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Mark Nasfell v. Ogden City, Utah : Brief of Respondents

Utah Supreme Court

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Case No. 7628

In the Supreme Court of the State of Utah

MARK NASFELL,

Plaintiff,

vs.

OGDEN CITY, UTAH,
a municipal corporation,

Defendant.

Respondents' Brief

FILED

MAY 19 1951

Clerk, Supreme Court, Utah

PAUL THATCHER,
CLYDE C. PATTERSON,
CHARLES H. SNEDDON,
JACK A. RICHARDS,
Attorneys for Respondent.

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In the Supreme Court of the State of Utah

MARK NASFELL,

Plaintiff,

vs.

OGDEN CITY, UTAH,
a municipal corporation,

Defendant.

STATEMENT OF FACTS

The statement of facts set out in the plaintiff's brief is a correct statement of the facts as stipulated and which are therefore controlling in this appeal.

STATEMENT OF POINTS

The city will answer and argue the five points posed by the appellant in the order set forth and argued in appellant's brief. In addition, the city contends that its ordinance No. 343 is merely declarative of what was already the law, in that, even without ordinance No. 343, proof of a vehicle standing or parking in violation of an ordinance of Ogden City, together with proof that the defendant is the owner of that vehicle is *prima facie* evidence that the defendant owner committed or authorized the commission of such violation.

POINT I.

APPELLANT'S CONTENTION THAT IT IS BEYOND THE POWER OF OGDEN CITY TO PASS SUCH ORDINANCE NO. 343.

The City's answer to this contention of the appellant is three-fold. First, it is submitted that the City has not only those powers "given it directly by the constitution or statute, or such powers as may be reasonably implied as being necessary in the enforcement of such powers," but also those necessarily or fairly implied in or incident to the powers expressly granted. Second, it is submitted that power to enact the ordinance is necessarily implied under power delegated to it by statute. Third, it is submitted that Ordinance No. 343 is within the specific grant of general police power as being one necessary and proper to provide for the safety and improve the peace and good order, comfort and convenience of the City and its inhabitants.

First then, regarding the breadth of the powers of municipal corporations, we believe that one citation will be all that is necessary to open this avenue for the court. In *Volume One, McQuillan on the Laws of Municipal Corporations, Second Edition, Section 367, Note 41*, it is said:

"Every investigation, therefore, of its (the municipality's) powers must be conducted from the standpoint of such laws. Wherefore, the usual formula, invariably supported by judicial utterances and judgments, in substance is: That the only powers a municipal corporation possesses and can exercise are: (1) Those granted in express terms; (2) those necessarily or fairly

implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable. This rule is supported by a wealth of decisions in practically every state as illustrated by the more recent cases set forth below."

If the opinion of this eminent authority and the cases cited by him establish the law to be as stated, and we believe they do, then it is submitted that Ordinance No. 343 is an exercise of a power "fairly implied in or incident to the powers expressly granted." As will appear from our argument on the second division of this point, the circumstances are such that the power to regulate traffic and parking on the public streets is absolutely aborted unless it carries with it the power to establish such rules of evidence as make it practically possible to enforce the parking regulations. Certainly the means of enforcement of a regulation is "fairly" implied in the power to make the regulation.

} why

The city contends that the power to enact that ordinance is necessarily implied under the power delegated to it by statute. Section 57-7-85, Utah Code Annotated, 1943, provides in part as follows:

"(a) The provisions of this act are intended to confer upon local authorities the right of, and shall not be deemed to deprive said authorities of existing powers with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power in:

"(1) Regulating the standing or parking of vehicles including the requirement for payment of a parking fee which fee may vary in order to relieve traffic congestion in designated areas."

3

How does this give power to pass rules of evidence?

