup>110</sup> Rule 301 as amended and passed by the House provided:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of the fact.<sup>111</sup>

The House Judiciary Committee, which adopted this "intermediate position,"<sup>112</sup> concurred in the Supreme Court's criticism of the

106. 46 F.R.D. 215, quoting from Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937).

107. Compare, e.g., *Psaty v. U.S.*, 442 F.2d 1154, 1160 (3d Cir. 1971) and *United Aniline Co. v. Commissioner*, 316 F.2d 701, 704 (1st Cir. 1963) with, e.g., *Stout v. Commissioner*, 273 F.2d 345, 350 (4th Cir. 1959) and *Gersten v. Commissioner*, 267 F.2d 195, 199 (9th Cir. 1959). In 1938, the Supreme Court said, with respect to the presumption against suicide, or in favor of accidental death:

The evidence being sufficient to sustain a finding that the death was not due to accident . . . the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1938).

108. Fornoff, *Presumptions—The Proposed Federal Rules of Evidence*, 24 ARK. L. REV. 401, 408 (1971).

109. *Hearings on Proposed Rules of Evidence Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93d Cong., 1st Sess., ser. 2, at 221 (1973) [hereinafter cited as *1973 Hearings*].

110. Under the "Rules Enabling Acts," 18 U.S.C. 3402, 3771, 3772 (1970); 28 U.S.C. 2072, 2075 (1970), the Supreme Court's rules would have taken effect ninety days after they were reported to Congress by the Chief Justice without action by Congress. Because of the significance of the rules and, as some contended under enabling acts, the substantive nature of some of the proposals, the Congress delayed the effective date of the rules until Congress had an opportunity to enact them affirmatively. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

111. H.R. 5463, 93d Cong., 1st Sess. (1973).

112. H.R. REP. No. 650, 93d Cong., 1st Sess. 7 (1973).

bursting bubble doctrine, but thought that a shift of the burden of persuasion was too great an effect to accord presumptions.<sup>113</sup>

The Senate Judiciary Committee disagreed:

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." This treatment requires juries to perform the task of considering "as evidence" facts upon which they have no direct evidence and which may confuse them in performance of their duties.<sup>114</sup>

When the Senate completed its revision of Rule 301, the gamut had been run—the Supreme Court's shift in the risk of non-persuasion was permanently left behind, the House presumption-as-evidence rule had been rejected, and the final step back to the bursting bubble theory was taken. The Senate version was adopted by the Conference Committee of both houses,<sup>115</sup> and Rule 301 enacted by the Congress<sup>116</sup> and incorporated in the Federal Rules of Evidence now provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.<sup>117</sup>

In terms, this formulation is a bursting bubble rule.<sup>118</sup> The explication of the operation of the rule given by the Committee of Conference, however, exhibits either a fundamental misunderstanding of the theory or an intent to modify it:

Under [the rule], a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact

113. *Id.*

114. S. REP. NO. 1277, 93d Cong., 2d Sess. 9 (1974) (footnotes omitted).

115. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 6 (1974).

116. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. \_\_\_\_ (1975).

117. Rule 301.

118. See pp. 305-06 & notes 32-35 *supra*.

from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.<sup>119</sup>

The Committee's implication that a presumption will not necessarily prevail in the absence of contradictory evidence is contrary to the most basic tenet of presumption law.<sup>120</sup> Either the Committee's choice of words is inexact or the federal courts will simply not abide by the language, for when a party fails to sustain his burden of producing evidence, the presumed fact controls. It is clear, however, that once evidence is introduced sufficient to support a finding of the nonexistence of the presumed fact,<sup>121</sup> the presumption is gone, and must not be mentioned to the jury, although the inference may remain in the case of basic facts which are circumstantially probative.<sup>122</sup>

### FEDERAL RULE 302

The conflict between the bursting bubble theory of Rule 301 and the greater procedural effect accorded presumptions under Maryland law poses this immediate question: When will Maryland law govern the effect of presumptions in federal court cases, and when will Rule 301 control? The answer is a function of the *Erie* doctrine<sup>123</sup> as formulated with respect to presumptions<sup>124</sup> by the Supreme Court in Federal Rule 302:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.<sup>125</sup>

119. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 5-6 (1974).

