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NOTES ON PRESUMPTIONS

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The opinion of the Supreme Court of Washington in *Morris v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company* represents the most recent effort of the Washington court to bring order out of previously existing confusion in reference to the effect of the “presumption of due care” in the trial of wrongful death actions.

The deceased was killed in a grade crossing collision between his truck and defendant's train. On the basis of disinterested testimony, the court first determined that, the presumption aside, the deceased was guilty of contributory negligence as a matter of law in failing to exercise reasonable care for his own safety as he approached and drove onto the crossing. There remained the question whether, particularly in view of the prior decision in *Karp v. Herder*, the presumption operated in these circumstances so as to require the submission of the cause to the jury. The court concluded that the presumption must yield to the disinterested testimony and the cause was ordered dismissed.

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1*101 Wash. Dec. 501, 97 P. (2d) 119 (1939). After the filing of the departmental opinion, a petition for rehearing en banc was granted. On rehearing a majority of the court (three judges dissenting, but without opinion) adhered to the departmental opinion. 103 Wash. Dec. 159 (1940).

2*181 Wash. 583, 44 P. (2d) 808 (1935). In the *Karp* case, one of the issues, though not necessarily a determinative one, was whether the deceased stopped before entering the arterial highway. An apparently disinterested witness had testified that she did not. The trial court instructed the jury that the law presumed that “the deceased did yield the right-of-way to the defendant” and that the presumption continued until “it has been overcome by the evidence in the case.” On appeal, the court, sitting en banc, by a five to four decision, held the instruction proper. The majority thought that there were some features of the witness’ testimony which did not “seem plausible, even in the printed record,” the court noting the fact that the witness was seated in a parked car headed away from the intersection which the deceased was approaching. Whether the story of this witness “was true, partially true, or false,” said the court, “was for the jury and not the court to say.” It is apparent that the court felt that, notwithstanding the witness was disinterested, the jury might reasonably disbelieve what he had to say.

The majority in the *Morris* case seems to have thought (pp. 514, 515, 516) that it was necessary to modify the rule of the *Karp* case in order to arrive at the result of the *Morris* case. But in result the *Karp* and *Morris* cases are not necessarily inconsistent. As already pointed out, in the *Karp* case the court concluded that, under the circumstances, the jury might reasonably reject the testimony of the “disinterested” witness. In the *Morris* case, on the other hand, the court felt that, under the circumstances
The majority held that a presumption was “not evidence of anything”, cited with approval previous decisions of the court, notably Scarrelli v. Washington Water Power Company, to the effect that “a presumption should never be placed in the scale to be weighed as evidence”, and that “when the opposite party has produced \textit{prima facie} evidence [the presumption] has spent its force and served its purpose”, and again cited approvingly the figure by the now famed, though unidentified “scholarly counselor”, who stated \textit{ore tenus} that “presumptions may be looked on as the bats of the law, fitting in the twilight but disappearing in the sunshine of actual facts.”

Against this background, which, it will be noted, adheres strictly to the Thayer-Wigmore argument, the court formulated for future guidance the following canons:

1. The presumption is not evidence, but will serve in the place of evidence until \textit{prima facie} evidence has been introduced by the opposite party.

2. The presumption disappears in the face of testimony of disinterested witnesses “even though such testimony may be in conflict or be disputed”. If the disinterested testimony establishes contributory negligence as a matter of law, under the familiar general rule, the case, of course, will be withdrawn from the jury. If the disinterested testimony does not, however, attain that conclusive character, the issue of contributory negligence will then be submitted to the jury, but without the presumption.

3. Where the only opposing testimony is that of interested witnesses or where there is no testimony at all on the issue, “the presumption must go to the jury, together with all the testimony and exhibits properly introduced in the case, unless from all the evidence the court can say of that case, the jury could not reasonably reject the testimony of the disinterested witnesses, which, the court held, demonstrated the contributory negligence of the deceased. See the language of Judge Blake in Luna de la Peunte v. Seattle Times Co., 186 Wash. 618, 627, 628, 59 P. (2d) 753 (1936), p. 84, infra.

On the other hand, it is clear that the rule of the \textit{Karp} case is inconsistent with and must be deemed overruled by the second of the “proper rules to be applied relative to the presumption of due care,” as they are laid down in the \textit{Morris} case. See text above.

This attractive simile apparently originated in Mockowik v. Kansas City, St. J. & C. B. R. Co., 196 Mo. 550, 571, 94 S. W. 256, 262 (1906), and was first sanctioned by the Washington court in Beeman v. Puget Sound Traction, L. & P. Co., 79 Wash. 137, 139 Pac. 1087 (1914). It is quoted by Wigmore. 5 Wigmore, Evidence (2d ed. 1923) § 2491, p. 452.

