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SOME PHASES OF PRESUMPTIONS, PARTICULARLY REGARDING NEGOTIABLE INSTRUMENTS.*

At the outset the reader should be warned that this subject is not alive with human interest. At a time when concern is with the tangible rather than the abstract, such justification as there is for theoretical discussion is that property rights still turn upon the application of the abstract.

Perhaps it is a fair generalization that the more abstract an idea is, the more room there is for diversity and absence of uniformity. If so, this is at least a partial explanation of the lack of uniformity in the use of such expressions as *"prima facie,"* "presumption" and "burden of proof". Any attempt to reconcile the many meanings which have been attributed to these expressions is doomed to failure. When one considers the long period of legal development, the variant background and ability which judges have brought to their judicial positions, and the fact that law itself is one of the inexact sciences, it would be surprising if uniformity were to be found. The imperfection of human nature necessitates the imperfection of law. In the treatment of any subject, whether it be law, philosophy, ethics, or some other, the failure of phraseology to acquire a definite and consistent meaning has, as much as any other one thing, made for confusion and inaccuracy. It is but natural that judicial enunciation should not be free of this charge.

In the preparation of this article it was intended originally to make reference to the numerous and variant meanings to which the phrases mentioned have been subjected. But consid-

* The discussion herein is confined to the problem in jury cases where it most frequently arises.

erations of space and clarity seem to justify a departure from that plan except as it may be necessary to a treatment of the subject matter.

Following the violation of a legal right with a resultant legal duty, the judicial machinery which must operate to enforce the duty and remedy the right requires "priming" in order to function. The person who conceives a right to have been invaded, puts the judicial machinery in operation by process and complaint, thus informing the defendant of the nature of his claim. Our problem will deal with that situation in which the invasion is disputed and thus the defendant by answer, explains or denies the invasion. The pleadings have framed the issue, the judicial machinery turns to the work of determining the facts of the controversy.

It is elementary that if at the trial of a cause the party seeking relief should, in the face of a pleading denying right to such relief, request the court to direct that the defendant show why he should not make recompense for the alleged wrong, the request would be denied. The reason is that the party seeking affirmative relief must adduce evidence justifying a finding that a legal duty has been violated by the defendant, or to express it differently, the burden of going forward with the evidence is upon him who seeks relief.

That burden requires that when the plaintiff has rested with the production of evidence, he must have adduced proof, in one form or another, of every element necessary to show the right to have existed and to have been invaded by the defendant, *i.e.,* there must be evidence justifying a finding of the existence of every fact requisite to the cause of action.[1] The effect of failure to prove the requisite facts is a non-suit, a ruling that the judicial machinery is unable, upon the proof adduced, to give affirmative relief.[2] The plaintiff has failed to meet the burden of going forward.

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[1] Beckley v. Evans, 49 N. J. L. 442 (E. & A. 1887); Bien v. Unger, 64 N. J. L. 596 (E. & A. 1900); Van Syckel v. Egg Harbor Etc. Co., 109 N. J. L. 604 (E. & A. 1932).

[2] "A nonsuit when ordered by the judge at trial, is a judicial declaration that the plaintiff has failed to adduce evidence sufficient in law to maintain his case." Polhemus v. Prudential Realty Co., 74 N. J. L. 570, 580 (E. & A. 1906), Green, J.

It is not required, however, that proof of every requisite fact must appear from documentary evidence or the lips of witnesses in order to meet this burden of going forward.[3] The vacancy left open by the failure affirmatively to prove some requisite fact may be filled by an inference which as a matter of law is made,[4] or is permitted to be made.[5] The inference of the unproved fact may in one instance be termed a "presumption" as to the unproved fact, and in the other may be termed *"prima facie"* evidence of the unproved fact, and while the two terms have frequently been used interchangeably there is an inherent difference. In a suit on a negotiable note by a payee against a maker, the maker's promise to pay is not enforceable unless supported by a consideration;[6] thus, consideration is a requisite fact, and yet proof hereof in the first instance by the payee is unnecessary to meet the burden of going forward.[7] It was the rule at common law,[8] as an adaptation of the Law Merchant, now embraced in the Uniform Negotiable Instrument Law,[9] that every negotiable instrument is presumed to have been given for a valuable consideration. In testing whether the plaintiff has met the burden of going forward (so as to avoid a non-suit) the effect of the presumption is to eliminate the necessity of proof of consideration.

From the proof of the making of a negotiable instrument and title to and possession thereof, the other elements necessary to a recovery, namely, consideration, delivery and non-payment, are presumed.[10] By this test, therefore, a presumption is

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[3] First National Bank v. Stoneley, 111 N. J. L. 519, 523 (E. & A. 1933).

[4] Penbrook Trust Co. v. Wiegand, 100 N. J. L. 353 (E. & A. 1924); Sladkin v. Ruby, 103 N. J. L. 449, 454 (E. & A. 1926); First National Bank v. Stoneley, 519, 523 (E. & A. 1933).

