as between those testifying for the Eberlys and the one testifying for the Kings. The finder of facts may believe all or none or part of the testimony of any witness. *Commonwealth v. Neil*, 447 Pa. 452, 290 A.2d 922 (1972).

The Court may consider all of the testimony in reaching its conclusions, believing some and rejecting other even from the same witness. In this case, the house and the conditions were sufficiently described so that absent testimony of valuation experts, the Court could reach his own conclusions.

Since this is true, it is meritless to discuss the relative qualifications of the experts or the certainties or defects of their positions.

ORDER OF COURT

NOW, May 26, 1978, the defendants Ronald E. Eberly and Nancy L. Eberly having filed exceptions to the Court's adjudication in this matter filed March 16, 1978, after argument on the exceptions before the court en banc, the exceptions are overruled.

Editor's Note: See earlier opinion, same case, 1 Franklin 31.

COMMONWEALTH v. HOGAN, et al., C.P. Cr. D., Franklin County Branch, No. 128 of 1977

*Criminal Law - Summary Offense - Burden of Proof - Proof of elements of Offense Under Sect. 36 (5) of Weights and Measures Act of 1965 (76 P. S. Sect. 100-36(5) ) - Unconstitutional Presumption of Guilt - Demurrer to Evidence*

1. In any criminal prosecution, the Commonwealth has an unshifting burden to prove beyond a reasonable doubt all elements of the crime.

2. A necessary element of the offense under Section 36 (5) of the Weights and Measures Act of 1965 charged against this nonpossessor of the commodity was that the defendant packaged the commodity.

3. Evidence that the defendant was the manufacturer of the nails in question is insufficient to establish proof of such element, but at best gives rise to an inference that the defendant could have been responsible for their packaging.

4. An inference does not shift the burden of persuasion or relieve the Commonwealth of the burden of proving every essential element of the alleged offense beyond a reasonable doubt.



5. Another necessary element in this case was that the packages of nails tested by the prosecutor must have contained the same quantity of nails as they did when they left the possession and control of the defendant.

6. Since the packages were purchased by the store from a third party, shipped to it from an undisclosed location, were not sealed, were placed on counters in the store open to the public and susceptible to shoplifting, there are too many unanswered imponderables to satisfy the requirements of proof beyond a reasonable doubt, even though it is not the burden of the Commonwealth to disprove all other non-criminal possibilities.

7. It is the continuing presumption of innocence which is the basis for the requirement that the state has the never shifting burden to prove guilt beyond a reasonable doubt.

8. A procedure by which when the weighing scale indicator falls exactly between an odd and even number on the scale, the Commonwealth always rounds the weight off to the even number, constitutes, in effect the taking of a presumption in favor of the Commonwealth part of the time, and this is constitutionally impermissible under the general rule that whenever conflicting presumptions are raised, the presumption of innocence must prevail.

9. A demurrer to the evidence in a criminal case must be sustained when the Commonwealth, in its case in chief, fails to prove the defendant guilty beyond a reasonable doubt.

*John C. Childe, Esquire, Deputy Attorney General*, Attorney for the Commonwealth

*Kenneth F. Lee, Esquire*, Attorney for the Defendant

OPINION

KELLER, J., June 29, 1978:

On August 17, 1976, a criminal complaint was filed by Charles C. Goodhart of the Pennsylvania Department of Agriculture, Bureau of Standard Weights and Measures, charging R. P. Hogan, Vice-President, Commercial Operating and Wheeling Corrugating Company, Division of Wheeling-Pittsburgh Steel Corporation with violation at Moore's #23 on August 22, 1976 of the Act of December 1, 1965, P.L. 988, "In that the defendant and his servants or agents did then and there on the above stated date and place aforesaid mentioned offer for sale at retail 36-16 oz. packages of size 8 flooring nails which were unreasonably short weight." Justice of the Peace Gotwals found the defendants guilty and an appeal was taken from the summary conviction to this

court. Hearings were held on April 28, 1977, September 22, 1977, and December 15, 1977. At the conclusion of the Commonwealth's case in chief the Court sustained the defendants' demurrer to the evidence on the following grounds:

1. The appearance of the name of the defendant on each box of nails and the identification of the defendant as the manufacturer does not prove beyond a reasonable doubt that the defendant was the party who weighed and packaged the nails. No other evidence of this fact was introduced.

