The Presumption Against Suicide as Applied in the Trial of Insurance Cases

Howard A. Hartman
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FOLLOWING in the wake of the depression, there has been much litigation involving insurance policies, wherein the so-called "presumption against suicide" and its application or misapplication has come before the appellate courts. As we may expect, the treatment of this presumption by the various courts has not been uniform, but throughout most of the decisions—with few exceptions—this so-called presumption of ancient and obscure origin, has been iterated and reiterated until a reading of many of the cases would create the impression that this presumption was so firmly fixed and entrenched in our common law jurisprudence, as to make it appear, in effect, as binding upon the courts as though it were a rule promulgated by legislative enactment.

Many of the opinions apply this presumption with little or no discussion as to its origin or function.

Quoting from the opinion of Judge Maxey of the Pennsylvania Supreme Court:

"An examination of many cases concerning presumptions, particularly 'presumptions against suicide', reveals what has been aptly characterized as 'a welter of loose language and discordant discussion concerning presumptions'.”

The court went on further to characterize presumptions as "phantoms of logic flitting in the twilight, but disappearing in the sunshine of actual facts."

This so-called presumption has been so often repeated by the courts, in many cases in the face of facts introduced in evidence, which would ordinarily be sufficient to remove entirely from consideration of both court and jury, any analogous presumption, that its application has reached the point with some courts where it is, in effect, hampering the flexibility of the common law.

One of the underlying principles of American and Anglo-Saxon jurisprudence is that the common law is not hampered by mere combination of words or forms of expressions that in effect beg the question at issue, but is a flexible system which adapts itself to search

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out the truth in varied cases under varied conditions in accordance with
the facts and issues presented by each particular case.

"It is only by the legislative power that law can be bound by
phraseology and by forms of expression. The common law eludes such
bondage; its principles are not limited nor hampered by the mere
forms in which they may have been expressed, and the reported adjudica-
tions declaring such principles are but the instances in which they
have been applied. The principles themselves are still unwritten, and
ready, with all the adaptability of truth, to meet every new and un-
expected case."2

The flexibility of the common law and its insistence upon reason
as the guiding criterion of its precepts, was tersely put by the Wiscon-
sin Supreme Court as follows:

"When the reason of a rule does not apply, neither does the rule."3

That the common law is peculiarly adapted to our present mode of
living because of its susceptibility to changing conditions, has also been
recognized, as appears from the following quotation from one of this
court's opinions:

"Viewed objectively and at large as a system of principles deducing
from litigated instances just, reasonable, and consistent rules of de-
cision suitable to the genius of the people and to their political, social,
and economic conditions, the common law never changes; but with
reference to the rules so deduced we may say with Francis Bacon:
'As waters do take tincture and taste from the soil through which
they run, so do laws vary according to the region where they are
planted though they proceed from the same fountains."4

While the general principles of the common law are fixed, their
preservation and development is a process of growth and change to
meet changing conditions. With this in view, we seek to discuss the
presumption against suicide as to its historical origin, its nature as a
presumption, and its purpose, function and application in the light of
modern conditions in the trial of an action upon an insurance policy.

Any presumption, through its blind application, may become a
means of excluding the light of reason in the trial of a lawsuit with
just as much certainty for practical purposes as though the courts were
rigidly bound by an outworn statute.

The underlying concepts of the common law may be obscured and
the ends of justice defeated if in a trial, evidence or the want of evi-
dence shall be supplemented or supplied by the hard and fixed rule of

4 Metropolitan Casualty Ins. Co. v. Clark, 145 Wis. 181, 182, 129 N.W. 1065, 1066 (1911).
a presumption, or if with evidence of what transpired in a given case, the jury is allowed to weigh with such evidence a presumption or rule of law. The danger of so circumventing the search for truth, which should be the prime object of every lawsuit, is increased manifold when we are dealing with a presumption of ancient origin and doubtful meaning.

Leading textbooks on evidence and the authorities have defined the function of presumptions as follows:

"A presumption cannot in itself possess probative weight, but merely necessitates evidence to meet the prima facie case which it creates. When evidence is introduced rebutting the presumption, the presumption disappears, leaving in evidence the basic facts which are to be weighed. * * *

"For a presumption, in a strict sense, is nothing more than a rule of law. It may or may not embody within it a logical, as well as a legal or technical deduction. Viewing it solely in its legal aspects, however, it is neither designed nor intended to have weight as substantive evidence."5

"It is sometimes said that the presumption will tip the scale when the evidence is balanced, but, in truth, nothing tips the scale but evidence, and a presumption, being a legal rule or a legal conclusion, is not evidence * * * it is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature."6

"A presumption is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent, * * * in strictness, there cannot be such a thing as a 'conclusive presumption'."7

Professor Thayer in his Storrs' Lectures before the Law School of Yale University, 1896, said:

"By a loose habit of speech, the presumption is occasionally said to be, itself, evidence, and juries are told to put it on the scale and weigh it. * * * A presumption itself contributes no evidence, and has no probative quality."

