The laws today which make such marriages void are foolish. They render the relationship insecure, and are ineffective. They have no real basis, for it has been proved that the bad heredity, not the consanguinity of the parties, is the cause of ill effects when they do follow. Perhaps in the future the law will not forbid marriage on account of consanguinity. It will incorporate the principle that a marriage cannot be avoided on grounds of consanguinity, but only because of proof of bad heredity (in certain traits enumerated by the statute, such as deafness, tuberculosis, etc.). And all marriages whether consanguineous or not will be subject to such policy. It will insist that parties to all marriages, not merely consanguineous, have a fairly good ancestry. Or, in those cases where the heredity is poor, it will provide for the sterilization of such unions. In short the laws of marriage in the future will not be based on consanguinity, but on the health and mentality of the parties entering them.

But without waiting for such a time, the laws making cousin-marriages illegal, incestuous and void should be repealed. Such marriages, at most, should be only voidable. In this way successful unions could be allowed to exist legally, and not be in danger of collateral attack after death. Unsuccessful marriages could be voided at the suit of either party and possibly, of health authorities of the state. The possibility that, due to double heredity, there might be poor offspring could be provided for, as indicated above, by special statute. Today we find the startling situation of the majesty of the law forbidding marriage of two healthy young people merely because, by accident of birth, they are related, and allowing two congenitally deaf persons to marry and produce progeny unfit to share the burdens of life!

RICHARD W. BROWN, '31.

STATUTORY PRESUMPTIONS OF GUILT

The validity of statutory presumptions of guilt in criminal prosecutions has long been a source of perplexing confusion and a prolific basis of judicial conflict.[1] The root of attack lies in the provisions of the Fifth and Sixth Amendments to the Constitution and their corresponding embodiment in state constitutions and in the Fourteenth Amendment to the Constitution of the United States.

One of the most important legal presumptions is that of inno-

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[1] As early as 1793, this type of statute was passed. "In all prosecutions and suits, whether criminal or civil, against persons for cutting out, altering or destroying the marks of the owner upon any logs or lumber, the possession of the logs or lumber by the accused shall be presumptive evidence of his guilt, and the burden of proof thrown on him to discharge himself." Mass. Laws (1793) c. 42, sec. 6.

cence. It is known in legal phraseology as "giving the benefit of doubt to the accused," and is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty.[2] The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law; the Sixth Amendment, that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law. Again, the Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. It has been contended that presumption-of-guilt statutes have taken away from the jury the right to determine the weight of evidence for themselves; that by depriving the accused of the common law presumption of innocence they curtail the right of jury trial; that presumption is substituted for actual proof of venue; and finally that the accused is deprived of life, liberty and property without due process of law and is denied that equal protection of law guaranteed to all persons.

In the light of recent Supreme Court decisions, there are three types of presumptive-evidence statutes: (1) those which create a conclusive presumption of fact; (2) those which create a rebuttable presumption of fact, which presumption is merely temporary in nature and vanishes upon the introduction of opposing testimony; and (3) those presumptions which fall in category (2) except that they are given the effect of evidence to be weighed against opposing testimony and to prevail unless defense testimony is found by the jury to preponderate. In so far as presumptive-evidence statutes have been upheld they are in the form of a declaration that certain facts shall be prima facie evidence of another fact, as contrasted with those statutes which create conclusive presumptions and thereby deny to the accused any right of explanation or rebuttal.[3] The difficulty lies in determining whether constitutional prohibitions are invaded by statutes falling within the second and third categories, above.

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[2] 1 Taylor, EVIDENCE, sec. 112; Starkie, EVIDENCE (4th ed.) 817; Greenleaf, EVIDENCE, sec. 13A; Coffin v. U. S. (1895) 156 U. S. 432, 453; Cochrane & Sayre v. U. S. (1895) 157 U. S. 286, 298; Davis v. U. S. (1895) 160 U. S. 469.