2. Even assuming the defendant was the weigher and packager of the nails, it was the burden of the Commonwealth to prove beyond a reasonable doubt that the boxes of nails contained the same quantity of nails on August 2, 1976 that they contained when they left the possession and control of the defendant. Parenthetically, we would say we do not feel it would be necessary for the Commonwealth to require tamper proof containers. It would seem a simple sealed container would suffice.

3. The Commonwealth's practice of accepting the even number on the weighing device each time the scale indicator falls exactly between two gradations, has the effect of taking a presumption in favor of the Commonwealth in certain instances, which is constitutionally impermissible.

On January 11, 1978, this Court received notice that "John E. Childe, Jr., Deputy Attorney General of Dauphin County, Attorney for the Commonwealth, hereby appeals to the Superior Court of Pennsylvania from the verdict entered. . ." On January 13, 1978, an order was entered under Pa. R.A.P. 1925(b) directing the appellant to file of record and serve on the Court a concise statement of the matters complained of on appeal. On January 30, 1978, the official court reporter was directed to proceed with the transcription of the complete record in the case. On February 8, 1978, a Deputy Attorney General, on behalf of the Commonwealth filed a new notice of appeal which stated that the Commonwealth of Pennsylvania appealed from the order entered December 15, 1977. The official transcript of the trial was certified March 17, 1978. The Commonwealth complied with the order of January 13, 1978 by serving upon the Court on May 2, 1978 a "Statement of Response for Appeal".

This Opinion is written in support of the demurrer to the evidence which was sustained by the Court.



## FINDINGS OF FACT

1. Charles Goodhart, the prosecutor, is a general duty inspector employed by the Department of Agriculture, Bureau of Standards, Weights and Measures. His duties include checking packages to determine if they are short weight, short measures or short quantity.

2. On August 2, 1976, he visited Moore's Hardware Store in the Borough of Chambersburg, Pa., and found 36-16 oz. packages of size 8 flooring nails. The packages were marked to show "made by Wheeling Corrugating Company, Division of Wheeling-Steel Corporation", and also were marked to show the weight of the nails as being 16 oz.

3. The prosecutor set up his official scales and weighed thirty of the 36 packages and found 16 of them to be underweight by varying amounts; 13 to be overweight by varying amounts and 1 to be exactly 16 oz. Using the Bureau's standard for "unreasonable short weight" the prosecutor concluded that the lot of 36 packages was unreasonably short weight, directed that the lot be removed from sale and initiated the prosecution.

4. Moore's Hardware Store purchased the lot of prepackaged nails for retail sale from Pan Am Buildings Corporation in Philadelphia, Pennsylvania.

5. The prosecutor charged R. P. Hogan as the individual defendant on the basis of information received from the "customer relations" manager of Wheeling Corrugating Company that Mr. Hogan was a "responsible person within their company to name on a private criminal complaint".

6. On the assurance of cousel for the Commonwealth that the Commonwealth had no other evidence of the criminal culpability of R. P. Hogan, the complaint against him was dismissed.

7. No evidence was introduced as to the identity of the individual or corporation that packaged the nails.

8. The packages containing the nails were cardboard boxes that were not sealed and could be readily opened and closed.

9. The boxes of nails here in question were exposed for sale on open shelves at Moore's Hardware Store.

10. The manager of the hardware store testified that in his

experience a great deal of shoplifting does occur, and these nails would be susceptible to shoplifting

11. The prosecutor testified that it is the practice of the Commonwealth to accept the even number on the weighing device each time the scale indicator falls exactly between two gradations; e.g., the Commonwealth would accept and use 2 when the indicator was exactly between the numbers 2 and 3, and use the number 4 when the indicator was exactly between the numbers 3 and 4.

