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SOME INFLUENCES OF JUSTICE HOLMES' THOUGHT ON CURRENT LAW—EVIDENCE

By
PERLIE P. FALLON*

Justice Holmes, dissenting, in *Donnelly v. United States* stated that the rules of evidence are in the main based on experience, logic and common sense, and they are less hampered by historical development than some parts of the substantive law.

I classify the opinions that I discuss here under two headings, namely, (1) The scope of the enquiry and, (2) The rules respecting presumptions. My purpose does not include a study of the rules of evidence. My objective is much narrower, namely, to bring together some of Justice Holmes' opinions on evidence. I shall relate Justice Holmes' thought to the present by using as a current standard the *Model Code of Evidence*. I shall refer to some recent cases. Justice Holmes' thought creates its own sparks of energy.

The grouping of the cases is an exercise of discretion in order to secure form and arrangement. The two cases that I place in the scope of the enquiry are usually classified under hearsay and self-serving declarations.

Those of us who have been trained in the common law are case minded. We look for a case that controls the problem we have at hand. Lately precedents have lost some of their value; *stare decisis* is not what it once was. The idea that the immediate is in a state of flux is old. The Roman *praetor*, in order to obtain a flexibility which life itself made necessary, used a case system of approach to the law. In Justice Holmes' work there is a practical analysis behind short opinions. The factual background upon which the law rests creates varying shades. The sensitivity of Justice Holmes to attendant facts is part of his grandeur. Our age, and a large part of Justice Holmes' era, is and were periods of technological expansion. Machines have functions that are adapted to use. This thinking invades the law since the law rests upon life. Form does not play so great a part when function dominates and at times form must struggle to find even a place. The Roman *praetors* and those who devised our case system had an understanding of inherent change. Justice Holmes is always aware that cases must be dealt with on their facts. He finds the inspiration of the law in the facts. There is another pole in the method that Justice Holmes uses. It is thought in the more abstract sense. That is the safeguard against confusion. We find it in the continual seeking for analogies from fields of the law other than that in which he is working at the moment. This sense

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1 228 U.S. 243; 33 S.Ct. 449, 57 L.Ed. 820 (1913).
of unity avoids the confusion that arises when there is emphasis on a case, however close on the facts, which may be quite foreign when the functional requirements of the law are considered.

All trials are enquiries. It is necessary to define what the scope of the enquiry is to be. We may say that we will not go into the declarations of absent persons who have admitted that they committed the crime that is the subject of the enquiry. We may say that we will not enquire respecting the self-serving declarations of interested parties. In fixing such boundaries we are limiting the scope of the enquiry regardless of the grounds on which we justify our course. The limitation may rest on a desire to keep fact finding within the scope of legal thought, or on a weighing of values in relation to circumstances. In Donnelly v. United States, Justice Holmes related the enquiry to experience, logic, and common sense. He stated that the law of evidence is less controlled by history than substantive law. Justice Holmes looked upon the enquiry as a flexible form varying as the experience of society changes. Common sense covers a broad field of man's activity: it includes those intuitions that are the overflow of experience and which we call judgment. Common sense includes also a forward looking thought that reaches beyond the expediency of the moment. To that part of experience Justice Holmes gave a dramatic emphasis in defining the enquiry by constitutional limitation. The dissent in Olmstead v. United States raised in respect to wire tapping a moral doubt.

Two opinions by Justice Holmes relate to the scope of the enquiry.

The first is Donnelly v. United States. There the appellant had been convicted of murder within the boundaries of an Indian reservation. As a part of the defense testimony was offered that one Dick, now dead, had confessed that he committed the murder. The trial court excluded the evidence. The Supreme Court sustained the ruling on the ground that declarations against pecuniary interest only were admissible within the hearsay rule.

Justice Holmes in his dissent stated that it would be necessary to prove that the confession was really made and that there was no connection between the defendant and Dick. He pointed out that there was nothing so much against interest as a confession of murder, and that dying declarations are admissible. The evidence would have a strong tendency to make any one believe that the defendant did not commit the crime. It "commonly would have much weight."

