Artificial Presumptions in the Criminal Law

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ARTIFICIAL PRESUMPTIONS IN THE CRIMINAL LAW

WITHIN the last few years, there has been an unprecedented volume of legislative enactments by which artificial presumptions designed to facilitate proof by prosecutors in criminal cases, have been incorporated into the penal laws of many jurisdictions. This appears to be due partly to the recognition by prosecutors that such presumptions inevitably minimize their labors in the procurement of convictions and partly to the fact that the courts have been more than liberal in the construction and application of this type of enactment. Indeed, it is not unlikely that this judicial trend in the present transitional age is influenced by the general feeling that the rights of the individual are secondary to the demands of the state. As a consequence, too little attention seems to have been paid by legislators to the dangers to liberty that lurk in this simplified and extremely mechanistic method of conviction, and to the peril that arbitrary oppression in the guise of artificial presumption be substituted for the judgment of one’s peers. Although it may be readily conceded that the modern criminal trial too often degenerates into a battle of wits or into a struggle of the emotions, it must also be realized that the cure does not lie in a statutory innoculation which may cure the malady by eventually killing the

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1 Presumptions as First Aid to the District Attorney (1928) 14 A. B. A. J. 287.
patient. Rules of evidence alone should not unduly bear the brunt of the attack upon organized crime and unscrupulous defense tactics, especially when, in doing so, they become the tools by which constitutional guaranties of liberty are uprooted and eventually destroyed. Some time ago, Mr. Justice McReynolds took occasion to warn against the extremes to which legislative presumptions might lead, when he remarked:

"Once the thumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry." 3

Inasmuch as it is intended to limit this discussion of the legislative presumption to the question of its constitutionality from the viewpoint of rationality, the following preliminary propositions are to be deemed established or conceded:

(a) That presumptions in the criminal law are presumptions of fact, as distinguished from presumptions of law. As such, they are not binding on the jury even though they be unfuted.4

(b) That presumptions, per se, are neither argument nor evidence although they frequently "accomplish the result of both." 5

(c) That a presumption is a legal concept entirely separate from the concept of "burden of proof." 6

4 People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (1893). "The distinction between a presumption of law and of fact is, that the former is to be declared and applied by the court in all cases where the facts raising it are established; and the latter is a question for the determination of the jury, who are to exercise their judgment in the particular case and find the fact if satisfied of its truth; or if not so satisfied, refuse to find it." Grover, J., in Stover v. People, 56 N. Y. 315, 317 (1874).
5 "Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both." Thayer, Preliminary Treatise on Evidence (1898) 314. "A presumption is a legal effect of facts, not a logical effect." Id. at p. 317.
6 See Thayer, op. cit. supra note 5, at 337. For contrary view, see Morgan, Some Observations Concerning Presumptions (1931) 44 Harv. L. Rev. 906.
(d) That subject to certain constitutional limitations, which are to be discussed herein, a legislature in defining a crime may also enact that proof of certain facts shall be prima facie evidence of guilt.\(^7\)

(e) That the term "prima facie proof" in a criminal case means such proof as would support a verdict of guilty by the jury.\(^8\)

(f) That an "artificial presumption" is a legislative enactment which provides that a jury may infer the existence of guilt upon the proof of the existence of some fact or facts which would not justify the inference at common law.

(g) That the burden of proof in many states and in particular in the state of New York is on the prosecution in criminal cases.\(^9\)

Typical of the recent artificial presumptions which have been enacted, is an addition to the Penal Law of New York, designed to facilitate proof in a prosecution for the unlawful possession of dangerous weapons. It reads as follows:

"The presence in an automobile other than a public omnibus, of any of the following weapons, instruments or appliances, viz., a pistol, a machine gun, etc., 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."\(^10\)

In the lower court this section survived the first attack made upon it on the grounds: (a) that it is in violation of the Fifth Amendment of the United States Constitution in so far as it provided that "no person shall be compelled in

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\(^7\) "It has often been held that the legislature, in defining a crime, may also enact that proofs of facts which are universally recognized as indicating guilt shall be prima facie evidence of the commission of an offense defined by statute." Voght v. State, 124 Ind. 358, 24 N. E. 680 (1890).