The language of Judge Baldwin of the Supreme Court of Connecticut is appropriate in connection with the repeated use of the presumption in question. Discussing presumptions this judge said:

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6 Elliott on Evidence, Volume 1, Sec. 83, page 15.
7 Wigmore on Evidence, 2nd Ed., Volume 8, Secs. 2491-2492. See, Thayer's Preliminary Treatise on Evidence, pages 314-346; Greenleaf on Evidence, Sec. 44; Steph. Dig. on Evd. 246.
"Its convenience, as a rule of decision, may be so generally recog-
nized as to place it in the rank of legal fictions. But, so long as it re-
tains its original character as a presumption of fact, it has simply the
force of an argument." 8

The Supreme Court of Missouri in a frequently cited case has said:

"Obviously, the presumption against suicide cannot continue to
exist in the face of evidence showing suicide, for such a view would
be utterly subversive of the well-settled doctrine, figuratively but strik-
ingly announced by Lamm, J., substantially, to-wit: that presumptions
are the bats of the law, which the light of evidence frightens and causes
to fly away." 9 (Italics supplied.)

The court in a subsequent case stated:

"In its character as a presumption it is not evidence, it is a mere
rule of law which operates to throw upon the party against whom it is
raised the duty of going forward with the evidence. It performs no
other function and has no other significance. * * * So soon as he
discharges his burden, that is to say, adduces contrary evidence, the
presumption vanishes entirely. * * * The presumption was not evi-
dence to be considered by the jury, but a rule of law to guide the
court and it had served its purpose and gone out of the case when the
case was submitted to the jury." 10

The United States Circuit Court of Appeals for the tenth circuit
has stated as follows:

"It is true there is a presumption against suicide, but it is one of
law, and it disappears when circumstances are adduced showing how
the death occurred, and in that case the beneficiary is bound to estab-
lish that the death was accidental." 11

The Supreme Court of the United States in considering the statu-

tory presumption that gifts made within two years of death were pre-
sumed to have been made in contemplation of death, applied the rule
that even such a statutory presumption must give way to the facts dis-

closed by the evidence. 12

So much for the nature of presumptions in general.

Let us now look at the historic origin of the so-called presumption
against suicide. The exact date of its origin, or the place or decision
where it was first applied to a specific case, seems to be unknown. It is
clear, however, that it existed at the common law. When Blackstone

Rep. 80 (1895).
9 Brunswick v. Standard Accident Ins. Co., 278 Mo. 154, 213 S.W. 45, 50, 7
11 Wirthlin v. Mutual Life Ins. Co., 56 F. (2d) 137, 139 (C.C.A., 10th, 1932) ; see
wrote his "Commentaries on the Common Law of England" suicide was not only a felony, but was considered a more heinous crime than murder. Furthermore, at the time in question, the rigors and penalties of the law punishing crimes were, in no sense, comparable with present day standards. There were no constitutional safeguards against cruel and unusual punishment or foreitures of property. The severity of the penalties and punishments meted out by the early English law, in an attempt to curb the practice of self-destruction fell heavily upon the family of the deceased. His goods and chattels were forfeited to the Crown and the offender was given an ignominious burial on the highway, with a stake driven through his body. It is true that subsequent changes in the law lessened the penalty, but even those medatory changes made in England in 1824, provided that the body could be buried only between the hours of 9 and 12 o'clock at night. 

Without condoning in any degree the offense against society that suicide involves, we are living in an enlightened age when no such penalties could or would be sanctioned, yet this historic background should be considered in discussing this presumption which comes down to us from the early days of the law.

It might be said that the history of the early English common law discloses a race between the legislators and the lawyers, with the lawyers one step in the lead. By this we refer to the attempts of the law to temper the severity of legislative enactments to meet the ends of justice in dealing with the particular facts before the court. If, then, we may go back to the early development of the common law, it is not hard to understand how the lawyers and courts could, for the protection of the widow and children of the man who had taken his life, seek to avoid not only the humiliation and pain inflicted by the rigors of the early law, but to prevent the forfeiture of his goods to the injury of his dependents who were in no wise chargeable with fault or blame.

It is here, and in this situation, so far as we can find, that the presumption arose that no sane man would take his life and as a corollary thereto, very slight evidence was sufficient to induce a coroner's jury to bring in a verdict of temporary insanity which made suicide no crime.

It might be stated in passing, that at this early date not only was there a strong motivating reason for making it difficult to establish the commission of the crime of suicide, but that the presumption at that date might be said to be a more logical inference based upon the experience of the general mass of mankind than would be the case today, considering the severe measures then taken to punish self-destruction.

