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Evidence--The Vanishing Presumption

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be only to the date of compliance with Kentucky Revised Statutes section 882.450 (1953). In order to defeat a prior equity the purchaser at the execution sale must be a bona fide purchaser.

3. If competing creditors have delivered executions to different officers, the first levy prevails, but if to the same officer, the first delivery creates a lien on the debtor's property.

Carl W. Turner

EVIDENCE—THE VANISHING PRESUMPTION

Jane's husband has been absent and unheard of for seven years. Jane, as beneficiary of a life insurance policy on his life, seeks to obtain its proceeds by suing the reluctant insurance company. At the trial, upon proof of the basic facts of absence for seven years without cause or suspicious circumstances, there arises a universally recognized presumption that the husband is dead. The insurance company introduces evidence from the lips of a witness, who says he saw the husband last year in Timbuktu. At this point we have a presumption which has been challenged by contradictory evidence. What happens to this rebuttal presumption is the topic of this paper. According to one writer, there are three answers expressed by the courts in answer to the above question: (1) The Thayer-Wigmore theory, to the effect that the presumption vanishes upon the introduction of evidence to the contrary and unless the party relying on the presumption then goes forward with evidence to support the fact presumed, a verdict will be directed in favor of the opposing party.\(^1\) The sole effect of the presumption, under this view, is to place on the other party the duty of going forward with the evidence. (2) The Presumption-as-Evidence theory, that the evidence supporting the presumption, the presumption itself, and contrary evidence, if any, are submitted to the jury. Under this view the presumption is weighed as evidence in deciding the fact in issue.\(^2\) (3) The Conditional Submission to the Jury theory, that it is for the jury to determine the truth and veracity of the evidence contradicting the presumption. Under this view if the jury believes the contrary evidence then it must find for the party against whom the presumption would have operated. But if the jury disbelieves the contrary evidence, then the presumption is controlling and the jury must find accordingly. Under this view the presumption does not

\(^1\) McBaine, Presumptions; Are They Evidence?, 26 Cal. L. Rev. 519, at 532 (1938).

\(^2\) Id. at 532-533.
disappear nor is it considered evidence, but is submitted to the jury as controlling if the evidence contradicting the presumption is disbelieved.\(^3\)

I

**The Thayer-Wigmore Rule**

This theory is followed by a large majority of the courts,\(^4\) including the Supreme Court of the United States.\(^5\) It was started on the road to general acceptance by the compilation of Thayer's *A Preliminary Treatise on Evidence at the Common Law* in 1898. It wasn't until Professor Wigmore took up the banner, however, that the rule started steamrolling toward its present majority.\(^6\) The rule these writers espoused was simple and logical—the real effect of a presumption of law is merely to invoke a rule of law compelling the jury to reach a certain conclusion in the absence of evidence to the contrary. If the opponent does offer evidence sufficient to "pass the judge," the presumption as a rule of law disappears, and the case is given to the jury free from any rule.\(^7\) Most authorities adopting this view would still submit the issue to the jury, from which they may infer the fact presumed from the proven facts upon which the presumption rested, but they would do so without the benefit of the presumption.\(^8\)

At a glance, if this theory were given a strict application, it would seem too harsh. It seems to invite perjury on the part of the person who wishes to overthrow the presumption since the mere introduction of contrary testimony or writings in evidence seems to destroy the presumption and subjects the party depending upon it to nonsuit or a directed verdict. Most presumptions have a strong footing in probability. This means that the basic facts which bring forth the presumption not only give the proponent the benefit of a prima facie case, required or permitted, but are also, by themselves, strong circumstantial evidence raising a logical inference that the presumed fact exists.\(^9\) In such a case the conflict between the circumstantial inference, which remains even if the presumption disappears, and the contradictory evidence calls for a determination by the jury. But what about presumptions which have no basic fact and are based on prob-

