promotion of justice would be greatly aided thereby. Actually a statute designed to approximate this result was proposed in New York in 1935,[38] but was not accepted. Later a modified form of the proposal was enacted which allows for impeachment by prior inconsistent statements provided they be in writing and sworn to.[39] Commenting on the proposal, Professor Ladd suggested that it would be simpler to solve the entire problem by enacting a statute reading: "No party shall be precluded from impeaching a witness because the witness is his own."[40]

In view of the statutes which have been enacted and the exceptions recognized in some States, there can be little doubt that the trend in the development of the law today is towards a modification of the rule, particularly with respect to prior inconsistent statements. It may be that the courts can find some justification for retaining the rule with respect to the other modes of impeachment, but it would be helpful if they would review its foundations in the light of present day circumstances.

WILLIAM L. ANDERSON

EVIDENCE — PRESUMPTION AGAINST SUICIDE — NATURE AND EFFECT ON BURDEN OF PROOF

Under the early common law suicide was a felony of serious import considered more atrocious than murder. Hartman, *The Presumption Against Suicide As Applied in Insurance Cases* (1935) 19 Marq. L. Rev. 20; *State* v. *LaFayette,* 15 N. J. Misc. 115, 188 Atl. 918 (1937). Blackstone describes how the suicide was given an ignominious burial along the highway, with a stake driven through his body; moreover, all his goods and chattels were forfeited to the crown. 4 Bl. Comm. Although the exact date when the presumption against suicide arose is not known, it was during this early period that the judges created this device to ease the harshness of the penalty placed upon the innocent family of the deceased. At the present time suicide is not treated with such severity and the original basis for the presumption is gone. However, the presumption still continues to be a rule of law in most of our states. *Mitchell* v. *Industrial Commission of Ohio,* 135 Ohio St. 110, 19 N.E. (2d) 769 (1939); *Wilder's Admr.* v. *Southern Mining Co.,* 265 Ky. 219, 96 S.W. (2d) 436 (1936); *Dow* v. *United States Fidelity and Guaranty Co.,* 7 N.E. (2d) 426 (Mass., 1937); *Falkinburg* v. *Prudential Ins. Co. of America,* 132 Neb. 831, 273

[38] Recommended changes in Practice Procedure & Evidence, Commission on the Administration of Justice in New York State, p. 61, sec. 38.

[39] New York Civil Proc. Act. 1937, sec. 343-a.

[40] See note 4, *supra.*

N.W. 478 (1937); *Honrath* v. *New York Life Ins. Co.*, 65 S. Dak. 480, 275 N.W. 258 (1937); *Texas and N. O. R. Co.* v. *Ewing et al.*, 46 S.W. (2d) 398 (Tex. Civ. Apps., 1931); statutory presumption, New York, Workmen's Compensation Law, sec. 21. The existence of the presumption as a rule of law has been denied in one recent case. *Watkins* v. *Prudential Ins. Co. of America*, 315 Pa. 497, 173 Atl. 644, 95 A.L.R. 869 (1934). Now, the presumption is more often expressed as being based on fear of death and love of life. *Stuckum* v. *Metropolitan Life Ins. Co.*, 283 Mich. 297, 277 N.W. 891 (1938); *Honrath* v. *New York Life Ins. Co.*, 65 S. Dak. 480, 275 N.W. 258 (1937); *Dow* v. *United States Fidelity and Guaranty Co.*, 7 N.E. (2d) 426 (Mass., 1937); *Consumers Co.* v. *Industrial Commission et al.*, 364 Ill. 145, 4 N.E. (2d) 34 (1936); *Wilder's Admr.* v. *Southern Mining Co.*, 265 Ky. 219, 96 S.W. (2d) 436 (1936). However, some courts, calling suicide a crime, have based the presumption on innocent as opposed to criminal behavior. *Sovereign Camp., W.O.W.* v. *Dennis*, 17 Ala. App. 642, 87 So. 616 (1920); *Almond* v. *Modern Woodmen of America*, 133 Mo. App. 382, 113 S.W. 695 (1908); *Angersbach* v. *South River Police Pension Commission*, 3 Atl. (2d) 873 (N. J. Supreme Ct., 1939). The presumption is not based either upon any difficulty of producing the evidence, or upon the fact that the evidence is peculiarly within the possession of one of the parties, or upon the judgment of the courts as to what is socially desirable.

