COMMENT.

Professor James Bradley Thayer, of Harvard, has for a long time been doing an excellent work toward making the law of evidence more logical and consistent and to bring it upon a rational basis. One of his contentions has been, and is, that the presumption that a man is sane in the absence of evidence to the contrary is a general maxim of legal reasoning, and that it has no particular relation to the law of evidence. Thayer Cas. Ev. 335. And he has inveighed strongly against considering presumptuous "instruments of proof" "of probative force," etc. In a recent Connecticut case, *Appeal of Sturdevant,* 42 Atl. 70, the court charged in part as follows: "But the law, gentlemen, presumes every person to be of sound mind until the contrary is shown; and this presumption makes for the proponents of the will and is of probative force in their favor, and must be considered by you along with the evidence offered by the proponents. This presumption must be cast into the scale with the evidence." The will was found duly executed, etc., and the contestants appealed. One of their grounds of appeal was that the charge was incorrect. They cited Prof. Thayer's works and argued along the lines which Prof. Thayer takes. The Supreme Court affirmed the decision of the court below. The opinion, by Baldwin, J., said: "A metaphysician addressing an academy of metaphysicians in terms of precision might properly tell them that the evidence for the proponents was the existence of the testator at the date of the will, and that in balancing this fact against the evidence of incapacity offered by the contestants some weight should be given to the presumption which the law *prima facie* makes that every man's mind is sound. Such an instruction, however, would only confuse an ordinary jury. It is of no service to them when called upon to pass on the question of testamentary capacity to have their attention directed to the fact, which nobody disputes, that the man was alive when he signed the will, or to be told that this is to be considered as evidence from which the law draws a certain inference. Any allusion to this intermediate step in proof can be safely omitted on the presumption of security brought directly before them, without raising subtle distinctions as to its proper source. The important thing for the jury to understand in the case at bar was that the proponents had something to rely on besides the positive evidence they had introduced—that this was to be considered together with the evidence, and that it consisted in a presumption recognized in law as based on the general facts of life, which has probative force enough to turn the scale, if otherwise the balance should seem to them to stand equal. The charge as given sufficiently answered this demand." This implied criticism on Prof. Thayer's theory of presumptions, coming from one who has been thirty years in the active administration of justice, who knows thoroughly the nature of the jury which, Prof. Thayer insists, has had so much effect on the law of evidence, should have much weight. Many who have read Prof. Thayer's Treatise of Evidence at the Common Law will be inclined to doubt the practical value of all the refinements he attempts. Now, as ever, there are practical difficulties which seem insuperable in the way of making the law of evidence administered by the courts academically and logically perfect.

The rule in regard to assessments by municipalities to recover from the abutters the part of the cost of improvements, etc., announced by the United States Supreme Court in the case of *Norwood* v. *Baker,* 19 Sup. Ct. 187, is that such assessments must be limited to benefits ascertained to accrue to the property owner. On principle it would seem as though the assessment should be subject to a further limitation that it must not exceed the cost of the improvement itself; this for the reason that there is no contract relation between the municipality and the property owner. He is forced to have his property benefitted and to pay the cost of the benefit so far as is peculiar to him, *i. e.,* the city can recover from the property owners as much as they are benefitted, because the work is a public one and justifies a use of the taxing power. But it would seem, on principle, that they could not recover more and in this way make money out of the property owner by selling him improvements against his will. This line of reasoning seems to be the true ground of decision in the series of cases which hold that an assessment to meet the cost of a contract which includes in its provisions an agreement to keep in repair for a series of years is void. *Boyd* v. *Milwaukee,* 66 N. W. 603 (Wis., 1896); where the repairs are by the charter made a charge on the city, *Fehler* v. *Gosnell,* 35 S. W. 1125 (Ky.); where statute allows assessment only for construction, *City of Kansas City* v. *Hanson,* 55 Pac. 513 (Kan.); where, apparently, the common law is considered to place repairs on the city. In this case there is also an intimation that the contract is void for want of power. This point was decided in *People, etc.,* v. *Maher, etc.,* 56 Hum. 81, where the contract was held void because repairs could not be assessed on the property owners. This seems an attempt to attack the contract where the assessment could not be attacked, and the court thought it inequitable. If the provision referred to is intended to be a warranty of proper construction, it is unfortunately phrased and should be changed. See *Fehler* v. *Gosnell,* 35 S. W. 1125, 1128. In the cases of *Parsons* v. *Dist. of Col.,* 170 U. S. 45, *Leominster* v. *Conant,* 139 Mass. 384, it is held that an assessment is not invalid because it will bring in more than enough to pay the original cost of an improvement, because the excess is to form a fund for repairs and not to go into the general fund of the city. But probably this would not be so if in the District of Columbia or in Leominster repairs could not be charged on the abutters.