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The Uniform Rules of Evidence and the North Dakota Law of Evidence (Continued)

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THE UNIFORM RULES OF EVIDENCE AND THE NORTH DAKOTA LAW OF EVIDENCE (Continued)

By LEO H. WHINERY*

In the last installment the meaning of proof, burden of persuasion, burden of producing evidence and finding of fact in the Uniform Rules was considered.[1] Changes in some of the Rules were suggested and the Rules, with the modifications, were compared with North Dakota law. The terminology and definitions in the Rules, with these modifications, will be applied in continuing the discussion. No other area of the law of evidence seems quite so plagued with ambiguity, misunderstanding and disagreement than burden of proof and presumptions. A good deal of this is attributable to the laxity of the courts in the use and explanation of terminology in deciding matters of proof pertaining to the trial process. Some attention was drawn to this problem in the previous installment and there will be occasion to consider it further in succeeding pages. In the meantime, it is important to emphasize the importance of consistency in terminology and meaning even though there may be disagreement with the views set forth.

III. *The Theory and Application of Proof in the Trial Process*

A fundamental principle of Anglo-American litigation is that the parties-litigant are responsible for informing the court of the matters of fact which constitute the basis of the dispute and for proving the existence or non-existence of such propositions of fact as will bring one or the other of them within a rule of law entitling him to a judgment.[2] At the pleading stage the parties develop the propositions of fact in dispute and thereby inform the court of the issues to be decided.[3] Similarly, at the trial stage, the court and trier of fact, though informed of the propositions of fact in dispute, know nothing of their existence or non-existence. Further, and though there are exceptions, the court and trier of fact do not ordinarily have the means for making such a determination.[4]

Proof, it has been suggested in the previous installment, should be defined in Uniform Rule 1(3) to mean "the cumulative effect of

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1. Whinery, Burden of Proof, 33 NDL Rev. 203 (1958).

2. A more detailed discussion of this principle of party presentation will be found in Millar, The Formative Principles of Civil Procedure, 18 Ill. L. Rev. 1, 16 et seq. (1923). See also, 9 Wigmore, Evidence § 2483 (3d ed. 1940).

3. Meckle v. Hoffman, 78 N.W.2d 166 (N.D. 1956); Reitman v. Whitaker, 74 N.D. 504, 23 N.W.2d 393 (1946). See also, Clark, Code Pleading § 1 (1947).

4. See Lindberg v. Burton, 41 N.D. 587, 171 N.W. 616, 618 (1919).

all the evidence relevant to a fact in issue which persuades the trier of fact of the existence or non-existence of such fact."[5] Since proof is the responsibility of the parties and the determinate of proof is both the evidence and its persuasive effect,[6] it necessarily follows that one or the other of the parties, during the course of the trial, will have the burdens of producing evidence and of persuasion as defined in Uniform Rules 1(5) and 1(4),[7] irrespective of whether the trial is a jury case or a non-jury case with the judge as the trier of fact.[8]

First, assuming a jury trial, as to each disputed proposition of fact, the party who will ultimately have the burden of persuasion is the one upon whom the burden of producing evidence first falls since, without evidence there can be no persuasion, without which there is no proof. He may be either the plaintiff or defendant depending upon how the burden of persuasion is allocated.[9] We will refer to him as the proponent. In terms of the foregoing definition of proof, the proponent must see to it that evidence of sufficient quantity and quality has been introduced which, at least, *may* persuade the trier of fact of the existence or non-existence of the disputed fact.

What is the test for determining whether the proponent has met this burden of producing evidence under Uniform Rule 1(5)? The Rule does not specify. Conversely, the Model Code provides that the burden of producing evidence is discharged when sufficient evidence has been introduced to support a finding that the fact exists.[10] Consideration should be given to modifying Uniform Rule 1(5) accordingly. As modified, however, there would be no significant change in North Dakota law. The Supreme Court has held that the test is "whether there is any competent evidence in the case reasonably tending to sustain" the fact sought to be proved.[11] As-

5. Whinery, *supra* note 1, at 207.

6. See Uniform Rule 1(1) defining "evidence" as "the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals . . . ."

7. Uniform Rule 1(5) provides: " 'Burden of producing evidence' means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact." It has been recommended that Uniform Rule 1(4) provide: " 'Burden of Persuasion' means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be." See Whinery, *supra* note 1, at 206. For the rule as recommended by the Conference, see page 203.

8. See Uniform Rule 1(11) defining "trier of fact" to include "a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence."

9. See Whinery, *supra* note 1, at 205-206.

10. Model Code of Evidence, rule 1(2) provides: " 'Burden of producing evidence of a fact' means the burden which is discharged when sufficient evidence is introduced to support a finding that the facts exists."

11. Cameron v. Great Northern Ry. Co., 8 N.D. 124, 77 N.W. 1016 (1898). See also, Schnoor v. Meinecke, 77 N.D. 96, 40 N.W.2d 803 (1950). North Dakota thus follows

suming there is, the proponent has established — if, according to Wigmore, the term is correctly used — a *prima facie* case.[12] And the term has been so used by the North Dakota court,[13] though, as we shall see later, it has by no means been confined to mean introducing just enough evidence to get to the jury on an issue of fact.

If the proponent fails to meet this burden of producing evidence, the evidence will not persuade and there is no issue of fact for the jury to determine. In these circumstances, the court would be required to direct a verdict or make a peremptory finding against the proponent. While this capacity of the court to dispose of the issue by a directed verdict or peremptory finding applies irrespective of whether the trial is with a judge or jury as trier of fact, its consequences are most significant in the jury trial. Taking the case from the jury is based on common law doctrine which, on the one hand, requires the court to control and supervise the jury process to insure rational results in fact-finding and, on the other, gives to the jury the responsibility to decide issues of fact.[14] This gives rise to two corollary rules of law. First, if the evidence will only permit one reasonable conclusion, the question of fact is to be determined by the court as a question of law. Second, but if the evidence is of such a nature that different minds might reasonably draw different conclusions therefrom, the question of fact must be submitted to the jury.[15]

Second, assume, however, that proponent has met his burden of producing evidence and the mass of evidence may, though not necessarily, persuade. The persuasive effect of the evidence is equivocal and an issue of fact arises which must be determined by the jury. It is still possible that the evidence will or will not persuade the jury that the fact does or does not exist. But suppose it has neither consequence and the mind of the jury is left in a state of uncertainty. The equilibrium is removed by requiring that the proponent, considering the evidence as a whole, shall have persuaded

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the majority, though the test is formulated in varying ways in different jurisdictions. A few states adhere to the so-called "scintilla rule", that is, any evidence at all will take the case to the jury [See 9 Wigmore, Evidence § 2494 (3d ed. 1940)], which the North Dakota Supreme Court has specifically rejected. See Schnoor v. Meinecke, *supra*.

12. 9 Wigmore, *op. cit. supra* note 11.

13. Schnoor v. Meinecke, 77 N.D. 96, 40 N.W.2d 803 (1950).

14. See, for example, the North Dakota case of Fuller v. Northern Pac. Elevator Co., 2 N.D. 220, 50 N.W. 359 (1891): "It is not the duty of any court, nor has it the right, to close its eyes to obvious facts. Courts were instituted to promote justice, and not to perpetuate error. A court may not substitute its judgment for that of the jury, but it should say whether or not the judgment of the jury has been fairly exercised, or whether or not the result shows unmistakable prejudice, or a disregard of the evidence submitted." For a thorough analysis of this point, see Thayer, A Preliminary Treatise on Evidence, 207-253 (1898).