[5] Mumma v. Easton & Amboy R. R. Co., 73 N. J. L. 653, esp. 660 (E. & A. 1905).

[6] Mueller v. Buch, 71 N. J. L. 486 (Sup. Ct. 1904); Koyer v. Robinson, 110 N. J. L. 363 (Sup. Ct. 1933).

[7] Duncan v. Gilbert, 29 N. J. L. 521, 523 (E. & A. 1862); Marine Trust Co. v. St. James Church, 85 N. J. L. 272, 276 (E. & A. 1913) (referring to §24 N. I. L. P. L. 1902, p. 589).

[8] Duncan v. Gilbert, 29 N. J. L. 521, 523 (E. & A. 1862).

[9] P. L. 1902, p. 583, 589 §24.

[10] See Havens v. Haas, 7 N. J. Misc. 1035 (Sup. Ct. 1929), where in a suit by payee against maker on negotiable promissory note, the execution being admitted, plaintiff merely offered the note. Trustees System Co. v. Lisena, 106 N. J. L. 549, 552 (E. & A. 1929).

the assumption by the judicial tribunal of the existence of a fact or facts to which there has not been actual proof, but which are assumed to exist by the mere proof of other relevant facts.

In such a situation if satisfactory proof be made of execution, title and possession, unless the defendant offers evidence in contradiction, there *must* be a finding in favor of the plaintiff.[11] In a jury case they, as triers of the fact, could not legally assume absence of consideration or delivery. The force of the presumption would, in the absence of opposing evidence compel a finding of the existence of these unproved requisites so that not only would the presumption operate to supply the unproved fact, but would operate in such a way as to make the finding mandatory in the absence of contradictory evidence. This is, accurately speaking, a presumption, *i.e.,* the inference of the unproved fact arises as a matter of law and is a question for the court and not for the jury if the evidence stands uncontradicted.

While the term *"prima facie"* has also been used to denote this same idea of a mandatory inference,[12] it has also been used to express a different kind of inference, *ie.,* an inference which is one for the jury to make or not to make, and not one for the court.[13] A classical illustration is where the doctrine of *res ipsa loquitur* applies. On analysis, the doctrine seems to be

[11] Trustees System Co. v. Lisena, 106 N. J. L. 549, 552 (E. & A. 1929); Eagle Pipe Etc. Co. v. Bordentown Steel Etc. Co., 98 N. J. L. 796 (E. & A. 1923).

[12] Freeman v. Britten, 17 N. J. L. 192, 208 (Sup. Ct. 1839); Denyse et al v. Crawford, 18 N. J. L. 325, 327 (Sup. Ct. 1841); Cook v. Linn, 19 N. J. L. 11, 15 (Sup. Ct. 1842). "If they were negotiable instruments, the plaintiff's possession of them would be *prima facie* evidence of his title to them and to the money due upon them." Hornblower, C. J. Park v. Miller, 27 N. J. L. 338 (Sup. Ct. 1859). "When one gives his check to another upon his banker, the *prima facie* presumption is that it was for money due, but the contrary may always be shown either by written or parol evidence." Whelpley J. at 343 *et seq.* "It is also conceded that the check named therein was also delivered by plaintiffs to the defendants at the same date. This is *prima facie* evidence that this claim of the plaintiffs' had been paid." Vredenburgh J. at p. 350. Gilbert v. Duncan, 29 N. J. L. 133 (Sup. Ct. 1861). "The production of the notes upon the trial was *prima facie* evidence of their title." Whelpley C. J. at p. 145 (Reversed 29 N. J. L. 521.) Reeve v. First National Bank, 54 N. J. L. 208, 210 (E. & A. 1891); Jennings v. Studebaker Sales Corp., 112 N. J. L. 399, 404 (E. & A. 1933).

[13] Mumma v. Easton & Amboy R. R. Co., 73 N. J. L. 653 (E. & A. 1905); Hughes v. Atlantic City Etc. R. R. Co., 85 N. J. L. 212 (E. & A. 1913).

merely the right to infer negligence under certain circumstances though there be no evidence thereof. Proof of facts showing application of the doctrine is *"prima facie"* evidence of negligence[14] and yet the jury is not, even in the absence of opposing evidence, compelled to find negligence. It may absolve the defendant even in the absence of evidence tending to show no negligence.[15] It is merely a permissive inference, not a compelling one. Failure to make this distinction has caused considerable confusion of thought. In the situation where the inference is permitted, but not required, it may, for the purpose of clarity be described as *"prima facie"* evidence of the unproved fact, and where mandatory in the absence of contradiction "presumptive evidence" or a true legal "presumption".

The difference in legal consequence, between the inference arising from a true "presumption" and the inference which is permitted to be made when the proved facts are *"prima facie"* evidence of the unproved is most apparent in noting its effect upon the burden of going forward. Before this can be properly considered, we must divert for a moment to consider briefly the difference between the burden of going forward with the evidence and the burden of proof by a preponderance of the evidence. Generally it is the rule that the burden of proof by preponderance rests upon the party who first asserts the particular fact, which is actually, or in effect, denied by the adversary,[16] but this rule seems to have a considerable limitation.[17]

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[14] Mumma v. Easton & Amboy R. R. Co., 73 N. J. L. 653, 658.