However, the danger involved in the application of this presumption

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13 Byrnes Law Dictionary, "Suicide."
was realized at an early date. In his “Commentaries” Blackstone re-
monstrated against the abuse of this presumption, stating:

"But this excuse ought not to be strained to that length to which
our coroners' juries are apt to carry it, viz: that the very act of suicide
is an evidence of insanity, as if every man, who acts contrary to rea-
son, had no reason at all, for the same argument would prove every
other criminal non compos as well as a self-murder." 14

If Blackstone had this comment to make on conditions prevailing
in his time, what would have been his admonition today on the appli-
cation of this presumption under modern conditions?

The ancient penalties referred to are now a matter of history. The
purpose of the presumption, as a protection to the relatives of the de-
ceased, no longer applies. The very prop upon which the presumption
is supposed to rest, namely, that no sane man would take his own life
is disproved by facts which are a matter of common knowledge.

Statistics show that suicide during the past few years, has been on
the increase in America. In 1932 there were more than 20,000 suicide
deaths and more than twice as many unsuccessful attempts at suicide.
This condition with which we are faced is true, not only in this coun-
try, but throughout the world. A leading publication stated that approx-
imately 23,000 persons took their lives in 1932 as against 20,008 in
1931, and that four out of five of the largest cities of the United States
showed a rise in the suicide rate. 15

The papers of this and other countries have mentioned, among
other victims of this scourge, industrial leaders, literary and artistic
geniuses, and learned professional men. Where, in the face of these
facts, can there be any logic or reason to support a presumption based
supposedly on the proposition that the love of life is so great, that no
sane man would take his life? We know that not only sane men, but
brilliant men, have done so.

Considering these statistics and the facts which are common knowl-
edge to those who read the news of our times and are familiar with
modern social conditions, there is no reason why the law should con-
tinue to apply with the rigor evidenced in many decisions a presump-
tion which has long since served its purpose, if any, and which no
longer is sustained by the props which, theoretically, were supposed
to sustain it. We know that the instinct of self-preservation has not
been sufficiently strong to deter sane men from taking their lives.

No longer are we confronted with the harsh and drastic penalties
inflicted centuries ago upon the relatives. On the contrary, a further

14 Blackstone's Commentaries, Book IV (Cooley's Edition), pages 189, 190.
15 Literary Digest, July 1, 1933; see also, footnote in Watkins v. Prudential Ins.
examination of statistics will reveal that in many of the cases, those who have committed suicide in recent years, have carried accident and life insurance and the reported decisions of the courts, to say nothing of those numerous cases which have not been reported, are ample evidence of the attempts made to realize on these policies.

We are here considering the matter, it is true, from the legal standpoint, but as indicated at the outset of this article, the common law takes into account changing social conditions, and the problem must, therefore, be approached accordingly. Whatever may be said of the value of the presumption from a social standpoint when it served to protect the family from disgrace and poverty, there certainly can be no occasion today for allowing this presumption to supply the evidence which could not otherwise be secured, and thus allow a jury under the instructions of the court to bring in a verdict of accidental death, when the judge trying the case, and the jurors, if passing judgment as individuals entirely freed from the influence of any presumption either way, would unhesitatingly conclude that death was self-inflicted. To so bolster up an action by this presumption is not only illogical from the legal standpoint, but it is anti-social as well, because conceding, as we must, that suicide is anti-social, the application of the presumption and the resultant aid to a recovery in actions upon insurance policies where suicide is a defense, acts not as a deterrent to, but, on the contrary, may serve to encourage self-destruction.

It is time, therefore, that lawyers and judges, in approaching the problem of suicide in the court room, should approach it in the light of present day knowledge of facts and conditions rather than to approach the problem from the standpoint of a coroner's jury in the 15th century.

There is also the presumption that a man will use due care for his own safety. Yet, in the trial of an action for personal injuries, where contributory negligence is an issue, the courts would not countenance a charge in the face of evidence showing what, in fact, transpired, i. e., plaintiff's conduct in the specific situation before the court, that the jury was entitled in considering the evidence, to weigh in the scales of justice as an additional factor substantiating the plaintiff's claim, a legal presumption that he had exercised due care.