Wigmore had already shown that much of the case law relied upon to exclude such evidence could be distinguished on the basis of special circumstances. The Model Code of Evidence adopted and promulgated by the American Law Institute, published in 1942, provides that declarations which subject a person to civil or criminal liability are admissible thus broadening the rule beyond the pecuniary

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2 n. 1.
3 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).
4 n. 1.
5 Wigmore, Sec. 1476.
interest limitation that the majority applied in Donnelly v. United States. Rule 509 (1) of the Model Code of Evidence states as follows:

"A declaration is against the interest of a declarant if the judge finds that the fact asserted in the declaration was at the time of the declaration so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against an other or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the declaration unless he believed it to be true."

In the illustrations of the rule is the following:

"(4) At a trial of D for murder of X, W offers to testify for D that M confessed that he, M, alone did the killing without the knowledge or assistance of any other person. Admissible."

The other opinion of Justice Holmes' which relates to the scope of the enquiry is found in Leach and Co. v. Pierson. The action was upon an alleged agreement to repurchase at any time, at the purchase price, bonds that the defendant sold to the plaintiff. The promise was alleged to have been made by one of defendant's sales agents. The agent's authority was denied. About two months after the sale the plaintiff had written a letter reciting the agreement and requesting repurchase. The trial court let the letter in evidence, and instructed the jury that if the petitioner received the letter and failed to disaffirm the transaction as claimed there would be grounds to find that the petitioner had acquiesced in the agreement, and that the agent had authority to make it. Justice Holmes, writing for reversal, held that a man could not make evidence for himself by writing letters containing statements that he wished to prove; he could not impose a duty to answer a charge, and a failure to answer, in the absence of circumstances making an answer requisite or natural, did not have the effect of an admission. The decision has been the subject of criticism. The point is covered by the Model Code of Evidence which vests a discretion in the trial judge to admit such evidence if a finding of adoption is warranted or an inference justified that the party believed the statement to be true. Rule 507 provides:

"Evidence of a hearsay statement is admissible against a party to the action if the judge finds that

(B) The party with knowledge of the content of the statement by words or other conduct manifested his adoption or approval of the statement or his belief in its truth."

In Leach and Co. v. Pierson, Justice Holmes' decision may have rested upon an order of proof. No contract was established until there was some evidence of the agent's authority. The letter had no bearing on that point. It was not inconsistent with an unauthorized contract by the agent upon which the petitioner had no lia-

6 275 U.S. 120, 48 S.Ct. 57, 72 L.Ed. 194 (1927).
7 n. 1.
bility. The decision may rest within the rule of the Model Code of Evidence which extends the scope of the enquiry to matters that the trial judge finds indicate adoption or manifestation of a belief in the truth of the other party’s statements. Justice Holmes made allowance for “circumstances making an answer requisite or natural.”

The scope of the enquiry has a limitation, over and above the rules of evidence developed by the common law, a limitation arising by reason of the Fourth and Fifth Amendments to the Constitution. The former forbidding unreasonable searches and seizures, and the latter forbidding the compelling of a person in any criminal case to be a witness against himself. Justice Holmes wrote opinions respecting both of these limitations.

The effort to overcome the reaction against prohibition left Justice Holmes with a moral doubt. This doubt occurs in a dissent in which Justice Holmes admits he cannot say that the result reached is contrary to the Amendments.

Since economic change tends now to sweep away civil rights there is an interest today in opinions such as these. A police state is not consistent with constitutional liberty. These opinions are a philosophy and a guide to peoples who are striving to retain privacy, personal security, and property, and so relate them to economic security that the political liberty of the past may be preserved.

In *Hester v. United States*, there was an indictment for concealing distilled spirits in violation of a Federal Statute. Revenue officers were allowed to testify that they had driven near to the house of the defendant’s father and concealed themselves. They saw bottles exchanged outside the house, and they saw the defendant seize a jug from a car and run. The jug, broken in the flight, and a bottle, were taken and found to contain moonshine whiskey. One officer entered the house and found nothing but on leaving found outside a jar containing whiskey. The officers did not have a warrant for a search. The point upon the appeal from a conviction concerned the admissibility of this evidence. Justice Holmes noted that the evidence concerned admissions and the only point which touched the Fourth Amendment was the examination of the bottle, jug and jar on the land of the defendant’s father. There was a distinction in the common law between a house and open fields and the Amendment allowed for it.