## DISCUSSION

This prosecution was commenced under Section 36(5) of the Weights and Measures Act of 1965, 76 P.S. 100-36(5), which provides inter alia:

> "Any person who, by himself or by his servant or agent, or as the servant or agent of another person, performs any one of the acts enumerated in clauses (1) through (9) of this section, shall upon a first conviction thereof in a summary proceeding be punished by a fine of not less than twenty dollars ($20) or more than two hundred dollars ($200) . . . .
>
> "(5) Sell, offer or expose for sale less than the quantity he represents of any commodity, thing or service: Provided, however, that if a commodity is pre-packaged by someone other than the possessor, the possessor shall not be deemed to have made a representation within the purview of this sub-section if the representation appears on the label of the pre-packaged commodity."

While we have some doubt whether the above quoted subsection does as a matter of law impose criminal responsibility upon the individual, partnership, association or corporation that did in fact pre-package the commodity and represent on the label of that pre-packaged commodity a quantity less than the amount contained within the package, that question does not appear to be before us. For the purposes of this Opinion, we will consider the sub-section as imposing such liability.

"In any criminal prosecution, the Commonwealth has an unshifting burden to prove beyond a reasonable dout all elements of the crime." *Commonwealth v. Rose*, 457 Pa. 380, 389, 321 A. 2d 800 (1974). If the Commonwealth is to sucessfully maintain its prosecution of the corporate defendant for violation of the above quoted sub-section, it must prove



beyond a reasonable doubt that the corporate defendant did, in fact, package the nails in question.

In the case at bar, the Commonwealth introduced no evidence establishing this threshold fact, but contended that the evidence showing that the defendant was the manufacturer of the nails leads to the presumption establishing the defendant's responsibility for the packaging. The Commonwealth has cited no authority for its bald allegation that a "presumption" arises, and we do not accept as a matter of law that any such presumption exists, for if that were true the defendant would be required to prove the contrary which would be constitutionally impermissible. At best, the proof that the defendant manufactured the nails does nothing more than raise an inference that it could have been responsible for their packaging. "An inference does not shift the burden of persuasion or relieve the Commonwealth of the burden of proving every essential element of the alleged offense beyond a reasonable doubt." *Commonwealth v. Shaffer*, 447 Pa. 91, 106 (1972).

In our judgment the Commonwealth has not proven beyond a reasonable doubt that the corporate defendant packaged, weighed, and made misrepresentations as to the quantity of nails in the boxes. Pan Am Buildings Corporation or some unknown and unidentified third party could just as readily have been responsible for the weighing, packaging and labeling of the boxes of nails. Absent proof beyond a reasonable doubt that the corporate defendant was responsible, it cannot be convicted under the sub-section above quoted.

Assuming arguendo that the corporate defendant was the packager, weigher and labeler of the boxes of nails, the Commonwealth has failed to prove that the boxes of nails tested by the prosecutor at the hardware store contained the same quantity of nails as they did when they left the possession and control of the defendant. The evidence discloses that the weighing of the boxes took place at the hardware store. The nails had been purchased by that store directly from Pan Am Buildings Corporation; shipped from some undisclosed location to the store; and placed on counters open to the public. The evidence further reveals that the boxes of nails were not sealed and the store manager testified that they were susceptible to shoplifting and a great deal of shoplifting does occur.