On the other hand take the following case upon double indemnity life insurance policies, where the facts showed that the deceased, while in the kitchen with his wife, picked up a knife stating to his wife, "Here goes," and fatally stabbed himself. The companies defended the cases on the ground of suicide and plaintiff sought to meet the proof thereof by evidence that the deceased had on previous occasions made the motions of stabbing himself in jest. The facts disclosed, however,
that the fatal stab was sufficiently deep to penetrate the heart. On ap-
peal the court held it would not disturb a verdict of the jury allowing
recovery.\textsuperscript{16}

On a subsequent appeal\textsuperscript{17} involving the same alleged accident com-
plaint was made that the court improperly charged that where the
death appears to have been caused solely by external, violent means, it
was presumed it was accidental rather than suicidal, unless upon a pre-
ponderance of the evidence, the jury is satisfied it resulted from inten-
tional self-destruction. On appeal the court affirmed the judgment for
the plaintiff and made the following statement:

"While the facts may suggest suicide, no one saw the blow admin-
istered, although it may be conceded that under all the facts there is
no room for doubt that it was self-inflicted. But such are the surround-
ing circumstances that we cannot say, as under some exceptional cir-
cumstances it has been said, that it was error to charge that if death
resulted wholly from outside violent means, it will be presumed to be
accidental rather than from suicide.

"However, the charge as a whole would scarcely have misguided
the jury in this regard. Immediately following the above-mentioned
part is the explanatory clause, 'that the law is that there is no presump-
tion that one will violently take his own life'."

If, as the court states, it must be conceded that the fatal wound was
self-inflicted, the charge in effect told the jury that the law presumed
the blow was struck in jest when it would seem that the facts had left
no room for any presumption.

From the foregoing it must be apparent first, that we are warranted
in considering the so-called presumption against suicide in the light of
its antiquated origin and purpose, from which it appears that its sup-
posed foundations have been so undermined by the facts of our com-
mon knowledge, as to warrant discarding it entirely in many cases.

Second, if the presumption is to have any function whatsoever, it
should be considered as a presumption, and not as evidence.\textsuperscript{18} Like
other presumptions, it has no place in a trial after evidence of the facts
have been produced. At the most it should be considered as a rule of
law for the guidance of the court and not the jury, in determining upon
whom rests the burden of coming forward with the evidence.

When so applied for this limited purpose, the court should have in
mind that the only basis which supposedly supports the presumption,
is the experience of mankind in general, and as soon as the evidence
discloses that the court and jury are, in the instant case, considering
the conduct of an individual which discloses that his situation differs

\textsuperscript{17}N. Y. Life Ins Co. v. Pater, 17 F. (2d) 963, 964 (C.C.A., 7th, 1927).
materially from that of the great mass of mankind, the presumption so far as his particular conduct is concerned, should entirely drop out of the case.

For example, if the evidence disclosed that the deceased was suffering from a painful and incurable disease, it is illogical to presume that this particular individual would have the same love of life and abhorrence of death that would be found in the average man. If we are going to rely on presumptions based on experience in general, as distinguished from evidence in a specific case, the presumption applicable to such an individual would be that based upon the general experience of individuals suffering from a similar malady and in a similar mental and physical condition. Obviously, such data is not available and such statistics would, no doubt, be excluded, if the defendant were to attempt to introduce them, just as the court commonly excludes evidence of other accidents in a personal injury action. Yet, such proof would be more material than a presumption based on the experience of mankind in general.

Third, the fact that the burden of proof of suicide, as an affirmative defense, rests upon the defendant, does not warrant the court in charging the jury that it may consider either that there is a presumption in favor of accidental death, as distinguished from suicide, or that there is a presumption that the deceased did not take his own life. Either of these propositions so submitted to a jury allows them to weigh the so-called presumption as evidence when, in truth and in fact, its only logical basis is a rule of law as distinguished from an established fact in the given case.

Space does not permit an attempt to analyze the various decisions of the various jurisdictions in their application and use of the presumption in question. We do wish, however, to point out some cases which we believe illustrate the misapplication of this ancient presumption.

No less an authority than the Supreme Court of the United States has upheld the proposition that the presumption against suicide was one for the guidance of the jury as well as the court, stating:

"Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of the death having been caused by external, violent and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts."

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The extent to which both trial and appellate courts have gone in applying this presumption is illustrated by the following charge to the jury, which was upheld by the United States Circuit Court of Appeals for the seventh circuit:

"The court instructs the jury that to commit suicide is contrary to the general conduct of mankind, and shows moral turpitude in a sane person, and therefore the presumption of law is against the theory of suicide, and before the jury can find that 'he' committed suicide there must be evidence introduced sufficiently strong to overcome such presumption and to convince the jury affirmatively that 'he' committed suicide. While this presumption of law is disputable and subject to be overcome by evidence which discloses that the deceased in fact committed suicide, it is nevertheless entitled to weight as affirmative evidence to support the theory of accidental death." 20

The Supreme Court of Wisconsin has stated, in considering the defense of suicide:

"However, it must be conceded that the theory against suicide, aside from the presumption of law that obtains against it, based upon the whole evidence, is not entirely satisfactory.Neither does an hypothesis in favor of suicide meet all the conditions of the evidence. In this situation resort must be had to the legal presumption that, where death occurs under such circumstances that it may or may not have been caused by suicide, it will be presumed to have been unintentional, and the burden rests upon the defendant to prove the contrary." 21

With all due respect to the courts, both Federal and State, we submit that the logic of the holdings in these cases and the language used in support of them, is not convincing. The very fact that the Wisconsin Supreme Court in the Krogh case conceded that the evidence on the theory against suicide was not entirely satisfactory, was all the more reason why the evidence of the plaintiff to sustain that theory, should not have been bolstered by a presumption, but that the case should have been determined on the facts before the court and the rule of law which prevails in other cases, namely, that the plaintiff through the trial had the burden of establishing the affirmative of the issue, i.e. to prove a death that comes within the terms of the policy.

This court applied the presumption under consideration in a subsequent carbon monoxide poisoning case 22 where there was evidence from which a motive for suicide could have been found, and where the court in its opinion commented on the fact that the deceased, who was found lying in the garage with the motor of the automobile running,

21 Krogh v. Modern Brotherhood, 153 Wis. 397, 401, 141 N.W. 276 (1913).
22 Wiger v. Mutual Life Ins. Co., 205 Wis. 95, 236 N.W. 534 (1931).
knew of the danger incident to the operation of an automobile in a closed garage and had spoken of such danger within a few months of his death. It also appears in the opinion of the court that the evidence disclosed there was no occasion for running the automobile with the doors closed, and that there was absent any evidence of an accidental fall that would have accounted for deceased being found lying in close proximity to the exhaust of the running motor. The court in its opinion stated:

"In the Fehrer case the court * * * said:

'The law is well settled, based on human experience, that there is a strong presumption against suicide. The love of life and the immorality of taking one's own life turn the mind against suicide. So it is that when suicide is alleged in defense the burden is on the defendant to establish such fact. In such a case where the evidence is wholly circumstantial, as in this case, every other reasonable hypothesis to account for the death must be excluded to take the case from the jury'.

"Certainly they (the facts) are sufficiently strong to justify the jury in coming to the conclusion of suicide, but that does not by any means exclude a reasonable inference that the insured met his death by accident."

The language quoted, as we read it, discloses on its face the error of such application of the presumption. The statement of the court that human experience justifies a presumption that a man will not take his own life, of necessity, refers to human experience in general, not the experience of men in a like situation to the deceased in that case. If, as the court points out, there are sufficient facts in the case to warrant a jury in finding suicide, there is obviously no further room or necessity in that case for discussing a presumption. On the contrary, that case should be tested as any other case upon a contract would be tested, i.e., by the evidence before the court and if, on that evidence the plaintiff has failed to prove an accidental death within the terms of the policy, the defendant is entitled to a directed verdict.

If, for example, plaintiff were suing upon a contract to recover the purchase price of goods sold and the defense of fraud was interposed, the court would consider that case on the evidence produced, and if the defendant proved facts warranting a finding of fraud, plaintiff could not hope to recover by reliance upon a presumption that men acted honestly and in good faith and the such a presumption (granting it

23 Fehrer v. Midland Casualty Company, 179 Wis. 431, 190 N.W. 910 (1922).
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might be true in the case of mankind in general) was sufficient on the facts of that particular case to allow the plaintiff to go to the jury.

The same reasoning, as we see it, applies to the defense of suicide. Where facts are produced which would warrant a jury in finding suicide and those facts are not refuted or rebutted by the plaintiff, the plaintiff should not be entitled to meet a motion for a directed verdict by in effect stating to the court that the great mass of mankind would not take their lives, therefore this particular plaintiff, regardless of the evidence as to his particular condition financial, physical or mental, must be presumed to have met his death accidentally.

We appreciate at this point that some readers may raise the question whether the courts go so far as to hold that there is a presumption that death was accidental. We concede that some of the cases do make this distinction and hold that the presumption against suicide is not a presumption that death was accidental.\textsuperscript{25} From a practical standpoint, however, it is in many cases a distinction without a difference. Certainly, so far as the average carbon monoxide case is concerned, the issue in many instances is whether the death is accidental or self-inflicted. The burden of proof is on the plaintiff, theoretically at least, to prove an accidental death. Yet, what practically occurs where the courts apply the presumption against suicide as a guide for the jury to be considered by them as evidence, is to place on the defendant not only the burden of proving suicide, but of disproving accidental death.

The following statement in a charge to the jury was held not to have constituted error:

"Where a man suffers injuries resulting in his death, which injuries might have been caused by accident or might have been intentionally inflicted upon himself, and there is no preponderance of evidence as to the cause of such injury, then the presumption is that death was caused by accidental means, and not intentionally self-inflicted or suicidal."