15. Thompson v. Hannah Farmers Coop. Elevator Co., 79 N.W.2d 31 (N.D. 1956); Fuller v. Northern Pac. Elevator Co., 2 N.D. 220, 50 N.W. 359 (1891).

the jury that the fact does or does not exist by a preponderance of the evidence (more probable than not), clear and convincing evidence (highly probable), or beyond a reasonable doubt, as the case may be.[16] If the proponent does not so persuade and destroy the equilibrium then there is no proof as heretofore defined.

Suppose, however, that the proponent, in meeting his burden of producing evidence, does more than just establish a *prima facie* case; suppose he introduces evidence of such a nature that no reasonable mind could fail to be persuaded that the fact exists. Under these circumstances, the burden of producing evidence would then shift to the opponent and unless he introduces evidence which, when considered with that already introduced, may have the opposite persuasive effect, the proponent would be entitled to a directed verdict under Uniform Rule 1(5), based upon the same general considerations which enable the court to take the case from the jury for the failure of proponent to meet his burden of producing evidence.

The foregoing has been predicated upon the introduction of evidence to shift the burden of producing evidence to the opponent under threat of a directed verdict. Another method by which the proponent can accomplish this is, in appropriate cases, by resorting to the use of the presumption, depending, of course, as we shall see, upon how one defines a presumption. And, depending upon the particular jurisdiction's rules governing the effect of presumptions, use of the presumption may also have another distinct advantage, allocating the burden of persuasion.

PRESUMPTIONS

I. *Definition and Rationale*

In General. Irrespective of its propriety, or utility, the conclusion is inescapable that courts generally, including the Supreme Court of North Dakota, have used the word "presumption" primarily to denote a relationship between two kinds of facts, commonly referred to as the basic fact and the presumed fact. Whenever the existence of fact B (basic fact) is established, either for reasons of logic or policy, the existence of fact P (presumed fact) will be presumed. While this is clear enough, the word "presumption" as descriptive of this relationship possesses the vice of generality and is misleading because the establishment of such a relationship will lead to different results depending upon the different legal consequences which, due to statute or judicial decision, must

16. See Whinery, *supra* note 1 ,at 207 *et seq.*

follow because of the nature of and/or the reasons for the particular relationship. To illustrate, several possibilities must be considered.[16a]

First, the term "presumption" has been used as synonomous with justifiable inference, that is, where the existence of the presumed fact can be logically deduced from proof of the basic fact. In *West-Land Oil Co.* v. *Firestone Tire & Rubber Co.*,[17] a Federal diversity case arising in North Dakota, plaintiff sought to show that a fire started by the sparking of a switch in a pump house which ignited gasoline overflowing from an adjacent storage tank. The plaintiff introduced no direct evidence of the cause of the fire, but did show that an employee of the plaintiff was in the pump house when the fire started, that the employee had received no notice from the defendant that the gasoline tank was full and that overflowing gasoline would run into the pump house. From this, plaintiff argued, it could be inferred that the fire started from the sparking of a switch when the employee attempted to stop the pump. In affirming the direction of a verdict for the defendant, the Eighth Circuit Court of Appeals said:

> "An inference of negligence must be based on a logical relation and connection between the proven facts or circumstances and the concluson sought to be adduced from them. The circumstances must themselves be proved and cannot be presumed. * * * Before inferring that the fire was caused by a spark from the turning off of the switch, there would at least have to be evidence that the switch was in fact turned off. A presumption must be based upon facts proven by direct evidence and cannot be based upon nor inferred from another presumption."[18]

Or, second, one will find the word "presumption" used in the decisions where, though there is no logical connection between the basic fact and the presumed fact, establishment of the basic fact authorizes the trier of fact to find the presumed fact. This has been described by Professor McCormick as a "permissive presumption."[19] By some this apparently characterizes *res ispa loquitur* on the ground that the doctrine is based on the policy that the defendant has greater access to the facts and circumstances of negligence or due

16a. See Morgan, Maguire & Weinstein, Cases and Materials on Evidence 438-439 (4th ed. 1957).

17. 143 F.2d 326 (8th Cir. 1944).

18. *Id.* at 330. On the question of whether an inference can be based upon another inference, see New York Life Insurance Co. v. McNeely, 52 Ariz. 181, 79 P.2d 948 (1938) where the court said: ". . . the courts do not mean that under no circumstances may an inference be drawn from an inference, but rather that the prior inferences must be established to the exclusion of any other reasonable theory rather than merely by a probability, in order that the last inference of the probability of the ultimate fact may be based thereon." *Id.* at 955. In the *Westland Oil Co.* case the Court said: "It would be necessary to infer (1)that Dippong in fact turned off the switch; (2) that a spark was emitted from the switch when it was turned off; and (3) that the spark ignited the gasoline."

19. McCormick, Law of Evidence 640 (1954).

care.[20] But, in any event, evidence that the plaintiff was injured in an accident involving an instrumentality within the control of the defendant, that the accident would not have occurred in the ordinary course of events if proper care had been used and that the injury was not due to a voluntary act of the plaintiff only takes the case to the jury from which it may find that defendant was negligent. In this sense it does nothing more than create a *prima facie* case of negligence through the use of circumstantial, rather than direct evidence. A majority of the courts thus hold that the doctrine, when applicable, is nothing more than a rule of evidence which gives the trier of fact, based on principles of logic, the right to infer the negligence of the defendant.[21] Based on logic, not policy, it is nothing more than illustrative of the "justifiable inference" previously discussed. Dean Prosser has commented as follows:

> "Courts frequently have said and occasionally have held that the doctrine cannot be applied unless evidence of the true explanation of the accident is more accessible to the defendant than to the plaintiff. It is difficult to regard this factor as anything more than a makeweight, or to believe that it can ever be controlling. If the circumstances are such as to create a reasonable inference of negligence, it cannot be supposed that the inference ever would be defeated by a showing that the defendant knew nothing about what had happened; and if the facts give rise to no such inference, a plaintiff who has the burden of proof in the first instance could scarcely make out a case merely by proving that he knew less about the matter than his adversary."[22]

There is, however, in North Dakota at least, authority which characterizes *res ipsa loquitur* as a "presumption of negligence"[23] and which takes the case to the jury, even though there is no logical connection between the basic fact and the presumed fact. In *Lieferman* v. *White,* with a strong dissent, the majority approved sending the case to the jury under *res ipsa loquitur* on proof of the happening of the accident alone.[24] The Court talks in terms of *res ipas loquitur* as nothing more than a species of circumstantial evidence, but it certainly does not so apply to the doctrine.[25]

The legislature may also provide, by statute, that a finding of

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20. See Morgan, Maguire & Weinstein, Cases and Materials on Evidence 438 (4th ed. 1957).
21. Prosser, Law of Torts § 42 (1955).
22. *Id.* at page 209.
23. See Wyldes v. Patterson, 31 N.D. 282, 153 N.W. 630 (1915); see also, the dissenting opinion in Leiferman v. White, 40 N.D. 150, 168 N.W. 569 (1918).
24. See note 23 *supra.*
25. See Prosser, *op. cit. supra* note 19, at page 205, where the author states: "The injury must be traced to a specific instrumentality or cause for which the defendant was responsible, or it must be shown that he was responsible for all reasonably probable causes to which the accident could be attributed."

the basic fact authorizes a finding of the presumed fact because of fairness or convenience, even though the principles of logic would not warrant such a result. In *State* v. *Nomberg*,[26] the defendants were tried and convicted under an information charging them with maintaining a common nuisance. The State introduced in evidence a United States government license for the sale of malt liquor pursuant to a statute providing that such should be "prima facie evidence" of the charge. The trial court instructed the jury to the effect that possession of the license was conclusive proof of the charge unless explained by the defendants by other evidence. In reversing the conviction, the Supreme Court said:

> "This statute, in declaring that the possession of the license shall be prima facie evidence, means 'that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does in fact satisfy them of his guilt beyond a reasonable doubt, and not otherwise.' . . . 'These statutes . . . do not raise a conclusive presumption against the defendant. It is error to instruct the jury that they must find him guilty on proof of such facts alone, for such evidence is competent and sufficient to justify a verdict only if, the jury are satisfied of defendant's guilt beyond a reasonable doubt.' "[27]

Third, a finding of the basic fact giving rise to the presumed fact may also require that the trier of fact find according to the presumed fact unless the party against whom the presumption operates meets certain conditions, described by Professor McCormick as a "mandatory presumption."[28] It is in this sense and this sense only that Thayer,[29] Wigmore,[30] the Model Code,[31] and the Uniform Rules[32] say the word "presumption" can be applied. And, by statute in North Dakota, presumption is so defined. Section 31-1103 of the *North Dakota Revised Code of* 1943 provides:

> "All presumptions other than those set forth in section 31-1102 [denominated conclusive presumptions] are satisfactory if uncontradicted. They are denominated disputable presumptions and may be contradicted by other evidence."

One might legitimately ask what is meant by the language "are satisfactory if uncontradicted," but, when this section is construed *in pari materia* with Section 31-1101, providing that jurors are bound to find according to the presumption unless controverted by other

26. 14 N.D. 291, 103 N.W. 566 (1905).
27. *Id.* at page 567.
28. McCormick, Law of Evidence 640 (1954).
29. Thayer, A Preliminary Treatise on Evidence 317, 321, 326 (1898).
30. 9 Wigmore, Evidence § 2940 (3d ed. 1940).
31. Model Code of Evidence, rule 701 (1942).
32. See page 20 *infra*.

evidence, the conclusion is inescapable that the "disputable presumption" defined in Section 31-1103 is provisionally mandatory.[33]

Section 31-1103 sets out forty different presumptions, among these being the well known ones that official duty has been performed regularly,[34] a letter duly addressed and mailed was received in the regular course of the mail,[35] a person not heard from in seven years is dead,[36] and a thing once found to exist continues as long as is usual with things of that nature.[37] The statute certainly does not purport to be exclusive. There are a number of other statutes creating presumptions, for example, the presumption of legitimacy,[38] in addition to those recognized by judicial decision, such as the presumption against suicide.[39]

The express language of Section 31-1103 would lead one to believe that the word "presumption" is confined to the basic fact—presumed fact relationship which is of a provisionally mandatory nature. Are the presumptions created independent of the enactment of Section 31-1103 all of this type? Some certainly are. For example, Section 36-2112 of the *Code* provides that the "killing of any livestock by a railroad car or locomotive shall be prima facie evidence of carelessness and negligence on the part of the railway company or corporation." This statute has been construed as creating a presumption of negligence, mandatory in nature,[40] and resting for its validity on the theory that the person who has superior knowledge of the facts relating to the question of negligence should prove them.[41] Yet, on the other hand, we have observed that the

33. See Foster v. National Tea Co., 74 N.D. 37, 19 N.W.2d 760 (1954); Schell v. Collis, 83 N.W.2d 422 (N.D. 1957); Anderson v. First Nat. Bank of Grand Forks, 6 N.D. 497, 72 N.W. 916 (1897), *aff'd on other grounds*, 172 U.S. 573 (1899). For a detailed discussion of Section 31-1101, see page 29 *infra*.

34. N.D. Rev. Code § 31-1103, subd. 15 (1943).

35. *Id.* at subd. 24. *Cf.* Kvale v. Keane, 39 N.D. 560, 168 N.W. 74 (1918).

36. *Id.* at subd. 26

37. *Id.* at subd. 31. The extent to which a legislature can go in creating presumptions is a study in itself. Professor McCormick has summarized and analyzed the various approaches to this question ably. See McCormick, Law of Evidence § 313 (1954). But briefly, they are the Wigmore view that, subject only to constitutional limitations, the legislature can go as far as it desires in creating presumptions; the "rational connection" test, *i. e.*, some rational connection must exist between the basic fact and the presumed fact; "the greater includes the less" test, *i. e.*, where the presumption effectuates a result which would not be beyond the power of the legislature to impose directly; the test which measures the validity of the presumption by the effect which it is given; and the test of whether the defendant has a superior access to the proof. Professor McCormick directs attention to which one of these tests ought to determine the limitations on legislative creation of presumptions, carefully distinguishing between criminal and civil cases and concludes that the Supreme Court went too far in Tot v. United States and United States v. Delia, 319 U.S. 463 (1943), two criminal cases, in adopting the "rational connection" test.

38. N.D. Rev. Code §§ 14-0901—14-0903 (1943).

39. See Svikovec v. Woodmen Acc. Co., 69 N.D. 259, 285 N.W. 447 (1939); Also, Edwardson v. Gerwein, 41 N.D. 506, 171 N.W. 101 (1919) (presumption of sanity).

40. Snyder v. Northern Pac. Ry. Co., 69 N.D. 266, 285 N.W. 450 (1939).

41. Corbett v. Great Northern Ry. Co., 19 N.D. 450, 125 N.W. 1054 (1910).

word "presumption" has also been applied to the other two types of relationships heretofore discussed.

Finally, the word "presumption" is used to describe the result reached where, upon a finding of the basic fact, the presumed fact must irrevocably be assumed. This is the so-called "conclusive presumption" which is recognized in North Dakota by Section 31-1102 of the *Code*. It is submitted however, that there is no such thing. Wigmore's analysis will suffice. He says:

> "In strictness, there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence."[42]

In summary, it would seem that the justifiable inference has no place in the category of presumptions, notwithstanding its similarity with presumptions in terms of the basic fact—presumed fact relationship described at the outset of this section. An inference is a matter of logic; not a matter of law.[43] In each of the three succeeding situations discussed, the basic fact—presumed fact relationship arises as a matter of law — by statute or judicial decision — either because the particular relationship is inherently probable, such as the presumption that official duty has been performed regularly;[44] it affords procedural convenience, such as the presumption of sanity;[45] it places the burden first producing evidence on the party who has superior access to the evidence, such as the statutory presumption of negligence arising from the killing or damaging of stock by a railway company;[46] or it effects desired social and economic policies, such as the presumption that a person not heard from in seven years is dead.[47] In consequence, when the problem is one of drawing inferences from circumstantial evidence, the courts ought not to be talking in terms of "presumption," except in those instances,

42. 9 Wigmore, Evidence § 2492 (3rd ed. 1940).
43. See Gausewitz, Presumptions in a One-Rule World, 5 Van. L. Rev. 324, 326 (1952).
44. N.D. Rev. Code § 31-1103, subd. 15 (1943). See McCormick, Law of Evidence 641 (1954).
45. See Edwardson v. Gerwien, 41 N.D. 506, 171 N.W. 101 (1919); also, McCormick, Law of Evidence 641 (1954).
46. N.D. Rev. Code § 36-2112 (1943). Corbett v. Great Northern Ry. Co., 19 N.D. 450, 125 N.W. 1054 (1910). See also, McCormick, Law of Evidence 641 (1954).
47. N.D. Rev. Code § 31-1103, subd. 26 (1943). See McCormick, Law of Evidence 641 (1954).

where the recurrence of the basic fact—presumed fact relationship has, because of its inherent probability, been accorded the status of a presumption.

