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EVIDENCE - CONSTITUTIONAL LAW - USE OF STATUTORY PRESUMPTIONS IN CRIMINAL CASES

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EVIDENCE — CONSTITUTIONAL LAW — USE OF STATUTORY PRESUMPTIONS IN CRIMINAL CASES — The recent efforts on the part of state legislatures to increase the effectiveness of their criminal codes has resulted in extending the use of the statutory presumption to new fields of criminal law. The reaction which necessarily follows such an innovation upon traditional practice has appeared in the form of renewed attacks upon the constitutionality of the device, accompanied by the usual expressions of alarm concerning the "threat to liberty" that lurks in the use of this "mechanistic" instrument of "arbitrary oppression."[1]

Nowhere has the statutory presumption been more thoroughly examined than in New York. Much of the current discussion as well as the litigation in that state has involved a presumption created in the penal code to the effect that "The presence in an automobile, other than a public omnibus, of . . . a pistol . . . shall be presumptive evidence of its illegal possession by all the persons found in such automobile at the time such weapon, instrument, or appliance is found."[2] This legislation is of particular interest because it has recently been both attacked and supported by the courts in the state of its origin. Furthermore, it may properly serve as a typical example of a statutory presumption in the following analysis of the constitutionality and desirability of the device as used in modern criminal procedure.

[1] O'Toole, "Artificial Presumptions in the Criminal Law," 11 ST. JOHNS L. REV. 167 (1937). Granting that dangers may exist, some of the exhortations certainly remind one of Chief Justice Cockburn's statement that a danger may be "of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." Queen v. Boyes, 1 B. & S. 311, 121 Eng. Rep. 730 (1861).

[2] 39 N. Y. Consol. Laws (McKinney, 1938), "Penal Law," § 1898-a.

I.

The presumption under consideration has been a part of the New York Penal Law only since 1936. Long before that time the legislature had enacted a statute making illegal the mere possession of a concealed weapon without a license,[3] and this provision had been upheld by the New York courts.[4] Illegal possession had been further interpreted to include not only actual but also constructive possession.[5] But the statute as a practical matter proved unenforceable in certain situations where it was most necessary that it be enforced. If a violator happened to be in an automobile with other occupants, he could successfully avoid prosecution by keeping his weapon on the floor of the car, for in case of apprehension by a police officer, all the occupants could deny knowledge and possession of the weapon. The state, having the burden of proof, could proceed no further. The typical attitude of the courts where prosecution was attempted is indicated by the following statement from *People v. Di Landri*:[6]

> "It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt."

The impossibility of enforcing the illegal possession statute against the modern gangster was apparent. Perhaps in the light of a presumption statute which had been for years a part of the New Jersey Code,[7] one of the supreme court judges was finally inspired to declare:

[3] "Any person over the age of sixteen years, who shall have in his possession in any city, village, or town of this state, any pistol, revolver, or other firearm of a size which may be concealed upon the person, without a written license therefor, issued to him as hereinafter prescribed, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime he shall be guilty of a felony." 39 N. Y. Consol. Laws (McKinney, 1938), "Penal Law," § 1897 (4).

[4] It was argued in People v. Persce, 204 N. Y. 397 at 401-402, 97 N. E. 877 (1912), that to declare mere possession of a weapon a crime is a denial of due process of law. The court held, however, that "The legislature has the undoubted power to declare that various acts, not theretofore so, shall be criminal without proof of other intent as a necessary ingredient of the offense than the intent to commit the prohibited act."

[5] People ex rel. Darling v. Warden of City Prison, 154 App. Div. 413, 139 N. Y. S. 277 (1913); People v. Persce, 204 N. Y. 397 at 402, 97 N. E. 877 (1912). In the latter case the court said that the provision "must mean a possession which places the weapon within the immediate control and reach of the accused and where it is available for unlawful use if he so desires."

[6] 250 App. Div. 52, 293 N. Y. S. 546 (1937). See also People v. Maiorano, 262 N. Y. 457, 188 N. E. 18 (1933); People v. King, 216 App. Div. 240, 214 N. Y. S. 537 (1926).

[7] New Jersey Rev. Stat. (1937), § 2:176-7. Although the statute was enacted in

> "The cases construing the word 'possession' under section 1897 of the Penal Law make conviction impossible unless there is shown which occupant of the automobile possessed the pistol, and this notwithstanding the fact that its presence in an automobile makes it available for instant use by any of its occupants. . . . I am compelled therefore, to discharge the relators. This, and similar cases, establishes the urgent need for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof. Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession." [8]

The legislature ultimately responded to the need, and the statutory presumption quoted in the introduction above was enacted.

2.