[15] Hughes v. Atlantic City Etc. R. R. Co., 85 N. J. L. 212. Where the doctrine applies, the "inference is still one for the jury and not for the court. They may not believe the witnesses, the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; *and in any event they may render a verdict for the defendant.*" (Italics mine) Swayze J. at 214.

[16] It may even require proof of a negative. Turner v. Wells, 64 N. J. L. 269, 272 (E. & A. 1899).

[17] In many instances the burden of proof by preponderance rests upon the plaintiff although the defendant first puts the fact in issue by his answer. For example, a plaintiff in a suit on a negotiable instrument need not allege that consideration was given for its issue or its transfer. The defendant first raises that issue by his answer in the common instance and the general rule would require the defendant's proof thereof by the preponderance and some cases have so held. (See *infra* note 32.) Those cases which represent what, it is submitted, is the better rule hold that the establishment of such facts by a pre-

The burden of proof by a fair preponderance operates only when both sides have rested. It is a guide in determining in whose favor the stronger evidence lies, and in order for affirmative relief to be granted, the scales must tip in favor of him who seeks relief. While Abraham Lincoln was still engaged in the practice of law, so the story goes, a jury before whom he was trying a case, after it had retired to deliberate its verdict, returned for further instruction as to the meaning of the term "fair preponderance of the evidence". The court gave a lengthy discourse thereon and then, with the court's permission, counsel also elaborated. Lincoln's adversary proceeded in legal terminology to discuss the question. When Lincoln's opportunity came he said something in this wise: "You have all seen sugar weighted at the grocers. The scales tip in favor of the sugar if it is heavier, and in favor of the weights if they are. In considering the evidence in this case, you should find for the plaintiff if the scales tip in his favor, and for the defendant if they tip in his favor". He might have added that if the scales were in equipoise the defendant was entitled to a verdict. The jury retired and returned with a finding in favor of Lincoln's client.

The burden of going forward with the evidence performs an entirely different function. Unlike the burden of proof it operates in the course of the trial and not at its conclusion. Mention has already been made of the burden of going forward with the evidence which rests upon the plaintiff in the first instance to avoid a non-suit. This burden may be met in one of two ways. It may be met by evidence of such quality that when the plaintiff rests, if the defendant offers nothing in contradiction, or his evidence is not sufficient to make a jury question,[18] the plaintiff will be entitled to a directed verdict.[19] As a

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ponderance is upon the plaintiff (although the burden of going forward with the evidence is upon the defendant) because ultimately they are necessary elements to the plaintiff's recovery. (Gaddis v. Gaddis, 10 N. J. Misc. 521; De Jonge v. Woodport Hotel, 77 N. J. L. 233; Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. 513.)

[18] Second National Bank v. Hewitt, 59 N. J. L. 57 (Sup. Ct. 1896); Champlin v. Davis, 94 N. J. L. 523 (E. & A. 1920); Eagle Pipe Etc. Co. v. Bordentown Steel Co., 98 N. J. L. 796; Alexander v. Reiter, 99 N. J. L. 447 (E. & A. 1924); Elizabeth Trust Co. v. Underwood, 101 N. J. L. 178 (E. & A. 1925); Sladkin v. Ruby, 103 N. J. L. 449 (E. & A. 1926).

[19] Second National Bank v. Hewitt, 59 N. J. L. 57; Times Square Auto Co. v. Rutherford National Bank, 77 N. J. L. 649 (E. & A. 1908); Champlin v.

matter of law, the triers of the fact could not, as reasonable men find against the plaintiff's evidence. When this is the posture of the plaintiff's evidence he not only has met the burden required of him in the first instance, but he has also shifted that burden of going forward to the defendant. The effect of this shifting of the burden is a directed verdict if the burden is not met by the defendant.[20]

There is no difficulty with the application of this rule where all the requisite facts are established by testimony or documentary evidence of such quality that the jury would not be permitted to find against them. Where, however, resort is had to a substitute for actual evidence to establish a particular fact, the inquiry must determine whether the fact inferred is one as to which there is a "presumption" or merely a "permissive inference". Upon the determination of this question depends whether or not the burden of going forward has shifted, and consequently whether a direction is proper.

