Advisory Committee
on Evidence
Memorandum No. 20

Article III. Presumptions

First Draft

1 Rule 3-01. Criminal cases.

2 (a) Classes of presumptions. In criminal cases, pre-
3 sumptions recognized at common law or created by statute,
4 including statutory provisions that certain facts are
5 prima facie evidence of other facts or of guilt, are
6 divided into two classes: (1) those directed against
7 the accused and presuming guilt or an element of the
8 offense or negativing a defense, and (2) all others.

9 (b) Submission to jury. When there is evidence of the
10 facts which give rise to a presumption, the existence
11 of the presumed fact is a question for the jury, unless
12 the judge is satisfied that the evidence as a whole
13 negatives the presumed fact.

14 (c) Instructing the jury. If the presumption is of
15 class (1), the judge shall instruct the jury that
16 while the presumed fact must, on all the evidence,
17 be proved beyond a reasonable doubt, the law declares
18 that the jury may, but is not required to, regard the
19 facts giving rise to the presumption as sufficient
20 evidence of the presumed fact. If the presumption
21 is of class (2), the judge may instruct the jury of
22 the existence of the presumption and that the law
23 declares that the jury may, but is not required to,
24 regard the facts giving rise to the presumption as
25 sufficient evidence of the presumed fact.

Comment

Subsection (a)

A convenient point of departure for considering the treatment of presumptions in criminal cases is first to examine, and insofar as possible to distinguish, so-called "affirmative defenses."

In civil cases the characteristics of affirmative defenses are well known. The law does not demand of a plaintiff that he deal with every possible element which might as a matter of substantive law bear upon the outcome of the case. Rather, it selects certain elements as constituting a prima facie case or cause of action and tells plaintiff that he will succeed if he establishes them, unless additional elements which will defeat him make their appearance in the case. These additional elements or affirmative defenses are the responsibility of the defendant, who must plead and prove them.

In similar fashion, the law does not require the prosecution in criminal cases initially to deal with every element which might conceivably within the confines of the substantive law affect the outcome of the case. As in the civil cases, a prima facie case

is sufficient. Ordinarily it will consist of proving the elements of the crime as they are set forth in the statutory definition. Affirmative defenses are the responsibility of the accused. They assume a variety of forms:

> Exceptions in statutes, preventing an otherwise included act from being a crime. United States v. Holmes, 187 F.2d 222 (7th Cir. 1951), burden on defendant to bring himself within provision excepting small amounts from operation of narcotics statutes.
>
> Excuse. United States v. Fleischman, 339 U.S. 349 (1950), burden on defendant to show effort to comply or excuse for non-compliance with subpoena of Congressional committee.
>
> Duress. Model Penal Code P.O.D. § 2.09 (1962).
>
> Military orders. *Id.* § 2.10.
>
> Entrapment. *Id.* § 2.13.
>
> Execution of public duty. *Id.* § 3.03.
>
> Self-defense. *Id.* § 3.04.
>
> Mental disease or defect. *Id.* § 4.03.

It will be observed that all the foregoing are matters happening concurrently with the otherwise criminal conduct and preventing it from ever in fact becoming a crime. In other cases, some subsequently arising element is relied upon to neutralize pre-existing criminality, as in cases of the running of the statute

of limitations, id. § 1.06, and double jeopardy, id. § 1.08. Again the resemblance to affirmative defenses in civil cases is apparent.

The notable difference between affirmative defenses in civil and criminal cases is found in the measure of responsibility. In civil cases, the usual burden imposed on a defendant is not only to produce enough evidence to support a finding of the existence of the defense but also to satisfy the trier of fact that its existence is more probable than not (preponderance of the evidence). The general pattern in criminal cases is to impose a lesser burden. Commonly it is to produce "evidence supporting such defense," Model Penal Code P.O.D. § 1.12(2)(a) (1962), or to produce "some evidence," Davis v. United States, 160 U.S. 469, 486 (1895); United States v. Currens, 290 F.2d 751, 761 (3d Cir. 1961). It can be seen that the procedure is one of issue-raising by defendant: if he wants the issue raised, he does so by introducing the required quantum of evidence, unless the prosecution's evidence does it for him. Once the issue is thus raised, it is in the case and constitutes an additional element in the prosecution's case to be proved beyond a reasonable

