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Constitutional Law—Invalidating Statutes on Hypothetical Facts

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A parking lot attendant drove a customer to her place of business, and, while returning the automobile to the parking lot, negligently struck the plaintiff, a pedestrian, who successfully recovered against the customer under the following Georgia statute:

> Every owner of a motor vehicle . . . shall be liable . . . for injuries . . . resulting from negligence in the operation of such motor vehicle if . . . used in the prosecution of the business (or) for the benefit of such owner.

On appeal, *Held:* the statute violates due process because it might impose liability upon an owner whose automobile was operated without his consent or knowledge, express or implied. *Frankel v. Cone,* 214 Ga. 733, 107 S.E.2d 819 (1959).[1]

[6] Van Antwerp v. Horan, 390 Ill. 449, 61 N.E.2d 358 (1945); Eder v. Rothamel, 202 Md. 189, 95 A.2d 860 (1952); 14 MD. L. REV. 151 (1954); *Cf.* Annot., 67 A.L.R.2d 999 (1959).

[7] Campbell v. Drozdowics, 243 Wis. 354, 10 N.W.2d 158 (1943), held that a husband's voluntary conveyance of his interest to land to his wife which they held in joint tenancy destroyed joint tenancy for all practical purposes including right of survivorship.

[8] See 34 NEB. L. REV. 293 (1954).

[1] Noted in 10 MERCER L. REV. 338 (1959).

A statute is invalid if it makes an owner absolutely liable for the negligence of a thief,[2] but this statute did not reach that far. It is very difficult to imagine a thief operating a stolen automobile for the owner's benefit, or in the prosecution of the owner's business.[3]

On the other hand, statutes imposing liability upon a car owner whose car is operated with his permission have been uniformly upheld.[4] In a leading case,[5] a resident of New Jersey loaned his automobile to another who drove to New York and there injured the plaintiff. Recovery was granted against the owner in a New Jersey court under a New York statute which predicated liability on the owner's permission, express or implied. The United States Supreme Court affirmed.[6]

In the instant case the element of permission is present, yet the court struck down the statute as applied to a thief situation when the statute obviously did not reach it. Unfortunately, the court is not alone in this practice of invalidating statutes on hypothetical facts.

The Delaware court, for example, invalidated the Non-Resident Motor Vehicle Act because it might allow the state to notify a non-resident that process "will soon be made" on the Secretary of State even though the non-resident then before the court had been notified of process actually served.[7] North Carolina struck down a tax statute because it might allow property to be re-valued without notice to owners in spite of the fact that notice had been

[2] This would be liability without fault; however the area of such liability is growing. An owner may be held absolutely liable where his automobile is parked in violation of a city ordinance, Commonwealth v. Ober, 286 Mass. 25, 189 N.E. 601 (1934). An owner may be held absolutely liable if he leaves the keys in ignition, Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943). Florida has declared the automobile a "dangerous instrumentality," Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (1947), see note, 5 U. FLA. L. REV. 412 (1952). See also PROSSER, TORTS, § 61 (2d ed. 1955).

[3] Of course, one might argue that the owner benefited if his car were stolen, and seconds later a plane crashed where the car had been.

[4] See cases cited in 5A AM. JUR. *Automobiles* § 612 (1956). The liability of an automobile owner for the negligence of third persons is discussed in 61 A.L.R. 867 (1929) and 53 A.L.R.2d 679 (1957).

[5] Masci v. Young, 109 N.J.L. 453, 162 Atl. 623 (1932).

[6] Young v. Masci, 289 U.S. 253 (1933), noted in 47 HARV. L. REV. 349 (1933), 18 MINN. L. REV. 350 (1933), and 12 TEX. L. REV. 87 (1933).

[7] Castelline v. Goldfine Truck Rental Serv., 48 Del. 550, 107 A.2d 915 (1954), *rev'd on other grounds*, 49 Del. 155, 112 A.2d 840 (1955).

published in the local newspaper. "Whether future boards would be so kind is not certain."[8]

Most courts refuse to indulge in this type of reasoning. For instance, a Connecticut court had before it a statute which imposed liability on a liquor vendor for any damage done by an intoxicated buyer. The court admitted that a vendor might be liable in a case where the damage and the intoxication had no causal connection, but such a possibility would not be considered when the facts did not require it.[9]

The Nebraska cases, however, appear to adopt the practice illustrated by the Georgia, Delaware, and North Carolina cases above.[10] In *State v. Pocras*,[11] for example, the Nebraska Supreme Court invalidated an obscenity statute because the phrase "dispose of in any manner" might allow one to be imprisoned for turning obscene literature over to the police although no such situation was before the court.[12]

This Nebraska tendency, and the instant case, accordingly raise a question concerning the constitutionality of a recent Nebraska statute:[13]

> The owner of any leased truck . . . shall be jointly and severally liable with the lessee and the operator thereof for any injury . . . resulting from the operation.

If Nebraska continues its tendency to consider statutes in light of what might be done under them, this statute by the reasoning

[8] Bowie v. Town of West Jefferson, 231 N.C. 408, 57 S.E.2d 369 (1950). Additional cases decided on hypothetical facts, Kentucky Alcoholic Beverage Control Bd. v. Jacobs, 269 S.W.2d 189 (Ky. 1954), Buchanan v. Health, 210 Ga. 410, 80 S.E.2d 393 (1954), and Demers v. Peterson, 197 Ore. 466, 254 P.2d 213 (1952).

[9] Pierce v. Albanese, 144 Conn. 241, 129 A.2d 606 (1957). See cases cited in 16 C.J.S. *Constitutional Law* § 97 at 349 (1956). The United States Supreme Court has had trouble in this area, see notes, 31 NOTRE DAME LAW. 684 (1956), and 40 CORNELL L. Q. 195 (1955). An excellant symposium on statutory construction is found in 3 VAND. L. REV. 365 (1950).

[10] "It may be said that this is not the situation presented by the facts in this case, but it must be remembered that the validity of the act does not depend upon what has been done, but upon what the act authorizes and by what may be accomplished under it." Peter Kiewit Sons' Co. v. County of Douglas, 161 Neb. 93, 104, 72 N.W.2d 415, 423 (1955).

[11] 166 Neb. 642, 90 N.W.2d 263 (1958).

[12] See dissent, *ibid.*

[13] NEB. REV. STAT. § 39-7,135 (Supp. 1957).

in the instant case may be found unconstitutional.[14] However, this tendency should not be continued. The court should return to an application of each statute to the actual facts of the case, leaving interesting hypotheticals for the future.

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