If the unproved fact is one which is "presumed" from the proof of other facts, then the burden of going forward has shifted. In *Trustees System Co. v. Lisena*,[21] this was clearly illustrated. The suit was by the payee against the maker of a negotiable note. The manager of the plaintiff testified as to the amount due on the note and on cross-examination stated that he had not been the only one to keep the records of the plaintiff during the period of the transaction and that his predecessor had been convicted of embezzlement of similiar funds. The defendant did not testify. The trial court directed a verdict for the plaintiff. The Supreme Court, on appeal reversed,[22] holding in support of the defendant's contention that the plaintiff's case depended upon the testimony of the manager and that "the credibility of the witness and the existence of the facts testified to by him, not being admitted, are questions of

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Davis, 94 N. J. L. 523; Jones v. National Bank of North Hudson, 95 N. J. L. 376 (Sup. Ct. 1921); Eagle Pipe Etc. Co. v. Bordentown Steel Co., 98 N. J. L. 796; Alexander v. Reiter, 99 N. J. L. 447; Elizabeth Trust Co. v. Underwood, 101 N. J. L. 178; Sladkin v. Ruby, 103 N. J. L. 449 (E. & A. 1926); Trustees System Co. v. Lisena, 106 N. J. L. 549 (E. & A. 1929).

[20] Polhemus v. Prudential Realty Co., 74 N. J. L. 570 (E. & A. 1906).

[21] 106 N. J. L. 549 (E. & A. 1929).

[22] 7 N. J. Misc. 572.

fact" for the jury and direction for the plaintiff was therefore erroneous. The Court of Errors and Appeals held the direction proper and reversed the Supreme Court, Wells, J. at p. 551 saying:

> "The note, bearing the signature of the defendant and in the hands of the plaintiff, raised a presumption of law that it was unpaid, and in the absence of contradictory proof, even without the testimony of the manager, as to what the records showed, and the credits thereon, established a *prima facie* case and warranted a direction in favor of the plaintiff for the amount of the note."

The Court thereafter stated that it did not find "discrediting circumstances" affecting the validity of the note.

It is apparent that the "presumption" of non-payment removed from the jury the right to consider that question and made the inference thereof mandatory in the absence of contradictory evidence, and that whether the alleged "discrediting circumstances" were sufficient to overcome the presumption so as to avoid a direction, was a question for the court.[23] Thus, if the factual evidence adduced would not justify a contrary finding, and if as a result of that evidence a "presumption" of the existence of some unproved but requisite fact arises, the burden of going forward has shifted and a direction results if it is not met.

This, then, is the effect of a *presumption*: that it makes unnecessary in the first instance any proof as to the fact "presumed" and if there be nothing in contradiction, the inference to be made is a compelling one and one which is made as a matter of law.

Factual evidence which stands uncontradicted and unimpeached and which establishes every requisite fact, or which,

[23] "In the opinion, Judge Learned Hand, took the view that the valuation of the evidence necessary to meet a presumption is entirely in the hands of the trial judge. Hence, if it be insufficient there must be a directed verdict for the plaintiff * * *" Perskie J. for the Supreme Court in Dunn v. Goldman, 111 N. J. L. 249, 251 (Sup. Ct. 1933), referring to Alpine Etc. Co. v. Penn R. R. Co., 60 Fed. 734.

coupled with a "presumption" establishes every requisite fact, must be distinguished from that situation in which the factual evidence coupled with a legally "permissive inference" *tends* to establish the requisite facts.

The plaintiff's evidence may not be of such quality that a directed verdict in his favor will result even in the absence of contradictory evidence. It may be of such quality that the jury as triers of the fact can find either for or against the plaintiff. Although there are other instances of this situation, the more common one is where some unproved fact is a necessary element of the plaintiff's case and the proved facts are *'prima facie* evidence" of the unproved; that is, *"prima facie"* in the sense that the jury may infer the unproved fact or may not infer it. If that is the posture of the plaintiff's evidence, then accurately speaking he has made out a *"prima facie"* case, not because the proved facts are *"prima facie"* evidence of the unproved fact, but because all that the plaintiff is entitled to is to have his case submitted to the jury.[24]

When the plaintiff has made out only a *"prima facie"* case, using the term in this sense, he has met the burden of going forward placed upon him in the first instance, but he has not shifted that burden to the defendant if he is only entitled to go to the jury on his case. In such an instance the only burden under which the defendant labors is to offer evidence to explain away the otherwise permissive inference so that the case will not go to the jury, and his failure so to do results only in its submission.[25]

In *Polhemus v. Prudential Realty Co.*[26] the plaintiff was an accommodation indorser for the maker and a prior indorser of a negotiable note. He was compelled to take up the instrument at maturity from the holder and sued maker and prior indorser. At the conclusion of the plaintiff's case, motion for a non-suit was made. The Court said:[27]

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[24] Hughes v. Atlantic City Etc. R. R. Co., 85 N. J. L. 212 (E. & A. 1913).

[25] "The risk of non-persuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a liability to a ruling by the judge disposing of the issues without leaving the question open to the jury's deliberations." Swayze J. quoting from WIGMORE ON EVIDENCE in Hughes v. Atlantic City Etc. R. R. Co., at 216.

[26] 74 N. J. L. 570 (E. & A. 1906).

[27] Green J. at 580.

> "We think that the plaintiff, when he rested, had made out a *prima facie* case. That is to say, he had offered proofs sufficient to satisfy the judge, on the preliminary question of law, that there was evidence which the jury should be allowed to consider,—evidence upon which, as the case then stood, the jury might properly find a verdict for him, upon whom the burden of proof lay."