doubt. Model Penal Code P.O.D. §§ 1.12(1) and (2)(a), 1.13(9). Occasionally a burden of persuasion is imposed on the accused, as is done with respect to entrapment in Model Penal Code P.O.D. § 2.13 (1962), with respect to insanity in California Evidence Code § 522, with respect to exemptions under the Domestic Opium Poppy Control Act, 21 U.S.C. § 188m, and with respect to the narcotics taxing provisions of the Internal Revenue Code, 26 U.S.C. § 4724(c). And in Leland v. Oregon, 343 U.S. 790 (1952), the Court upheld as against a claimed denial of due process a unique Oregon statute requiring an accused to prove insanity beyond a reasonable doubt. However, a dilemma arises in a prosecution for murder, as was Leland, or other crime requiring premeditation, in telling the jury that the burden is on the prosecution to establish guilt beyond a reasonable doubt, including premeditation and the necessary mentality to accomplish it, and also that the accused must prove insanity beyond a reasonable doubt. Logic may allow the distinction, but the result seems inevitably to be hopeless confusion of the jury. While Leland says that Davis did not establish constitutional doctrine, the latter

seems more likely to endure. Note, 56 Nw. L. Rev. 409, 434 n.77.

The existence of a constitutional floor below which Congress and legislatures cannot go in specifying the minimum requirements of a prima facie criminal case, leaving additional issues to be raised by the accused, is scarcely open to doubt. Fixing its location in a given situation is something else. As is pointed out in the Comments to Model Penal Code § 1.13, T.D. No. 4 (1955):

> "What is involved seems rather a more subtle balance [than the mere logic of not having to prove a negative or the grammar of exceptions and provisos in statutes] which acknowledges that a defendant ought not be required to defend until some solid substance is presented to support the accusation but, beyond this, perceives a point where need for narrowing the issues, coupled with the relative accessibility of evidence to the defendant, warrants calling upon him to present his defensive claim. No doubt this point is reached more quickly if, given the facts the prosecution must establish, the normal probabilities are against the defense, but this is hardly an essential factor. Given the mere fact of an intentional homicide, no one can estimate the probability that it was or was not committed in self-defense. The point is rather that purposeful homicide is an event of such gravity to society, and the basis for a claim of self-defense is so specially within the cognizance of the defendant, that it is fair to call on

> him to offer evidence if the defense is claimed. This is in essence the classic analysis by Justice Cardozo in Morrison v. California, 291 U.S. 82, 88-90, 54 S. Ct. 281 (1934). . . ."

See also Amsterdam et al., Trial Manual for the Defense of Criminal Cases § 426 (1967).

The nature, consequences, and constitutionally permissible limits of affirmative defenses can thus be seen at least in outline. And one might at this point set their area to one side as not falling within the proper ken of a committee on evidence. However, the shading over from affirmative defense to presumption may be so subtle as to lack practical significance in many, if not all, situations. The Morrison cases illustrate the point. In the first Morrison case, Morrison v. California, 288 U.S. 591 (1933), the appeal was dismissed for want of a substantial federal question, with only a per curiam memorandum opinion, and for an understanding of the case one must turn to its history in the California courts and the discussion of it in the second Morrison case, Morrison v. California, 291 U.S. 82 (1934). In each case Morrison was convicted of conspiracy to place an alien ineligible for citizenship in possession of land in violation of the

California Alien Land Law. Both cases were tried on stipulation. In the first case it was stipulated that co-defendant Ozaki was a member of a race (Japanese) ineligible for citizenship but that there was no evidence of his place of birth or citizenship. Under § 9(b) of the Law, upon proof that a member of a race ineligible for citizenship was in possession, the burden of proving citizenship (as by birth) was on defendants. This procedure was held to be valid. In the second case, unlike the first, the stipulation was silent as to co-defendant Doi's race or ineligibility to citizenship. Under § 9(b) of the Law, when the state proved possession (which was stipulated) and the indictment charged alienage or ineligibility to citizenship, the burden was on defendants to prove citizenship or eligibility. This procedure was held invalid. The difference between the two cases is substantial. In the first (valid) case, the State's *prima facie* case was possession + membership in a race ineligible for citizenship, and the offsetting defense allowable under the Law (but not shown) was actual citizenship. In the second (invalid case), the State's case was possession only, and the offsetting defense

allowable under the Law (but not shown) was citizenship or eligibility. In the second case the indictment was required to allege alienage or ineligibility, but the State was not required to prove it; the burden rather was on defendants to disprove it. The burden of the defense in the first case was within constitutionally permissible limits; in the second case it was not.