It is true, as between the justifiable inference and the permissive presumption, both have the effect of taking the case to the jury or, what we have heretofore described as creating a *prima facie* case.[48] Notwithstanding this similarity, the former arises as a matter of logic; the latter as a matter of law. For this reason, the two ought not to be confused with one another by using a generic term to describe both.

As between the permissive presumption and mandatory presumption we find both a similarity in the basic fact—presumed fact relationship and in the origin of that relationship in a rule of law. They do differ in one respect, that is, the permissive presumption will permit the trier to find the presumed fact, or, in other words, create a *prima facie* case, while the mandatory presumption would compel a finding of the presumed fact except upon fulfillment of certain conditions by the party against whom the mandatory presumption operates. However, the use of the term "prima facie evidence" as characterizing the result of a permissive presumption is not free of ambiguity under North Dakota law. Recall the *Nomberg* case interpreting the term "prima facie evidence" in the applicable statute to mean the same thing as a permissive presumption.[49] Conversely, consider Section 36-2112 of the *Code* which provides that the "killing or damaging of any livestock by a railroad car or locomotive shall be prima facie evidence of carelessness and negligence on the part of the railway company or corporation." This statute has been construed as creating a mandatory presumption of negligence.[50] For this reason, the qualifying terminology suggested by Professor McCormick might prove extremely helpful in distinguishing these two different basic facts — presumed fact relationships.

The Uniform Rule Definition and North Dakota Law. The Uniform Rules, following Thayer, Wigmore, and the Model Code,[51] define presumption in the mandatory sense in Rule 13 as follows:

> "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action."

The justification for confining the word "presumption" to the

48. See pages 12-13 *supra.*
49. See page 17 *supra.*
50. See page 18 *supra.*
51. See notes 29-31 *supra.*

mandatory presumption is based on the fact that the word is most frequently used in this context, the instances in which "presumption" has been used to describe other basic fact—presumed fact relationships having different consequences being of a sporadic nature which are easily identified and handled.[52] As against this policy, however, one should compare and consider Professor McCormick's suggested permissive—mandatory presumption dichotomy.

As stated in the comments to Rule 13, it "embodies in one simple definition the substance of (1) and (2) of A. L. I. Model Code of Evidence Rule 701. No separate definition of 'basic fact,'—the fact or facts from which the presumption is drawn is deemed necessary." The apparent simplicity of the formulation in Rule 13 may be preferred, but the logic and clarity of the definitions in Model Code rule 701 ought to be given serious consideration. In Rule 701(1) "basic fact" is defined as "the fact or group of facts giving rise to a presumption," and consistently, a presumption is then defined in Rule 702(2) as meaning "that when a basic fact exists the existence of another fact must be assumed, whether or not the other fact may be rationally found from the basic fact."

In Rule 13 of the Uniform Rules, the language "found or otherwise established" is determinative of the finding of the basic fact. What does this language mean? In the comment to Rule 13 it is said that "the establishing of the facts on which the presumption is based is accomplished in the same manner, by evidence or by judicial notice, or by the pleadings or stipulation as any other fact is established." Presumably the comment to Rule 13 would shed light on the interpretation of "found or otherwise established." But would it not be just as easy, yet more certain if a rule were drafted similar to Rule 702 of the Model Code which provides that the basic fact "may be established in an action by the pleadings, or by stipulation of the parties, or by judicial notice, or by evidence which compels a finding, or by a finding of the basic fact from the evidence?"[53]

Finally, the Uniform Rules continue to recognize a distinction between the so-called "conclusive presumption" and the mandatory presumption prescribed in Rule 13, by excluding them from the operation of Rule 14 dealing with the effect of presumptions. The extent to which this can rationally be supported is questionable if you adhere to the notion of Wigmore that there is no such thing

52. See Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245, 250 (1943).

53. See, in this connection, Morgan, Presumptions, 10 Rutgers L. Rev. 512, 513 (1956).

as a conclusive presumption, not to mention the extent to which it may mislead courts.[54] Illustrative of this is *State* v. *Nomberg*[55] where the Supreme Court used "conclusive presumption" as synonomous with the mandatory presumption. This aspect of the Uniform Rules, it is true, would be consistent with existing North Dakota law. The question is whether it ought to be a part of either.

Adoption of either the Uniform Rule or Model Code rules 701 and 702 would not constitute a major change requiring a substantial revision in existing North Dakota law. On the contrary, we have observed that Section 31-1103 is perfectly consistent in its definition of "presumption" with that in either the Uniform Rules or Model Code. The difficulty arises in connection with the decisions of the Supreme Court in which the presumption has been used to describe presumptions of both the permissive and mandatory type, not to mention the use of the word when dealing with justifiable inferences. By adopting Rule 13, would the so-called "permissive presumptions" in North Dakota be subject to the provisions of Uniform Rules 13 - 16? It seems not. A determination on a case by case basis would solve most, if not all, problems in the applicability of Rules 13 - 16.

II. THE EFFECT OF PRESUMPTIONS

Acording to Professor Morgan, there are at least seven different rules which the courts have applied in determining the effect to be given to presumptions.[56] Of these, the most significant for the purposes of this study are: the so-called Thayerian rule; the Uniform Rule; the rule that a presumption is evidence; and the Connecticut rule.

The Thayerian Rule. Thayer's view of the effect of presumptions was that they placed upon the party against whom they operated the burden of going forward with the evidence and, failing to do so, would require a finding of the presumed fact.[57] Wigmore indorsed the view as follows:

> " . . . the peculiar effect of a presumption . . . is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent *does* offer [sufficient] evidence to the contrary . . . , the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule."

54. *Id.* at 516.
55. 14 N.D. 291, 103 N.W. 566 (1905).
56. Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245, 247-249 (1943).
57. Thayer, A Preliminary Treatise on Evidence 336, 339 (1898).
58. 9 Wigmore, Evidence § 2491 (3d ed. 1941).

To illustrate, assume that the proponent wishes to prove the receipt of a letter. Through evidence, or judicial notice, or stipulation, it is established that the letter was addressed, stamped and mailed. Establishment of this basic fact gives rise to the presumed fact of receipt. Under the Thayerian rule, in the absence of any evidence that the letter was not received, the court is required to rule that the letter was received. If, on the other hand, the opponent introduces the testimony of a witness that the letter was not received, the presumption disappears and it becomes purely a question for the trier of fact as to whether the letter was received. The jury is free, in addition to the opponent's evidence, to consider the regularity of the mails as evidence of the fact of receipt, but no independent probative force is given to the presumption.[59]

In a jurisdiction adhering to the Thayerian rule, directed, as it is, toward regulating the duty of producing evidence, there is ordinarily no need to refer to the presumption in the instructions to the jury. To illustrate, in *Ryan* v. *Metropolitan Life Ins. Co.*,[60] a Minnesota case, plaintiff's intestate sued to recover accidental death benefits under two life insurance policies. The insured had died about one hour after being found on the ground below the window of a hospital room where he had been confined with an incurable throat cancer. The jury returned a verdict for the defendant and the plaintiff appealed contending, *inter alia*, that the trial court erred in failing to instruct the jury on the effect of the presumption against suicide. The Supreme Court said:

> "The function of a presumption, . . . is solely to control decision on a group of unopposed facts. Given death from violence, without more, decision must be that it was accidental. . . .
>
> "With us a presumption does not shift the burden of proof [persuasion]. . . .
>
> "A presumption may and frequently does shift the burden of going on with the evidence. That is to say only that it makes a prima facie case. If the trial stops there, without further evidence opposing the case so made, there is nothing for the jury. By nonsuit or directed verdict, the judge decides the issue as one of law. If, however, the prima facie case is met by adequate evidence, the case goes to the jury with the burden of proof where it was in the beginning. So the presumption is properly appraised as a mere

59. See, in this connection, Jefferson Standard Life Ins. Co. v. Clemmer, 79 F.2d 724 (1935), involving the presumption against suicide, where the court said: "[The judge] may of course [in his instructions] refer in his discretion to the improbability of suicide as an inference of fact, based on the common experience of mankind, but the jury should be permitted to give the inference such weight as it deems best undisturbed by the thought that the inference has some sort of artificial probative force which must influence their deliberation."

