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FACULTY COMMENTS

PRESUMPTIONS: A COMMENT UPON *DICK V. NEW YORK LIFE INSURANCE CO.*

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The decision of the United States Supreme Court in *Dick v. New York Life Insurance Co.*[1] is one more shot in what has been called the "Battle of Presumptions,"[2] but it is a shot from a court with considerable standing. The decision might be misconstrued, and in any event it is troublesome to this writer. Prior to the decision in *Dick* the bar was justified in believing that the United States Supreme Court followed the Thayer theory of presumptions.[3] In *Dick* that theory was rejected. However, the Court did not purport to make a federal rule as to presumptions but only purported to be following the law of North Dakota.

The accuracy of the Court's statement in *Dick* that "under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive'..." may be conceded.[4] It follows that in a diversity case the federal court will apply the same rule as to presumptions that is followed in the courts of the state in which it sits. Still the decision in *Dick* impresses the writer as unfortunate for the following reasons. (1) It is contrary to the Thayer theory.[5] (2) The Court improperly construed the law of North Dakota. (3) The reasoning by which the Court reached its conclusion is confused. For those who prefer the Thayer theory the sting may appear to have been removed from the decision by virtue of the fact that the Court did not purport to reject that theory but only followed North Dakota law, which it construed as rejecting the Thayer theory. In any event the bar should be cau-

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[1]359 U.S. 437 (1959).

[2]Wykoff v. Mutual Life Ins. Co., 173 Ore. 592, 147 P.2d 227 (1944).

[3]New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938).

[4]Cf. Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), cert. denied, 310 U.S. 650.

[5]For the reasons why the writer prefers the Thayer theory see the following articles: Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953); and Laughlin, The Location of the Burden of Persuasion, 181 U. Pitt. L. Rev. 3 (1956).

tioned against giving *Dick* a broader construction than is justified. But the reasoning used by the court is still a matter of concern.

A true presumption operates in favor of a party with the burden of persuasion upon any issue and entitles him to have that issue conclusively determined in his favor in the absence of evidence rebutting the presumption. To this extent there is no difference between the various views. For example: consider the presumption involved in *Dick,* which is one of the most common. A policy has been issued insuring a specified person against death by accidental means. The insured person suffers a violent death and an action is brought by the person named as beneficiary in the policy. If the death resulted from an act of suicide it was not accidental and there can be no recovery. The plaintiff-beneficiary has the burden of persuasion (commonly called the burden of proof) upon the issue of suicide because the fact of accident goes to the very essence of the coverage of the policy.[6] If, however, the plaintiff introduces evidence of a violent death both a *permissible inference* and a *presumption* arise. There is a will to live which makes suicide the exception, not the rule. Therefore the jury is entitled to infer an accidental death from proof of the fact of violent death; this is a *permissible inference.* Also, the jury is *required* to find accident unless there is evidence sufficient to justify a conclusion of suicide; this is a *presumption.* The usually accepted difference between an inference and a presumption is that an inference is permissive whereas a presumption is compulsive. By proving a violent death the plaintiff is entitled to have a directed verdict upon the issue of accident unless the defendant insurance company introduces evidence sufficient to justify a finding of suicide. Thus far, there is no material dispute between the various theories about presumptions.

What happens when rebutting evidence is introduced? It is said that there are at least eight different theories. Actually, however, the eight theories reflect only two points of view. One point of view is that the presumption disappears (*i.e.,* loses its compulsive effect although not necessarily its permissive effect) with the introduction of rebutting evidence. This is the *Thayer* theory. The other point of view is that the presumption retains its conclusive effect until the trier of fact (usually the jury) credits the rebutting evidence. The technique of handling a case under the Thayer theory is easy. The

[6]This must not be confused with the location of the burden of persuasion upon an issue of suicide in suits upon ordinary life insurance policies, as distinguished from policies insuring against accidental death. In such cases suicide, within a limited time, is a matter of defense and the burden of persuasion is on the defendant.

case goes to the jury which weighs the permissible inference of accident against the evidence of suicide and reaches a conclusion without any reference to presumptions. How to handle a case under the anti-Thayer point of view presents a difficult problem which has given rise to most of the diverse theories about presumptions.

Professor Morgan, who rejects the Thayer theory, believes that a presumption should shift the burden of persuasion. Thus, in the typical case presented above Professor Morgan would say that, upon proof of violent death, the jury should be instructed to find accident unless they were persuaded of the fact of suicide. This view does not require telling the jury about the presumption but it is objectionable because it confuses the concept of *burden of persuasion*. Rules regarding the burden of persuasion are normally thought of as being in the field of substantive law and as resulting from policy considerations. There is extensive, and almost uniform, judicial holding to the effect that the burden of persuasion never shifts.