Commenting on this the court states:

"While the paragraph is not as clear as might be desired, we think it fairly appears that it purports to deal exclusively with the two alternatives of accident and suicide, and to tell the jury that if they find from the evidence that the death must have been caused by one or the other and does not preponderate to show suicide, the presumption which is indulged against suicide will raise a presumption that the death occurred from the only other alternative with which the paragraph purports to deal, viz., accident."\textsuperscript{26}


\textsuperscript{26} Ocean Accident & Guarantee Corporation v. Schachner, 70 F. (2d) 28 (C.C.A., 7th, 1934).
The court went on to state that other parts of the charge definitely told the jury that in order to recover, the plaintiff must show by a preponderance of the evidence that the deceased came to his death wholly through accidental causes, and that the burden was not on the defendant to show that it was not liable.

While theoretically such a charge, when taken in its entirety, may be explained to the satisfaction of a legal mind as preserving the rule that the burden of establishing liability rested on the plaintiff, the fact remains that we are dealing here with the practical question of trying an issue before jurors, who may or may not fully understand the legal terminology as to burden of proof and preponderance of evidence. If, however, a jury is told that the law presumes that the death was accidental, the plaintiff in these cases, where the evidence on both sides may be and is in many cases, of necessity, circumstantial, has a decided advantage over his adversary.

At the most, the so-called presumption against suicide in the very nature of things, cannot be an absolute presumption because we know that men do, in fact, commit suicide. It must, therefore, rest (if upon any foundation) upon the proposition that the great mass of mankind do not, while sane, take their own lives. So considered, it is not a presumption in the sense of being a fact so well known as to be weighed in the scales of justice as evidence, but on the contrary, is merely an inference of fact deduced from the experience of mankind in general.

Treating it as such, it should go no further than to place the burden of coming forward with the evidence upon the defendant, where the plaintiff has proved a violent death under circumstances which might be accidental within the terms of the policy. So treated it would, like any other presumption of similar character, drop out of the case on the production of evidence by the defendant which would allow the court or jury to find that the death was self-inflicted, whereupon the burden of coming forward with the evidence would again rest on the plaintiff, upon whom the burden of the affirmative of the issue never shifts.

Such, for example, is the situation where the court has before it the statutory presumption that gifts made within two years prior to death are made in contemplation of death.27

So long as the presumption against suicide is in this category and we submit that the able text writers so classify it,28 it would seem logically to follow that this so-called presumption is no more than a rule for the guidance of the court in determining upon whom rests the burden of coming forward with the evidence, and that it is not a rule

28 Supra, note 6, 7.
for the guidance of the jury, and has no place in a charge to the jury.

Again, using for example, a case of carbon monoxide poisoning, the plaintiff, in a jurisdiction where the presumption against suicide prevails, makes out a prima facie case by proving that the deceased was found in the closed garage with the motor of his car running and producing the colorless, odorless, and poisonous carbon monoxide gas. On a motion for a non-suit or a directed verdict on this state of the evidence, the plaintiff would prevail in those jurisdictions, not because the plaintiff had proved any facts disclosing in what manner the deceased had been accidentally subjected to the gas, but because the court would apply the presumption that the deceased, like other ordinary men, had a sufficient love of life and abhorrence of death, not to have intentionally subjected himself to the poisonous gas.

If, however, on the motion for non-suit being denied, the defendant comes forward with ample proof of motive for suicide, let us say for example, that the deceased was faced with financial ruin and disgrace, or was suffering from an incurable and painful disease, and should prove further that the deceased knew and had expressed to others the evidence of his knowledge of the danger of death from running a car in a closed garage, and should prove further that there was no evidence of any accidental fall or diversion of attention, but that on the contrary the deceased, in possession of his mental and physical faculties, must have deliberately entered the closed garage, and started the motor and remained in the zone of danger without apparently attempting to escape therefrom, it then becomes evident, in the light of common knowledge at least, that this particular deceased was not subject to any rule or presumption that might apply to the so-called ordinary man, or the general mass of mankind. On the contrary it would then be evident that his was the unusual situation, so that on such proof the duty of coming forward with the evidence should rest upon the plaintiff, and in the absence of further proof from the plaintiff, the court would be warranted in granting a directed verdict for the defendant.

If, on the other hand, plaintiff should produce proof to negative the defendant's proof as to motive for suicide and should produce facts which might explain as accidental, rather than intentional, the deceased's presence in the garage containing the deadly gas so as to make an issue of fact for the jury, it must also be evident that on this state of the proof to charge the jury that the law presumes the death would have been accidental rather than suicidal, or that there is a legal presumption that this deceased did not take his life, is adding to the plaintiff's evidence in regard to what happened in this particular case,
the benefit of a rule of law governing the duty of coming forward with
the evidence of which plaintiff has already availed himself on the mo-
tion for a non-suit.