Both _Morrison_ cases seem to involve affirmative defenses in the usual sense of the phrase, mapping out the permissible from the impermissible areas. The opinion, however, discusses the problem of validity at considerable length in terms of presumptions. Yet it seems clear that if by presumption one means that from proof of certain basic facts the existence of another fact, in which we are actually interested, will be assumed, then the _Morrison_ cases did not involve presumptions. It may be, of course, that standards for measuring the validity of affirmative defenses coincide with or are at least relevant to those for measuring the validity of presumptions.

At this point it should be noted that determining the validity of presumptions is not this Committee's responsibility. However, the relationship between

validity and effect is an intimate one, and the Committee cannot well avoid coming to grips with the effect to be given presumptions.

Congress has enacted provisions to lessen the burden of the prosecution in a number of situations, principally though not exclusively in the fields of narcotics control and taxation of liquor. Occasionally these take the form of affirmative defenses, previously discussed. In other cases they become difficult to classify with precision. The provisions may take the form that proof of a specified fact (possession or presence) is sufficient to authorize conviction. 26 U.S.C. § 4704(a), unlawful to buy or sell opium except in or from original stamped package; absence of stamps from package prima facie evidence of violation by person in possession; 26 U.S.C. § 4724(c), unlawful for person who has not registered and paid special tax to possess narcotics; possession presumptive evidence of violation. Sometimes the qualification is added, "unless the defendant explains the possession (presence) to the satisfaction of the jury." 18 U.S.C. § 545, smuggling a crime; possession of unlawfully imported goods sufficient for conviction, unless explained; 21 U.S.C. § 174, crime to buy or sell

narcotic, knowing it to have been imported contrary to law; possession sufficient to authorize conviction, unless explained; 26 U.S.C. § 5601(a)(1), possession, custody, or control of unregistered still a crime, and _id._ (b)(1), presence at unregistered still sufficient to authorize conviction, unless explained; _id._, § 5601(a)(4), crime to carry on business of distiller without giving bond, and _id._ (b)(2), presence where business of distiller carried on without bond sufficient to authorize conviction, unless explained; _id._, § 5601(a)(8), crime to produce distilled spirits without legal authority, and _id._ (b)(4), presence at site of unauthorized distillation sufficient to authorize conviction, unless explained. Another recurring and somewhat different pattern centers upon a particular aspect of the crime, and makes possession evidence of it. 15 U.S.C. § 902(f), unlawful for convicted felon to receive firearm or ammunition shipped in interstate commerce; possession by such a person presumptive evidence of receipt in violation; _id._, (i), unlawful to receive in interstate commerce any firearm with serial number removed; possession presumptive evidence of receipt in violation; 21 U.S.C. § 174, crime to buy or

sell narcotic drug, knowing it to have been imported contrary to law; possession sufficient to authorize conviction, unless explained; 21 U.S.C. § 176b, crime to furnish unlawfully imported heroin to juveniles; possession sufficient proof of unlawful importation, unless explained; 50 U.S.C. App. § 462(b), unlawful to possess draft card not lawfully issued to holder, with intent to use for purposes of false identification; possession by defendant of card not duly issued to him sufficient evidence to establish intent, unless explained. Perhaps this latter group consists of presumptions in the usually accepted sense of taking one fact as established upon proof of another. Yet in each of them the "presumed fact," if such it can be called, is central to the issue of guilt, with other elements of the crime probably only a matter of more or less routine proof, and to attempt to distinguish between them and the situations in which the "presumed fact" is guilt seems to be unjustified and unrealistic. The proposed draft treats them alike and for convenience calls them all presumptions. The only classification which is treated as having validity is between (1) those upon which the prosecution relies as raising a presumption

of guilt or an element of the offense or negativing a defense, and (2) all others, including all relied upon by the accused and those relied upon by the prosecution which are merely tactical in nature.

Subsections (b) and (c)

Essential differences in the burdens of proof and in the roles of judge and jury as between civil and criminal cases preclude a standardized treatment of presumptions which would be applicable in all cases. These latter differences center in the inability of the judge to direct a verdict or finding against the accused, and the corresponding right of the accused to have the jury pass upon every disputed question of fact. The impact upon the permissible range of effect to be given presumptions is substantial.

