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# The Presumption of an Unlawful Purpose from Proof of Possession of Liquor: Is Possession for Home Consumption an Affirmative Defense?

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# NOTES

## THE PRESUMPTION OF AN UNLAWFUL PURPOSE FROM PROOF OF POSSESSION OF LIQUOR: IS POSSESSION FOR HOME CONSUMPTION AN AFFIRMATIVE DEFENSE?

The following actual scene is typical of many similar ones enacted daily in court-houses throughout the country. A liquor case is called for trial. The defendant is charged with "unlawful possession." He pleads not guilty and puts himself on the country. The state calls a deputy sheriff who testifies that he descended upon the defendant's home with a search-warrant, and on entering found the

defendant had fled, leaving behind him broken jugs and jars, and the remains of a large quantity of liquor which had just been poured out on the hearth. The state rests and the defendant offers no evidence.

It not being legally allowable to leave the matter to the jury's unaided common sense, the trial judge is faced with the problem: How shall he charge the jury? The answer is, surprisingly, not free from difficulty.

The Volstead Act and the North Carolina Conformity Act (which is fairly representative of other state enforcements acts) provide, in substance: (1) that it is unlawful to "possess" liquor, "except as authorized" in other provisions of the Act;[1] (2) that the possession of liquor by any person not legally permitted under the Act to possess liquor is prima facie evidence that such liquor is being kept for the purpose of being sold or otherwise unlawfully disposed of;[2] (3) "but it shall not be unlawful to possess liquor in one's private dwelling only, while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein."[3] The Federal Act adds, but the North Carolina Statute omits: (4) "the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."[4]

[1] U. S. C. A., Title 27, §12, in part: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

N. C. Public Laws of 1923, ch. 1, §1; N. C. Code 1927, §3411 (b), in part: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as beverage may be prevented."

[2] The following language from North Carolina Public Laws of 1923, ch. 1, §10 [N. C. Code 1927, §3411 (j)] is copied from the Volstead Act (U. S. C. A. Title 27, §50): "The possession of liquor by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article."

[3] N. C. Public Laws of 1923, ch. 1, §10 [N. C. Code 1927, §3411 (j)]; U. S. C. A. Title 27, §50.

[4] U. S. C. A. Title 27, §50.

In the actual case alluded to[5] the judge's solution was to charge as follows:

"The court instructs you that the burden of proof is upon the state to satisfy you beyond a reasonable doubt that he had the liquor in his possession, either actual or constructive, and the court further instructs you that if he did have it in his possession that it would be unlawful, unless he had it in his home for his own use, for his own personal use or the use of his bona fide friends or guests. The possession of liquor anywhere in the home or out of the home is prima facie evidence that he is keeping it for the purpose of violating the law. It is prima facie evidence that he is keeping it in violation of the law, and what is meant by that is, that it is artificial evidence created by the law from certain facts and sufficient to carry the case to the jury, and upon which the jury may act either way. . . . The court instructs you that if he had this liquor in his home for the purpose of selling it, or for the purpose of giving it away, except as mentioned in the statute, or for the purpose of furnishing it to somebody else, except as mentioned in the statute, he would be guilty, but if he had it in his home for his own bona fide use, his personal use or the use of his bona fide guests, then he would not be guilty *(and the court instructs you as to whether or not he had it for that purpose is a matter that is within his own knowledge alone and, therefore, the burden is upon him to show that he had it for his own consumption or for the use of his bona fide guests)."*

Was he right in thus placing upon the defendant the "burden of proof," which it would seem he must have used in the sense of "burden of persuasion"?[6]

Certainly his charge cannot be justified on the ground that the statutory "permissive presumption" or "prima facie case" which arose in the state's favor upon the proof of possession, *shifted* the burden of persuasion. The locally accepted and generally prevailing view is that a presumption does *not* shift the burden of proof in this sense to the adversary, but only places on him the risk of losing his case if he does not produce some substantial evidence in rebuttal.[7]

Nevertheless the change was approved, and it would seem properly, by the Supreme Court of North Carolina, on another theory. The court held that there was no need to resort to any shifting, but that *from the outset* the burden on this issue was upon the defendant.

[5] State v. Dowell, 195 N. C. 523, 143 S. E. 133 (1928).

[6] The writer has discussed the different uses of the term "burden of proof" in an article entitled "Charges on Presumptions and Burden of Proof," 5 N. C. LAW REVIEW 291 (May, 1927).

In other words, while a formal allegation that the possession was for purposes of sale (or other specified unlawful disposition) might be required in the indictment, yet if the defendant is to rely on his lawful intent to use the liquor for home consumption, he must adduce proof thereof as an *affirmative defense.*

At first blush, the holding might be thought to be in conflict with the earlier decision of the same court in *State v. Wilkerson.*[8] In that case, under an earlier statute which made proof of possession of more than one gallon of liquor prima facie evidence of intent to sell in violation of the act, the trial judge charged the jury that if possession had been proved to them beyond a reasonable doubt, the defendant had "the duty of going forward and satisfying the jury by the greater weight of evidence" that he did not have it for purpose of sale, and this was held to be reversible error, as erroneously "shifting the burden." The case is readily distinguishable from the present situation, however, in that the earlier statute[9] specifically defined the crime as "possession, *for the purpose of sale*" as contrasted with the present act which forbids possession generally, subject to separate exceptions.[10] The earlier act moreover, unlike the present, contained no independent proviso as to "home consumption." It was, therefore, reasonably construed as making proof of intent to sell a part of the state's case from the outset, as to which the burden of persuasion would never shift but would remain to the end of the trial upon the state.

