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CRIMINAL LAW AND PROCEDURE - "PUBLIC ENEMY" STATUTES - CONSTITUTIONALITY

CRIMINAL LAW AND PROCEDURE — "PUBLIC ENEMY" STATUTES — CONSTITUTIONALITY — Defendants were convicted of the crime of being disorderly persons within the meaning of section 167, Michigan Public Acts, 1931, No. 328, which provided that "any person who engages in an illegal occupation or business . . . shall be deemed a disorderly person. Proof of recent reputation for engaging in an illegal occupation or business shall be prima facie evidence of being engaged in an illegal occupation or business." Police officers testified as to the reputation of the defendants for being bootleggers, stick-up men, robbers, and murderers. *Held*, that section 167 of the statute is unconstitutional and void as denying the defendants due process of law. *People v. Licavoli*, 264 Mich. 643, 250 N. W. 520 (1933).

Under the due process clauses of the state and federal constitutions, especially as to the guaranteeing of the right to trial by jury, the legislature cannot prescribe a rule of conclusive evidence which is obligatory and binding upon the jury.[1] The legislature can, however, establish a rule of evidence permitting a jury to presume the existence of the ultimate fact in issue upon proof of certain given facts,[2] the jury being allowed to exercise its own judgment as to the actual existence of the fact which the statute purports to presume. If evidence of the

[1] 2 WIGMORE, EVIDENCE, 2d ed., secs. 1353, 1355 (1923); 30 MICH. L. REV. 600 (1932); 8 CYC. LAW & PROC. 820 (1903).

[2] 2 WIGMORE, EVIDENCE, 2d ed., sec. 1356 (1923); Manley v. Georgia, 279 U. S. 1, 49 Sup. Ct. 215 (1929); People v. Beck, 305 Ill. 593, 137 N. E. 454 (1922); State v. Beach, 147 Ind. 74, 46 N. E. 145 (1897); Brosman, "The Statutory Presumption," 5 TULANE L. REV. 17 at 42 (1930); and see 86 A. L. R. 179 (1933). For a variety of statutory presumptions, see 17 CAL. L. REV. 565 at 571-3 (1929).

given fact is already admissible, a statute of this kind, in effect, does no more than to declare the common law rule, and the purported presumption, so far as binding the jury in the absence of rebutting testimony, is meaningless.[3] Under the common law, evidence of reputation was inadmissible for the purpose used in the instant case.[4] The Michigan statute, then, not only made such evidence admissible against the accused, but also went on to make it "prima facie evidence," and the main point on which the Michigan court disagreed was as to the further effect of these words upon the statute. If, as the majority of the court decided, the phrase is to be interpreted to mean that it was obligatory upon the jury, in the absence or insufficiency of rebutting evidence, to find the accused guilty upon proof of reputation, the statute is admittedly unconstitutional.[5] However, if the minority view were adopted, and the statute interpreted to mean that reputation was only competent evidence, from which the jury would merely be permitted to presume the fact of guilt, then, in effect, the presumption raised carries no more weight than if the statute merely declared such evidence admissible; for, just as by common law, the jury must still use its own judgment and be convinced of the actual guilt beyond a reasonable doubt. In general the phrase, as used in the instant case, is equally susceptible to either interpretation mentioned above.[6] In any particular case it would seem to depend on a careful examination of the statute and a knowledge of the general spirit and purpose of the legislation.[7] In view of the apparent purpose of this statute, which seems to be an attempt to assist the prosecution at the expense of the accused,[8] the decision in the

[3] 59 C. J. 1039 (1932); HARROLD, STATUTORY CONSTRUCTION 21 (1913); SUTHERLAND, STATUTORY CONSTRUCTION, 1st ed., 374-5 (1891); Gray v. Bennett, 44 Mass. 522 (1842); Morgan, "Instructing the Jury upon Presumptions and Burden of Proof," 47 HARV. L. REV. 59 (1933); MCKELVEY ON EVIDENCE, 4th ed., 288 (1932).

[4] Gordon v. United States, (C. C. A. 5th, 1918) 254 Fed. 53; People v. Boske, 221 Mich. 129, 190 N. W. 656 (1922); Lentz v. State, 169 Ark. 31, 272 S. W. 847 (1925); Brashear v. Commonwealth, 178 Ky. 492, 199 S. W. 21 (1917).