The Court considered the problem in United States v. Gainey, 380 U.S. 63 (1965). The principal concern in Gainey was the validity of the provision of 26 U.S.C. § 5601(b)(2) that presence at the site is sufficient to convict of the offense of carrying on the business of distiller without giving the required bond, unless the presence was explained to the satisfaction of the jury. The Court concluded that the "presumption"

satisfied the rational connection test and was valid under Tot v. United States, 319 U.S. 463 (1943). It was then confronted with the necessity of measuring the effect to be given a presumption of this kind. Did it require the judge in every instance to submit the question to the jury, thus substituting Congressional for judicial judgment? Did it require the judge to instruct the jury about the presumption or would any reference to it invade their province? If he could tell them about it, what effect should they be instructed to give it? See the opinion of Mr. Justice Douglas, dissenting in part, 380 U.S. at 71, and the dissenting opinion of Mr. Justice Black. Id. at 74. The majority of the Court gave answers to all of them. The power of the judge to withdraw a case from the jury for insufficiency of evidence was left unimpaired; he could submit the case on the basis of presence alone, but he was not required to do so. Nor was he precluded from rendering judgment notwithstanding the verdict. It was proper to tell the jury about the "statutory inference," since they were told it was not conclusive. The instruction given by the judge was quoted at length with approval, with emphasis upon the following portion:

"'Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.' (Emphasis supplied [by the Court].)" 380 U.S. at 70.

The jury could still acquit, even if it found defendant present and his presence unexplained. Compare the mandatory character of the instruction condemned in Bollenbach v. United States, 326 U.S. 607 (1945). To avoid any implication that the statutory language relative to explanation be taken as directing attention to the failure of the accused to testify, the better practice would, however, be to instruct the jury that they may draw the inference unless the evidence provides a satisfactory explanation of defendant's presence, omitting any explicit reference to the statute. Id. at 71, n.7.

While Gainey was concerned with a presumption relied upon by the prosecution to establish the "presumed fact" of guilt, its language and atmosphere seem to dispel any thought that the judge could remove any question of fact from the determination of the jury on the basis of a presumption. Assume a situation in which the prosecution

relies upon the presumption of receipt of a duly mailed letter to establish an admission by the accused through failure to deny when a denial would be expected because of a prior course of dealings. Also assume that defendant offers no evidence of non-receipt of the letter. The presumed fact of receipt of the letter is not an element of the offense, but merely an item of proof in the total case. In a civil case, an instruction could be expected to the effect that the fact of receipt was to be taken as established, absent any evidence denying either mailing or receipt. In a criminal case, however, it is believed that the matter must be left to the jury. A similar problem arises in connection with the taking of judicial notice against the accused in a criminal case, previously considered by the Committee. See Memorandum No. 17, pp. 29-32.

The proposal strongly resembles Model Penal Code § 1.12(5) P.O.D. (1962), which reads:

> "(5) When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences:
>
> (a) when there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and

(b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

"(6) A presumption not established by the Code or inconsistent with it has the consequences otherwise accorded it by law."

The proposal differs from the Model Penal Code provision in several respects, however. (1) The proposal specifically recognizes non-statutory presumptions and accords them the same treatment as statutory presumptions. This is believed to be in accord with existing practice, to have the advantage of consistency and logic, and to represent a marked improvement over the vagueness of subsection (6) of the Model Penal Code provision quoted above. See, for example, the Dyer Act cases approving instructions that guilt may be inferred from possession of a recently stolen automobile, though no statute so provides. Harding v. United States, 337 F.2d 254 (8th Cir. 1964); Minor v. United States, 375 F.2d 170 (8th Cir. 1967); Beufve v. United States, 374 U.S. 123 (5th Cir. 1967). But cf. United States v. Martin, 375 F.2d 956 (6th Cir. 1967). (2) The proposal is more specific than the Model Penal Code in its division into two

classes, i.e. those where the presumed fact is guilt or an element and those which are tactical. The result, however, is the same. (3) The proposal gives greater emphasis to the discretionary power of the jury to apply or disregard the presumption.

The Reporter for the Model Penal Code submitted an alternative draft of subsection (5) which gave presumptions substantially greater effect when an element of the offense was involved. It provided that in the absence of evidence to the contrary, the presumed fact should be taken as established upon proof beyond a reasonable doubt of the basic facts giving rise to the presumption; that when there is evidence contra the presumed fact, the issue must be submitted to the jury, unless the judge is satisfied the evidence clearly negatives the presumed fact, giving weight to the basic facts and the legislative policy; and that when the issue is submitted, the judge shall instruct that, while the presumed fact must be proved beyond a reasonable doubt, the basic facts are strong evidence of it. This alternative was rejected by the majority of the A.L.I. Council, and it is believed that it would not, in any event, have measured up to the specifications subsequently stated in *Gainey*.

