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Criminal Law—Presumption Statute

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of Criminal Procedure[9] indicates that an information is a jurisdictional requisite for courts of special sessions trying misdemeanors. The affidavit of the defendant may be used as a substitute for a written information where the affidavit completely spells out the offense with which the defendant is charged.[10] If the affidavit fails to spell out a distinct crime, then it cannot, and should not be used as a substitute for the information, since the written information itself, if similarly defective, would be a nullity.[11]

Judge Desmond's contention that a plea of guilty waives the requirement of a written information is novel. The available sources, including the opinions of the other six judges, indicate that a written information or a substitute therefor is a prerequisite to jurisdiction. Judge Desmond would in effect have had the court accept the plea of guilty when it lacked jurisdiction, and then have made such jurisdiction retroactive to a time before the plea was entered.

If an affidavit by a defendant can be used as a substitute for a written information, and the affidavit fails to state a distinct crime, does the jurisdiction of the court fail *in principio* or does the plea of guilty cure the jurisdictional defect? A most interesting case decided by a county court within less than one month after the *Jacoby* decision reveals the dilemma which the lower courts face when the highest court in the state decides an appeal without settling the issue framed. In *People v. Tompkins*,[12] a misdemeanor case, there had been no affidavit of the appellant, nor a written information to which his plea of guilty could have been addressed. The court regarded the *Jacoby* case as controlling, but was uncertain exactly what the 3-1-3 decision held. The county court finally decided that since appellant had made no affidavit stating a distinct crime, the absence of a written information is a jurisdictional defect which cannot be waived by a plea of guilty.

Presumption Statute

The average defendant who finds himself before the bar of justice for the violation of a law of which he was ignorant will usually submit meekly to the court and reflect that everyone is presumed to know the law. However, if he were to be informed

9. §§ 699, 672.

10. *People v. Rosenkrantz*, 123 Misc. 334, 205 N. Y. Supp. 861 (Ct. of Spec. Sess. 1924); *People v. Lindner*, 133 Misc. 728, 234 N. Y. Supp. 89 (Ct. of Spec. Sess. 1929).

11. *People v. Grogan*, 260 N. Y. 138, 142, 183 N. E. 273, 274 (1932).

12. *People v. Tompkins*, ___ Misc. ___, 114 N. Y. S. 2d 297 (Co. Ct. 1952).

that not every defendant is presumed to be innocent, the revelation might prove quite a shock to him.

There is a possibility that the Court in *People v. Terra*[13] may have struck a blow against the ancient concept of justice that the defendant is presumed to be innocent.[14] In the *Terra* case the defendants were found guilty of the unlawful possession of a machine gun under §1897 of the Penal Law, which provides: "The presence of such machine gun in any room, dwelling, structure or vehicle shall be *presumptive evidence of its illegal possession*[15] by all the persons occupying the place where such is found." In the *Terra* case defendants were not present when the machine gun was found in their room. On appeal the issue was whether or not the statute, insofar as it creates the presumption, is constitutional. A unanimous Court held the statute is reasonable and does not violate the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

Presumptions are no innovation in the field of criminal law. However, the device may not be employed in such a manner as to relieve the prosecution of the burden of proving guilt beyond a reasonable doubt, or otherwise deny to persons accused of crime "those fundamental rights and immutable principles of justice which are embraced within the conception of our due process of law."[16]

A legislative fiat that certain evidence is presumptive proof of a further fact does not violate due process of law if based on a rational connection between the fact proved and the ultimate fact presumed.[17] However, if the fact presumed also constitutes the substantive crime of which the defendant stands accused, then the presumption is equivalent to a presumption of guilt. In the instant case, the jury was permitted under §1897 to presume that defendants unlawfully possessed a machine gun because they were occupants of the room in which it was found. Since this presumed fact was also the crime alleged, arguably the burden of proof of innocence was placed upon the defendants, whose right not to take

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13. 303 N. Y. 332, 102 N. E. 2d 576 (1951).

14. Code of Crim. Proc. § 389: "A defendant in a criminal action is presumed innocent, until the contrary be proved; and in a case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."

15. Ital. added.

16. *Bailey v. State of Alabama*, 219 U. S. 219, 239 (1911); *People v. Connor*, 139 N. Y. 32, 43, 34 N. E. 495, 498 (1893).

17. *People v. Pieri*, 269 N. Y. 315, 324, 19 N. E. 495, 498 (1936).

the stand[18] may have been negatived. The Court would have been justified in finding that the statute created guilt by legislative fiat and so violated due process.[19] In construing presumption statutes, the Court should not forget that great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.

Trial—Reversible Errors

Irrespective of the guilt or innocence of a defendant, he is entitled to a fair and orderly trial. Of vital importance to him are the rules pertaining to the admissibility of evidence and the conduct of the prosecution. Two important decisions rendered by the Court in this regard are *People v. Ford*[20] and *People v. Hetenyi*.[21]

In the *Ford* case, the appellant had been found guilty of first degree murder.[22] A psychiatrist had examined him before the administration of a "truth serum", again while appellant was under the effects thereof, and a third time after the effects had worn off. As a defense witness he was permitted to testify regarding the first and third examinations but not as to the second. Failure to permit the jury to hear and consider the results of this second examination was cited by the appellant on appeal as error entitling him to a reversal of the conviction. Although the conviction was affirmed, a vigorous dissent by Judge Desmond indicates that the use of the evidence offered by the defense is hardly startling in this scientific age.[23] Judge Desmond was of the opinion that the proferred evidence was not in the same class with the results of a lie detector test, which the New York courts have not accepted as admissible.[24] The Court's reluctance to accept the evidence is not in keeping with the spirit of judicial modernization exemplified in *Woods v. Lancet*.[25]

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18. CODE OF CRIM. PROC. § 393: "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

19. See *Tot v. U. S.*, 319 U. S. 463 (1943).

20. 304 N. Y. 679, 197 N. E. 2d 595 (1952).

21. 304 N. Y. 80, 106 N. E. 2d 20 (1952).

22. PENAL LAW §§ 1044-1045.

23. There is widespread use of radar checks in obtaining convictions for speeding in the lower courts of this State. The sufficiency of the evidence has not yet been tested at the Court of Appeals.

24. *People v. Forte*, 279 N. Y. 204, 18 N. E. 2d 31 (1938).

25. See TORTS, this Section, 120-122.