

April 20, 1966



Honorable Lem T. Jones, Jr.
Senator
State Capitol Building
Jefferson City, Missouri

Dear Senator Jones:

You have inquired concerning our views respecting the constitutionality and validity of a proposed statute relating to possession of stolen property. We have examined the proposed statute and believe that its constitutionality may be attacked on two possible grounds:

1. That it would destroy the presumption of innocence of a defendant.
2. That it would violate a defendants privilege against self-incrimination.

Of course, this office can not predict with certainty what the Courts might rule respecting this statute, however, it is our view that the proposed statute would probably be held valid and constitutional by the courts. Attached hereto you will find a memorandum prepared by our staff relating to our consideration of the authorities and their probable application to this proposed statute.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By
J. Gordon Siddens
Assistant Attorney General

Enclosure

April 21, 1966

Honorable Lem T. Jones
State Senator
10th District
700 Waltower Building
Kansas City, Missouri



Dear Senator Jones:

This is a memorandum which considers your request for an opinion from this office respecting the constitutionality of a proposed new statute to supersede Section 560.270, which would read as follows:

"1. Any person who with intent to defraud, receives or buys any property from another, knowing the same to have been stolen, or who conceals, withholds or aids in concealing or withholding any property, knowing the same to have been stolen, shall, upon conviction, be punished in the same manner and to the same extent as for the stealing of said property.

"2. Possession of stolen property within six months from the date of stealing thereof shall be deemed sufficient evidence of knowledge that the property was stolen unless it is shown that the possessor received the property under such circumstances as to cause a reasonable man to believe that the property was not stolen.

"3. Any person who with intent to defraud receives or buys or who conceals or withholds or aids in concealing or withholding any form or document the contents of which show that upon execution thereof if it is intended to become a draft, check, order, bill of exchange or negotiable instrument, which has been stolen, knowing the same

to have been stolen, shall, upon conviction, be punished by imprisonment by the department of corrections for a term of not more than ten years nor less than one year; or by a fine of not more than one thousand dollars, or by both such fine and confinement."

Subsection 2 of the quoted proposed statute creates a rebuttable presumption of fact, in that it permits a jury in a prosecution for receiving stolen property to infer knowledge on the part of defendant that property is stolen from the fact of this possession of stolen property within six months after it was stolen. The constitutionality of this proposed statute may be attacked on two grounds; First, that it would destroy the presumption of innocence of a defendant, and second, that it would violate a defendant's privilege against self-incrimination. Although, of course, this office cannot predict with certainty the outcome of any future litigation, it is our opinion, based upon the following considerations, that the proposed statute would not be held unconstitutional by the courts of Missouri or by the Federal courts.

A state legislature can create a procedural presumption in favor of the state in a criminal case, without depriving the defendant of the presumption of innocence where there is a rational connection between the fact to be inferred and the fact proved. *Mobile J. & K. C. R. v. Turnipseed*, 219 U.S. 35, 31 S.Ct. 136; *Yee Hem v. U.S.*, 268 U.S. 178, 45 S.Ct. 170; *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281; *U.S. v. Fleishman*, 339 U.S. 349; *Communist Party of the United States v. United States*, D.C. Cir. 331 F.2d 807, 55 Columbia Law Review 527; *State v. Lively*, Mo., 279 S.W. 976; *State v. Shelby*, Mo., 64 S.W. 2d 269; *City of St. Louis v. Cook*, Mo., 221 S.W.2d 468. The Supreme Court of the United States has consistently held that it is within the power of a state or a federal legislative body to provide for certain presumptions in both civil and criminal law. In *Mobile J. & K.C.R. v. Turnipseed*, supra, the Supreme Court allowed a statutory presumption of negligence in a railroad case to stand on the ground that there was a sufficient rational connection between the fact of the accident and the railroad's negligence to warrant judgment against the railroad unless it offered some proof of non-negligence.

In addition to the idea of a rational connection between the fact proved and the fact inferred, the Supreme Court has announced a second test with respect to the validity of a statutory presumption. In *Morrison v. California*, supra, the Supreme Court found invalid a California alien property law with respect to its placing the burden of proving citizenship (prerequisite to owning property in California) upon the defendant, accused of being an alien property owner. However, Justice Cardozo in

writing the opinion stated that it was proper for the burden of proceeding with the evidence to be shifted in a criminal case under proper circumstances. The court stated, 291 U.S. 82, 1.c. 87:

" . . . For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . ., or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, §79. The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises."

In *Yee Hem v. United States*, supra, the constitutionality of a federal statute was upheld that provided that "all opium within the United States shall be presumed to have been imported after 1909 and the burden shall be on defendant to rebut such presumption." This statute squarely put the burden of proceeding with the evidence upon a defendant to show that opium in his possession was imported prior to a year when it became illegal to import opium, if such was his defense. The Supreme Court deemed the statute to be constitutional against the argument that it compelled a defendant to take the stand against himself. The Court's reasoning was that the defendant did not necessarily have to testify; he only had to produce evidence to overcome the presumption. The Court said:

"* * * 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

Senator Lem T. Jones

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 circumstances and not from any form of compulsion forbidden by the Constitution."
(268 U.S. 178, 45 S.Ct. 472.)