The Uniform Rules formula is believed to be even more unacceptable under Gainey. Uniform Rule 14 divides presumptions into two classes: (a) those in which the basic facts have probative value as evidence of the existence of the presumed fact, and (b) those in which they do not. Under Tot v. United States, 319 U.S. 463 (1943), a rational connection between the basic fact and the presumed fact is required, and the definition of class (b) in the Uniform Rule seems in effect to be a paraphrase of lack of rational connection. This group may then be dismissed from further consideration in criminal cases as being invalid. As to group (a), the burden of persuasion of the non-existence of the presumed fact is imposed upon the accused. This is believed to be of dubious validity under the Gainey case. This view is reinforced by Speiser v. Randall, 357 U.S. 513 (1958), striking down a California statute imposing on veterans the burden of establishing nonadvocacy of overthrow of the government by force or violence as a condition precedent to a tax exemption. This, said the Court, was an encroachment on free speech. While the case was not criminal, the language referring to the

reduction of the fact-finding margin of error by imposing burdens on the prosecution is highly relevant. It is possible, of course, within the confines of Morrison to impose some burden of an affirmative defense on the accused, but to impose a burden of nonpersuasion in all presumption cases would go squarely against that decision.

New Jersey Rule 14 may avoid some of the pitfalls of the Uniform Rule but is unacceptable in seeming to make the presumption mandatory upon the jury in criminal cases in the absence of evidence of the nonexistence of the presumed fact.

The California scheme is likewise subject to question as applied to criminal cases. Under California Evidence Code §§ 600, 604 and 606 the application of presumptions appears to be mandatory upon the jury, despite the language of § 607. While Gainey may not in this respect rise to constitutional proportions, the problem of jury trial thus raised is not to be overlooked.

First Draft

1 Rule 3-02. Application of State law.

2 [A presumption respecting a fact which is an element

3 of a claim or defense having its source in state law]

4 shall have the consequences accorded it by the law of

5 the State in which the court sits.

6 Alternative to bracketed language:

7 [In cases in which the jurisdiction of the court is

8 founded on diversity of citizenship, a presumption with

9 respect to a fact which is an element of a claim or

10 defense] . . . .

Comment

A series of Supreme Court decisions in diversity cases leaves little doubt as to the relevance of Erie to questions of burden of proof. In Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939), a claim for reformation of a Texas deed was met by the defense of bona fide purchase. The Texas rule placed the burden of proof on the issue of bona fide purchase on the party attacking the legal title, but the District Court and the Circuit Court of Appeals refused to apply it. Mr. Justice McReynolds, writing for the Court, said the question was not one of practice but "relates to a substantial right upon which the holder of recorded legal title to Texas land may rely." A reversal was the result. Palmer v. Hoffman, 318 U.S. 109 (1943), involved charging the jury on burden of proof of contributory negligence in a diversity action in New York arising from a grade crossing accident in Massachusetts. To oversimplify somewhat the successful plaintiff contended that the charge placing the burden on defendant was correct, since Rule 8(c) listed contributory negligence as an affirmative defense, contrary to the

Massachusetts rule. Mr. Justice Douglas replied for the Court:

> "Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases . . . must apply." 318 U.S. at 117.

Finally was Dick v. New York Life Ins. Co., 359 U.S. 437 (1959), which originated as an action in a North Dakota state court to recover double indemnity on a life policy for death by external, violent, and accidental means and was removed on grounds of diversity. Defendant alleged suicide as an affirmative defense. Denying defendant's motion for a directed verdict, the trial judge instructed the jury that the burden was on defendant and entered judgment on a verdict for plaintiff. The Court of Appeals reversed, holding it error to submit the issue of suicide. The Supreme Court sustained the action of the trial court. Though both parties agreed that North Dakota law governed, the Chief Justice nevertheless said:

> "Under the Erie rule presumptions (and their effects) and burden of proof are 'substantive' and hence respondent was required to shoulder the burden [of proving suicide] during the instant trial." 359 U.S. at 446.

Attention is also directed to a recent Court of Appeals decision, O'Brien v. Willys Motors, Inc., 385 F.2d 163 (6th Cir. 1967), holding that failure to instruct that the burden was on defendant to prove contributory negligence, in accordance with state law, was such plain error as to require reversal, even though not properly raised below.