In the course of its uncertain existence this statutory presumption has twice been declared unconstitutional and has twice been upheld in the lower courts of New York.[9] The Court of Appeals has not as yet had the question of the presumption's constitutionality squarely presented.[10] There have been numerous bases for attack upon the New York statute, all of which might be advanced in any criminal case where the prosecution attempts to use a presumption to aid in establishing the defendant's guilt. Of these arguments, six are worthy of consideration in some detail.

(a)

The first contention is that a statutory presumption amounts to an arbitrary declaration by the legislature of the guilt of the accused without requiring actual proof.[11] This argument is ineffective because it

1898, it seems never to have been interpreted by a court of last resort. It provides that "The presence of a firearm in a vehicle is presumptive evidence of possession by all persons occupying or using the vehicle at the time."

[8] People ex rel. De Feo v. Warden of City Prison, 136 Misc. 836, 241 N. Y. S. 63 (1930).

[9] A vigorous declaration of the statute's invalidity appears in People ex rel Dixon v. Lewis, 249 App. Div. 464, 293 N. Y. S. 191 (1937), which overruled the decision of the lower court upholding the statute in 160 Misc. 327, 290 N. Y. S. 284 (1936). Following the appellate division's reasoning is People v. Pinder, 170 Misc. 345, 9 N. Y. S. (2d) 311 (1938). In a later phase of this case, however, the presumption was upheld. People v. Burt, 171 Misc. 166, 11 N. Y. S. (2d) 465 (1939).

[10] People ex rel. Dixon v. Lewis, 249 App. Div. 464, 293 N. Y. S. 191 (1937), was appealed, but the court of appeals in a memorandum decision found that the indictment failed to state a crime. It was therefore unnecessary to pass upon the issue of constitutionality. 276 N. Y. 613, 12 N. E. (2d) 603 (1938).

[11] People ex rel. Dixon v. Lewis, 249 App. Div. 464, 293 N. Y. S. 191 (1937); People v. Pinder, 170 Misc. 345, 9 N. Y. S. (2d) 311 (1938).

assumes that the presumption is conclusive, i.e., that presence of a weapon is synonomous with possession. Actually the legislature has only said that presence may be considered as evidence of possession until the defendant has spoken. To argue that there would be no proof is to deny the validity of circumstantial evidence.

(b)

It has also been maintained that the legislature is at least imparting probative force to the facts.[12] Apparently this argument originated as an analogy to the rule that the judge is not permitted to influence the jury by commenting upon the facts or otherwise intimating his own views. Aside from the fact that the rule as applied to the judge is of questionable value,[13] the claim of legislative persuasion is certainly distinguishable. The statute merely lays down a general rule to apply to all cases of a certain type, indicating in advance of litigation the legislative approval of a jury's finding that one fact exists when another exists. The jury might so find without the statute; but again they might want to so find and yet be in doubt as to whether or not their verdict would be sustained by a judge whose convictions differed from theirs. The presumption assures the jury that if they are convinced of the defendant's guilt beyond a reasonable doubt their verdict will be sustained.

(c)

It has been claimed that the presumption deprives the accused of his right to a trial by jury, since it compels the jury to find the fact presumed. This contention is seldom seen in the modern cases, but it occasionally finds support elsewhere. For example, one law review writer declares that the theory of circumstantial evidence is to *influence* juries while the prima facie case established by a presumption is designed to *compel* them.[14] If the presumption were conclusive, i.e., if it were a presumption of law, then the statement would be true; but a statute such as the one under consideration involves only a rebuttable presumption, i.e., a presumption of fact. The latter in a criminal case merely indicates that legal effect may be given to certain evidence under particular circumstances. It amounts to a declaration that an inference of guilt is permissible and reasonable after the state has proved certain facts; but the jury is left free to determine the issue of guilt or innocence of the defendant in its discretion. The burden of proof remains

[12] People ex rel. Dixon v. Lewis, 249 App. Div. 464, 293 N. Y. S. 191 (1937).

[13] 30 MICH. L. REV. 1303 (1932); Hogan, "The Strangled Judge," 14 J. AM. JUD. SOC. 116 (1930); Sunderland, "The Inefficiency of the American Jury," 13 MICH. L. REV. 302 (1915).

[14] O'Toole, "Artificial Presumptions in the Criminal Law," 11 ST. JOHNS L. REV. 167 at 173 (1937).

at all times on the prosecution to prove beyond a reasonable doubt that the defendant is guilty. The statute only establishes a rule of evidence which places the burden of going forward with the proof upon the defendant after the prosecution has established a prima facie case. The jury is in no way compelled to reach a verdict. It may still disregard the presumption, even though the defendant fails to offer any evidence at all.[15]

(d)

Another contention is that the presumption removes the constitutional privilege against self-incrimination by compelling the defendant to testify. This argument has often been advanced but is seldom sustained by the courts.[16] The somewhat technical answer is that the defendant is not "compelled," since it is possible that he will still be acquitted, even though he fails to introduce evidence. In other words, a defendant's failure to introduce evidence is a gamble in any case, and a presumption merely increases his risk.

