#34(L) 6/8/64

Second Supplement to Memorandum 64-37

Subject: Study No. 34(L) - URE (Article III. Presumptions)

There appears below an excerpt from a comment on Tot v. United States, 319 U.S. 463 (1943), by Professor Morgan. The comment is that referred to in the comment to Model Penal Code Section 1.12 relating to affirmative defenses. See Memorandum 64-37 p. 6. It was published in 56 Harv. L. Rev. 1324 (1943). The footnotes are the original footnotes except for the one in brackets that is marked by an asterisk. Emphasis has been added.

This excerpt is presented to you because the comment was apparently relied on by the ALI commissioners in drafting the MPC provisions on affirmative defenses, and it may prove helpful to this Commission as it wrestles with the same problem.

TOT V. UNITED STATES: CONSTITUTIONAL RESTRICTIONS ON STATUTORY PRESUMPTIONS.--Section 2(f) of the Federal Firearms Act makes it unlawful for a person who has been convicted of a crime of violence or who is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. It further provides that "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."[1] . . .

* * * * *

No doubt the court may be convinced that the legislature in a given case is not purporting to exercise a judgment as to the relationship in experience between two facts, but is using a formula expressing such a

relationship in order to accomplish quite another purpose. If so, then it may well ignore the expression and insist that, however desirable the purpose, it must not be accomplished by illegitimate means. That it would be of great benefit to society if agencies of the Federal Government had both the privilege and the duty to prevent convicts and fugitives from justice from possessing firearms and ammunition wherever and whenever acquired cannot justify Congress in requiring or permitting triers of fact to find all arms and ammunition so possessed to have been the subject of recent interstate shipment.

There is therefore ample justification for the Supreme Court's recent holding in Tot v. United States[2] that Section 2(f) of the Federal Firearms Act violates the due process clause. One may suspect that the Court was influenced by its notion of the legislative purpose. Or one may feel that the majority was implying that there was no basis for a reasonable difference of opinion as to the facts of relevant human experience, when they said in effect that the inference authorized by the Act is "so strained as not to have a reasonable relation to the circumstances of life as we know them . . . ."[3]

The Court did not trouble to consider critically the words of the Act. The cases were said to present "the question of the power of Congress to create the presumption . . . that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequently to July 30, 1938, the effective date of the statute."[4] The Court cited indiscriminately previous decisions dealing with state statutes and with congressional acts in civil and in criminal cases; and it made no distinction

between statutes making one fact prima facie evidence of another and statutes making the establishment of one fact in an action determine the allocation of the burden of going forward with evidence, or the burden of persuading the trier, as to another fact.[5] In short, it treated every such enactment as creating a presumption and proceeded to state general rules concerning the validity of all statutory presumptions. It did not define a presumption or describe its exact operation in an action. In one place the main opinion speaks of casting on the defendant the burden of coming forward with evidence to rebut the presumption,[6] in another, of the basic fact in a cited case having such strong logical significance "that a statutory provision scarcely was necessary to shift the burden of proof,"[7] and in still another of the necessity that evidence rebutting a presumption be believed by the jury.[8] It repeats previously uttered formulae and contrasts the pattern made by former cases with the case at bar.

The majority opinion appears to leave no doubt as to its test of the validity of a presumption.

> The Government seems to argue that there are two alternative tests of the validity of a presumption created by a statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and that the second is but a corollary.
> . . . The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship.[9]

This seems to mean (1) that a statutory presumption is invalid if applied in either a civil or a criminal proceeding unless there is a logical connection between the proved facts and the presumed fact, and (2) that a statutory presumption with the requisite logical basis is invalid if it

operates in a criminal case to fix upon the defendant the burden of producing evidence of the nonexistence of the presumed fact, unless its application will serve to avoid procedural inconvenience without unfairness or hardship to the defendant.[10] If this opinion is to be taken at face value, it destroys the distinction between the Turnipseed and Henderson cases set forth by Mr. Justice Butler, disapproves a doctrine recognized by Mr. Justice Holmes and Mr. Justice Cardozo, and overrules numerous prior decisions.[11] The concurring opinion merely adds a too-easy generalization which, if purporting to give the result of past decisions, involves rather obvious question begging.[12]

Since the Court treated the subject generally, it is much to be regretted that it ignored seemingly important differences in the phrasing of applicable statutes and in the curial effect of pertinent procedural devices. There is an important difference between using one fact as evidence of another, and causing the establishment of the one to fix the burden of coming forward with evidence tending to establish the other or the burden of persuading the trier of fact of the existence of the other. The first involves a question of reasoning from known human experience. How far the courts may control the process of reasoning of a trier the result of whose reasoning seems to them unreasonable is one sort of question. Fixing the burden of coming forward with evidence, or the burden of persuading the trier of fact, as to the truth of a given proposition is quite another. The latter is a necessary concomitant of our adversary system. It involves judgment as to practicability, convenience, and fairness which has no necessary connection with the process of reasoning from one fact to another. Furthermore, the burden of introducing evidence is quite different from the burden of persuading the trier of fact.