\(^8\) "Raising a statutory presumption based on proof of a certain fact removes from the court the power to set aside a verdict on the ground of insufficient evidence." Note (1932) 30 Mich. L. Rev. 600.

\(^9\) N. Y. Code Crim. Proc. §389. "A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."

\(^10\) N. Y. Penal Law § 1898a, added by N. Y. Laws 1936, c. 390.
any criminal case to be a witness against himself"; (b) that it is in conflict with Article I, Section 6 of the state constitution which contains language substantially similar to that found in the Fifth Amendment of the Federal Constitution; (c) that it is violative of the Fourteenth Amendment of the Constitution of the United States which prohibits any state from depriving a person of life, liberty or property without due process of law; and (d) that it is likewise in conflict with Article I, Section 6 of the New York State Constitution which is in effect a re-enactment of the Fourteenth Amendment. 11 These are the stock objections that appear time and time again when an artificial presumption is questioned. Other common arguments against such presumptions, although not urged in this case, include the contentions that the enactments are in conflict with the presumption of innocence or that they result in the suspension or abolition of the rule that the prosecution has the burden of proof in the criminal case. 12

However, when the significant statement of Wigmore is considered, in which he declares that:

"There is not the least doubt, on principle that the Legislature has entire control over such rules (presumptions), as it has over all other rules of procedure in general and evidence in particular—subject only to the limitations of the rules of evidence expressly enshrined in the Constitution," 13

it would seem that the fundamental as well as the most usual problem which would be presented by an artificial presumption, is the determination of its rationality or reasonableness in the light of the Fourteenth Amendment of the Federal Constitution. The mere fact that a state statute would change the burden of proof in a criminal case, 14 or would modify the

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12 For a list of cases in which these and other special lines of attack have been considered, see Brosman, The Statutory Presumption (1931) 5 Tulane L. Rev. 178.
13 Wigmore, Evidence (1925) § 1356.
14 There is now such a statute in New York. N.Y. Vehicle and Traffic Law § 66 reads as follows: "Any person having possession for more than
presumption of innocence,¹⁶ or would remove the privilege against self-incrimination ᵃ¹⁶ ought not and in general does not condemn it as unreasonable and therefore in violation of the Fourteenth Amendment. It is rationality that looms up as the fertile field of debate and dissension.

To assert that a law is reasonable is necessarily much simpler than to demonstrate it. It must be admitted that no working definition of the word “reasonable” can be stricken off which could be applied with unerring accuracy to a legislative enactment.¹⁷ And, yet, the need of determining the judicial attitude towards the concept of “reason” seems imperative. Legislators cannot function intelligently and within constitutions unless they have some insight into the judicial approach to this problem. Of necessity, an effort should be made to interpret the term “reasonable in law” in a fashion which is as concrete and real as the possibilities permit.

An examination of numerous cases dealing with the “reasonableness” of an artificial presumption reveals that the courts have prescribed certain well defined tests to which they submit such a presumption in passing upon its rationality or reasonableness. These tests are far from uniform, frequently inconsistent with one another, but withal are markers which guide in the solution of the problem.

Two of the tests of “reasonableness” which appear more outstanding than the others and which clash most violently with each other, are the pragmatic and the a priori. As applied to the question under discussion, the pragmatic test might be stated as follows: “What social evil do most of the people desire to eradicate? Everything not immediately

thirty days of a motor vehicle * * * the engine number of which has been destroyed, removed, defaced, * * * shall be guilty of a misdemeanor * * * . Upon a prosecution therefor, lack of knowledge of the condition of such engine, as to number, shall constitute a defense; but such possession shall be prima facie evidence that the defendant had such knowledge, and the burden of proof shall be upon him that he had no such knowledge.” Thus far, the statute has not been subjected to judicial review.

