Montana Law Review

Volume 27
Issue 2 *Spring 1966*

Article 9

January 1966

United States v. Gainey, 380 U.S. 63 (1965)

Harry B. Endsley III.

the state's fundamental power and the Water District's public character. The state's power to regulate natural resources should not be denied or limited by doctrines adopted when mining and agriculture were the only public concerns. The public's interest in water has changed and diversified, as is demonstrated by the popularity of all forms of water recreation. As the demand on recreational resources becomes greater because of a larger population with more free-time, states must have adequate methods for asserting the public right.[34] Western water law has always been flexibly administered in order to obtain the most beneficial use of water.[35] As Mr. Justice Cardozo said: "The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. *We may not suffer it to petrify at the cost of its animating principle.*"[36] (Emphasis supplied.) The Western States cannot allow the doctrine of appropriation to "petrify" at the expense of the changing public interest in the limited water supply.

JOHN R. GORDON.

STATUTORY PRESUMPTION OF GUILT FROM PRESENCE AT ILLEGAL DISTILLERY. —Defendant Gainey's conviction for carrying on an illegal distillery business was reversed by the United States court of appeals.[1] The court held unconstitutional a statute[2] authorizing an inference of guilt from the accused's unexplained presence at a distillery. On certiorari to the Supreme Court of the United States, *held,* reversed. *United States v. Gainey,* 380 U. S. 63 (1965).

Defendant Romano's conviction of the possession, custody, and con-

[34]A good example of unimaginative application of the doctrine of appropriation with disturbing results is Cascade Town Co. v. Empire Water & Power Co., 181 Fed. 1011 (D. Colo. 1910), where the district court found that the private town of Cascade had water rights to the spray of Cascade Falls to keep the walls and floor of the canyon green. The circuit court reversed in favor of the power company that wanted to build a hydroelectric dam on the falls; holding that there was no diversion of the spray nor application to a beneficial use because beauty was not an economical use of water. 205 Fed. 123, 129 (8th Cir. 1913).

[35]Western water law originated in the mining camps of California. *Basey v. Gallagher, supra* note 15. The riparian theory was rejected (or avoided) by legislatures and courts because of its rigidity. The mining custom of prior appropriation was better suited to frontier environment. As more persons settled the land and streams became fully appropriated, the "first come, first served" maxim of appropriation proved impractical. The courts and legislatures made changes following the public policy favoring the most economical use of water. See Wiel, *Public Policy in Western Water Decisions,* 1 CALIF. L. REV. 11, 14-20 (1912); Wiel, *Theories of Water Law, supra* note 6, at 531-33.

[36]Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861, 862 (1922). Justice Cardozo was speaking of mutuality of remedy, but the principle is equally applicable here.

[1]Barrett v. United States, 322 F.2d 292 (5th Cir. 1963).

[2]68A Stat. 683 (1954), 26 U.S.C. § 5601(a)(1) (1958) provides that: "Any person who . . . has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

trol of an unregistered still was reversed by the court of appeals[3] on the ground that a statute authorizing an inference of guilt from defendant's unexplained presence at the site of the still violated due process of law. On certiorari to the United States Supreme Court, *held,* affirmed. *United States v. Romano,* 15 L. Ed. 2d 210 (1965).

The *Model Code of Evidence*[4] states that "a presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action." The effect of a presumption is to invoke a rule of law which authorizes or compels the jury to return a verdict in accordance therewith, in the absence of controverting evidence.[5] The principal reason ascribed for the recognition of a presumption is that of probability. Proof of fact A renders the inference of the existence of fact B so probable that the existence of fact B will be presumed until rebutted. Other considerations are those of procedural convenience, fairness in allocation of the burden of proof, and implicit notions of social and economic policy.[6]

The juridical influence given an inference by virtue of a presumption has a dual character. A presumption may either permit the jury to draw the inference, or compel it to do so in the absence of contrary proof. Professor McCormick characterizes the former as permissive presumptions and the latter as mandatory.[7]

Considerable judicial discord has its genesis in the question whether, after evidence contrary to the presumption has been presented, the presumption vanishes or continues to have probative force. The majority rule is that it vanishes and the jury may consider the proof free from any such rule.[8] Montana, in the minority, has taken the view that a pre-

---

26 U.S.C. § 5601(a)(4) provides that: "Any person who . . . carries on the business of a distiller or rectifier without having given bond as required by law . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

Section 5601(b)(1) provides:

> Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

Section 5601(b)(2) provides:

> Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

[3]United States v. Romano, 330 F.2d 566 (2d Cir. 1964).

[4]Rule 13 (1942). REVISED CODES OF MONTANA, 1947, § 93-1301-3 provides that, "A presumption is a deduction which the law expressly directs to be made from particular facts." For other definitions, see 1 JONES, EVIDENCE 49-52 (2d Ed. 1926); THAYER, EVIDENCE 314 (1898); TRACY, EVIDENCE 29 (1952); MCCORMICK EVIDENCE 639 (1954). (Hereafter REVISED CODES OF MONTANA are cited R.C.M.)