As to the same proposition one party may have to bear the former, while the other has to sustain the latter. The former determines the result if no evidence, or no further evidence, is received. The latter is decisive where the mind of the trier is in equilibrium. Each party and the court must know where the former rests at every stage of the trial; neither court nor party is concerned with the latter until the evidence is closed. The trier of fact, as distinguished from the judge, need never hear about the former but must always be instructed as to the latter. It would seem to follow that no court should attempt to determine the validity of a statute affecting these aspects of a trial without first ascertaining the exact effect of its application in an action. If the statute as construed permits or requires evidence of A to be used as evidence of B, then the existence of a rational connection between them is demanded by the Constitution. But how does it follow that the Constitution makes the same demand where the establishment of A fixes the burden of producing evidence or the burden of persuasion as to B?

In our adversary system of litigation the court knows the rules of law but it has no knowledge of the disputable facts in litigation. Usually it will accept as facts what the parties agree to be facts. Where the parties are in disagreement, the court makes no investigation of its own. It requires the parties to frame the issues and to make known the facts. In this process it must allocate the burdens of pleading and of introducing evidence and of persuading the trier. If it places the burden of pleading X on plaintiff, it is in effect declaring that unless plaintiff pleads the existence of X, the court will assume its nonexistence; if it puts on him the burden of introducing evidence of X, it is ruling that in the absence of such evidence, it will assume the nonexistence of X; and if it allocates to him the burden

of persuasion of X, it will instruct the trier that if the trier's mind is in equilibrium as to X, the nonexistence of X must be found. How does the court determine which party shall bear any one of these burdens? Must it look over the whole situation as made known to it at the time of pleading and determine that plaintiff must bear the burden of pleading X because from the facts known to it it concludes that there is a reasonable inference that X does not exist? Likewise in determining that when plaintiff has alleged X, defendant must bear the burden of introducing evidence that X does not exist, must the court first determine that while plaintiff was required to allege X, still the same facts justify an inference that X does exist and the burden of introducing evidence should for other reasons be put on defendant? What considerations of logic determine that while plaintiff must allege nonpayment in order to state a ground of recovery, defendant relying on payment must plead it specially, and must sustain both the burden of going forward with evidence and the burden of persuasion? The federal courts insist that in a criminal prosecution for a crime involving intent, the prosecution must prove defendant's sanity beyond a reasonable doubt, but defendant has the burden of introducing evidence of insanity at the peril of having the issue of sanity excluded from the case.* Is this because the facts of experience as known to the court form a basis for a reasonable inference of defendant's sanity? Many courts rule that the time of death of an absentee whose absence is unexplained and who has not been heard from for seven years must, if no evidence to the contrary is introduced, be taken to be the last instant of the seventh year. Has anyone ever ventured to suggest that such a finding is reached by the application of the rules of reason to the facts of experience as known by judges or by any other men or group of men?

The reasons given for determining the allocation of both the burden of introducing evidence and the burden of persuasion are various. Some rules of thumb have been formulated as prima facie applicable, but it is now generally agreed that considerations of policy, convenience, and fairness as revealed in judicial and legislative experience are controlling, and that the rules of thumb merely emphasize important factors. Can it be that the Supreme Court is now declaring that any statute which makes the establishment of A fix the burden of introducing evidence or the burden of persuasion of B is unconstitutional unless a logical connection exists between A and B, and that considerations of policy, convenience, and fairness must give way; that where such a connection exists, these other factors are persuasive, but logical connection is a sine qua non? Or is the Court merely declaring that the operation of that thing which it calls a presumption necessarily permits the use of the basic fact as the basis for an inference of the existence of the presumed fact and that therefore a logical connection is necessary? If the latter, the state courts and all legislatures must eschew all language of prima facie evidence, presumptive evidence and presumptions, and speak definitely of the exact procedural effect to be given to the establishment of the basic fact. If the former, the Supreme Court is destroying a useful and time-honored device for effective conduct of litigation.