¹⁶ JONES, EVIDENCE (1926) § 46.
²⁷ “This failure (to define due process) has been due not to any lack of judicial effort or acumen but to the very nature of the doctrine, which asserting a fundamental principle of justice, rather than a specific rule of law, is not susceptible of more than general statement.” WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d Student’s ed. 1933) 723.
harmful in itself to society and tending to stamp out that evil is reasonable.”

It naturally, although not necessarily, follows that those who use this test focus more on the object in view than the means applied in its accomplishment. Truth is based on desires rather than on facts and reason. The current history of many European nations has proven that such a procedure, if carried to its logical conclusion is charged with insurmountable danger to personal liberty. In direct opposition to the pragmatic method is the a priori form of test founded on the concession of the existence of primary or natural laws known “to us in themselves and not capable of direct demonstration.”

Such natural laws are deemed so much a part of our natural being that their defiance is nothing less than an act against nature itself—a veritable descent into chaos. Perhaps the most timely example of the operation of this test can be found in a hypothetical case, proposed in the lower court decision in People ex rel. Dixon v. Lewis, to the following effect: “To enact by statute, for instance, that anyone found in a house in which a person had been murdered would be presumed to have caused the death of such person, would be an arbitrary and unreasonable presumption and clearly in conflict with the constitutional guaranty of a trial by due process of law.” In reducing this statement to the first principles of the a priori school of thought, it might be paraphrased to read as follows: “To enact by statute that one is capable of being a murderer, who is not shown to possess a single attribute of a murderer as defined by law is to state that one may be what he is not. Such a proposition is contrary to the first principle of contradiction which is to the effect that ‘nothing can at the same time exist and not exist.’”

A third and quite popular test might be classified as the a posteriori test or the test of experience. It may be summed up as follows: Does our experience demonstrate that the fact presumed is usually and probably co-existent with the fact

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19 Prof. Morris R. Cohen in his work entitled “Law and the Social Order” criticizes the courts for failing to follow a method such as this in the solution of constitutional problems.

20 Richard F. Clarke, S.J., Logic (1927) 32.

21 Clarke, op. cit. supra note 19, at 33.
from which the presumption flows? Here, great care must be employed to distinguish between what experience has shown us to be related and what experience has shown us to be rarely separated. On the first premise are built our rules of circumstantial evidence, while on the second is constructed the theory of the prima facie case. Furthermore, the first is designed to influence juries, the latter to compel them.

It was in 1910 that the Supreme Court of the United States first enunciated its rule in respect to artificial presumptions in the Turnipseed case as follows:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main fact thus presumed."

The statute construed and found constitutional in this case made an injury inflicted on persons or property "by running of locomotives or cars" of a railroad prima facie evidence of negligence. But, in 1929, the same Court in passing upon the constitutionality of a somewhat similar statute enacted by the State of Georgia found it to be unconstitutional and took occasion to clearly distinguish the logical effects of the Georgia statute and the one construed in 1919 in the Turnipseed case as follows:

23 Western & A. R. R. v. Henderson, 279 U. S. 639, 49 Sup. Ct. 445 (1929). In this case the Court construed § 2780 of the Georgia Civil Code which reads as follows:

"A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company".
“Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotive cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing testimony. That of Georgia as construed in this case creates an inference that is given the effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate.”

The distinction is quite obvious. Where the legislature passes an act in the form of a presumption which calls upon the one against whom it is raised to come forward or be cast in judgment, it is giving no false or arbitrary meaning to the presumption, but is merely using it as a threat that judgment will follow if some evidence is not forthcoming from the defendant. In other words, the legislature has provided that if the plaintiff has proved fact A, the duty of giving some proof as to the non-existence of fact B is shifted to the defendant, who must go forward or have fact B found against him. On the other hand, if a legislature should arbitrarily declare that A equals or may equal B when there is no human experience or logical process to justify the equation, the statute so enacted is unreasonable. Clearly, the ends sought to be attained in both statutes were similar, if not identical. Nevertheless, the Supreme Court found that a fundamental concept was ignored in the means adopted by the Georgia statute. A neither by experience nor in logic equals B. “If a thing can be true and false at the same time, to what purpose is it to make any assertion respecting any single object in the universe? Fact ceases to be fact, truth ceases to be truth, error ceases to be error.”