[5]20 AM. JUR. *Evidence* § 158 (1939).

[6]MCCORMICK, *op. cit. supra* note 4, at 641.

[7]*Id.* at 640.

[8]New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938); Morrison v. California, 291 U.S. 82 (1934); Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910).

sumption is in the nature of evidence and is to be evaluated upon that basis.[9] A presumption therefore remains even though controverted by other evidence and must be considered with the other evidence.

Statutes creating artificial presumptions of fact are being used with increasing frequency.[10] In criminal cases, principally two tests have been used by the courts in determining the constitutionality of such statutes. The first is that of rational connection. For a statute to be constitutional under this view, there must be a rational connection between the fact proved and the ultimate fact presumed. The second test, that of comparative convenience, is applied only where the defendant has more convenient access to the proof, and where the burden of going forward with such evidence will not be unfair. The United States Supreme Court has considered the application of the two tests in the following language:[11]

> We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

The fact, therefore, that the defendant has the better means of information will not, standing alone, justify the creation of such a presumption, but such a consideration will be incorporated into the rational connection test as the court applies it.

Prior to the instant cases the Supreme Court, in *Bozza v. United States*,[12] considered a similar problem. In that case Bozza was charged in one count with carrying on the business of a distiller with intent wilfully to defraud the United States. Count two charged him with having possession and custody of the still. Testimony indicated that Bozza sometimes helped in the operation of the still and the manufacture of the alcohol but that he did not participate in the handling and mixing of the mash. The Court found that Bozza's activities were those of *carrying on* the business of a distiller but did not sustain the "very strained inference" that he had *possession and control* of the still. The Court reasoned

---

Even though the presumption disappears, of course a valid inference may remain in the minds of the jury.

[9]Montana's position is the result of two statutes. R.C.M. 1947, § 93-1301-5 declares, "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless controverted, the jury are bound to find according to the presumption." R.C.M. 1947, § 93-1301-1 provides that: "Indirect evidence is of two kinds: (1) Inferences; and, (2) Presumptions." See Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (1942).

[10]State v. Lewis, 67 Mont. 447, 216 Pac. 337, 339 (1923), recognized the power of the legislature to "prescribe that which shall constitute prima facie evidence of guilt, and shift to the defendant the necessity of satisfactory explanation, in the absence of express constitutional inhibition." See generally, Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 178 (1930); Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245 (1943); Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 TEX. L. REV. 34 (1931).

[11]Tot v. United States, 319 U.S. 463, 467 (1943).

[12]330 U.S. 160 (1947).

that the Internal Revenue Code had focused upon various aspects of the illicit distilling business and made each of them a separate crime. This required that "testimony to prove [a] separate offense . . . must point directly to conduct within the narrow margins which the statute alone defines."[13]

Evidently to avoid the result of *Bozza,* Congress amended the Internal Revenue Code to include the presumptions stated.[14] The Court in both *United States v. Gainey* and *United States v. Romano,* applied the rational connection test to the amended provisions. The statute under which Gainey was convicted required proof of the *carrying on* of the business of an illegal distillery. The question before the Court, therefore, was whether there was a rational connection between *carrying on* the business and the defendant's presence at the still. The Court concluded there was. Romano was convicted under the provision requiring proof of the *possession, custody and control* of an illegal distillery. Here the question was as to the rational connection between the *possession, custody and control* of an illegal distillery and defendant's presence there. Mr. Justice White, speaking for the majority of the Court, reasoned that presence at an operating still is sufficient evidence to prove the charge of *carrying on* because anyone present at the site is quite probably connected with the illegal business. Presence, however, implies nothing about the defendant's specific function and carries no rational inference that he was engaged in one of the specialized functions connected with *possession.*

The United States contended in *United States v. Romano* that the effect of the amendments to the Internal Revenue Code was to overrule *Bozza* and to broaden the substantive crime of possession to include any relation to an illegal distillery. The Court, in refusing to accept this view, said that the amendments did not change the character of the substantive crime. "Possession, custody or control remain the crime which the Government must prove."[15] Although Congress conceivably has the power to make presence at an illegal distillery a punishable offense, such conduct has no rational connection with possession and is therefore violative of due process.

Mr. Justice Black dissented in *Gainey,* finding that Gainey was deprived of his constitutional right to trial by jury, of his right to be tried by a court of law independent of Congressional interference, and of his right not to be compelled to be a witness against himself.[16] He insisted that the jury has the constitutional power to determine guilt or innocence and the exercise of this power cannot be interdicted in whole or in part,

[13] *Id.* at 163.

[14] S. Rep. No. 2090, 85th Cong., 2d Sess., p. 189 (1958) states that:

> These paragraphs are new. Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from this presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in Bozza v. United States.

[15] *United States v. Romano,* at 215.

[16] Justice Black would overrule the following excerpt from Yee Hem v. United States, 268 U.S. 178, 185 (1925): "The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against

directly or indirectly, by Congress. This position, however, is retrogressive when compared with the tendency of modern decisions and prior statements of the Supreme Court.[17] For example, in *Yee Hem v. United States* the Court said:[18]

> Every accused person . . . enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect to a great variety of presumptions not resting upon statute.