As a practical matter, if the defendant fails to speak the jury will generally convict on the strength of the presumption and the silence of the defendant.[17] But in order to ascertain the truth, it is often essential to have the defendant's testimony, especially where the facts are peculiarly within his own knowledge.[18] If the defendant can be "induced" by a presumption, without being "compelled" (in the constitutional sense) to take the stand, the result would seem to justify the not implausible reasoning which makes possible a circumvention of the constitutional barrier.

(e)

It is often argued that the application of a statutory presumption in a criminal case modifies the presumption of innocence[19] and shifts the

[15] Commonwealth v. Williams, 6 Gray (72 Mass.) 1 (1856). Perhaps the clearest explanation of a presumption of fact is found in People v. Cannon, 139 N. Y. 32 at 43-44, 34 N. E. 759 (1893), where the court said: "A provision of this kind does not take away or impair the right of trial by jury. . . . It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though statutory *prima facie* evidence were uncontradicted."

[16] Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908); State v. Humphrey, 42 S. D. 512, 176 N. W. 39 (1920).

[17] 28 COL. L. REV. 489 at 491 (1928).

[18] Chamberlain, "Presumptions as First Aid to the District Attorney," 14 A. B. A. J. 287 (1928).

[19] The presumption of innocence affords protection "which from time immemorial the law has thrown around a person accused of crime." Dodson v. United States, (C. C. A. 4th, 1928) 23 F. (2d) 401 at 402. But in spite of this peculiar sanctity the

burden of proof to the defendant. No intelligent appraisal of the merits of this argument can be attempted until the ambiguity surrounding the terms "presumption of innocence" and "burden of proof" have been removed.

It is necessary at the outset to understand that the terms merely represent two ways of stating the same thing. More specifically, one is the parallel or corollary of the other. They are somewhat analogous to a right of one party and a commensurate duty of the other in ordinary civil litigation. The presumption of innocence on one side is a right or privilege of the accused. It is paralleled on the other side by the corresponding obligation of the prosecution to sustain the burden of proof. Furthermore, one is the necessary concomitant of the other. Just as the existence of a right implies the existence of a correlative duty, so the existence of a presumption of the defendant's innocence implies the existence of the state's burden of proof. Likewise, an alteration of one implies a proportionate alteration of the other. Therefore, the lawyer must be on his guard whenever he finds decisions or text books which make unqualified statements to the effect that shifting the burden of proof has no bearing upon the presumption of innocence—or that impairing the presumption of innocence is a violation of due process but shifting the burden of proof is not. He may be sure that when declarations such as these are made, the words are used in different senses and that his authority may or may not have been aware of the equivocation.

The ambiguity in the phrase "burden of proof" is widely recognized.[20] It may mean (1) the burden of introducing or going forward

presumption has been severely criticized. One writer declares that it is "misleading and has no proper place in the administration of justice." Benedict, "The Presumption of Innocence," 1 N. Y. L. REV. 442 at 444 (1923). In 90 JUST. P. 269 at 270 (1926), an "American writer" is quoted as challenging the presumption of innocence in this way: "The treatment of the prisoner itself negatives the presumption. If he is presumed innocent, why is he manacled? Why is he put in gaol? Why is he let out only on bail? Why, when he is put on trial, is he put in the dock? Why does he not have a place with the bystanders, who are simply presumed innocent? The 'presumption' in the presence of such things is a contradiction of terms. How can a person be presumed innocent who is presumably guilty? The fact that he is restrained of his liberty presumes guilt." The English writer answered by saying that the unfavorable appearances are inherently necessary and that it is in order to offset the effect of these adverse circumstances that the presumption is used.

Certainly the rule is not founded upon logical grounds. "The truth is that, although the law pays a prisoner the compliment of supposing him to be wrongly accused, it nevertheless knows very well that the probabilities are in favor of the prosecutor's accusation being well founded. . . ." DARLING, SCINTILLAE JURIS 28 (1877) [5th ed., 43 (1903)], cited in 5 WIGMORE, EVIDENCE, 2d ed., 504 (1923).

