

dence" facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck v. Sarver* [20 Cal. 2d 585, 128 P. 2d 16, 21 (1942)] and was repealed after 93 troublesome years [Cal. Ev. Code 1965 §600].

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

* * * *

Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence", to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence. [McCormick, *Evidence*, 669 (1954); *Id.* 825 (2d ed. 1972)].

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT
No. 93-1597

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1931.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co. v.*

Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), and *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchasers, contributory negligence, and non-accidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. "tactical" presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. *Vestal, Erie R.R. v. Tompkins: A Projection*, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, *The Federal Courts and the Federal System*, 697 (1953); 1A Moore, *Federal Practice* ¶0.305[3] (2d ed. 1965); Wright, *Federal Courts*, 217-218 (1963). Hence the rule employs, as appropriately descriptive, the phrase "as to which state law supplies the rule of decision." See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, §2344(c), p. 40, P.F.D. No. 1 (1965).

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1931.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, *Basic Problems of Evidence* 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows

in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, *Relevancy, Probability and the Law*, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in *Selected Writings on Evidence and Trial* 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more * * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick §152, p. 317, says, "A brick is not a wall," or, as Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, " * * * [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code §210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code §210, defining relevant evidence in terms of tendency to prove a disputed fact.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1931.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, *Preliminary Treatise on Evidence* 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see California Evidence Code §§350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure §60-407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner of other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. §3501(c).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. §1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. §3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. §8693, same as to Air Force; 11 U.S.C. §25(a)(10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. §205(a), railroad reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. §403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. §9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. §605, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right