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could bring action against them as private nuisances. Injunctions have been granted on theories of mental depression resulting in physical impairment or depreciation of property values in some cases,<sup>38</sup> but the modern trend seems to be to hold mental depression not enough, even though property values may also be diminished.<sup>39</sup> Although it could be argued that there is little justification for a nudist camp, and that little economic loss would result to it by having to move, they are generally placed far enough away from other habitations that the claim of a property owner of being bothered by them seems rather frivolous.

Whether our society should accept the nudists and neither persecute nor prosecute them, may be disputed. Generally, with the exception of a few states, existing laws do not make nudism illegal. However, the diametrically opposed holdings of the *Ring* and *Burke* cases serve as evidence that the differences in the statutes are negligible compared to the differences in the views of the courts. These differences in opinion, though, are not as to the intrinsic goodness of nudist camps, but as to the propriety of construing a statute broadly or narrowly against them. If a state is so inclined, a statute such as New York's adequately and unquestionably prohibits nudism.

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### OWNERSHIP AS EVIDENCE OF RESPONSIBILITY FOR PARKING VIOLATION

Kenneth Levin

Of the myriad traffic control problems created by the constantly increasing number of automobiles, the enforcement of parking ordinances is one which has given difficulty to some trial courts. In the typical situation, the policeman who discovers and tickets an illegally parked automobile never sees its driver. If the registered owner is later brought into court, he may contend that the state or city can hold him responsible only by proving that he himself committed the offense. Ordinarily the prosecution cannot make such proof by any direct evidence. But the violation need not on that account go unpunished. The highest courts of a few states have been willing to hold that the fact of ownership constitutes sufficient circumstantial evidence against the owner to convict him of the violation.<sup>1</sup> More commonly, however, there are statutes or ordinances which operate to make the owner of an illegally parked automobile *prima facie* responsible in a criminal or civil action. Appellate courts, practically without exception, have upheld this legislatively created presumption.<sup>2</sup>

STAT. tit. 18, §4511 (1945); MASS. LAWS c. 139, §20 (Supp. 1948); ILL. STAT. c. 100½, §1 (1935).

38. *Gunderson v. Anderson*, 190 Minn. 245, 251 N.W. 515 (1933); *Sair v. Joy*, 198 Mich. 295, 164 N.W. 507 (1917); *Ware v. Wichatau*, 113 Kan. 153, 214 Pac. 99 (1923).

39. PROSSER, TORTS §73 (1941); COOLEY, TORTS §439 (4th ed. 1932).

1. *People v. Rubin*, 284 N.Y. 392, 31 N.E. 2d 501 (1940); *State v. Morgan*, 72 R.I. 101, 48 A. 2d 248 (1946) (affirming conviction by an evenly divided court); see *Commonwealth v. Kroger*, 276 Ky. 20, 25, 122 S.W. 2d 1006, 1009 (1938). But see *People v. Bigman*, 38 Cal. App. 2d Supp. 773, 778, 100 P. 2d 370, 372-373 (1940).

2. *Commonwealth v. Ober*, 286 Mass. 25, 189 N.E. 601 (1934) (criminal action); *City of Chicago v. Crane*, 319 Ill. App. 623, 49 N.E. 2d 802 (1943) ("quasi criminal" action); *City of Buffalo v. Thorpe*, 230 N.Y. Supp. 187, 132 Misc. 307 (Sup. Ct. 1928) (civil action). Since most ordinances provide for criminal penalties, and since any defense which would not avail the defendant in a criminal action would not do so in one called civil, it will be convenient to speak of all the cases hereafter as though they were criminal cases.

Other courts have upheld ordinances which permit the police upon discovery of an illegally parked automobile to remove it from the streets. The owner may regain possession only by paying a service or pound charge, usually not more than five dollars. This charge is not a fine because it represents actual cost of removal and storage of the automobile.

The statutes and ordinances which make owners *prima facie* responsible for parking violations fall into two general classes. First, there are those which provide that the facts of violation and ownership together raise a *prima facie* presumption that the owner committed the offense.<sup>3</sup> This presumption is rebuttable. The second type omits any reference to a *prima facie* presumption. It declares merely that whenever an automobile is parked illegally the registered owner shall be subject to the penalty for such violation. Or it may be couched in terms forbidding anyone to permit a vehicle registered in his name to stand or park illegally. The courts have usually interpreted these acts to mean that, when an automobile is found illegally parked, that constitutes *prima facie* proof against the owner.<sup>4</sup> Thus, while the bare words of this second type of statute would appear to render the owner absolutely responsible whenever his automobile is illegally parked, the courts have avoided the constitutional question inherent in such a provision,<sup>5</sup> and have permitted the owner to avoid conviction by showing that he did not in fact commit or authorize the violation.

The defending automobile owner often attacks the constitutionality of the *prima facie* presumption against him. He argues that he must be considered innocent until proved guilty, that this presumption shifts the burden of proof to the defendant, and that it forces him to testify. But such arguments have been uniformly rejected.

Our law, of course, requires that the defendant be presumed innocent until proved guilty, and the burden of proving guilt rests on the prosecution. The courts point out, however, that the legislature may provide what facts, if un rebutted, will be sufficient to support a conviction. It is not always necessary to prove the guilt of an offender by the direct testimony of an eyewitness. Reasonable inferences may be drawn from facts. Given the facts of ownership and a violation, the legislature may say that these are enough from which to infer that the owner committed the violation. Unless the defendant is able then to present further evidence showing that the legislative presumption is not true in his case, the trier of fact will be justified in giving conclusive effect to it. The prosecution will have carried its burden of proof. Both the State and Federal Supreme Courts have often upheld this legislative rule of evidence.<sup>6</sup>

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There is no need for a court proceeding unless the city wishes also to impose a fine. *Hughes v. City of Phoenix*, 64 Ariz. 331, 170 P. 2d 297 (1946); *Steiner v. City of New Orleans*, 173 La. 275, 136 So. 596 (1931); *Jackson v. Copelan*, 50 Ohio App. 414, 198 N.E. 596 (1935); *accord*, *McLaurine v. City of Birmingham*, 247 Ala. 414, 24 So. 2d 755 (1946).

