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Criminal Law--Statutory Presumptions

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Ds, arrested as they arrived at the scene of an unregistered still, were convicted on three counts under a federal statute relating to illegal distilling of spirits. The statute provided that presence of a person at the site of a still ". . . shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury." *Ds* appealed the convictions. Held, reversed and remanded for new trial. The trial court's incorporation of the statutory presumption into the instruction to the jury operated to deprive *Ds* of their constitutional right to due process of law. *Barrett v. United States,* 322 F.2d 292 (5th Cir. 1963).

The statute which the circuit court found to be unconstitutional in the principal case was added to the Internal Revenue Code in 1958. INT. REV. CODE OF 1954, § 5601(b). The principal case pointed out that the amendment was designed to overcome the decision reached by the Supreme Court in *Bozza v. United States,* 330 U.S. 160 (1947). The Bozza case held that a person could not be convicted solely on inferences drawn from his presence at the site of the still when the illegal acts were committed. The amendment was therefore intended to create a rebuttable presumption of guilt. Congress believed this to be necessary because of the practical impossibility of proving the defendant's actual participation in the illegal activities. The court in the principal case was of the opinion that this statutory presumption would violate the due process clause of the fifth amendment. This amendment and the West Virginia Constitution provide that a person in a criminal case can not be compelled to be a witness against himself. W. VA. CONST. art. III, § 5.

A presumption, according to Professor Wigmore, is simply a rule changing one of the burdens of proof in that it states that the main fact will be inferred or assumed from some other fact until evidence to the contrary has been introduced. Professor Wigmore goes on to say that there is not the least doubt, on principle, that a legislative body has entire control over such rules in the same manner as it has over all other rules of procedure in general and evidence in particular. This control is subject only to the limitations of the rules of evidence enshrined in the Constitution. 4 WIGMORE, EVIDENCE § 1356 (3d ed. 1940). The term "burden of proof" has two distinct meanings. One meaning involves the obligation on the plaintiff

throughout the trial to establish proof of his allegations or sustain the charges in the indictment by a preponderance of the evidence in a civil case or beyond reasonable doubt in a criminal case. This burden never shifts. On the other hand the term, particularly in the civil case, may denote an obligation devolving upon the defendant and perhaps passing from one party to another as the trial progresses. This is to overcome a *prima facie* case made by the opposing party. The latter meaning of the term is more accurately described as the necessity of going forward with the evidence. *Lester v. Flanagan,* 145 W.Va. 166, 113 S.E.2d 87 (1960). It is this concept of going forward with the evidence that is shifted by the statutory presumption considered in the instant case.

In an earlier case, the United States Supreme Court held that a legislative presumption of one fact from the evidence of another may not constitute a denial of due process of law or a denial of equal protection. However, the Court pointed out that there should be a rational connection between the fact proved and the ultimate fact presumed. *Mobile, J. & K. C. R.R. v. Turnipseed,* 219 U.S. 35 (1910). This test was again recognized in *Tot v. United States,* 319 U.S. 463 (1943), where it was held that a statutory presumption cannot be sustained if there is no rational connection in common experience between the fact proved and the fact that is to be presumed.

The Supreme Court further decided in the *Turnipseed* case, *supra,* that there was no ground for holding that due process of law had been denied when the legislative provision, not unreasonable in itself, did not preclude a reasonable opportunity for the party affected to submit to the jury in his defense all of the facts bearing on the issue. This would apply to criminal and civil cases alike.

In considering statutory presumptions in a criminal prosecution, New Hampshire has taken a rather strong stand. The New Hampshire court has held that non-action on the part of the defendant cannot be substituted for action on the part of the state as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any of the evidence to prove such case can be imposed upon the party charged with crime. This court was also of the opinion that most jurisdictions that have sustained these statutes as binding the judgment of the jury have done so on the theory that all the legislature had undertaken to do was to prescribe a rule of evidence. This,

according to the New Hampshire court, was not the effect of the legislation. It sought to compel a party to go ahead in the case, to produce evidence, or else have the fact found against him as a matter of law. This was, therefore, a rule of procedure which undertook to take from the defendant rights guaranteed to him by the constitution. *State v. Lapointe,* 81 N.H. 227, 123 Atl. 692 (1924.)

In a Virginia decision dealing with a presumption similar to that in the principal case, the court held that the statutory provision did not violate any rights guaranteed by the constitution. *Jennings v. Commonwealth,* 155 Va. 1075, 156 S.E. 394 (1931). The Virginia court, while recognizing the rational connection test for a valid presumption, went on to decide that the inference of participation in the crime from presence at the still while it is in actual operation is not so unreasonable as to be purely an arbitrary mandate.

West Virginia has considered the constitutionality of statutory presumptions involving criminal conspiracy. In *State v. Bingham,* 42 W. Va. 234, 24 S.E. 883 (1896), the court hinged the validity of the provision on whether it attempted to create a conclusive or rebuttable presumption. The court stated that if they were to construe the provision as making the presumption conclusive it would be unconstitutional. If the presumption was rebuttable in nature there would be no objection to its validity. In this decision the court held the presumption to be valid. In a later case the court took a contrary view. The court held that it was error to instruct the jury that it may presume a conspiracy existed from the facts presented and that it was therefore the burden of the defendant to show that such conspiracy did not exist and unless he did so they would find the defendant guilty as charged. *State v. Wisman,* 93 W. Va. 183, 116 S.E. 698 (1923).

It is conceded that prosecution and conviction of persons accused of crime is essential to the orderly processes in government and society. This fact, however, must always be considered in light of the guaranties set forth in the Constitution. These guaranties, forged and tested through the years, should not be lessened as a mere convenience to the prosecution. In the maintenance of this leveling balance the courts discharge their mission in the administration of justice.

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