or not a court of equity will strictly enforce the condition precedent when time has been made of the essence of a bilateral contract. Though it seems that most of the other cases in Ohio have adopted a strict construction, and required performance of conditions precedent, there is abundant authority favoring the lenient construction adopted by the majority.

It was, however, the view of the dissent that this was not a case of a bilateral contract, but of an option, and for that reason the condition precedent of performance on time should be strictly enforced. This seems to be a perfectly justifiable view if we can consider that this was an option, since equity will not give relief where there is a failure to comply with the conditions of an option because there is no forfeiture, but the option holder is left in *status quo*. *Lauderdale Power Co.* v. *Perry*, 202 Ala. 394, 80 So. 476 (1918); *Hughes* v. *Holliday*, 149 Ga. 147, 99 S.E. 301 (1919); 1 Ames, *Cases on Equity Jurisdiction*, p. 320n (1904). "The burden of proof in an action for specific performance of an option is on the plaintiff to show either a tender of the purchase price or a justification for his failure to do so. But a mistaken belief that title was encumbered will not excuse the plaintiff's failure to tender the purchase price within time." *Bingham* v. *Shoup*, *supra*. The general view is, then, that in the case of an option time will be of the essence, and will be regarded as a condition precedent which will be strictly enforced. There is, however, one line of authority which holds that a condition precedent will not be strictly enforced even in an option. *F. B. Fountain Co.* v. *Stein*, 97 Conn. 619, 118 Atl. 47, 27 A.L.R. 976 (1922). If this view were followed, the decision of the majority could be upheld even if this be considered an option, though to go to this extent would seem to be a glaring example of coddling a debtor.

JOHN S. MITCHELL

EVIDENCE

PRESUMPTION OF CONTRIBUTORY NEGLIGENCE RAISED BY PLAINTIFF'S OWN EVIDENCE

Plaintiff's evidence disclosed that his automobile was struck by defendant's backing engine on an improved grade crossing. The crossing was well known to plaintiff, and the visibility was obscured by the early morning fog. The trial court charged on negligence, and requested counsel for any additionally desired instructions. None were offered, but defendant's counsel made a general exception. The court of appeals reversed a judgment for the plaintiff on the sole ground that the trial

court committed prejudicial error in failing to charge the jury upon the principle that if plaintiff's evidence raises a presumption of contributory negligence, then before plaintiff could recover, this presumption must be dispelled by evidence of at least equal weight. The Supreme Court reversed the Court of Appeals, and affirmed the trial court on the ground that had a charge been requested on this phase, it would have been the duty of the court to have done so, but since it was not requested, the error, if any, was one of omission, and not commission, and not prejudicial. *Valencic* v. *Akron & B.B.R. Co.*, 133 Ohio St. 287, 13 N.E. (2d) 240 (1938).

The Supreme Court by dictum in this case threw an interesting new light on the confusion and indecision of the cases dealing with this presumption of contributory negligence by declaring that, "it is not a presumption of law but a presumption of fact, or, as is often called, an inference." It again raises the question: What is this "presumption"; why and what is its effect?

The doctrine first appeared in Ohio in *Baltimore & Ohio R.R. Co.* v. *Whitacre*, 35 Ohio St. 627 (1880), where the court said, "If plaintiff's testimony raises a presumption of contributory negligence, then it is his duty to remove that presumption, otherwise he would fail in his action." As a basis for this statement the court cited *Hays* v. *Gallager*, 72 Pa. at 141 (1872), and *Robison & Weaver* v. *Gary*, 28 Ohio St. 241 (1876). The former case stated, "If plaintiff's own evidence discloses facts which prove negligence, it is not necessary that the defendant should prove it." The latter case declared that, in such a case, the presumption of due care on plaintiff's part is so far removed that he cannot be relieved from disproving his own negligence, and that the question should be left, upon the whole evidence, to the determination of the jury, with the instruction that the plaintiff can not recover if his own negligence contributed to the injury. But neither case spoke of any presumption which plaintiff must remove.