That section was enacted in 1941, and it expressly reserves to local authorities their "existing powers" to regulate the standing or parking of vehicles on streets and highways. What were the "existing powers" in those matters? Prior to the enactment in 1941 of the Uniform Act Regulating Traffic on Highways, of which Act Section 57-7-85 above quoted is one section, the local authorities had much broader powers over traffic, use of the streets, and the like. Some of those powers are defined in the following code sections:

Section 15-8-11, Utah Code Annotated, 1943:

"They (boards of commissioners and city councils of cities) may regulate the use of streets, alleys avenues, sidewalks, crosswalks, parks and public grounds, prevent and remove obstructions and encroachments thereon,"

Section 15-8-30, Utah Code Annotated, 1943:

"They may regulate the movement of traffic on the streets, sidewalks and public places, . . ."

Section 15-8-84, Utah Code Annotated, 1943:

"They may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein; and may enforce obedience to such ordinances with such fines or penalties as they may deem proper; pro-

vided, that the punishment of any offense shall be by fine in any sum less than \$300 or by imprisonment not to exceed six months, or by both such fine and imprisonment."

The city contends that the enactment of the Uniform Traffic Act, by Section 57-7-85, reserved to Ogden City all rights as to parking of vehicles on its streets that had theretofore been delegated to the city by the sections of the code above quoted. It follows that the city's power to enact its ordinance No. 343 is derived not only from Section 57-7-85, Utah Code Annotated, 1943, but also the powers delegated by Sections 15-8-11, 30 and 84, Utah Code Annotated, 1943.

this does not follow at all

These sections give the power to Ogden City to regulate parking on its streets, and, if it desires, to exact a parking fee for said parking. They give the city powers as broad and as all inclusive as can be stated in all matters relating to parking and standing vehicles on its streets. Indeed, it appears the local authorities are given the exclusive right to control and regulate parking within their own boundaries.

True, but not to use rules of evidence

It is common knowledge that because of the number of motor vehicles involved, the miles of parking space, the limited number of police officers, and the other limitations of time and facilities, it is practically impossible for the police officers to observe and arrest the person who actually parks a vehicle in violation of the parking laws. For example, there are 1757 parking meters in Ogden City. They are along both sides of streets totaling approximately two miles in length. It would require an officer full time during the hours the

also with burglar, larceny etc

This is not in the record

meters are required to be operated for each half block of meters to actually observe the persons parking the same.

Consider the other parking laws---parking in alleys, by fire hydrants,, in theater zones, and the like. From the very nature of the violation, it is very rare that a police officer or an interested citizen actually observes the drivers park in violation of such laws. The practical situation is that an officer or someone affected thereby observes a vehicle unlawfully parked. The driver might not return to the vehicle for hours; and undoubtedly oftentimes the person who drives the vehicle away is not the person who parked it.

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There are just not enough police officers in Ogden City and undoubtedly not in any other city to wait by each improperly parked vehicle until the driver returns. And even if there were, if appellant's arguments are followed to their logical conclusions, it is impossible in the great majority of cases for the city to prove that the person who gets into an improperly parked car and drives it away is the person who improperly parked the same.

It follows from the practical situation and physical facts that parking laws cannot reasonably be enforced by the city unless the registered owner of the vehicle which is parked in violation of any of the parking laws is prima facie responsible for the violation of that law.

The legislature has delegated plenary powers to the cities to control and regulate parking. Does that means the cities have the power only to enact ordinance

defining what is and what is not legal parking, or does it mean that the city, considering all the physical conditions and circumstances can also give those parking ordinances life and enforceability by providing that the owner of vehicles is prima facie responsible for the parking violations? It is not to be presumed that the legislature did a useless thing when it gave cities power to control and regulate parking. It follows that the cities have the implied power to enact such ordinances as make the parking ordinances enforceable. Ogden City's ordinance No. 343 is such an ordinance.

*It does
not
follow*

The same argument as herein made by the appellant has been made in other like cases, to which the same answer has been given by the city there involved.