Hence it becomes important to determine whether a legislative presumption is one which creates the duty of proceeding to negative the existence of certain facts or commands a deduction where no deduction is logically possible.

Professor Morgan has pointed out that a presumption may determine the “burden of persuasion.” Assuming that

24 Clarke, op. cit. supra note 19, at 34.
25 Morgan, Some Observations Concerning Presumptions (1931) 44 Harv. L. Rev. 906.
his conclusions are correct, no court could find any objection to an artificial presumption which might go so far as to change the burden of proof in a civil case, where the legislature's power to do so seems undisputed. But, in the criminal case in those jurisdictions where the burden of proof is on the prosecution, other questions arise. For instance, a statutory presumption which would arbitrarily change the burden of persuasion on any element of the crime or require the defendant to negative the existence of an ingredient of the crime would be clearly in conflict with the rule as to the burden of proof. Furthermore, if the legislature were to arbitrarily declare that a jury may consider fact A as presumptive evidence of fact B or even of guilt, the constitutional problem of rationality immediately arises even though it is expressly provided that the burden of proof on the whole case remains with the prosecution.

Probably the most frequently cited criminal case of state jurisdiction where the constitutionality of an artificial presumption was involved is People v. Cannon. In this case there was construed the constitutionality of an act prohibiting the unlawful use by junk dealers of bottles etc., marked as prescribed therein, and further providing that the possession by a junk dealer of such bottles shall be presumptive evidence of unlawful use, etc. The court found the statute constitutional and in interpreting it said among other things:

"It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecution the legislature may with some limitations enact that when certain facts have been proved they shall be prima facie evidence of the main fact in question. The limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact."
It should be noted that the court was not giving sanction to a presumption that merely changed the duty of going forward but was insisting on a natural relationship between the fact in issue and the fact from which the presumption followed. Without the statutory presumption, "possession" would be merely a relevant fact, not sufficient in itself to bring the case to the jury, but by virtue of the statute this relevant fact was raised to the dignity of *prima facie* proof, which would warrant a submission of the question of guilt to the jury. Naturally, the degree of relativity must be very high to attribute such certainty to a single fact.

**Instances of Unconstitutional Presumptions**

A reference to some of the decisions, where artificial presumptions have been held unconstitutional might tend at this point to clarify the meaning of "relationship" and "natural connection" as expressed in *People v. Cannon*.\(^2\) Cases in which unconstitutionality has been declared seem to reveal more clearly the judicial approach to the subject, than do those cases where the presumptions have been approved. The latter for the most part are replete with generalities and devoid of analysis and adopt as a rule the familiar arguments of Wigmore as the rule of the case.\(^3\)

In *Manley v. Georgia*,\(^3\) the Supreme Court of the United States held that a legislative enactment creating a presumption of fraud on the part of the president and directors of a bank from the mere fact of insolvency was unreasonable and arbitrary. Apparently the Court in determining what was unreasonable was relying on logic and experience, and could find no connection in either between insolvency and fraud. That the legislature might have intended to shift the burden

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\(^{20}\) "A rule of presumption is simply a rule changing the burden of proof, \(i. e\), declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced (post, sec. 2490). There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has over all other rules of procedure in general and evidence in particular—subject only to the limitations of the rules of evidence expressly enshrined in the Constitution". *Wigmore, Evidence* (1925) § 1356.

\(^{21}\) *279* U. S. 1, 49 Sup. Ct. 215 (1928). This ruling was followed in *People v. Mancuso*, 255 N. Y. 463, 175 N. E. 177 (1931).
of persuasion of proof was not even considered. "The connection," said the Court, "between the fact proved and the fact presumed is not sufficient." "Reasoning does not lead from one to the other."