In *Burdeau v. McDowell*, grand jury proceedings were in progress respecting fraudulent use of the mails. The petitioner had sought an order from the District Court for the return of books, papers and memoranda which had been stolen from a safe in the petitioner’s private office by individuals not identified with the Government. The papers had been subsequently turned over to the United States District Attorney. The majority held that the papers had come into the government’s possession without a violation of petitioner’s rights. Justice Holmes

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9 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).
joined in the dissent which went on the ground that title to the papers was still in the petitioner.

In *Silverthorne Lumber Co. v. United States*, the Court had before it a judgment for contempt issued by a District Court. The appellant was a corporation and some of its officers had been indicted for violation of a Federal statute. Representatives of the government had gone to the office of the corporation and without authority "made a clean sweep of all the books, papers and documents found there" (p. 390). An application was made to the District Court for a return of the material thus taken. The petition was granted. Copies of the papers had been made however and a later indictment was based upon this knowledge. A *subpoena* was issued for the originals and upon failure to comply the order of contempt was issued. Justice Holmes held that the Fourth Amendment extended not only to the physical possession of the papers but to any advantage gained by doing the forbidden act. The Fourth Amendment was not a form of words.

In *Olmstead v. United States*, there had been a conviction for a conspiracy to violate the National Prohibition Act by unlawfully importing liquor from abroad into the state of Washington. The information leading to the discovery of the conspiracy was obtained by intercepting telephone messages. Notes were taken and testimony was given on the trial. The objection made became the issue when the cases were reviewed by the Supreme Court. The majority limited the Amendment to "persons, houses, papers and effects" and declined to apply "searches and seizures" to the act of listening and hearing. The inclusion within the prohibition of telephone conversations was left to Congressional legislation. Justice Holmes, dissenting, wrote (p. 469) that he could not say that the *penumbra* of the Fourth and Fifth Amendments covered the defendants. There were two objects of desire, criminals should be detected, the Government should not play an ignoble part. Neither prosecutor nor judge should have a hand in "dirty business" (p. 470). If evidence obtained by violating the Constitution is excluded under the established code, evidence obtained by violating state law, as was the case here, should be excluded also.

In 1934 Congress passed legislation forbidding the unauthorized publication or use of communications by wire or radio. This legislation is now found in Title 47 U. S. C. A. Sec. 605, 48 Stat. 1103, 1934.

The case history of the statute on intercepted messages contains many references to the opinions of Justice Holmes. In *Nardone v. United States*, the Supreme Court of the United States held that the statute barred as evidence messages that federal agents had intercepted and which were later offered in support of an in-

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10 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). In United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), Justice Murphy, writing for the court, held that an officer of the union had no privilege against the production of the books and records of the union since the Fifth Amendment created a privilege that applied to natural persons only.
11 n. 3.
dictment for smuggling alcohol. A new trial was granted. At the second trial the defendant sought to enquire as to the use made of the evidence that the Supreme Court of the United States had held to have been illegally obtained. The trial court denied the motion. On a second appeal the Supreme Court of the United States held that the enquiry should have been allowed since information obtained by the government's wrong could not be used.13 There we have an application of the view that Justice Holmes had taken in Silverthorne Lumber Co. v. United States.14 The Silverthorne case was distinguished however in United States v. Wallace and Tiernan Co.15 A subpoena had brought before a grand jury documents and papers in a criminal proceeding under the Sherman Act. Later, because women had been excluded from the grand jury, the court dismissed the indictment and directed the return of the documents and papers. There was a civil proceeding later and a subpoena issued for the production of the documents and papers. The Supreme Court of the United States sustained the subpoena on the ground that the documents and papers had been obtained in the first instance by judicial process. How would Justice Holmes have applied there the point on which he dissented in Burdeau v. McDonald,16 namely, that title to the documents and papers was still in the defendant? The antithesis appears in Davis v. United States17 where ration coupons were held to be public property. The view of the majority in Olmstead v. United States,18 rather than Justice Holmes' dissent in that case, prevailed in Goldman v. United States.19 A detectaphone was placed in an adjoining room to overhear telephone conversations that the defendant had from his own room. The use of the detectaphone was not barred by the statute. Co-conspirators, who confessed when confronted with intercepted messages, were held in Goldman v. United States20 to be proper witnesses against the other conspirators. The Goldman21 and Goldstein22 cases and Wolf v. Colorado,23 which held that the Fourteenth Amendment does not place a similar restraint on the states, go to the farthest point that Justice Holmes' view could extend. In the Silverthorne Lumber Co.24 case, Justice Holmes pointed out that corporations had the benefit of the Fourth Amendment. The Supreme Court of the United States accepted that view in Oklahoma Press Publishing Co. v. Walling25 but held that the Amendment guarded the corporation only against abuses of indefiniteness or of scope in a subpoena. Justice Frankfurter has made a through going note of the recent cases concerning seizure in con-

