for the wrongful refusal of such inspection.[4] The wide use of this privilege for its nuisance value[5] has led a few states to limit the right of inspection to a class of stockholders possessing certain minimum qualifications,[6] because stockholders within the statutory class are less likely to have improper purposes for demanding inspection.

The court's conclusion in the principal case that a shareholder not of the statutory class was not entitled to the remedy of mandamus seems an unjustifiable interpretation of the statute. The wording of the statute is somewhat unfortunate in that the first paragraph appears to limit the right to inspect to the statutory class. But the third paragraph providing that "nothing *herein* contained" shall impair the power to issue mandamus upon a showing of proper purpose clearly refutes this construction. Nothing contained in the entire section is to affect the mandamus remedy. The only intended limitation on a shareholder not of the statutory class is that he is not entitled to the penalty provided for in the second paragraph. This an Illinois appellate court had previously decided in *Miller* v. *Spanogle*[7] where a petition for mandamus was granted although the shareholder did not allege that he was a member of the statutory class. There the court said: "This is not a proceeding to recover the penalty provided for in section 45 and we are clearly of the opinion that it was unnecessary in this proceeding for petitioner to allege, before he is entitled to the relief prayed for, that he was either a stockholder of record for six months immediately preceding his demand to inspect the books of the corporation, or that he was the holder of record of at least five per cent of all the outstanding shares of the corporation." The conclusion in the instant case leaves a shareholder of the non-statutory class who can show proper purpose without a remedy, a result which it is probable the legislature did not intend.

Evidence—Presumption against Suicide—Effect on Burden of Proof—Applicability of State Law—[Federal].—The defendant agreed to pay ten thousand dollars on proof of death of the insured or twenty thousand dollars on proof of his death by "external, violent and accidental means," but the double indemnity clause was to have no effect if insured were a suicide. The defendant admitted that the insured died by "external" and "violent" means, and the sole dispute was as to whether the death was "accidental." The plaintiff sued in a Montana court and the defendant, a foreign corporation, removed to federal district court of Montana. After the circuit court of

[4] See Cahill's Cons. Laws N.Y. 1935, c. 60, §10; Smith's Ill. Rev. Stat. 1919, c. 32, §38; Remington's Rev. Stat. Wash. 1932, §§3827, 3828. See also Estuar, *op. cit. supra* note 3; 5 Fletcher, *op. cit. supra* note 3, §2257.

[5] Ill. Bus. Corp. Act Ann. 187 (1934); 47 Harv. L. Rev. 335 (1933); 5 Fletcher, *op. cit. supra* note 3, §2226.

[6] Ill. Rev. Stat. 1937, c. 32, §157.45 (6 months, 5%); Cahill's Cons. Laws N.Y. 1935, c. 60, §10 (6 months, 5%); Gen. Laws Fla. Ann. 1927, §6584 (6 months, 1%); *Cf.* La. Gen. Stat. 1932, §1118 III (6 months, 2%): "Two or more shareholders, each of whom has been a holder, of record of shares for the period aforesaid, and whose aggregate holdings equal the percentage aforesaid, may join in such request and jointly exercise such rights."

[7] 275 Ill. App. 335 (1934). In Wise v. Byllesby, 285 Ill. App. 40 (1936), the appellate court held that even if the 1933 statute did not apply to foreign corporations, a stockholder nevertheless had a common law right to mandamus. See also Sullivan, Right of a Stockholder to Inspect the Books of a Corporation in Illinois, 2 John Marshall L. Q. 260 (1936); Ill. Bus. Corp. Act. Ann. 187 (1934).

appeals remanded the case for a new trial, the defendant appealed from a verdict for the plaintiff assigning as part of the error the following charge: "The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide . . . . must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary. . . . ." The circuit court of appeals sustained the judgment but the Supreme Court *held*, (Black, J. dissenting) reversed and remanded. The above charge was error since "the presumption is not evidence," "may not be given weight as evidence" and "ceases upon the introduction of substantial proof to the contrary." *New York Life Ins. Co. v Gamer.*[1]

The objection to this decision lies not in the result reached but in the danger that the court's rationale will be accepted as sound precedent. The analysis is faulty because the majority does not recognize (1) the possibility of using a presumption as a device to shift the burden of persuasion, (2) that as so used a presumption is not being treated as "evidence" and that (3) even if used solely as a device to shift the burden of producing evidence to get to the jury it is questionable whether a presumption "drops out" of the case until rebutted by enough evidence to put the jury in doubt.