[20] 5 WIGMORE, EVIDENCE, 2d ed., §§ 2485, 2487 (1923); Bohlen, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof," 68 UNIV. PA. L. REV. 307 (1920); Ray, "Burden of Proof and Presumptions," 13 TEX. L. REV. 33 (1934).

with the evidence, or (2) the burden of persuading the jury beyond a reasonable doubt of the defendant's guilt. It is seldom pointed out, however, that the parallel term, "presumption of innocence," has exactly the same ambiguous connotation.[21] Thus it may mean (1) that the defendant is presumed innocent and therefore may remain inactive and secure until the prosecution has established a prima facie case, i.e., until the state has introduced sufficient evidence to insure its cause against a directed verdict for the defendant, or (2) that the defendant is presumed innocent until the prosecution has sustained its burden of persuading the jury beyond a reasonable doubt of the defendant's guilt. The parallel still exists between the first meaning of "burden of proof" and "presumption of innocence," and a like parallel exists between the second meaning of each. The confusion arises only by using or interpreting "burden of proof" in sense (1) as a corollary of "presumption of innocence" in sense (2), or by considering "burden of proof" in sense (2) as a parallel term of "presumption of innocence" in sense (1).

Having once resolved the ambiguity, it is possible to reconcile or distinguish the outwardly conflicting statements in the books regarding the presumption of the defendant's innocence and the prosecution's burden of proof. Most important for the purposes of this discussion is a consideration of the apparent conflict concerning the requirements of due process.[22] One reputable authority denies that a modification of the presumption of innocence is a violation of the due process guaranty.[23]

[21] Wigmore seems to be one of the few writers to recognize the distinction, and he mentions it only incidentally when he states that "it is to be noted that the 'presumption of innocence' is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, i.e. the rule that it is for the prosecution to adduce evidence . . . and to produce persuasion beyond a reasonable doubt. . . ." 5 WIGMORE, EVIDENCE, 2d ed., § 2511 (1923). The typical treatment is illustrated by the following excerpts. Benedict, "The Presumption of Innocence," 1 N. Y. L. REV. 442 (1923), states that "the so-called presumption [of innocence] is nothing more than a mode of statement of the fundamental proposition that the prosecution must prove beyond a reasonable doubt the guilt of the accused." On the other hand in Culpepper v. State, 4 Okla. Cr. 103 at 119, 111 P. 679 at 685 (1910), the court says, "The presumption of innocence fulfilled its purpose when it required the state to go forward with its evidence and establish a *prima facie* case." In each instance the authority was only half right because it failed to recognize the other meaning which is inherent in the term.

[22] It is important to recognize that there is nothing in the Constitution of the United States expressly requiring that the defendant be presumed innocent until the state has sustained the burden of proving him guilty. No statistical survey of the state constitutions has been made, but it may be stated as a general rule that they do not contain specific references to the subject. The only question of constitutionality, therefore, involves the requirements of the due process provision.

[23] "The idea that the presumption of innocence has become, in this country, a constitutional right has never taken serious hold." 1 JONES, EVIDENCE, 2d ed., 87 (1926).

On the other hand, statements in the cases generally point to the opposite conclusion.[24] Although seemingly irreconcilable, such statements may consistently stand together if it is recognized that the first refers to the presumption of innocence as defined in sense (1) while the second pertains to the presumption as described in sense (2). If by modification of the presumption of innocence a writer means that the defendant can no longer safely remain secure and inactive after the prosecution has introduced sufficient evidence to establish a prima facie case, then it is certainly correct to say that no question of due process is raised. If, on the other hand, by modification of the presumption of innocence, a writer refers to an authorization which permits the jury to find the defendant's guilt without being persuaded beyond a reasonable doubt, then clearly it is correct to say that due process in such a case is denied.

The same confusion in definition has resulted in conflicting statements with regard to the burden of proof, although the ambiguity here is more often recognized. Scores of decisions flatly declare that the burden of proof may be shifted to the defendant, and statutes have generally been upheld even though they expressly cast the burden of proof upon the accused.[25] On the other hand, due process is widely declared to require the state to sustain the burden of proof throughout the trial.[26] The explanation, of course, lies in the fact that the burden of proof in the sense of going forward with the evidence may be shifted without violating due process,[27] while the burden of proof in the sense

[24] "American law accords an accused the presumption of innocence, and due process of law requires that, before a conviction be had, this presumption must be removed by evidence establishing guilt beyond a reasonable doubt." People v. Licavoli, 264 Mich. 643 at 655, 250 N. W. 520 (1933). See also Wyneharner v. People, 13 N. Y. 378 at 446 (1856); State v. Beswick, 13 R. I. 211 (1881); In re Wong Hane, 108 Cal. 680, 41 P. 693 (1895); Hammond v. State, 78 Ohio St. 15, 84 N. E. 416 (1908); State v. Grimmett, 33 Idaho 203, 193 P. 380 (1920).