14 n. 10.
16 n. 9.
17 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946).
18 n. 3.
21 n. 19.
22 n. 20.
24 n. 10.
nection with arrest in the dissenting opinion in *Harris v. United States.* Many of these cases refer to the opinions of Justice Holmes that I have discussed here. The *Harris* case, although it concerns seizure in reference to arrest, is of interest here because there Justice Jackson in a dissenting opinion brings back to us the moral doubt that Justice Holmes had raised in *Olmstead v. United States.*

"Of course, this, like each of our constitutional guarantees, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught."

Justice Holmes by admitting in evidence declarations of the commission of a crime extended the field of the enquiry. There his thought rested on the application of logic and experience. Respecting self serving declarations Justice Holmes did not give the scope to the enquiry that current thought allows. We broaden the enquiry now by a more thorough study of the circumstances. Justice Holmes rested there on logic and experience in matters of self interest. The current thought meets that point through a more extended enquiry by the trial court. In the field of constitutional limitations Justice Holmes was prepared to exclude from the enquiry evidence that was subject to a doubt under the larger import of the words used in the Constitution. Thus in the detection of crime Justice Holmes resolved the dilemma created by the desire to catch the criminal and the means used for that purpose by reference to the rights of privacy, security, and property that were the affirmative purposes of the Constitution. This view prevailed later by a statutory change. Justice Holmes added thereby to the tests of experience, logic and common sense that he had stated in *Donnelly v. United States* a further test that rests on a moral doubt, a doubt that arises from the basic constitutional purpose. This doubt might be expressed in the homely metaphor that you may not eat your cake and have it.

We turn now to the opinions of Justice Holmes dealing with presumptions. We shall first examine those relating to issues of fact; then those opinions relating to how far a statute may create a presumption consistent with due process of law under the Fifth and Fourteenth Amendments.

Chief Justice Stone stated in *Commercial Molasses Corp. v. New York Tank Barge Corp.* that the word "presumption" is an equivocal term. Justice Holmes contributed much to the thought in this field of law. (1) He related the presumption rule to procedure, and he separated it from the field of evidence. (2) He separated the process of assuming a fact from the evidential value of the

27 n. 26.
28 n. 3.
common experience of life. (3) He distinguished between presumptions and the burden of proof. (4) He distinguished presumptions from rules of substantive law.

These clarifications in the field of procedure are valuable contributions which Justice Holmes made to judicial thinking. The procedural part of justice is in itself of fundamental importance to society. Contributions there are as helpful as those made in the fields of substantive law and constitutional thought. If justice is to be attained, the procedures of the law must be definite. This is especially so where there is a division of work between the court and a jury. The issues of fact must be clearly placed before a jury. The material that a jury may use in reaching a conclusion should be identified.

(A) Presumptions in Relation to Procedure

In *Battle v. United States* the court had been a conviction in the District Court on an indictment for murder. A charge concerning sanity had been requested and refused. There was a shadow of evidence that the defendant was of unsound mind. The court charged that the burden of proof was on the Government to prove facts beyond a reasonable doubt, and that the jury were to consider all of the evidence. Holmes wrote that in the circumstances no more could be asked. He pointed out that until evidence is given on the other side the burden of proof is satisfied by a presumption arising from the fact that most men are sane. (p. 38). The important words in Holmes' statement of the law are "until evidence is given on the other side the burden of proof is satisfied by a presumption ***.""

The *Model Code of Evidence* makes the following statement in Rule 704 relating to the effect of presumptions:

"Rule 704. Effect of presumptions.