\textit{It must be kept in mind that the peculiar effect of a presumption of law} (that is, the real 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 evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.” 5 Wigmore, Evidence § 2491. See also § 2487 and Thayer, Preliminary Treatise on Evidence (1898) pp. 339, 346.
that the contributory negligence of the person killed was so evident that reasonable minds could not differ thereon."

Rule (1) above is in accord with the Thayer-Wigmore view as to the force and effect of a presumption; (2) is likewise, though not so precisely. It seems pretty obvious that (3) is not consistent with either (1) or (2). Certainly it is not consistent with the Thayer-Wigmore view, to which, in the abstract, the court in the fore part of the opinion appears to subscribe completely. If the presumption "serves" only "until prima facie evidence has been introduced by the opposing party", it would seem to follow that the testimony of interested witnesses substantial enough to justify a finding of contributory negligence would dissipate the presumption. In other words, if the court means what is usually meant by "prima facie evidence", then prima facie evidence may consist entirely of interested testimony.

But these are digressions. The purpose of this comment is to suggest that this "presumption of due care", unlike the usual presumption,
operates against rather than in favor of the party upon whom rests the burden of proof (burden of persuasion); that consequently it is not a true presumption if we assume that the office of a true presumption is to relieve the party upon whom rests the burden of persuasion, of the burden of going forward with the evidence in the first instance; that this being true, there is no point in talking about a presumption of due care at all unless it is concluded that the defendant should be required to establish contributory negligence by something more than a fair preponderance of the evidence; that if the defendant's burden on this issue be no greater than has heretofore been assumed, the issue in every case ought to be submitted to the jury in terms of burden of proof alone, without mention of a "presumption", and finally, that in virtue of the foregoing there is a good bit to be said, even at this late day, in favor of forgetting the so-called presumption of due care.

The difficulty of precise exposition of any segment of the law of presumptions is largely due, no doubt, as James Bradley Thayer remarked, to the fact that "the numberless propositions figuring in our cases under the name of presumptions, are quite too heterogeneous and non-comparable in kind, and quite too loosely conceived of and expressed, to be used or reasoned about without much circumspection. Many of them are grossly ambiguous, true in one sense and false in any other; some are not really presumptions at all, but only wearing the name; some express merely a natural probability, and others, for the sake of having a definite line, establish a mere rule of legal policy; very many of them, like the rule about children born in wedlock, lay down a prima facie rule of the substantive law, and others, a rule of general reasoning, and of procedure, founded on convenience or probability or good sense. . . . Some are maxims, others mere inferences of reason, others rules of pleading, others are variously applied . . . Among things so incongruous as these and so beset with ambiguity, there is abundant opportunity for him to stumble and fall who does not pick his way and walk with caution." 8

While recognizing that "numberless propositions" "heterogeneous and non-comparable in kind" go under the name of presumptions, I believe it is justifiable to assume at the beginning of this discussion that, normally, a presumption (at least one that fits into the usual judicial language about presumptions) operates in favor of the party upon whom rests the burden of persuasion, and that the office of the presumption is to relieve that party of his concomitant duty to go forward with the evidence in the first instance.

8 "Every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair." Morgan, Presumptions (1937) 12 Wash. L. Rev. 255.

9 Thayer, op. cit. supra, note 5, p. 351.
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However far in concrete result most of the recent Washington cases have departed from the Thayer-Wigmore view as to the quantum and quality of evidence necessary to overcome a presumption (and the departure has been considerable), I am not aware that there has been any substantial controversy as to the purpose and function of a genuine presumption. "This last [the result of fixing the duty of going forward with proof]," says Thayer, "and this alone, appears to be the characteristic and essential work of the presumption."10 "But the essential character and operation of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other; that is to say, they throw upon the party against whom they work the duty of going forward with the evidence; and this operation is all their effect, regarded merely in their character as presumptions."21 "Presumptions may, of course, relieve, at the outset, him who has the duty of establishing the issue; for both sides, they are, always, levamen probationis. In the region of the law of evidence, this appears to be their characteristic function, indeed their only one."21

Wigmore is equally clear: "So far as 'presumption' means anything for the present purpose, it signifies a ruling as to the duty of producing evidence." The function of a presumption, he says, is "to cast upon the opponent the duty of producing evidence."213 Further: "A presumption, as already noticed, is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent." "It must be kept in mind," Wigmore continues, "that the peculiar effect of a presumption 'of law' (that is, the real 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."214

