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Statutory Presumption of Illegal Importation of Cocaine is Unconstitutional.

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a third party passenger who is causing a disturbance in the vehicle has been held to be a question of fact for the jury.[35] However, in the instant case the court held as a matter of law that the bus driver had no duty to remove, restrain or eject the assailant.[36] The court, in effect, said that the evidence was so conclusive that all reasonable minds would agree that it was not the bus driver's duty to remove, restrain or eject the assailant. It seems questionable to deny that reasonable minds could differ about whether there was a duty. It is more conceivable that the bus driver did no more than leave the scene when the arguing got loudest. The fact and circumstances of the case certainly could lead reasonable minds to differ as to whether the company fulfilled its legal duty to its passengers, and this may possibly best be judged by a jury.

Donato D. Ramos

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—STATUTORY PRESUMPTION OF ILLEGAL IMPORTATION OF COCAINE IS UNCONSTITUTIONAL. *Turner v. United States*, — U.S. —, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970).

Petitioner was arrested for possession of heroin and cocaine. He was charged with violation of 21 U.S.C.A. section 174 of the Narcotic Drugs and Import and Export Act for receiving, concealing and facilitating the transportation and concealment of drugs while knowing same to be *unlawfully imported* into the United States.[1] On appeal, Turner claimed that there was an evidentiary lack of logical, reasonable connection between the proven fact of possession and the statutorily sanctioned presumption of importation. The court of appeals rejected the claim that the allegedly invalid presumption coupled with use of Turner's failure to testify and explain the origin, receipt, and possession of the drugs was violative of his self-incrimination privilege.[2] Held—*Reversed.* In view of *Leary v. United States*,[3] the statutory presumption of importation of cocaine is violative of the defendant's privileges under the fifth amendment of the United States Constitution.

Presumptions, as creatures of the law and of evidence specifically,

35 Ft. Worth & R.G. Ry. Co. v. Stewart, 102 Tex. 594, 182 S.W. 893 (1916); Walker v. International & G.N. Ry. Co., 117 S.W. 1020 (Tex. Civ. App. 1909, no writ).

36 City of Dallas v. Jackson, 450 S.W.2d 62 (Tex. Sup. 1970).

1 21 U.S.C.A. § 174 (1961), reads in part, "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells . . . any such narcotic drug after being imported or brought in, knowing same to have been imported . . . into the United States. . . ."

2 United States v. Turner, 404 F.2d 782 (3d Cir. 1968).

3 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).

have grown in usage through statutory power to effect a logical, legal, and deserving shift of the burden of proof.[4] Blackstone spoke of presumptions in three classes: (1) violent, (2) probable, and (3) light; being respectively, conclusive and irrebuttable, rebuttable, and useless or carrying no weight.[5] Most presumptions in criminal cases are statutory and belong to Blackstone's second class, being subject to a requisite evidentiary factual connection and being open to rebuttal evidence. The requisite factual connection necessary to a valid statutory presumption consists of one party proving one fact or group of facts that, when proven, give rise to the existence of an ultimate fact or presumption-inference. The connection between the proven fact and the ultimate fact must be strong, logical, reasonable and non-arbitrary.[6] Though the requisite connection exists, attacks on the presumption usually ensue with a claim challenging the strength, sufficiency or reasonableness and validity of the factual connection.[7] The attack on a "validly established" presumption inevitably arises because of an accompanying, and usually undesirable, shift of the burden of proof. Thus, if a party, usually the prosecution, proves a fact giving rise, through connection, to a presumption, the burden is then on the other party, usually the defendant, to explain away the connection and the subsequent ultimate fact or to be subjected to its purposed effect of guilt.[8]

When a court recognizes the establishment of a presumption, the defendant is usually reluctant to recognize the shift in the burden of proof. He usually disagrees that the factual connection is strong, logical and reasonable enough to establish the ultimate fact. He also claims that adherence by the court to the established presumption, over this objection, will result in his innocence and liberty being removed without any proof of guilt, resulting in a denial of due process of law; and/or that his insistence in refusing to recognize the shift and consequent failure of explanation of the ultimate fact, will lead to a violation of the self-incrimination clause of the fifth amendment of the United States Constitution.[9]

Because of the danger that a defendant might be found guilty and

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4 4 WIGMORE, EVIDENCE § 1356, at 724 (3d ed. 1940).