\(^3\) Id. at 533.
\(^4\) For cases see 9 Wigmore, Evidence, 290 n. 6 (1940, Supp. 1955). See also to the effect that presumptions are not evidence, 158 A.L.R. 747, 748 (1945).
\(^6\) Wigmore first dealt with the problem in his *A Treatise on the System of Evidence In Trials at Common Law* (1904).
\(^7\) 9 Wigmore, supra, note 4.
\(^8\) Id. at 291.
ability alone? Here the presumption ordinarily disappears without even an inference remaining. Is this shocking? In this type of situation, if the facts from which the presumption arose are not strong enough to support a circumstantial inference, why shouldn't the opposing party be relieved of his burden of rebuttal without the strong proof that is required to offset the presumption having a strong inference drawn from its basic fact. Even here the rebutting evidence may be so weak that enough of an inference will remain from the common experience of all mankind to send the question to the jury. In one such case involving the question of whether a death was a suicide, the court said:

The presumption of law is against suicide, as contrary to the general conduct of mankind, and where the evidence of evidence is circumstantial only, and admits of more than one reasonable conclusion, the question is for the jury. . . .

This is believed to be in accord with the Thayer-Wigmore theory, although there are some writers, advocating another view, that seem to think otherwise. The principal objection of Thayer and Wigmore to allowing presumptions, as such, to exist after the interjection of evidence to the contrary is that it gives the presumption a weight that it does not and should not possess, because they feel that the essential function of a presumption is to fix the duty of going forward with the evidence, and no more.

II

The Presumption-as-Evidence Rule

A second view of the problem is that "a presumption is evidence and may in certain cases outweigh positive evidence adduced against it." The presumption under this theory disappears only when the facts upon which it is based have been overcome by evidence to the contrary. This view is followed only in a few jurisdictions. Under

11 McBaine, supra note 1 and Morgan, Instructing The Jury Upon Presumptions And Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933), where the author says: "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."
129 Wigmore, supra note 4 at 290; Thayer, A Preliminary Treatise on Evidence at the Common Law 336, 384 (1898).
15 For cases see Anno. 158 A.L.R. 747, 750 (1945).
this rule, instead of a presumption merely fixing the burden of going forward with evidence, it practically shifts the burden of proof. The one relying on the presumption had the original burden of proof, but upon the introduction of the presumption, he is being placed in a position where, although he still has the burden of persuasion, what he now asserts is considered to be a fact.16 This places too great a burden on the opposing party, since, practically, it makes it improbable that he can overthrow the presumption. This does more than create a prima facie case, it creates evidence in the proponent’s favor. A presumption is a legal rule or a legal conclusion and is not evidence.17 As the Missouri court said, “presumptions are the bats of the law, which the light of evidence frightens and causes to fly away.”18

This quotation is an oversimplification, but it expresses the general view that a presumption is definitely not to be considered as evidence. Even in jurisdictions adopting this second view the courts seem to find it distasteful. For example, the Oregon court in a four to three decision, followed this view only because of long-established precedent over a strong dissent by Justice Brand who, citing extensive authorities, felt that the Thayer-Wigmore theory should be adopted.19

III

The Conditional Submission To The Jury Theory

Under this view the presumption is submitted to the jury as controlling if the jury disbelieve the rebutting evidence. Professor Morgan’s argument for this theory is:

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.20

This third view is followed by some courts who feel that presumptions should have more weight than under the Thayer-Wigmore theory, but not so much as to be considered as evidence. Some of the courts which follow this rule go too far. For instance the court said:

The cases are clear upon the proposition that the nonexistence of the presumed fact must be conclusively established before presumption can be eliminated.21

16 McBaine, supra, note 1 at 547.
17 Thayer, supra, note 12 at 576.
20 Morgan, supra, note 11 at 82.
This goes further than most courts which are considered to follow this view. This court commits the same error as those giving the presumption probative value; it gives a presumption greater weight than it logically should possess. The better interpretation of the third view is stated in a leading case thusly:

From this it would follow that if the plaintiff offered no evidence upon the issue and the trier disbelieved the testimony offered by the defendant . . . then plaintiff would be entitled to recover. . . .