There is a great deal of similar language in the Washington decisions which need not be here collected in view of the fact that it is recapitulated in the majority opinion of the Morris case itself: "We think the rule [presumption of due care] is based primarily upon the fact that there is no evidence to show what the deceased did or did not do immediately preceding the accident; and so, where an action is brought for damages resulting from such death, in order that the action may go forward, in the first instance, to that stage of the proceedings where it can be presented to a court or jury, the law indulges in a conclusion which presumably is based upon human experience, that the deceased must be presumed to have used due care."215

10Id. at 337.
11Id. at 339.
12Id. at 338.
135 WIGMORE, EVIDENCE § 2487.
14Id. § 2491.
But where the burden of persuasion on the issue of contributory negligence has been cast upon the defendant (as it is in this jurisdiction),\textsuperscript{16} plaintiff’s action “may go forward in the first instance” without the necessity of any evidence in plaintiff’s behalf on the issue. Consequently, there is no necessity for the use of a presumption.\textsuperscript{17} The language from the \textit{Morris} case just quoted would be exceedingly apt in a jurisdiction (and there are some) where the plaintiff has the burden of persuasion on the issue of contributory negligence, \textit{i. e.}, where he is required as a part of his own case to show the exercise of due care. The logic of the situation makes it a good guess that the presumption of due care had its origin in jurisdictions where the burden of proof is upon the plaintiff.\textsuperscript{18} All of which makes it appropriate to suggest again that the “presumption of due care,” operating as it does against rather than in favor of the party upon whom rests the burden of persuasion, is anomalous in a jurisdiction such as this, that it is not a genuine presumption, and that the difficulty, if not the confusion, which has resulted in attempting to apply to this “presumption” a body of doctrine rationally applicable to genuine presumptions only, persuasively argues that it might well be forgotten, at least in instructions to juries. There is authority for this view.

In Massachusetts prior to 1914, the burden of persuasion on the issue of contributory negligence was upon the plaintiff. By a statute enacted in that year, it was provided that “in all actions, civil or criminal, to recover damages for injuries to the person or property, or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant.”\textsuperscript{19}

In \textit{Brown v. Henderson},\textsuperscript{20} which was a personal injury action decided by the Massachusetts court in 1934, it appeared that the jury had been instructed that “there is a presumption that every person is in the


$^{17}$Contrast the situation presented by an issue of agency in an automobile accident case. The establishment of agency is an essential element of the plaintiff’s cause of action under the substantive law, and the burden of proof upon that issue is allocated to the plaintiff. However, the ownership of the vehicle by the defendant being admitted or established, the presumption of agency operates to relieve the plaintiff of the burden of going forward with the evidence on that issue. This presumption of agency, operating as it does in favor of the party upon whom rests the burden of persuasion, has a definite and palpable function to perform.

$^{18}$Comment (1920) 6 Iowa L. Bull. 55 and Note (1926) 12 Iowa L. Rev. 89 deal with the operation of the “presumption of due care” as a genuine presumption, \textit{i. e.}, in a state (Iowa) where plaintiff in a wrongful death action has the burden of showing due care on the part of the deceased.


$^{20}$285 Mass. 192, 189 N. E. 41, 43 (1934).
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exercise of due care... a presumption is not evidence; it is merely a rule in reference to evidence; and if there is no evidence as to the due care in this case of Mr. Brown, then the presumption controls. When evidence is introduced, then you are to consider the evidence. If you believe the evidence, the presumption disappears; but just because somebody has said something and you do not believe a word of that evidence, the presumption would control.” The defendant questioned this instruction on appeal. The court held the instruction not erroneous; it merely “required the jury to consider the evidence and to give weight to it only so far as found to be true.”

But Mr. Justice Lummus, while concurring in the result, had this to say: “When the statute cast upon the defendant the burden of proving by a preponderance of the evidence contributory negligence on the part of the plaintiff, it did everything for the plaintiff that a presumption of his due care could do, and according to most authorities on the subject of presumptions it did more. The statutory presumption of due care, therefore, is wholly overshadowed by that burden of proof, and can have no practical effect. If it never had been created, or should be abolished, neither party would be a whit the better or the worse. The statutory presumption of due care is like a handkerchief thrown over something also covered by a blanket... For this reason, if the burden of proof is correctly stated to the jury, there can be no reversible error in dealing with the presumption of due care, whether the judge adopts what seems the better course of refusing to mention it at all, or, as the judge did in this case, indulges in what must needs be an academic discussion of its theoretical operation; and this, no matter whether that discussion conforms to the true theory of presumptions or not. Since the simple ground which has been stated requires the overruling of these exceptions, and we are dealing with a so-called presumption which has no operative effect and only a verbal or theoretical existence, a discussion of the working of genuine presumptions would be superfluous.”

