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Hanson: The Effect of a Rebuttable Presumption
**THE EFFECT OF A REBUTTABLE PRESUMPTION
IN MONTANA**

I. INTRODUCTION

The 16th Century Italian lawyer Alciatus said about presumptions: "The matter we are about to take up is very useful and in daily practice; but it is confused, almost inextricably."¹ And several centuries later Professor Morgan observed: "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 with a feeling of despair."²

The exact function of a presumption has been the subject of debate and the source of confusion for a long time.³ One reason for the confusion is the existence of over 100 different presumptions.⁴ These have arisen from different policy considerations, and vary in their effect and legal importance. The language applied to presumptions has too often been loose and indiscriminate, resulting in doubt as to what a presumption really is. Attempts to classify and group presumptions have added more confusing terminology and definitions to the problem. However, the terms conclusive presumption and rebuttable presumption (of fact and of law) have become generally accepted as descriptive of broad categories of presumptions.

A presumption can be defined as a conclusion which the trier of fact is required to draw from certain other facts in the absence of evidence to the contrary.⁵ It is often spoken of in terms of "basic facts" which result in the assumption of the "presumed fact."⁶ Definition of the broad categories of presumptions might be helpful.⁷

Conclusive presumption: Once fact "A" (the basic fact) is proven, fact "B" (the presumed fact) must be taken as true, and the adversary is not allowed to dispute this conclusion.⁸ The result of the rule is that the

¹THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 (1898).

²Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937).

³See e.g., Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. OF PA. L. REV. 307 (1920); Gausewitz, *Presumptions in a One Rule World*, 5 VAND. L. REV. 324 (1952); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C. L. REV. 291 (1927); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

⁴Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

⁵For further definitions see MODEL CODE OF EVIDENCE rule 701; UNIFORM RULE OF EVIDENCE 13.

⁶Morgan, *Forward to MODEL CODE OF EVIDENCE* 52 (1942).

⁷For definitions of smaller classifications of presumptions see Morgan, *Id.* at 53; *The Procedural Effect of a Rebuttable Presumption of Law*, 23 U. PITT. L. REV. 685 (1962).

⁸9 WIGMORE, EVIDENCE § 2492 (3d ed. 1940).

existence of fact "B" has become legally immaterial,⁹ since no additional evidence can be introduced to dispute it. Conclusive presumptions are really rules of substantive law, rather than rules of evidence.¹⁰

Rebuttable presumption of fact: (Inferences) Once fact "A" is proven, the existence of the presumed fact "B" "may be inferred by the application of the rules of logic. This seems to mean that the segment of human experience with which the court is familiar convinces the court that when the basic fact exists there is a reasonable probability that the presumed fact also exists."¹¹

Rebuttable presumption of law: Once fact "A" is proven, the existence of fact "B" "must be assumed unless and until certain specified conditions are fulfilled. What these conditions are is the subject of conflicting decisions."¹² The presumption will be operative until satisfactorily rebutted.

Most authorities describe the rebuttable presumption of law as the only true presumption.¹³ Since 1898, when Thayer wrote *A Preliminary Treatise on Evidence at the Common Law*, there has been a great volume of scholarly writing about presumptions. Most of it has been addressed to the question of what effect is to be given to a rebuttable presumption in a court of law. This article will present a general discussion of the historical development of this effect and will then deal specifically with the law of Montana. Conclusive presumptions and presumptions of fact will not be considered.

II. HISTORY AND BACKGROUND

Presumptions were created by the law for many different reasons. The need for relaxing the quantum and quality of proof required by the common law was partly responsible for their creation.¹⁴ Other reasons commonly noted for the existence of presumptions are: "(1) procedural convenience, (2) to dissolve a legal impasse, (3) to satisfy a deep-rooted social need, (4) because experience demonstrated their inherent probability, (5) because the facts were within the peculiar knowledge of the opponent of the presumption."¹⁵ Whatever the reason for their creation, presumptions have had and continue to have an important effect on the burden of proof required in a trial. But just what this

⁹*Id.*

¹⁰*Higby v. Hooper*, 124 Mont. 331, 221, P.2d 1043, 1053 (1950); 23 U. PITT. L. REV. 685, 686 (1962).