It should by no means be supposed, however, that these decisions call for applying the state rule in every situation in which a presumption is involved. In each case, the burden of proof question was one which had to do with a substantive element of the claim or defense: status as bona fide purchaser, contributory negligence, non-accidental death (suicide) of an insured. Whether the result was reached in the language of prima facie case and affirmative defense or in the language of presumptions is wholly unimportant. But the cases go no farther; they do not require applying _Erie_ in tactical situations and should not be so read. And that is the theory on which the proposals are drafted.

Burden of proof, then, insofar as it relates to elements of a claim or defense, is "substantive" within the doctrine of _Erie_. The final question then arises,

When does *Erie* call for the application of this principle, i.e. when does *Erie* generally apply? The opinions and writers have tended simply to tag *Erie* problems as arising from the exercise of diversity jurisdiction. Careful analysis, however, leads to the conclusion that *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and that *Erie* does not apply to a federal claim or issue, even if jurisdiction is based on diversity. Vestal, Erie R.R. v. Tompkins: A Projection, 48 Iowa L. Rev. 248 (1963); Hart and Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 697 (1953); Moore, FEDERAL PRACTICE ¶ 0.305[3] (2nd ed. 1965); Wright, FEDERAL COURTS 217-218 (1963). The bracketed language of the proposal is designed to conform to these conclusions. It is possible, however, that the enhancement of accuracy is gained at the expense of workability. The Committee may wish to substitute the alternative bracketed language in the interest of achieving greater utility and ease of understanding with a corresponding rather minute sacrifice of precision. The Reporter solicits the views of our associates who are expert in this area.

First Draft

1 Rule 3-03. Presumptions in other cases.

2 In all cases in which it is not otherwise provided by

3 Act of Congress or by these rules, the burden of es-

4 tablishing the non-existence of the presumed fact is

5 upon the party against whom a presumption operates.

Comment

Before the Committee is free to turn to consideration of what effect, or effects, should as a matter of policy be accorded presumptions, some clearing of constitutional ground must first be undertaken. The task begins with examination of two elderly cases, both involving the liability of railroads. The first, Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910), considered the validity of a Mississippi statute stating that in actions against railroad companies for damages to persons or property, proof of injury inflicted by the running of the locomotives or cars of the company should be prima facie evidence of negligence on the part of the servants of the company. The statute was attacked on the ground of unreasonable classification in not

applying the general rule requiring that negligence be proved. Mr. Justice Lurton's opinion sustaining the statute may be summarized as follows: Legislation making one fact proof of a main fact in issue is within the general power of government in both civil and criminal cases. The only effect was to cast on the railroad "the duty of producing some evidence to the contrary. When that is done, the inference is at an end . . . ." 219 U.S. at 43. The statute does not deny equal protection or due process because all it does is supply an inference in the absence of contradicting evidence, and this may be done as long as there is a rational connection between the fact proved and the fact presumed, and as long as the opposite party is not precluded from presenting his evidence to the contrary. 219 U.S. at 43. The inference that the derailment in question was due to negligence was not unreasonable. Applying the rule to railroad trains was not an arbitrary classification, "but one resting upon considerations of public policy arising out of the character of the business." 219 U.S. at 44. The basis, or bases, of decision are elusive. Successively, emphasis is given to (1) the

limited bursting bubble effect, (2) presence of a rational connection, and (3) public policy arising out of the character of the business. If these are taken as factors not adding up to invalidity, which seems to have been intended, the result is to leave the future of presumptions pretty much open. If, however, these factors are read as requirements to be met, particularly the first two, then the future of presumptions was cloudy indeed. Nineteen years later, the Court had before it a Georgia statute making the railroad liable for damages done by the running of the locomotives, "unless the company shall make it appear that their agents have exercised all reasonable care and diligence, the presumption in all cases being against the company." The declaration alleged a grade crossing collision death of plaintiff's husband, and certain specified acts of negligence of the defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care, and unless it did so, they should find for plaintiff. The statute was held invalid. There was no rational connection between the mere fact of collision and

negligence on the part of anyone. Moreover, how could the presumption support the conflicting allegations of the declaration that the engineer failed to stop after seeing the truck and that his eyesight was so bad he could not see it anyway? Turnipseed was distinguished on the ground that the presumption there vanished upon the introduction of opposing evidence, while here the presumption imposed a burden of persuasion upon the railroad company.