Justice Black himself noted that the courts are less strict about the "logical strength of presumptive inferences"[19] permitted in civil, as opposed to criminal, cases. To apply a presumptive inference in support of proof beyond a reasonable doubt, the Court must and does require a rational connection of more potency than that required in civil cases. Further, the majority of the Court in *Gainey* adopted the view that the statutory inference "authorizing conviction" was not mandatory, but permissive. Even if the defendant's presence at the still remained unexplained, the jury could, nevertheless, acquit him if they found that the government had not proved its case beyond a reasonable doubt.[20]

---

himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not, as he chooses.'' *United States v. Gainey*, at 87. The principal grounds on which statutes creating presumptions have been assailed include: denial of due process of law (*Morrison v. California, supra* note 8; *Tot v. United States, supra* note 11); denial of equal protection of the laws (*Mobile v. Turnipseed, supra* note 8; Shea v. North-Butte Mining Co., 55 Mont. 522, 179 Pac. 499 (1919)); encroachment upon the power and discretion of the judiciary (United States v. Gainey, 380 U.S. 63 (1965); *Lewis v. New York L. Ins. Co., supra* note 9); compulsion of the accused to give testimony against himself (*Yee Hem v. United States, supra; State v. Lewis, supra* note 10); and a deprivation of the presumption of innocence (State v. Kelly, 218 Minn. 247, 15 N.W.2d 554 (1944)).

[17]The Court has repeatedly stated that the legislature may not ''declare an individual guilty'' (McFarland v. American Sugar Ref. Co., 241 U.S. 79, (1916)) and that a presumption shall not be conclusive of the rights of the accused. In view of the legislative power over the rules of evidence, where the presumption is based on sound reasons of probability and policy, and where the defendant has a reasonable opportunity to interpose his defense, he is not denied due process of law or the constitutional right to a jury trial. In *Morrison v. California, supra* note 8, at 88, Justice Cardozo noted that,

> The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. 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.

[18]*Supra* note 16, at 184.

[19]*United States v. Gainey*, at 79.

[20]The trial court in *United States v. Gainey*, at 70, gave this instruction:

> 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.

Mr. Justice Black seemed to take the position that the statute was to be read as

The evidentiary effect of the presumption itself will further influence the court's conclusion as to the rationality of the connection between the fact proved and the fact presumed. In those courts following the minority rule that the presumption has the weight of evidence, the presumption artificially strengthens the prosecution's case. To protect the rights of the accused, these courts will be more stringent in their requirements of rationality than those which follow the majority.[21]

Implicit in Justice Black's dissent is the concern that the urge to simplify the task of the prosecutor by aiding him with presumptions might some day substitute an inquisitorial procedure for our traditional accusatory system. The term "accusatory system," however, does not connote an absolute principle of logic. It must be and is subject to change to meet the exigencies of the judicial process. In the words of Professor Wigmore: "There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has (when not infringing the Judiciary's prerogative) 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."[22] The mere fact that a statute will change the burden of proof in a criminal case, or will modify the presumption of innocence ought not to condemn it, if it is both rational and founded upon sound bases of convenience and fairness.

Mr. Justice Stewart in *Gainey* noted that "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." This statement was based on a recognition that from the nature of certain crimes, even in an "atmosphere pregnant with illegality," the prosecutor is unable to obtain evidence of complicity. He stated, "Congress was undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implications of seclusion only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of secrecy."[23] In the areas of narcotics, firearms and alcohol, Congress has consequently seen fit to aid the prosecutor with a presumption permitting the jury to

---

providing for a mandatory, rather than permissive presumption. If this were true, his comments would be more persuasive, but not controlling.

[21]This is well illustrated by the antipodal results in *Mobile v. Turnipseed, supra* note 8, and Western v. Henderson, 279 U.S. 639 (1920). In the first case the Court found that a statute, providing that proof of injury inflicted by the running of locomotive or cars was prima facie evidence of negligence, was not violative of due process nor equal protection of the laws. In the latter case the Court found that a statute, similarly providing for prima facie negligence upon a showing of injury, was violative of due process. The Court stated: "The [Turnipseed] statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. That of [Henderson] as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate." *Western v. Henderson, supra* at 643.

[22]4 WIGMORE, EVIDENCE 724 (3d ed. 1940).

[23]*United States v. Gainey*, at 67.

infer the defendant's guilt, leaving him free to offer evidence in rebuttal.[24]

It seems, therefore, that the rational connection test, shown to be flexible in fact, if not in theory, provides a court with an alembic through which to strain the pertinent considerations of probability, convenience, fairness to the defendant, and social policy. Remaining cognizant of legislative control over the rules of evidence, the court is yet given ample means to protect the constitutional rights of the accused.

HARRY B. ENDSLEY III.

[24]35 Stat. 614 (1909), 21 U.S.C. § 174 (1958); 68A Stat. 728 (1954), 26 U.S.C. § 5851 (1958); and statutes cited *supra* note 2.