5 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 529, 530 (W. Browne ed. 1892).

6 Yee Hem v. United States, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925); Ng Choy Fong v. United States, 245 F. 305 (9th Cir. 1917), *cert. denied*, 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539 (1918); Mobile, J. & K.C. Ry. Co. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910).

7 California v. Wells, 202 P.2d 53 (Cal. 1949), *cert. denied*, 338 U.S. 836, 70 S. Ct. 43, 94 L. Ed. 510 (1949).

8 Mobile, J. & K.C. Ry. Co. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910); MCCORMICK, EVIDENCE § 313 (1954).

9 Turner v. United States, — U.S. —, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970).

deprived of liberty without sufficient proof or because of self-incrimination through silence or testimony against himself, *most* courts have been careful to demand that the evidence definitely prove the facts upon which a factual connection leading to the ultimate fact or presumption will rely.[10] When the conclusion or presumption of the ultimate fact has arisen from an arbitrary, illogical or unreasonable factual connection, the presumption has been held unconstitutional.[11] This cautious sentiment of the courts is perhaps best understood in view of Blackstone's comment:

> All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer. Sir Matthew Hale lays down two rules: (1) Never to convict a man for stealing the goods of a person unknown, merely because he will not account how he came by them; unless an actual felony be proved of such goods. (2) Never to convict any person of murder or manslaughter till at least the body be found.[12]

Concerning criminal statutory presumptions, a multitude of cases show that usually a strong, logical factual connection validly supports a presumption. Sometimes, however, the imagination is burdened with the task of deducing how and where the connection was introduced, admitted and/or otherwise established.

Most cases that result in attacks on statutory presumptions deal with malicious homicide, negligent homicide, a defensive plea of insanity, and more recently, possession of narcotics. In prosecution for murder with malice, malice is a question of fact, inferable from the circumstances, and it is generally supported by proof that the killing took place by means of the use of a deadly weapon. In such case, malice may be presumed from the use of such weapon in such a manner as to produce death.[13] In negligent homicide cases, statutes defining such have been upheld as constitutional and not in violation of due process on the ground that violation of a statute or ordinance shall be presumptive evidence of criminal negligence.[14] In recent murder trials, when insanity is the defense, the presumption of innocence until proven guilty shifts slightly because the defendant has the burden of

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10 Yee Hem v. United States, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925); Mobile, J. & K.C. Ry. Co. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910).

11 United States v. Romano, 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210 (1965).

12 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 529, 713 (W. Browne ed. 1892).

13 Martin v. Texas, 200 U.S. 316, 26 S. Ct. 338, 50 L. Ed. 497 (1906); Muckelroy v. State, 165 Tex. Crim. 629, 310 S.W.2d 315 (1957); Myles v. Indiana, 124 N.E.2d 205 (Ind. 1955), *cert. denied*, 349 U.S. 932, 75 S. Ct. 776, 99 L. Ed. 1261 (1955).

14 State v. Nix, 31 So.2d 1 (La. 1947), *cert. denied*, 332 U.S. 791, 68 S. Ct. 100, 92 L. Ed. 373 (1948).

proving the existence of the claimed insanity.[15] Examples of attacks on statutory presumptions include cases dealing with liquor related violations,[16] possession of firearms violations,[17] gambling violations,[18] and commerce-oriented violations.[19]

Other cases dealing with violations include presumptions concerning: possession of typically burglarious tools, presumptive evidence of intent to break and enter, upheld;[20] possession of automobile with motor number mutilated, presumptive of stolen, upheld;[21] breaking and entering, presumptive of intent to commit crime, upheld;[22] possession of stolen property within six months after stolen, inference of theft by holder, invalid;[23] circumstantial evidence of being without

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15 McVeigh v. Florida, 73 So.2d 694 (Fla. 1954), *appeal dismissed*, 348 U.S. 885, 75 S. Ct. 210, 99 L. Ed. 696 (1955); Leland v. Oregon, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952); Williams v. State, 152 Tex. Crim. 18, 210 S.W.2d 155 (1948).