We do not feel that we can discount the possibilities that the boxes of nails could be short weight due to shoplifting at the hardware store; or that nails could have been removed by employees of Pan Am Buildings Corporation or the shipper; or

that someone could have innocently spilled the nails and inaccurately replaced them so as to create the recorded short weights and over weights. There are enumerable ways in which tampering could have occurred after the boxes of nails left the control of the defendant. We do not expect the Commonwealth to desprove all possibilities, but it remains its duty to prove the defendant guilty beyond a reasonable doubt, and this Court is unwilling to assume the essential element that the boxes tested were either short weight or over weight at the time they left the possession and control of the corporate defendant and were untampered with during their unknown journey from manufacturer to retail store.

The Commonwealth contends that our insistence that it prove that the boxes of nails were in the same condition at the time they were weighed as when they left the possession of the defendant would require the Department of Agriculture, Bureau of Weights and Measures to promulgate a regulation demanding "tamper-resistant containers", which would put an increased economic burden on the industry and the consumer. If such a regulation is necessary to permit successful prosecutions under the Act, we are not persuaded that would be a valid or viable argument for altering the constitutional burden of proof imposed upon the Commonwealth. However, we do not believe such a regulation need be so burdensome as envisioned by the Commonwealth, for the application of a single seal on the container would seem to suffice. If the seal were found unbroken the Commonwealth would have its proof that there had been no tampering between packaging and the retail shelf. If the seal were broken the retail vendor and the consumer would be on notice of the possibility of tempering.

We are not persuaded that the Court erred in ruling that the burden of the Commonwealth to prove beyond a reasonable doubt that the boxes of nails tested were not tampered with after leaving the defendant's control. "It is the continuing presumption of innocence which is the basis for the requirement that the state has the never shifting burden to prove guilt beyond a reasonable doubt." *Commonwealth v. Owens*, 444 Pa. 520, 524 (1971); 281 A. 2d 861 (1971).

In the absence of evidence that the representations made by the defendant as to the weight of the nails was, in fact, false when made the defendant cannot be held to have violated the above quoted sub-section of the Act.

The final point for consideration involves the weighing procedure followed by the Commonwealth. According to the prosecutor's testimony whenever the scale indicator falls



exactly between two gradations, the Commonwealth rounds off to the even number. Thus, when the scale indicator falls exactly between 2 and 3, the inspector uses the number 2, and if the scale falls exactly between 3 and 4, the number 4 is used. Following this procedure the scale reading would necessarily be more favorable to the Commonwealth part of the time. This has the effect of taking a presumption in favor of the Commonwealth which we are persuaded is constitutionally impermissible under the general rule that whenever conflicting presumptions are raised, the presumption of innocence must prevail.

In the light of our findings as to the lack of evidence on the other points heretofore discussed in this Opinion, we do not feel it necessary to dwell on the point of reading the scale. However, we feel it is important to note that in this prosecution and other similar prosecutions the Commonwealth is necessarily dealing with extremely minute figures and calculations. In the case at bar, the weights involved tenths and hundredths of an ounce short weight. We find it difficult to believe that the Commonwealth cannot establish a testing procedure that would not tilt in favor of the Commonwealth in certain situations. With today's calculators and other technological devices, certianly the Commonwealth need not round off in its own favor.

We conclude the Commonwealth did not in its case in chief prove the corporate defendant guilty beyond a reasonable doubt. There was no evidence as to the identity of the packager, weigher and labeler of the boxes; nor was there any evidence that the boxes of nails remained intact from the time they left the corporate defendant's control until removed from the hardware store counter by the prosecutor. The Commonwealth has not met its burden of proof and the Court correctly sustained the defendant's demurrer to the evidence.

JOHN, et ux. v. GIANT FOOD STORES, INC., et al., C.P. Franklin County Branch, No. A.D. 1978-31

*Trespass Action - Petition to Open Default Judgment - Relief Within Sound Discretion of Court - Requirements for Relief - Distinction between Trespass and Assumpsit Actions - Timeliness of Filing - Reasonable Excuse for Failure to Appear before Defualt in the Action*

**1. A petition to open judgment by default is essentially an equitable proceeding ruled by equitable principles, and is addressed to the sound discretion of the Court.**