[25] "The Constitution of Montana contains no guaranty that the burden of proof may not be shifted in a criminal action, unless it may be considered as implied in the 'due process of law' clause or the guaranty that a person accused of crime shall not be compelled to be a witness against himself. Neither of these clauses would appear to prohibit the enactment of such rule of evidence." State v. Lewis, 67 Mont. 447 at 452, 216 P. 337 (1923).

[26] "To convict an accused by due process of law, there must be a conformity to established and fundamental rules respecting the presumption of innocence, the burden and degree of proof, and the competency of evidence. . . ." 16 C. J. S. 1181 (1939).

[27] "It is true, then, that presumptions 'shift the burden of proof,' in a familiar sense of that phrase, importing the duty of going forward in the argument, or in the giving of evidence. That is the only sense of the 'burden of proof,' in which, having once been fixed, it can ever shift." THAYER, EVIDENCE, 383 (1898). But see State v. Lapointe, 81 N. H. 227 at 235, 123 A. 692 (1924), where the court said: "The rule of the constitution is that the defendant in a criminal case cannot be compelled to go forward. . . . Neither the burden of proof nor the burden of proceeding with any

of persuading the jury beyond a reasonable doubt of the defendant's guilt can never be shifted.[28]

With the foregoing analysis in mind, it is clear that in order to sustain an argument that a statutory presumption violates due process by impairing the presumption of innocence or by shifting the burden of proof, it must be shown that the statutory presumption makes it unnecessary to prove the defendant guilty beyond a reasonable doubt. For example it would be unconstitutional for the legislature to authorize conviction of an accused without proof of any facts whatsoever.[29] A presumption statute, however, ordinarily requires actual proof of certain facts by the prosecution before a presumption is raised. The statute merely takes the case to the jury and indicates that from the evidence introduced by the prosecution the jurors are permitted to infer the guilt of the defendant if they so desire. In a criminal case the statute really does no more than to declare that the facts upon which the presumption is based constitute competent circumstantial evidence sufficient to sustain a verdict of guilty.[30] The burden of persuasion beyond a reasonable doubt still rests upon the prosecution.

Superficially it might seem that a presumption of the defendant's innocence cannot co-exist with a presumption of the defendant's guilt, even though the latter does not arise until certain basic facts have been proved. But it must be remembered that the presumptions are not conclusive. They merely represent a legislative permit to the jury to make an inductive inference one way or the other.

But even though these presumptions are mere permissive inferences and are not conclusive, if a presumption of innocence and a presumption of guilt happened to rest upon exactly the same facts, they would be conflicting and would only confuse the jury without serving any useful purpose. However, the presumption of innocence arises from the fact of common knowledge that most men do not commit crime, while a statutory presumption arises out of certain facts which the prosecution must prove. Thus these presumptions may co-exist throughout the trial, since they merely present alternatives for the jury's choice. To allow simultaneous existence of a presumption of guilt and a presumption of innocence based upon different facts is no more inconsistent

evidence to prove such case can be imposed upon the party charged with crime." The court admitted that there are an "array of cases" contra.

[28] 5 WIGMORE, EVIDENCE, 2d ed., § 2489 (1923). But see 48 HARV. L. REV. 102 (1934); Bohlen, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof," 68 UNIV. PA. L. REV. 307 (1920); Morgan, "Some Observations Concerning Presumptions," 44 HARV. L. REV. 906 (1931).

[29] McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498 (1915).

[30] North, J., dissenting in People v. Licavoli, 264 Mich. 643 at 661, 250 N. W. 520 (1933).

than to permit the introduction of conflicting competent evidence by the opposing parties in any law suit, civil or criminal.

In view of the ambiguity in meaning considered above, it is understandable that the arguments concerning modification of the presumption of innocence and shifting the burden of proof are almost universally advanced whenever a statutory presumption is attacked. Few if any presumptions, however, are fatally defective in denying due process, since they seldom interfere with the defendant's constitutional right to have the jury persuaded of his guilt beyond a reasonable doubt.

(f)

Any presumption may be attacked because a natural or a rational connection is lacking between the fact proved and the fact presumed. This is the argument most often relied upon by the courts in declaring a statutory presumption unconstitutional.[31] As an original proposition the soundness of a rationality requirement might well be questioned. Professor Wigmore has criticized the whole theory as unnecessary and undesirable. In his treatise on *Evidence*, he writes:

> "It has occasionally been suggested that these legislative rules of presumption, or any legislative rules of evidence, must be tested by the standard of *rationality*, and are invalid if they fall short of it. But this cannot be conceded. If the Legislature can make a rule of Evidence at all, it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic truth. Apart from the Constitution, the Legislature is not obliged to obey either the axioms of logic or the axioms of economic science. . . . So long as the party may exercise his freedom to introduce evidence, and the jurors may exercise their freedom to weigh it rationally, no amount of irrational legislation can change the result."[32]