¹¹*Morgan*, *supra* note 6.

¹²*Id.* at 53.

¹³*Wigmore*, *supra* note 8; *Bohlen*, *supra* note 3.

¹⁴*Bohlen*, *supra* note 3 at 314.

¹⁵*Subrin, Presumptions and Their Treatment Under the Law of Ohio*, 26 OHIO ST. L.

effect is remains in controversy. Is a presumption evidence? A substitute for evidence? What is its function with respect to the burden of producing evidence and the burden of persuading the trier of fact?

Most commentators discuss these problems with reference to Professor Thayer's writing on presumptions.¹⁶ This is certainly justified, since Thayer was the first writer of note to give serious consideration to the problem, and one of the most widely accepted views as to the effect of a presumption bears his name. Thayer's view of the effect of a presumption can best be explained in his own words.

If now, it be asked, what particular effect have rules of presumption in applying the law of evidence?, the answer seems to be that they have the same effect (and no other), which they have in all other regions of legal reasoning. . . . In the conduct, then, of an argument, or of evidence, they throw upon him against whom they operate the duty of meeting the imputation. Should nothing further be adduced, they may settle the question in a certain way, and so he who would not have it settled thus, must show cause. This appears to be the whole effect of a presumption. . . . There are, indeed, various rules of presumption which appear to do more than this, — to fix the amount of proof to be adduced, as well as the duty of adducing it. But in these cases also, the presumption, merely as such, goes no further than to call for proof of that which it negatives, i.e., for something which renders it probable. It does not specify how much; whether proof beyond a reasonable doubt or by a preponderance of all the evidence, or by any other measure of proof. . . .¹⁷

Under the Thayerian rule, the existence of a presumed fact must be assumed until evidence has been introduced which would support a finding that the presumed fact does not exist. The introduction of evidence is the crucial point; once this has occurred, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action. Whether the evidence supporting the non-existence of the presumed fact is believed or disbelieved by the judge or jury is irrelevant under this view.¹⁸ Thus, the only effect of the presumption is to shift the burden of going forward with the evidence to the party asserting the non-existence of the presumed fact.¹⁹

Professor Wigmore approved of Thayer's analysis,²⁰ and his influence has had much to do with the fact that the Thayer view is the prevailing rule in a majority of jurisdictions.²¹ Wigmore stated, "Nevertheless, it must be kept in mind that the peculiar effect of a presumption 'of law' . . . is merely to invoke a rule of law compelling the jury to reach the

¹⁶See e.g., articles cited *supra* notes 3 and 4; Gausewitz, *Presumptions*, 40 MINN. L. REV. 391 (1955).

¹⁷Thayer, *supra* note 1 at 336.

¹⁸Morgan, *supra* note 6 at 55.

¹⁹*Id.* at 55.

²⁰WIGMORE, *supra* note 8.

²¹See CAL. EVIDENCE CODE § 601, comment; Morgan, *Presumption*, 10 RUTGERS L. REV. 512, 516 (1956).

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 hand free from any rule."²²

The so-called "Pennsylvania"²³ rule gives a different interpretation of the effect of a presumption. The rule has been described by Morgan: "The existence of the presumed fact must be assumed unless and until the jury finds that the nonexistence of the presumed fact is more probable than its existence. In other words the presumption puts upon the party alleging the nonexistence of the presumed fact both the burden of producing evidence and the burden of persuasion of its nonexistence."²⁴ The Pennsylvania rule thus requires the opponent of the presumption to do more than would be necessary under the Thayer rule. Instead of just the introduction of some evidence, the opponent must produce evidence sufficient to persuade the trier of fact that the presumed fact does not exist.

Proponents of both the Thayer rule and the Pennsylvania rule clashed over which should be included in the American Law Institute *Model Code of Evidence*. The strict Thayer view was finally adopted in the Code,²⁵ promulgated in 1942. But this did not diminish the controversy between advocates of the two rules. The *Uniform Rules of Evidence*,²⁶ approved in 1953, contained this modification of the Thayer rule:

Rule 14. Effect of Presumptions. . . . (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 nonexistence 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 nonexistence 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.