If we are to give a presumption the effect of evidence, would it not
appear reasonable to consider its accuracy based on experience in the
type of case before the court?

If, for example, a study of the statistics should disclose that 60 per
cent of the deaths resulting from carbon monoxide poisoning in closed
garages were self-inflicted, or if similar investigation should show that
75 per cent of the cases of death from drinking carbolic acid had been
suicidal, the court would not be warranted in charging a jury on a case
where the evidence is in conflict, that there was a presumption against
suicide, in such a type of case, even though it be conceded that man-
kind generally does not commit suicide.

This very point has been made by the Supreme Court of Nebraska,
where it states:

"Because men love life and fear death, they instinctively avoid
obvious danger. This fact, drawn from experience, is the basis of a
presumption relied upon by plaintiff, that when the cause or manner of
death is unknown, we infer it was not suicidal. The inference is not
based upon a law of nature which is invariable. Men do frequently
commit suicide. Being a probability resting upon human experience, in
its nature, it is controlling only in the absence of evidence of the
actual. When, knowing only that one has died from drinking carbolic
acid, you say you are in doubt as to cause, and then, bringing into ser-
vice the presumption against suicidal intent, you finally conclude that
the death was accidental, are you not guilty of that error known in
logic as petitio principii? Had you not, in reaching your first conclu-
sion, given the theory of accident the benefit of the truth upon which the
presumption is founded? Had you assumed as a fact that the de-
ceased contemplated suicide or was indifferent to life, you might not
have entertained the doubt. Let us suppose experience has shown that
of all the persons who have died from drinking carbolic acid three out
of four were cases of suicide; then, would it not be palpably absurd to
infer in the given case, that the death was not intentional? The rule
invoked arises when we are ignorant of the intent and loses its force as a
presumption in presence of actual facts bearing upon intent

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Furthermore, if we assume for the sake of argument that a court
is warranted in charging a jury either that the death was presumed to
be accidental rather than suicidal, or in charging the jury that there is
a legal presumption against suicide, which may be weighed in evidence
by the jury as a fact in reaching its verdict, then on what basis can a

29 Grosvenor v. Fidelity & Casualty Co. of New York, 102 Neb. 629, 168 N.W.
596, 597 (1918); Brunswick v. Standard Accident Ins. Co., 278 Mo. 154, 213
S.W. 45, 48 (1919); Griffith v. Continental Cas. Co., 290 Mo. 455, 235 S.W. 83,
85 (1921); Loessig v. Travellers Ins. Co., 169 Mo. 272, 69 S.W. 469, 371 (1902).
court ever find, as a matter of law, that the death was self-inflicted? Obviously, if the presumption has a place in the charge to the jury and is to be weighed by them as evidence in reaching their verdict it must, of necessity, follow that such presumption would constitute sufficient evidence to carry every case to the jury. Yet, this is not the fact, and the books are full of cases wherein the courts have held that suicide was proved as a matter of law.

The United States Circuit Court of Appeals for the Eighth Circuit, commenting on this point, stated:

"The contention of plaintiff in the last analysis is that she may deduce, from the facts and circumstances shown in the proof, a presumption against death by suicide, and thereafter, regardless of the state of the proof of suicide, she may again add such presumption to her side of the case. This is not the law (citing cases). For obviously, if it were the law, every case of alleged suicide would have to go to a jury."

Other presumptions, such for example, as the presumption of due care in a case for personal injuries, drop out in the light of evidence and cannot be considered or weighed as evidence by the jury.

The separate concurring opinion of Judge Denison of the Circuit Court of Appeals for the Sixth Circuit in *New York Life Ins. Co. v. Ross* contains an interesting comment reflecting the view here sought to be brought forth regarding this proposition:

"Its origin seems to be in early cases, which had occasion to and did decide (rightfully, of course) that there is no presumption of suicide, and which then assumed that therefore there is a presumption of non-suicide—an obvious non sequitur. All authorities agree that in a death action upon an accident policy, and where suicide is not pleaded as an affirmative defense, the burden of proof is on plaintiff to establish that the death was by accident, and hence by inclusion was not by suicide. *

"Upon such a record it was for the jury to say whether the conclusion of accident was supported by the preponderance of inferences; and I cannot see how any presumption, or even inference, as to the action of the average man under average circumstances, could help the jury to determine the action of this man under these circumstances."