In the case of *People v. Bigman*, 38 Calif. App. 2d Supp. 773, 100 P. (2) 370, the Supreme Court of California had before it an interpretation of the validity of a statute whose provisions were substantially identical to the provisions of the ordinances here before the court, and the court, in finding that the statute was constitutional and within the legislative powers of the state, said as follows:

“The great convenience to the state through operation of this presumption in the proof of identity of operators in cases of illegal parking on the thousands of miles of highways in the state or to the officers of a municipality in enforcing the laws within the more limited but still relatively extensive public streets therein, is readily apparent. It is a matter of common knowledge, of which we may take notice, that it would be, and has in fact been, impractical for

a city the size of that wherein this prosecution arose (Los Angeles; and we do not doubt that the same is relatively true in municipalities throughout the state) to maintain a police force large enough to personally detect any substantial portion of vehicular parking law violators by observing them in the act of illegal parking or by discovering the illegally parked vehicle and awaiting the return of the absent operators. The extent of the convenience to the state, it seems apparent to us, will far outweigh such inconvenience as may be occasioned to some registered owners whose automobiles when used by others may be illegally parked and result in the owners having to appear and answer the charges. In such instances, however, except in the comparatively rare cases of stolen or unlawfully moved cars, the owners can protect themselves by permitting their automobiles to be used only by persons who will be responsible to them for any unlawful parking of the vehicles. In any event, the in-convenience is basically caused not by the operation of the presumption of identity of the operator but rather by the violation by the actual operator of the substantive law involved. In no way whatsoever does the operation of the presumption preclude the owner from his right to challenge the fact as to who did operate the vehicle."

In the case of *City of Chicago v. Crane*, 319 Ill. App. 623, 49 N. E. (2) 802, (1943), the problem there before the court was much the same as here, and on the question of the difficulties of arresting the person who actually parked the vehicle, the court said:

"It is common knowledge that many thousands of automobiles are parked in the streets at all times,

and it would be inconvenient and impossible for a municipality such as Chicago to keep watch over the parked vehicles to ascertain who in fact operated or parked them."

In a Massachusetts case, *Commonwealth v. Ober*, 286 Mass. 25, 189 N.E. 604, the court said:

"In the instant case, the public mischief to be averted is obvious. The inconvenience of keeping watch over parked vehicles to ascertain who in fact operates them would be impracticable, if not impossible, at a time when many vehicles are parked. We think the rules and regulations of the Boston Traffic Commission . . . were framed and intended to cover and make punishable any violations of Section 31 (5), 1917 (4) by the owner of the registered vehicle, whether the particular violation or violations were by the owner or were by a person allowed, permitted or suffered by the owner of any vehicle registered in his name, in any street, way, highway, road or parkway under the control of the City of Boston."

Where the same question was before the Missouri court in *City of St. Louis v. Cook*, 221 S.W. (2) 468, the court said:

"From a practical standpoint it would be impossible for the police department of the City of St. Louis to keep a watch over all parked vehicles to ascertain who in fact operates them. In such a situation and in view of the purpose of City's traffic regulations, the City having shown the vehicle to have been parked in violation of the regulatory ordinance and having shown a defendant to be the person in whose name the

vehicle is registered, it would seem an owner-registrant, a defendant, could not be said to be put to great an inconvenience or to an unreasonable hardship in making an explanation if he desires. The connection between the registered owner of an automobile and its operation is a natural one. While there are no doubt instances where an owner's automobile is used without his authorization, yet it is not generally so. If, in fact, defendant's vehicle was parked at the time without any authorization from defendant, such fact was peculiarly within defendant's knowledge and, if defendant had desired, the fact could have been easily proved with such certainty as to almost entirely preclude a false conviction. In our opinion the inference authorized by the Ordinance No. 41240 is a reasonable one. The ordinance does not make any inferred fact conclusive. And the ordinance does not require that a defendant testify; nor does it deny him his right to make out his defense, or to testify."

Of course, there are not the number of vehicles in Ogden City that there are in Chicago, Boston, Los Angeles, and St. Louis, which are the cities the cited cases concern. However, there also are not the number of police officers in Ogden City that there are in those large cities, and the arguments mentioned in those cases apply with equal force to a city the size of Ogden.