In *United States v. Fleishman*, supra, a prosecution for contempt of the House Un-American Activities Committee, the question was whether it was necessary for the federal government to negative every defense in an action for citation for contempt for refusal to produce records before a house committee. The Supreme Court ruled in the negative, saying that this type of defense is more particularly within the knowledge of the defendant and to insist upon its proof would cause an unreasonable burden upon the government.

In *Communist Party of the United States v. United States*, supra, the Court of Appeals of the District of Columbia stated with regard to shifting the procedural burden, "But where the pertinent information is much more readily available to the defendant than to the government, the burden may be shifted to him, provided this can be done without subjecting the accused to hardship or oppression. 331 F.2d 807, l.c. 814."

Thus, the federal constitution is in no way violated when there is a shift of a procedural burden of going forward with the evidence, pursuant to a criminal statute. Justice Cardozo's opinion in *Morrison v. California*, supra, as approved in the *Fleishman* case indicates that, based upon the test of comparative convenience, that is, where the pertinent knowledge is much more readily available to the defendant than to the state, the burden of proceeding may be shifted to the defendant, so that the failure of the defendant to produce this knowledge will create a presumption of fact in favor of the state. The proposed statute under consideration does precisely that. The defendant's knowledge of the stolen character of the property can very seldom be shown by the state; this task becomes almost impossible in view of recent United States Supreme Court decisions which limit interrogation of an accused by police.

This view of the Federal Supreme Court is concurred in by the Supreme Court of this state. In *City of St. Louis v. Cook*, supra, a city ordinance of St. Louis was attacked on constitutional grounds in respect to a provision that the finding of a

Senator Lem T. Jones

car parked illegally created a prima facie presumption that the owner of the car authorized the illegal parking. Although the case involved a city ordinance, the language of the opinion applies both to ordinances and statutes. The court stated, 221 S.W.2d 468, 1.c. 469, 470:

"[2, 3] Statutes or ordinances providing a rule of evidence, in effect, that a shown fact may support an inference of the ultimate or main fact to be proved are well within the settled power of the legislative body; and such legislative provisions do not violate provisions of the federal or state constitutions. State v. Shelby, 333 Mo. 1036, 64 S.W.2d 269; Yee Hem v. United States, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904; People v. Kayne, 286 Mich. 571, 282 N.W. 248; Commonwealth v. Kroger, 276 Ky. 20, 122 S.W.2d 1006; People v. Bigman, 38 Cal. App. Supp.2d 773, 100 P.2d 370. '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.' Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 137, 55 L.Ed. 78, 32 L.R.A., N.S., 226, Ann.Cas. 1912A, 463. Giving a regard to due process, the power to provide such an evidentiary rule is qualified in that the fact upon which the presumption or inference is to rest must have some relation to or natural connection with the fact to be inferred, and that the inference of the existence of the fact to be inferred from the existence of the fact proved must not be purely arbitrary or wholly unreasonable, unnatural, or extraordinary. State v. Shelby, supra; Yee Hem v. United States, supra; People v. Kayne, supra. And it is clearly beyond the legislative power to prescribe what shall be conclusive evidence of any fact. O'Donnell v. Wells, 323 Mo. 1170, 21 S.W.2d 762; State v. Shelby, supra. It is 'only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed (or inferred), and that the inference of one fact from proof of another shall not be so

unreasonable as to be a purely arbitrary mandate.' Mobile, J. & K.C.R. Co. v. Turnipseed, supra; Commonwealth v. Kroger, supra; People v. Bigman, supra; People v. Kayne, supra."

The above language was quoted with approval in Borden Co. v. Thompson, 353 S.W.2d 735, wherein the Court decided in declaratory judgment that the legislature had power to create presumptions in the Unfair Milk Sales Practice Act. The Supreme Court therein quotes Justice Cardozo's test of "comparative convenience" of proof as a standard in legislative shifting of the burden of proceeding with the evidence.

The comparative convenience test is again announced in Kansas City v. Wilhoit, Mo. App., 237 S.W.2d 919.

The proposed statute herein involved is similar to New Jersey Revised Statutes, Section 2: 164-1, as amended. Under the New Jersey statute, the jury in a prosecution for receiving stolen property is authorized to find the issue of knowledge against defendant upon proof of possession by defendant of stolen property within one year after it was stolen unless the defendant satisfies the jury that he did not have such knowledge. This statute is construed in State v. Laster, Supreme Court of New Jersey, 174 A2d 486, wherein the Court states:

"* * * The statute does not shift the burden of proof, nor deprive a defendant of due process but is merely an evidentiary rule whereby the accused must go forward with an explanation to rebut the permissive presumption. State v. Lisena, 129 N.J.L. at pages 571-572, 30 A2d 593.