60. 206 Minn. 562, 289 N.W. 557 (1939).

'procedural device' for allocation of the burden of going on with the evidence. . . .

"It follows that if the case is one for the jurors the presumption should not be submitted as something to which they may attach probative force." . . .[61]

The Uniform Rule. The Thayerian rule is approved by the courts of many jurisdictions,[62] but is has not escaped criticism. Professor Morgan, in concluding that most presumptions should require a finding of the presumed fact unless the evidence persuades the trier of the non-existence of the presumed fact, has argued as follows:

"If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing. And if the judicial desire for the result expressed in the presumption is buttressed by either the demands of procedural convenience or is in accord with the usual balance of probability, it is a little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect. Indeed, the only purpose which the reception of such credible but discredited evidence can ever accomplish is to demonstrate that in the particular case the proposition that the presumed fact exists is legally disputable, and the only situation in which such a purpose can furnish a justification for creating a presumption is where the presumption expresses a balance of probability not potent enough to overcome the burden which must normally be borne by the litigant seeking to overcome the inertia of the court."[63]

Consistent with this reasoning, it was proposed that the American Law Institute adopt a rule which would place on the party against whom the presumption operates the burden of persuading the trier of the nonexistence of the presumed fact.[64] But the Institute rejected the proposal and adopted the Thayerian rule.[65]

The Uniform Rules, however, reject and adopt, in substance, the

61. *Id.* at 560.

62. McCormick, Law of Evidence § 316 (1954).

63. Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933).

64. Model Code of Evidence, proposed rule 904(2): "Subject to Rule 903, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact (a) if the basic fact has no probative value as evidence of the existence of the presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if the presumption had never been applicable in the action; (b) if the basic fact has any probative value as evidence of the existence of the presumed fact, whether or not sufficient to support a finding of the presumed fact, the party asserting the non-existence of the presumed fact has the burden of persuading the trier of fact that its non-existence is more probable than its existence." 18 Proc. Am. Law Inst. 199-200 (1941).

65. Thus, Rule 704 of the *Model Code* provides: "Subject to Rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action." Model Code of Evidence rule 704 (1942).

rule recommended by Professor Morgan for the Model Code. Uniform Rule 14 provides as follows:

> "Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved."

The indirect recognition in this rule of the so-called "conclusive" or "irrefutable" presumption has already been considered.[66] The rule is stated in two parts, a different effect to be given the presumption depending upon whether the basic fact has any probative value as evidence of the presumed fact.[67] If it does then the burden is on the party against whom the presumption operates to persuade (it is assumed) the trier of fact of the non-existence of the presumed fact. The justification for the rule is found in the comments to Rule 14 as follows:

> " . . . the presumption is a 'working' hypothesis which works by shifting the burden to the party against whom it operates of satisfying the jury that the presumed inference is untrue. This often gives a more satisfactory apportionment of the burden of persuasion on a particular issue than can be given by the general rule that the pleader has the burden. One looks rather to the ultimate goal, the case or defense as a whole, the other to a particular fact-problem within the case."[68]

The question arises, however, as to what is meant by "burden of establishing" in Rule 14?[69] Are the drafters injecting problems of interpretation by adopting such phraseology when it is at least apparent from the comments that the language is intended to mean burden of persuasion?

If the basic fact does not have any probative value as evidence then, under Rule 14, when evidence is introduced which would support a finding of the non-existence of the presumed fact, then the case is to be determined as if no presumption had ever been

66. See page 21 *supra*.
67. Compare Model Code of Evidence, proposed rule 904, *supra*, note 64.
68. Handbook, Nat'l. Conf. of Com. on Uniform State Laws 172 (1953).
69. See Morgan, Presumptions, 10 Rutgers L. Rev. 512, 513 (1956).

involved in the case. This is, of course, the Thayerian rule.[70] Though the comments to Rule 14 do not contain an explanation of the distinction between Rule 14(a) and 14(b), it is undoubtedly due to the same constitutional considerations which led to a similar distinction in the proposed, but defeated rule for the *Model Code*.[71] In *Western & Atlantic Railroad* v. *Henderson*,[72] the United States Supreme Court held unconstitutional a Georgia statute which provided, in effect, that the statutory presumption of negligence of a railroad company, arising upon proof of damage to person or property by railroad equipment, placed upon the company the burden of persuading the trier of fact of the non-existence of the presumed fact. The Court said that there was no rational connection between a collision of a railway train and a vehicle at a highway crossing (basic fact) and negligence of the company (presumed fact). It distinguished *Mobile, J. & K.C.R.R.* v. *Turnipseed*,[73] involving a similar statute, on the ground that the legal effect of the presumption was to impose on the railroad company only the burden of producing evidence; that the statute did not infringe due process of law because the presumption only supplied a presumption of liability in the absence of evidence to the contrary. In the *Henderson* case the statute gave the presumption the weight of affirmative evidence and since the basic fact that no probative value of the presumed fact the statute was a denial of due process.[74]

When Rule 14(a) is applicable it will, of course, be necessary, through appropriate instructions, to charge the jury to the effect that it must find according to the presumed fact unless the party against whom the presumption operates has persuaded it of the nonexistence of the presumed fact.[75] If Rule 14(b), or the Thayerian rule, applies there would be no need to mention the presumption beyond perhaps telling the jury that they might draw whatever inferences the basic fact warrants. [76]

70. See pages 22-24, *supra*.
71. See note 64 *supra*. 18 Proc. Am. Law Inst. 206-207 (1941).
72. 279 U.S. 638 (1929).
73. 219 U.S. 35 (1910).
74. But see the comments of Professor Morgan as follows: "Although on the facts it was demonstrable that the basic fact did have some value in reason as tending to show the existence of the presumed fact, and although the opinion proceeds on the erroneous assumption that so to fix the burden of persuasion is to make the basic fact evidence of the presumed fact, still the inadvisability of enacting a provision which the United States Supreme Court might make totally ineffective induced the Advisers and Council to seek another solution.

"The Supreme Court had intimated that there would be no objection to a rule which caused a presumption to fix the burden of persuasion if the basic fact has a logical value as evidence of the presumed fact. A rule drawn on this theory was approved by the Advisers and Council, but was rejected . . . ." Am. Law Inst., Model Code of Evidence, Foreword by Edmund M. Morgan, 60 (1942).
75. See Handbook, Conf. of Comm. on Uniform State Laws 172 (1953).
76. See note 58, *supra*.