E. M. M.

Respectfully submitted,

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FOOTNOTES

1. 52 STAT. 1250 (1938), 15 U.S.C. § 902(f) (1940).

2. 63 Sup. Ct. 1241 (June 7, 1943). Mr. Justice Black concurred in an opinion in which Mr. Justice Douglas joined. Id. at 1247. Mr. Justice Murphy took no part in the consideration of the case.

3. 63 Sup. Ct. at 1245.

4. Id. at 1244. But compare: "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits." Id. at 1245. (Italics supplied.)

5. Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35 (1910) (state statute, civil: prima facie evidence); Bailey v. Alabama, 219 U. S. 219 (1911) (state statute, criminal: prima facie evidence); Luria v. United States, 231 U. S. 9 (1913) (act of Congress, cancellation of citizenship: prima facie evidence); Western & A. R. R. v Henderson, 279 U. S. 639, 640 (1929) (state statute, civil: "railroad company shall be liable . . . unless the company shall make it appear . . . , the presumption in all cases being against the company."); Morrison v. California, 291 U. S. 82, 88 (1934) (state statute, criminal: "shall create a prima facie presumption . . . and the burden of proving . . . shall thereupon devolve upon such defendant.").

6. 63 Sup. Ct. at 1246: "It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it."

7. Id. at 1246.

8. Id. at 1246: "If the presumption warrants conviction unless the defendant

comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted . . . ."

9. 63 Sup. Ct. at 1245-46.

10. Query, why should a presumption created by a legislature have to meet due process tests not applied to a presumption created by the courts? Or are the tests the same for both?

11. Cf. Mr. Justice Butler's distinction of the Turnipseed case. "Each of the state enactments raises a presumption from the fact of injury . . . . The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. . . . That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to be preponderate." Western & A. R. R. v. Henderson, 279 U. S. 639, 643-44 (1929). This seems to mean that the logical relation between the proved facts and the presumed fact in the Turnipseed case was identical with that in the Henderson case, and that a presumption without a logical relation may constitutionally fix the burden of producing evidence but not the burden of persuasion.

And cf. Mr. Justice Holmes' opinion for the majority in Casey v. United States, 276 U. S. 413, 418 (1928): "Furthermore there are presumptions that are not evidence in the proper sense but simply regulations of the burden of proof. . . . The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it . . . .

It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government." And Mr. Justice Cardozo's opinion for the Court in Morrison v. California, 291 U. S. 82, 90 (1934): 'There are, indeed, 'presumptions that are not evidence in a proper sense but simply regulations of the burden of proof.' . . . Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . ., or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge . . . . Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises."

12. "These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged." 63 Sup. Ct. at 1247-48. But is not sanity an element of a crime involving intent which in a federal

court must be proved beyond reasonable doubt? Yet the prosecution need introduce no evidence of it until defendant has come forward with evidence of insanity. Even if "elements of crime charged" is to be defined as "facts to be established by the prosecution," the quoted generalization of the Court is not supported by the decisions. Are the concurring justices prepared to invalidate all presumptions in criminal cases unless based on evidence tending to prove the presumed fact, or do they regard a verdict supported by a fact judicially noted as a verdict "preceded by the introduction of some evidence which tends to prove" that fact?

* [In Leland v. Oregon, 343 U.S. 790 (1952), decided nine years after the Tot case, the Supreme Court in a 7-2 decision held that a state could require a criminal defendant to prove the defense of insanity beyond a reasonable doubt. Black and Frankfurter, JJ., dissented on the ground that such a heavy burden could not be placed on the defendant. The dissenting opinion concedes, however, that "States may provide various ways for dealing with this exceptional situation by requiring, for instance, that the defense of 'insanity' be specially pleaded, or that he on whose behalf the claim of insanity is made should have the burden of showing enough to overcome the assumption and presumption that normally a man knows what he is about and is therefore responsible for what he does . . . . The laws of the forty-eight States present the greatest diversity in relieving the prosecution from proving affirmatively that a man is sane in the way it must prove affirmatively that the defendant is the man who pulled the trigger or struck the blow. Such legislation makes no inroad upon the basic principle that the State must prove guilt, not the defendant innocence, and prove it to the satisfaction of the jury beyond a reasonable doubt." 343 U.S. at 804.]