It may be because of this reluctance on the part of courts to shift the burden of persuasion that Professor Morgan's theory has received little acceptance. Most courts which do not follow the Thayer theory say that a presumption may be regarded as evidence. This view necessitates instructing the jury about the presumption. It is objectionable in that it confuses the concept of *evidence*. Evidence is usually thought of as consisting of propositions of fact rather than legal or logical principles. Even Professor Morgan criticizes the view that a presumption is evidence.[7]

In the typical case of *New York Life Ins. Co. v. Gamer*[8] the Supreme Court followed the Thayer theory. It held that the presumption against suicide was not evidence and that it was reversible error to give an instruction about the presumption. The recent case of *Dick v. New York Life Ins. Co.*[9] involved the same problem and the same presumption. In that case the evidence of suicide seemed to be so conclusive that the Court of Appeals reversed a judgment for the plaintiff-beneficiary upon the ground that the District Court should have directed a verdict for the defendant insurance company. In reversing the Court of Appeals, the United States Supreme Court (opinion by Mr. Chief Justice Warren) upheld the trial court's instruction that accidental death was presumed and that the defendant had the burden of persuading the jury that death resulted from suicide. The Court avoided the effect of *Gamer* upon the ground that subsequent to that

[7]ALI Model Code of Evidence, p. 311.
[8]303 U.S. 161 (1938).
[9]359 U.S. 437 (1959).

case the decision in *Erie Ry. v. Tompkins*[10] required the following of state law. The instruction approved in *Dick* substantially follows Professor Morgan's theory, although that theory would not require telling the jury about the presumption but only about the location of the burden of persuasion. In supporting his conclusion the Chief Justice states that, under North Dakota law, the presumption "has the weight of affirmative evidence." Professor Morgan would not say that. Here the court has confused the *shift the burden of persuasion* view of presumptions with the *presumption as evidence* theory.

The Supreme Court of the United States in *Dick* took the position that its decision was necessitated by North Dakota law. Chief Justice Warren referred to N. D. Rev. Code of 1943, section 31-1101 and relied upon four North Dakota cases. The code provision is as follows:

> "A presumption, unless declared by law to be conclusive, may be controverted by other direct or indirect evidence but unless so controverted, the jurors are bound to find according to the presumption."

The North Dakota statute does not, by its terms, repudiate the Thayer theory. It is equally consistent with both Thayer and anti-Thayer theories. The statute merely provides that, in the absence of rebutting evidence, the presumed fact must be found. As pointed out above, this is true under all theories. The statute does not touch upon the real issue which is: what happens when rebutting evidence is introduced?

The first of the four North Dakota decisions cited by the Supreme Court in *Dick* is the most recently decided, *Svihovec v. Woodmen Acc. Co.*[11] That case was similar to *Dick* and involved the same presumption. Although the evidence of suicide in *Svihovec* was no stronger than in *Dick* the Supreme Court of North Dakota held that there should have been a directed verdict for the defendant insurance company. The court did, by way of dictum, say that the presumption had the "weight of evidence," but there is no indication that the instruction approved in *Dick* was even offered.

The next two cases cited by the Court in *Dick* are *Paulsen v. Modern Woodmen of America*[12] and *Clemens v. Royal Neighbors of America.*[13] Both of these cases involved ordinary life insurance and not insurance against accidental death. In such cases it is well established that the burden of persuasion as to the defense of suicide is

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[10]304 U.S. 64 (1930).
[11]69 N.D. 259, 285 N.W. 447 (1939).
[12]21 N.D. 235, 130 N.W. 231 (1911).
[13]14 N.D. 116, 103 N.W. 402 (1905).

upon the defendant insurance company *irrespective of any* presumption.[14] In fact, the concept of a presumption is of little value in cases like these. A presumption has utility when it operates in favor of the party upon whom the burden of persuasion is imposed. For a presumption to operate in favor of one party when his adversary has the burden of persuasion has been likened to "throwing a handkerchief upon a man already covered by a blanket."[15] In *Paulsen* the court upheld a verdict for the plaintiff-beneficiary, whereas in *Clemens* the court upheld a directed verdict for the defendant. Notwithstanding the presumption, the evidence of suicide in *Clemens* was so conclusive as to justify the peremptory instruction. In both cases the court did say that the burden of persuasion was on the defendant, but, as pointed out herein, that would be true irrespective of any presumption.

The other North Dakota case cited by the U.S. Supreme Court in *Dick* is *Stevens v. Continental Cas. Co.*[16] Like *Svihovec, Stevens* involved suit upon a policy of insurance against accidental death. Stevens did not, however, involve the problem of suicide but rather the coverage of death resulting from injury intentionally inflicted by a third party. Deceased was the brakeman and was killed by the discharge of a pistol during his attempt to eject a person from the train. The whole issue was whether the shot by the third person was intentional (in which case there was no liability) or accidental (in which case there would be liability). It was held that the evidence created a jury case upon that issue. The court held that the policy was so worded that the defendant insurance company had the burden of persuasion. Thus it is seen that *Stevens* is subject to the same analysis as *Paulsen* and *Clemens* and there is no presumption of any significance.

The following conclusions may be drawn:

(1) The authorities cited by the U. S. Supreme Court in *Dick,* except for dictum in *Svihovec,* are entirely consistent with the Thayer view and do not require the conclusion reached in *Dick.*

(2) It is not clear whether the Supreme Court is following the *shift the burden of persuasion* rule (the true Morgan theory) or the *presumption as evidence* view.

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[14]See note 8, supra.

[15]There is a temptation to designate as spurious such a use of the term presumption. A better expression might be to say that such a so-called presumption lacks significance. The best example is the presumption of innocence in criminal cases. Here the force of tradition hides the dearth of logic.

[16]12 N.D. 463, 97 N.W. 862 (1903).