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CRIMINAL LAW AND PROCEDURE — AUTOMOBILES — CONSTITUTIONAL LAW — CRIMINAL LIABILITY OF OWNER OF AUTOMOBILE — The recent decision of the Supreme Judicial Court of Massachusetts in the case of *Commonwealth v. Ober*[1] has brought to the fore a serious

[1] (Mass. 1934) 189 N. E. 601. Noted in 33 MICH. L. REV. 443 (1935); 14 BOSTON UNIV. L. REV. 672 (1934). In this case the defendant, the registered owner of an automobile, was convicted of illegal parking under a Boston ordinance punishing car owners who permitted or suffered their vehicles to be illegally parked. There was no evidence that defendant had herself parked the vehicle.

administrative problem arising out of the enforcement of traffic regulations. The problem is particularly acute in the illegal parking cases. Here it is usually impossible for the policeman to do more than tag the car, take down its registration number, and institute proceedings against the registered owner. The difficulty also often occurs in many other situations such as driving through red lights or stop streets where the offense is observed by a patrolman standing near by who is unable to give chase and arrest the driver. If the owner in these cases, when prosecuted, should demand a trial, the only evidence which the state has is that a vehicle bearing a certain number was used in committing a violation of the traffic laws, and that according to the records, the defendant is the owner of that vehicle. This evidence, in the absence of statutory provisions regarding its sufficiency, is clearly insufficient, since it does not connect the defendant with the offense.[2] To enforce the traffic laws under such circumstances would necessitate police forces many times the size of those maintained at present, and even then a large number of violators would slip through the meshes of the legal net because of the inability of the prosecuting policeman to identify the operator. To remedy this situation, three, or perhaps four, methods seem to be in use: (1) Enactments making the registered owner absolutely liable, including those providing for towing away and impounding illegally parked cars; (2) Enactments penalizing the owner or other person who permits or suffers his vehicle to be used in a traffic offense; (3) Statutes making the registration number prima facie evidence that the registered owner was operating the vehicle at the time of the offense. It is proposed here to discuss the problems arising under each of these types of enactments.

1. *Enactments Making Registered Owner Absolutely Liable*

The few cases [3] which can be assembled on this subject approach the problem from the intent angle. It is certainly true that lack of criminal intent is no defense to prosecutions for violations of traffic regulations,[4] but that really is not the question here. Such an approach is satisfactory when it is sought to hold the operator for a traffic offense, but it does not dispose of the question whether it is due process of law to make a criminal of the owner of a car when there is no evidence to connect him with the commission of the offense and such offense was not committed by his agent or servant.[5] As a general rule, removal of the

[2] Rex v. Ralston, 27 B. C. 563 (1919).

[3] See, for example, Rex. v. Labbe, (Quebec 1910) 17 Can. Crim. Cas. 417, discussing what is now 1 Quebec Rev. Stat. (1925), c. 35, sec. 53.

[4] See cases collected in 11 A. L. R. 1434 (1921).

[5] For a survey of the cases raising the question of the criminal liability of the

element of intent from a statutory offense has been held not a denial of due process,[6] but some courts [7] and writers [8] have stated that there are limits to the legislative power in such matters. In the parking cases it may be proper to hold the registered owner, because an illegally parked car is in the nature of a nuisance, and under the common law an owner is liable for nuisance regardless of intent,[9] but this solution does not take care of other traffic violations.

The problem of due process becomes most acute where it is sought to hold the owner for an offense committed by a trespasser or thief while in possession of the car. There seems to be some authority in the state courts to the effect that the legislature has no power to make otherwise innocent acts criminal,[10] but just what this means is not clear. Cases which seem to be more clearly in point are those in which it is said that while the power of the legislature to remove the element of intent from the ingredients of a crime is clear, there must nevertheless still be intent in the sense that the act which is denounced as criminal must be voluntarily and deliberately done in order to hold the defendant;[11] but on the other hand, a recent writer on the subject [12] has stated that in his opinion the ordinary defenses of compulsion and insanity are lost when the legislature has said that absence of intent is no defense to a given crime.

master or principal for the acts of his servants ar agents, see 14 BOSTON UNIV. L. REV. 672 (1934).