In spite of Professor Wigmore's argument, the courts have unanimously adopted the "rational connection" requirement as an element of due process of law.[33] Two possible reasons for the rule have been suggested.[34] In the first place, when a presumption is used, the court cannot set aside a verdict of guilty on the ground that the verdict was

[31] People ex rel. Dixon v. Lewis, 249 App. Div. 464, 293 N. Y. S. 191 (1937); People v. Pinder, 170 Misc. 345, 9 N. Y. S. (2d) 311 (1928); 51 A. L. R. 1139 at 1141 (1927); 12 AM. JUR. 316 (1938).

[32] 2 WIGMORE, EVIDENCE, 2d ed., 1068-1069 (1923).

[33] People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (1893); Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136 (1910); Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215 (1928); Brosman, "The Statutory Presumptions," 5 TULANE L. REV. 178 at 184-189 (1931).

[34] 30 MICH. L. REV. 600 at 605-606 (1932).

not supported by sufficient evidence. In the second place, when the jury is instructed as to a presumption, they undoubtedly attach some weight to the facts upon which the presumption is based which would not be carried by the facts in and of themselves.

The meaning of the courts' requirement that there be a rational and natural connection between the fact upon which the presumption is to rest and the main fact which is presumed, is perhaps best understood through illustration. The following hypothetical situation was suggested by Lumpkin, J., in a Georgia case:[35]

> "If the legislature should declare that every man found wearing a straw hat in September should be presumed to have committed any forgery which took place in that month, such an act would be invalid, because there is no rational connection between forgery and wearing a straw hat, and the presumption would be purely arbitrary."

Another example, nearly as absurd as this imaginary situation, is an actual Georgia statute passed in connection with the banking act of that state. The legislature declared that "every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary . . . provided that the defendant . . . may repel the presumption of fraud."[36] Professor Wigmore would, of course, deny the power of a court to invalidate such a statute, because it provides an opportunity to the defendant to rebut the presumption, and because the jury theoretically will take account of the irrationality before they arrive at a verdict. As might be supposed, however, the Supreme Court of the United States followed the great weight of authority and held the statute unconstitutional as a violation of the due process requirement of the Fourteenth Amendment.[37]

Since the courts so universally make "rationality" a prerequisite to a presumption's validity, how may a compliance with the standard be recognized in any particular case? The most thorough analysis indicates three possible tests.[38]

The first, the pragmatic test, emphasizes the object to be attained and the evil to be eradicated. Thus if the presumption serves a desir-

[35] Griffen v. State, 142 Ga. 636 at 639, 83 S. E. 540 (1914).

[36] Ga. Banking Act, art. 20, § 28, Ga. Laws (1919), p. 219.

[37] Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215 (1928). It is interesting to note that about the same time the New York legislature passed an identical statute [39 N. Y. Consol. Laws (McKinney, 1938), "Penal Law," § 297], which was declared unconstitutional on the same ground as the statute in the Manley case. People v. Mancuso, 255 N. Y. 463, 175 N. E. 177 (1931).

[38] O'Toole, "Artificial Presumptions in the Criminal Law," 11 ST. JOHNS L. REV. 167 (1937).

able purpose and is not considered directly harmful to society, it is held to be reasonable. Opponents of this view argue that the pragmatic test should not be considered, since it would leave legislative discretion virtually unlimited. They say that without further restriction it would still be possible for legislatures to enact irrational presumptions whose application would tend to destroy the protection to liberty and against the tyranny of government afforded by our constitutional system.[39] However, even if the pragmatic test were to be made the exclusive criterion of rationality, it would not be as far-reaching as Professor Wigmore's suggestion that no rebuttable presumption, regardless of irrationality, is a violation of due process. The "dangers" of this test are certainly not so "insurmountable" as to justify excluding it entirely. On the other hand, it need not be made the exclusive or all-important factor in determining whether or not the rationality requirement has been met.

The second is the *a priori* or ingrediency test. Apparently the proponents of this criterion would require that the fact upon which the presumption is based be one of the ingredients of the crime which is presumed.[40] Just what is meant by "ingredient" is nowhere to be found. If the common meaning, viz., a component part, constituent, or element,[41] is applied, it would seem that beyond question the test is satisfied where the presence of a weapon in an automobile is declared to give rise to a presumption that one of the occupants of the car is guilty of the crime of illegal possession. Certainly the presence or proximity of a thing is an ingredient of the possession of that thing. The fallacy of Professor O'Toole's contention that the New York statute fails to meet the ingrediency test[42] lies in his assumption that *illegality* and *possession* are the only ingredients of the crime presumed and that neither element has to be proved in any case where the presumption is applied. *Illegality* is not an ingredient requiring proof, because the penal code[43] expressly makes illegal the possession of a weapon without a license. *Possession*, on the other hand, is more than an ingredient; it is the crime itself. The ingredients of possession are (1) physical control and (2) intent to exercise that control.[44] The prosecution still has to prove

[39] Ibid., 171-172.