16 United States v. Romano, 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210 (1965)—mere presence at a still, a presumption of illicit production, rejected; United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965); and, Hawes v. Georgia, 258 U.S. 1, 42 S. Ct. 204, 66 L. Ed. 431 (1922)—distilling without a required bond, presumed illicit production, upheld; Kay v. United States, 255 F.2d 476 (4th Cir. 1958), *cert. denied*, 358 U.S. 825, 79 S. Ct. 42, 3 L. Ed. 2d 65 (1959), and, State v. Childress, 274 P.2d 333 (Ariz. 1954)—blood test with set percentage of alcohol, presumptive of intoxication, upheld; Richardson v. State, 204 S.W.2d 477 (Ark. 1947)—a general reputation of bootlegging and illicit production was insufficient evidence to uphold a provisionary inference of illegal production; New York v. Lyon, 27 Hun. 180 (N.Y. 1882)—drinking of liquor on the premises, an inference of illegal sale, rejected; State v. Hurley, 54 Me. 562 (1867)—delivery of intoxicating liquor, as presumptive evidence of sale, upheld.

17 Sipes v. United States, 321 F.2d 174 (8th Cir. 1963), *cert. denied*, 375 U.S. 913, 84 S. Ct. 208, 11 L. Ed. 2d 150 (1964), and, Frye v. United States, 315 F.2d 491 (9th Cir. 1963), *cert. denied*, 375 U.S. 849, 84 S. Ct. 104, 11 L. Ed. 2d 76 (1964)—possession of firearms, a presumption of transferring of firearms without paying the required excise tax, upheld; McMullen v. Squier, 144 F.2d 703 (9th Cir. 1944), *cert. denied*, 324 U.S. 842, 65 S. Ct. 586, 89 L. Ed. 1404 (1945), and, Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943)—possession by convict of firearm, presumed as transferred in interstate commerce in violation of statute, rejected; People v. Russo, 103 N.Y.S.2d 603 (N. Y. App. 1951)—mere presence in automobile of firearm, presumptive of illegal possession, upheld.

18 Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968)—failure to register and pay occupational tax on wagers, presumption of illegal gambling, rejected; Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 906 (1968)—failure to pay tax on proceeds from wagering, presumptive of illegal gambling, rejected; Fiorella v. City of Birmingham, 48 So.2d 761 (Ala. App. 1950), *cert. denied*, 340 U.S. 942, 71 S. Ct. 506, 95 L. Ed. 80 (1951), and, Adams v. New York, 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1904)—possession of gambling or policy game paraphernalia, presumptive of illegal gambling, upheld; Jefferson v. Sweat, 76 So.2d 494 (Fla. 1954)—owning Federal Tax Stamp, prima facie evidence against owner in prosecution of violation of gambling laws, rejected.

19 Manley v. Georgia, 279 U.S. 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929)—insolvency of a bank, presumed fraudulent per se, invalid; McFarland v. American Sugar Refining Co., 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (1916)—presumption of monopolistic operations because of payment of lower prices, rejected; Mott's Super Markets v. Frasinelli, 199 A.2d 16 (Conn. 1964)—conducting sales at less than cost giving rise to an inference of unfair competition, invalid; Wiley v. Sampson—Ripley Co., 120 A.2d 289 (Me. 1956)—usage of injunctive relief as prima facie evidence of intent to injure competition, invalid.