In Oklahoma, a statute was held unconstitutional which provided:

"It shall be unlawful for any person who is under the influence of intoxicating liquor, or who is a habitual user of narcotic drugs, and the having on or about one's person or in said vehicle of said intoxicating liquor is prima facie evidence of the violation of this act, to operate or drive a motor vehicle on any highway within the state etc." 32

The Court pointed out that the deduction sought to be drawn was entirely too remote in that there must first be the inference that the driver had used the intoxicants and the further inference that he had used them to such an extent that he was under the influence thereof to the extent of intoxication. Although Professor Wigmore characterizes this decision as "unsound" 33 it would appear that it is in conformity with the ruling of the Supreme Court in the Manley case.34

In Massachusetts, the Supreme Court declared unconstitutional a statute establishing an eight-hour day on public works with the exception that employees who were given a half holiday on Saturday might work eight hours a day on other days and further providing that working more than eight hours in any one day shall be prima facie evidence of the violation of the statute. Although this ruling has met with a similar characterization of "unsoundness" by Professor Wigmore, the following language of the Court seems more than convincing from a purely rational viewpoint:

"We are of the opinion that the Legislature has no constitutional authority to punish any citizen merely

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33 WIGMORE, EVIDENCE (Supp. 2d ed. 1934) § 1356.
34 279 U. S. 1, 49 Sup. Ct. 215 (1928).
upon evidence of the existence of a fact which in ordinary cases has no tendency to establish guilt.\(^\text{35}\)

The Court is emphatic in differentiating between evidence which might have some relevancy to guilt, and evidence which has a strong tendency to establish it. This thought might be amplified by the following proposition: The fact that one had a motive to kill another is relevant in a prosecution for homicide, but of and in itself would not have a tendency to establish guilt.

In a significant decision in Idaho, there was declared unconstitutional an act of the legislature which provided that the failure of anyone to retain in his possession for thirty days the hides removed from any cattle slaughtered by him is prima facie evidence of the commission by such person of the crime of grand larceny of the cattle which he had so slaughtered.\(^\text{36}\) In the clearest of language, the Court laid bare the crux of the problem, when it stated:

"So long as the evidence is of itself material and relevant, the statute may make it prima facie proof of the ultimate fact which it tends to establish, and may thus shift the burden of evidence. Where, however, there is no connection or rational relationship between the fact proved and the ultimate fact to be presumed, such a statute shifts the burden of proof, and in a criminal case deprives the defendant of his constitutional guarantees. * * *

"The act of a person in disposing of the hide of an animal within 30 days after it has been slaughtered by him is an act innocent in itself, except as made otherwise by statute. Under this statute one could be convicted without any evidence that any cattle of any description had been stolen from any person. The instruction, if followed by the jury, relieved the state from the necessity of offering any evidence of the corpus delicti. It deprived the defendant of the benefit of any presumption of innocence, and required him to

\(^{35}\) In re Opinion of Justices, 208 Mass. 619, 94 N. E. 1044 (1911).

\(^{36}\) State v. Grimmett, 33 Idaho 203, 193 Pac. 380 (1920).
take the burden, not only of proving his own innocence, but perhaps of proving that the crime had not been committed."

Here is an application of the *a priori* test. When experience demonstrates that the facts from which the deduction is drawn are in no way connected with the ultimate fact, then the deduction becomes an operation of the imagination and not of reason.\(^7\)

In *State v. Beswick*,\(^3\) the Supreme Court of Rhode Island found unconstitutional a statute prohibiting the sale of liquors wherein it was also enacted that:

"It shall not be necessary to prove an actual sale of the liquors * * * in any building etc. * * * in order to establish the fact that any of said liquors are there kept for sale; but the notorious character of any such premises, or the notorious bad or intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tippling shops or places where such liquors are sold, shall be prima facie evidence that such liquors are kept on such premises for the purpose of sale within this state."

In its decision the court applied the *a priori* test most convincingly as follows:

"Indeed to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but are not even a *constituent part* of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it the very element

\(^7\) Here (referring to *prima facie* evidence) the legislature is not merely attaching procedural consequences to the proof of a certain fact or group of facts, but is giving to the proved fact or facts artificial weight as evidence. * * * It is submitted, therefore, that due process might well require that in order to support a finding of fact B (from proof of fact A) there must be some evidence logically tending to prove it." Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect* (1931) 10 Tex. L. Rev. 34.