While courts continue to apply this time-worn presumption, there are dicta among the opinions of some of the courts casting a doubt on the significance of the proposition which, no doubt, is accounted for by

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32 30 F. (2d) 80, 82 (C.C.A., 6th, 1928).

the fact that some of the judges are becoming impressed with the fact that recent experience is demonstrating that the props upon which the presumption has stood for centuries are weakening, and that they realize that not only sane men, but brilliant and educated men do, in fact, commit suicide, and that every case that comes up for trial upon an accident policy, should be considered upon the facts of that particular case, just as the court would consider any other action in contract or in tort.

In a decision rendered in June of this year by the Supreme Court of Pennsylvania, in an action for double indemnity on life insurance policies, the court carefully analyzed not only the presumption against suicide, but presumptions generally from the standpoint of their origin, characteristics, and their function or application in the trial of a lawsuit: After considering the authorities, leading texts on evidence and many decisions, and also the statistics pertaining to suicide, the court held that it was prejudicial error for the trial court to charge the jury that the necessary element of accidental death was prima facie supplied by the presumption against suicide, and that the law presumed that the insured's death was accidental. Among other things, the court in its opinion points out that accidental death, as opposed to self-inflicted death, is no more to be legally presumed than suicide is to be legally presumed as against homicide, stating that there are thousands of homicides annually, still more suicides, and the number of the latter is surpassed by the number of fatal accidents. The court pointed out in the footnote on page 649 of its opinion that the number of homicides in the United States (excluding Utah) for 1932 was 11,016, number of suicides, 20,880; fatal accidents, 85,474, and death from all other causes, 1,186,739.

The Pennsylvania court went so far as to hold that on an even balancing of the evidence on the issue of death by accidental means or suicide, the plaintiff has failed to sustain the burden of proof and the verdict should be for the defendant. On page 651 the court states as follows:

"Here plaintiff pleaded as her cause of action that the insured 'without intention on his part, but accidentally, inhaled carbon monoxide gas as a result of which he died.' She proved that the death was caused by external and violent means, and the trial judge then said that this much being proved, 'the law presumes that his (the insured's) death was not by suicide, but was accidental' and that 'this presumption has the same probative force and effect as direct evidence of accidental death.' This was error, for, as already pointed out by us, plaintiff's invoking a mere 'presumption against suicide' (a presumption unsupported by relevant evidence) cannot serve, on the pivotal issue, as an

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adequate substitute for the proof the well-pleaded cause of action requires."

We believe that a careful reading of this able opinion, with its analytical approach to and logical discussion of this ancient presumption, should stimulate a desire to re-examine the field of presumptions, and in particular, the so-called presumption against suicide.

We submit for consideration that this entire question be considered in the light of the true conception of the common law, namely, a system of law sufficiently flexible to meet the needs of a changing society. We submit further that so tested the presumption is one which has outworn its usefulness and is no longer worthy of the place which it has been afforded in the litigation of insurance cases. If the presumption is to be given any force or effect at all it must, of necessity, be treated not as a presumption that stands true in all cases, but merely as an inference based upon the general conduct of mankind, which will warrant the court in considering it, if at all, only as a guide to the court and not the jury in determining upon whom rests the burden of coming forward with the evidence. This presumption, like other presumptions of similar characteristics and nature should, under the well-recognized principles of the law, drop out of the case in the light of evidence as to what actually happened in the particular case on trial. There is no more basis for laying down a general presumption to determine the intention of a given deceased in a given case, where the facts are produced to show his state of mind as a particular individual, than there would be to contend that because most men used care in the operation of their automobiles, that the particular plaintiff in a personal injury action had operated his car with due care in the face of proof that he was operating the same in a palpably negligent manner.

In no event, we believe, should the court, where the facts are produced as to what happened in the given case and as to what the mental condition of the given deceased was, allow the jury to weigh in the scales of justice this general presumption as the equivalent of evidence or as evidence, in addition to the testimony actually produced by the parties, nor should the so-called presumption be referred to in the charge. Such a charge must, it would seem, be open to the objection that it allows the jury to base its verdict on conjecture as distinguished from evidence.35

In conclusion, it would seem that the problem will be clarified by an adherence to the fundamental rule of law pertaining to such presumptions, tersely stated: "Presumptions may be looked upon as legally

recognized phantoms of logic, flitting in the twilight, but disappearing in the sunshine of actual facts." The logic of this proposition should, we submit, appeal to the bench and bar today when in the progressive development of the law, it is recognized both in the teaching of the law and in its application by the courts, that every case must be considered on its own facts.

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CONTRIBUTORS TO THIS ISSUE
James E. Coleman, A.B. Milton University, 1910; LL.B. University of Maryland, 1913; member of the Wisconsin Bar. Chairman of the Fidelity and Surety Committee of the American Bar Association.


Clark J. A. Hazelwood, A.B. University of Wisconsin, 1924; LL.B. University of Wisconsin, 1926. Member of the Wisconsin Bar; Assistant Corporation Counsel for Milwaukee County since 1931.

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