Does this not mean that the plaintiff had made out a case in which he had met the burden of going forward? The question presented was non-suit or no. To the question—has the plaintiff adduced evidence establishing or tending to establish every requisite of his cause of action—the answer was in the affirmative.

After the motion for non-suit the defendant offered no evidence and the trial court directed for the plaintiff. This ruling was also challenged on appeal. The court further said as to this ruling at page 581:

> "We have already determined that the plaintiff, on his *prima facie* evidence was entitled to go to the jury . . . When, however, the defendant failed to meet the plaintiff's case, a further determination was and is proper, to the effect that the *prima facie* evidence became decisive of the issue". (and a direction for the plaintiff therefore proper).

Thus the opinion holds that once a plaintiff has made out a case entitling him to submission to the jury, he is entitled to a directed verdict in the absence of evidence from the defendant. If this be true, then once a *prima facie* case (one requiring submission to the jury) has been established, the burden of going forward shifts and must be met, and a direction will result in the absence of opposing evidence.

But the Court of Errors and Appeals has, in effect, if not explicity, said that this is not so. In *Hughes v. R. R. Co.*,[28]

[28] 85 N. J. L. 212 (E. & A. 1913).

plaintiff had recovered a judgment as the result of being injured by the explosion of an electric light bulb in a railroad car of the defendant. The trial judge had charged the jury that "when an accident of this kind happens to some of the means of transportation, the law shifts the burden of proof from the plaintiff, as to the explanation or showing the actual cause to the defendant, and imposes upon it the burden of making an explanation exculpating itself from negligence". Here was a clear instance of the failure of the trial court to recognize the difference between the burden of going forward[29] and the burden of proof by preponderaance, and the appellate court clearly pointed out this error.

> "The inference of negligence from the mere happening of the accident may be a legal inference in the sense that it is permitted by the law, but it is not a legal inference in the sense that it is required. It is true that in some cases language may be found to the effect that under certain circumstances, the burden of proof shifts, while other cases declare quite as explicitly that the burden of proof never shifts. The seeming conflict arises from the ambiguous meaning of the words 'burden of proof' as applied to jury trials . . . In one sense 'burden of proof' means the duty of the actor, *i.e.,* the party having the affirmation of the issue to establish the proposition *at the end of the case* (italics mine). In this sense the burden never shifts . . . In a second sense the expression means the duty of going forward in argument or in producing evidence, and in this sense the burden may shift as one side or the other satisfies the judge that the evidence suffices to make a *prima facie* case in his favor."[30]

It is difficult to find a more accurate expression of this distinction.

But, it is suggested, at least, in the opinion that the evi-

[29] See note 25.

[30] Page 215 *et seq.*

dence adduced entitled the plaintiff to submission to the jury.[31] This being so, then under *Polhemus v. Prudential Realty Co., supra,* the burden of going forward to explain or exculpate would have been on the defendant. But in the *Hughes* case, the court says that this is not so and the reason is that the proved facts in the *Hughes* case were merely *"prima facie"* evidence of negligence, permitting, an inference thereof which the jury might or might not draw; consequently there was no real shifting of the burden of going forward because a *"prima facie"* and not a "presumptive" case was made out.

It is the failure to distinguish between the quality of the inference in the class of cases like the *Lisena* case where the inference was mandatory in the absence of contradiction, and the quality of evidence in the *Hughes* case where the inference was, at best, merely permissive which has caused confusion.[32] In those cases in which the distinction has been considered, it has almost invariably been made.

There remains to be considered the effect of a *presumption* where the defendant (or the plaintiff if the presumption operates in the defendant's favor) offers evidence in contradiction to the presumed fact. The New Jersey cases may be classified as follows:

(a) That the effect of a presumption is to cast upon the party against whom it operates, the burden of proving by the weight of the evidence that the fact presumed is not so.[33]

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[31] Page 215.

[32] "The difference is that between a presumption and an inference * * * The distinction is of critical importance in the present case, in view of its probable retrial, because of its bearing upon the burden of proof and the duty of producing testimony. It is proper therefore to point out that the fundamental distinction between a presumption and an inference does not arise from any consideration as to the greater persuasive quality of the former, but solely from a rule of law by force of which in the case of a presumption a given evidential fact is invested with certain consequences touching the further production of proof.

"For the term 'presumption' denotes that a force is accorded by law to a given evidential fact whereby the duty of producing further testimony is affected. A presumption therefore is an inference to which definite legal consequences are attached. An inference, however persuasive, that does not affect the duty of producing testimony, is not a presumption." Garrison J. for the Court of Errors and Appeals in Bower v. Bower, 78 N. J. L. 387 at p. 392 (1909).