[6] Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 30 Sup. Ct. 663 (1910); United States v. Balint, 258 U. S. 250, 42 Sup. Ct. 301 (1922); People v. Fernow, 286 Ill. 627, 122 N. E. 155 (1919).

[7] See State v. Strasburg, 60 Wash. 106, 110 Pac. 1020, 32 L. R. A. (N. S.) 1216, Ann. Cas. 1912B 917 (1910) (legislature cannot deprive defendant of defense of insanity); In re Ah Jow, (C. C. Cal. 1886) 29 Fed. 181 (ordinance punishing every person visiting a place where opium is sold is unconstitutional).

[8] Sayre, "Public Welfare Offenses," 33 COL. L. REV. 55 at 79 (1933); Laylin and Tuttle, "Due Process and Punishment," 20 MICH. L. REV. 614 at 627 (1922).

[9] See Regina v. Stephens, L. R. 1 Q. B. 702 (1866). Thus in Commonwealth v. N. Y. C. & H. R. Ry., 202 Mass. 394, 88 N. E. 764 (1909), in a prosecution for allowing a train to block a crossing longer than the statutory period it was held that the fact that third persons had maliciously opened the air cocks on the brakes so that the train could not be moved was no defense.

[10] People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 16 Am. St. Rep. 578 (1889); State v. Julow, 129 Mo. 163, 31 S. W. 781, 50 Am. St. Rep. 443, 29 L. R. A. 257 (1895); Grossman v. Caminez, 79 App. Div. 15, 79 N. Y. S. 900 (1903); State ex rel. Larkin v. Ryan, 70 Wis. 676, 36 N. W. 823 (1888).

[11] 16 C. J., sec. 94 (1918); Louisville R. R. v. Commonwealth, 130 Ky. 738, 114 S. W. 343, 132 Am. St. Rep. 408 (1908); State v. Cox, 91 Ore. 518, 179 Pac. 575, 582 (1919); Reynolds v. Robinson, 8 Pa. Dist. & Co. Rep. 8 at 16 (1925); Rex v. McHale, (Manitoba) [1928] 2 Dom. L. R. 621; In re Ah Jow, (C. C. Cal. 1886) 29 Fed. 181.

[12] Sayre, "Public Welfare Offenses," 33 COL. L. REV. 55 at 75 (1933).

Some analogy may be drawn between the type of statute now under consideration and the statutes found in several of the states making the owner civilly liable for damages caused by the operator of the car. In the early case of *Camp v. Rogers*,[13] where a statute made the owners of carriages liable for the failure of the drivers to keep to the right, the Connecticut court held such an enactment unconstitutional as depriving the owner of jury trial and of his property without due process of law, because the statute made no exception in the case where the carriage had been stolen. And when the Michigan legislature enacted a statute making the owners of automobiles liable for damages resulting from their operation, except in the case where the car was in the hands of a thief, the law was held invalid by the Michigan court because it did not also except the case of a trespasser using the car without the owner's permission for such use.[14] When, however, the statute was changed so as to make an exception in this case also, the new law was held constitutional,[15] and the current of authority in other states seems to uphold similar statutes making owners liable in many cases where the relationship between the owner and driver is not that of master and servant, or principal and agent.[16] Also in a recent decision the United States Supreme Court assumed without much argument that such statutes did not violate the Fourteenth Amendment.[17] It should

[13] 44 Conn. 291 (1877). The court said (at p. 297), "If such a law . . . were to be held valid, then a law that should by a merely arbitrary rule make one man liable for the debts of another would be valid." But see Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928) (statute making lessor of motor vehicle liable for damages held valid).

[14] Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann Cas. 1915A 1163 (1913).