In *Commonwealth v. Kroger*, 122 S.W. (2) 1006, the Supreme Court of Kentucky had before it an ordinance of the city of Newport, Kentucky. The defendant made the contention that the authority to make such a prima facie statute was not given the city by the legislature of the state, the defendant maintaining that while it was competent for a state legislature to provide for

the creation of prima facie presumptions, that right was not possessed by municipal legislative boards. The Supreme Court of Kentucky found that by necessary implication, the grant of authority by the legislature to the city to legislate under the general police power was sufficient to regulate traffic, and having regulated traffic, it was likewise proper for them to provide for such a rule of evidence as necessary for effective enforcement.

Counsel contends that the courts of this state are created by the Constitution and by statutes passed by the State Legislature, and that cities are not given power of any sort over such courts. It is submitted that within the scope of authority which has been delegated to cities, they may enact ordinances which the courts of this state must recognize. We fail to see what appellant means by his contention that the cities have no power over the courts. Certainly, within the realm of delegated powers, the courts are bound by the ordinances the cities enact. So, the problem reverts back to the initial contention and the initial problem, and that is whether or not in this case Ogden City has the express or implied power to enact its ordinance No. 343. If the city does have that power, then the ordinance is binding on the courts. If it does not have that power, the ordinance is invalid and therefore not binding on the courts. We submit that the ordinance is valid and binding.

As to the third division of our argument on this point, it is observed that by the provisions of Section 15-8-84 cities are granted not only power to pass ordinances necessary for carrying into effect powers and

duties specifically conferred, but also "such as are necessary and proper to provide for the safety, . . . improve the morals, peace and good order, comfort and convenience of the cities and the inhabitants thereof and for the protection of property therein." (Italics added). We believe that this court will take judicial notice of the dangers, the breaches of the peace and the chaos, the discomfort and inconvenience which would inevitably result in any American city of any size, in this motorized age, if there were no effective regulations of the parking of private vehicles upon the city streets. The streets would be monopolized and traffic obstructed by the selfish and unsocial among vehicle operators. Their activities would inevitably provoke the resentment and retaliation of other citizens. For all practical purposes the business district of a modern city can not exist as a comfort and convenience to the citizens unless the parking of vehicles can be effectively regulated by the local public authority. Property values would inevitably fall and the city as an effective and functioning social unit would be paralyzed if such regulations were not effective.

Perhaps this picture is to some extent exaggerated, but if so, the exaggeration is slight.

This court has held in the case of *Gronlund vs. Salt Lake City Utah*, 194 *Pac. 2nd* 464, that this general grant of police power to cities is sufficient to support a Sunday closing law so long as it also violates no constitutional provision. Certainly if the closing of businesses on Sunday is within the powers of the city, the power to make effective parking regulations for vehicles which is even more necessary to the public

welfare, is also within the grant. And as has been pointed out heretofore, the enforcement of a parking regulation is as a practical matter impossible unless the rule established by Ordinance No. 343 is available to the local authorities. It seems clear that the power to pass Ordinance No. 343 is specifically included in the grant of powers to provide for the general welfare as above quoted.

We submit that the appellant's point number one is not well taken.

POINT II

APPELLANT'S CONTENTION THAT SUCH ORDINANCE NO. 343 IS UNCONSTITUTIONAL UNDER THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF UTAH, IN THAT IT DENIES HIM CERTAIN PRIVILEGES GRANTED HIM UNDER SUCH CONSTITUTIONS.

It is difficult for the city to understand how the appellant can urge that ordinance No. 343 is unconstitutional when, on Page 9 of his brief and again on Page 14, he indicates that had the State Legislature enacted the same ordinance, it would have been within its authority. However, we are answering the contentions made by the appellant, (1) that the ordinance denies the accused the presumption of innocence until proven guilty beyond a reasonable doubt, and (2) that the ordinance in effect makes the defendant take the witness stand against his will.

To see if this ordinance denies the accused the presumption of innocence until he is proven guilty beyond

reasonable doubt, we must determine what the words "prima facie evidence" mean in the ordinance. The words "prima facie evidence" are used in Section 103-36-1, Utah Code Annotated, 1943, wherein it is provided:

"Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt."