Among the several reasons given as to why most rebuttal presumptions should not disappear upon the appearance of evidence contrary to the fact presumed, the following are most often argued: (1) The objectives of the presumptions could be defeated by testimony that would not be believed by the jury or by the judge sitting as trier of the facts; (2) The witness might be corrupt, untrustworthy or his powers of observation might be poor; or (3) The witness could block desirable objectives because he might be prejudiced or willing to commit perjury. The general feeling surrounding this theory, that more weight should be given presumptions, is not without merit. But to let the duration of the presumption depend on belief or disbelief of specific facts in evidence is impractical, to say the least. How, without utterly confusing the jury, could you accomplish such a result? Should you present each bit of evidence, as it is introduced, to the jury for its determination of belief or disbelief or should you wait until the time for instructions and include all the contrary evidence on a belief or disbelief basis in your instruction as to whether the presumption fails or is in force. It is believed that it would be too difficult a task to frame instructions which would make the life of the presumption depend on belief or disbelief of specific items of evidence.

A slight variation of this view, advocated by Professor Morgan, would continue the presumption until the evidence puts the minds of the jury in equilibrium as to the existence of the presumed fact. He concludes that there would be no difficulty in making a jury understand that the presumption that a fact does exist prevails until the party against whom it operates convinces them that it is as probable that the fact presumed does not exist. Professor Morgan seems to presuppose that under the Thayer-Wigmore theory, the mere introd...
tion of any flimsy evidence will cause the presumption to disappear and the depending party will lose. This is fallacious, since underlying most presumptions there are basic facts which do not disappear and the jury would be at liberty under the Thayer-Wigmore doctrine to consider the inference arising therefrom, the only difference being, that the inference is not accorded the artificial weight of presumption.27 As has already been said, if the presumption rests on no basic fact, then it is weak and should disappear upon introduction of evidence to the contrary. With this latter type we can say that the fact presumed can no longer be thought of as probably true.28 There is another reason why Professor Morgan's theory is also unsound because it obviously overestimates the ability of the average jury. Should not instructions be simplified rather than made even more confusing and technical? Even a jury of trained lawyers would have a difficult time determining when the evidence is in exact equilibrium.

IV

Kentucky Cases

The Kentucky Court is typical in its use of unfortunate and misleading language, when declaring the law of a particular presumption. It is generally accepted that a presumption's function is to shift the burden of going forward with evidence, not to shift the burden of proof.29 But the Kentucky Court as late as 1953 said:

While there may be a presumption against suicide, that presumption has no force other than to shift the burden of proof. . . .30

It is submitted that the Kentucky Court probably did not mean that the burden of proof is shifted because, in this decision, it quoted from Aetna Life Ins. v. Tooley, in which the Court said:

The presumption against suicide is overcome, where the preponderance of the evidence is consistent with the theory of suicide, and is at the same time inconsistent with any reasonable hypothesis of death by accident or by the act of another.31

This shows nothing more than carelessness in choice of words. We are confronted with the same problem when we try, from studying the cases, to discover where Kentucky stands on the "Vanishing Presumption." It would seem from the cases that the Court is merely fitting

27 9 Wigmore, supra, note 4 at 290.
28 McBaine, supra, note 1 at 594, n. 37.
29 Thayer, supra, note 12 at 337, 575; Wigmore, supra, note 4 at 285.
30 Thelen v. Mutual Life Ins. Co. of N.Y., 261 S.W. 2d 427, at 428 (Ky. 1953).
31 16 F 2d 243, 244 (1926).
language to a preconceived decision. Let us look at some of this language and the presumption involved. In a case involving the presumption of marriage by reputation, the Court said:

A presumption may be indulged only so long as there is no substantial evidence to the contrary. When that is offered, the presumption disappears, and the issue must be decided on the evidence.32