[15] Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N. W. 520, L. R. A. 1918A 916 (1917). See also Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69 (1928) (family purpose statute held valid).

[16] Seleine v. Wisner, 200 Iowa 1389, 206 N. W. 130 (1925); O'Neill v. Williams, 127 Cal. App. 385, 15 Pac. (2d) 879 (1932); Kernan v. Webb, 50 R. I. 394, 148 Atl. 186 (1929); Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928). Statutes subjecting the vehicle to a lien for damages under certain circumstances are also valid: Ex Parte Maryland Motor Car Ins. Co., 117 S. C. 100, 108 S. E. 260 (1921); *cf.* Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S. W. 54 (1916).

[17] Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599 (1933). In an earlier case, Marvin v. Trout, 199 U. S. 212, 26 Sup. Ct. 31 (1905), the Court had held valid an Ohio statute imposing liability upon the owner of a house used for gambling when he knew of such use. As to the validity of other statutes imposing liability upon the owner of real property, see City of East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198, 7 Ann. Cas. 1015 (1906) (liability of landlord for tenant's water rent); People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454 (1917) (abatement of house of prostitution as nuisance); Bunkley v. Commonwealth, 130 Va. 55, 108 S. E. 1 (1921) (same).

be noted, however, (1) that these are all civil cases, and there may be more reluctance on the part of the courts to hold automobile owners criminally liable for offenses by operators than to hold them civilly liable for damages arising out of the operation of the car; and (2) in no case has the problem of the owner's liability under such a statute when the damage was done by a thief or a trespasser been placed before the courts.

Another class of cases much closer to the present problem is presented under the statutes providing for the forfeiture of cars used in the liquor traffic or otherwise to defraud the government of its taxes. In the leading case of *Goldsmith, Jr.-Grant Co. v. United States*[18] the United States Supreme Court upheld the forfeiture, though whether on analogy to the common law of deodand, or on the basis of administrative necessity is not clear. The Court, however, expressly reserved for future decision the question arising when the car was used by a thief or trespasser at the time of the offense.[19] The lower federal courts, following this decision, refused to decree forfeiture in the case of trespass or theft, thus apparently denying the deodand approach,[20] but there seemed to be some dispute as to the forfeiture of the interests of innocent owners generally.[21] In one case a district court states that the rule is that the car of an innocent owner may be constitutionally forfeited, except where the illegal use was by a trespasser or thief, and that the burden is on the owner to bring himself within these exceptions which make the forfeiture statute unconstitutional in its application.[22]

[18] 254 U. S. 505, 41 Sup. Ct. 189 (1921).

[19] 254 U. S. 505 at 512 (1921):

"The changes are rung on the contention, and illustrations are given of what is possible under the law if the contention be rejected. It is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. . . . [the law] has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it. *And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent.*" (Italics ours.)

The court also refused to pass upon the point in United States v. One Ford Coupé, 272 U. S. 321, 47 Sup. Ct. 154, 47 A. L. R. 1025 (1926); and Van Oster v. Kansas, 272 U. S. 465, 47 Sup. Ct. 133 (1926).

[20] United States v. One Buick Roadster, (D. C. Mont. 1922) 280 Fed. 517; United States v. One Ford Coupé Automobile, (D. C. S. D. Idaho 1927) 21 F. (2d) 639.

[21] *Cf.* United States v. One Chevrolet Coupé, (D. C. E. D. Mo. 1925) 9 F. (2d) 85; The Dependent, (D. C. E. D. La. 1928) 24 F. (2d) 538; and the recent case of United States v. One Dodge Truck, (D. C. Wyo. 1934) 9 F. Supp. 157, where a bailee loaned the car to the bootlegger, despite the owner's instructions not to do so, and forfeiture was decreed.

[22] United States v. One Ford Truck, (D. C. Wyo. 1932) 3 F. Supp. 283.