(1) Subject to Rule 703, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.

(2) Subject to Rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action."

The comment on Rule 704 contains the following statement respecting cases where the basic fact has sufficient value as evidence of the presumed fact to support a finding:

(Please provide the rest of the comment.)

(1) If there is no evidence justifying a finding contrary to the presumed fact, the judge instructs the jury that if the basic fact is established, then the presumed fact must be taken as true; but

(2) If there is evidence justifying a finding contrary to the presumed fact, the judge says nothing about a presumption, but leaves the jury to find the existence or non-existence of the presumed fact exactly as if the presumption had never had any effect in the action.”

(B) Presumptions Based Upon Common Experience

In Greer v. United States\(^3\) there had been a conviction for introducing whiskey from without the state into that part of Oklahoma that formerly was within the Indian Territory. The trial court had been asked to instruct the jury that the defendant was presumed to be a person of good character and that the presumption should be considered as evidence in favor of the accused. This was refused and the trial court gave the usual charge that the defendant was presumed to be innocent of the crime until guilt was established beyond a reasonable doubt.

Justice Holmes in sustaining the trial court wrote that the character of the defendant was a matter of fact which, if investigated, might turn out either way. The Government could not introduce this issue and the defendant’s character could not become an issue in the case unless the defendant chose to make it an issue. Holmes went on to write that presumption upon a matter of fact meant that common experience shows the fact to be generally true. He further pointed out that the term “presumption of fact” is often a disguise for some other principle of law. (p. 561).

The only possible justification for the use of a presumption is that the fact we presume arises from common experience. In Greer v. United States,\(^5\) Justice Holmes disposed of the matter by the statement that there is no presumption that persons indicted by a Grand Jury are of good character.

The point which Justice Holmes brought out in Greer v. United States\(^5\) is illustrated by cases where the fact is one resting within common experience. Wellisch v. John Hancock Mutual Life Ins. Co.\(^6\) is an illustration. There was an issue as to the insured’s death by accident or suicide. The insured died from an over-dose of seconal. The issue was whether he took the extra capsules by mistake or with an intention of killing himself. He was found in a comatose condition sitting in his automobile which had left the highway and crashed into a tree. There was conflicting evidence and inference. The action was upon a life policy and not an accident policy. Suicide was a defense with the burden of proof resting upon the insurer. Presumption as procedure had been properly eliminated by the trial court in its charge to the jury. The beneficiary had a verdict which was affirmed by the Appellate Division on the ground that the verdict was not against the weight of the evidence. The only issue open in the Court of Appeals was whether there was any evidence to sustain the findings below. The Court of Appeals could not re-

\(^3\) 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469 (1918).
\(^5\) n. 31.
\(^6\) n. 31.
\(^4\) 293 N.Y. 178, 56 N.E.2d 540 (1944).
weigh the evidence. The presumption against suicide was held to be an evidential fact—"judicial recognition of what is probable." (p. 184). The presumption is here treated not as a presumption but as a fact. There was therefore no question of law left for review after the jury's verdict which had been affirmed on the facts by the Appellate Division. The decision rests on jurisdictional ground. It does not disturb the presumption rules.

(C) Presumptions and the Burden of Proof

In Tinker v. Midland Valley Mercantile Co., the action was upon a promissory note that an Osage Indian residing on the reservation had given. The note was in the sum of $922.50. A Federal statute made it unlawful for traders upon the reservation to give credit to any individual Indian, head of a family, in an amount greater than seventy-five per centum of the next quarterly annuity payment to which such an Indian was entitled. The answer alleged a violation of the statute. The evidence showed that the defendant's total quarterly payment would be $322. There was no evidence as to when the credits were given. Plaintiff's demurrer to the evidence was sustained in the lower court which held that the burden of proof was on the defendant as in the case of illegal consideration. Justice Holmes, writing the opinion for reversal, held that the nature of the statute was such as to put the duty of bringing the claim within the statute on the plaintiff. The duty to plead the defense may have rested on the defendant. This is a matter of convenience, however, and the order of pleading does not always determine the burden of proof. Here the burden was on the plaintiff. Justice Holmes refers by analogy to the rule that the payee of a promissory note need not allege a consideration but if there is conflicting evidence he has the burden of proof.