In this case there was "substantial evidence" and so the Court said it "disappears." In another case involving the presumption against suicide the Court said, "But where the evidence is such that the jury may or may not infer suicide, it is the duty of the Court to submit the issue to the jury for its finding."33 These two cases are consistent with each other and are consistent with the majority view that the presumption disappears when met with substantial contradictory evidence.34 The same can be said for the Kentucky cases involving the presumption of sanity.35 These three presumptions represent the group which lack a basic fact from which a valid inference could be drawn, and could not operate without the particular rule of law which created them. Lacking a basic fact, they are of a weaker variety and their disappearance does not disturb the court on appeal. But it is a different story when the court is confronted with a strong presumption, for instance, legitimacy of children born in wedlock. The presumption in favor of legitimacy contains two factors: (1) the basic fact of marriage; plus (2) strong public policy against bastardizing children. The courts seem to require a great deal more to expel a presumption such as this than one based on probability alone. In one such case involving legitimacy the court said that this presumption would give way "only when it comes in conflict with clear, distinct and convincing proof."36 It would seem that we, at this point have two different rules for two different types of presumptions. Now let us look at another common type of presumption which, although having a basic fact, lacks the strong public policy.

In Kentucky, there is a statutory presumption which reads as follows:

If any person who has resided in this state goes from and does not return to this state for seven successive years, he shall be presumed to be dead, in any case wherein his death comes in question, unless proof is made that he was alive within that time.37

32 Carroll v. Carroll, 251 SW 989, at 991 (Ky. 1952).
34 Supra, note 4.
35 City of Covington v. O'Meara, 133 Ky. 762, 119 SW 187 (1909); Davenport v. Jenkins Committee, 214 Ky. 716, 283 SW 1044 (1926).
36 Dudley's Adm'r. v. Fidelity and Deposit Co. of Md., 240 SW 2d 76, at 79 (Ky. 1951).
It has been held that this statute does not abolish the common law presumption, which is applied if, for some reason, the statutory rule cannot. The presumption of death after seven years' absence has been overcome in Kentucky by the testimony of three disinterested witnesses, who testified they saw the party within the prescribed seven year period. Evidence that the missing party's aunt was told by an acquaintance that she saw or thought she saw the party, was held insufficient in another case which seemed to require positive evidence before the presumption would disappear.

A discussion of the law in Kentucky on presumptions would not be complete without some mention of the doctrine of *res ipsa loquitur*. One of the most interesting and extraordinary applications of this rule in Kentucky, occurred in the case of *Lewis v. Wolk*. A brief resumé of the facts of this case are in order to fully appreciate the impact of this case. The plaintiff was injured when the defendant's car rolled down an incline after being parked in an up-hill position. The trial court directed a verdict for the defendant when the defendant and another testified that the wheels were turned into the curb and the brake was set when the car was parked. Since the plaintiff was completely dependent upon the doctrine of *res ipsa loquitur* he seemed to be lost upon the introduction of such evidence to the contrary. But the Court of Appeals came to his rescue, reversing and sending the case back for retrial with the requirement that the defendant show how the accident could have happened without his negligence. The appellate court said:

Presumption or inference of negligence is not destroyed by defendant's evidence tending to show the contrary.

In another part the same court said:

Certainly the jury is authorized to balance the accepted probability against the defendant's denial.

It would seem from what was said in this case that in order for the defendant to unshackle himself from the burden of the presumption, he must show how the accident could have occurred without his negligence. This is as close as we come in Kentucky to a shifting of the

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42 Id. at 541, 288 SW 2d, at 435.
43 Id. at 542, 288 SW 2d at 435.
burden of proof arising from a presumption. In explanation of the case the court in *Geller v. Geller* said:

The rule does not raise a conclusive presumption, but it does require the defendant to explain the occurrence if he would avoid liability.\(^{44}\)

Does the court intend to literally shift the burden of proof in these negligence cases where the *res ipsa loquitur* doctrine applies? Probably not, it is merely saying that under these facts the defendant must be more convincing in his rebutting proof. In still a later case, the court seemed to take a more reasonable view of the rule in the *Wolk* case; in drawing an analogy the court said:

> The mere spoken word of the plaintiff as to the cause of the collision is scarcely enough to demolish the reasonable inference of negligence. Such fallible testimony of itself is not conclusive. Its acceptance as sufficient to exonerate the defendant would make it an easy matter to avoid the consequences of neglect. The defendant's testimony was so regarded in *Lewis v. Wolk*.\(^{45}\)

Even when the above case is considered, it would seem that in Kentucky there is a strong presumption of negligence when the facts call for application of the *res ipsa loquitur* doctrine. The reason for this must lie in some sort of feeling on the part of the court that a plaintiff who can bring himself within the doctrine, is entitled to more aid than one who is able to produce positive evidence of negligence. That is, in the former case the defendant is in the much better position to explain how the accident occurred than the plaintiff is, whereas in the latter it is just the opposite. It is submitted that the doctrine *res ipsa loquitur*, though technically a presumption of law, is, in addition, a rule of evidence and should be considered a separate class of presumption from the usual presumptions of law and therefore the requirement set out in *Lewis v. Wolk* should not be repugnant to the majority view that presumptions should disappear upon the introduction of evidence to the contrary. The result achieved here could be explained by giving sufficient weight to the basic facts alone to take the case to the jury.

In summing up the law in Kentucky, the only thing that can be given as a guide is that one has to look at the presumption upon which he stakes his claim and act accordingly. If it is one which is based on probability alone, which disappears easily, he had better work a little harder to find something upon which to base his claim or, the chances are, he will fail. If he has a "basic fact" presumption he is in a little

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\(^{44}\) *Geller v. Geller*, 314 Ky. 291, at 295, 234 SW 2d 974, at 977 (1950); see also 37 Ky. L. J. 327 (1949).

\(^{45}\) *Crawford v. Alexander*, 259 SW 2d 476, at 478 (Ky. 1953).
better position, and if he has the basic fact plus a strong public policy he is in an even better position. The Kentucky Court seems to require more and stronger evidence to dispel the presumption as you ascend the scale from probability to public policy.

Conclusion

In conclusion, it is believed that Kentucky follows the majority Thayer-Wigmore theory which is the best solution to the problem of presumptions. Its antagonists seem afraid that unscrupulous or dishonest witnesses could cause a genuine claim to be lost. They seem to state the majority rule in this way, "The presumption disappears upon the introduction of any evidence to the contrary." It is submitted that their interpretation is wrong, and if so it defeats their whole argument against the majority view. The correct way to state the rule is, A presumption serves the purpose of making a prima facie case, and it continues to serve this purpose until the adversary has gone forward with his evidence. How much evidence is required to meet or overcome the presumption is determined not by a fixed rule, but according to the strength and value of presumption. Very little proof may be required in the case of a presumption which lacks a basic fact from which a valid inference can be drawn, or it may require a great deal where the presumption has a basic fact plus a strong public policy. As for the fear of perjury, the same problem exists any time a case goes to trial. If the safeguards are adequate for the ordinary case why should not they also be in the case of presumptions? A strong reason for acceptance of the majority rule is its simplicity. The submission of a presumption to the jury for their decision on whether it disappears places too great a burden on the normal jury. It is submitted that the jury could not and probably would not even try to understand such instructions. The Thayer-Wigmore theory avoids this difficulty and is, therefore, the better view.

Earl M. Henry

GARNISHMENT IN KENTUCKY—SOME DEFECTS*

The purpose of this article is to summarize and clarify the present-day garnishment procedure in Kentucky for the benefit of the beginning practitioner and to suggest reforms to those who may question the adequacy of the present system.

*Much of the information contained in this note was obtained from conversations with practicing attorneys. The writer is particularly indebted to Rufus Lisle, Esq., of Lexington, and to Robert Caldwell, Esq., of Ashland, whose letter to the writer is quoted at some length in this note.