Notes

PRESUMPTIONS UNDER ARIZONA LAW: DIVINING THE STANDARDS

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I. INTRODUCTION

Professor Edmund Morgan asserted that "[t]he 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 create."[1] This statement is as compelling today as it was in 1937. Professor John H. Wigmore, in his treatise on evidence, echoed Morgan's general theme:

> The whole situation is complicated, quite apart from any ambiguity of terms, by the operation of *presumptions* upon *specific fragments* of the issue under a single pleading, in combination with the established practice of leaving to the jury for a general verdict the whole of the issues under a pleading.[2]

Although there has been considerable scholarly discussion seeking to clarify the topic of presumptions,[3] there remains a conspicuous lack of consensus regarding their effect. In 1977, the drafters of the Arizona Rules of Evidence decided against adopting Federal Rule of Evidence 301[4] because of uncertainty about the procedural effect of the rule.[5] Thus, for the practitioner in Arizona, the confusion continues.

The purpose of this Note is to determine whether Arizona case law answers the question left unanswered by the Arizona Rules of Evidence: how will presumptions be treated in Arizona courts? The core of this debate focuses on the burden-shifting effects of presumptions.[6] The answer to this question

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1. Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. 255, 280 (1937).
2. 9 JOHN H. WIGMORE, EVIDENCE § 2490 (3d ed. 1940).
3. *See, e.g.*, MORRIS K. UDALL ET AL., ARIZONA LAW OF EVIDENCE, §§ 141–144 (1991); Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959); Judson F. Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940); Mason Ladd, *Presumptions in Civil Actions*, 1977 ARIZ. ST. L.J. 275; J. P. McBaine, *Presumptions: Are They Evidence?*, 26 CAL. L. REV. 519 (1938); Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).
4. Instead, we find the helpful phrase "[f]ederal rule not adopted." ARIZ. R. EVID. 301.
5. Charles L. Hardy, *History of Rules, General Provisions (Article I), Miscellaneous Rules (Article XI), and Judicial Notice (Article II)*, 1977 STATE BAR OF ARIZONA: THE NEW ARIZONA RULES OF EVIDENCE [hereinafter NEW ARIZONA RULES OF EVIDENCE].
6. *See* UDALL ET AL., *supra* note 3, § 143.

will guide trial attorneys in effectively rebutting presumptions, thus avoiding or obtaining directed verdicts[7] and summary judgments.[8]

This Note begins with a discussion of the presumption as a procedural device and an examination of the Thayer and Morgan theories of presumptions.[9] It then examines the role of the competing theories of presumptions in the adoption of Federal Rule of Evidence 301 and the non-adoption of Federal Rule 301 in Arizona.[10] Next, this Note attempts to determine the current standard in Arizona based on analysis of the relevant case law.[11] Finally, the Note proposes a rule governing the effect and treatment of presumptions for adoption in Arizona.[12]

II. THE COMPETING THEORIES OF PRESUMPTIONS

A. Presumptions as Procedural Devices

1. Presumptions Generally

The presumption is a procedural device which allows a party to prove a set of basic facts, and once such facts have been proven, the presumption works to establish the presumed fact.[13] As an illustration, suppose a plaintiff is attempting to prove fact *C*. A presumption from a relevant statute or case states that if the plaintiff proves facts *A* and *B*, fact *C* will be presumed. The party for whom the presumption operates, therefore, benefits from this rule of law which allows a particular fact to be established without really proving that fact at all.[14]

The rule allows a fact to be presumed because there is a probabilistic relationship between the basic fact and the presumed fact.[15] A common example of this is the Arizona presumption of death after an absence of five years.[16] Here, the initial burden of producing evidence is placed on the party for whom the presumption operates.[17] Once that party has shown absence for five consecutive years, the court will presume the death of the person in question.[18]

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7. *Id.*

8. *See* Steven David Smith, Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101 (1984).

9. *See infra* part II.

10. *See infra* part III.

11. *See infra* part IV.

12. *See infra* part V.

13. UDALL ET AL., *supra* note 3, § 141.

14. Some common Arizona presumptions include the presumption that property held jointly by a husband and wife is community property, the presumption of receipt following proper posting, and the presumption that a valuation as approved by the appropriate state or county authority is correct and lawful. For further discussion of specific Arizona presumptions, see UDALL ET AL., *supra* note 3, § 141.

15. Often, the presumed fact will be "based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact." 9 WIGMORE, *supra* note 2, § 2491.

16. ARIZ. REV. STAT. ANN. § 12–509(A) (1982) states: "A person absenting himself from the place of his last domicile for five years successively shall be presumed dead in any action wherein his death comes in question, unless proof is made that he was alive within that time."

17. JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 342 (4th ed. 1992) [hereinafter MCCORMICK].

18. *Id.* § 343.

The presumed fact of death is related to the basic facts through probability[19] and for other policy reasons.[20]

The principal effect of presumptions is clear: the party for whom the presumption works is relieved of having to actually prove the presumed fact itself, and thus is placed at a procedural advantage.[21] The procedural convenience of the presumption can be seen in the preceding example by the fact that no evidence which proves the fact of death is required. In the absence of the procedural advantage provided by the presumption, death would be extremely difficult, if not impossible, to prove. In Arizona, this procedural advantage extends to many fact situations ranging from the presumption of intoxication when blood alcohol level is greater than 0.10%,[22] to the presumption of negligence when a railroad car or engine kills an animal.[23]

It is important that the presumption be distinguished from the inference. Presumptions are closely related to inferences, but they differ in one important manner: inferences do not carry the legal effect of presumptions.[24] Consequently, presumptions can be thought of as inferences which are *legally* considered presumptions.[25] A presumption is a legal conclusion which arises from the relationship between a set of basic facts and some unproven fact.[26] Even without the legal effect of the presumption, the trier of fact may independently consider the relationship between the basic facts and the unproven fact at which they point. This probability based relationship is at the heart of the inference.[27]

2. The Rationale Underlying Presumptions

Not every basic fact/presumed fact relationship deserves to be accorded

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19. *See* Sheppard v. United States, 587 F. Supp. 1525 (D. Ariz. 1984) (Federal Tort Claims Act case holding evidence sufficient to warrant finding of death under ARIZ. REV. STAT. ANN. § 12–509(A)).

