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# Constitutional Law - Statutory Inferences of Criminality, U.S. v. Romano, 382 U.S. 136 (1965)

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tute defendants must be afforded as adequate appellate review as defendants who had funds to have counsel represent them.[20]

Along the same line, the Court in *Griffin* v. *Illinois*,[21] held that transcripts must be provided if necessary to allow for an adequate, nondiscriminatory appeal. In the situation where an indigent cannot afford a transcript, they must be provided by the state.[22]

In effect, the present case overrules the *Breedlove* decision. The United States has limited discrimination in "right to vote" cases to intelligent use of the ballot. While the Court has condoned reasonable literacy tests by states, invidious discrimination has been dilineated by the Court in the present case to include affluence as a prerequisite for voting. The *Harper* decision, by renouncing a poll tax of one dollar and fifty cents per year, leaves no room for doubt that the Court will not tolerate a burden of any sort on the constitutional rights of citizens.

*Michael Lesniak*

**Constitutional Law**—STATUTORY INFERENCES OF CRIMINALITY. In *U. S.* v. *Romano*,[1] the United States Supreme Court held that the statutory inference of guilt drawn from mere presence was insufficient evidence to convict for possession, custody and control of an illegal operating still.

On October 13, 1960 Federal ATTU Agents and Connecticut State Police conducted a raid on an illegal operating still within an industrial complex in Jewett City, Connecticut. Respondents, Frank Romano and John Ottiano, who were found standing a few feet from the still when the officers entered the building, were arrested and charged with possession, custody and control of an illegal still, illegal production of distilled spirits and conspiracy to produce distilled spirits. Both were subsequently tried in the United States District Court for the District of Connecticut and found guilty on all three courts, receiving three years imprisonment for each offense to run concurrently, and in addition,

20. *Id.*, at 355.
21. 351 U.S. 12 (1956).
22. *Id.*, at 14.
1. 382 U. S. 136 (1965).

a fine of ten thousand dollars on the possession charge.[2] The United States Court of Appeals affirmed the conspiracy conviction and reversed the convictions on possession and production.[3]

The United States Supreme Court, having granted certiorari to review the constitutionality of the inference of criminality under the statute,[4] held that the inference drawn rendered this section invalid and, therefore, unconstitutional as a violation of the due process clause of the Fifth Amendment.[5] This decision basically raises an evidentiary question of whether a presumption of guilt may be inferred from mere presence.

"A rule of presumption is simply a rule changing one of the burdens 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." [6] Historically, the legal device of a presumption of fact or "inference", as Dean Wigmore refers to it, has been used by legislatures in an effort to facilitate the prosecution of certain crimes.[7] Judges have frequently in civil trials made use of their power to establish such inferences,

2. U. S. v. Romano, 203 F. Supp. 27 (D. Conn. 1962). This decision is in direct conflict with *Barret v. U. S.*, 322 F. 2d 292 (5th Cir. 1963). In the *Barret* case under similar fact conditions the Court held that the statutory inference raised from § 5601 (b) (1), *infra* note 4, was not constitutional.

3. U. S. v. Romano, 330 F. 2d 566 (2d Cir. 1964). The appellate court reversed the lower court's decision on the grounds that the inference drawn violated the defendant's Firth Amendment rights under the due process clause. This decision brought the Second Circuit in line with the Fifth Circuit's holding in the *Barret* case, *supra* note 2.

4. 26 U. S. C. § 5601 (b) (1) (1959) 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).

The above section of Title 26 is designed to be applied to § 5601 (a) (1) (1959) which 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 § 5179 (a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both . . . .

5. *Supra* note 1 at 280. Both the United States and the respondents petitioned the Supreme Court to review only the constitutionality of the inference drawn from § 5601 (b) (1).

6. 4 WIGMORE, EVIDENCE 1356 (3d Ed. 1940).

7. Chamberlain, *Presumptions as First Aid to the District Attorney*, 14 A. B. A. J. 287 (1928).

notably as to facts especially within the knowledge of the person against whom the inference is made.[8] In criminal trials such inferences are particularly important to the prosecution where it is necessary to prove the state of mind or intent of the accused person.[9]

Basically, there are two methods which legislatures have used to create these presumptions: (1) where the statute provides what set of facts will constitute a prima facie case of intent, *i.e.*, the burden is put on the defendant to show that his act was not done with any criminal intent; and (2) where the statute makes certain facts prima facie evidence of the existence of another fact, the existence of which the defendant is called upon to negate.

The legislatures have entire control over rules of evidence subject only to the limitations of the rules of evidence expressly enshrined in the Constitution.[10] According to Dean Wigmore it is consistent with all constitutional protections of accused men to transfer to them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government.[11] "If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence." [12]

The presumption involved in the statutes in question was added by Congress to the *Internal Revenue Code of 1954* with the specific purpose of creating a rebuttable presumption of guilt in the case of a person found at the site of an illegal still.[13] The new statutory inferences in

8. Harper v. Highway Motor Freight Lines, Tex. Civ. App., 89 S.W. 2d 448, 449 (1935); Egger v. Northwestern Mutual Life Ins. Co., 203 Wis. 329, 234 N.W. 328, 329 (1931); Thompson v. Southern Michigan Transport Co., 261 Mich. 440, 246 N.W. 174 (1933).

9. *Supra* note 7 at 287.

10. *Supra* note 6. For example the Legislature cannot go so far as to indirectly coerce the accused into taking the stand as a witness against himself in violation of the Fifth Amendment.

11. 4 *Wigmore, op. cit. supra* at 2486.

12. *Supra* note 6. See also, 16 C. J. S., § 269 (b) which states that the Legislature may establish the requisites of prima facie evidence, and establish, alter, or abolish rules as to presumptions, as long as it does not make presumptive evidence conclusive and preclude the adverse party from showing the truth . . . . It may likewise change existing rules as to burdens of proof as by shifting the burden of proof from one party to another.