At the most, the so-called presumption against suicide in the very nature of things, cannot be an absolute or conclusive presumption. We know that men do, in fact, commit suicide. The courts agree that the presumption is rebuttable. *Brotherhood of Maintenance of Way Employees* v. *Page*, 123 S.W. (2d) 536 (Ark., 1939); *Bergman* v. *Supreme Tent, Knights of Maccabees of the World*, 203 Mo. App. 685, 220 S.W. 1029 (1920); *Falkenburg* v. *Prudential Ins. Co. of America*, 132 Neb. 831, 273 N.W. 478 (1937); *Abbott* v. *Metropolitan Life Ins. Co.*, 282 Mich. 433, 276 N.W. 506 (1937); *McDaniel et al.* v. *Metropolitan Life Ins. Co.*, 195 S.E. 597 (W. Va., 1937). In fact, in the light of the increasing rate of suicides, the balance of probabilities is not nearly as strong in favor of accidental over suicidal deaths as it once was. *Supra*, 19 Marq. L. Rev. 20; *Watkins* v. *Prudential Ins. Co. of America*, 315 Pa. 497, 173 Atl. 644, 95 A.L.R. 869 (1934). Interestingly enough, the presumption against suicide is confined to civil cases; there is no presumption against suicide in criminal cases. *Persons* v. *State*, 90 Tenn. 291, 16 S.W. 726 (1891); *People* v. *Creasy*, 236 N.Y. 205, 140 N.E. 563 (1923); *People* v. *Miller*, 257 N.Y. 54, 177 N.E. 306 (1931).

Regardless of how strong or weak the basis upon which the presumption rests is thought to be, the fact remains that the presumption still exists. The problem, then, is as to what effect this presumption shall be held to have upon the ultimate burden of proof. No court holds that the presumption against suicide is conclusive. Wigmore states, "In strictness there cannot be such a thing as a 'conclusive presumption.'" WIGMORE ON EVIDENCE, (Vol. 5, 2d Ed.) sec. 2492. Sharply conflicting positions are taken by the courts as to the general effect of this presumption. The majority of the courts follow what is known as the Thayer-Wigmore view. 103 A.L.R. 185 (1936). Under this view the presumption is merely a guide-post for the judge; it disappears or drops out when evidence to the contrary is introduced by the party against whom the presumption operates. *Brunswick* v. *Standard Acc. Ins. Co.*, 278 Mo. 154, 213 S.W. 45, 7 A.L.R. 1213 (1919); *Wirthlin* v. *Mutual Life Ins. Co.*, 56 Fed. (2d) 137, 86 A.L.R. 138 (10 Cir. Ct. of App., 1932). It has no artificial probative weight as evidence and has no effect on the ultimate burden of proof, which remains just as it would under the pleadings had no presumption been indulged in. THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898) 353, *et seq.*; WIGMORE ON EVIDENCE, (Vol. 5, 2d Ed.) sections 2485, 2486, 2491. The effect of the presumption under this view would be merely to place the burden of coming forward with the evidence upon the party against whom the presumption operates. If so, the presumption is purely a rule of law for the judge, and after its purpose has been served, it need not be mentioned in the court's charge to the jury. Evidently, the Thayer-Wigmore formula is intended for all cases regardless of the many different types of presumptions which are in use.

In a second group of cases, even where rebutting evidence has been introduced, the presumption against suicide is held to have probative weight as evidence to be considered by the jury. *Provident Life and Accident Ins. Co.* v. *Prieto*, 169 Tenn. 124, 83 S.W. (2d) 251 (1935); *Connell* v. *Traveling Men's Association*, 139 Iowa 444, 116 N.W. 820 (1908); *New York Life Ins. Co.* v. *Beason*, 229 Ala. 140, 155 So. 530 (1934); *Mitchell* v. *Industrial Commission of Ohio*, 135 Ohio St. 110, 19 N.E. (2d) 769 (1939). However, most of these courts speak of the presumption not as evidence but rather as being in the nature of evidence. It is not at all clear what is thought to be the distinction. Usually, after holding that the presumption against suicide is in the nature of evidence, the courts say that it has different effects depending on the nature and amount of actual evidence present.