20. *See* discussion *infra* part II.A.2. The greatest policy reason for the presumption of death is procedural convenience. If the presumed fact could be proven with evidence, there would be no need for the presumption. Here, the difficulty of proving the presumed fact combined with the probability of its accuracy leads to the presumption. Morgan, *supra* note 3, at 925.

21. Ladd, *supra* note 3, at 279; *see also* UDALL ET AL., *supra* note 3, § 141.

22. ARIZ. REV. STAT. ANN. § 28–692(A)(1) (1992). *See also* Englehart v. Jeep Corp., 122 Ariz. 256, 259, 594 P.2d 510, 513 (1979) ("[T]he statutory presumption of intoxication arises from and gives meaning to the substantive evidence of blood alcohol"); Gibson v. Boyle, 139 Ariz. 512, 520, 679 P.2d 535, 543 (Ariz. Ct. App. 1983) ("A person with a blood alcohol level of .10% or greater is rebuttably presumed to be under the influence.").

23. Southern Pac. Co. v. Nelson, 20 Ariz. 344, 180 P. 987 (1919) (the killing of animals by the cars or engines of a railroad company is prima facie evidence of the negligence of such corporation). Other presumptions include the presumption of receipt following proper mailing procedures, ARIZ. REV. STAT. ANN. §§ 12–1597, 1598.17 (1992), and the presumption of due care. Englehart v. Jeep Corp., 122 Ariz. at 259, 594 P.2d at 513 ("The presumption of due care exists only in the absence of evidence."). *See also* Seiler v. Whiting, 52 Ariz. 542, 84 P.2d 452 (1938).

24. MCCORMICK, *supra* note 17, § 342.

25. 9 WIGMORE, *supra* note 2, § 2491.

26. *Id.*

27. Some authorities recognize a distinction between presumptions of law and presumptions of fact. A presumption of law is an inference which carries with it certain legal consequences, and a presumption of fact is merely an inference, to which no legal consequences attach. *Id.* The confusion created by this nomenclature is simplified by treating presumptions of law as presumptions and presumptions of fact as inferences. *Id.*

the weight of a presumption. Thus, certain basic facts are given special treatment while others are not. Professor Edmund Morgan, the author of many works on presumptions, described the characteristics that determine whether a particular set of facts will give rise to a presumption.[28] These include procedural convenience, access to evidence, probability, and social policy.[29]

(a) Procedural Convenience. Often, courts are faced with perplexing issues which are difficult, if not impossible to prove. In such a case, the presumption operates to require only a showing of the basic facts.[30] The perplexing fact is then presumed.[31] Consider the presumption of simultaneous death when two people die in a common accident.[32] Neither the parties nor the court have any way of knowing who died first, and in cases where survivorship is at issue, the presumption provides a convenient and uniform solution to the problem. There is no logical relationship between the basic fact that two people died in a common accident and the presumption that they died simultaneously.[33] The presumption allows the court to accept simultaneous death as a fact, which works to the plaintiff's advantage and allows the court to move on to other issues.[34]

(b) Superior Access to Evidence. In some cases, one of the parties has superior access to material evidence.[35] Here, presumptions favor the party without easy access to this evidence.[36] For example, imagine taking a package in good condition to a shipper for delivery to a third party.[37] While in transit, the package may be handled by a variety of shippers.[38] If, upon delivery, the package is damaged, it is difficult to ascertain which carrier is responsible for the damage.[39] There is a presumption, therefore, that the last shipper caused the damage.[40] These circumstances require the carrier to come forward with evidence because he or she has better access to the evidence. Unlike the consumer, the carrier has the opportunity to observe the package while it is en route, so the burden of producing evidence of care rests upon the carrier.[41]

(c) Probability. Many presumptions are the result of a probabilistic relationship between a set of basic facts and the presumed fact. The presumption of receipt of mail following proper posting[42] is an example. Modern experience

28. Morgan, *supra* note 3, at 924–31.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 924–25.
33. *Id.*
34. A presumption of simultaneous death works to the plaintiff's advantage especially in the area of wills and trusts where a simultaneous death clause will often prevent property from passing and being taxed. *See* WILLIAM J. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 10.5 (1988).
35. Consider the case where a private individual sues a railroad for negligence in operation of the locomotive. The railroad will have better access to its own policies, practices and regulations as well as much physical evidence. A presumption of negligence given certain basic facts will protect the individual that lacks access to the evidence while encouraging the railroad to investigate internally.
36. Morgan, *supra* note 3, at 927.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 926–27.
42. *See supra* note 23.

with the postal service shows that a properly mailed letter rarely does not arrive at its destination.[43] Because of this high probability, receipt is presumed.[44]

(d) Social Policy.[45] Presumptions based upon social policy arise because the presumed fact is difficult to prove, probable, and socially desirable.[46] The presumption that a child born during marriage is the child of that marriage,[47] for example, is based on both probability and social desirability.[48] Here, social benefit is conveyed to the child through the presumption.[49]

In practice, many presumptions will be based upon two or more of the preceding factors.[50] The factors underlying a particular presumption are important in order to determine what the burden shifting effects of that presumption are.[51] By examining the reasons for the existence of a presumption, it should be relatively easy to classify presumptions. The problem arises in classification of the reasons underlying a given presumption.[52] One suggestion calls for every presumption to be classified according to its underlying bases and weighted accordingly.[53] This system, while being extremely unwieldy, could provide a method grounded on the basis for the presumption rather than a purely mechanical rule.[54]

The distinction between a purely mechanical rule and a system which takes other factors into consideration is central to the historical debate surrounding the burden shifting effects of presumptions. The two sides of the debate were championed, respectively, by James B. Thayer and Edmund M. Morgan. Today, we generally refer to the two camps as "Thayer-Wigmore" and "Morgan-McCormick",[55] for their principal proponents. An examination of the competing theories is indispensable for a full understanding of the presumption and of the evolution of Federal Rule of Evidence 301.