The two cases leave the reader in a state of some confusion. Would the Turnipseed presumption have been bad if it had placed a burden of persuasion on defendant? Giving it that effect would in no wise have impaired its "rational connection." Can a burden of persuasion ever, under Henderson, be imposed on a defendant? If not, then all affirmative defenses go out the window. If so, it should make little difference whether the burden is imposed in the language of presumptions or that of affirmative defenses.

Two explanations of Henderson are possible. The first is found in an odd intermixture of fiction and logic. The basic assumption is that negligence is an indispensable element of liability. Plaintiff thought

so and drafted her complaint accordingly. She then relied upon the presumption to establish defendant's negligence. But how, rationally, could the same presumption establish the alternative grounds of negligence that the engineer was so blind he could not see the train and failed to stop after he saw it? Logic simply would not allow that use of the presumption. And even if plaintiff had alleged negligence generally, when there were two actors, as in this grade crossing accident, there was no reason to suppose that one rather than the other, or in fact anybody, was negligent. (_Turnipseed_ had involved a derailment, but nothing was made of the difference--negligence was negligence.) Thus viewed as an exercise in logic, and given the basic assumption, _Henderson_ may merely state an inevitable result. But take away the basic assumption, as the Court had intimated in _Turnipseed_ might be done ("considerations of public policy arising out of the character of the business"), and the whole structure fails. Why the Court did not do so leads to the second explanation of _Henderson_. Suppose the statute, instead of being worded in terms of presumption of negligence, had simply said: a prima facie case of liability is made

against a railroad by proof of injury from the operation of its train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. No question of logic now arises. The problem would simply be one of economic due process, and it seems likely that the Supreme Court of 1929 would have voted that due process was denied. Forty years later it seems highly unlikely that the result would be the same. See, for example, the shift in the direction of absolute liability in consumer cases. Prosser, The Assault upon the Citadel, 69 Yale L.J. 1099 (1960). And with the Henderson statute compare the following:

> "In any action brought by a person for damages claimed to have been sustained by reason of the negligent operation of a motor vehicle by a person other than the owner thereof, with respect to the element of liability of such owner for any such negligence of such driver of said vehicle, it shall be sufficient in the complaint filed in such action to allege operation of said vehicle by the driver thereof and the name of the owner thereof, without the necessity of alleging the legal relationship existing between such owner and driver or any other averments of fact related to authority or consent of such owner with respect to the operation of said motor vehicle by the driver thereof. In any such action, should the owner of any such motor vehicle desire to urge as a defense therein a denial of liability for the alleged negligent acts of any

such driver in the latter's operation of said vehicle, such defense shall be set forth the answer particularly alleging the facts upon which said owner relies for his denial of liability for such acts of said driver. Upon trial of any such action, the plaintiff therein, with respect to the element of liability of said owner for such acts of said driver, shall be required only to prove by competent evidence the ownership of said vehicle and the driver thereof at the time of the alleged negligent operation of the same, to establish a presumption of liability of said owner for any such negligent acts of said driver in his operation of such vehicle, said presumption being subject to rebuttal by said owner by competent evidence within the limits of the facts set forth in the answer." Fla. Stats. Ann. § 51.12.

and

"In all actions to recover damages for injuries to the person or to property or for the death of a person, arising out of an accident or collision in which a motor vehicle was involved, evidence that at the time of such accident or collision it was registered in the name of the defendant as owner shall be prima facie evidence that it was then being operated by and under the control of a person for whose conduct the defendant was legally responsible, and absence of such responsibility shall be an affirmative defence to be set up in the answer and proved by the defendant." Mass. G.L. Ann., c. 231 § 85A.

The Massachusetts court, in 1929 when the Supreme Court struck down the Henderson statute, upheld its statute. Thomas v. Meyer Store, 268 Mass. 587, 168 N.E. 178 (1929). The statutory automobile presumptions

are the subject of a Comment, 65 Harv. L. Rev. 1077 (1952).

If doubt still lingers as to the constitutional validity of presumptions which impose a burden of persuasion as to the non-existence of the presumed fact, it is surely laid at rest by the decision in Dick v. New York Life Ins. Co., 359 U.S. 437 (1959). There the Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of establishing that the death of insured was due to suicide. The action was under a clause providing double indemnity in case of accidental death. The position of the Court is unmistakable.