In Lisbon v. Lyman, one of the issues was as to the emancipation of a minor in respect to which plaintiff had the burden of persuasion. The jury were instructed that in deciding whether the minor was emancipated, they should take into account the presumption against emancipation. Here, too, it will be noted that the “presumption” operated against the party having the burden of persuasion. This instruc-

This statement, I think, is open to question. As pointed out in Lisbon v. Lyman, 49 N. H. 553 (1870), and by Judge Beals in his dissenting opinion in Karp v. Herder, stating a presumption of due care to the jury seems definitely to increase the burden cast upon the defendant. If there be substance to this suggestion, it follows that if the presumption “never had been created, or should be abolished”, plaintiff’s position would be somewhat worse and the defendant’s correspondingly better.

49 N. H. 553 (1870).
tion was held to be error (though harmless because the verdict went for the plaintiff). The court pointed out that the burden of proof (i.e. of persuasion) was on the plaintiff; that in order to sustain this burden the plaintiff was required to do no more than produce a preponderance of the evidence on the issue; “it was not necessary that the evidence of the plaintiff should be heavier than the defendant’s evidence, increased by the indeterminate weight of a legal presumption.” If the plaintiff’s evidence was heavier than the defendant’s evidence, it was heavy enough to prove emancipation. In this context, saying that there is a presumption against emancipation amounts to no more than saying that the plaintiff has the burden of proving emancipation. And the court continued: “A legal presumption is not evidence. In civil cases, it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative. When this is the case, the assignment of the burden of proof to one party, and the benefit of the legal presumption to the other, is a double and unjust use of one and the same thing.”

Board of Water Commissioners v. Robbins & Potter, was an action upon a contractor’s performance bond in which the contractor, by counterclaim, charged the making of fraudulent representations by the plaintiff. There was a verdict for the defendant on the counterclaim, and on appeal the plaintiff assigned error because of the refusal of the trial court to charge that “fraud was never to be presumed” and that “the plaintiff, being an official body charged with the performance of governmental duties, would be presumed to have acted honestly and fairly in the performance of these duties.” The Connecticut court disposed of this contention as follows: “The court gave sufficient instructions as to these points when it said that the burden was upon the defendants to prove their charges of fraud, that the existence of fraud was not to be found unless established by direct evidence, or as an

2Cf. the following from Judge Beals’ dissenting opinion in Karp v. Herder: “It cannot be contended that the rule of law which makes contributory negligence a defense and requires the defense to be proven by preponderance of the testimony, also brings into effect a presumption that a living plaintiff, testifying at length concerning his version of an accident, used due care, and requires the defendant to overcome both plaintiff’s evidence and a presumption!” Further: “The jury might well have disbelieved [the testimony of the disinterested witness], but they should have been instructed to consider the testimony without being required to weigh against the same any legal presumption to the effect that Mrs. Karp had done something which the witness testified positively she did not do. Under the opinion of the majority . . . the defendant, then, is not only required to prove contributory negligence by preponderance of the evidence, but is required, in addition, to disprove a presumption of law.”

382 Conn. 623, 74 Atl. 938 (1910).
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Inference from facts and circumstances themselves directly established, which was clear, strong, natural, and logical, and the result of an open and visible connection between it and the facts from which it is drawn, and, while speaking of the conduct of the engineer, that fraud or bad faith was not to be presumed, but must be proved. Presumptions like that appealed to have no probative force. They perform an office in the absence of evidence, so that one who has cast upon him the burden of proof as to a given proposition may be enabled to sustain that burden upon the strength of a presumption without the presentation of proof. When such a presumption is advanced in favor of one upon whom the burden of proof does not rest, it really adds nothing to the duty or burden of the other party, since the latter is already under the obligation to present proof in support of his contention, and the presumption only reiterates that obligation.”