It is believed that the holding in *State v. Dowell,* the recent case referred to, that possession "for home consumption" is an affirmative defense is justified both upon reason, and upon the authorities cited in the notes.[11] The statute forbidding possession in general terms, sub-

[7] Wigmore, EVIDENCE, 2d ed., §§2489, 2490; Kay v. Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751 (1900); Hunt v. Eure, 189 N. C. 482, 127 S. E. 593 (1925) and other cases cited 5 N. C. LAW REVIEW 307, note 42.

[8] 164 N. C. 432, 79 S. E. 888 (1913). A like holding was made in State v. Bean, 175 N. C. 748, 94 S. E. 705 (1917).

[9] N. C. Public Laws of 1913, ch. 44.

[10] See Note 1, *supra.*

[11] Examples of the numerous decisions recognizing affirmative defences in liquor cases: Dillon v. U. S. (C. C. A., 2d), 279 Fed. 639 (1921) (possession for home consumption); State v. Yokum, 155 La. 846, 99 So. 621 (1923) (home consumption); State v. Prophet, 157 La. 550, 102 So. 666 (1925) (home consumption); People v. De Geovanni, 326 Ill. 230, 157 N. E. 195 (1927) (permit); Hiller v. State, 189 Wis. 539, 208 N. W. 260 (1926) (permit); Giacalone v. U. S. (C. C. A., 9th) 13 F. (2) 108 (1926) (registry of still); Sanford v. State, 198 Ind. 198, 152 N. E. 814 (1926) (registry of still);

ject to exceptions, separately recited, followed by the proviso in a later section beginning "but it shall not be unlawful" to possess for home use, thus withdrawing from the statute's operation conduct which would otherwise be within it, seems to manifest the legislative intention to make "home consumption" a matter of defense.[12] Moreover, this construction seems consonant with wise policy. To impose upon the defendant the necessity of producing convincing evidence that his purpose in storing the liquor in his home was to provide for its use by himself, his family, and his guests, which is ordinarily readily proveable, seems to impose no undue hardship or risk upon an innocent man.[13] On the other hand, trials would be prolonged and an unduly difficult task would be placed upon the state if it must secure proof "beyond a reasonable doubt," which to the jury often means *direct* rather than inferential proof, of a purpose to sell. To place upon the state the risk of a failure of proof of the unlawful intent of a proved possessor of liquor, would certainly promote the escape of the guilty. "When the guilty escape, the judge is condemned."

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Davis. v. State (Ark.), 298 S. W. 359 (1927) (registry of still); Murray v. State, 198 Ind. 389, 153 N. E. 773 (1926) (lawful right to transport); State v. Cox, 117 Ore. 204, 243 Pac. 77 (1926) (state must allege non-registration of still, but defendant must prove registration); State v. Barksdale, 181 N. C. 621, 107 S. E. 505 (1921) (prosecution under N. C. Code of 1927, Art. 3373, for soliciting orders for liquor; defence, that the article sold was a flavoring extract permitted under N. C. Code of 1927, Art. 3375; the court said: "This, in our opinion, being the correct construction of the statute, when the State has offered evidence sufficient to satisfy the jury beyond a reasonable doubt that defendant is selling, or offering for sale, a liquor or mixture thereof, containing 40 to 45 per cent alcohol, or which is making men drunk, the defendant should be convicted unless he satisfies the jury, not beyond a reasonable doubt, but satisfies them that what he sells, or is offering for sale, comes within the exception claimed by him, and it must be an extract approved by valid official sanction or recognized as such by the general trade. The burden is on him to so prove to the jury that the article he sells is in fact and in truth what it professed to be, a flavoring extract, and that he is offering it to be used or sold as such for flavoring purposes and not as a beverage." Cases of similar purport are collected in BLAKEMORE, PROHIBITION (1925), 637, 638.

[12] State v. Connor, 142 N. C. 700, 55 S. E. 787 (1906); 2 Chamberlayne, MODERN LAW OF EVIDENCE, §960; see also the cases cited under Note 11, *supra*.

[13] Compare Singleton v. U. S. (C. C. A. 4th), 290 Fed. 130, 133 (1923) where the late Circuit Judge Rose said: "One who has become legally possessed of intoxicants may keep them in his dwelling. He may obtain a permit for them, but he is not required to do so; but, if the rightfulness of his having them is legally challenged, the burden is on him to show that he lawfully obtained, keeps, and uses them. There is nothing harsh or oppressive in such construction. He always knows how he procured the liquor, and frequently no one else does."