B. Theory of Presumptions

1. Thayer's Theory

James B. Thayer, a professor of law at Harvard University, proposed one

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43. MCCORMICK, *supra* note 17, § 343.
44. *See* Ladd, *supra* note 3, at 280.
45. "There are but few presumptions which are invented for the sole purpose of reaching what the courts deem a socially desirable result." Morgan, *supra* note 3, at 930.
46. *Id.*
47. Ladd, *supra* note 3, at 281.
48. *Id.*
49. *Id.*
50. Morgan, *supra* note 3, at 930. Note that the presumption that a child born during marriage is legitimate is based on both a social policy ground and a probability ground. It may be this factor which leads some courts to treat the presumption as nearly conclusive. Ladd, *supra* note 3, at 281.
51. Morgan, *supra* note 3, at 931.
52. Professor Morgan suggested that much of the confusion surrounding presumptions could be solved if all presumptions were given varying degrees of weight based on the reasons for their existence. *Id.* at 931.
53. *Id.* at 931–32.
54. Professor Morgan suggested that such a system would "substitute a rational for a mechanistic approach to every problem presented by presumptions." *Id.* at 933.
55. 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §5100 (1977).

of the two theories that created the controversy about the effect of presumptions.[56] Thayer's theory, known as the "bursting bubble" theory, argues that the presumption vanishes in the face of conflicting evidence.[57] Under this theory, the presumption operates to shift the burden of going forward with evidence.[58] This burden is the burden of producing evidence, which requires that a party produce evidence to support each element of a prima facie case.[59] If such evidence is not produced, the judge will resolve the matter through a directed verdict.[60] The party against whom the presumption operates must then produce evidence which would tend to contradict the presumed fact.[61] Upon this showing, the presumption vanishes from the case,[62] and the presumption "bubble" bursts.

An example of this paradigm is the presumption of death after a seven year absence without communications or explanation.[63] Once the proponent has produced evidence showing absence of X for seven years, the presumption takes effect, and X is presumed dead.[64] The opponent may then offer evidence showing that, prior to his departure, X stated his purpose to remain away for ten years. The presumption then vanishes, and the jury will consider only the facts as presented by each side.[65] The jury is free to weigh the evidence of absence for seven years as well as the evidence of an intention to remain away for ten years, and the court will not give any special instructions about the presumption.[66]

Thayer's theory is criticized as being an overly simplistic solution to the complex problem of presumptions.[67] Of Thayer's theory, Morgan said "Mr. Thayer's attempt to clarify [the rules regarding presumptions] was almost completely futile; and, in my opinion, has served only to furnish a formula which many courts have verbally adopted, few have understood, and fewer still have actually applied."[68] This attitude can be seen in the contrast between Thayer's and Morgan's theory, which is discussed in the next section.

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56. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336–343 (Boston, Little, Brown and Co. 1898).

57. Thayer's theory has been described in many ways: "'[p]resumptions' ... 'may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts,'" Mackowik v. Kansas City, St. J. & C. B. R. Co., 94 S.W. 256, 262 (Mo. 1906); "[t]he presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose," Peters v. Lohr, 124 N.W. 853, 855 (S.D. 1910).

58. Thayer says of shifting the burden of going forward with evidence: "This last, and this alone, appears to be characteristic and essential work of the presumption." THAYER, *supra* note 56, at 337.

59. MCCORMICK, *supra* note 17, § 342.

60. The burden of production should not be confused with the burden of persuasion, which is the ultimate responsibility of convincing the trier of fact that the essential elements of the claim exist. *Id.* § 336.

61. THAYER, *supra* note 56, at 336.

62. *Id.*

63. MCCORMICK, *supra* note 17, § 343.

64. *Id.*

65. Professor Wigmore followed the view of Thayer: "[i]f the opponent does offer evidence to the contrary, the presumption disappears as a rule of law." 9 WIGMORE, *supra* note 2, § 2491.

66. MCCORMICK, *supra* note 17, § 344(A).

67. Morgan, *supra* note 1, at 277–78.

68. *Id.* at 277.

2. Morgan's Theory

Professor Edmund Morgan championed the other theory which has produced the debate. Morgan's criticism of Thayer's theory centered on what he felt was an "attempt[] to furnish a simple, theoretical solution to a complicated problem by the naive device of ignoring the complications."[69] Professor Morgan felt that a rule which failed to account for the rationales underlying presumptions, including procedural convenience, superior access to evidence, probability, and social policy, was inadequate.[70] Because the reasons behind two different presumptions might differ greatly, these presumptions should not always have the same procedural effect.[71]

Professor Morgan first suggested that the trial judge be charged with the task of determining the policies underlying the creation of any specific presumption and then assigning to each classification of presumptions a different procedural effect.[72] Because these rules would have to be applied quickly during a trial, Professor Morgan noted that this solution was impractical.[73] As a solution to this dilemma, Professor Morgan urged adoption of a rule which would shift both the burden of proof and the burden of persuasion to the party opposing the presumption.[74]

Professor Morgan recognized that his suggestion could be criticized for being as arbitrary as Thayer's,[75] but he felt that the practical result of his approach would be a simplification of the confusion surrounding presumptions.[76] Under Morgan's theory, the presumption would never be mentioned to the jury because they would be charged with weighing the conflicting evidence.[77] Furthermore, the trial judge could easily apply Morgan's rule.[78] The judge merely determines whether the opponent of the presumption has produced sufficient evidence to avoid a directed verdict.[79] If so, the case is sent to the jury for consideration.[80]

Morgan criticized Thayer's theory because any evidence, credible or not, that the opponent produces will completely destroy the presumption and will shift the burden of producing evidence back to the party who initially had this burden.[81] In such a situation, the plaintiff who is relying upon a presumption as an element of a prima facie case and can prove only the basic facts will

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69. *Id.* at 277–78.
70. *See supra* section II.A.2.
71. Morgan said that in such a case, "to give these presumptions precisely the same procedural effect would call for extended explanation." Morgan, *supra* note 1, at 278.
72. Morgan, *supra* note 3, at 931–32.
73. Morgan, *supra* note 1, at 280. The same conclusion was reached about the idea of attempting to codify every presumption in statutes with their resulting effect. *Id.*
74. *Id.* at 281.
75. Morgan, *supra* note 3, at 932.
76. *Id.*
77. Morgan, *supra* note 1, at 281.
78. *Id.* at 280.
79. A motion for directed verdict is made at the close of the evidence. In determining whether a party has produced sufficient evidence to avoid a directed verdict, the judge considers the evidence produced and asks whether there is an issue of fact for the jury. If the motion for directed verdict is granted, the judge will enter judgment for the moving party. JACK H. FRIEDENTHAL ET. AL, CIVIL PROCEDURE § 12.3 (1985). This is a familiar task to the trial judge, so the burden would be minimal.
80. MCCORMICK, *supra* note 17, § 344(B).
81. Morgan, *supra* note 3, at 913.