Almost all the writers agree that a presumption is not evidence, but is a rule of law, a procedural device to govern the burden of persuasion and/or the burden of going forward with the evidence.²⁷ Most jurisdictions have adopted the basic premise of the Thayer-Wigmore view, holding that the presumption is effective to shift the burden of going forward with the evidence but that once the opposing party introduces

²²WIGMORE, *supra* note 8.

²³For a discussion of what the law is now in Pennsylvania, see 23 U. PITT. L. REV. 685, 696 (1962).

²⁴Morgan, *supra* note 6 at 57.

²⁵MODEL CODE OF EVIDENCE rule 704.

²⁶9A U.L.A. 602.

²⁷Thayer, *supra* note 1; WIGMORE, *supra* note 8; Bohlen, *supra* note 3; Morgan, *supra* note 3.

evidence, the presumption disappears as a rule of law.²⁸ However, although the presumption itself disappears, the probative facts upon which it was based still remain and are to be considered by the jury.²⁹

III. PRESUMPTIONS IN MONTANA

In contrast to the Thayer-Wigmore majority rule, Montana statutes expressly state that a presumption is evidence. In order to determine the effect of a presumption in Montana, an examination of the relevant statutes and the decisions construing them is necessary. These statutes were enacted in 1895 and are identical to the Oregon and California statutes then in effect.³⁰

Revised Codes of Montana, 1947.

93-1301-1. (10600) *Indirect evidence classified.* Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

93-1301-3. (10602) *Presumption defined.* A presumption is a deduction which the law expressly directs to be made from particular facts.

93-1301-5. (10604) *Presumptions may be controverted, when.* A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.

93-1301-7. (10606) *All other presumptions may be controverted.* All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: . . .

The following discussion of cases will illustrate how the Montana court has construed these statutes and developed its rule as to the effect of presumptions.

In 1914, in *Cooper v. Romney*,³¹ the court said that a presumption is a form of indirect evidence, and it is valid and effective until controverted by other evidence, direct or indirect. In subsequent cases, the court expanded on this statement, saying that a presumption did not disappear upon introduction of evidence to the contrary but rather a conflict was created in the evidence which the jury must decide. In

²⁸*Supra*, note 21.

²⁹*Supra*, note 26.

³⁰CAL. EVIDENCE CODE § 600, effective Jan. 1, 1967, repealed sections identical to the Montana statutes. California now says that a presumption is *not* evidence. Oregon statutes are still like those of Montana. ORE. REV. STAT. §§ 41.040, 41.080, 41.310.

³¹*Cooper v. Romney*, 49 Mont. 119, 141 P. 289 (1914).

Johnson v. Chicago, M. & St. P. Ry. Co.,³² appellant's contention was that ". . . having presented testimony tending to exonerate it from negligence, the presumption was overcome in the absence of a further showing by the respondent, and a verdict should have been directed accordingly. This is untenable. When a presumption of this character is confronted with testimony in the opposite direction, the result is a conflict of evidence which the jury must resolve."³³ In these early decisions,³⁴ the Montana court construed the statutes literally and treated the presumption as evidence. By holding that a case may go to the jury where on one side there is only the presumption and on the other side there is evidence contradicting the presumption, the court was in direct conflict with the Thayer-Wigmore doctrine.

The rule that a presumption alone would get the proponent to the jury was qualified in *Welch v. All Persons*.³⁵ The case involved the presumption that a man and a woman departing themselves as husband and wife have entered into a lawful contract of marriage. The evidence was heavily against the presumption. The court said that in cases where the controverting evidence was overwhelmingly against the presumption, the case would not go to the jury, but the presumption ". . . fades away in the face of contrary facts." In *Nichols v. New York Life Ins. Co.*,³⁷ the court relied on *Welch* and further defined the exception to the rule. There, the plaintiff was trying to recover from his wife's insurance company for her death under a policy which excluded coverage for suicide. All the evidence pointed to an intentional taking of strychnine. The lower court allowed the case to go to the jury on the basis of the presumption in favor of accident and against suicide where death is shown as the result of external and violent means. A verdict was returned for the plaintiff. The supreme court reversed, saying that defendant's motion for a directed verdict should have been granted. The question to be decided was "Does the presumption, when controverted by positive evidence, as here, make a sufficient case for the jury?"³⁸ The court answered no and went on to say, "The presumption against suicide must give way to evidence to the contrary where it all points to suicide as the cause of death with such certainty as to preclude any other reasonable hypothesis. And when the evidence points overwhelmingly to suicide as the cause of death, the question becomes one of law for the court and not a question to be submitted to the jury."³⁹

³²*Johnson v. Chicago, M. & St. P. Ry. Co.*, 52 Mont. 73, 155 P. 971 (1916).