> "Under that [North Dakota] law, it is clear that under the circumstances present in this case a presumption arises, which has the weight of affirmative evidence, that death was accidental." 359 U.S. at 442.

> "Proof of coverage and death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide. [Citations.] Under North Dakota law, this presumption does not disappear once the insurer presents any evidence of suicide. . . . Rather, the presumed fact (accidental death) continues and a plaintiff is entitled to affirmative instructions to the jury concerning its existence and weight." _Id._ at 443.

> "In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." Id. at 446.

If these views with respect to presumptions in civil cases are correct, how can the continued existence of the rational connection requirement of Tot be justified, with its stringent limitations, in criminal cases? The answer lies in the Court's unwillingness to extend to criminal cases the greater-includes-the-lesser theory of Ferry v. Ramsey, 277 U.S. 88 (1928). A Kansas statute made bank directors personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was prima facie evidence of knowledge and assent. Mr. Justice Holmes pointed out that the Kansas legislature could have made the directors personally liable to depositors in every case. That being so,

> "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it. . . . The statute would be none the worse if it allowed a defense in the single case of the defendants having made an honest examination and having been led to believe that the bank was solvent."

Mr. Justice Sunderland dissented. Rational connection was lacking. The State did not purport to create an absolute liability, though it might have done so. Instead it based liability on assent and made insolvency prima facie evidence of it. Perhaps it would have been different if being open for business were the basis of the presumption.

The Sunderland view has prevailed in criminal cases. The reason seems to lie in the higher standard of notice which criminal cases by their nature demand. The fiction that everyone is presumed to know the law may be necessary as to the substantive law in order to prevent a complete breakdown of law enforcement. This need does not extend into criminal evidence and procedure, and the fiction does not encompass it. "Rational connection" needs no fiction, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, United States v. Gainey, 380 U.S. 63 (1965), but not that Romano should have known that his presence could convict him of possession. United States v. Romano, 382 U.S. 136 (1965).

In his dissent in Gainey, Mr. Justice Black put it more artistically:

> "It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called 'possession' and 'carrying on an illegal distillery business' but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See Ferry v. Ramsey, 277 U.S. 88. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see Heiner v. Donnan, 285 U.S. 312, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in Lanzetta v. New Jersey, 306 U.S. 451, and many other cases." 380 U.S. at 84, n.12.

And the majority opinion in Romano agreed with him:

> "It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power.[11] The crime remains possession, not presence, and with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter."

> (Footnote "11 The Government advanced a somewhat similar contention in Tot. It was rejected, partly on the ground that it was

not supported by legislative history. Tot v. United States, 319 U.S. 463, 472. Cf. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218.")

The conclusion that the Ferry v. Ramsey theory is too refined for criminal cases and that presumed knowledge of criminal law goes no farther than substance itself plus conduct which would have a "rational connection" with guilt is totally consistent with the philosophy underlying the warning requirements of Miranda v. Arizona, 384 U.S. 436 (1966).

With the conclusion reached that there is no constitutional barrier against such a course, the draft proposal takes the position that all presumptions should be given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact. (Excepting criminal cases and diversity cases to the extent specified in proposed Rules 3-01 and 3-02.) This is the effect of an affirmative defense, and the same considerations of policy, fairness, and probability which justify classifying certain matters as affirmative defenses also justify the creation of presumptions. See the Reporter's article, 12 Stanford L. Rev. 11-14. No lesser status for presumptions gives full effect to

these considerations. Moreover, an enormous gain in the direction of simplicity is gained by eliminating the need to concern oneself in a given situation with the question whether a particular matter is part of a prima facie case, part or all of an affirmative defense, or a mere matter of presumption. Compare the treatment of presumptions in California Evidence Code §§ 600-668, with its division of presumptions into one group affecting the burden of producing evidence (based on no public policy other than to facilitate the determination of the case) and another group affecting the burden of proof (based on some policy other than facilitating the determination of the case). The truth probably is that no presumption is justified solely by the desirability of deciding a case--other policy factors seem always to be present. The unreality of the groupings is apparent from the presumptions specified as falling in one or the other. California Evidence Code §§ 630-645, 660-668. Thus to put the presumption of ownership from proof of possession in the first category is to overlook the great policy considerations which underlie the law's traditional willingness to protect possession,

id. § 637, and to put the presumption of death from seven years' absence in the second category is to recognize a distinction without a difference. § 667. While the California pattern must be regarded as a marked improvement over its predecessor, it is believed not to be one to copy.