suffer a directed verdict when the defendant produces any evidence which contradicts the presumed fact.[82]

As previously noted,[83] many of the facts which are presumed are difficult, if not impossible to prove. In *McIver v. Schwartz*,[84] the plaintiff's property was damaged by a car concededly owned by the defendant and operated by the defendant's employee.[85] These basic facts raised a presumption that the employee was operating the vehicle with the permission of the employer and that such operation was within the scope of the employee's duties.[86] Under such circumstances, the defendant is liable under the doctrine of agency.[87] The defendant alone testified as to the lack of agency.[88] Both the trial judge and the jury admittedly did not believe the testimony of the defendant.[89] The plaintiff could produce no further evidence supporting the claim but the trial judge allowed the case to go to the jury.[90] The defendant, applying Thayer's theory, noted that without the presumption the plaintiff lacked a prima facie case and should have suffered a directed verdict, but the trial court refused to set aside a verdict for the plaintiff.[91] The Rhode Island Supreme Court reversed the trial court ruling and granted an order setting aside the verdict.[92] Morgan's concern, aptly illustrated here, is that such a rule ignores the reasons for creation of the presumption in the first place.[93]

These competing theories present the background against which the drafters of the Federal Rules of Evidence began the task of creating a uniform set of evidentiary rules. Consideration of both the Thayer and Morgan theories led to disagreements among the drafters, the courts, and the congress.[94] This controversy and the result it created are examined in the next section.[95]

III. FEDERAL RULE OF EVIDENCE 301 AND THE ADOPTION OF ARIZONA RULE OF EVIDENCE 301

A. Definition and Scope

In 1975 the Supreme Court promulgated Federal Rule of Evidence (FRE) 301.[96] The rule currently reads as follows:

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

82. *Id.*
83. *See supra* part A.1.
84. 145 A. 101 (R.I. 1929).
85. *Id.* at 102.
86. *Id.*
87. *Id. See also* RESTATEMENT (SECOND) OF AGENCY §§ 219, 243, 244 (1957).
88. McIver v. Schwartz, 145 A. at 102.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* Of this decision, Professor Morgan stated "[s]uch a ruling makes the presumption a naked procedural device, available to the judge alone." Morgan, *supra* note 3, at 913.
93. However, the problem presented by the *McIver* fact pattern does not arise very often, and this fact has led to criticism of Professor Morgan's theory.
94. *See infra* part III.A.
95. *See infra* part III.B.
96. This section is entitled "Presumptions in General in Civil Actions and Proceedings."

> proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[97]

This version apparently repudiates Professor Morgan's theory that the presumption should work to shift the burden of persuasion.[98] Although the language of the rule suggests that the drafters adopted Professor Thayer's "bursting bubble" theory,[99] the rule actually adopts a portion of Thayer's theory while recognizing the concerns of Professor Morgan.[100] Different readings of the rule will produce different procedural results.

A broad reading of FRE 301 suggests that in cases where the party against whom the presumption operates produces no evidence to contradict the presumed fact, the judge should instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact.[101] In cases where the party against whom the presumption operates offers some evidence that tends to contradict the presumed fact, "the court cannot instruct the jury that it may presume the presumed fact ... but the court may instruct the jury that it may infer the existence of the presumed fact from the basic facts."[102]

While reading FRE 301 narrowly, it is still possible that the presumption, although it has spent its force, can still have an effect.[103] In such an instance, the court can point out the underlying probative value of the basic facts through a discussion of inferences.[104] Under this narrow reading of FRE 301, Thayer's "bursting bubble" theory is not fully applicable, because the presumption does not vanish from the case, but remains as an inference that the presumed fact exists.[105]

B. Evolution of FRE 301: The Debate Rages

In its original form, FRE 301 was significantly different from its present form.[106] The Supreme Court adopted Professor Morgan's formulation of the rule, giving presumptions "the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it."[107] The

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97. FED. R. EVID. 301.

98. The rule is said "to have a distinct Thayerian flavor." MCCORMICK, *supra* note 17, § 344(B).

99. A narrow reading of FRE 301 suggests that the pure "bursting bubble" theory was adopted and controls.

100. The major concern of Professor Morgan was that the plaintiff relying on the presumption for an element of the prima facie case should not face a directed verdict when the jury does not believe the contradictory testimony. *See supra* part II.C.

101. 12 FED. PROC., L. ED. § 33:95 (1988) [hereinafter FEDERAL PROCEDURE].

102. *Id.* (Citing Conference Committee Report No. 93–1597, at 5–6). Note that the court must instruct the jury that it *may* infer the presumed fact, and that such inference may not be conclusive. *Id.* This broad interpretation of FRE 301 demonstrates that Thayer's theory laid the groundwork for the rule, but was not adopted in its entirety.

103. *Id.*

104. David W. Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, 309 (1977).

105. FEDERAL PROCEDURE, *supra* note 101, § 33:95.

106. The rule, as proposed, reads as follows: "In all cases not otherwise provided for by act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." PROPOSED FED. R. EVID. at 48 (Callaghan 1974).

107. *Rules of Evidence For United States Courts and Magistrates*, FED. R. EVID. SERV. (Callaghan 1987).