Pragmatically defined a presumption is a compelled inference shifting one of the two burdens of proof.[2] By this is meant that if the party desiring to take advantage of the presumption establishes proposition A (often called the base of the presumption) by a preponderance of the evidence, the trier of fact should be instructed that it must, in the absence of rebuttal evidence, find B (the proposition presumed). In the instant case the base of the presumption, death by violent means, was admitted by the pleadings and gave rise to the compelled inference that the deceased died by accident, *i.e.*, was not a suicide.

The orthodox statement is that every presumption remains in a case only until the person against whom it operates introduces some evidence to the contrary.[3] But there has been a wide reaction against this view by able courts[4] and commentators.[5] By their view, the length of time a presumption operates, *i.e.*, the quanta of evidence required in rebuttal, is dependent on the strength of the reason giving rise to the presumption.[6] Where there is a strong social policy in support of the presumption it probably should operate to put the burden of persuasion on the person against whom the presumption operates and therefore require him to establish the contrary by a

[1] 58 S. Ct. 500 (1938).

[2] See Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, n. 1 (1931).

[3] Thayer, A Preliminary Treatise on Evidence 339 (1898); 5 Wigmore, Evidence 445 (2d ed. 1923).

[4] Clark v. Diefendorf, 109 Conn. 507, 144 Atl. 35 (1929); Mayer v. Davis, 119 App. Div. 96, 103 N.Y. Supp. 943 (1907); Johnson v. Johnson, 187 Ill. 86, 58 N.E. 237 (1900); O'Dea v. Amodeo, 118 Conn. 58, 170 Atl. 486 (1934).

[5] Morgan, *op. cit. supra* note 2, at 913; McCormick, Charges on Presumptions and Burden of Proof, 5 N.C.L. Rev. 291, 298 (1907); Bohlen, The Effect of Rebuttable Presumptions of Law upon the Burden of Proof, 68 U. of Pa. L. Rev. 307, 308 (1920).

[6] "No general rule can, however, be laid down as to the effect of a particular presumption in the actual trial of a case, for this depends upon the purpose it is designed to serve." O'Dea v. Amodeo, 118 Conn. 58, 60, 170 Atl. 486, 487 (1934); Morgan, Presumptions, 12 Wash. L. Rev. 255, 259 (1937); Bohlen, *op. cit. supra* note 5 at 314.

preponderance of the evidence.[7] To so treat a presumption is not to give it the status of "evidence" but is merely to say the presumption remains in the case longer.[8] Even presumptions based on mere procedural convenience or slight probability should not drop out when some evidence to the contrary is introduced since whatever the reason for the presumption, a palpable perjury should be insufficient to nullify its effect.[9] Probably, if the presumption is based merely on procedural convenience, it should remain only until credible evidence to the contrary is introduced. If, however, the presumption is based on a strong probability and its base is not in dispute, the trier of fact should be instructed to find for the person in whose favor the presumption operates unless the opposing party has put the jury in doubt on the issue.[10]

Justice Black's position that the conclusion of the majority deprived the defendant of the right to jury trial is equally fallacious. His argument is predicated on the assumption that under the view of the majority the base of the presumption as well as the presumption dropped out of the case. But the jury under the majority opinion could still be instructed to weigh the inherent improbability of suicide—*i.e.*, draw a permissive inference[11] (as opposed to a compelled inference) of accidental death from the fact of violent death.

The majority implicitly assumed that Montana law[12] as to the effect of the presump-

[7] It has been suggested, in the interest of simplification that all presumptions so operate. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 913 (1937). It seems, however, to have been the earlier view of Maguire and the view of Hinton that when A (base of the presumption) is established B (proposition presumed) remains in the case until C (an affirmative avoidance) is established by the opponent by a preponderance of the evidence. Morgan, *op. cit. supra* note 2 at p. 923, note 27. Such a formula does not seem to be substantially different from that of Morgan that once A is established B is presumed until the opponent establishes not-B by a preponderance of the evidence. For example in the legitimacy cases, once the base of the presumption, birth during wedlock is established, Morgan would say that the opponent must prove illegitimacy whereas Hinton and Maguire would require the opponent to establish non-access. The usual treatment, however, of *res ipsa* cases and statutory presumptions such as Western & A. Rr. v. Henderson, 279 U.S. 639 (1929) (if the statute does not attempt to make a presumption evidence) indicates a probable difference in the two views. Cf. O'Dea v. Amodeo 118 Conn. 58, 63, 170 Atl. 486, 487 (1934) where the court said, "But where the circumstances involved in an issue are peculiarly within the knowledge of one party and his power to bring them before the court, in certain instances the law deems it fit that he should have the burden not merely of offering some substantial countervailing evidence but of proving such circumstances."