Vigorously to the contrary is Worth v. Worth,25 a Wyoming case decided in 1935. This was an action for alienation of affections by a daughter-in-law against her parents-in-law. The defendants asked that the jury be instructed that “the law recognizes the right of the parents to advise and counsel their son in respect to his domestic affairs, and that the law presumes that counsel and advice given by a parent to a son is given in good faith and from proper motives and honest impulses.” While this instruction was refused, the jury were told that the plaintiff had the burden of proving that the advice given the husband by the defendants was given in bad faith, and further that “the defendants, being the parents of plaintiff’s husband, had the right to receive their son into their home, also the right to counsel and advise him regarding his relations to the plaintiff, in good faith, on reasonable grounds and in the honest desire to promote his welfare and happiness, and they are not responsible for doing any of these things unless they acted not in good faith . . . but wrongfully and maliciously.” The Supreme Court of Wyoming declined to follow the New Hampshire and Connecticut cases already referred to, held that the requested instruction should have been given, and said: “It is not, we think, quite correct to say that the ‘presumption only reiterates’ the obligation of the burden of proof. An instruction that the burden to prove malice is on the plaintiff states the duty resting on the latter. An instruction that the jury must start out with the assumption that the defendants were in good faith states a benefit or privilege conferred upon the defendants by the law. It at least makes that benefit clear and brings it home to the jury—which, after all, is the one important point in a jury trial. It is, in fact, a distinct thought which, particularly if pressed home to the jury by counsel, may often be of value. And that it should be of value is unquestionably the intent of the law. If what is said in the Connecticut

case is correct, it is apparent that the presumption, created by law specially in favor of parties situated as the defendants herein, would, so far as the jury is concerned, be but a phantom. It is hardly possible that a presumption such as we are dealing with here can be of that nature. It is not a procedural rule; it is based upon reason; upon the strong love usual in parents for their children. By giving merely the ordinary instruction, and refusing that on presumption, would not even call attention to the inference, which, as a matter of reason (Wigmore, supra, § 2491), remains to be considered in any event, no matter how we view a presumption . . . reason dictates that an important presumption, intended to benefit parents in a material way, should not be kept hidden from the jury. The instruction on the burden of proof given herein was the ordinary instruction on that subject. It put the case upon the exact level of any other case. But the law puts it on a different level . . . We think, therefore, that the requested instruction, or the fundamental ideas contained therein, should have been given to the jury."

I do not think the reasoning of the Wyoming court is persuasive. To the argument that the rule of the New Hampshire and Connecticut cases treats the "presumption" only as a "phantom," I think it may be suggested that this, to a substantial degree, assumes as true the very proposition questioned by the New Hampshire and Connecticut decisions, namely, that a presumption operating against the party having the burden of proof is in reality a legal presumption. In effect, the New Hampshire and Connecticut cases point out, as does Mr. Justice Lummus in the Massachusetts case, that a "presumption" so operating is not in truth a presumption at all. Rather, the statement of such a presumption merely iterates the allocation of the burden of persuasion. And as Mr. Justice Doe pointed out in the New Hamp-

\textsuperscript{3} Nevertheless, it must be conceded that the statement of the "presumption" does, in a measure, rationalize the allocation of the burden of proof. Instead of merely instructing the jury in terms of burden of proof, without mentioning the presumption at all, Professor McCormick feels "that it is a more natural practice, especially under the American tied-judge system, to mention the presumption, so that the jury may appreciate the legal recognition of a slant of policy or probability as the reason for placing on the party this particular burden." He concludes: "If this is true when the presumption operates (as it usually would) in favor of the plaintiff, who has the general burden of proof, so that the presumption would result in an issue being singled out and the burden thereon placed on the defendant, much more is it true (as Mr. Justice Blume points out in . . . [Worth v. Worth, 48 Wyo. 441, 49 P. (2d) 649 (1935)]) when the presumption operates in favor of the defendant. In such case the presumption would not affect the instructions at all, but would be swallowed up in the larger instruction that the plaintiff has the burden on everything that he has pleaded. This smothers any hint of the recognized policy or probabilities behind the particular presumption." McCormick, \textit{What Shall the Trial Judge Tell the Jury About Presumptions?} (1938) 13 WASH. L. REV. 185, 194. With deference, it is suggested that perhaps this view overlooks two considerations: First, it is certainly not customary to
shire case, "the assignment of the burden of proof to one party, and the benefit of the legal presumption to the other, is a double and unjust use of one and the same thing." To the argument of the Wyoming court that the "presumption" with which it was there dealing was not a mere procedural rule, but that it was based upon reason and upon the strong love usual in parents for their children, it may be suggested that the New Hampshire and Connecticut cases do not overlook these considerations. Among others, these are the factors which have already been operative in the allocation of the burden of persuasion. Paraphrasing the language of Mr. Justice Lummus, when the burden of persuasion on the issue of malice and bad faith was cast upon the plaintiff in the alienation suit, that allocation did everything for the plaintiff and probably more than a presumption of good faith could do. Unless, of course, these considerations (i.e., those giving rise to the "presumption") seem so cogent as to require an increase in the plaintiff's burden, over and above the normal obligation to produce a preponderance of the evidence. That is to say, if the circumstances indicate the propriety of requiring an increase over the normal burden, say to point of requiring the plaintiff to establish malice or bad faith by "clear, cogent and convincing evidence," let it be so held and stated to the jury. Perhaps that is what the Wyoming court meant to hold. But attempt to rationalize to a jury either the applicable substantive or procedural law and the wisdom and expediency of such a course is, I believe, open to serious question. In the second place, the statement of the presumption to the jury increases the burden of proof without a determination that it ought to be increased.