Notes of the Advisory Committee indicate that the Supreme Court intended that this rule be construed as a pure-Morgan rule: "[t]he so called 'bursting bubble' theory... is rejected as according presumptions too 'slight and evanescent' an effect."[108]

From the Supreme Court, FRE 301 traveled to the House of Representatives.[109] The House did not adopt the Supreme Court formulation, but rather adopted a rule which shifted only the burden of going forward with the evidence.[110] However, the House went a step further and gave presumptions the weight of evidence.[111] When the party opposing the presumption presents evidence which tends to contradict the presumed fact, the presumption itself is sufficient evidence of the presumed fact, and therefore it should be weighed by the trier of fact with all of the other evidence.[112] The jury could consider the presumption and weigh it against the evidence which contradicts it.[113]

The Senate rejected this amendment because it overestimated the value of the presumption by affording the presumption the weight of evidence.[114] The Senate cited several reasons for the decision, including a committee statement:[115] "Presumptions are not evidence, but ways of dealing with evidence."[116] A second factor was California's treatment of a similar rule regarding presumptions, which drew much criticism in *Speck v. Sarver*,[117] where a dissenting judge pointed out the difficulty of considering the presumption as evidence:

> The burden of proof may well be impossible for a litigant to sustain if a presumption is applied as evidence against him. He must ... establish the existence of certain facts by a preponderance of the probabilities, while a presumption persists that these facts do not exist ... despite physical evidence that they do.[118]

The rule was finally repealed in California after 93 years.[119]

In the United States Senate amendment to rule 301, the presumption shifts only the burden of going forward with the evidence to the party attempting to rebut the presumption.[120] If the opposing party does produce evidence suffi-

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108. *Notes of Advisory Committee*, Fed. Proc. R. Serv., Fed. R. Evid. 301 at 895 (1993) (citing Edmund M. Morgan and John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937)).

109. Fed. R. Evid. Serv., *supra* note 107, at Art. III–1.

110. The House proposal reads:

> [i]n all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of facts.

HR 5463, PROPOSED FED. R. EVID. at 186 (Callaghan 1974).

111. *Id.*

112. *Id.*

113. *Id.*

114. Fed. R. Evid. Serv., *supra* note 107, at Art. III–1,2.

115. This statement was made by the Standing Committee on Practice and Procedure of the Judicial Conference in association with the Committee on the Rules of Evidence.

116. *Hearings Before the Committee on the Judiciary*, United States Senate, H.R. 5463, p.56.

117. 128 P.2d 16 (1942) (Traynor, J., dissenting).

118. *Id.* at 21.

119. CAL. EVID. CODE § 600 (West 1965).

120. *See supra* note 58 and accompanying text.

cient to meet this burden, the court cannot instruct the jury that it may *presume* the existence of the presumed facts, but it may instruct the jury that it may *infer* the presumed fact from proof of the basic facts.[121] This version was adopted and controls today.[122]

C. Arizona Rule of Evidence 301

Approximately 24 states[123] adopted rules that appear to be based on or are similar to either the original Supreme Court promulgation of FRE 301 or the final version of FRE 301.[124] Arizona, however, adopted neither. In 1977, when Arizona was considering adoption of the Federal Rules of Evidence, the Arizona drafters seemed confused by the debate about the proper treatment of presumptions.[125] According to one commentator, the federal rule was not adopted because it was unclear to the drafters what the application of the rule was after the party opposing the presumption had met the burden of going forward.[126] As a result of the absence of a presumption rule in Arizona, the practitioner must wade through volumes of inconsistent case law to determine how the Arizona courts will treat the presumption.

IV. THE ARIZONA STANDARD IN THE ABSENCE OF FEDERAL RULE OF EVIDENCE 301

A. Statutory and Non-Statutory Presumptions

The case law relied upon by the drafters when they decided not to adopt FRE 301 is far from clear.[127] Apparently, courts were having the same problem dealing with presumptions that the drafters of the Arizona Rules of Evidence encountered.[128] For several years, the Arizona courts distinguished between two types of presumptions: statutory presumptions and non-statutory presumptions.[129] The dichotomy developed as a result of the theory that when the legislature declared a presumption, it was somehow more important than a presumption that had simply developed through the processes of the common law.[130]

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121. *Id.*
122. The rule was adopted January 2, 1975.
123. These States include Alaska, Arkansas, Colorado, Delaware, Idaho, Maine, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, South Dakota, West Virginia, Wyoming, Hawaii, Iowa, Montana, North Carolina, Oregon, Utah, Vermont.
124. FEDERAL PROCEDURE, *supra* note 101, § 33:96.
125. NEW ARIZONA RULES OF EVIDENCE, *supra* note 5.
126. *Id.*
127. *See e.g.*, Seiler v. Whiting, 52 Ariz. 542, 84 P.2d 452 (1938); Southern Pacific Co. v. Nelson, 20 Ariz. 344, 180 P. 987 (1919); Arizona Corp. Comm'n v. Reliable Transp. Co., 86 Ariz. 363, 346 P.2d 1091 (1960).
128. This difficulty is reflected in the language of the Arizona Supreme Court: "[t]here has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law and presumptions of fact, of conclusive presumptions and disputable presumptions." Seiler v. Whiting, 52 Ariz. 542, 548, 84 P.2d 452, 454 (1938).
129. *See, e.g.*, Flores v. Tucson Gas, Elec. Light & Power Co., 54 Ariz. 460, 97 P.2d 206 (1939).
130. "The principles of the Silva case to the effect that a mere presumption disappears in the face of rebutting evidence has no application when the legislature has directed that establishment of one fact is prima facie evidence of another fact." Mitchell v. Emblade, 81 Ariz.

A statutory presumption, therefore, was considered to carry more weight than a non-statutory presumption.[131] As a result, cases held that a statutory presumption would not vanish in the face of contradictory evidence, but would become a question for the trier of fact.[132]

In contrast, non-statutory or common law presumptions were treated like "bursting bubble" presumptions, and vanished in the face of contradictory evidence.[133] This dichotomy ignores the underlying bases for presumptions and substitutes the idea that the legislative codification makes certain presumed facts more conclusive than other presumed facts.

1. Statutory Presumptions: An Example

The dichotomy between statutory and non-statutory presumptions in Arizona can be traced back to the creation of the State. In *Southern Pacific Co. v. Nelson*,[134] a case which involved the killing of cattle by a train engine, the plaintiff relied upon a statute which made the killing of animals by the engines or cars of railroads prima facie evidence of negligence on the part of the railroad.[135] The defendant claimed that once he produced evidence which tended to exonerate the railroad company from the charge of negligence, the presumption had spent its force, and without further evidence of negligence, a directed verdict was required.[136] The trial court disagreed, as did the Arizona Supreme Court on appeal, saying "[t]his statute changes the common-law rules as to the burden of proof."[137] The defendant railroad company was required to "show that it was not negligent, and, where the company introduces evidence to rebut the presumption, an issue of fact arises which should be submitted to the jury."[138] The court indicated that because the legislature changed the common law rules, the presumption should carry the additional weight of evidence.[139] Where the legislature has given the presumption a specific effect, the bursting bubble theory was considered rejected.[140]

In *Flores v. Tucson Gas, Electric Light & Power Co.*,[141] the court relied

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121, 123, 301 P.2d.1032, 1033 (1956).