[8] This is elementary, but many courts have fallen into the error of saying otherwise. For example, Modern Woodmen v. Klincheloe, 93 N.E. 452 (Ind. App. 1910); Griffith v. Continental Casualty Co., 299 Mo. 426, 253 S.W. 1043 (1923); Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 Atl. 644 (1934).

[9] See Morgan, *op. cit. supra* note 2, at 912; that it does see McIver v. Schwartz, 50 R.I. 68 145 Atl. 101 (1929); State v. Arnold, 326 Mo. 32, 30 S.W. (2d) 1015 (1930).

[10] See Morgan, *op. cit. supra* note 2, at 926; Morgan, Instructing the Jury upon Presumption and the Burden of Proof, 47 Harv. L. Rev. 59 (1933).

[11] Briglio v. Holt, 85 Wash. 155, 147 Pac. 877 (1915); 5 Wigmore *op. cit. supra* note 3 §2491.

[12] Montana gives the presumption the effect of shifting the burden of persuasion on the issue of suicide to the insurance company. See Nichols v. New York Life Ins. Co., 88 Mont. 132, 292 Pac. 253 (1931).

tion did not govern.[13] Since the question of burden of proof is considered by the federal courts as one of "substantive law,"[14] the Rules of Decision Act[15] rather than the Conformity Act[16] must be considered.[17] Whether under the former the federal courts apply the state rules of evidence which are non-statutory[18] is a question on which the federal circuits are divided,[19] although the Supreme Court, in *Nashua Savings Bank v. Anglo-American Can Co.*, said "the 'laws of the several states' with respect to evidence within the meaning of this section (721) apply not only to the statutes but to the decisions of their highest courts."[20] The practice, however, of the Supreme Court since, has not been to apply state law[21] but seemingly the "best common law rule."[22] But in light of *Erie Railroad Co. v. Tompkins*[23] which expressly overruled *Swift v. Tyson*[24] it seems probable that hereafter state rules of burden of proof will be applied in the federal courts.

The application of the "best common law" standard requires an analysis of the reasons giving rise to the presumption against suicide. It is based on strong probability.[25] If, as a large number of jurisdictions have decided, the presumption is so

[13] Justice Black, however, was of the opinion that the state law governed.

[14] New Orleans & N.E.R. Co. v. Harris, 247 U.S. 367 (1918).

[15] 1 Stat. 92 (1789); 28 U.S.C.A. §725 (1926).

[16] 17 Stat. 197 (1872); 28 U.S.C.A. §724 (1926).

[17] That the Conformity Act does not apply to evidence at all see Callahan and Ferguson, Evidence and the New Federal Rules of Procedure, 45 Yale L.J. 622, 627 (1936); *contra:* De Soto Motor Co. v. Stewart, 62 F. (2d) 914 (C.C.A. 10th 1932).

[18] If a Montana statute provided the effect to be given the presumption, it is clear the statute would govern. Callahan and Ferguson, *op. cit. supra* note 17, at 635–638. The Montana statute, however, provides only that a presumption is "indirect evidence" and may be controverted: Mont. Rev. Code 1935, §§10600, 10606. The effect of a presumption on the burden of proof is left to the courts and varies with the type of presumption involved. Hansen v. Johnson, 90 Mont. 597, 4 P. (2d) 1088 (1931) (presumption that a private transaction has been fair prevails "until overcome by evidence satisfactory to the court"); but the presumption against suicide operates to shift the burden of persuasion, note 13 *supra*. But see 51 Harv. L. Rev. 1110 (1938) to the effect that the operation of the presumption in the instant case is governed by a Montana statute.

[19] Leach, State Law of Evidence in Federal Courts, 43 Harv. L. Rev. 554, 571, esp. notes 74–80 (1930).

[20] 189 U.S. 221 (1903).

[21] Leach & Co., Inc. v. Pierson, 275 U.S. 120 (1927) discussed in Leach, *op. cit. supra* note 19, at 575 and Callahan and Ferguson *op. cit. supra* note 17.