13. *Hearings before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems*, 84th Cong., 2d Sess., pt. 3, at 95 (1956). See also Casey v. United States, 276 U. S. 43 (1928); Morrison v. California, 291 U. S. 82 (1934). In the former case, Mr. Justice Holmes discusses Congressional power to establish a rule of law of presumptive evidence in civil cases, and in the latter case the opinion of Mr. Justice Cardozo deals with statutory presumptions of criminality in the alien land laws.

Sections 5601 (b)(1) and 5601 (b)(2)[14] are modeled after Section 4 of the Smuggling Act of 1866.[15] Similar wording appears in the Narcotic Drugs Import and Export Act of 1909,[16] the constitutionality of which was sustained in *Yee Hem* v. *United States*.[17]

During the last term of Court in *U. S.* v. *Gainey*[18] a presumption of mere presence at an illegal operating still was held to be sufficient evidence to maintain a conviction on a charge of carrying on the business of a distillery. The United States Supreme Court in upholding this statutory inference of guilt from mere presence stated that the constitutionality of the legislation was held to depend on the "rationality of the connection 'between the facts proved and the ultimate fact presumed.' "[19] Applying this test in *Gainey* the Court held that there was

14. 26 U. S. C. § 5601 (b) (2) (1959) 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).

Note the similarity between this section and § 5601 (b)(1), *supra* note 4. The above section of Title 26 is designed to be applied to § 5601 (a)(4) (1959) which provides:

> Failure or refusal of distiller or rectifier to give bond.—Any person who *carries on the business of a distiller* (emphasis added) or rectifier without having given bond as required by law.

15. 18 U. S. C. § 545 (1958). This statute deals with smuggling goods into the United States and provides in part:

> Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

16. 21 U. S. C. § 174 (1958). This statute deals with fraudulently or knowingly importing or bringing into the U. S. any narcotic drug and further provides:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

17. 268 U. S. 178 (1925). This case deals with the importation of opium. The Court held that the presumptions created in the Narcotic Drugs and Exportation Act, *supra* note 16, were reasonable and did not contravene the due process of law and compulsory self-incrimination clauses of the Fifth Amendment.

18. 380 U. S. 63 (1965). The facts in this case are almost identical to those in *Romano* in that respondent Gainey was merely present at the site of a still when observed by Federal officers. Here the Court held his unexplained presence to be "deemed in law sufficient to convict." But see Mr. Justice Black's dissenting opinion, *id.* at 76, and note its similarity to the *Romano* decision, *supra* note 1, which was to come a year later.

19. *Id.*, at 66. The rationality test originated in *Tot v. U. S.*, 319 U.S. 463 (1943). The case involved the construction and validity of the presumption raised in § 2 (f) of the Federal Firearms Act, c. 850, 52 Stat. 1250, 1251, 15 U. S. C. § 902 (f) (1938) and

a reasonably sufficient connection between mere presence and carrying on the business of a distillery and therefore held Section 5601 (b)(2) to be valid.[20] One year later in *Romano* the Court again applied the rationality test to a similar set of circumstances, but involving the companion section, 5601 (b)(1). Here they held that the influence did not meet the test and there was no rational connection between mere presence and possession, custody and control.

The indication from this decision is that the Court is more emphatically placing the burden of proof upon the prosecution and in so doing is destroying a rule of evidence, *i.e.*, the statutory inference or presumption involving intangible possession. It does appear, however, that if the *Gainey* case were to arise again it may be decided differently, although the Court distinguished the two cases by saying that the crime of carrying on the business of a distillery is narrower in scope than that of possession, custody and control.[21] This seems to be a distinction without difference. However, it is doubtful that the decision in *Romano* will have any significant impact on the role of the prosecution in cases involving possession of tangible goods.[22]

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is significant in that it reaffirms and clarifies the test to be applied to statutory presumptions in criminal cases. The Court points out the limits set by the Fifth and Fourteenth Amendments upon Congress or a State Legislature in making proof of one fact or group of facts evidence of the ultimate fact on which guilt is predicated. The Court further states that such a legislative determination will not be sustained if there is "no rational connection between the fact proved and the ultimate fact presumed . . . ."

20. *Ibid.*

21. U. S. v. Romano, 382 U. S. 136 (1965).

22. For several classic cases involving presumptions where the item possessed is of a physical nature, see Rosso v. United States, 1 F. 2d 717 (3rd Cir. 1924) (possession of drugs with foreign label); Morlen v. United States, 13 F. 2d 625 (9th Cir. 1926) (presumption supporting conviction from possession of narcotics); Pitta v. United States, 164 F. 2d 601 (9th Cir. 1947) (possession of drugs raises presumption); U. S. v. Hardgrave, 214 F. 2d 673 (7th Cir. 1954) (possession of sawed-off shotgun supporting conviction under Firearm Act); Williams v. State, 205 Md. 470, 109 A 2d 89 (1954) (recent purchase of tools probably used to consummate the crime); Phillips v. State, 157 Neb. 419, 59 N.W. 2d 598 (1953) (possession by one evidence against the other); Wilborne v. Commonwealth, 182 Va. 63, 28 S.E. 2d 1 (1943) (possession of burglar tools alone not sufficient but only requires slight additional evidence); State v. Hagerman, 361 Mo. 994, 238 S.W. 2d 327 (1951) (possession of recently stolen goods tended to show guilt); and State v. Sparks, 40 Mont. 82, 105 Pac. 87 (1909) (with other facts possession of stolen goods gave rise to presumption of burglary). These cases involving physical possession seem to be in no danger as they have been distinguished from the instant case where the possession derives from presence at the site of the object possessed.