The meaning of "prima facie evidence" in that statute has been repeatedly interpreted and defined by the decisions of this court. One of the earliest such decisions, and one of the most complete, is the case of *State v. Potello*, 119 P. 1023, 40 Utah 56. It is there determined as follows:

"Now, what is meant by the term 'prima facie' as here used in the statute? If the meaning to be given it is that, unless rebutted by other evidence, or discredited by circumstances, it becomes, conclusive of the fact of guilt and to operate upon the minds of the jury as decisive of that fact, a meaning sometimes given the term (*Kelly v. Jackson*, 31 U. S. 622, 9 L. Ed. 523; *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72) then again are we of the opinion that the legislature would have encroached upon the judiciary. That is to say, we would be of such opinion, if, upon the proof of the facts which the legislature has declared shall be deemed and unexplained, the jury would be required to find the accused guilty of the alleged offense, though they should not be convinced of his guilt beyond a reasonable doubt. We, however, are of the opinion that the term 'prima facie' is not used in the statute in that sense. It frequently is used in

statutes similar to the statute here in question in the sense of only presumptive evidence. (*State v. Hardelein*, 169 Mo. 579, 70 S. W. 130; *State v. Intoxicating Liquors*, 80 Mo. 57, 12 Atl. 794; *State v. Kline*, 50 Ore. 426, 93 Pac. 237; *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248)

“In that sense we think it is used in this statute. That is, it is declared by the statute that from the proven facts of the larceny, recent possession in the defendant, and his failure to satisfactorily explain his possession, an inference or presumption arises, unless rebutted by other evidence or discredited by circumstances, of the further existing fact that is was the defendant who feloniously took the property, the person who committed the proved larceny, and hence a prima facie case of guilt is made against him. Not that the jury, on such proven facts, though unrebutted or not discredited by circumstances, are required to convict if upon such proven facts they are not convinced beyond a reasonable doubt of the accused’s guilt, but that they, upon such proven facts, if unrebutted or not discredited by circumstances, may presume or infer the further fact of the felonious taking by the accused, and if, upon all the evidence adduced, they are convinced beyond a reasonable doubt of his guilt, may convict.”

The later cases of *State v. Berretta, et al*, 47 Utah 479, 155 P. 343, and *State v. Donovan*, 77 Utah 343, 294 P. 1108, also clearly indicate that “prima facie evidence”, as used in the statute, is for the direction of the court as distinguished from the trier of the fact, be it judge or jury, and that when “prima facie evidence” of guilt

has been introduced by the state, even though that evidence is un rebutted and uncontradicted, the trier of the fact still must determine from all the evidence whether or not the defendant is guilty beyond a reasonable doubt.

In *St. Louis v. Cook*, supra, Ordinance No. 41240 read:

“The presence of any vehicle in or upon any public street. . . in violation of any ordinance regulating the parking of such vehicle. . . shall be prima facie evidence that the person . . . in whose name such vehicle is registered on either the records of the City License Collector or the records of the Secretary of State of the State of Missouri, committed or authorized such violation.”

As to that, the Illinois court said:

“The Ordinance No. 41240 does not in any way change the *burden of proof* the city must carry in making out a case, although the ordinance does affect the *burden of evidence*. See the exposition of the difference between *burden of proof* which does not shift and the *burden of evidence* which may shift to a defendant to produce, if he desires, evidence which, if believed, will meet a plaintiff’s prima facie case. *McCloskey v. Koplar*, 329 Mo. 527, at Page 541, 46 S. W. 2d 557, at page 563, 92 A. L. R. 641; Vol. IX, *Wigmore on Evidence*, 3d Ed., S 2485, pp. 270-274 and S 2487, pp. 278-284.”

In *People v. Kayne*, 286 Mich. 571, 282 N. W. 248, the court was charged with determining the validity of a prima facie ordinance passed by the city of

Detroit. The defense was made that the city, under the constitution of the state of Michigan, had no such authority to so legislate.

The court said as follows:

“In any criminal case, the burden of proof is upon the State to prove the guilt of the defendant beyond a reasonable doubt; a person accused of violation of a criminal law is presumed to be innocent, until he is proved guilty. Such axioms of law, however, do not exclude the use of rules of evidence provided for, by statute or ordinance, which place upon a defendant the burden of going forward with the evidence after the ‘prima facie evidence’ is introduced.”