[33] "The burden of proof on this subject (purchase of note by plaintiff after maturity against a defendant having a personal defense) was on the party who relies upon the fact as a part of his defense." Beasley C. J. in Seyfert v. Edison, 45 N. J. L. 393 (Sup. Ct. 1883). The court having previously stated that there

(b) That a presumption is such strong evidence of the fact that it cannot be overcome so as legally to justify a direction against the presumption, even though there be no evidence in support of the fact save the presumption.[34]

(c) That the effect of a presumption is to make unnecessary the production of evidence in support of the fact presumed in the first instance; but once evidence has been introduced in contradiction of the presumption, of such quality as to overcome it, the duty of going forward with the evidence and of proving by a fair preponderance the fact originally presumed rests upon the party in the establishment of whose case it is a necessary element.[35]

It is apparent that fundamentally different consequences have attached to "presumptions" under the decisions. Either the term "presumption" has no recognized legal meaning and

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was a presumption of purchase before maturity. Snediker v. Everingham, 27 N. J. L. 143, 150 (Sup. Ct. 1858); Duncan v. Gilbert, 29 N. J. L. 521, 527 (E. & A. 1862); Fidelity Union Etc. Co. v. Decker Etc. Co., 106 N. J. L. 132, 135, 136 (E. & A. 1929).

[34] McCormack v. Williams, 88 N. J. L. 170 (E. & A. 1915); Havens v. Haas, 7 N. J. Misc. 1035 (Sup. Ct. 1929).

[35] De Jonge v. Woodport Hotel, 77 N. J. L. 233. Holding that proof of defective title in prior holder of a negotiable instrument casts upon plaintiff the duty of proving elements of holder in due course or of overcoming defendant's evidence by contrary proof. Tischler v. Steinholtz, 99 N. J. L. 149. Holding that presumption of agency by reason of ownership of automobile may be overcome by uncontradicted testimony. See also Missell v. Hayes, 86 N. J. L. 348 (E. & A. 1914); Mahan v. Walker, 97 N. J. L. 304 (E. & A. 1922); Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. 513, 517 (E. & A. 1886); Westmont Bank v. Payne, 108 N. J. L. 133, 140 (E. & A. 1931).

Dunn v. Goldman, 111 N. J. L. 249 (Sup. Ct. 1933). "* * * if sufficient, (defendants' evidence against the fact inferred from the presumption) the presumption is destroyed and the defendant has succeeded in getting back to the jury; if positive and uncontradicted, a directed verdict for defendant is warranted. This view is in harmony with the Rhode Island decision of *McIver v. Schwartz,* 50 R. I. 68, 145 Atl. 101, which holds that a presumption is not evidence, and in the face of testimony to the contrary, cannot go to the jury." Perskie J. at p. 251.

Gaddis v. Gaddis, 10 N. J. Misc. 521. This case cites with approval McCormack v. Williams, 88 N. J. L. 170 (E. & A. 1915), although the holding in that case was not directly involved. The court after referring to the provision of the N. I. L. that every instrument is "deemed *prima facie* to have been issued for a valuable consideration" says:

> "Under this provision of the statute the plaintiff has the *prima facie* presumption of valuable consideration, subject to being rebutted and overcome. The burden of going *forward* with such proof is upon the defendant, but in the end, and ultimately, the burden is that of the plaintiff by proof plus the presumption as against proof by the defendant to the contrary to establish consideration by a fair preponderance of the evidence. That burden never shifts to the defendant." *Per curiam.*

is merely a catch-all to meet the requirements of a particular case, or its true legal meaning as demonstrated by the better considered cases has not been consistently followed. It is submitted that the latter is the actual situation. In at least one case it is stated that the effect of a presumption is the same in negligence cases, cases of bailment and breach of contract;[36] and no reason is suggested why it should not have the same consequences in all cases.

Assuming this premise, the question is what is the true legal rule. In *Dunn v. Goldman,*[37] the effect of a presumption was considered at some length. It was there held that the effect was to shift the *burden of going forward* and once that burden was met, the force of the presumption was overcome and the duty of proving by the weight of the evidence the fact originally presumed, rested on the plaintiff. In other words, a true presumption has the effect of making mandatory the inference of the fact presumed in the absence of contrary evidence, but once the presumption is overcome it is as if it did not exist; it has no probative force.[38]

If such be the true legal rule, the greatest violence done it is illustrated by *McCormack v. Williams*[39] and *Havens v. Haas.*[40]

In the former case the suit was by an indorsee against the maker of a promissory note. The defendant pleaded failure of consideration and notice, admitting execution. The plaintiff (apparently after having proved payee's indorsement)[41] offered the notes and rested. Defendant offered evidence establishing or tending to establish lack of consideration and notice, and the taking after maturity. Plaintiff offered nothing in rebuttal so that there was no actual evidence of consideration. The trial court directed a verdict for defendant. By a divided court

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[36] Dunn v. Goldman, *supra,* note 35, in which the court observed that: "In our state the cases all hold that if the evidence adduced is positive and uncontradicted, the presumption is destroyed and a directed verdict for the defendant is warranted." (page 252).

[37] *Supra,* note 35.