131. *See* Englehart v. Jeep Corp., 122 Ariz. 256, 594 P.2d 510 (1979) (statutory presumption of intoxication gives meaning to the substantive evidence of blood alcohol); Arizona Corp. Comm'n v. Reliable Transp. Co., 86 Ariz. 363, 346 P.2d 1091 (1960) (legislative declaration that one fact is prima facie evidence of another fact is entitled to greater weight); Mitchell v. Emblade, 81 Ariz. 121, 301 P.2d 1032 (1956) (presumption does not disappear when mandated by the legislature); Flores v. Tucson Gas, Elec. Light & Power Co., 54 Ariz. 460, 97 P.2d 206 (1939) (legislature has power to make certain facts prima facie evidence of another fact).

132. Mitchell v. Emblade, 81 Ariz. at 123, 301 P.2d at 1033.

133. *See* Silva v. Traver, 63 Ariz. 364, 162 P.2d 615 (1945).

134. 20 Ariz. 344, 180 P. 987 (1919).

135. *Id.* at 345, 180 P. at 987.

136. *Id.* at 345, 180 P. at 988.

137. *Id.* at 346, 180 P. at 988.

138. *Id.*

139. *Id.*

140. "The principles ... to the effect that a mere presumption disappears in the face of rebutting evidence has no application when the legislature has directed that establishment of one fact is prima facie evidence of another fact." Mitchell v. Emblade, 81 Ariz. 121, 122, 301 P.2d 1032, 1033 (1956).

141. 54 Ariz. 460, 97 P.2d 206 (1939). This case arose when the estate of the decedent brought a negligence claim against defendant, alleging that decedent was killed through the negligence of the defendant's agent.

on the same reasoning and held that the presumption of agency was not a statutory presumption.[142] Because the court held that the presumption was merely a common law presumption, it vanished in the face of contradictory evidence.[143]

This distinction between statutory presumptions and non-statutory presumptions is not always clear. The most often cited statutory presumption is that of intoxication.[144] This presumption provides a stronger basis for holding that the presumption should be accorded greater weight:

> The statutory presumption of intoxication ... is of a different nature. Unlike the presumption of due care, which is really a substitute for actual evidence, the statutory presumption of intoxication arises from and gives meaning to the substantive evidence of blood-alcohol. While it can be rebutted, this statutory presumption does not vanish with presentation of evidence to the contrary.[145]

It is this relation to the substantive evidence of blood alcohol level which persuades the courts to treat this presumption differently.[146]

Because this presumption does not disappear when contrary evidence is introduced, the jury may consider it.[147] It would be possible to present evidence which tended to show that the defendant was not intoxicated immediately preceding the incident such that the jury could conclude that the defendant was not, in fact, intoxicated.[148] However, the presumption of intoxication remains as some evidence and the jury will be instructed to consider it.[149]

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142. The court recognized the dichotomy, however. "There can be no doubt that the legislature has the power to make certain facts *prima facie* evidence of another fact .... In such a case it may well be held that a conflict in the evidence exists which takes the case to the jury." *Id.* at 465, 97 P.2d at 208. Arizona Corp. Comm'n v. Reliable Transp. Co., 86 Ariz. 363, 346 P.2d 1091 (1959) reaffirmed the dichotomy. The case involved orders of the corporation commission granting contract motor carrier permits. There, the court said "this Court has held that a legislative declaration that establishment of one fact is prima facie evidence of another fact is entitled to greater weight than the ordinary presumption arising out of common law rules of evidence." *Id.* at 374, 346 P.2d at 1098. *See also* Gaethje v. Gaethje, 7 Ariz. App. 544, 441 P.2d 579 (1968).

143. *Flores* at 464, 97 P.2d at 208.

144. The presumption of intoxication is created by Ariz. Rev. Stat. § 28–692(E)(3) (1992), which reads: "If there was at that time 0.10 or more alcohol concentration in the defendant's blood, breath or other bodily substance, it may be presumed that the defendant was under the influence of intoxicating liquor." *Id.* "This statutory presumption can be rebutted, but it does not vanish with presentation of evidence to the contrary." CIVIL JURY INSTRUCTIONS COMMITTEE, STATE BAR OF ARIZONA, RECOMMENDED ARIZONA JURY INSTRUCTIONS (CIVIL) 2D 40 (1991) [hereinafter RAJI (CIVIL) 2D].

145. Englehart v. Jeep Corp., 122 Ariz. 256, 259, 594 P.2d 510, 513 (1979).

146. *Id.*

147. In doing so, "the jury could consider 'other evidence' presented ... to overcome the statutory presumption of impairment." Gibson v. Boyle, 139 Ariz. 512, 520, 679 P.2d 535, 543, (Ariz. Ct. App. 1983).

148. *Id.*

149. RAJI (CIVIL) 2D, *supra* note 144, provides:

> (1) If a driver had a blood alcohol concentration of 0.05 percent or less at the time of driving, it may be presumed that he or she was not under the influence of alcohol.
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> (2) If a driver had a blood alcohol concentration of more than 0.05 percent but less than 0.10 percent at the time of driving, there is no presumption that he or she was or was not under the influence of alcohol.
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> (3) If a driver had a blood alcohol concentration of 0.10 percent or more at the time of driving, it may be presumed that he or she was under the influence of alcohol.
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> In deciding whether a person was under the influence of alcohol at the time of

2. Non-Statutory Presumptions: An Example

Another line of cases held that Arizona law did not recognize any dichotomy.[150] These cases declared that no matter what the source of the presumption—statute or common law—the result was always the same.[151] The presumption itself is not evidence, but merely "an arbitrary rule imposed by the law, to be applied in the absence of evidence, and whenever evidence contradicting the presumption is offered the [presumption] disappears entirely."[152]