The ordinance, therefore, does not deprive the accused of the presumption of innocence, nor does it allow him to be convicted upon less evidence than that establishing his guilt beyond a reasonable doubt. Indeed, the ordinance has nothing to do with the quantum of evidence required to convict the defendant. The constitutional requirement requiring defendant to be found guilty beyond a reasonable doubt thus remains intact.

Now as to the question of the ordinance requiring the defendant to take the witness stand against his will.

The problem has been before the Supreme Court of the United States and the Supreme Courts of other states. In the case of *Yee Hem v. United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904, the Supreme Court of the United States was examining a statute providing possession of opium should be deemed sufficient evidence to authorize conviction of the offense of concealing opium after importation, knowing the

same to have been unlawfully imported. The court put aside the point made by the defendant that the practical effect of the statute was to compel the accused person to witness against himself. Said the court:

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“The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of the circumstances and not from any form of compulsion forbidden by the Constitution.”

In the case of *City of St. Louis v. Cook*, supra, the appellant made the same argument as here made, and the court held that the defendant was not deprived of any constitutional right, such as being made to take the witness stand against himself.

On Pages 10 and 11 of appellant's brief, he seems to argue that Ordinance No. 343 is unreasonable because it is a common knowledge that in many instances the registered owner is not the sole user of his auto-

mobile. The City admits that the power of a legislative body to make the proof of certain facts prima facie evidence of other facts, as is done by Ordinance No. 343, is limited in that the fact presumed must reasonably flow from the facts proven. As said in *State v. Potello*, supra, Page 67 of Utah Reports:

“It undoubtedly is the established rule by the great weight of authority that the legislature has the power to declare that certain facts shall be prima facie, presumptive or conclusive, evidence of another and substantive fact essential to convict when they have some general relation to or connection with such other fact.”

The presumption that the registered owner of a vehicle parked his car or authorized the parking of his car in violation of a parking ordinance naturally and reasonably flows from the fact that he is the registered owner of the vehicle concerned. It has been so held in *St. Louis v. Cook*, supra, *City of Chicago v. Crane*, supra; *People v. Rubin*, 284 N. Y. 392, 31 N. E. (2) 501.

The court said in *People v. Bigman*, supra, Page 372:

“Relationship between the registered owner of an automobile and its operation is natural; if he is not the operator on any occasion that fact is directly within his knowledge and in the ordinary course of events can easily be proved with such certainty as almost entirely to exclude the possibility of a false conviction.”

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 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.

The city's ordinance No. 343 does not deprive the accused of any right secured to him by the Federal or State Constitutions.

POINT III

APPELLANT'S CONTENTION THAT THE CITY IS ENCROACHING UPON THE FUNCTIONS OF THE JUDICIARY, AND THE STATE LEGISLATURE.

Here again the contention is merely another way to state appellant's Point I. If the city has the express or implied power to enact Ordinance No. 343, the ordinance is binding upon the judiciary. If it has that power, the enacting of the ordinance is no more an encroachment of the functions of the judiciary or upon the functions of the state legislature than for the city to enact an ordinance under the powers delegated to it, for example, in Section 15-8-41, Utah Code Annotated, 1943, to suppress or prohibit prostitution and gambling and other related activities. There are legislative fields in which both the state legislature and the city commission of Ogden City can act without one encroaching upon the other. The question is whether or not Ogden City has the express or implied power to enact that ordinance.

It is submitted that the appellant has misconceived the ruling in *State v. Potello*, supra. That case held that by the express words of the Utah statute, to make

a *prima facie* case of larceny, the state had to prove the accused had possession of recently stolen property, and that he failed to give a satisfactory explanation therefor.

The court in said case did not hold that had the statute provided that mere possession of recently stolen property was *prima facie* evidence of guilt would be unconstitutional. The court did hold that if the statute made mere possession of recently stolen property *conclusive* evidence of guilt, that it would be unconstitutional.