* * * * *

'The practical effect of the presumption of guilty knowledge arising out of possession of stolen property is to require the accused to go forward with the evidence and explain his possession, the jury being instructed that they may find him guilty in the absence of any reasonable explanation.' (The Court's Emphasis)"

Please note that the New Jersey statute goes further than the proposed Missouri statute. In New Jersey the case would go to the jury on the question of guilty knowledge, regardless of any contradictory evidence on behalf of the accused. The proposed Missouri statute would permit the court to sustain a motion for directed verdict on a showing that defendant received the property under circumstances which would cause a reasonable man to believe

Senator Lem T. Jones

that the property was not stolen. Such a ruling would be proper where the evidence shows as a matter of law that reasonable minds could not differ in concluding that the defendant acquired the property innocently.

Our legislature has in other statutes shifted the burden of proceeding with the evidence in a criminal case. Section 195.180, RSMo., part of the Missouri Narcotics Code, states:

"In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this law, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this law, and the burden of proof of any such exception, excuse, proviso or exemption, shall be upon the defendant."

While not challenged in Missouri, this provision of the Uniform Narcotics Law has been held constitutional in at least one state. *State v. Jourdain*, (Louisiana, 1954), 74 So. 2d 203. By implication the reasonableness of this statute was set out in *State v. Virdure*, Mo., 371 S.W. 2d 196, where the defendant argued that the state had not proved that his possession of narcotics was not by virtue of a prescription. The court stated, l.c. 202:

"We comment in passing that these facts constituting the claimed exceptions would be peculiarly within the knowledge of the accused. The state would have no way of knowing them, except as to the box container which was in evidence."

This statute then clearly places the burden on a defendant to negative the state's case by showing he was within a lawful exception to the act.

Section 561.470, RSMo., provides that if a check is drawn on insufficient funds it "shall be prima facie evidence of intent to defraud and knowledge of insufficient funds . . . provided such maker shall not have paid the drawee thereof within ten days of receiving notice that such check . . . has not been paid." This statute creates a presumption in favor of the State of Missouri. Opinion of the Attorney General No. 201, Schantz, 8-6-64.

The now repealed criminal bank fraud statute, formerly Section 43.65, RSMo. 1919, made it a crime to receive money in a bank with knowledge of its insolvency and provided that the failure of the bank after the deposit of such funds shall be prima facie evidence of the knowledge by the director of the insolvency. Prior to its repeal, this statute was tested in the Supreme Court as to its constitutionality in *State v. Lively*, Mo., 279 S.W. 76, and therein upheld. Although *State v. Shelby*,

Senator Lem T. Jones

Mo., 64 S.W.2d 269, overruled the Lively case, this was on the basis of an instruction to the jury, not as to the constitutionality of the statute.

We do not overlook the case of People v. Stevenson, Supreme Court of California, 1962, 376 P.2d 297. The court therein had before it a contention of the unconstitutionality of a statute which provided:

"Any person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion from any person under the age of 18 years, shall be presumed to have bought or received such property knowing it to have been so stolen or obtained unless such property was sold by such minor at a fixed place of business carried on by the minor or his employer. This presumption may, however, be rebutted [and overcome] by proof."

The court held the quoted part of the statute to be unconstitutional for lack of any rational connection between the fact of acquisition and the presumed fact of guilty knowledge. The opinion states that a presumption of one fact from evidence of another violates due process if there is no rational connection between the fact proved and the fact presumed, citing Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241; Bailey v. Alabama, 292 U.S. 219, 31 S.Ct. 135; People v. Wells, 33 Cal.2d 330, 202 P.2d 203; People v. Scott, Cal.2d 774, 154 P.2d 517. The court ruled that the proved fact must be at least a "warning signal" of the presumed fact and have a "sinister significance." We quote the following language, l.c. 299:

"* * * The presumption is equally applicable where the minor is himself the thief or where he obtained the property honestly and conducts himself with respect to it in a manner not arousing suspicion. It applies both to one who 'buys' . . . and to one who 'receives' . . . , including a person who borrows property or accepts possession as a temporary accommodation to the minor without any personal benefit. . . . Nor is the operation of the presumption limited to situations where acquisition of the property occurs soon after the theft or where there is some incriminating conduct by the accused in addition to acquisition, such as his silence or false explanation upon questioning by the police."

"* * * It has a scope significantly beyond that of the rule that an inference of guilt

Senator Lem T. Jones

is permissible where recently stolen property is found in conscious possession of a defendant who gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt. (See People v. McFarland, Cal., 26 Cal. Rptr. 473, 376 P. 2d 449.)"

Without purporting to decide which view is better reasoned, that of California or that of New Jersey, it seems that the latter, upholding the constitutionality of a rebuttable presumption of guilty knowledge from the fact of possession of stolen property within one year of the theft, creates no departure from the rules announced in the authorities above cited.