Formerly the presumption of contributory negligence was declared to shift the burden of proof to the plaintiff. *P. & L.E. Ry. Co.* v. *Blair*, 11 Ohio C.C. 579. But later it was decided that if plaintiff's own testimony raises a presumption of contributory negligence upon his part, the burden of proof does not shift, and he is only required to furnish such proof as is sufficient merely to equal or counterbalance the evidence tending to show contributory negligence on his part. *Tresise* v. *Ashdown*, 118 Ohio St. 307, 316, 160 N.E. 898, 58 A.L.R. 1476 (1928).

It has been said that there is no burden upon plaintiff to remove a

mere suggestion of contributory negligence created by his own evidence; there must be an inference from facts. *Lopa* v. *Smith*, 37 Ohio App. 346, 174 N.E. 258. Aff'd in 123 Ohio St. 213, 174 N.E. 735. The courts constantly speak of presumption or inference in the alternative and the last cited case declares that the two terms are used interchangeably. Each party is entitled to the benefit of evidence in his favor no matter which party offers it and thus plaintiff is entitled to the benefit of any evidence that may be produced by the defense tending to dispel the inference or presumption of negligence that has arisen from plaintiff's own evidence. *Smith* v. *Lopa, supra.* If plaintiff's evidence is susceptible of no other reasonable inference than that of negligence on his part directly contributing to the injury, and plaintiff is not aided by other evidence in the case, it becomes the duty of the court to direct a verdict for the defendant. *Buell, Adm'x* v. *N.Y.C.R. Co.*, 114 Ohio St. 40, 150 N.E. 422 (1926); 29 Ohio Jur., "Negligence," 655; *C.C.C. & St. L. Ry. Co.* v. *Lee*, 111 Ohio St. 391, 145 N.E. 843 (1925).

The rule has led our trial courts to charge the jury in this manner: "If you find that the evidence offered by the plaintiff raises a reasonable presumption of negligence on his part * * * , the burden is cast upon plaintiff to rebut or counterbalance the presumption, or he can not recover." Now, if plaintiff's evidence has made a prima facie case of contributory negligence as a matter of law, defendant's motion for a directed verdict will be granted. If not so strong, then the case goes to the jury, and the burden is upon plaintiff to rebut the presumption. But it is not, in truth, a presumption that the jury is requested to find, but an inference. What the jury is really told is that if it finds any evidence (more than a mere suspicion) of contributory negligence in plaintiff's own evidence, then from the entire evidence of plaintiff and defendant it must find enough evidence to counterbalance this evidence or "presumption" before it can go ahead and determine the issue of contributory negligence in the whole case with the burden of proof on the defendant. Thus, upon the appearance of evidence of contributory negligence in plaintiff's case, the burden of going forward and dispelling this evidence is placed upon him. It is exceedingly difficult for a jury to apply such an instruction.

The most common statement used by the courts supposedly following the same view as that of Ohio is: "Where plaintiff's own case presents evidence which, unexplained, makes out prima facie contributory negligence on his part, he must produce further evidence exculpating him, or he cannot recover." *Grant* v. *Chicago, Etc. Ry. Co.*, 78 Mont. 97, 252 Pac. 382 (1927). It is to be noted, however, that this rule

seems to be applied only in cases terminating in a directed verdict, nonsuit, or sustained demurrer.

There seems to be no logical reason to require the creation of the presumption or the shifting of the burden of going forward to the plaintiff. There is a presumption against the negligence of either party. Contributory negligence is an affirmative defense, and the burden of proving it by a preponderance of the evidence is upon the defendant. *Knisely* v. *Community Traction Co.*, 125 Ohio St. 131, 136, 180 N.E. 654; *Maddex* v. *Columbus*, 114 Ohio St. 178, 186, 151 N.E. 613. Plaintiff does not have to plead nor prove freedom from contributory negligence. If plaintiff's evidence established a prima facie case of contributory negligence, then he has made a defense to his own case—he has failed to make out his prima facie case, and the court will direct a verdict for defendant. If there is no contributory negligence as a matter of law, then the case should go to the jury with the burden of proving contributory negligence entirely on defendant, the defendant having any benefit that he may secure from either his own or plaintiff's evidence. This seems to have been the doctrine of the cases which an early Ohio court interpreted as creating a presumption against the plaintiff.