The Wyoming court placed considerable reliance upon Cramer v. Cramer, 106 Wash. 681, 180 Pac. 915 (1919), which was also an alienation of affections action against plaintiff's parents-in-law. The trial court instructed the jury that parents have the right "in a moderate, intelligent and careful manner" to advise a son as to his domestic affairs and that if given in good faith and from worthy motives, the wife may not complain, even though the advice contribute in some degree to a separation. Defendants requested an additional instruction directing attention to the distinction between the case of a stranger to the blood and that of parents, particularly to the effect that in the latter case, advice given is "presumed to be good, and a clear case of want of justification must be shown before parents can be held responsible." Refusal of the trial court to give this instruction was held reversible error. The court held "that the burden of proof is heavier in this action than some other kinds of civil actions" and said that "a clear case of want of justification" was required. The court also said that "if there is a presumption in favor of good faith carrying its companion of a burden imposed upon him who assails it—and there is—it is important that juries should be so instructed." While the case may appear to be opposed to the Connecticut and New Hampshire cases, I do not believe it is necessarily so. The nub of the ruling is that plaintiff must establish bad faith on the part of the parents by more than a mere preponderance—she must make out "a clear case of want of justification". Here, then, is an express determination that the normal burden should be increased. Had the trial court instructed correctly on the burden of proof, that is to say, that plaintiff must make out want of justification by clear, or strong, or cogent, or convincing evidence, it is to be doubted whether the appellate court would have thought it erroneous to have refused to state to the jury the "presumption of good faith". It is
without an express or definitive determination that the burden ought to be increased, the statement to the jury of an anomalous presumption (i.e., one operating against the party having the burden of proof), thereby casting an additional onus upon that party, appears to be difficult to justify. And I think it is correct to say that the Washington court has never expressly held, nor has it ever identified any reason for holding, that the defendant in a wrongful death action ought to be required to sustain an allegation of contributory negligence by more than a preponderance of the evidence.\(^{28}\)

The objection to stating to the jury the "presumption of due care" rests on considerably more than the theoretical anomaly. In the first place, as has already been suggested, such a presumption tends to increase the defendant's burden of proof without a determination that it ought to be increased. Secondly, and what may be more important, there is the difficulty of conveying to the jury in simple, accurate and understandable language the nature of a "presumption", how long it persists and how much evidence it takes to overcome it. "The baffling nature of the presumption," says McCormick, "as a tool for the art of thinking bewilders one who searches for a form of phrasing with which to present the notion to a jury."\(^{29}\) This difficult problem is inevitable and must be faced and resolved when the court is dealing with a genuine presumption, i.e., one operating in favor of the party having the burden of proof. However, because of its inherently difficult character, the problem ought not be invited; it ought to be avoided whenever reasonably possible. And generally speaking, it may be avoided, quite rationally, by declining to instruct on a "presumption", such as the "presumption of due care", operating against the party having the burden of proof. Trial judges and trial lawyers of experience will, I think, agree on the difficulty of framing proper instructions on presumptions, and on the comparative ease of instructing juries intelligibly on burden of proof. "If the presumption [of due care] has no operative effect, as seems to be the case, why would it not be better to avoid

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\(^{28}\) Arguable that to have done so would have amounted to a second or double increase of the burden.

\(^{29}\) A word is appropriate here about the "presumption of innocence". Operating as it does against the party having the burden of proof, this "presumption", as Wigmore observes, "implies what the other rule [for the burden of proof] says, namely, that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure until the prosecution has taken up its burden and produced evidence and affected persuasion." 5 Wigmore, Evidence § 2511. But, continues Wigmore, "the term does convey a special and perhaps useful hint over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment and the arraignment and to reach their conclusion solely from the legal evidence adduced." On this basis, it is fair to say that the presumption of innocence is in a category by itself.