[5] See n. 1, supra.

[6] For the majority interpretation: 2 POPE, LEGAL DEFINITIONS 1232 (1920); 1 JONES, EVIDENCE, 2d ed., sec 19 (1926); 39 YALE L. J. 747 (1930); State v. Kline, 50 Or. 426, 93 Pac. 237 (1907); Hammond v. State, 78 Ohio St. 15, 84 N. E. 416, 15 L. R. A. (N. S.) 906 (1908); United States v. Andrade, (D. C. N. D. Texas 1926) 10 F. (2d) 572; State v. Beswick, 13 R. I. 211 (1881); State v. LaPointe, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212 (1924); People v. Lyon, 27 Hun. (N. Y.) 180 (1882). For the minority interpretation: 24 CYC. LAW & PROC. 192 (1907); State v. Momberg, 14 N. D. 291, 103 N. W. 566 (1905); State v. Adams, 22 Idaho 485, 126 Pac. 401 (1912); State v. Liquors, 80 Me. 57, 12 Atl. 794 (1888); Butler v. State, 12 Okla. Cr. 530, 159 Pac. 1090 (1916); Commonwealth v. Williams, 72 Mass. 1 (1856); People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (1893); People v. Beck, 305 Ill. 593, 137 N. E. 454 (1922).

[7] Brosman, "The Statutory Presumption," 5 TULANE L. REV. 198 (1931); 28 COL. L. REV. 489 at 491 (1928); Chamberlain, "Legislative Correction of Criminal Procedure," 13 A. B. A. J. 653, 703 (1927); Chamberlain, "Presumptions as First Aid to the District Attorney," 14 A. B. A. J. 287 (1928); State v. LaPointe, 81 N. H. 227, 123 Atl. 692 (1924); and see majority opinion in the instant case.

[8] Wiest, J., speaking for the majority in the instant case at p. 645: "I am of the opinion that the statute constitutes such proof of reputation *prima facie* evidence of

instant case comes within the established principles. It would seem, too, that a court, if rquested by a jury to define the phrase as used in the instant case, would encounter the difficulty of attempting to explain the force of this presumption and yet avoiding either of the above interpretations: the one which would make the statute unconstitutional, and the other which would make it valid as a rule of evidence admitting proof of reputation but, in effect, meaningless as to the presumption.[9] Indeed, the court's difficulty might be still further increased by the possible question as to the validity of the legislation making such evidence even admissible in derogation of the common law rule.[10] Statutes making evidence of reputation admissible against the accused are found chiefly in disorderly house[11] and liquor law[12] cases. Whether the common law prohibition against hearsay evidence could be further relaxed by statute so as to admit such evidence for the purpose attempted by the statute in the instant case presents an interesting problem in itself.

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guilt, and that such was and is its manifest purpose. . . . The purpose of this enactment is too plain not to be recognized, and its purpose, manifested by its language, is self-destruction." "This act relieves the prosecution from establishing the guilt of an accused beyond a reasonable doubt . . . " (p. 655).

[9] See Morgan, "Instructing the Jury upon Presumptions and Burden of Proof," 47 HARV. L. REV. 59 (1933).

[10] 30 MICH. L. REV. 600 (1932).

[11] Gregg v. People, 65 Colo. 390, 176 Pac. 483 (1918); State v. Anderson, 82 Conn. 111, 72 Atl. 648 (1909); State ex rel. Robertson v. New England Furn. & Carpet Co., 126 Minn. 78, 147 N. W. 951 (1914); WHARTON, CRIMINAL EVIDENCE, 10th ed., 489, and note (1912). See also State v. Price, 175 N. C. 804, 95 S. E. 478 (1918); Lismore v. State, 94 Ark. 207, 126 S. W. 863 (1910).

[12] State v. Beswick, 13 R. I. 211 (1881); State v. Wilson, 15 R. I. 180, 1 Atl. 405 (1885); Keith v. Commonwealth, 197 Ky. 362, 247 S. W. 42 (1923); Anthony v. Commonwealth, 142 Va. 577, 128 S. E. 633 (1925). See also Hughes v. State, 29 Ohio C. C. 237 (1907), where reputation was made prima facie evidence of an illegal trust combination.