³³*Id.*

³⁴See also *State v. Nielsen*, 57 Mont. 137, 187 P. 639 (1920).

³⁵*Welch v. All Persons*, 85 Mont. 114, 278 P. 110 (1929).

³⁶*Id.* at 115.

³⁷*Nichols v. New York Life Ins. Co.*, 88 Mont. 132, 292 P. 253 (1930).

³⁸*Id.* at 255.

³⁹*Id.* at 255; see also *Renland v. First National Bank of Grass Range*, 90 Mont. 424, 4 P.2d 488, (1931).

The exception recognized in *Nichols* was enlarged in *In re Wray's Estate*.⁴⁰ *Nichols* had required "overwhelming" evidence against a presumption before it could be overcome as a matter of law. *Wray* said that a disputable presumption is successfully controverted when proof to the contrary satisfactorily overcomes it, and held that a *preponderance* of the evidence was sufficient to overcome a presumption as a matter of law and keep the case from the jury.⁴¹ Justice Angstman, concurring in the result, recognized that the language of the majority was a departure from earlier decisions.

A presumption can not be overcome, as a matter of law, by what we believe to be a preponderance of the evidence controverting it. Ordinarily, when there is a presumption of a certain fact and positive evidence controverting it, an issue is made for the jury and when a case is tried to the court without a jury, an issue is made for the trial judge. It is only when the controverting facts are so overwhelmingly against the presumption that the question becomes one of law for the court.

The holding in the majority opinion that a presumption may be overcome as a matter of law by a preponderance of conflicting evidence is contrary to [citing Montana statutes] and the decisions in [citing cases], in each of which the evidence controverting the presumption was all one way; it was not even conflicting and it was still held to present a fact question for the jury.⁴²

The question of just when a directed verdict against the presumption was proper was considered in a case involving the presumption that a servant driving his master's automobile was doing so in the course of his employment. In *Ashley v. Safeway Stores, Inc.*,⁴³ "If the evidence tending to overcome the presumption that the automobile was being driven by the servant in the course of his employment is clear, convincing, and uncontradicted, and if only one inference can be drawn by reasonable men therefrom to the effect that the servant was not then engaged in the master's business within the scope of his employment, then this presumption is entirely overcome; it fades away, and a directed verdict is proper. (citing cases)."⁴⁴

In 1938, the United States Supreme Court decided *New York Life Ins. Co. v. Gamer*.⁴⁵ The case is significant because it originated in a Montana District Court and because the United States Supreme Court refused to apply Montana law on the effect of presumptions. The defendant had removed the case to Federal District Court on the basis of diversity of citizenship. It was an action to recover double indemnity for accidental death under a life insurance policy, in which the defendant alleged suicide on the part of the insured. There was evidence from which the

⁴⁰*In re Wray's Estate*, 93 Mont. 525, 19 P.2d 1051 (1933).

⁴¹*Id.* at 1054.

⁴²*Id.* at 1056.

⁴³*Ashley v. Safeway Stores, Inc.*, 100 Mont. 312, 47 P.2d 53 (1935).

⁴⁴*Id.* at 57; see also *In re Harper's Estate*, 98 Mont. 356, 40 P.2d 51 (1934); *Gagnon v. Jones*, 103 Mont. 365, 62 P.2d 683 (1936).