\(^{26}\)McCormick, op. cit. supra note 26, at 189.
an academic discussion of its theoretical operation and to charge the jury only on the defendant’s burden of proof?

Aside from the difficulty of constructing “a form of phrasing with which to present the notion” of the presumption to the jury, there is the more fundamental and still more perplexing problem of determining in advance what shall be said to be the effect of a presumption and the quantum and quality of evidence necessary to overcome a presumption. For, until there has been some fairly definitive determination of these much mooted questions, it is not only futile but probably confusing to say very much to a jury about presumptions. There is a wide divergence of judicial opinion as to the effect and persistence of a genuine presumption. The Thayer-Wigmore view is that “the presumption ceases upon the introduction of substantial proof to the contrary”, even though the jury may reasonably disbelieve this “substantial proof”. In other words, it is merely a procedural device operating in favor of the party upon whom rests the burden of persuasion for the purpose of relieving him in the first instance of the burden of going forward with the evidence. But this latter burden shifts back upon the production by the opponent of the presumption of this “substantial evidence” to the contrary. Some recent cases adhere closely to this view. But many, if not most of the more recent cases do not, and have given to the genuine presumption considerably more effect. Professor Morgan has, in some detail, outlined the various ideas which have emerged in the last two or three decades. It is sufficient to say here that the divergence of judicial opinion is, indeed, very extensive.

As to the Washington cases, we can agree with Professor Morgan that the Thayer-Wigmore view “distinctly is not the present view of the Washington court.” As far back as 1915, the court, in Welch v. Creech, held in effect that a presumption that an admitted killing was wrongful was not overcome as a matter of law by the defendant’s testimony that he killed in self-defense. And the “interested witness” rule which has been applied particularly to the presumption of agency in automobile accident cases is obviously a definite break with the Thayer-Wigmore argument. The most forthright repudiation came

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23Comment, Presumption of Due Care and Burden of Proof (1934) 14 Bosun. L. Rev. 440, 445.
24McCormick, op. cit. supra note 26, at 189-190.
27Id. at 261.
28Id. at 429, 153 Pac. 355 (1915).
29Typical are Amning v. Rothschild & Co., 130 Wash. 222, 226 Pac. 1013 (1924); Feldtman v. Russak, 141 Wash. 207, 251 Pac. 572 (1926); Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P. (2d) 39 (1933).
in *Luna de la Puente v. Seattle Times Company*. That was an action for libel. Plaintiff offered no evidence on the subject of his reputation and character. The defendant produced three witnesses who testified that plaintiff's reputation and character were bad. The trial court instructed the jury that "the law presumes the reputation and character of plaintiff to be good," and that it was not necessary for him to adduce evidence in support thereof. The giving of this instruction was held to be proper, and Judge Blake, speaking for the court, said "appellant makes the usual argument that a presumption is merely a rule of law relating to the order of proof; that it suffices as evidence only until evidence to rebut is received; that it then falls and loses its force completely. The difficulty, however, lies not so much with the statement of law as with its application. When and by whom is it to be said that the evidence is sufficient to rebut a presumption? In some cases, doubtless, it may be said by the court, as a matter of law. In other cases it may very properly be left to the jury to say. Simply because some witness takes the stand and swears to facts which, if true, would rebut the presumption, does not require the court to hold, as a matter of law, that the presumption has been rebutted. The quantum and quality of proof sufficient to rebut a presumption differs widely in different classes of cases... The sum and substance of all that has been written on the force and effect of presumptions is that, in the first instance, it is for the court to say whether or not the evidence is sufficient, as a matter of law, to overcome a presumption. If not, the question may be left to the jury, under proper instruction." The court went on to point out that facts were developed from which it might be inferred that each of defendant's witnesses was "animated by a motive of personal hostility" toward plaintiff and that consequently the trial court "very properly left it to the jury to say whether the evidence was sufficient to overcome the presumption." So that in this jurisdiction, unless the evidence in opposition to the presumption is of such conclusive character that the court must say, as a matter of law, that the jury could not reasonably disbelieve or reject it, the presumption should go to the jury along with the opposing evidence, it being for the jury to say, "under proper instructions", whether the presumption has been overcome. What are these "proper instructions"? There is very little, if anything, in the Washington cases which can be helpful in the framing of such instructions. A variety of solutions have been attempted in other jurisdictions and suggested by the commentators. The point is again that the difficulty of the problem, apparently inevitable in respect to genuine presumptions, cogently suggests the inadvisability of stating to the jury an anomalous presumption.