[38] See notes 35 and 36.

[39] See note 34.

[40] See note 34.

[41] Beckley v. Evans, 49 N. J. L. 442 (E. & A. 1887); Van Syckel v. Egg Harbor Etc. Co., 109 N. J. L. 604 (E. & A. 1932).

this was, on appeal, held error. The court concerning itself with the rule that every negotiable instrument is presumed to have been given for a valuable consideration said:

> "The notes spoke for themselves. They gave inherent evidence of validity. Because all the individual witnesses who testified gave evidence tending to show their invalidity, *no matter how strong that evidence,* it raised in effect a conflict of testimony; and conflicting testimony is always for the jury."[42] (italics mine).

In *Havens v. Haas,* the suit was on a promissory note by payee against maker. The execution of the note was admitted. The plaintiff offered the note and rested. The defendants offered evidence establishing or tending to establish complete failure of consideration. The plaintiff offered nothing in rebuttal.

The trial judge, as a matter of law, "held that there was a failure of consideration," and directed a verdict for the defendant. The Supreme Court, in reviewing this ruling and relying upon *McCormack v. Williams,* reversed, because under that case there cannot be a direction of a verdict against the plaintiff in a suit on a negotiable instrument on the question of consideration. *McCormack v. Williams* and *Havens v. Haas* do not turn upon the ground that the evidence offered against the presumption of consideration was not sufficient to overcome it, nor on the ground that the evidence in contradiction of the presumption was too weak to permit a holding as a matter of law, that the presumption had been overcome, but turn squarely upon the proposition that legally no evidence can be strong enough to overcome the presumption so as to justify a direction against it.

It is submitted that this is unsound. Suppose in a situation like *Havens v. Haas,* where the plaintiff is payee, the defendant, after adducing evidence establishing failure of consideration, risked calling the plaintiff as his witness, and the plaintiff admitted failure of consideration, still a direction for the defendant would be improper because "no matter how

[42] Walker C. at p. 172 *et seq.*

strong" the evidence, the presumption of consideration would still exist and a jury question would result. Such a rule is, to say the least, unsound, and gives to a presumption an unwarranted and mystic significance. It cannot be supposed that the courts will follow the language of *McCormack v. Williams* to this illogical conclusion.[43] It may be that the evidence necessary to overcome the presumption of consideration on a negotiable instrument must be of stronger probative force (particularly so, perhaps, because it has been embraced in the statute)[44] than would be necessary in connection with some other presumption, but the effect of the evidence against the presumption as raising a question of fact for the jury would seem properly to be a matter for the court.[45] The effect which *McCormack v. Williams* has given the presumption is quasi-conclusive, *i.e.,* it may by contradictory evidence be reduced from a mandatory inference to a permissive one, but in no event can it be entirely destroyed. Even in the absence of all factual evidence to support it, and in the face of evidence "no matter how strong" in contradiction, it still remains a factual question.

Cases falling under the first classification hold that a presumption places upon the party against whom it operates, the burden of disproving by the weight of the evidence the fact presumed, *e.g.,* the burden of proving by a preponderance, failure of consideration in a suit on a negotiable instrument, is on the defendant. Such a rule seems unsound because consideration must exist in order for the promise to be enforceable. If the presumption did not exist there would have to be proof thereof by the plaintiff and he would carry the burden of preponderance on the issue. It does not seem that the presumption should have any greater or different effect than would factual evidence itself.[46] The better considered cases hold that though the burden of going forward as to such defenses rests upon the

[43] The N. I. L. provision that "every negotiable instrument shall be deemed *prima facie* to have been issued for a valuable consideration" cannot be the reason for the doctrine of these cases because the statute also provides "Every holder is deemed *prima facie* to be a holder in due course" (sec. 59) and yet if the evidence conclusively shows that the requisites of a holder are not present the "presumption" is overcome. (Westmont Bank v. Payne, 108 N. J. L. 133.)

[44] P. L. 102 p. 589, sec. 24.

[45] See note 23.

[46] See Niebel v. Winslow, 88 N. J. L. 191, 193 (E. & A. 1915).

defendant, once that burden is met the plaintiff carries the burden of preponderance on the issues since the fact in issue is a necessary element of the plaintiff's recovery.[47]

Such solution as there may be to the difficulties of the subject seem to lie in a more consistent application of the principles of the better considered cases, and a more consistent terminology.

It is submitted that from those cases the following principles may be deduced:

(a) That inferential evidence falls into two classes:[48]

(1) Permissive inference, *i.e.*, that class of cases in which an inference is permitted to be drawn from the factual evidence adduced but which inference as to the unproved fact is not mandatory even though there be no contradiction.[49] Generally, factual evidence giving rise to such inference is said to be *"prima facie"* evidence, and the right to draw, or not to draw the inference lies with the arbiters of the facts. (2) Mandatory or compelling inference, *i.e.*, that class of cases in which an inference is *compelled* to be drawn from the factual evidence adduced so that as a matter of law, the fact inferred is not open to dispute in the absence of contrary evidence.[50] Gen-

[47] See note 17.