The most critical challenge, however, to the Thayer-Wigmore doctrine is the rule which a number of courts apply to certain specific presumptions. In all cases involving presumptions the Pennsylvania courts hold that the presumption operates to put upon the opponent the burden of persuading the jury that the presumed fact does not exist. *Holzheimer* v. *Lit Bros.*, 262 Pa. 150, 105 Atl. 73 (1918); *Watkins* v. *Prudential Ins. Co. of America*, 315 Pa. 497, 173 Atl. 644, 95 A.L.R. 869 (1934). Adhering to this view of presumptions, the Supreme Court of Pennsylvania in *Watkins* v. *Prudential Ins. Co.*, *supra*, ruled that the so-called presumption against suicide is not a presumption but merely a permissible consideration of the nonprobability of death by suicide. When confronted with the presumption of legitimacy of a child born in wedlock, all courts take the view that the presumption shifts the ultimate burden of proof. In certain other cases including some involving *res ispa loquitur*, some courts are also in accord. *Saunders* v. *Fredette*, 84 N.H. 414, 151 Atl. 820 (1930); *Weber* v. *Chicago R. I. and P. Ry. Co.*, 175 Iowa 358, 151 N.W. 852 (1915); *Price* v. *Metropolitan St. Ry. Co.*, 220 Mo. 435, 119 S.W. 932, 132 Am. St. Rep. 588 (1909); *Kapros* v. *Pierce Oil Corporation*, 324 Mo. 992, 25 S.W. (2d) 777 (1930); *Sullivan* v. *Charleston and W. C. Ry. Co.*, 85 S. Car. 532, 67 S.E. 905 (1910). Missouri has recently abandoned this view in *res ispa* cases. *McCloskey* v. *Koplar et al.*, 329 Mo. 527, 46 S.W. (2d) 557 (1932). However, no court has held that the presumption against suicide shifts the ultimate burden of proof. In accordance with the Pennsylvania view, there is a dictum in an Ohio case, *Glowacki* v. *North Western Ohio Ry. and Power Co.*, 116 Ohio St. 451, 157 N.E. 21, 53 A.L.R. 1486 (1927), to the effect that if a presumption were present, it would shift the ultimate burden of proof. This *dictum* has not been followed in subsequent Ohio cases.

In the case of *Mitchell* v. *Industrial Commission of Ohio*, 135 Ohio St. 110, 19 N.E. (2d) 769 (1939), the Supreme Court of Ohio adopted the view that the presumption against suicide is in the nature of evidence. This was a workmen's compensation case wherein the claimant could not recover compensation if the injury causing death was purposely self-inflicted. Ohio G. C. sec. 1465-68. The presumption against suicide arose after evidence was adduced showing a violent external death. The court held that the presumption operates to its fullest extent only where there is no proof as to whether the death was accidental or suicidal. But even if such proof were present, the presumption is still to be given probative weight, although not as much weight as actual evidence. In a *dictum* the court suggested that if the actual

evidence adduced were so clear that reasonable minds could come to but one conclusion on the issue of accidental death or suicide, the presumption against suicide drops out and has no further effect upon the determination of the issue. By holding that the presumption against suicide is in the nature of evidence, the Ohio Court adopted the minority view heretofore followed in but three states, *viz.*, Tennessee, Iowa, and Alabama. *Provident Life and Accident Ins. Co.* v. *Prieto*, 169 Tenn. 124, 83 S.W. (2d) 251 (1935); *Accident Ins. Co. of North America* v. *Bennett*, 90 Tenn. 256, 16 S.W. 723 (1891); *Connell* v. *Traveling Men's Association*, 139 Iowa 444, 116 N.W. 820 (1908); *Tackman* v. *Brotherhood of American Yeomen*, 132 Iowa 64, 106 N.W. 350, 8 L.R.A. (N.S.) 974 (1906); *New York Life Ins. Co.* v. *Beason*, 229 Ala. 140, 155 So. 530 (1934); *Mutual Life Ins. Co. of New York* v. *Maddox*, 221 Ala. 292, 128 So. 383 (1930). The Alabama court held that the presumption against suicide is analogous to the presumption of innocence, which latter presumption is held to be in the nature of evidence in Alabama. Ohio, however, takes a different view in regard to the presumption of innocence. In Ohio, the presumption of innocence is neither evidence nor in the nature of evidence. Its sole function is to require the courts to charge that the state must prove its case beyond a reasonable doubt. *Morehead* v. *The State of Ohio*, 34 Ohio St. 212 (1877). Ohio General Code section 13442-3 codifies the rule of this early Ohio case.

However, in a will contest the presumption of due validity of the will, which arises from the order of probate, is held to be evidence of probative value. The contestant, if he is to succeed in upsetting the will, must adduce sufficient evidence to outweigh by a preponderance of the evidence both the evidence produced by the proponent and the presumption arising from the order of probate. *Hall* v. *Hall*, 78 Ohio St. 415, 85 N.E. 1125, 15 Ohio Dec. 161, 2 Ohio Law Rep. 328 (1908); *West* v. *Lucas et al.*, 106 Ohio St. 255, 139 N.E. 859 (1922); see note (1936) 2 O.S.L.J. 292. This decision, however, was based on the wording of a statute which made the order of probate *prima facie* evidence of due validity. Ohio G.C. sec. 12083.

