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EVIDENCE-EFFECT OF PRESUMPTION AGAINST SUICIDE

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EVIDENCE—EFFECT OF PRESUMPTION AGAINST SUICIDE—Asserting that the deceased met his death by accidental drowning, appellant sued as beneficiary to recover under a double indemnity clause of an insurance policy issued to the deceased by the defendant. The defense was that the deceased committed suicide and that a clause in the policy prevents recovery of double liability under such circumstances. The jury found for the defendant and, on appeal, the beneficiary contended that the trial judge committed prejudicial error against her by refusing to instruct the jury that there was a strong presumption against suicide and in favor of accidental death. *Held,* the code [1] provides that the presumption against suicide should be considered by the jury when determining its final verdict, and failure to so instruct the jury constituted reversible error. New trial ordered. Three judges dissented. *Wycoff v. Mutual Life Insurance Co. of New York,* (Oregon 1944) 144 P. (2d) 227.

The presumption against suicide appears to have been adopted by the common-law courts in an effort to protect the deceased's family from the ancient

[1] Ore. Comp. Laws Ann. (1940) § 2-401 declares that a presumption is indirect evidence; § 2-405 provides that a presumption may be overcome by other evidence; and § 2-1001 states that the jury "are the judges of the effect or value of evidence."

harsh laws [2] which provided for the forfeiture to the crown of all the goods and chattels of a proven suicide.[3] The presumption is based on human experience [4] and that experience has proven, as the Iowa court [5] has said that "the instinct of self-preservation and love of life is so pervading an element of human nature that the presumption always obtains against self-destruction." [6] Pennsylvania appears to be the only state that denies the existence of a presumption against suicide. There is little disagreement [8] among all other courts as to the effect of the presumption when the party opposing it either introduces no evidence whatsoever,[9] or when he introduces opposing evidence of an overwhelming quality.[10] In the first case the opponent of the presumption loses, in the second he wins, both times by a directed verdict.[11] The conflict in the cases arises in those instances when there can be no directed verdict for only enough evidence has been offered against the presumption to make an issue of fact which must be determined by the jury. Under such circumstances, what effect is to be given the presumption against suicide? Some courts hold, as does the court in the principal case, that the presumption should be given the effect of evidence, and that the jury should be informed of that fact.[12] Other courts go further and say that the opponent can win only by

[2] "The letter of the law borders a little upon severity." 4 BLACKSTONE, COMMENTARIES, Wendell ed., 190 (1854).

[3] Id. at 170. Also see Hartman, "The Presumption against Suicide as Applied in Insurance Cases," 19 MARQ. L. REV. 20 (1935), for a discussion of the evolution of the suicide presumption.

[4] Id. at 20. 8 COUCH, CYCLOPEDIA OF INSURANCE LAW, § 2230, p. 7245 (1931). See numerous cases cited.

[5] Tackman v. Brotherhood of American Yeomen, 132 Iowa 64 at 68, 106 N.W. 350 (1906).

[6] Id., 132 Iowa at 68.

[7] Watkins v. Prudential Insurance Co. of America, 315 Pa. 497, 173 A. 644 (1934). See id., 173 A. at 645. This court holds that there is a probability against suicide, but that it is not strong enough to be a presumption. It points out the vast number of suicides each year. Also see Hartman, "The Presumption against Suicide as Applied in Insurance Cases," 19 MARQ. L. REV. 20 (1935), the general theme of which is, has the suicide presumption outlived its usefulness? Note dicta against the presumption of suicide in Burkett v. N.Y. Life Ins. Co., (C.C.A. 5th, 1932) 56 F. (2d) 105. Landress v. Phoenix Mutual Life Ins. Co., (C.C.A. 6th, 1933) 65 F. (2d) 232 at 234.

[8] Eminent Household of Columbian Woodmen v. Matlock, 144 Ark. 126, 221 S. W. 858 (1919) says the presumption still arises even when it is shown that the death was self-inflicted.

[9] The presumption compels the "jury to reach [a certain] conclusion in the absence of evidence to the contrary from the opponent," 9 WIGMORE, EVIDENCE, 3d ed. § 2491, p. 289 (1940). Also in THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 314, 315 (1896). See the principal case at 229.

[10] Kernin v. City of Coquille, 143 Ore. 127, 21 P. (2d) 1078 (1933); Hancock Land Co. v. City of Portland, 82 Ore. 85, 159 P. 969, 161 P. 250 (1916).

[11] See notes 9 and 10.