Presumption as Evidence. Some jurisdictions, including North Dakota,[77] adhere to the view that a presumption is evidence. But scholars have rejected this concept[78] and most courts are now in accord.[79] The principal difficulty in viewing a presumption as evidence is the almost insurmountable difficulty it places on the trier of fact. How can the jury weigh a presumption, which is a compelled inference, (as evidence) against testimonial or documentary evidence? Professor McBaine, following a penetrating analysis, comes to the following conclusions:

> "Juries can go through the mental process of weighing evidence, that is reasoning from it and arriving at a conclusion whether a fact exists or does not exist, whether it is probably true or not, but they cannot possibly determine whether it does or does not exist by being told that there is a rule of law made for their guidance to the effect that there is a rebuttable presumption that the fact exists or a judicial fiat that it probably exists and that they should (a) weigh the rule of law or (b) reason from an arbitrary premise that the fact is probably true. To use a common figure of speech, you cannot place in one scale-pan of the scales of justice evidence that shows that a fact exists and in the other scale-pan place a rule of law that the fact is presumed to exist, absent evidence to the contrary, or a legal fiat that a fact is probably true, and thereby determine which side outweighs the other."[80]

The Connecticut Rule. The foregoing discussion has proceeded on the assumption that there is but one of several choices to be made in determining what effect to give a presumption. As against this background, the Connecticut rule should be mentioned, that is, the effect of the presumption is to be determined according to the purposes which it is designed to serve.[81] Thus, the presumption of innocence merely emphasizes the burden of persuasion as resting on the State in a criminal case;[82] the presumption that the insured has performed all the conditions of the policy on which he is suing is based only on convenience and, for this reason, when evidence is introduced it should drop out of the case; similarly, presumptions based on experience and probability should have the same effect, such as the presumption of the continuation of life; but where the

77. See pages 29-30, *infra.*

78. Thayer, A Preliminary Treatise on the Law of Evidence, 339 (1898); 9 Wigmore, Evidence § 2491 (3d ed. 1940); Morgan, Further Observations on Presumptions, 16 So. Calif L. Rev. 245, 261-264 (1943); McCormick, Law of Evidence 669 (1954).

79. McCormick, *op. cit. supra,* note 78 at page 669, note 3.

80. McBaine, Presumptions: Are They Evidence, 26 Calif. L. Rev. 517, 548 (1938).

81. O'Dea v. Amodeo, 118 Conn. 58 170 Atl. 486 (1934).

82. See Carr v. State, 192 Miss. 152, 4 So.2d 887 (1941), stating that the presumption of innocence is not a presumption in the true sense of the word, but only an assumption designed to place burden of persuasion on person asserting a deviation from socially prescribed norms of conduct.

presumption arises because evidence of the presumed fact is peculiarly within the knowledge of a party, he should also have the burden of persuading the trier of the non-existence of the presumed fact, for example, the presumption that a motor vehicle is being operated as a family car.[83]

Which approach should be adopted: one rule for all presumptions; or different rules depending upon the reason for which the particular presumption was created? Dean Gausewitz has summarized well these competing approaches. He says:

> "The one policy is to do actual, concrete, substantial justice in each individual case; the other policy is to do formal, procedural justice by having a uniform rule that is easily administered regardless of its effect in the particular case. * * * The first of these conflicting policies can be called the 'particular justice policy' because it aims at actual justice in the particular, individual, case. The other can be called the 'procedural justice policy' because it aims at an easily understood and administered uniform rule that will probably result in justice in the average case and also avoid injustices due to difficulties of administration."[84]

While, as Professor Morgan has observed, the most intellectually satisfying and theoretically sound solution would be to give presumptions varying effects depending upon the reasons for creating them, there are significant practical problems in attempting any such approach.[85] The trial judge could not be expected to apply such a rule offhand. It might not be readily apparent what reason gave rise to a particular presumption; even more significant is that many presumptions are based upon more than one policy consideration and determining which one is predominant to give the presumption the proper effect could not often be expected to be more than a mere guess.[86] While a pre-determined classification might solve the trial judge's problems in this respect, is such a classification possible? Professor Morgan suggests that it is not. Courts cannot classify them except by a process of judicial decision which would take too long and legislatures cannot classify them easily because of the tremendous effort involved.[87] Though views to the contrary have been expressed,[88] the leading commentators today appear to agree that there should be basically one rule governing

83. O'Dea v. Amodeo, *supra*, note 81.

84. Gausewitz, Presumptions in a One-Rule World, 5 Vand. L. Rev. 324, 331 (1952).

85. Morgan, Foreword, in Model Code of Evidence 1, 52 (1942); Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245, 250, 253-254 (1943).

86. Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245, 253-254 (1943); McCormick, Law of Evidence 668-669 (1954).

87. Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245, 253-254 (1943).

88. O'Dea v. Amodeo, *supra*, note 80; Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. of Pa. L. Rev. 307, 313 (1920).

the effect of all presumptions.[89] The controversy has then been reduced to which one of two rules to adopt; the rule espoused by Thayer and restated by Wigmore or Rule 14 of the Uniform Rules.

III. *The Effect of Presumptions Under North Dakota Law As Compared to Uniform Rule 14*

In General. Section 31-1101 of the Code provides as follows:

> "A presumption, unless declared by law to be conclusive, may be controverted by other direct or indirect evidence but unless so controverted, the jurors are bound to find according to the presumption."

As to the effect of presumptions, it will be noted that the statute reads "may be controverted by *other* direct or indirect evidence." [emphasis supplied] In the first place, and without the interpretive assistance of the Supreme Court, a reading of this language very clearly indicates that, by the use of the word "other", a presumption is to be regarded as evidence in North Dakota. A leading case on the point is *Svihovec* v. *Woodmen Acc. Co.*[90] The beneficiaries of an accident policy sued to recover the proceeds, the insurer contending, however, that death was by suicide. At the close of the beneficiaries' case, both parties rested and the insurer moved for a directed verdict. The motion was denied and the jury returned a verdict for the beneficiaries. On appeal, the insurer alleged, as error, that the evidence was insufficient to sustain the verdict. In reversing the trial court's refusal to direct a verdict for the insurer, the Supreme Court of North Dakota held that the evidence could not be reconciled with any reasonable theory of accidental or non-intentional death. In so doing, however, the Court, following an earlier case,[91] said that Section 31-1101, fairly construed, gave to the presumption against suicide the weight of affirmative evidence and "that proof of death by gunshot wound, aided by this presumption, was sufficient to establish a prima facie case of accidental death, and that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental on [sic] nonintentional injury."[92] Whatever might be the wisdom of giving a presumption the effect of evidence (and it has been suggested that it is ill-advised),[93] there is little doubt that this

89. Causewitz, *supra* note 84 at 331.
90. 69 N.D. 259, 285 N.W. 447 (1939).
91. Stevens v. Continental Casualty Co., 12 N.D. 463, 97 N.W. 862 (1903).
92. See note 90 *supra* at 449.
93. See page 27 *supra*.

is the rule embodied in Section 31-1101. But it is also equally clear that Uniform Rule 14 does not so provide.[94]

Does Section 31-1101 give any other effect to presumptions, for example, shift the burden of presumption to the opponent, as in Uniform Rule 14? It is not an easy task to make such a determination,[95] but the *Svihovec* case, together with a more recent decision of the Supreme Court of the United States,[96] indicate that the statute gives to a presumption the effect of shifting the burden of persuasion to the person against whom the presumption operates. The statute uses language which, in effect, says that jurors are bound to find according to the presumption unless controverted by other evidence. The meaning of "controverted" in the statute is not clear; it might mean anything, though perhaps a strong argument can be made that controvert is to overcome in the persuasive sense. On analysis, the *Svihovec* case is of more assistance. Recall that there the suit was on a policy insuring against accidental death. The rule is that the burden of persuasion as to accidental death rests on the plaintiff.[97] In the *Svihovec* case, the Supreme Court did not speak in terms of Section 31-1101 calling for a shifting of the burden of persuasion. But it did unequivocally state that the presumption established a prima facie case (in the mandatory sense) of accidental death. Further, the Court asserted "that the burden was upon the defendant to establish that the death of the insured was due to his suicide or the intentional act of another person." Though, as heretofore noted, the word "establish" is ambiguous,[98] the foregoing factors lead to the reasonable conclusion that Section 31-1101 also gives to presumptions the effect of shifting the burden of persuasion. In any event, this is the conclusion of the Supreme Court of the United States in the recent case of *Dick* v. *Metropolitan Life Insurance Co.*[99] To this extent then, we can find basic agreement in the law of North Dakota and the proposed Uniform Rule 14.