The result of these cases would seem to be that in civil cases the owner's property may be confiscated or he may be made liable in damages, save when the operator is a thief or trespasser. But does this rule also hold in criminal cases? Can an innocent owner be criminally liable for the acts of the driver? The Massachusetts case of *Commonwealth v. Ober* [23] throws little light on this problem, for it contains little discussion of the constitutional question. The case would seem to say that an ordinance making the owner liable is constitutional on the whole, but probably the court, if the case were presented of illegal operation by a thief or trespasser, would hold the act unconstitutional in its application to such a set of facts.[24] And in accordance with the rule that a statute is presumed constitutional until the contrary is shown, the burden should be on the defendant to show such facts as will relieve him of liability.[25] But at all times it should be borne in mind that we are here dealing with a criminal statute and that in the criminal field the courts are more solicitous in assuming the existence of the rights in the defendant. Under a previous dictum of the Massachusetts court in the case of *Commonwealth v. Certain Motor Vehicle* [26] it would seem that the innocent owner (in that case a conditional vendor) is not subject to any criminal penalties whatsoever, though the car itself might be forfeited for illegal use. The weight of this dictum is not undermined by the case of *Commonwealth v. Ober* [27] because in that case the defendant failed to offer any evidence whatsoever and sought to have the prosecution dismissed on the ground that the ordinance in question was entirely invalid.

Perhaps a more satisfactory method of imposing as nearly absolute liability as is possible within the limits of due process is the towage and pound method, whereby the illegally parked car is removed to the city pound and returned to the owner on the payment of a pound fee. This method has been approved by the Louisiana court [28] and is probably subject to the same limitations as is the forfeiture procedure. It can, of course, be used only in the illegal parking cases.

[23] (Mass. 1934) 189 N. E. 601.

[24] See the discussion in 14 BOSTON UNIV. L. REV. 672 (1934).

[25] United States v. One Ford Truck, (D. C. Wyo. 1932) 3 F. Supp. 283.

[26] 261 Mass. 504 at 508, 159 N. E. 613 at 614 (1928). The court said, ". . . where the person so [illegally] using the *res* is the owner or rightfully possesses it, the forfeiture is in the nature of a punishment. . . . If it were only a punishment, no argument is needed to show that it should not be imposed upon one who is innocent of guilt."

[27] (Mass. 1934) 189 N. E. 601.

[28] Steiner v. New Orleans, 173 La. 275, 136 So. 596 (1931).

2. *"Suffer or Permit" Ordinances and Statutes*

In the case of *Commonwealth v. Ober*[29] the ordinance in question read,

> "No person shall allow, permit or suffer any vehicle registered in his name to stand, or park in any street . . . in violation of any of the rules and regulations of the Traffic Commission of the City of Boston."

Other ordinances of this type are found in other cities[30] and there are also statutes whose language is very similar in many states, particularly those sections of the vehicle codes forbidding parking in front of driveways, fire hydrants, on the main traveled portion of highways, and those requiring brakes to be set on a parked vehicle.[31] Two questions arise under such enactments: (1) What is the meaning of the words "suffer" and "permit"? And (2), if they are construed to make the owner absolutely liable, are such enactments constitutional? The second problem, of course, has been discussed above, and the only question remaining is one of construction. In the case of *United States v. Gregory*[32] there was a proceeding to confiscate property under a federal statute declaring forfeited the property of every person who suffered or permitted his property to be used as a means of ingress and egress for an illicit distillery. The defense was lack of knowledge on the part of the owner. The court held that the essence of "suffering" and "permitting" was knowledge on the part of the owner, and that evidence of lack of knowledge was admissible. A perusal of the cases cited in "Words and Phrases" shows that there seem to be two meanings to these words. When the word "suffer" is used in a deed of special warranty[33] and in Section 3 (3) of the Bankruptcy Act[34] in the sense of suffering incumbrances, or suffering preferences through legal pro-

[29] (Mass. 1934) 189 N. E. 601.

[30] See Chicago Rev. Code (1931), sec. 2015, p. 787; Detroit Comp. Ordinances (1926), p. 246; 1930 Supp. to Municipal Code of Cleveland, sec. 2445.

