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Criminal Law--Municipal Ordinance Imposing Vicarious Criminal Liability upon Registered Owner of Automobile for Parking Violations Does Not Violate Due Process

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CRIMINAL LAW—MUNICIPAL ORDINANCE IMPOSING VICARIOUS CRIMINAL LIABILITY UPON REGISTERED OWNER OF AUTOMOBILE FOR PARKING VIOLATIONS DOES NOT VIOLATE DUE PROCESS. *City of Kansas City v. Hertz Corporation,* 499 S.W.2d 449 (Mo. 1973).

In *City of Kansas City v. Hertz Corp.*,[1] the Supreme Court of Missouri recently joined a small number of jurisdictions which have upheld municipal ordinances imposing vicarious criminal liability upon the owners of improperly parked automobiles. These ordinances apparently have been particularly disputed by car rental companies whose customers have proved indifferent to municipal parking citations. Under the Kansas City ordinance, a registered owner could be held prima facie responsible even if it were proved that another was driving the vehicle, unless the owner could show the car was stolen or was otherwise being used without his consent.

The litigation stemmed from the issuance of a parking citation to the permissive user of a motor vehicle rented from the Hertz Corporation. The automobile was found illegally parked in a bus zone, and when the fine was not paid by the lessee the defendant Hertz was charged with the violation. Two ordinances were discussed by the court:[2]

> Section 34.1 *Owner* . . . . The operation or use of a motor vehicle in violation of the provisions of this chapter shall be prima facie evidence that said motor vehicle was at the time of such violation controlled, operated and used by the owner thereof.
>
> Section 34.344. *Registered owner prima facie responsible for violation.* If any vehicle is found upon a street in violation of any provision of this chapter, the owner or person in whose name such vehicle is registered in the records of any city, county or state shall be held prima facie responsible for such violation, if the driver thereof is not present.

Hertz was found guilty under section 34.344 in the municipal court, but obtained an acquittal on appeal to the circuit court. The supreme court reversed for the city, rejecting Hertz's argument that section 34.344 was not intended to impose absolute liability upon a

1. 499 S.W.2d 449 (Mo. 1973).
2. KANSAS CITY, MO., REV. ORDINANCES (1970).

non-driver who permits another to use his car. The court noted that section 34.1, defining "owner," generally creates only a presumption that the owner was the operator of the vehicle at the time of the violation which may be rebutted by a showing that the automobile was being driven by another. Section 34.344, however, was held to place absolute responsibility upon the owner regardless of a showing that another was using the car.[3]

The court also rejected Hertz's contention that the ordinance violated the due process clauses of the Missouri and United States Constitutions. The court found that the purpose of the ordinance was to permit public streets to be used to their best advantage by the public. Reasoning that the major problem of keeping traffic moving necessitated strong action on the part of the city and that the fine was minor and there was no potential incarceration, the court held the ordinance constitutional.

The *Hertz* decision is certainly not according to the weight of authority,[4] but a few other jurisdictions have upheld similar ordinances. The Massachusetts decision in *Commonwealth v. Minicost Car Rental Inc.*,[5] presented an identical situation to that of *Hertz* and was relied upon heavily by the Missouri court. The municipal ordinance in *Minicost* placed absolute liability on the owner of a motor vehicle when an-

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3. For discussion of the various types of municipal ordinances which have been reviewed by the courts see Comment, *Ownership as Evidence of Responsibility for Parking Violation*, 41 J. CRIM. L.C. & P.S. 61 (1950), in which the following observation is made:

> 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. 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 (footnotes omitted).

The author continued by noting that most courts that have construed the second type of ordinance purporting to impose absolute liability, such as section 34.344, have found it to create a mere rebuttable presumption that the owner was the driver, thus avoiding the constitutional question.

Typically, a municipality will adopt one type of ordinance or the other. It is unclear why the city of Kansas City deemed it necessary to adopt both types unless it desired to limit the rebuttable presumption of section 34.1 to moving violations and the absolute liability of section 34.344 to parking violations.

4. Red Top Driv-Ur-Self v. Potts, 227 Ark. 627, 300 S.W.2d 261 (1957); City of Seattle v. Stone, 410 P.2d 583 (Wash. 1966). In *Stone*, the ordinance imposed absolute liability expressly negating as a defense that the owner was not the driver, except for commercial lessors of automobiles. The entire ordinance was struck down. *See generally* Annot., 49 A.L.R.2d 456 (1956).

5. 242 N.E.2d 411 (Mass. 1968).

other was using it with the owner's consent. The Massachusetts court found that the single fine was minor and not a deprivation of property without due process of law, despite the obvious potential for a large cumulative liability when a car rental firm is involved. Since the car rental contract provided for indemnification against the lessee for parking fines assessed against the vehicle and charged to the lessor, the defendant was deemed adequately protected.[6]

In *Kinny Car Corp. v. City of New York*,[7] a municipal ordinance purported to make lessors and bailors of motor vehicles jointly and severably liable with their customers for parking violations committed within the city. Several car rental companies brought an action to have the ordinance declared unconstitutional as a denial of due process and equal protection. In a short opinion, the Court of Appeals of New York affirmed an order of the appellate division upholding its validity.

In the two Oklahoma cities where nonchalant car renters might pose a parking problem the ordinances are not as stringent as those in Kansas City, Boston and New York. As a consequence, Oklahoma has not construed an ordinance similar to the section relied on in *Hertz*.[8] However, in *Cantrell v. Oklahoma City*,[9] the Oklahoma Court of Criminal Appeals did deal with an ordinance imposing a presumption of guilt. The ordinance provided that proof (1) of the violation and (2) that the defendant was the registered owner of the vehicle would constitute a prima facie presumption that the owner was

6. The identical ordinance had previously been construed in Commonwealth v. Ober, 286 Mass. 25, 189 N.E. 601 (1934), but the defendant merely challenged the ordinance without introducing evidence as to who parked the car. In upholding the ordinance and imposing liability the court used ambiguous language and it was never clear, at least to some courts, whether the *Ober* ordinance created a rebuttable presumption or absolute liability; *see* City of Seattle v. Stone, 410 P.2d 583 (Wash. 1966). The *Minicost* decision has resolved the question.

7. 28 N.Y.2d 741, 269 N.E.2d 829 (1971).

8. Heretofore, the bulk of Oklahoma case law has dealt with the right of a municipality to regulate the use of its streets. In *Ex parte* Duncan, 179 Okla. 355, 65 P.2d 1015 (1937), an action involving the validity of the Oklahoma City parking meter ordinances, the Oklahoma Supreme Court established the right of cities to regulate the use of the streets through their police power. This same theme was elaborated in Hirsh v. Oklahoma City, 94 Okla. Crim. 249, 234 P.2d 925 (1951), where the court of criminal appeals sustained the power of a municipality to adopt reasonable measures which remove the causes of traffic congestion. As early as 1922, in McGuire v. Wilkerson, 22 Okla. Crim. 36, 209 P. 445 (1922), it was held that ordinances regulating the parking of automobiles did not deprive the owners and operators of such vehicles of their liability or property without the due process of law. Along these same lines, in an action challenging the ability of the city of Lawton to regulate parking at its municipal airport, the supreme court in *Ex parte* Houston, 93 Okla. Crim. 26, 224 P.2d 281 (1950), held that courts will indulge every presumption to sustain the validity of parking regulations.

9. 454 P.2d 676 (Okla. Crim. 1969).