120. P. 303 & note 13 *infra*; 29 AM. JUR. 2d, *Evidence* § 165 at 200 (1967).

121. See 1 J. WEINSTEIN & BERGER, *WEINSTEIN'S EVIDENCE* § 301 [02], at 301-28 (1975).

122. See p. 314-15 *supra*. While the proscription against mentioning the word "presumption" is sound Thayer doctrine, p. 306 & note 36 *supra*, the distinction between using the word "presume" and the word "infer" appears superficial. McCormick points out that the word "presume" may make an inordinately strong impression upon the jury. MCCORMICK 825. Judge Weinstein and Professor Berger state that a reversal will not necessarily follow from mention of the "dreaded word." WEINSTEIN & BERGER, *supra* note 121, at 301-28: "It is unlikely that it will be understood by the jury in its technical sense rather than as a synonym for inference."

123. *Erie v. Tompkins*, 304 U.S. 64 (1938). As most commonly formulated, the doctrine commands the application of the substantive law of the forum state by federal courts exercising diversity jurisdiction. For a more refined analysis in the light of subsequent cases, see C. WRIGHT, *LAW OF FEDERAL COURTS* §§ 55-60 (2d ed. 1970). More accurately, state substantive law applies if the issue presented to the court arises out of state-created rights, regardless of the ground of jurisdiction. *Id.* at 226; K. REDDEN & S. SALTZBURG, *FEDERAL RULES OF EVIDENCE MANUAL* 56 (1975).

124. Advisory Committee Note, 46 F.R.D. 211.

125. Rule 302 as submitted by the Supreme Court was enacted by the Congress without substantial change.

Before the enactment of the Federal Rules of Evidence the *Erie* doctrine seemed to have comprehended state presumption law in toto, for the federal courts in diversity cases routinely applied state law on the effect of presumptions.<sup>126</sup> In 1959, the Supreme Court itself applied North Dakota law on the effect of the presumption of accidental death, or against suicide, arising from proof of violent death. The plaintiff in *Dick v. New York Life Ins. Co.*<sup>127</sup> was the beneficiary of two insurance policies issued by the defendant on the life of the plaintiff's husband. The defendant had rejected the plaintiff's claims under clauses providing for double indemnity in the event of accidental death but excluding double indemnity in the event of suicide. The defendant contended that the insured had taken his own life. At the close of the evidence, the district court judge denied the insurer's motion for a directed verdict and instructed the jury, in accordance with North Dakota law, that accidental death is presumed and that the insurer has the burden of persuasion. The Eighth Circuit Court of Appeals reversed,<sup>128</sup> holding that, on the evidence, the issue should not have been submitted to the jury and that the defendant's motion for a directed verdict should have been granted.<sup>129</sup> The Supreme Court held this to be error.<sup>130</sup> Under North Dakota law, a presumption not only shifts the burden of persuasion but is considered as affirmative evidence to be weighed. Chief Justice Warren's majority opinion concluded that the evidence presented by the plaintiff, together with the presumption, was sufficient proof of accidental death to present a jury question. Although the Supreme Court did no more than apply state law in finding that the court of appeals weighed the evidence improperly, Chief Justice Warren's opinion broadly declared: "Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' . . ."<sup>131</sup> With the enactment of Rule 302, the question has been raised whether the *Erie* doctrine and presumptions will maintain this relationship.

Rule 302 declares that state law will control "the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision."<sup>132</sup> State law supplies the rule of decision as to claims and defenses having their origin in state law, or, more generally, in diversity cases.<sup>133</sup> It is the language "respecting a fact which is an element of a claim or defense" which

126. *E.g.*, *Castilleja v. Southern Pacific Co.*, 406 F.2d 669, 675 (5th Cir. 1969) (applying Texas law); *Maryland v. Baltimore Transit Co.*, 329 F.2d 738 (4th Cir. 1964) (applying Maryland law). *See also* 5 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE*, ¶ 43.08 at 43-89 to 43-90 (2d ed. 1975).

127. 359 U.S. 437 (1959). The plaintiff initially brought suit in North Dakota state court, but the defendant removed the case to federal district court on diversity grounds. *Id.* at 438.

128. *Dick v. New York Life Ins. Co.*, 252 F.2d 43 (8th Cir. 1958).

129. *Id.* at 47.

130. 359 U.S. at 445.

131. *Id.* at 446 (footnote omitted).