[48] "But presumptions are properly divided into two classes, *viz.*: Presumptions of law and presumptions of fact. Presumptions of law are such as are conclusive or absolute, that is, such as are not permitted to be overcome by proof that the fact is otherwise, or such as are termed disputable presumptions, that is, such as admit of contrary proof, but which, in the absence of all opposing evidence, make a *prima facie* case, and throw the burden of proof (burden of going forward?) on the other party. When presumptions of this class arise, it is the duty of the court to instruct the jury that they are bound to find in favor of the presumption (in the absence of contradiction?).

"Presumptions of fact are of an entirely different character, and are in truth but mere arguments, and differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. These cases fall within the exclusive province of the jury." Elmer J. in Snediker v. Everingham, 27 N. J. L. 143, 150 (Sup. Ct. 1858). (No attempt is made to consider "conclusive presumptions" which on final analysis are rules of substantive law.)

[49] Mumma v. Easton & Amboy R. R. Co., 73 N. J. L. 653 (E. & A. 1905); Hughes v. Atlantic City Etc. R. R. Co., 85 N. J. L. 212 (E. & A. 1913); Snediker v. Everingham, 27 N. J. L. 143.

[50] Penbrook Trust Co. v. Wiegand, 100 N. J. L. 353 (E. & A. 1924); Sladkin v. Ruby, 103 N. J. L. 449 (E. & A. 1926); Trustees System v. Lisena, 106 N. J. L. 549 (E. & A. 1929).

erally, factual evidence giving rise to such an inference is said to establish a "presumption" but it has not infrequently been said to be *"prima facie"* evidence although the effect herein indicated has resulted.

(b) Where a permissive inference is involved, the party establishing his case in part by such inference is entitled to go to the jury only, even in the absence of evidence in contradition.[51] The burden of going forward has not shifted.

(c) Where a presumption is involved, the party establishing his case in part by such presumption is, in the absence of a defense, entitled to a directed verdict.[52] (if there be no legal justificatiaon to doubt the factual evidence).[53] The burden of going forward has shifted.

(d) That the *burden of proof by the fair preponderance* of the evidence never shifts[54] and there is no exception merely bacause a presumption is involved,[55] the only effect thereof being to shift *the burden of going forward* with the evidence, as to the fact presumed, to the party against whom it operates.[56]

(e) That evidence of sufficient probative force can, as a matter of law, overcome *"prima facie"* evidence in the one case,[57] or a "presumption" in the other,[58] so as to destroy the right to "draw the inference" of fact, on the one hand, or to "presume" it on the other.

The more truth there is in the statement that juries are little concerned with the abstractions of the law, the more nec-

[51] Hughes v. Atlantic City Etc. R. R. Co., 85 N. J. L. 212 (E. & A. 1913).

[52] Elizabeth Trust Co. v. Underwood, 101 N. J. L. 178 (E. & A. 1924); Trustees System Co. v. Lisena, *supra,* note 50; Sladkin v. Ruby, *supra,* note 46; First National Bank v. Stoneley, 111 N. J. L. 520 (E. & A. 1933).

[53] Cook v. Smith, 30 N. J. L. 387 (Sup. Ct. 1863).

[54] Hughes v. Atlantic City Etc. R. R. Co., *supra,* note 51.

[55] Gaddis v. Gaddis, *supra,* note 35; Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. 513 (E. & A. 1886).

[56] See Mauer v. Hahn, 8 N. J. Misc. 565 (Sup. Ct. 1930). On appeal 108 N. J. L. 404 (E. & A. 1931). Where the burden of going forward to show plaintiff not a holder in due course was on defendant and upon proof of defective title in prior holder, burden of going forward shifts to plaintiff, which he must meet, and as to which status he must also carry the burden of preponderance. De Jonge v. Woodport Hotel, 77 N. J. L. 233.

[57] MacCormack v. Standard Oil Co., 60 N. J. L. 243 (Sup. Ct. 1897); Collins v. West Jersey Express Co., 76 N. J. L. 551 (E. & A. 1908).

[58] Westmont National Bank v. Payne, 108 N. J. L. 133 (E. & A. 1931) holding that the presumption of holder in due course could be overcome so as to justify a direction for defendant. Dunn v. Goldman, 111 N. J. L. 249 (Sup. Ct. 1933).

essary it is that those abstractions be definite and consistent. Otherwise an error of law committed in the trial of a jury case and having little or no actual effect upon the jury's deliberation, but nevertheless constituting legal and prejudicial error, lays the basis for a reversal and thus not infrequently hampers, impedes and delays the administration of justice.

In view of the confusion which exists in the application of such phrases as *"prima facie,"* "presumption" and "burden of proof" there is ample excuse for the committing of legal error in the trial of cases involving the legal concepts supposed to attach to these expressions, and it is therefore to be hoped that the appellate courts will move toward a clarification of the existing ambiguities and confusion.

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