20 Burnette v. Commonwealth, 75 S.E.2d 482 (Va. 1953).

21 Mantell v. Jones, 36 N.W.2d 115 (Neb. 1949).

22 White v. State, 429 P.2d 55 (Nev. 1967).

23 Carter v. State, 415 P.2d 325 (Nev. 1966).

property, inference of vagrancy, upheld;[24] failure to provide children with necessities for more than thirty days, presumptive of being absent from state, invalid;[25] possession of butchered beef, ownership unknown, failure to produce hide, presumptive of theft, invalid;[26] presence of car in street, presumptive of authorization of presence by owner, upheld.[27]

More specifically as to narcotics violations, statutes giving power to the establishing of a presumption of illegal "importation" have been upheld more often than rejected. The trend began with the early opium cases,[28] notably *Yee Hem v. United States.* The courts in these cases pronounced, although sometimes vaguely, that opium is not to any degree manufactured domestically; and relying on the rationale of *Mobile, J. & K.C. Ry. Co. v. Turnipseed,*[29] stated that a validly established statutory presumption of an ultimate fact, should be just that—a conclusion of fact and not of law. This leaves the door open for evidentiary rebuttal. Because of the somewhat universal view that opium could not be "produced" domestically, the factual connection arguments in these cases were at best weak, the defense seemingly doomed by the fact that possession of opium was possession of illegally imported opium.[30]

An unfortunate result of the opium cases was that subsequent narcotics cases seemed to fall into the very pitfall warned of in the rationale of *Yee Hem* and *Turnipseed,* and relied on by the "opium courts,"[31] that is, that the statutes should not give rise to irrebuttable conclusions of substantive law, but should be used merely as a rule of evidence.[32] Subsequent cases involving heroin and morphine violations turned mainly on blind, conclusive adoption of the opium rationale. However, the fact that morphine is derived from opium[33] and that heroin is

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24 Wallace v. State, 161 S.E.2d 288 (Ga. 1968).

25 People v. Johnson, 66 Cal. Rptr. 99 (Cal. App. 1968).

26 Garcia v. People, 213 P.2d 387 (Colo. 1949).

27 City of St. Louis v. Cook, 221 S.W.2d 468 (Mo. 1949).

28 Yee Hem v. United States, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925); Ng Choy Fong v. United States, 245 F. 305 (9th Cir. 1917), *cert. denied,* 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539 (1918); Mobile, J. & K.C. Ry. Co. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910).

29 Mobile, J. & K.C. Ry. Co. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910).

30 Yee Hem v. United States, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925); Ng Choy Fong v. United States, 245 F. 305 (9th Cir. 1917), *cert. denied,* 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539 (1918); United States v. Sussman, 409 F.2d 219 (4th Cir. 1969); Yee Fing v. United States, 222 F. 154 (D. C. Mont. 1915).

31 Cases cited note 30, *supra.*

32 Ng Choy Fong v. United States, 245 F. 305 (9th Cir. 1917), *cert. denied,* 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539 (1918).

33 Turner v. United States, — U.S. —, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970); Copperthwaite v. United States, 37 F.2d 846 (6th Cir. 1930).

derived from either[34] (and therefore that at the very least heroin and morphine are ultimate products of imported opium and indirectly imported themselves) "redeemed" the conclusionary attitude of these morphine and heroin courts, in that conviction was nevertheless achieved. Still it is disappointing to see that in almost all these subsequent cases, the factual connection doctrine of opium is neither attacked, questioned, nor even in dictum explained or specifically adopted or sanctioned by the courts.[35] One heroin court accepted the presumption on the reasoning that it had a duty to aid Congress in tightening the prohibitive net around illicit narcotics operations.[36] Nevertheless, the opium, morphine, and heroin cases, whether intentionally or unintentionally, fortunately avoided what could have resulted in convictions on insufficient evidence from weak factual connections supporting statutory presumptions.