One might suppose that Section 31-1101, as interpreted, is exclusive so far as the effect of presumptions in North Dakota is concerned. Such is very clearly not the case. Section 36-2112 of the *Code* provides:

94. See the comments to Uniform Rule 1(1) defining evidence as "the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion and hearsay." The drafters say that this definition is consistent, *inter alia*, with the principle that presumptions are not evidence. Handbook, Conf. of Comm. on Uniform State Laws 165 (1953).

95. See Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245, 249 (1943).

96. Dick v. New York Life Insurance Co., 79 S.Ct. 921 (1959).

97. Appleman, Insurance Law and Practice § 12141 (1947).

98. See page 21 *supra*.

99. See note 96 *supra*.

"the killing or damaging of any livestock by a railroad car or locomotive shall be prima facie evidence of carelessness and negligence on the part of the railway company or corporation."

As elsewhere noted, this statute has been construed by the Supreme Court as creating a mandatory presumption.[100] This presumption of negligence has been construed in a line of decisions as having the effect of only shifting the burden of producing evidence to the opponent and,[101] if evidence of negligence is introduced it "clear[s] away and suspend[s] all presumptions."[102] So construed the rule governing the effect of this statutory presumption is the straight Thayerian rule.[103] In one case, there was an extremely strong dissent in which the judge argued most strongly for what, in effect, would be to give the statutory presumption the effect of shifting the burden of persuasion to the opponent.[104] But the opinion had no effect on later cases on point in which the court has adhered to the Thayerian rule.

So interpreted, the presumtion of the statute need not necessarily be regarded as conflicting with Uniform Rule 14. It may very well be nothing more than illustrative of that class of cases in which the basic facts have no probative value of the presumed fact and would fall within Uniform 14(a). As such, the statutory presumption in question may also be illustrative of the type in which the burden of persuasion, for constitutional reasons, could not be shifted to the opponent in view of *Western & Atlantic Railroad* v. *Henderson*.[105] Apparently no case concerning Section 36-2112 on this point has been before the courts.

This apparent harmony is shattered by at least two decisions of the Supreme Court.[106] Plaintiff sued to recover workmen's compensation for the death of her husband while allegedly in the employment of a lumber company. To sustain the contention that he was an employee within the meaning of the Act, plaintiff relied on Section 65-0103 of the *Code* providing that "where one performs service for another for remuneration, whether the same is paid as a

100. See page 18 *supra*.

101. Snyder v. Northern Pac. Ry., Co. 69 N.D. 266, 285 N.W. 450 (1939); Stoeber v. Minneapolis, St. P. & S. S. M. Ry. Co., 40 N.D. 121, 168 N.W. 562 (1918); Reinke v. Minneapolis, St. P. & S. S. M. Ry. Co., 23 N.D. 182, 135 N.W. 779 (1912); Clair v. Northern Pac. Ry. Co., 22 N.D. 120, 132 N.W. 776 (1911); Corbett v. Great Northern Ry. Co., 19 N.D. 450, 125 N.W. 1054 (1910); Wright v. Minneapolis, St. P. & S. S. M. Ry. Co., 12 N.D. 159, 96 N.W. 324 (1903); Hodgins v. Minneapolis, St. P. & S. S. M. Ry. Co., 3 N.D. 382, 56 N.W. 139 (1893).

102. Stoeber v. Minneapolis, St. P. & S. S. M. Ry. Co., *supra*, note 101.

103. See page 22 *supra*.

104. See the opinion of Justice Grace in Stoeber v. Minneapolis, St. P. & S. S. M. Ry. Co., *supra* note 101 at pages 564-565.

105. 279 U.S. 639 (1929), discussed at page 26 *supra*.

106. Starkenberg v. North Dakota Workmen's Compensation Bureau, 73 N.D. 234, 13 N.W.2d 395 (1944).

salary, commission or otherwise, the person performing such service is presumed to be an employee of the person for whom the services are performed until the contrary is shown."[107] The Court said:

> "When evidence has been introduced as to the agreement under which the employment is performed, and the respective obligations of the parties thereunder, the presumption has spent its force and the evidence is controlling. 'Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.' "[108]

Clearly, the Court is applying the Thayerian rule to this statutory presumption. Yet it clearly seems to be one in which the basic fact has probative value of the presumed fact, in which event, under Uniform Rule 14, the burden of persuasion would shift to the opponent.

Again, in the recent case of *Johnson v. Johnson*,[108a] the Supreme Court has applied the Thayerian rule in ruling on the effect of the statutory presumpton "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage."[108b] Without citing or considering Section 31-1101, *supra*, or the Court's interpretation of that statute in the *Svihovec* case, *supra*, the Supreme Court concluded, as in the *Starkenberg* case, *supra*, that a presumption is not evidence and its only effect is to place on the party against whom it operates the burden of going forward with the evidence. If the party comes forward with evidence, the presumption disappears and the case is decided as if no presumption had ever been involved. Rightly, I believe, the court rejects the notion that a presumption is evidence, though the question remains whether it can consistently so rule in the face of Section 31-1101, *supra*. As to whether the presumption should have the effect of only requiring evidence form the opponent, or whether it should place the burden of persuasion on him, is another question. That the basic fact of the presumption involved in the *Johnson* case has probative value of the presumed fact seems clear enough; a situation in which Uniform Rule 14 would require placing the burden of persuasion on the opponent. Hence, the decision seems clearly inconsistent with the result which would be reached under this Rule. For immediate purposes, the *Johnson* decision insofar as it conflicts with the *Sviho-*

107. The statute has since been amended, but the amendment does not alter the decision in the Starkenberg case, *supra*, note 105 on the effect of the presumption. See N.D. Laws c. 375, § 2 (1947), now found in N.D. Rev. Code § 65-0103 (Supp. 1957).
108. See note 106 *supra* at 398.
108a. 104 N.W.2d 8 (N.D. 1960).
108b. N.D. Rev. Code Sec. 31-1103, subd. 30 (1943).

vec case, adds further confusion to an already confused state of the law on the effect of presumptions in North Dakota; an area badly in need of clarification, whether by way of legislative revision or judicial decision.

The Presumption of Legitimacy. Notwithstanding the controversy among courts and writers on whether presumptions generally should have the effect of placing the burden of persuasion to the opponent, there is agreement that this should be so in the case of the presumption of legitimacy.[109] Furthermore, the extent of the burden of persuasion required is at least by clear and convincing evidence (highly probably true) and some even require the degree of proof applicable to criminal cases — beyond a reasonable doubt.[110] Accordingly, when the Model Code was drafted a special rule was incorporated requiring the placing of the burden of persuasion in the case of the presumption of legitimacy.[111] Also, the degree of proof required by the rule is beyond a reasonable doubt,[112] rather than proof by clear and convincing evidence on the theory that this intermediate degree of proof would be difficult to apply in practice.[113] The special rule is based, of course, on strong reasons of policy which require that a child born during wedlock should be treated as legitimate except upon the clearest showing that it is not.

The theory behind the general rule and the rule of the Model Code supports the similar rule in the Uniform Rules, except that the Rule is stated in broader terms to give it general application to presumptions other than just the presumption of legitimacy. Furthermore, it deals only with the degree of belief necessary since, as noted, the Uniform Rules, unlike the Model Code, reject the Thayerian rule of the effect of presumptions. Rule 16 provides as follows:

> "A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 and 15 and the burden of proof to overcome it continues on the party against whom the presumption operates."