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81186 Wash. 618, 627, 628, 59 P. (2d) 753 (1936).
The suggestion is that contributory negligence in a wrongful death action may and should be disposed of by both court and jury in terms of burden of proof alone, without invoking a "presumption of due care." A finding of contributory negligence as a matter of law presumably will not be made where the supporting evidence comes from interested witnesses only. This is not because of a "presumption of due care," but because the evidence does not attain that conclusive character required to justify the intervention of the court. Thus the "interested witness" notion would not yield anything in the suggested procedure. If the issue goes to the jury, it need only be instructed that the burden of establishing contributory negligence by a fair preponderance of the evidence rests upon the defendant, and this instruction, together with the usual advice that the jurors are the "sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each," would seem to meet the necessities of the situation.

It is Morgan's opinion that "the role which presumptions are theoretically deemed to play in actual litigation is almost negligible when compared with the confusion, uncertainty and opportunities for error and alleged error which they created." The confusion could be cleared away, he suggests, "without harm to courts, clients or lawyers by a statute enacting a rule similar to the common law rule of Pennsylvania—that the sole effect of a presumption is to put upon the opponent the so-called burden of proof, in the double sense of producing evidence and of persuading the jury that the presumed fact did not exist." This, he says, would make it unnecessary ever to mention the presumption to the jury and would be very easy of application by the trial judge. "To be sure," he says, "it would be arbitrary, but it would abolish the prevailing confusion and complexities." But if the practice is to obtain of instructing the jury in reference to a "presumption" operating against the party who already has the burden of persuasion, it does not seem that a great deal would be gained by adopting Professor Morgan's suggestion, because its principal virtue appears to lie in the assumption that under his suggested procedure the necessity of discussing the presumption with the jury will be avoided.

In 1933, in the case of *Steiner v. Royal Blue Cab Co.*, the court arrived at the exact result suggested by Morgan. The action was one

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29 172 Wash. 396, 20 P. (2d) 39 (1933). This case, in addition to its holding on the effect of the presumption of agency, is significant in other respects. It held that an employee of the defendant, though not a party, was an "interested witness", overruling Babbit v. School District, 100 Wash. 392, 170 Pac. 1020 (1918) on the point. The court also held that the presumption of agency arose upon a showing of the single fact that the automobile was owned by the defendant. The prior cases seem to require not only a showing of ownership, but also that the driver, at the time of the accident, was in defendant's employ.
to recover for personal injuries caused by the operation of defendant's taxicab. The issue was whether at the time of the accident the cab was being operated by the defendant's employee and in its business. The agency of the driver was, of course, an essential element of plaintiff's case, and in respect to which plaintiff had the burden of proof. The trial court instructed the jury that the ownership of the cab being admitted, "a presumption of operation by the owner arises . . . and the burden is then cast upon the defendant to overcome such presumption by a fair preponderance of all the evidence, either that the driver of the automobile was not the agent or employee of the defendant, or that the automobile at the time was not being driven upon the business of or for the benefit of such owner." The instruction was approved on appeal. The holding, then, is that a presumption of agency operates to shift to the defendant the burden of persuasion, as well as the burden of going forward with the evidence.\footnote{This being true, and the operative effect of the presumption having been exhausted according to the most extreme view, there is no need of talking about the presumption any further. It is suggested that in this situation, instead of instructing the jury about a presumption of agency, the simpler and more intelligible procedure would be simply to tell the jury that, the ownership of the car having been admitted, plaintiff will be entitled to recover unless the defendant, by a fair preponderance of the evidence, negatives agency.\footnote{A similar suggestion may appropriately be made in reference to a situation like that involved in Selover v. Aetna Life Insurance Co., 180 Wash. 236, 38 P. (2d) 1059 (1934). In that action upon a personal accident policy, the upshot of the court's ruling was that the burden of persuasion on the issue of suicide was upon the defendant. It is immaterial whether the court arrived at that conclusion by casting the burden upon the defendant in the first instance or by determining that the presumption against suicide was cogent enough to shift the burden from plaintiff to defendant. In either event, the burden having been cast upon the defendant and the presumption having no further operative effect, there would seem to be no point in instructing on a presumption against suicide. The issue can be better, more rationally and more simply presented to the jury in terms of burden of proof alone. On the other hand, the court, of course, held that the burden of showing accidental death was upon the plaintiff, though it recognized the genuine presumption that death was accidental upon a showing that it was caused by external and violent means. This latter presumption will, in appropriate cases, have to be stated to the jury. The case, then, illustrates very well the distinction between a genuine presumption, i. e., one operating to shift the burden of going forward, and an anomalous presumption, i. e., one having no such function to perform.}}