It may be admitted that it is somewhat incongruous for the legislature to adopt the drastic device of confining the state's case to "possession," and requiring the defendant to raise and maintain any issue based on lawfulness of the possession, and yet at the same time lay down the far milder rule that possession is "prima facie" evidence of guilty purpose, which under accepted usage would seem to leave it open to the jury to find innocent purpose, though the defendant does not grasp the laboring oar by offering evidence of innocent purpose.[14] Complaint of such an incongruity, however, "assumes a greater nicety of precision in the use of language than, in view of conditions under which legislative draftsmen are compelled to work can ordinarily be expected from them."[15] Furthermore, there is ordinarily no inconsistency in submitting the case to the jury on the evidence of possession, where the defendant has offered no evidence in support of the defense of lawful purpose, for usually the state's evidence will itself disclose some fact (as that the possession was in the defendant's home) from which the jury might infer the lawful purpose. Even here, however, the burden of persuasion, of satisfying the jury of the lawful purpose should of course be cast on the defendant. Inconsistency could only arise in the extreme case where the state's evidence of possession discloses no circumstance upon which the inference of any excepted lawful use could be based, and the defendant offers no evidence, and in such a case, it is submitted that, under the North Carolina practice it would be proper for the court to instruct the jury, *not* that possession is prima facie evidence of guilt, but that the defendant not having sustained any affirmative defense, it is the jury's duty to find the defendant guilty, if they believe the evidence.[16]

Another and more serious objection to the instruction of the trial court placing the burden on the defendant, in *State v. Dowell,* the case under comment, is raised by Mr. Justice Brogden in a vigorous dissenting opinion. He disapproves the charge because it deprives the defendant of the "right to rely on the weakness of the state's case" and of the "benefit of the presumption of innocence." But as

[14] Such is the usual construction of the term "prima facie evidence." See for example, State v. Wilkerson, *supra,* note 8, and McDaniel v. R. Co., 190 N. C. 474, 130 S. E. 208 (1925).

[15] Rose, Circ. Judge, in Singleton v. U. S., 290 F. 130, 132, alluding to another part of the Act.

[16] A South Carolina decision is to the contrary, however, State v. Burns, 133 S. C. 238 130 S. E. 641 (1925). Compare State v. Helms, 181 N. C. 567, 181 N. C. 567, 107 S. E. 228 (1921).

the same judge has recently intimated in another case,[17] the presumption of innocence is but an alternative expression of the rule that the state must prove *its case* beyond a reasonable doubt,[18] and the question arises: what is the state's case? Many authorities hold that that is the entire question of the guilt of the accused, so that if an issue arises even upon a so-called affirmative defense, the burden of convincing the jury beyond a reasonable doubt upon such issue is upon the state. In this view, the "affirmative defense" in a criminal case is radically unlike a defense in a civil action, for in the civil case if the defendant goes no further than to raise a doubt in the jury's mind, he will lose, for he has the burden of establishing his defense by a preponderance of the evidence; whereas in a criminal case if the defendant raises only a reasonable doubt as to the verity of his defense, he will win. Under this theory, the defendant has no burden of proof at all in the sense of burden of persuasion, but only the burden of producing some evidence sufficient to raise a doubt.[19] Clearly under this theory, the trial judge's charge placing the "burden of proof" on defendant would be wrong, or at least misleading. The above-mentioned theory as to criminal defenses, however, clearly does not obtain in North Carolina which in company with a few other states,[20] consistently applies to criminal defenses the same principle which obtains as to civil defenses, that is, that a disproof of the defense is no part of the state's case, but the defendant to succeed in his defense must "satisfy the jury" of its truth and not merely raise a doubt in their minds about it.[21]

Under this well-settled local rule, conceding that the purpose of home-consumption is an affirmative defense, the placing of the burden of proof thereof upon the defendant seems clearly correct.[22]

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[17] State v. Boswell, 194 N. C. 260, 263, 142 S. E. 583 (1927).

[18] Compare 2 Wigmore, EVIDENCE, 2d ed. §2511.

[19] People v. Beck, 305 Ill. 593, 137 N. E. 454 (1922); Brown v. State, 102 Tex. Crim. 522, 278 S. W. 436 (1926); Underhill, CRIMINAL EVIDENCE, 3d ed. §51, note 22; 6 Wigmore, EVIDENCE, §2512; 2 Chamberlayne, MODERN LAW OF EVIDENCE, §960; Clark, CRIMINAL PROCEDURE (2d. ed., by Mikell), pp. 634-637.

[20] See 5 Wigmore, EVIDENCE, §2512, note 1; Tucker v. State, 89 Md. 471, 43 Atl. 778 (1899); Comm. v. Colandro, 231 Pa. 343, 80 Atl. 571 (1908).

[21] State v. Willis, 63 N. C. 26 (1868); State v. Barringer, 114 N. C. 840, 19 S. E. 275 (1894); State v. Barrett, 132 N. C.; 1005, 43 S. E. 532; the matter is discussed and cases collected in the opinion of Stacy, C. J. in Speas v. The Merchants Bank & Trust Co., 188 N. C. 524, 528, 125 S. E. 398 (1924).

[22] The dissenting justice seems in one portion of his opinion to concede the abstract correctness of the charge if the affirmative defense theory be adopted,