[3] Notes to Cases (1906) 2 L. R. A. (N. S.) 1009. Mobile, J. & K. C. R. Co. v. Turnipseed (1910) 219 U. S. 35; In re Opinion of Justices (1911) 208 Mass. 619, 94 N. E. 1044; Darbyshire v. State (1925) 196 Ind. 608, 149 N. E. 166; Hawes v. Georgia (1922) 258 U. S. 1, 4.

As to a general classification, the case of *People v. Cannon*[4] enunciates the almost universally accepted doctrine: "It may be said that the general accepted limitations upon a legislative body have been that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be arbitrary or wholly unreasonable, immaterial, or extraordinary; and the accused must have in each case a fair opportunity to make his defense and to submit the whole case to the jury to be decided by that body." Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.[5]

This line of distinction seems clear in its essence and is the only one which need be applied in passing upon the validity of statutes falling within category (2), but its application to particular statutes involving particular circumstances has led to a wide diversity of judicial decisions. Perhaps no better illustration can be found than in two recent Supreme Court decisions involving the constitutionality of so-called 'presumptive-evidence' statutes. In the case of *Casey v. United States*[6] a conviction was sustained under the provisions of the Harrison Anti-Narcotic Act. That statute provides that it shall be unlawful for any person to purchase, sell or dispense drugs except in the original stamped packages, and that the absence of the required stamps shall be prima facie evidence of a violation of this section by the person in whose possession the same might be found. In the instant case conviction for purchase was sustained upon the mere fact of possession alone in spite of a noteworthy absence of any proof of purchase whatsoever. This conclusion was reached by the court on the basis that there was a rational connection between the fact presumed and the fact actually proved. On the other hand, in the case of *Manley v. State of Georgia*,[7] a statute providing that every insolvency of a bank shall be deemed fraudulent, reserving to the defendant the right to repel such presumption by showing that the affairs of the bank had been fairly and legally administered, was declared unconstitutional as being arbitrary and violative of the due process clause of the Fourteenth Amendment. In the former case, by a divided court,

[4] (1893) 139 N. Y. 32, 34 N. E. 759; Cockrill v. California (1925) 268 U. S. 258.

[5] McFarland v. American Sugar Refining Co. (1916) 241 U. S. 79.

[6] (1928) 276 U. S. 414; Anti-Narcotic Act, 26 U. S. C., sec. 692, par. 1; Act of Dec. 17, 1914, c. 1 as amended by Act of Feb. 24, 1919, c. 18, sec. 1006.

[7] (1929) 49 S. Ct. 215, Adv. op. 232. See Ga. State Banking Act, art. 20, sec. 28.

the rule of rationality between proved and presumed facts was held to be satisfied, while in the latter case, the court was unanimous in declaring that the connection between the two facts was insufficient, in that reasoning does not lead from one to the other and that the presumption created was therefore wholly arbitrary. An adequate definition of a rational connection becomes almost impossible under these apparently conflicting decisions.

In approaching the problem with reference to statutes in category (3), the same difficulty of reconciliation between proved and presumed facts appears, and there is the additional necessity of distinguishing between those statutes which merely create a temporary inference of fact that disappears upon the introduction of opposing testimony and those statutes where the presumption remains until the close of the trial and must be weighed with all other evidence in the determination of the innocence or guilt of the accused party. The case of *Western Atlantic R. R. v. Henderson*[8] illustrates the fine-cut distinctions which are made in the determination of the validity of such statutes. A Georgia statute provided that railroad companies should be liable for any damage done to persons, stock, or other property by the running of locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company should make it appear that its agents had exercised all ordinary care and diligence, the presumption in all cases being against the company. The plaintiff's husband had been killed at a railroad crossing and this statute was relied upon as an essential part of her case. It was held that the mere fact of collision furnished no basis for any inference as to whether the accident was caused by negligence of the railroad company and that under the statute, properly interpreted, such presumption fell within category (3) above. Hence the court held it to be violative of the due process clause of the Fourteenth Amendment. Compare this decision with that of *Mobile, J. & K. C. R. R. v. Turnipseed* rendered in 1910.[9] A Mississippi statute provided that in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such company shall be prima facie evidence of the want of reasonable care and skill on the part of the servants of the company in reference to the injury. The similarity of this statute with the above-quoted Georgia statute is to be noted, yet in an action for the death of a section foreman due to the derailment

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[8] (1929) 279 U. S. 639.