The degree of proof necessary to rebut the presumption of legitimacy has never been drawn in question in North Dakota.[114] How-

109. McCormick, Law of Evidence 646 (1954).
110. *Id.* at 646-647.
111. Model Code of Evidence rule 703 (1942) provides: "Whenever it is established in an action that a child was born to a woman while she was the lawful wife of a specified man, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact beyond reasonable doubt that the man was not the father of the child."
112. *Ibid.*
113. See the comments to Model Code of Evidence, page 313 (1942).
114. See N.D. Rev. Code § 14-0901 (1943) providing: "All children born in wedlock are

ever, since the Rule does not, by its terms, expressly apply to the presumption of legitimacy, North Dakota is not bound to adopt what is the rule elsewhere governing the effect of the presumption. It is doubtful, however, that it would reach any other result than require the party against whom the presumption operates to at least persuade the jury that the presumed fact is highly probably untrue.

The more general form of Uniform Rule 16 is preferable to the Model Code rule since the North Dakota Court has held, as to presumptions other than legitimacy, that a higher degree of proof than ordinarily required is necessary to rebut the presumed fact. In *State* v. *Crum*,[115] the Court held that the presumption that a warranty deed, absolute on its face, is an unconditional conveyance, must be rebutted by clear, satisfactory and specific proof, which probably means "highly probably true."[116]

IV. *Inconsistent Presumptions*

Rule 15 of the Uniform Rules provides:

> "If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded."

W married H in 1916. H disappeared in 1923. In 1928 W married D. D received fatal injuries in his employment in 1934 and W sued for compensation. Is W the widow of D?[117] W gets the benefit of a presumption of the validity of the marriage with D. The opponent gets the benefit of the presumption of the continuance of the marriage relationship. Which prevails as between these conflicting presumptions? Here, the courts, contrary to Thayer's insistence that the presumptions cancel one another,[118] hold that the stronger presumption prevails. Since the presumption of the validity of the marriage is based on the strong social policy in favor of family stability and legitimacy it outweighs the presumption of the continuance of the marriage relationship which is based chiefly on probability and trial convenience.[119] Under these circumstances, W would get the benefit of the presumption of the validity of her marriage with D and, under the Uniform Rules, the opponent would have the burden of persuading the jury of the non-existence of the

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presumed to be legitimate." See also, State v. Coliton, 17 N.W.2d 548 (N.D. 1945) and State v. Fury, 53 N.D. 33, 205 N.W. 877 (1925), both involving the question of who can rebut the presumtion of legitimacy under Section 14-0903 of the *Code*, both holding that the husband or wife are competent under the statute.

115. 70 N.D. 177, 292 N.W. 392 (1940).

116. See Whinery, *supra* note 1 at 214-215.

117. See Sillart v. Standard Screen Company, 119 N.J.L. 143, 194 Atl. 787 (1937).

118. Thayer, A Preliminary Treatise on the Law of Evidence 346 (1898).

119. See McCormick, Law of Evidence 653 (1954).

presumed fact. This is the result called for under Uniform Rule 15 which is in accord with the law of North Dakota.[120]

If, on the other hand, the presumptions are of the same type or based on the same considerations of policy, then under Rule 15 the presumptions would be disregarded and the basic facts of the presumptions would merely be considered, along with other evidence, as circumstantial evidence of the fact in issue. There appear to be no authorities on the point in North Dakota, but courts have so held elsewhere and the result seems reasonable.[121]

V. *Conclusion to Burden of Proof and Presumptions*

One might suppose that the purpose of this section is to bring together in a concise, orderly, and harmonious fashion the analysis of Burden of Proof appearing in volume 33 of the Review and the foregoing analysis of presumptions and their relationship to burden of proof. Even if it were possible to do so in such a troubled area — if the black letter of the appellate decisions is any indication — it would involve hardly more than a reiteration.

It can perhaps be said that adoption of the Uniform Rules relating to burden of proof and presumptions would not represent a drastic departure from what appears to be the existing condition of the law in North Dakota. The most bothersome problem is in definition. The Uniform Rules confine the word presumption — as does North Daokta ostensibly by statute — to a provisionally mandatory assumption of the existence of the presumed fact. In application the word has not been so confined. But, as suggested in the text, perhaps the situations in which the word presumption has been otherwise used are sufficiently isolated to enable the courts, to determine when the provisions of the Uniform Rules would be applicable.

The wisdom of continued recognition of the so-called "conclusive presumption" in the Uniform Rules is debatable, but if the situations in which it is used are clearly indicated it may be justifiably retained because of its recognized usage. It would also avoid coping with the repeal of Section 31-1102 of the *Code* and any other statutes creating these rules of law denominated "conclusive presumptions."

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120. Holtan v. Beck, 20 N.D. 5, 125 N.W. 1048 (1910), holding that the presumption that a person has not committed an unlawful act outweighs the presumption that a thing once shown to exist continues as long as is usual with things of that nature; and Salzer Lumber Co. v. Claflin, 16 N.D. 601, 113 N.W. 1036 (1907), holding that the presumption that an affidavit is sworn to in the county named in its caption is overcome by the presumption that an officers acts are performed at the county where he is legally authorized to act.

121. See McCormick, Law of Evidence 653 (1954).

As to the effect to be given presumptions (as defined in Uniform Rule 13), adoption of Rule 14 would clearly result in a rejection of the existing statutory rule in North Dakota that a presumption is evidence, but for the reasons given, it would effect a desirable change. We have also seen a general conformity of the North Dakota law to the distinction made in Uniform Rules 14(a) and 14(b) in the different effect to be given presumptions depending on whether the basic fact has any probative value of the presumed fact. Two cases have been noted where the Supreme Court may have gone astray in applying the Thayerian rule when, certainly in view of Section 31-1101, as interpreted, the presumption should have placed the burden of persuasion. With the qualifications to be noted hereafter, Rule 14 would certainly constitute a better reasoned, more articulate, approach than we now find in the existing statutory scheme.

If, however, we were to retain some measure of consistency in terminology, meaning and interpretation, consideration should be given to the following suggestions for changes in the Uniform Rules:

(1) Proof in Uniform Rule 1(3) should be defined as follows:

"Proof is the cumulative effect of all of the evidence relevant to a fact in issue which persuades the trier of fact of the existence or non-existence of such fact."

(2) The term "burden of persuasion" should be inserted in Uniform Rule 1(4) in lieu of "burden of proof" and the parenthetical statement "burden of proof is synonomous with 'burden of persuasion'" be deleted. Also, some consideration should be given to Professor McBaine's proposal to define "preponderance of the evidence," "clear and convincing evidence" and "beyond a reasonable doubt" in Uniform Rule 1(4) in terms of degrees of belief.

(3) Consideration should also be given to modifying Uniform Rule 1(5) to incorporate the test for determining when the burden of producing evidence has been met, such as was done in Model Code rule 1(2).

(4) While the definition of presumption in Uniform Rule 13 would perhaps suffice, serious consideration should be given to the formulations in Model Code rules 701 and 702.

(5) Finally, it seems most essential that the terminology "burden of persuasion of" be substituted for "burden of establishing" in Uniform Rule 14(a).

Adoption of Uniform Rules 13-16 with the recommended changes would necessitate a repeal of Section 31-1101 of the *Code* pertaining to the effect of presumptions and the first paragraph of Section 31-1103 defining "disputable presumption." With the foregoing changes it would be naive to assume that adoption of the Rules would solve all the problems. Perhaps, however, it would constitute a useful step in clarifying a troublesome area of the law in North Dakota.