\(^3\) 13 R. I. 219 (1881).
which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact and in an important measure to predetermine their decisions and verdicts for them."

The test which was applied might also be designated as the "ingrediency" test since it requires that the facts out of which the presumption arises should not only be relevant to the crime but should constitute in themselves an element of the crime presumed. The "ingrediency" test and the "a priori" test are one and the same in that they both stand for the fundamental principle that fact $A$ can never equal fact $BC$ nor be an integral part of it, where facts $A$, $B$, and $C$ represent identities distinct from one another.

**THE TREND IN NEW YORK**

The early law in New York concerning artificial presumptions was crystallized in the case of *People v. Cannon*, to which reference has been made. The crime involved was the unlawful use of second-hand bottles and the presumption of illegality was drawn from proof of use. It appears that the test of "relevancy" and "ingrediency" were both satisfied. In fact the court stated that "it (use) is some evidence of the main fact and the strength of it is properly a matter for legislative enactment in the first instance."

Ten years after the decision in the *Cannon* case, no little confusion came into the law when the Court of Appeals in *People v. Adams*, held constitutional a statute prohibiting the possession of policy slips under certain defined circumstances. Whereas the court found no constitutional viola-

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39 139 N. Y. 32, 34 N. E. 759 (1893). Prior to this, the court in Board v. Merchant, 103 N. Y. 143, 8 N. E. 484 (1886) had held constitutional a statute making the drinking of liquor on premises, *prima facie* evidence of occupant's sale with intent that liquor should be there drunk.

40 176 N. Y. 351, 68 N. E. 636 (1903).

41 N. Y. Penal Law § 975: "Possession of policy slips. The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share or interest in numbers, sold, given away, drawn, or selected, or to be drawn or selected, or in what is commonly called 'policy', or in the nature of a bet,
tion in the statute and affirmed on the authority of the Cannon case, it said that the "legislature has cast the burden of proof upon the person who has in his possession these incriminating papers." This is a surprising statement in view of the fact that in the Cannon case the court expressly ruled that such a presumption "does not in reality and finally change the burden of proof." In all other respects the decision seems sound in that the presumption of illegality of possession arises out of the relevant fact of possession which is an ingredient of the crime.

Subsequently, in People ex rel. Woronoff v. Mallon, the Court of Appeals turned to the pragmatic test in its determination of what was reasonable. In this case the constitutionality of the presumption enacted by Section 442 of the Penal Law was involved. In approving this enactment as applicable to a prosecution for larceny by false pretenses the court manifested its pragmatic approach when it said:

"The criminal law of our state attempts to meet the new devices and methods of committing crime and
and further stated:

"So in this case, experience and habits and customs of honest merchants and trades people, would naturally lead to the conclusion that if a purchaser refused to verify his financial statement by his books, something was crooked and that he was dishonest. Section 442 of the Penal Law has merely codified this natural presumption."

Since the crime charged was larceny by false pretenses, the failure to produce the books might well be a relevant fact, but surely not an ingredient of the crime. This decision as do many others on the subject relies in part on People v. Galbo, where the common-law rule was applied that one found in recent possession of the fruits of a crime may be inferred to be its perpetrator. This rule does not seem in point since it is applied at common law only after there is proof offered that a crime has been committed in which the identity of the perpetrator is in question. At best, possession of the fruits of a crime is a fact which fairly calls for an explanation from him whose knowledge in this respect is peculiar to himself.