The conclusionary attitude eventually led to misfortune in that it seeped into marihuana cases, most of them adopting *Turnipseed* and/or *Yee Hem* without questioning or investigating the reasonableness of the factual connection, accepting the statute at face value.[37] Recently, however, narcotics courts have used a "possibility-of-domestic-production" test in either accepting or rejecting due process attacks on narcotics statutes, challenging the factual connection giving rise to the presumption of guilt.[38] Only recently was this willing and uninquiring acceptance successfully attacked as to marihuana, finally establishing that marihuana, unlike opium, morphine and heroin, can be and is produced domestically in considerable quantities. Thus, the presumption that possession of marihuana is possession of illegally imported marihuana is successfully rebutted.[39]

Cocaine did not suffer the misfortune of the earlier marihuana cases, most likely because no cases dealing with cocaine violations were brought to trial on a statutory presumption of importation.[40] Not until 1963

[34] United States v. Chiarelli, 192 F.2d 528 (7th Cir. 1951), *cert. denied*, 342 U.S. 913, 72 S. Ct. 359, 96 L. Ed. 683 (1952).

[35] Maestas v. United States, 311 F.2d 457 (10th Cir. 1962), *cert. denied*, 372 U.S. 936, 83 S. Ct. 883, 9 L. Ed. 2d 767 (1963); Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); Casey v. United States, 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed. 632 (1928); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); United States v. Moe Liss, 105 F.2d 144 (2d Cir. 1939); *but cf.* Copperthwaite v. United States, 37 F.2d 846 (6th Cir. 1930).

[36] Gore v. United States, 357 U.S. 386, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958).

[37] White v. United States, 315 F.2d 113 (9th Cir. 1963); United States v. Davis, 272 F.2d 149 (7th Cir. 1959); Lott v. United States, 218 F.2d 675 (5th Cir. 1955).

[38] Turner v. United States, — U.S. —, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970); Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969); Erwing v. United States, 323 F.2d 674 (9th Cir. 1963).

[39] Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).

[40] Erwing v. United States, 323 F.2d 674 (9th Cir. 1963) at 680: "No decision of a reviewing court has been called to our attention which had occasion to consider the applicability of the statutory presumption to the unexplained possession of the narcotic drug involved in this case to wit: cocaine hydrochloride."

did a case concerning cocaine reach the courts. The court of appeals ruled that the presumption of importation of cocaine was insufficiently sound to permit conviction.[41] The Supreme Court, in an excellent analysis using a "possibility-of-domestic-production" test, in *Turner* accepted this conclusion that much more cocaine is lawfully produced in this country than is smuggled into this country, and that, therefore, to possess cocaine is not *per se* to possess imported cocaine.[42]

Thus, *Turner*-cocaine follows the footsteps of *Leary*-marihuana, with a Supreme Court sanctioned successful attack and subsequent rebuttal of faulty and illogical factual connection between a proven fact and the ultimate presumed fact of guilt.[43] The ultimate effect of *Turner* is that, in view of the current public war on narcotics and drugs, still another possible defense is made available to defense counsel in a possession of narcotics charge on the one hand, and further narrowing or "tightening" of the enforcement loopholes is achieved in the narcotics laws for the prosecution on the other.

In presumptions, though they may seem conclusive, illogical and perhaps harsh at times, the fact is nevertheless established, as in *Turner*, that, through resourcefulness, a supposedly factually connected presumption can be successfully attacked. Conversely, if after investigation, it seems that a presumption has been validly established through a logical, reasonable factual connection, it will probably be approved as not inconsistent with due process of law; and an attack would be impractical, frustrating, and time consuming.[44] Acceptance as another piece of unfavorable and burdensome evidence and pursuance of other avenues of defense should be commenced. It should be remembered that the presumption is not a complete, outright aid to the prosecution, because, although it is allowed to infer certain facts, a jury must still believe the existence of the ultimate fact of guilt through the inference beyond a reasonable doubt.[45]

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41 *Id.*
42 Turner v. United States, — U.S. —, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970).
43 *Id.*
44 4 WIGMORE, EVIDENCE § 1356, at 725 (3d ed. 1940).
45 Turner v. United States, — U.S. —, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970); State v. Wilfong, 438 S.W.2d 265 (Mo. 1969); People v. Daugherty, 256 P.2d 911 (Cal. 1953), *cert. denied*, 346 U.S. 827, 74 S. Ct. 47, 98 L. Ed. 352 (1954).