It seems to the city that the case clearly interprets what is meant by *prima facie* evidence, and it clearly holds that the statute passed by the State Legislature complies with the constitutional provisions and is valid.

The appellant's brief says at Page 13:

“Ogden City's ordinance stops just where the legislation, assumed in the language of the court in the *Potello* case, stopped. It makes the mere ownership of the car, and proof that the car was illegally parked by someone, proof of the guilt of the owner. This clearly then is an attempt by the city to impose upon the courts of this state a substantive rule of evidence, which the state legislature, even with its much broader power, could not do under the language of the above quoted case, without imposing upon the functions of the judiciary.”

Ogden City's ordinance does not attempt to do what was condemned in the *Potello* case. Ogden City's ordinance still makes the proof of ownership and violation of the ordinance only *prima facie* evidence of

guilt, not conclusive. Under the ordinance, the defendant must be found guilty beyond a reasonable doubt.

POINT IV

APPELLANT'S CONTENTION THAT THE CITY HAS NEVER RECEIVED AUTHORITY FROM THE STATE ROAD COMMISSION TO PLACE PARKING METERS UPON STATE HIGHWAYS WITHIN ITS BORDERS.

The stipulation of facts does not include anything concerning whether or not Ogden City has received permission from a State Road Commission to install parking meters on 24th Street. There is, therefore, no evidence one way or the other before this court. It is presumed that a city exercise its powers in a lawful manner, and it is submitted that until evidence is introduced to the contrary, it should be presumed that Ogden City placed parking meters on 24th Street with permission of the State Road Commission.

Whether or not the State Road Commission has given that authority to Ogden City is not a matter of which this court can take judicial notice. The appellant should have introduced evidence on this question in the district court, or should have required the stipulation to cover the same. However, if this court can take judicial notice of the actions of the Road Commission in this matter, it will learn that the State Road Commission interprets the words "traffic control device" in Section 57-7-88, Utah Code Annotated, 1943, as not to include parking meters. The Commission

therefore permits any installation by local authorities of parking meters on any and all state highways at the sole discretion of the local authorities.

It is further submitted that the question of whether or not Ogden City has permission from the State Road Commission to erect parking meters on a state highway is a matter which is between Ogden City and the State Road Commission, and that the users of the highways are not proper parties to such a controversy. As long as traffic control devices and parking meters have been installed and are in use, the drivers of vehicles should observe and comply with the directions of those traffic control devices.

Moreover, section 57-7-85 expressly negatives any legislative intention to deprive local authorities of authority to regulate parking and charge a fee therefor by any device.

POINT V .

APPELLANT'S CONTENTION THAT THE PLAINTIFF IN THIS ACTION WAS NOT GIVEN DUE NOTICE OF ANY ACTION CONTEMPLATED BY THE CITY.

Paragraphs 4 and 5 of the stipulation of facts show that the jurisdiction of the city court over the appellant is based upon the issuance of a complaint, followed by the issuance and service of a summons upon the appellant ordering him to appear on a date certain to answer the charges in the complaint threthore filed. Ogden City makes no claim of jurisdiction over the appellant arising out of the placing of the ticket on the windshield of appellant's automobile. There

was personal service of summons upon the appellant; he was therefore served by one of the three methods which the appellant himself, in Page 16 of his brief, says is an authorized method of service.

The like point was raised in *Chicago v. Crane* supra, where the court held:

“The contention of defendant made at the opening of the trial (he has filed no brief in this court) seems to be that the court did not acquire jurisdiction over him because the police officer attached a ticket to the parked automobile. This is clearly a misapprehension. The city does not claim it obtained jurisdiction in this manner but says that afterwards a complaint was filed, a warrant issued and he was taken on the warrant and appeared in the trial of the case. Obviously the court had jurisdiction over him.”