Attention was focused on the relevancy and ingrediency tests as such for the first time in 1932 by the dissent of Justice Martin in Eff Ess, etc., v. N. Y. Edison Co., wherein the constitutionality of Section 1431a of the Penal Law was determined. By Section 1431 of the Penal Law, the altering or tampering with an electric light meter is made a crime and by Section 1431a the legislature has prescribed certain conditions which are deemed presumptive evidence

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218 N. Y. 283, 112 N. E. 1041 (1916).
N. Y. Penal Law § 1431a: "The existence of any of the conditions with reference to meters, or attachments described in section fourteen hundred and thirty-one of this article is presumptive evidence that the person to whom gas, electricity, water or steam is at the time being furnished by or through such meters or attachments has, with intent to defraud created or caused to be created with reference to such meters or attachments, the condition so existing. (Added by L. 1926, ch. 849, in effect May 19, 1926.)"
of the violation of the first mentioned statute. In the upholding of this presumption, it is submitted that the prevailing opinion erroneously applied the ingrediency test when it stated that a subscriber for electric service is "in effect the receiver of stolen current." In his dissent, Justice Martin pointed out quite clearly that this was not the case:

"The meter in this case was not in the basement or cellar, but was in a public hallway where anyone might have tampered with it. There are many conditions here present which make this presumption unreasonable."

It is clear that the dissent was urging in principle the necessity of ingrediency in all criminal presumptions created by statute. Illegality of use ought not to be predicated on a mere order to supply.

Two artificial presumptions which were recently enacted have been challenged in the courts on the ground of unconstitutionality. One, Section 772 of the Penal Law,47 makes it a crime for persons bearing an evil reputation or engaging in an unlawful occupation to consort with criminals. The other, Section 1898a of the Penal Law,48 created an artificial presumption in reference to the possession of weapons found in a motor vehicle. The consorting statute which provided that

47N. Y. Penal Law § 722: "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct. **

"Subd. 11. Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts;

"Subd. 12. In any prosecution under subdivision eleven of this section the fact that defendant is engaged in an illegal occupation or bears an evil reputation, and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was for an evil purpose. (Sec. am'd. by L. 1936, ch. 896, § 2.)"

48N. Y. Penal Law § 1898a: "The possession, by any person other than a public officer, of any of the weapons, instruments or appliances specified in sections eighteen hundred and ninety-seven and eighteen hundred and ninety-seven-a except as permitted therein, is presumptive evidence of carrying, concealing or possessing with intent to use the same in violation of this article. The presence of any such weapon, instrument or appliance in any stolen vehicle is presumptive evidence of its illegal possession by all the persons found in such vehicle at the time such weapon, instrument or appliance is found (am'd. by L. 1936, ch. 137)."
proof of consorting would be *prima facie* evidence that such consorting was for an illegal purpose was declared constitutional \(^{49}\) by the dictum of the Court of Appeals. Although the pragmatic approach is revealed when the court says that the statute is "an attempt to prevent crime by disrupting and scattering the breeding spot", it would seem that the ingrediency test has been met. Consorting, one of the elements of the crime, must be proven before the prosecution will be entitled to a presumption of illegality of purpose.

The presumption created by Section 1898a of the Penal Law \(^{50}\) might be illustrated as follows: Upon proof that A is in a privately owned automobile and upon further proof that there is a weapon in this automobile, A shall be presumed to be in illegal possession of such weapon. It should be observed that in order to be entitled to the presumption, the prosecution need give no proof of either illegality or possession, which constitute the elements of the crime. Is there any established connection between proximity to a thing and dominion over that thing? In declaring the statute constitutional, the Special Term of the Supreme Court relied to a great extent on the common-law doctrine that the burden of "proving the existence of a fact peculiarly within the knowledge of the accused is placed upon him".\(^{51}\) It is on this very theory that error is most likely to infiltrate, unless great stress is placed upon its limitations. Every person charged with crime surely has peculiar knowledge as to whether he has committed it but no one could conceive that under our present system, a jury should be advised that the failure of a defendant in a homicide case to give evidence of innocence of which he has peculiar knowledge, should result in an unfavorable inference against him. The "peculiar knowledge" doctrine has and should be limited in unlawful possession cases to those instances where the prosecution proves the *genus* and the knowledge of the species is readily available to the defendant. Where the charge is unlawful possession,

\(^{49}\) People v. Pieri, 269 N. Y. 315, 197 N. E. 295 (1936). It should be noted that the convictions in this case were reversed on the facts.

\(^{50}\) Supra note 48.