State Tax Commission v. Phelps Dodge Corp.[153] reflects this view of presumptions. Here, the Phelps Dodge Corporation challenged a tax valuation prepared by the State Tax Commission and others.[154] The presumption arose because a statutory provision[155] said that the assessment of the Tax Commission is presumed to be correct and lawful.[156] The Arizona Supreme Court held that the presumption had been sufficiently rebutted by the evidence presented by Phelps Dodge.[157] The court noted that "[t]he presumption, although declared by statute, is one of fact, and may be rebutted and overcome by evidence."[158] The repudiation of the statutory/non-statutory distinction continued: "[a] presumption so declared by law is raised only in the absence of evidence on the ultimate fact in question."[159]

This issue was further complicated by the case of *Silva v. Traver.*[160] The Arizona Supreme Court declared that the standard for presumptions is a modified Thayer approach.[161] That case dealt with the presumption of agency, and the court held that presumptions disappear entirely in the face of contradictory evidence,[162] subject to one caveat. The court recognized that there may be cases where the basic facts create a logical inference as to the fact presumed.[163] Thus, although the presumption has disappeared, the court may still discuss it with the jury.[164]

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driving, you should consider all the evidence.

150. *See* Seiler v. Whiting et al., 52 Ariz. 542, 84 P.2d 452 (1938); State Tax Comm'n et al. v. Phelps Dodge Corp., 62 Ariz. 320, 157 P.2d 693 (1945); Silva v. Traver, 63 Ariz. 364, 162 P.2d 615 (1945); Graham County v. Graham County Elec. Coop., Inc., 109 Ariz. 468, 512 P.2d 11 (1973); Sheehan v. Pima County, 135 Ariz. 235, 660 P.2d 486 (Ariz. Ct. App. 1982).

151. "In truth there is but one type of presumption in the strict legal meaning of the word, and that is merely a general rule of law that under some circumstances, *in the absence of any evidence to the contrary*, a jury is compelled to reach a certain conclusion of fact." *Seiler* at 548, 84 P.2d at 454.

152. *Id.* at 548, 84 P.2d at 454–55.

153. 62 Ariz. 320, 157 P.2d 693 (1945).

154. *Id.*

155. ARIZ. CODE ANN. § 73–110 (1939).

156. *Id.*

157. *State Tax Comm'n* at 330, 157 P.2d at 697.

158. *Id.*

159. *Id.*

160. 63 Ariz. 364, 162 P.2d 615 (1945).

161. *Id.* at 372, 162 P.2d at 619.

162. *Id.* at 368–73, 162 P.2d at 617–619.

163. *Id.* at 373, 162 P.2d at 619.

164. The court purported to have been applying this rule all along. "Although we have, perhaps, not declared it so explicitly, this is the rule which we have heretofore applied in this court." *Id.* at 370, 162 P.2d at 618.

B. State v. Grilz: A Rejection of the Dichotomy

In a 1983 case, *State v. Grilz*,[165] the Arizona Supreme Court attempted to clarify the status of presumptions. The question of presumptions arose out of a jury instruction.[166] The trial judge gave an instruction to the jury in which the presumption of sanity was discussed.[167] The defendant claimed that to mention the presumption of sanity was fundamental error because he had put on evidence which rebutted it, and therefore it vanished.[168] In rejecting any distinction in the effect of statutory and non-statutory presumptions, the court held that the instruction about the presumption of sanity was not fundamental error.[169] The court further held that "the presumption of sanity, whether statutory or not, vanishes once the accused presents sufficient[170] evidence to raise a reasonable doubt as to sanity."[171] When this occurs, the presumption should not be mentioned in jury instructions.[172]

The court reinforced its rejection of any distinction between statutory and non-statutory presumptions in a lengthy footnote.[173] Recognizing that there were two inconsistent lines of cases, the court held:

> We believe that *State Tax Commission v. Phelps Dodge Corp.* ... is better reasoned. When the party against whom the statutory presumption operates has met the burden of production or proof imposed by the presumption then "the presumption has spent its force and has served its purpose, and the party in whose behalf it has theretofore operated must meet the opponent's ... case *with evidence and not with presumptions.*"[174]

This language suggests that the court is adopting a pure-Thayer scheme for presumptions; however, there is further language that indicates a modified Thayer approach:

> In some cases, the basic facts that bring the presumption into effect are themselves relevant in that they tend to establish the existence of the presumed fact independent of the presumption. Though the presumption still vanishes in such cases, the proof of the basic facts remain for the trier of fact to evaluate.[175]

This holding makes clear that the court intends that all presumptions are to be treated in the same manner, regardless of their source.[176] Once the oppo-

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165. 136 Ariz. 450, 666 P.2d 1059 (1983). This was a criminal case where the defendant had been convicted of one count of first degree murder and one count of second degree murder.

166. *Id.* at 454, 666 P.2d at 1063.

167. *Id.* The jury was instructed: "The defendant is presumed to have been sane at the time the offense was committed. Once sufficient evidence has been presented to raise the question of the defendant's sanity at the time of the offense, the state must prove beyond a reasonable doubt that the defendant was sane." *Id.*

168. *Id.*

169. *Id.* at 456, 666 P.2d at 1065.

170. In requiring "sufficient" evidence to overcome the presumption, the court is referring to meeting the burden of producing evidence, which requires producing such evidence that "a reasonable person could draw from it the inference of the [non-] existence of the particular fact." MCCORMICK, *supra* note 17, § 338.

171. *Grilz* at 455, 666 P.2d at 1064.

172. *Id.* at 456, 666 P.2d at 1065.

173. *Id.* at 456, n.3, 666 P.2d at 1065 n.3.

174. *Id.* (quoting State Tax Comm'n v. Phelps Dodge Corp., 62 Ariz. 320, 330, 157 P.2d 693, 697).