⁴⁵*New York Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938).

jury might have found either accidental death or suicide. Defendant moved for a directed verdict. The Court denied the motion and instructed the jury in part, "The presumption of law is that the death was not voluntary and the defendant . . . must overcome this presumption and satisfy the jury by a preponderance of the evidence, that his death was voluntary."⁴⁶ The jury found for the plaintiff and the Circuit Court of Appeals affirmed. The United States Supreme Court reversed, holding that the giving of the instruction was reversible error. The Court said that the question to be resolved was whether the insured died of an accident or by suicide. "The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence."⁴⁷ The Court clearly applied the Thayer-Wigmore doctrine of the effect of a presumption in saying that the presumption was not evidence and that it disappeared upon the introduction of evidence sufficient to sustain a finding that the death was not due to accident. Mr. Justice Black dissented⁴⁸ on the basis that the majority failed to apply Montana law and that under Montana law the instructions were proper. He relied primarily on the *Nichols* case to demonstrate the effect of a presumption under Montana law and to support his conclusion that the instruction was correct.

The Montana court was afforded the opportunity to consider the *Gamer* decision in 1942 in the case of *Lewis v. New York Life Ins. Co.*⁴⁹ The presumption involved was that in favor of accidental death and against suicide. The plaintiff was trying to recover on an insurance policy as in both *Nichols* and *Gamer*. The significance of the case is that, although reaching a different result on the merits, the court followed the rule of *Nichols* and earlier Montana decisions and expressly rejected the rule laid down in *Gamer* by the United States Supreme Court. In affirming the jury's finding for plaintiff, the court said that the evidence produced by the defendant did not preponderate against the presumption and thus the case was properly presented to the jury. In relation to the *Gamer* case, the court said:

Defendant urges us to adopt the view announced in the *Gamer* case to the effect "The presumption is not evidence and may not be given weight as evidence." This court has repeatedly and without exception held otherwise under sections 10600 and 10604, Revised Codes. It perhaps is not correct to speak of a presumption as evidence in spite of the provisions of section 10600 which class presumptions as

⁴⁶*Id.* at 167.

⁴⁷*Id.* at 171.

⁴⁸*Id.* at 172.

⁴⁹*Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 124 P.2d 579 (1942).

indirect evidence, in view of section 10602 which directly defines a presumption as a deduction which the law expressly directs to be made from particular facts. Yet that does not require any change in the rule long adhered to by this court that a presumption stands in the face of positive evidence to the contrary except in certain circumstances such as are found in [citing *Wray* and *Nichols*] and must be given weight in determining the fact question. Section 10604 provides that the presumption may be controverted by other evidence. If the presumption disappeared once evidence to the contrary appeared, there would be nothing for that evidence to controvert. Section 10604 clearly means that when positive evidence appears it stands on one side and the presumption on the other, and the trier of fact must weigh them both in determining the question. This court has adhered to this view throughout its history. The rule that the presumption stands even though controverted is not necessarily based on a theory that it is evidence itself, but upon the statutes. The legislature may define the effect of the presumption as it has and even though, strictly speaking, it is not itself evidence, there is no reason why the legislature cannot require that a proven fact out of which the presumption arises be given certain probative value which has the effect of evidence.⁵⁰

Since the decision in *Lewis*, the court has not departed from the rule announced there as to the effect of disputable presumptions.⁵¹

IV. CONCLUSION

The Montana statutes classify presumptions as evidence and the decisions construing and applying those statutes have firmly established that a presumption does have the effect of evidence in some instances. A disputable presumption in Montana, then, allows many cases to get to the jury which would result in a directed verdict under the Thayer-Wigmore doctrine. The presumption cannot be overcome by the mere introduction of contrary evidence. It goes to the jury with other evidence of the proponent of the presumption. If the proponent relies on the presumption alone, the jury, not the court, decides whether the presumption has been successfully controverted.

This is subject to the exception noted in *Nichols* and *Wray* that the court will grant a directed verdict against the presumption when the evidence clearly preponderates against the presumed fact. Thus the judge must make a decision in every case as to whether the evidence clearly preponderates against the presumption. If he decides that it does, he will grant a directed verdict. In such cases, the presumption cannot be said to be evidence, since evidence does not "disappear" or fade away upon the introduction of other evidence.

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⁵⁰*Id.* at 584.

⁵¹See e.g., *In re Sword's Estate*, 129 Mont. 165, 284 P.2d 674 (1955); *State Highway Commission v. Vost Farm Company*, 142 Mont. 239, 384 P.2d 277 (1963).