[9] Above, n. 3.

of cars the validity of the statute was upheld upon the basis that there was a rational connection between the proved and presumed facts and that the statute merely created a temporary inference of fact which vanished upon the introduction of opposing evidence. The *Western & Atlantic R. R.* decision makes it doubtful if the same result would have been reached today. Hence the outcome of future decisions is doubtful; but it seems certain that a much clearer connection between presumed and proved facts is to be required and that there must be only a temporary presumption, causing the statute to fall within category (2).

Legislation involving presumptive-evidence statutes has not been limited to the states. Congress, in regulating the sale of narcotics and providing for the punishment of counterfeiting has made use of the same device.

Convictions under the anti-narcotic laws have been repeatedly upheld.[10] A similar situation exists under the counterfeiting laws.[11] However, in actions for purchase under the anti-narcotic laws, convictions have been repeatedly reversed for failure to prove venue. Illustrative of this type of case is *Brightman v. United States*[12] where the court in denying the validity of presumptive-evidence statutes in regard to venue held that venue is a distinct and independent matter which must be both alleged and proved and that common experience does not support a presumption that the mere fact of possession indicates the place of purchase. This rational conclusion was entirely ignored in the case of *Casey v. United States.*

Authorities are not lacking in support of the validity of prima facie evidence statutes. Thus the court has upheld the validity

[10] United States v. Ah Hung (1917) 243 F. 762, under Act Jan. 17, 1914, c. 9, sec. 2, 38 Stat. 275 (Comp. Stat. 1916) sec. 8801, providing that importation of opium shall be unlawful. Sec. 3. Smoking opium found after July 1, 1913, shall be presumed to have been imported after April 1, 1909, and the burden of proof is on the accused to rebut the presumption. Gee Woe v. United States (C. C. A. 5, 1918) 250 F. 428, 162 C. C. A. 498; U. S. v. Yee Fing (D. C. 1915) 222 F. 154. Presumptions are but rules of evidence and not substantive law creating offenses, and do not deprive the jury of its function of weighing evidence and determining facts. Fiunkin v. U. S. (1920) 265 F. 1; Dean v. U. S. (1920) 266 F. 694; Pierriero v. U. S. (1921) 271 F. 912; James v. U. S. (1922) 279 F. 111; Bram v. U. S. (1922) 282 F. 271; Willsman v. U. S. (C. C. A. 8, 1923) 286 F. 852, holding that possession to be incriminating must be personal and exclusive, but the possession of a confederate or partner in the business of unlawfully selling narcotics would be the possession of the defendant.

[11] Baender v. United States (C. C. A. 9, 1919) 260 F. 832, 171 C. C. A. 558.

[12] (1925) 7 F. (2d) 532; Cain v. U. S. (1926) 12 F. (2d) 580; De Moss v. United States (1926) 14 F. (2d) 1021.

of a statute providing that when any apparatus used for the manufacture of intoxicating liquors is found upon premises, the same shall be prima facie evidence that the person in actual possession of the premises has knowledge of its existence.[13] A statute making the destruction of fluids to prevent seizure prima facie evidence that the fluids were intoxicating liquids intended for unlawful purposes was held to be valid.[14] A similar conclusion was reached for the possession of burglar tools[15] and of gambling implements located in any house.[16] It has been held competent for the legislature to provide that the possession of intoxicating liquors in certain cases shall be taken as prima facie evidence of intent to sell.[17] The same principles have been applied in relation to the possession of game out of season;[18] to the possession of stolen property as prima facie evidence of larceny;[19] and to a statute providing that involuntary liquidation of a bank within thirty days after receiving a deposit shall be prima facie evidence of intent to defraud on the part of the officers.[20] Likewise, statutes declaring that the possession of policy slips by a person other than a public officer is presumptive of possession knowingly in violation of law have been held to be valid and not violative of the due process clause of the Fourteenth Amendment.[21] In all of these cases the distinction introduced by the *Western & Atlantic R. R.* case, between statutes in categories (2) and (3) above, was ignored as it was in the *Turnipseed* case.