[22] See Callahan and Ferguson *op. cit. supra* note 17. This is the doctrine applied in the law of criminal evidence. Rosen v. United States, 245 U.S. 467 (1918); Funk v. United States, 290 U.S. 371 (1933); Leach *op. cit. supra* note 19 at pp. 550–556.

[23] Erie Railroad Co. v. Tompkins, 58 S. Ct. 817 (1938).

[24] 16 Pet. (U.S.) 1 (1842).

[25] " . . . . it [the presumption] is based on the well-nigh universal human characteristic of love of life and fear of death . . . ." Brunswick v. Standard Accident Ins. Co., 378 Mo. 154, 213 S.W. 45 (1919).

strong as to shift the burden of persuasion[26] there ought to be some social policy to justify this effect of the presumption.[27] But the only ascertainable policy, if such it may be called, seems to be the implicit dissatisfaction with the disproportionate contractual bargaining positions of the insured and the insurer. The usual policy is drawn by the insurer's attorneys. It seems questionable whether, by the use of limited conditions, they should succeed in placing the burden of pleading and proof on the beneficiaries.[28] The question of "best common law" however, was foreclosed by *Travellers' Ins. Co. v. McConkey*.[29] In that case the Supreme Court expressly approved an instruction which was in substance that of the instant case.[30] Surprisingly enough, the majority here said that in the *McConkey* case no instruction was approved.

Labor Law—Anti-injunction Act—Right To Picket in Non-labor Dispute—[Federal].—The plaintiff operates a large number of retail grocery stores in the District of Columbia, some of which are largely dependent on negro patronage. The defendant, a corporation composed solely of colored persons not associated with any labor organization, is "organized for the mutual improvement of its members." The plaintiff refused a request of the defendant to adopt a policy of employing colored help in certain of its stores. The defendant thereafter began an organized peaceful patrol of the premises of one of the plaintiff's stores and threatened a similar patrol of two others. The pickets

[26] Travellers Ins. Co. v. McConkey, 127 U.S. 661 (1888); New York Life Ins. Co. v. Brown, 39 F. (2d) 376 (C.C.A. 5th 1930); Bachmeyer v. Mutual Reserve Fund Life Assoc., 87 Wis. 325, 58 N.W. 399 (1894); United Commercial Travellers v. Watkins, 38 Ohio App. 420, 176 N.E. 469 (1931); O'Brien v. New England Mut. Life Ins. Co., 109 Kan. 138 197 Pac. 1100 (1921); American Home Circle v. Schneider, 134 Ill. App. 600 (1907); Withers v. Pacific Mutual Life Ins. Co., 58 Mont. 485, 193 Pac. 566 (1920); the "weight of authority," however, appears to be *contra:* 103 A.L.R. 185.

[27] See Morgan, *op. cit. supra* note 2, at 909; but see Morgan, Instructing the Jury upon the Presumption and Burden of Proof, 47 Harv. L. Rev. 59, 81 (1933).

[28] Normally the burden of persuasion follows the burden of pleading. First National Bank v. Ford, 30 Wyo. 110, 216 Pac. 691 (1923); Wigmore, *op. cit. supra* note 3, §2486. Other tests often used place the burden of persuasion on the party having special knowledge (Wilson v. Hodges, 2 East 312 (1802); 5 Wigmore, *op. cit. supra* note 3, §2486), the "legal affirmative" (Dickinson v. Evans, 6 T.R. 57 (1794)), or the "literal affirmative" of the issue (Berty v. Dormer, 12 Mod. 526 (1701)), but seem inapplicable here. The general contract rule that the party desiring to come within a limited condition has the burden of pleading and proof on that issue, 5 Wigmore *op. cit. supra* note 3, §§2510, 2537, is not illuminating. It may be argued that the condition was the double indemnity clause and the burden should be on the insured to show the accident to come within the limited condition, or it is equally plausible to say that a more limited condition was suicide and the burden is on the insurance company on that issue. Though it is questionable whether the language of the insurance company's lawyers should determine the placement of the burden of persuasion, it may be that because the beneficiary in a double indemnity policy is trying to recover something extra that the burden of persuasion should be on him. If the policy is in standard form prescribed by statute there seems even less reason to favor the beneficiary.

[29] 127 U.S. 661 (1889).

[30] "The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant. The presumption is that death is not voluntary . . . . ."