[12] Mitchell v. Industrial Commission of Ohio, 135 Ohio 110, 19 N.E. (2d) 769 (1939); Kruger v. Brown, 79 N. J. L. 418, 75 A. 171 (1910); Brown v. Metropolitan Life Ins. Co., (Iowa, 1943) 7 N.W. (2d) 21; Tackman v. Brotherhood of American Yeomen, 132 Iowa 46 (1906); O'Brien v. New England Mut. Life Ins. Co., 109

introducing sufficient evidence to overcome the weight of that presumption by a preponderance of the evidence.[13] And there are at least two courts that appear to hold that the jury must be convinced beyond a reasonable doubt that the deceased committed the crime of suicide.[14] The last two considered views, then, have the effect of shifting the burden of proof from the one relying on the presumption to the opponent. This theory, however, is opposed by a majority of the courts,[15] including the United States Supreme Court,[16] which follows the Thayer-[17] Wigmore [18] view regarding presumptions. This theory holds that the burden of proof should not be shifted from *A* to *B* merely because *A* is relying on a presumption of law rather than upon actual evidence to substantiate his point. In fact, this theory states that a presumption could not possibly affect the burden of proof, for it is neither an argument nor evidence, and that the primary function of presumptions is a procedural device, which casts "upon the party against whom they operate, the duty of going forward, in argument of evidence on the particular point to which they relate." [19] With the introduction of contrary evidence, according to the Thayer-Wigmore doctrine, the presumption disappears and only the facts upon which it was based, remain.[20] Under such circumstances, the majority of the courts hold it is unnecessary and error to instruct the jury concerning the presumption for it no longer has any probative effect and the only possible effect of an instruction to the contrary would

Kan. 138, 197 P. 1100 (1921); Order of United Commercial Travelers v. Watkins, 38 Ohio App. 420, 176 N.E. 469 (1931); Bachmeyer v. Mutual Reserve Fund Life Assn., 87 Wis. 325, 58 N.W. 399 (1894). Wisconsin allows the judge to inform the jury of the presumption, but allows no other instructions permitting the jury to give to the presumption the weight which it desires. Falkinburg v. Prudential Ins. Co. of America, (Neb. 1937) 273 N.W. 478 holds that to instruct the jury as to presumptions is error, but not reversible.

[13] Wood v. Sovereign Camp of Woodmen of the World, 166 Iowa 391, 147 N.W. 888 (1914); Green v. New York Life Ins. Co., 192 Iowa 32, 182 N.W. 808 (1921); Hoette v. North American Union, (Mo. App. 1916) 187 S.W. 790; Jefferson Standard Life Ins. Co. v. Bentley, (Ga. Ct. App. 1937) 190 S.E. 50; Schrader v. Modern Brotherhood of America, 90 Neb. 683, 134 N.W. 267 (1912). Eckendorff v. Mutual Life Ins. Co., 154 La. 183, 97 S. 394 (1923); Worth v. Worth, 48 Wyo. 441, 49 P. (2d) 649 (1935).

[14] Bryan v. Aetna Life Ins. Co., (Tenn. 1939) 130 S.W. (2d) 85; Provident Life & Accident Ins. Co. v. Prieto, 169 Tenn. 124, 83 S.W. (2d) 251 (1935). 8 COUCH, CYCLOPEDIA OF INSURANCE LAW § 2230 (1931).

[15] Majority opinion of principal case at 230: "most courts have, in the main, adopted the Thayer-Wigmore doctrine that a presumption of law has no probative or evidentiary value." Also see 103 A.L. R. 185 (1936) and cases on Pp. 186, 187, 188, 189, 190 and 191.

[16] New York Life Ins. Co. v. Gamer, 303 U.S. 161, 58 S. Ct. 500 (1938).

[17] See THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 313 et seq. (1896).

[18] See 9 WIGMORE, EVIDENCE, 3d ed., 288 et seq. (1940).

[19] See THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 314 (1896).

[20] See notes 17 and 18. Also Bunnell v. Parelius, 166 Ore. 174, 111 P. (2d) 88 (1910). When contrary evidence is introduced the presumption, "like a chrysalis, . . . takes wings and is gone." Id. at 94.

be to harm the one opposing the presumption.[21] However, it has been held by these same courts [22] that, from the facts which originally gave birth to the now defunct presumption, an inference against suicide might still arise. And the judge is allowed to direct the attention of the jury to this inference and instruct them that they may weigh it against the other evidence in arriving at their verdict.[23] It has been argued that the two views could be reconciled. In the minority opinion of the principal case it is said that the difference between the rules is "chiefly one of terminology" [24] and that to the layman the difference between the words "inference" and "presumption" is too subtle to be distinguished. In all probability the "two views lead by different roads to the same result." [25] The proponents of this line of reasoning agree, however, that the Thayer-Wigmore view is the better one, for it is less confusing to the jury. They contend that to ask the jury to weigh a presumption against the other evidence is like asking them to "weigh distance against weight or yards against pounds." [26] The Vermont court [27] was recently swayed by this argument and overruled a long line of cases in favor of the majority doctrine. The hearty dissent in the principal case and the recent dissent from the established practice in California [28] in the *Speck v. Sarver* case leads one to believe that eventually all courts will adopt the view of Thayer and Wigmore.

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[21] See note 15.

[22] See note 15. Also 9 WIGMORE, EVIDENCE, 3rd ed., 288 (1940).

[23] Id. at 288, 289.

[24] Principal case at 239.

[25] Id. at 241.

[26] Id. at 242.

[27] Tyrrell v. Prudential Ins. Co. of America, 109 Vt. 6, 192 A 184 at 192 (1937).

[28] Speck v. Sarver, (Cal. 1942) 128 P. (2d) 16.