CITY'S POINT I

THAT ORDINANCE No. 343 IS MERELY DECLARATIVE OF WHAT WAS ALREADY THE LAW, IN THAT, EVEN WITHOUT ORDINANCE No. 343, PROOF OF A VEHICLE STANDING OR PARKING IN VIOLATION OF AN ORDINANCE OF OGDEN CITY TOGETHER WITH PROOF THAT THE DEFENDANT IS THE OWNER OF THE VEHICLE IS PRIMA FACIE EVIDENCE THAT THE DEFENDANT OWNER COMMITTED OR AUTHORIZED THE COMMISSION OF SUCH VIOLATION.

It has been held that though there was no ordinance or statute defining prima facie evidence, a city makes a prima facie case in a trial for a parking violation by pro-

ing only that the defendant is the registered owner of the vehicle and that said vehicle was parked in violation of a parking ordinance. In *People v. Rubin*, 284 N. Y. 392, 31 N. E. (2) 501, the court said:

“The defendant also contends that violation of the ordinance was not proved. The record on this point is very brief. The defendant conceded that the police officer who made the charges found the car in question parked at the times and places charged in the city and county of New York for the length of time charged in the complaint and that the defendant was the licensed owner of the car in each instance. No evidence was offered by the defendant. No question is made of the right of the magistrate to take judicial notice of the character of the localities as falling within the description of the regulation. The concession made out a prima facie case. The contrary is urged because there was no direct proof that the stationing of the car in violation of the ordinance was done by the defendant. *To rule that this inference may not be drawn from the established facts would be to deny to the trier of the facts the right to use a common process of reasoning.* Justice v. Lang, 52 N. Y. 323. Ownership of a vehicle in civil cases has long been recognized as prima facie proof that it was being operated by or for the owner. *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78, 8 A. L. R. 785; *St. Andrassy v. Mooney*, 262 N. Y. 268, 186 N. E. 867. Here, ownership has been held a sufficient basis for an inference of personal conduct. If he was not in control he could easily have produced a witness or witnesses to show it. *People v. Dyle*, 21 N. Y. 578; *People ex rel. Woronoff v. Mallon*, 222 N. Y.

456, 465, 119 N. E. 102, 4 A. L. R. 463. We find it competent under the circumstances to conclude from the proof that the owner of the car controlled the car and personally violated the regulation. *Commonwealth v. Ober*, 286 Mass. 25, 189 N. E. 601. Cf. *People v. Kayne*, 286 Mich. 571, 282 N. W. 248." (Italics Added)

In *City of St. Louis v. Cook*, supra, the court said on this point:

"Even when there had been no legislative action enacting such a rule of evidence the inference that the owner parked or was responsible for the parking of a vehicle has been held to be reasonable and sufficient, *City of Chicago v. Crane*, 319 Ill. App. 623, 49 N. E. 2d 802; *People v. Rubin*, 284 N. Y. 392, 31 N. E. 2d 501, although the supreme court of the State of Rhode Island was evenly divided on the question, *State v. Morgan*, 72 R. I. 101, 48 A. (2d) 248."

There is thus very good authority for the proposition that the city's ordinance No. 343 merely declares what is a rule of evidence in full force and effect and binding on the courts, even had that ordinance not been enacted. It follows that the ordinance, while it may be unnecessary, nevertheless is valid.

CONCLUSION

Ordinance No. 343 of Ogden City is thus supported and authorized on three grounds, any one of which would be sufficient:

- a. Its enactment is within the fairly or necessarily implied powers delegated to the city by

- Sections 15-8-11, 30 and 57-7-85, U. C. A., 1943.
- b. Its enactment is within the express powers delegated to the city by Section 15-8-84, U. C. A., 1943, to promote the peace, good order and convenience of the city and its inhabitants.
- c. It is merely declatory of a rule of evidence which exists without the ordinance and as a result of a common process of reasoning from the facts of the case.

The ordinance denies to the accused no rights given by the State or Federal Constitutions. No encroachment is made on the legislative or judiciary branches of the state.

Jurisdiction of the defendant was obtained in a manner authorized.

This court should therefore affirm the judgment of the district court.

Respectfully submitted,

Paul Thatcher
Clyde C. Patterson
Charles H. Sneddon
Jack A. Richards

Attorneys for Respondent

Respondent's Address:
Municipal Building
Ogden, Utah