A recent case illustrates the rule that presumptions do not change the burden of proof. In Commercial Molasses Corp. v. New York Barge Corp., a bailee, which was not an insurer, gave evidence which repelled the suggestion that a barge had sunk because of unseaworthiness—a presumption which arises in unexplained sinkings. Upon all of the evidence the trial court was left in doubt as to the cause of the accident. Since the presumption was one of procedure only and had been met it was held that the issue must be resolved under the rule respecting the burden of proof and the bailor had not met the burden of proof in view of the finding of the lower court that it was in doubt as to the cause of the sinking.

(D) Presumptions as Rules of Substantive Law

In Schlesinger v. Wisconsin, a state statute directed that all gifts of a material part of a decedent's estate within six years of death be deemed made in

86 231 U.S. 681, 34 S.Ct. 252, 58 L.Ed. 434 (1914).
87 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926). "An irrebuttable presumption" may be a rule of substantive law. In agency the rule that notice shall be imputed to the principal and the principal charged with the agent's knowledge of matters within the scope of the employment is often described as an "irrebuttable presumption" Bowen v. Mt. Vernon Savings Bank, 105 F.2d 796, CCA, D.C. (1939).
contemplation of death and be subject to graduated inheritance taxes. The majority of the court held that the statute created an arbitrary classification which was beyond the state's power under the due process clause of the Fourteenth Amendment. Justice Holmes dissenting, treated the "absolute presumption" (p. 241) as a rule of substantive law. A state legislature could constitutionally tax such transfers upon proper classification. The statute was therefore a rule of tax law and not a presumption in the sense that word is generally used. This point comes out even clearer in the dissent in Heiner v. Donnan, a case decided after Justice Holmes' time in the court. There Sec. 302 (c) of the Federal Revenue Act of 1926 created a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death and required such gifts to be included in computing the value of the taxable estate of a decedent. The majority held the provision of the statute invalid under the due process clause of the Fifth Amendment. Justice Stone developed the point in his dissent that tax statutes were involved. The statement in the second paragraph on page 335 is a declaration that a rule of substantive law and not a presumption is involved in the decision.

Schlesinger v. Wisconsin shows that there are limitations upon the presumption that a statute may create and which may be treated as evidence. The Fifth and Fourteenth Amendments thus limit the scope of the inquiry. In defining the permissible inference that became evidence by reason of a presumption, Justice Holmes distinguished between that which is reasonable and that which is arbitrary in experience, logic and common sense. This may be expressed by saying that there must be reasonable connection between the fact proved and the fact assumed. Such was the standard that Justice Holmes followed in the field of evidence. In the field of Constitutional law, and for the purpose of defining what presumptions are permissible under the Fifth and Fourteenth Amendments, Justice Holmes applied the same standard as in the field of evidence, namely, the reasonable connection between the fact proved and the fact that the statute permitted to be inferred from the fact proved, using experience, logic and common sense as the criteria.

In McFarland v. American Sugar Co. a Louisiana statute concerning monopolies was before the court. It contained these provisions among others: that a person engaged in refining sugar in the state who systematically paid a price for sugar less than he paid in any other state be presumed a party to a conspiracy in restraint of trade; that a refinery kept idle for more than a year be presumed to have been kept idle for the purpose of violating the laws against monopoly; that books, letters and other documents or apparent copies establish the facts carried on their face unless sufficiently rebutted, if possession or control was found to be in a defendant; that the report of any legislative committee of the state or of Con-

89 n. 37.
gress or any bureau, department, or commmission acting under their authority be primae facie evidence of the facts set fourth, subject to rebuttal. Justice Holmes, writing for the court held that the principal presumption that the statute created had no relation to fact and was without foundation except with tacit reference to the plaintiff who was suing in equity to restrain the enforcement of the statute. This case smacks of discrimination and raises issue under the equal protection as well as the process clause.