175. *Id.*

176. While the court is attempting to decide between two lines of cases, note that the

nent of the presumption has met the burden imposed by the presumption, the presumption will vanish and not be mentioned.[177] In situations where the basic facts alone serve as circumstantial evidence of the existence of the presumed fact, the judge may be allowed to discuss the presumption with the jury as an inference or a probability.[178]

There is one unusual aspect of the decision to adopt the *State Tax Commission v. Phelps Dodge Corp.* standard. *State v. Grilz* is a criminal case dealing with the presumption of sanity.[179] The standard adopted, however, comes from a civil tax valuation case.[180] While presumptions in criminal cases are beyond the scope of this Note, there are important constitutional issues associated with such presumptions.[181] *In Re Winship*[182] determined that, in every criminal case, the prosecution must prove every element of the offense charged beyond a reasonable doubt.[183] The burden shifting effects of presumptions have caused the Supreme Court to examine presumptions in criminal cases very closely,[184] and often they do not pass constitutional muster.[185] The Arizona Supreme Court does not discuss these considerations in *Grilz*, but rather adopts a civil standard without discussion of the ramifications for the constitutional concerns.[186]

C. The State v. Grilz Standard: Which Burden will Shift?

Although the supreme court in *State v. Grilz*[187] decided which standard would apply to rebutted presumptions, it left unanswered the fundamental question of which *burden* will be shifted to the opponent of a presumption.[188] The court merely glosses over this question by stating that the presumption will vanish "[w]hen the party against whom the statutory presumption operates has *met the burden of production or proof imposed by the presumption.*"[189] Thus, the court fails to explain the burden shifting effect of the presumption.

Examining the reasoning of the court in connection with the presumption of sanity provides some insight. "[W]e do not believe that the question of whether the presumption of sanity has been rebutted is necessarily a jury question. It is a preliminary question as to the sufficiency of evidence."[190] This reference to the initial inquiry into the sufficiency of the evidence suggests that the court is concerned with the burden of production. Once the judge deter-

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language of the new standard incorporates "statutory presumption," which is precisely the term that the court is attempting to get away from. *Id.*

177. *Id.*
178. *Id.*
179. *Id.*
180. State Tax Comm'n et. al v. Phelps Dodge Corp., 62 Ariz. 320, 157 P.2d 693 (1945).
181. MCCORMICK, *supra* note 17, § 347.
182. 397 U.S. 358 (1970).
183. *Id.* at 362.
184. *See, e.g.*, Tot v. United States, 319 U.S. 463 (1943); United States v. Gainey, 380 U.S. 63 (1965); United States v. Romano, 382 U.S. 136 (1965); Ulster County Court of N.Y. v. Allen, 442 U.S. 140 (1979).
185. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975).
186. 136 Ariz. 450, 666 P.2d 1059 (1983).
187. *Id.*
188. *See supra* part II.
189. 136 Ariz. at 456 n.3, 666 P.2d at 1065 n.3 (emphasis added).
190. *Id.* at 456, 666 P.2d at 1065.

mines that the party opposing the presumption has produced evidence sufficient to allow a finding that the presumption has been rebutted, "it is not necessary to mention the presumption to the jury."[191] The trial judge is "quite able to determine when that point is reached."[192]

The fact that *Grilz* is a criminal matter makes it difficult to determine whether this rule applies to all presumptions, criminal presumptions only, statutory presumptions only, or is limited to the presumption of sanity discussed in the case. Because the court has not addressed this question again and because the lines of cases to which the court refers are all civil presumptions, it is reasonable to conclude that the rule taken from *State v. Grilz* applies equally to all presumptions.

V. A PROPOSAL FOR ADOPTION OF A RULE

The preceding examination of presumptions in Arizona suggests that a rule should be adopted to clarify the procedural effects of presumptions. As the Morgan-Thayer debate illustrates, it is difficult to formulate a rule that will please everyone. Consideration of the rationales underlying presumptions provides invaluable guidance, and should be part of the calculus that leads to a rule. Procedural convenience, superior access to evidence, probability, and social policy are all important foundations, and recognition of their importance requires that the presumption not be given too "slight and evanescent"[193] an effect. This view is reflected in the Supreme Court's final draft of Federal Rule of Evidence 301, and also in Rule 301 of the 1974 Uniform Rules of Evidence.

There are many benefits to adopting a rule which reflects Morgan's view of presumptions. First, such a rule is easy for trial judges to apply. The trial judge regularly decides when a party has produced sufficient evidence to avoid a directed verdict.[194] Second, such a rule would resolve the confusion surrounding presumptions by requiring a uniform treatment and a uniform effect, thus answering the burden-shifting question left open by the court in *State v. Grilz*.[195] Under such a rule the burden of persuasion would shift to the opponent, and once he had produced enough evidence to convince the judge that a reasonable jury could find the nonexistence of the presumed fact, the presumption would vanish and never be mentioned.

In 1976, North Dakota adopted a rule based on the United States Supreme Court's version of Federal Rule of Evidence 301. The rule reads as follows:

> (a) Effect. In all civil actions and proceedings not otherwise provided for by statute or these rules, if facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the fact presumed until the trier of fact finds from credible evidence that the fact presumed does not exist, in which event

191. *Id.*
192. *Id.*
193. Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937).
194. In the Advisory Committee's Note to proposed Rule 301, the committee noted that "[t]he rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties." FED. R. EVID. 301 advisory committee's note.
195. *See supra* part IV.C.

> the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.[196]

The drafters of the rule felt that, in light of the important social considerations which give rise to presumptions, it was important to accord presumptions the effect of shifting the burden of persuasion.[197] This rule provides all of the benefits described in the preceding paragraph, and is especially helpful in clearly articulating the procedural posture of each party during the operation of the presumption. The description of the procedural posture appears to answer the concerns expressed by the drafters of the Arizona Rules of Evidence,[198] and would serve to give Arizona practitioners a clear guide to dealing effectively with presumptions. Arizona should adopt a similar rule.

VI. CONCLUSION

Presumptions continue to be an important component of our legal system, but a part that continues to be misunderstood. The Morgan-Thayer debate illustrates the lack of agreement about the procedural effect of presumptions. Congress did not agree with the Supreme Court, the Arizona drafters agreed with neither, and the courts of Arizona disagree with each other. The Arizona Supreme Court attempted to reach a solution. In doing so, however, the court left unanswered precisely the question they sought to answer.

This lack of agreement makes it very difficult for the practitioner in Arizona to know how the court will administer any particular presumption, and so reduces the ability of the lawyer to effectively represent a client's interests. Taking the example of North Dakota Rule of Evidence 301 and recognizing the important policies underlying the creation of presumptions will lead to uniform administration of presumption rules and a simplified environment for the practitioner. The time has come for Arizona to resolve the issue and end the confusion.

196. N.D. R. EVID. 301.
197. N.D. R. EVID. 301 explanatory note.
198. *See supra* note 125 and accompanying discussion.