ARTIFICIAL PRESUMPTIONS

possession is the genus and illegality the species. Surely, the prosecution gives no proof of the genus "possession" when it proves "proximity". The defendant's silence under such a situation should be construed as a characterization of his "proximity" and not of his "possession".

By a 3–2 vote, the Appellate Division of the Third Department has declared Section 1898a of the Penal Law unconstitutional.52 With stern rigor, the Justices who voted against the constitutionality of this section have applied the a priori system of reasoning. Justice Rhodes in his opinion states the a priori point of view in the following manner:

"It is a truism requiring neither argument nor demonstration to establish that the Legislature has not the power, nor has any other human agency the power, by fiat, to make two plus two other than four; neither has it the power to give substance to shadows nor to declare that to be proof which inherently lacks probative force."

With equal emphasis does the concurring opinion of Justice McNamee lay bare the absurdity of a purely pragmatic approach to presumptions in the criminal law. He writes:

"An automobile is not designed for the commission of crime, albeit sometimes it is devoted to such an end. Also, because of its fleetness, it may be useful to criminals. But the same is true of motorcycles, airships, railroad trains and similar devices in common use by the people. But to say that one who innocently steps into an automobile may, ipso facto, place himself in the criminal class, and subject himself to criminal prosecution, because of the unrelated fact that at sometime a pistol had been placed in the car and still remains there, is to assert something that is unreal, and has not the support of reason. It is against reason. If this presumption were sound in law under our

52 People ex rel. Dixon v. Lewis, — App. Div. —, 293 N. Y. Supp. 191 (1937). Through the courtesy of the Honorable Henry S. Kahn, Assistant District Attorney of Albany County, the author was furnished with a copy of the decision in this case in advance of publication in the official reports.
constitutional limitations, it is difficult to see why it may not be extended with equal force to every home in the States; as homes, and 'hide-outs' of various kinds, have been reduced to their purpose by criminals. The patient on his way to the hospital, or the physician or clergyman being hastily conveyed to the bedside of the sick, may be jeopardizing his legal character. If this presumption be legally effective, one may be convicted of crime when guilty of no unlawful act, has no guilty knowledge, harbors no evil intent. This result is not within the contemplation of the common law, nor of our Constitution. It amounts to a total disregard of due process of law."

Clearly and decisively Justice McReynolds also points out that the statute is defective even from the a posteriori viewpoint which requires that the facts proven have a tendency to establish guilt. He states:

"The facts presumed must have a persuasive tendency to establish the fact to be proved; and the presumption must rest upon a fact or circumstance of 'sinister significance'. This is not even a case of a presumption which obstructs a defendant in the presentation of his defense; there is nothing against which to defend, because no crime has been proved."

In a brief opinion, the dissenting Justices applied apparently the purely pragmatic test in reaching the conclusion that the statute was constitutional. The dissenting opinion reads as follows:

"We are unable to say that an automobile wherein a pistol is found is not so closely allied with present day criminality and criminal methods that the Legislature may not enact as an evidentiary rule that a presumption of possession arises against a person riding in an automobile so equipped."

No one can deny that there is grave danger to society in permitting criminals to ride in armed vehicles and neverthe-
less escape punishment because of the difficulty of proving possession of the weapons against the occupants. The criminal and not the law is keeping pace with the technological developments in transportation and communication. But, should this menace to society be destroyed by a method, which if it takes root and is nourished by judicial approbation may spread until it undermines and weakens that society which it was designed to protect? Should liberty be lost, future historians will probably discover that it was due to an arbitrary interpretation of the rules of procedure rather than a planned organization of economic forces.

CONCLUSIONS

In order that an artificial presumption in the criminal law be deemed reasonable:

1. The fact out of which the presumption flows should be relevant to the crime charged. In this respect, the test is a posteriori;

   and

2. The fact out of which the presumption flows should constitute an ingredient of the crime charged. In this respect, the test is a priori;

   and

3. The fact out of which the presumption flows should be one which experience has demonstrated to be closely connected with the establishment of the crime as distinguished from evidence of the crime. To this extent, the test is a posteriori.

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