In Ferry v. Ramsey a Kansas statute made it unlawful for a director of a bank to assent to the receipt of deposits by the bank after he had knowledge of the fact that the bank was insolvent. The statute made it the duty of a director to examine the affairs of a bank, to know its condition, and upon failure to do so a director was presumed to have had knowledge of insolvency and made "individually responsible for such deposit so received." The statute then went on to make the fact that the bank was insolvent, or in failing circumstances, at the time of the reception of a deposit primae facie evidence of knowledge and an assent to the deposit. Depositors had recovered their losses from directors in actions in the state courts. The issue before the Supreme Court was the validity of the presumption. One of the defendants was the executor of a director who was seriously ill at the time the deposit was made and who had since died. Justice Holmes was of the opinion that the presumption rule was not involved. He pointed out that the state could make the directors personally liable for deposits; and an acceptance of the office was an acceptance of the risk. This is an instance where the substantive law became controlling.

We turn now to two cases that arose under the Federal Statutes concerning the possession of opium.

In United States v. Jin Fuey Moy the question involved was in essence one of statutory construction. Justice Holmes avoided the issue that the statutory presumption might have created under the Fifth Amendment by construction of the statute. The defendant had been indicted under the Federal Narcotics Act for issuing a written prescription in bad faith to one Martin and for the purpose of supplying opium to a person addicted to its use. The indictment connected the defendant by an allegation of conspiracy to put opium in Martin's possession in violation of the section of the statute forbidding the possession of opium by unregistered persons. Martin was not registered. Section 8 of the statute made it unlawful for "any person" not registered to have in his possession any of the drugs covered by the statute. The Government argued that this section included all persons and made possession in itself unlawful. Justice Holmes pointed out that if the statute

41 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 (1928).
42 241 U.S. 394, 36 S.Ct. 658, 60 L.Ed. 1061 (1916). In Bandini Petroleum Co. v. Superior Ct. Los Angeles Cty., Calif., 248 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136 (1931), a provision in a statute that "the blowing release or escape of natural gas into the air shall be primae facie evidence of unreasonable waste" was held valid.
were so construed the statute would make possession *prima facie* a criminal act; and since the statute contemplated that production of opium was taking place in the United States the court could not assume that Congress had made possession illegal. Justice Holmes refused, therefore, to give Section 8 the construction that the Government urged and he limited Section 8 so that it referred to persons who were clearly required to register under Section 1 of the statute, namely, producers, importers, manufacturers and compounders.

This opinion must be read with the opinion that Justice Holmes wrote in *Casey v. United States*.

The Federal Narcotics Act had been amended since the earlier case. The indictment in the *Casey* case rested on a count for purchasing opium otherwise than in the original stamped package. The defendant’s conviction rested upon a purchase; there was no direct evidence of a purchase; the Government relied upon a presumption that the statute created. The statute provided that the absence of the required stamps from the drug "shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found." Justice Holmes held that the possession of the drug that manifestly had not been produced by the possessor was reasonably connected with the purchase of the drug. He pointed out that here the presumption had nothing to do with evidence and that it related to the burden of proof and that under circumstances such as these the burden of explanation and justification could be put upon the possessor.

Three recent cases in the Supreme Court of the United States illustrate the points that Justice Holmes made in the cases under the Fifth and Fourteenth Amendments. In *Tot v. United States* the defendant had been convicted under the Federal Firearms Act. There was evidence that the defendant had previously been convicted of crime in the state courts and that on September 22, 1938 he was found in possession of a loaded automatic pistol. There was evidence that the pistol had been made in Connecticut in 1919 and that the maker had shipped it to Chicago. The defendant had presented evidence of a purchase of the pistol in 1933 or 1934. The statute in Section (2) provided that the prior conviction and present possession of the firearm created a presumption that the firearm had been received in interstate or foreign commerce and that the receipt occurred after July 30, 1938, the effective date of the statute. The court held that there was no rational connection between the fact proved and the fact presumed; and that the statute could not be justified as a proper shifting of the burden of proof since the jury would be left free to act on the presumption alone.

*Bollenbach v. United States* discusses the presumption that a court may make from a given state of facts, namely, the possession of stolen property shortly after

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44 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632 (1928).
46 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943). In *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934), a presumption in respect to race was held invalid.
it had been stolen in another state. The defendant had been convicted under the National Stolen Property Act. He had helped to dispose in New York of securities that had been stolen in Minneapolis. The trial court charged that the possession of the stolen property in New York shortly after the theft raised the presumption that the possessor was the thief and had transported the property in interstate commerce. The Supreme Court of the United States held that the presumption suggested was not a fair summary of experience. The fact that the defendant might have been an accessory-after-the-fact weakened the presumption further.