132. Rule 302.

133. *See* p. 318 & note 123 *supra*.

must be scrutinized. Although on its face, this language might seem to be no more than a codification of the Warren Court's assertion in *Dick* that, for *Erie* purposes, presumptions are substantive, thus mandating the application of state law, the Rule has affixed a qualification: the presumed fact must be substantively material to the complainant's recovery or the defendant's avoidance of liability.<sup>134</sup> According to the Advisory Committee, this scope of the *Erie* doctrine in the field of presumptions was the product of three Supreme Court cases, *Dick* and two earlier cases involving original allocations of burden of proof. In *Cities Service Oil Co. v. Dunlop*,<sup>135</sup> the plaintiff sued to quiet title to land, claiming status as a bona fide purchaser. The Supreme Court held that the lower courts erred in failing to apply the Texas rule that the burden was on the defendant to prove that the plaintiff was not a bona fide purchaser. *Palmer v. Hoffman*<sup>136</sup> similarly involved state law regarding burden of proof on the issue of contributory negligence. Judge Weinstein and Professor Berger believe that Rule 302 evidences a policy favoring the application of federal law over state law "in cases of doubt" because "the draftsmen of the Rule deliberately chose to interpret the *Erie* doctrine as narrowly as possible."<sup>137</sup> Were this true, the rule would have required as a prerequisite to the applicability of state presumption law that the existence of the presumed fact must tend to establish or disprove the claim or defense itself, rather than an "element" of the claim or defense. It is probably more accurate to say that Rule 302 embodies the Burger Court's more refined view of the appropriate scope of the *Erie* doctrine as it applies to presumptions, without ascribing any underlying functional policy.

It is clear, nevertheless, that Rule 302 contemplates instances in diversity cases in which state law will not control the effect of presumptions. The Advisory Committee Note refers to these instances as "tactical presumptions" without further explanation.<sup>138</sup> The term is misleading in that it implies that particular presumptions may never be governed by state law, regardless of their significance in the case. Indeed, Weinstein and Berger were misled into citing as an example of a tactical presumption, the presumption of receipt arising from proof of proper mailing.<sup>139</sup> First, the federal courts have regularly followed state law concerning the effect of this presumption.<sup>140</sup> Second, the receipt of mailed matter is often an element of a claim or defense, for example, in a suit for breach of warranty in regard to accepted goods where the plaintiff must prove that the defendant was given reasonable notice of

134. The Advisory Committee Note on Rule 302 states that the presumption must operate upon a substantive element of the claim or defense. 46 F.R.D. 211. See also WEINSTEIN & BERGER, *supra* note 121, at 302-05.

135. 308 U.S. 208 (1939).

136. 318 U.S. 109 (1943).

137. WEINSTEIN & BERGER, *supra* note 121, at 302-05.

138. 46 F.R.D. 211.

139. WEINSTEIN & BERGER, *supra* note 121, at 302-04.

140. *E.g.*, Federal Ins. Co. v. Summers, 403 F.2d 971, 975 (1st Cir. 1968).

the breach.<sup>141</sup> It is not the nature or origin of the particular presumption which determines the applicability of state law, but the materiality of the presumed fact in the case.

Although the Rule allows for a rather nebulous zone in which non-material presumptions may not be governed by state law and although the Burger Court's formulation of Rule 302 is, in terms, either less broad or more precise than the Warren Court's statement in *Dick*, Rule 302 will not measurably whittle down the applicability of state law in appropriate federal cases. Certainly the Congress did not contemplate such a result. While Rule 301, which originally proposed a drastic departure from the bursting bubble theory,<sup>142</sup> was much debated and amended,<sup>143</sup> Rule 302 was not even debated. In enacting Rule 302, the Congress undoubtedly viewed it as a maintenance of the status quo. In addition, the foothold which state presumption law has established in federal courts and the latitude available to federal judges in originally determining the scope of Rule 302 militate against any significant excision of state presumption law from the *Erie* doctrine.

Thus, the major task and opportunity of the advocate relying on a presumption in a federal court applying Maryland substantive law will not be to convince the court that state law should control the effect of the presumption, but to persuade the court, as he must in a Maryland forum<sup>144</sup> and as the plaintiff did in *Maryland v. Baltimore Transit Co.*,<sup>145</sup> that the law of Maryland would accord the presumption a particular procedural effect.

*J. Clinton Kelly*

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141. See MD. ANN. CODE, Comm. L. Art., § 2-607(3)(a) (1975).

142. P. 315 *supra*.

143. Pp. 315-17 *supra*.

144. P. 315 *supra*.

145. 329 F.2d 738 (4th Cir. 1964). See p. 313 *supra*.