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Evidence--Burden of Proof--Presumption of Innocence

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Evidence — Burden of Proof — Presumption of Innocence

The subcommittee of the House of Representatives Un-American Activities Committee issued a subpoena directing the executive secretary of an organization to produce organization records. The executive secretary did not produce the records and did not even suggest to the subcommittee any reason why he could not produce them. *D,* the executive secretary, was convicted of criminal contempt upon indictment for violating 2 U.S.C. § 192 (1938) for his refusal to comply with the subpoena. The Supreme Court held that evidence of subcommittee's reasonable basis for believing that the executive secretary could produce the records, coupled with evidence of his failure even to suggest to the subcommittee his inability to do so, established a prima facie case of willful failure to comply with subpoena, that burden then shifted to executive secretary to present some evidence to explain or justify his refusal, and that, when he elected not to present any evidence, the court properly charged jury that records called for by subpoena were in existence and under executive secretary's control at time the subpoena was served upon him. *McPhaul v. United States,* 81 Sup. Ct. 138 (1960).

Is the majority opinion in this five-to-four decision of the Court in accord with accepted and settled procedural concepts, particularly with reference to the rules of evidence and more particularly with reference to the burden of proof?

Before proceeding with a discussion of the problem, some definitions and distinctions are warranted. A most succinct definition of the two meanings of the phrase "burden of proof" is found in *Sellers v. Kincaid,* 303 Ill. 216, 135 N.E. 429 (1922). In this civil case, the clear distinction is made between (1) the duty of producing evidence as the case progresses, and (2) the duty to establish the truth of the claim by a preponderance of the evidence. Although the former may pass from party to party, the latter rests throughout upon the party asserting the affirmative of the issue. One able writer, MCCORMICK, EVIDENCE § 307 (1954), explains the former as the burden of producing evidence and the latter as the burden of persuasion. This same writer points out that one of the obvious determining characteristics between the two meanings of burden of proof is that the burden of producing evidence may shift, while the burden of persuasion never shifts. The latter, in fact, never has occasion to shift, since it does not come into play until near the end of the trial, when the judge charges the jury. Also, it must be

noted that in a criminal trial, such as the principal case, the measure of persuasion required for conviction is beyond a reasonable doubt, as distinguished from the civil trial requirement of a preponderance of the evidence. *State v. Kearns,* 47 W. Va. 266, 34 S.E. 734 (1899); MCCORMICK, EVIDENCE §§ 320-321 (1954). Another pertinent rule is that in criminal contempt prosecutions the rules of evidence as employed in criminal trials apply. *State ex rel. Hoosier Eng. Co. v. Thornton,* 137 W. Va. 230, 72 S.E.2d 203 (1952).

To grasp the significance of the *McPhaul* decision, one must understand the function that a presumption performs during a trial. Briefly described, a presumption is a judicial implement employed by courts to shift the burden of coming forth with or producing evidence in an effort to obtain facts essential to a proper decision. See 20 AM. JUR. *Evidence* §§ 157-166 (1939).

In criminal trials, the presumption of innocence (which must be distinguished from the true presumption described above) plays a major role. This somewhat nebulous but firmly fixed concept serves two purposes: (1) to place the burden of producing evidence of guilt upon the prosecution, and (2) to require the burden of persuasion of defendant's guilt to be established beyond a reasonable doubt. MCCORMICK, EVIDENCE § 309 (1954). See also 9 WIGMORE, EVIDENCE § 2511 (3d ed. 1940).

A presumption is created when sufficient evidence is admitted during a trial, from which, if accepted as true, an inference may be drawn that other facts by experience must be true. MORGAN, SOME PROBLEMS OF PROOF 72 (1956). Therefore, in a criminal trial when the prosecution has carried its burden of producing evidence, as required by the presumption of innocence, resulting in a prima facie case, an adverse presumption arises against the defendant. The burden of producing evidence then shifts to the defendant to raise a reasonable doubt as to his guilt. This is particularly true where the negation is peculiarly within the knowledge of the defendant. *Rossi v. United States,* 289 U.S. 89 (1933).