The power of legislatures to create presumptive rules of evidence is no longer questioned. As stated by Cooley, "There is no provision of our Constitution that expressly prohibits this exercise of legislative power as to rules of evidence, nor do we

[13] Hawes v. Georgia (1922) 258 U. S. 1.

[14] Roberts v. People (1926) 78 Colo. 555, 243 Pac. 544.

[15] State v. Fitspatric (1927) 141 Wash. 638, 251 Pac. 875.

[16] Wooten v. State (1888) 24 Fla. 335, 5 So. 39.

[17] State v. Cunningham (1856) 25 Conn. 195; State v. Morgan (1873) 40 Conn. 44; Commonwealth v. Williams (Mass. 1856) 6 Gray 1; Edwards v. State (1889) 121 Ind. 450; State v. Hurley (1867) 54 Me. 562; Commonwealth v. Wallace (Mass. 1856) 7 Gray 222. *Cf.* State v. Beswick (1880) 13 R. I. 211, holding that a statute providing that the notorious character of premises and persons frequenting them shall be prima facie evidence that liquors are being sold there is unconstitutional.

[18] People v. Williams (1916) 61 Colo. 11, 155 Pac. 323; People v. Martin (1908) 123 App. Div. 335, 107 N. Y. S. 1076; State v. Stone (1898) 20 R. I. 559, 40 Atl. 499.

[19] State v. Potello (1911) 40 Utah 56, 119 Pac. 1023.

[20] State v. Beach (1896) 147 Ind. 74, 43 N. E. 949; Ramsey Petroleum Co. v. Adams (1925) 119 Kan. 844, 241 Pac. 433; State v. Buck (1894) 120 Mo. 479, 25 S. W. 573; Robertson v. People (1894) 20 Colo. 279, 38 Pac. 326.

[21] Adams v. New York (1904) 192 U. S. 585.

know of anyone that is violated in its necessary implications by such an exercise of legislative power. We cannot declare a statute void simply because it may in our opinion be opposed to a spirit supposed to pervade the Constitution, or because we may think it unjust, unwise or impolitic."[22] Wigmore does not feel that the Constitution imposes any such limitation as the Supreme Court has imposed upon state legislation. He says: "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. 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 evidence enshrined in the Constitution. Yet this elementary truth has been repeatedly questioned, and the courts have repeatedly vouchsafed an unmerited attention to the question, chiefly through a hesitation in appreciating the true nature of a presumption and a tendency to associate in some indefinite manner the notion of conclusively shutting out all evidence and that of merely shifting the duty of producing it."[23]

The obvious difficulty in reconciling the results reached in *Casey v. United States*,[24] *Manley v. State of Georgia*,[25] *Mobile, J. & K. C. R. R. v. Turnipseed*[26] and *Western & Atlantic R. R. v. Henderson*[27] constitutes a strong argument in support of abandoning the rule requiring a rational connection between proved and presumed facts. It is clear that decisions under one presumption cannot be used as precedents involving another. Prima facie statutes should be interpreted as merely demanding explanation by the party against whom the presumption operates and thereby as in no manner usurping the functions of a jury and violating constitutional safeguards and prohibitions.

CASPAR R. STAUFFACHER, '30.

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[22] Cooley, CONSTITUTIONAL LIMITATIONS; (5th ed.) 199, 202, 205.

[23] 2 Wigmore, EVIDENCE (2d ed. 1923), secs. 1354, 1356.

[24] Above, n. 6.

[25] Above, n. 7.

[26] Above, n. 3.

[27] Above, n. 8.