[31] See sections 26 and 27 of the Uniform Act Regulating Traffic on the Highways as set forth in HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, pp. 541-542 (1926).

[32] (C. C. S. D. N. Y. 1879) 17 Blatchf. 325, Fed. Cas. 5803.

[33] See Shaffer v. Greer, 87 Pa. 370 (1878); United States v. Robins Dry Dock & Repair Co., (C. C. A. 1st, 1926) 13 F. (2d) 808; Mackintosh v. Stewart, 181 Ala. 328, 61 So. 956 (1913). But see also Smith v. Eigerman, 5 Ind. App. 269, 31 N. E. 862, 51 Am. St. Rep. 281 (1892); Polak v. Mattson, 22 Idaho 727, 128 Pac. 89 (1912); Block v. Citizens' Trust & Savings Bank, 57 Cal. App. 518, 207 Pac. 510 (1922), cases holding that the word "suffer" does not apply to incumbrances not caused by the act of the party involved, and not within his power to prevent.

[34] Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74 (1901); In re Rung Furniture Co., (C. C. A. 2d, 1905) 139 Fed. 526.

ceedings, many courts hold that intent makes no difference, and that the result, without more, is all that counts. On the other hand, the weight of authority seems to be that when used in criminal statutes the words "suffer or permit" connote knowledge.[35] In *Commonwealth v. Ober*[36] no evidence was introduced by the commonwealth tending to show knowledge of the offense on the part of the owner, or that the car was driven by her servant, agent, or bailee, and the defendant offered no evidence whatsoever. Since the burden was on the commonwealth to prove all the essential elements of the offense, the case was criticized because it was felt that the prosecution had failed to meet this burden.[37] As a result, the decision would seem to say either that lack of knowledge is no defense under this type of regulation, or that the burden is on the defendant to prove such lack of knowledge. Because of the possibility that other courts may construe such ordinances as requiring the prosecution to prove knowledge on the part of the owner, it is submitted that this is not a very satisfactory method of handling the problem under consideration.

3. *Prima Facie Evidence Statutes*

A third method of meeting the situation is by a statute making the registration tag prima facie evidence of the fact that the owner was the operator at the time of the offense. So far as can be discovered, this method, despite its simplicity, has not been very widely used.[38] The Pennsylvania statute of this type is extremely fair and may be taken as a model. It makes the registration tag prima facie evidence that the owner was the operator, but then provides that if the owner will testify as to who the real operator was, and give the name of that person, if known to him, then the burden of proof shall shift back to the common-

[35] Selleck v. Selleck, 19 Conn. 501 (1849) (suffering animals to run at large); Town of Collinsville v. Scanland, 58 Ill. 221 (1871) (same); Wilson v. State, 19 Ind. App. 389, 46 N. E. 1050 (1897); Willis v. Gerking, 109 Wash. 382, 186 Pac. 1064 (1920); Lancaster Hotel Co. v. Commonwealth, 149 Ky. 443, 149 S. W. 942 (1912) (revocation of liquor license for suffering and permitting gambling on premises). But see In re Cullinan, 88 App. Div. 6, 84 N. Y. S. 492 (1903) (in revocation of liquor license for gambling, lack of knowledge on part of proprietor is no defense when employee permits gambling); People v. Harrison, 183 App. Div. 812, 170 N. Y. S. 876 (1918) (owner riding in car and talking to wife is liable for permitting car to be driven at unlawful speed).

[36] (Mass. 1934) 189 N. E. 601.

[37] 33 MICH. L. REV. 443 (1935).