3. *City of St. Louis v. Cook*, 221 S.W. 2d 468 (Mo. 1949); *Commonwealth v. Kroger*, 276 Ky. 20, 122 S.W. 2d 1006 (1938); *People v. Kayne*, 286 Mich. 571, 282 N.W. 248 (1938); *People v. Bigman*, 38 Cal. App. 2d Supp. 773, 100 P. 2d 370 (1940).

4. *City of Chicago v. Crane*, 319 Ill. App. 623, 49 N.E. 2d 802 (1943); *Commonwealth v. Ober*, 286 Mass. 25, 189 N.E. 601 (1934). *Contra*: *People v. Forbath*, 5 Cal. App. 2d Supp. 767, 42 P. 2d 108 (1935). See text at note 14.

5. See note 11 *infra*.

6. In *Mobile, J. & K. C. Ry. v. Turnipseed*, 219 U.S. 35, 42 (1910), the Court said, "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous." Again in *Yee Hem v. United States*, 268 U.S. 178, 184-5 (1925), the Court said, "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute." The cases cited in note 1 *supra* are representative of those in which the presumption does not rest upon statute, but upon judicial fiat.

For detailed discussion of presumptions and *prima facie* evidence see 9 WIGMORE, Evi-

The contention that the prima facie presumption forces a defendant to testify is easily answered. He is not forced to take the witness stand; he is at liberty to rebut the presumption by the testimony of witnesses other than himself.<sup>7</sup> Furthermore, no constitution guarantees that a defendant may not find himself in a position where only his own testimony can save him; it merely prevents the prosecution from calling him to testify.<sup>8</sup>

Two primary restrictions accompany the use of a rule of evidence like the one under consideration. First, the presumption cannot be arbitrary or unreasonable. The facts from which the inference is drawn must have a natural and rational evidentiary relation to the fact inferred.<sup>9</sup> It is generally conceded that the owner of a car usually controls it.<sup>10</sup> Secondly, the inference of fact cannot be made conclusive. The defendant must be permitted to rebut it if he can.<sup>11</sup>

Evidence that the defendant did not commit or authorize the violation is usually enough to rebut the presumption. Only one case appears to cast any doubt upon the sufficiency of such evidence.<sup>12</sup> The ordinance there in question provided that no person shall permit any vehicle registered in his name to stand or park illegally. The court stated that this ordinance established prima facie proof of the owner's guilt, but it did not go on to say what evidence would serve to rebut the presumption. Moreover, the court used ambiguous language<sup>13</sup> which another state court subsequently interpreted to mean that even an owner whose car had been stolen and parked illegally by the thief would be conclusively guilty. The latter court, faced with an almost identical ordinance, was so disturbed by this possibility that it refused to be influenced by the previous case. It would not even permit the raising of a prima facie presumption against the owner under the ordinance, declaring rather that the state would have to show by direct evidence that the defendant knew of or acquiesced in the violation.<sup>14</sup> Not until the legislature had specifically provided that evidence of ownership and a violation should constitute prima facie

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DENCE §§2483-2498 (3d ed. 1940) and articles there cited in note 1, page 287. On the presumption of innocence see 9 WIGMORE, EVIDENCE §2511 (3d ed. 1940).

7. "If he was not in control he could easily have produced a witness or witnesses to show it." *People v. Rubin*, 284 N.Y. 392, 397, 31 N.E. 2d 501, 503 (1940).

8. The Supreme Court put it succinctly in *Yee Hem v. United States*, 268 U.S. 178, 185 (1925): "If the accused happens to be the only repository of the facts necessary to negative the presumption . . . , that is a misfortune which the statute under review does not create but which is inherent in the case."

9. In *Manley v. Georgia*, the Supreme Court declared a Georgia statute to be unreasonable, arbitrary, and violative of due process of law where "the connection between the fact proved and that presumed [was] not sufficient." 279 U.S. 1, 7 (1929).

10. In *People v. Kayne*, 286 Mich. 571, 282 N.W. 248 (1938), testimony showed that in Detroit on January 14 and 15, 1938, in cases where an automobile was parked in violation of an ordinance, the owner parked it in 87.6% of the cases, members of the owner's immediate family in 8% of the cases, and some other person in 4.4% of the cases.

11. This is the reason courts have had to read the words "prima facie" into statutes which on their face would appear to subject the owner to conclusive liability. To presume conclusively that defendant committed or authorized the offense would violate the maxim that a defendant is presumed innocent until proved guilty. "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment." *Manley v. Georgia*, 279 U.S. 1, 6 (1929).

12. *Commonwealth v. Ober*, 286 Mass. 25, 189 N.E. 601 (1934).

13. The Massachusetts court said, "In a word this is one of the unusual instances where a person at his peril must see to it that the rules and regulations are not violated by his act or by the act of another." *Id.* at 32, 189 N.E. at 604.

14. *People v. Forbath*, 5 Cal. App. 2d Supp. 767, 42 P. 2d 108 (1935). The court used broad language to the effect that "evidence of the mere fact that an automobile is registered in the name of a person does not constitute prima facie proof, in a criminal case arising out of the illegal operation of the car, that the registered owner was the operator on such occasion, that he had knowledge of, aided or abetted in, or consented to, the same." *Id.* at 773, 42 P. 2d at 110.