It is evident that the Ohio courts have not adopted one general formula which they apply to all presumptions regardless of their nature or reason for existence. Nor have the Ohio courts announced an intention or evinced an inclination to follow the suggestions of Mr. Bohlen and Mr. Morgan. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof* (1920) 68 U. of Pa. L. Rev. 307, reprinted in BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 636;

Morgan, *Some Observations Concerning Presumptions* (1930) 44 Harv. L. Rev. 906. Challenging Mr. Thayer and Mr. Wigmore, they suggest that no general rule can be laid down as to the effect which all presumptions have. This must depend upon the purpose each particular presumption is designed to serve. A few states have recognized the judiciousness of this suggestion and have indicated that presumptions should be classified according to the purpose each is to serve. *Zabarsky* v. *Employers' Fire Ins. Co.*, 97 Vt. 377, 123 Atl. 520 (1923); *Bond* v. *St. Louis-San Francisco Ry.*, 315 Mo. 987, 288 S.W. 777 (1926); *O'Dea* v. *Omodeo et al.*, 118 Conn. 58, 170 Atl. 486 (1934); *Mutual Life Ins. Co. of New York* v. *Maddox*, 221 Ala. 292, 128 So. 383 (1930). Embodied in this view are practical advantages which are nonexistent in the arbitrary Thayer-Wigmore formula. The Supreme Court of Ohio would obviate confusion were it to indicate which view it favors.

Under the Thayer-Wigmore view the presumption against suicide would not be held to be in the nature of evidence. Similarly, following the reasoning of Mr. Bohlen and Mr. Morgan, it would seem that the presumption against suicide, from its very nature, could not be placed in a class with those presumptions which have probative weight. It is based on common experience and a balance of probabilities; it seems to have no real evidential value. If the presumption has inferential value, this value will remain even after the presumption has disappeared. However, it appears that this presumption would serve its purpose if it merely cast upon the adverse party the burden of coming forward with the evidence. Apparently, it would be extremely difficult, if not impossible, for the jury members to weigh a presumption. Seemingly, such an artificial thing is not susceptible of being set off as against conflicting evidence. An instruction that the presumption is in the nature of evidence to be weighed with the other evidence would serve only to confuse further an already bewildered jury. The benefit which obtains to the one in whose favor the presumption operates is rather questionable. It is difficult to ascertain just how closely or scrupulously juries follow, or attempt to follow, the instructions of the trial judge. Practically, there is much danger that an erroneous charge will be given which will constitute prejudicial error. Each year many cases are actually reversed because of the giving or the failure to give an instruction on presumptions and matters relating to the burden of proof.

In the light of these circumstances, it would appear highly desirable that the Supreme Court of Ohio review the law relating to presumptions and indicate what, in its opinion, the nature of a presumption should be,

what is gained by calling a presumption "evidence" or "in the nature of evidence," and what effect the presumption should have upon the burden of coming forward with the evidence and upon the ultimate burden of proof. If the Court were to conclude that no single rule could be applied to all presumptions, a statement to that effect would be helpful. A definite commitment by the Supreme Court of Ohio would obviate much of the misunderstanding which now obtains in the field of presumptions.

ROGER H. SMITH

EVIDENCE — PRIVILEGE AGAINST SELF-INCRIMINATION

The defendant was charged with a violation of Ohio G. C. sec. 6296-30 by operating a motor vehicle while in a state of intoxication or under the influence of alcohol. He refused to submit to a blood test or urinalysis to determine the amount of alcohol in his system. The Court of Appeals for Wayne County said that since the privilege against self-incrimination as guaranteed by the Ohio Constitution applies only to disclosure by utterance, evidence of the demand and refusal was admissible and there was no error in permitting the prosecutor to urge the refusal as an inference of the guilt of the defendant. *State* v. *Gatton*, 60 Ohio App. 192, 14 Ohio O. 20 (1938).

Art. 1, sec. 10 of the Ohio Constitution as amended in 1912 provides, . . . "No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. . . ." Ohio G. C. sec. 13444-3 provides that a criminal defendant ". . . may at his own request be a witness but not otherwise. . . ." The result is that the state may comment on the failure of the defendant to testify but would not be permitted to call him to the stand and force him to claim the privilege. Practically all states have constitutional provisions giving the defendant a privilege but very few authorize comment by the prosecution. (See Calif. Const. Art. 1, Sec. 13 as amended in 1934).

In the principal case the comment by the state upon the defendant's failure to submit to these tests before trial would be meaningless unless it was first shown that the defendant was asked to submit to the tests and refused to do so. Would this be similar to an attempt by the state to call the defendant to the stand in order to force him to claim his privilege? Or would there be any violation of the privilege if these tests had been made against the will of the defendant? The holding of the court here is that "the privilege against self-incrimination . . . applies only to disclosure by utterance, oral or written." This position has