[40] Ibid., 180, 187.

[41] 5 OXFORD DICTIONARY 289 (1901).

[42] O'Toole, "Artificial Presumptions in the Criminal Law," 11 ST. JOHNS L. REV. 167 (1937). See his general criticism of the presumption in question at pages 184-185.

[43] 39 N. Y. Consol. Laws (McKinney, 1938), § 1897 (4), quoted in note 3 supra.

[44] BROWN, PERSONAL PROPERTY 18-21 (1936). By "intent to exercise physical control" the writer does not mean the intent to use. There is a real difference between an intent to use or operate a deadly weapon and an intent to exercise dominion over it as a latent instrument. Only in the latter sense is intent an ingredient of possession as

the element of physical control; only the element of intent to control is presumed. Thus it is clear that the *a priori* or ingrediency test is fully satisfied by the presumption, since the fact out of which the presumption flows, viz., the physical control of the weapon by the occupants of the car, in itself constitutes an ingredient of the crime charged.

The third test listed by O'Toole is termed the *a posteriori* or experience test and is defined in this way: "Does our experience demonstrate that the fact presumed is usually co-existent with the fact from which the presumption flows?"[45] The author emphasizes the importance of exercising great care in the application of this test to distinguish between what experience has shown us to be merely related and what experience has shown us to be rarely separated. In support of this distinction the famous *Turnipseed* case[46] is cited as authority; but neither that case nor any of those which adopt the experience test of rationality have recognized such a distinction. On the contrary, the Supreme Court in the *Turnipseed* case required only that there be "some rational connection" between the fact proved and the fact presumed and that it be not "so unreasonable as to be a purely arbitrary mandate."[47] In fact, the presumption itself in the *Turnipseed* case indicates that the fact proved and the fact presumed need be only "related" in experience and not "rarely separated" as contended, since the Court found that injury to persons or property by railroads has such a rational connection with negligent operation of those railroads that a statutory presumption to that effect was constitutional.[48]

The test of experience set up by the courts seems to require nothing more than a relationship which is probable or likely to exist. This test, then, like the other tests of rationality already examined is satisfied by the presumption in section 1898-a of the New York Penal Law. Consequently the requirement of rationality is fully met.

Six possible bases for attack upon the validity of a statutory presumption have been considered. The arguments that there is no actual

the term is used in § 1897 (4) of the Penal Law. Possession with intent to use is expressly made a distinct crime in subdivision 1 of the same section of the statute.

[45] O'Toole, "Artificial Presumptions in the Criminal Law," 11 ST. JOHNS L. REV. 167 at 172-173 (1937).

[46] Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136 (1910).

[47] Ibid., 219 U. S. at 43.

[48] Presumptions have been upheld in numerous cases when experience would show that the fact proved is only occasionally a basis for finding the existence of the fact presumed. For instance in People v. Pieri, 269 N. Y. 315, 199 N. E. 495 (1936), it was held that experience indicates a rational connection between the defendant's consorting with criminals and consorting with those criminals for an unlawful purpose. A presumption of the latter fact was declared justified upon proof of the former. Statutes have been upheld making the keeping of liquor prima facie evidence of intent to sell it. Toole v. State, 170 Ala. 41, 54 So. 195 (1910); State v. Sheppard, 64 Kan. 451, 67 P. 870 (1902); State v. Cunningham, 25 Conn. 195 (1856).

proof, that the burden of proof is shifted and the presumption of innocence is affected, that the legislature imparts probative force to the evidence, and that there is no rational connection between proved and presumed facts are all included within, or at least are allegedly a part of, that vague body of law known as due process. The contentions that the defendant is compelled to testify and that he is deprived of his right of jury trial are, of course, covered by specific provisions in the federal and state constitutions. Some of these arguments may have real merit in particular cases; but it seems clear that they are ineffective against the New York statute which declares that the presence in an automobile of a pistol shall be presumptive evidence of its illegal possession by the occupants of the vehicle.

3.