This view is in accord with the holdings of a majority of courts. "Where the plaintiff's evidence makes a prima facie case of negligence proximately causing the injury and merely raises a question of contributory negligence to be solved by the jury, the burden of proving such defense is on the defendant." *Fort Worth Gas Co.* v. *Cooper*, 241 S.W. 282 (1922); *Houston B. & T. Ry. Co.* v. *Davis*, 19 S.W. (2d) 77 (1929). The burden of establishing contributory negligence is on the defendant, though proof of such negligence may arise out of the plaintiff's testimony in the first instance. *Philadelphia B. & W. R. Co.* v. *Buchanan*, 2 Boyce 202 (Del), 78 Atl. 776 (1911). The fact that the burden is on defendant to establish contributory negligence does not preclude defendant from taking advantage of plaintiff's own evidence showing him guilty of contributory negligence. *Houdashelt* v. *State Highway*, 137 Kan. 485, 21 Pac. (2d) 343 (1933); *Washington, A. & Mt. V. Ry.* v. *Vaughn*, 111 Va. 785, 69 S.E. 1035 (1911). The burden does not shift, but defendant must go ahead and prove contributory negligence with the aid of plaintiff's adduced evidence. *Rapp* v. *Sarpy County*, 71 Neb. 383, 98 N.W. 1042 (1904). Unless evidence of plaintiff establishes contributory negligence as a matter of law, the burden is on defendant to show that fact. The jury must be instructed in determining such issue that they may look to all the facts in the case. *Gulf, C. & S. F. Ry. Co.* v. *Melville*, 87 S.W. 863

(1905); *Harrington* v. *Eureka Hill Min. Co.*, 17 Utah 300, 53 Pac. 737 (1898). "The fact that plaintiff, in making out his own case, introduces evidence tending to prove his own contributory negligence does not change the nature of the issue, * * * and the fact that the defendant may use the evidence introduced by the plaintiff does not shift the burden of proof from the defendant to the plaintiff." 20 R.C.L., Neg. 164, p. 200. When different inferences may be drawn from the evidence, the burden of establishing contributory negligence is upon the defendant, regardless of whether the evidence with regard thereto comes from plaintiff's or defendant's witnesses. The burden is on defendant, although contributory negligence may have been inferable from testimony produced by plaintiff. *Conway* v. *S. L. & O. Ry. Co.*, 47 Utah 510, 155 Pac. 339, L.R.A. 1916D, 1109 (1916); *Dahlquist* v. *Denver & R.G.R. Co.*, 52 Utah 438, 174 Pac. 833 (1918).

Ohio cases have been gradually weakening the "presumption" rule, and the court of appeals in *Tudor Boiler Mfg. Co.* v. *Teeken*, 33 Ohio App. 512, 519, 169 N.E. 704, (motion to certify overruled Mar. 21, 1929) strove to adopt the better and sounder rule. Therein, it criticized the necessarily indefinite application of the rule laid down in *B. & O.* v. *Whitacre*, *supra*, and the consequent vacillation of the burden of proving contributory negligence. Refusing to follow it, the court said: "As we view the law, supported by the great weight of authority, (if there be no prima facie case for a directed verdict), the rule is that the burden of proof is on defendant to show contributory negligence, but that the defendant is entitled to all of the evidence in the case, that presented by the plaintiff as well as that presented by the defendant."

The rule as at present accepted by the Ohio courts is not only without logical support, but it is also to be regretted, in that it uselessly confuses the jury by the complexity of its application, and harasses the already burdened trial court by increasing the danger of reversible error in its instructions. It is hoped that a simpler and sounder doctrine will soon be enunciated by the Ohio Supreme Court.

JAMES M. GORMAN