In *United States v. Fleischman*49 there is an application of the burden of proof rule that Justice Holmes had distinguished from presumption in *Casey v United States*.50 A Congressional committee had subpoenaed the defendant and others to produce certain organization records. The records were not produced. There was an indictment for willful default. On appeal from the conviction it was argued that the Government had not gone far enough in its proof: the defendant may have adopted the position that she did after she had tried in good faith to bring about compliance with the subpoena. The court held that the Government was not obliged to present positive evidence in respect to circumstances that were fairly established by other circumstances since the defendant could disprove any of the inferred circumstances by evidence within the defendant's possession or control. The facts were peculiarly within the defendant's knowledge. The court pointed out that the defendant did not thereby lose the presumption of innocence and that presumption continued to operate until guilt was established beyond a reasonable doubt.

In *Bollenbach v. United States*61 and *United States v. Fleischman*62 there were dissenting opinions. In *Tot v. United States*63 there was a concurring opinion that rested on the ground that the presumption created by the statute was invalid and the opinion refused to consider the point respecting the burden of proof. These three cases show that the application of the provisions of the Fifth and Fourteenth Amendments to presumptions created by a statute and to a statute that shifts the burden of explanation is not always free from doubt. Justice Holmes developed the basic principles by distinguishing between presumptions and burden of explanation. The analytical work that he did there clarified the principles of law and made the task of applying the Amendments to cases of this kind easier. The

49 339 U.S. 349, 70 S.Ct. 739, 94 L.Ed. 906 (1950). In Atlantic Coast Line R. v. Ford, 287 U.S. 502, 53 S.Ct. 249, 77 L.Ed. 457 (1933), a statute raising a presumption of a failure to give prescribed warning signals at a railroad crossing that amounted to a mere temporary inference was held valid. In Helvering v. Rankin, 295 U.S. 123, 55 S.Ct. 732, 79 L.Ed. 1343, (1935), a Treasury regulation in respect to gains from the sale of corporate shares that charged sales against the earliest purchase was held valid. In Rossi v. U. S., 289 U.S. 89, 53 S.Ct. 532, 77 L.Ed. 1051 (1933), a presumption in a Federal statute that the operation of a still in a dwelling house was evidence of a failure to register and give a bond was held valid.

60 n. 44.

61 n. 48.

62 n. 49.

63 n. 46.
inference from an established fact, the burden of proof, and the rule of substantive law were separated out from the general word “presumption” and thereby a term of the law that had very little denotative force became a definite form. The principles of law that were being applied became clear. The work of application of course remained.

Justice Holmes reasons from the facts of the case that the court is deciding. He never generalizes or uses abstractions. Phrases have no place in his thought. There is a reference to the fundamentals of the law when that is necessary. Justice Holmes’ habit of approaching the law through the facts has a special interest. The political thought of the era in which Justice Holmes lived was given to generalizations, a trait that continues into the present. Science and technology were in the meantime developing in leaps and bounds by experiment and with an enquiring attitude. Justice Holmes was influenced by this development. In his legal work he proceeded from the facts. He insisted upon a clearly defined thought. We have had an example of this in discussing presumptions. There Justice Holmes’ work changed a generality into a principle of law that had a functional use.

Justice Holmes approached the law of evidence in the terms of life which he defined as experience, logic, and good sense. The experience that Justice Holmes had in mind was based on an observation of life. His own observation of life had been close enough so that his work was influenced by the industrial and technological development of the time. We have supplemented this direct observation that Justice Holmes described as experience by psychology, a science that in Justice Holmes’ time was in its beginnings, but in the hands of men who were to place it upon a foundation where it would later become important.

Justice Holmes’ approach to the law over the facts was supplemented by an intuitive power in applying legal principles to facts. Thus, his work was characterized by a penetrating, analytical power. Referring again to presumptions, we find Justice Holmes distinguishing sharply between questions of law and questions of fact and separating facts that might be assumed from the rule respecting the burden of proof. Justice Holmes carried into the constitutional questions the same responsiveness to life that he had used in the law of evidence. He applied the same test: the reasonable relations and connections that life itself made probable.