In considering the preceding principles as they apply upon the failure of one to produce books and papers after due notice has been given, the presumption arises that these books and papers would prove to be adverse to the party refusing to produce them. *Lewis Prichard Charity Fund v. Mankin Invest. Co.,* 118 W. Va. 134, 189

S.E. 96 (1936). In a case similar to the *McPhaul* situation, wherein the defendant was being prosecuted for willful failure to produce papers under subpoena, the burden was on the defendant to prove excusing circumstance, if any. *United States v. Fleischman,* 339 U.S. 349 (1950).

Now, a practical justification of the majority opinion in the principal case may be established. When the evidence of the subcommittee's reasonable basis for believing that *D* could produce records was admitted to trial along with evidence of *D's* failure to even suggest his inability to produce them, a presumption that *D* could produce the records arose which shifted to him the burden of producing evidence to justify his refusal. In view of the principles and authorities above cited, this procedure would seem to be warranted and fundamentally sound.

Although it may appear that the minority opinion is saying that the burden of persuasion shifted, a more discerning study shows that the minority merely disagrees with the amount of evidence required to create a presumption which will cause the burden of producing evidence to shift. More explicitly, the minority apparently did not believe that the prosecution had introduced enough evidence to overcome the presumption of innocence as this phrase applies to the burden of going forward with the evidence. The minority placed great emphasis upon the fact that the majority cited *United States v. Bryan,* 339 U.S. 323 (1950), wherein the defendant was concededly the executive secretary of the organization and had custody of its records, while in the principal case neither of those facts was proven. The minority, no doubt, was correct in believing that those facts were not proven, but to hold that those facts must be proved before a presumption can arise which will shift the burden of producing evidence would be to misunderstand how a presumption is created and its practical utility. The judge determines when there are sufficient facts to raise a presumption, thereby allocating upon which party the burden of going forward with the evidence rests. See MORGAN, SOME PROBLEMS OF PROOF 72, 73 (1956). Hence, since the majority of the Court in the *McPhaul* case was convinced that sufficient evidence existed to create an adverse presumption against *D* without the proof that *D* was actually the executive secretary and had the records in his control, this result would not seem to be open to question.

While there may have been less evidence required to shift the burden of producing evidence in the *McPhaul* case, as compared

with prior cases, this fact alone does not even closely approach a justification for the minority criticism that the Court dispensed with the safeguard of the presumption of innocence, since (1) the presumption of innocence as it applies to the burden of persuasion was not under consideration by the Court at the time, and (2) the presumption of innocence as it applies to the burden of producing evidence was sufficiently assured to the satisfaction of the majority of the Court. No other requirements are necessary to preserve the safeguard.

Although the dissent in the instant *McPhaul* case asserts that the Court is departing from accepted procedure and is taking a backward step, careful analysis of the decision does not substantiate the broad assertions. The minority opinion is helpful to focus sharply the issues involved, but the majority opinion appears to restate and reaffirm settled principles of law practically applied in a modern setting.

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Income Tax — Payment by Sublessee for Cancellation of Lessee's Interest

A sublessee, desiring to deal directly with the owner of real property, paid a sum of money to the lessee in consideration of the lessee's right and interest under the lease. The Tax Court considered the sum received by the lessee as ordinary income. *Held,* reversed. It is not the person of the payor which controls the nature of the transaction. Rather, it is the fact that the transaction constituted a bona fide transfer of the entire leasehold interest, not merely a liquidation of a right to future income. *Metropolitan Bldg. Co. v. Commissioner,* 282 F.2d 592 (9th Cir. 1960).

At present, there is little problem in determining the tax treatment resulting when only the lessor and lessee are involved in the situation. Rev. Rul. 56-531, 1956-2 CUM. BULL. 983. Payment by the lessee to the lessor in order to absolve the lessee of his contractual obligation is nothing more than the relinquishment of the right to future rentals and is taxable at the ordinary rates. *Hort v. Commissioner,* 313 U.S. 28 (1941). Conversely, payment by the lessor to the lessee in consideration of the lessee's surrendering his leasehold interests in the real property is ordinarily considered to constitute proceeds from the sale of capital assets receiving the