[38] See Purdon's Pa. Stat. Ann., tit. 75, sec. 739 (Pocket Part 1934); also 19 Complete Stats. of England 67 (1931), being sec. 13 (2) of the Locomotives Act, 1898 (61 and 62 Vict. c. 29); modified by Road Traffic Act, 1930 (20 and 21 Geo. V, c. 43, sec. 113 (3), 23 Complete Stats. of Eng. 607).

wealth to prove that the owner was in fact the operator.[39] The constitutionality of this statute will depend on the usual tests of prima facie evidence statutes, but it is difficult to imagine a fairer enactment, or one setting up a more reasonable presumption in view of the control which an owner usually has over his personal property.[40]

Beginning in 1910 with the case of *Mobile, J. & K. C. R. R. v. Turnipseed*,[41] followed closely by the case of *Bailey v. Alabama*,[42] the Supreme Court of the United States has gradually been evolving tests for determining the constitutionality of prima facie evidence statutes under the due process clause.[43] The most thorough exposition of the Court's approach is found in the opinion of Mr. Justice Cardozo in the recent case of *Morrison v. California*.[44] This was a prosecution under the Alien Land Law of California which provided that when the state had proved acquisition of real estate and the indictment alleged alienage and ineligibility to citizenship on the part of the owner, then the burden of proving citizenship or eligibility fell upon the defendant. In holding such a provision invalid, the Court made it clear [45] that no formula could be laid down, but the tests of common sense must govern: a statute which requires the state to prove enough facts with a sinister significance as to make it just for the defendant to offer excuse or explanation, or which recognizes that a balancing of convenience makes it just that the defendant with peculiar opportunities for knowledge should be required to disclose that knowledge, without subjecting

[39] Purdon's Pa. Stat. Ann., tit. 75, sec. 739 (Pocket Part 1934) reads as follows:

> "In any proceeding for a violation of the provisions of this act or any local ordinance, rule or regulation, the registration plate displayed on such motor vehicle shall be prima facie evidence that the owner of such motor vehicle was then operating the same. If at any hearing or proceeding, the owner shall testify, under oath or affirmation, that he was not operating the said motor vehicle at the time of the alleged violation . . . and shall submit himself to an examination as to who at that time was operating such motor vehicle, and reveal the name of the person, if known to him . . . then the prima facie evidence arising from the registration plate shall be overcome and removed and the burden of proof shifted."

No reported decision either in the county or appellate courts of the state can be found in which the constitutionality of this statute has been passed upon.

[40] See Buffalo v. Thorpe, 132 Misc. 307, 230 N. Y. S. 187 (1928).

[41] 219 U. S. 35, 31 Sup. Ct. 136, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A 463 (1910).

[42] 219 U. S. 219, 31 Sup. Ct. 145 (1911).

[43] See McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 Sup. Ct. 498 (1916); Manley v. Georgia, 279 U. S. 1, 49 Sup. Ct. 215 (1929); Western & A. R. R. v. Henderson, 279 U. S. 639, 49 Sup. Ct. 445 (1929); 17 CAL. L. REV. 565 (1929); 51 A. L. R. 1139 (1927).

[44] 291 U. S. 82, 54 Sup. Ct. 281 (1934).

[45] 291 U. S. 82 at 88-90 (1934).

him to oppression, is valid. Under these tests it is submitted that the statute in question is constitutional.

As has been shown, it is believed that statutes and ordinances making the owner of an automobile absolutely liable for traffic violations are constitutional, save in the case where the offense was committed by a thief or a trespasser. Such a method of treatment, however, is unnecessarily harsh, and it is difficult to understand what good can be accomplished by punishing the innocent conditional vendor or lessor of a vehicle, or even an innocent master in a case where his servant disobeys instructions. The public policy of making a financially responsible person liable for the operation of vehicles is not present here as in the civil cases. On the other hand, the "suffer or permit" type of enactment either leads to the same harsh result, or else imposes such a burden on the prosecution as to make it impractical. It is submitted that the most just solution and the one freest from complications is the prima facie evidence statute. Under such a law, no really innocent owner need worry about criminal liability for the acts of another, and the actual violator can usually be easily apprehended and punished. In this way all the necessities of the situation are taken care of, without oppression, and comparatively few difficult constitutional questions can be raised.

W. W. K.