The use of the statutory presumption is, of course, not limited to the particular type of situation covered by the New York statute. There are numerous fields in the criminal law where an urgent need for such legislation exists. It is necessary not only for the effective enforcement of state laws but also in aid of police regulation under local ordinances. An important problem in this connection recently arose in the city of Detroit. The city officials found it impossible to sustain convictions for the violation of parking ordinances because of the difficulty of satisfactorily proving who had actually parked the car. The person who returned to the automobile after the violation occurred was not necessarily the person who had parked it in the first instance. This meant that unless a vigilant policeman could positively testify as to the identity of the driver on both occasions, the law was unenforceable. The impracticability of identifying every parking motorist as a potential violator of an ordinance is apparent.

In order to remedy the situation, the common council of Detroit passed an ordinance[49] which provided that an owner of a vehicle was presumed to be the operator of the same at the time of the violation of a parking ordinance, unless he testified under oath that he was not operating the vehicle at that time, and unless he either submitted himself to an examination as to the identity of the person who was operating the vehicle or voluntarily revealed the identity of such person. The ordinance was declared unconstitutional by the Supreme Court of Michigan on the theory that the accused was restricted to the means specified in the statute in rebutting the presumption. This was held to compel the accused to be a witness in the proceedings brought against him and to deprive him of due process.[50]

[49] Detroit Ordinance No. 115-c, § 4 as amended by Ordinance No. 350-c.

[50] People v. Hoogy, 277 Mich. 578, 269 N. W. 605 (1936). The court did not indicate the phase of due process that was considered nor in what sense it was violated or denied.

After this decision violations were flagrant, but again they remained for the most part unpunished. Unless a police officer actually saw the defendant park his car in the restricted area, the violator could escape by merely maintaining (1) that the burden of proof was on the people to show that he himself parked his car and (2) that the people had no basis for inferring that he knew or allowed his car to be illegally parked.

Recognizing that the situation remained unaltered, the Detroit common council acted again.[51] This time the ordinance merely provided that the registration plates displayed on an automobile parked in violation of an ordinance should constitute in evidence a prima facie presumption that the owner was the person who parked such motor vehicle at the point where such violation occurred. The Supreme Court of Michigan subsequently held that this ordinance was constitutional,[52] although the usual arguments were advanced for its invalidity. Particular emphasis in the decision was placed upon the fact that a rational connection exists between the ownership of an automobile together with the license plates thereon and the actual use of the highways by the owner in parking his car.

4.

The accused under the Anglo-American system of jurisprudence is certainly given the benefit of every doubt. Whether the reason may be wholly attributed to our basic ideas of justice and equity or whether it is in part due to a peculiar concept of what is sporting and chivalrous, it is outside the scope of this article to determine. The important thing to consider here is the fact that without the use of a presumption in a criminal prosecution, the state is deprived of its most valuable witness. The defendant as a rule is the only person who knows the whole story. The details of that story are often necessary in order to discover the truth. Truth is one of the prerequisites to justice. Yet without the defendant's testimony the truth may be unascertainable, and the prosecution may be helpless to proceed.

Bearing in mind the constitutional limitations already considered, it is certainly possible as well as highly desirable for the legislatures to render "first aid" to the district attorney by the use of the statutory presumption in order that the best interests of society may prevail over the interests of the criminal.[53] This is indeed a proper place for the application of a rule of trial convenience which induces the defendant to divulge facts that are essential to a discovery of the truth and yet which are, by the very nature of the criminal act, peculiarly within his own

[51] Detroit Comp. Ordinances, c. 196, § 65b.

[52] People v. Kayne, 286 Mich. 571, 282 N. W. 248 (1938).

[53] See Chamberlain, "Presumptions as First Aid to the District Attorney," 14 A. B. A. J. 287 (1928).

knowledge. The Supreme Court of the United States has approved such a rule. In *Casey v. United States*[54] Justice Holmes said:

> "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government."

It has been suggested that the statutory presumption lightens the duty of a district attorney who may be too indolent to discover the available evidence.[55] The criticism has some validity and indicates a limitation beyond which the legislature should not venture.[56] Even where not restricted by constitutional sanctions, the enactment and use of criminal presumption statutes should remain the exception and not the rule. Only in those situations where the defendant has peculiar and exclusive knowledge of the facts is such a statute necessary. Where that is the case, however, an application of a proper presumption will aid in ascertaining the truth and in better serving the ends of justice.

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[54] 276 U. S. 413 at 418, 48 S. Ct. 373 (1927). See also People ex rel. Dixon v. Lewis, 160 Misc. 327, 290 N. Y. S. 284 (1936); People v. Nuce, 34 Hun. (N. Y.) 298 (1884).

[55] O'Toole, "Artificial Presumptions in the Criminal Law," 11 ST. JOHNS L. REV. 167 (1937).

[56] Justice Cardozo, speaking for the court in Morrison v. California, 291 U. S. 82 at 88-89, 54 S. Ct. 281 (1933), said: "The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."