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POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Liability of Law Enforcement Officer and Surety for Excessive Force Used in Making a Misdemeanor Arrest—In an action brought against a local constable and his official bondsman the evidence showed that the defendant officer had shot at a fleeing car in attempting to make an arrest for the commission of a misdemeanor. A shot struck one of the rear tires, overturning the car, killing one occupant and seriously injuring another. The trial court directed a verdict for the defendants on the ground that the plaintiffs were guilty of a misdemeanor (public intoxication), which gave the defendant constable the right to make an arrest and to use such force as is necessary to effect the arrest. On appeal the Court of Appeals of Tennessee reversed.

"[I]t is not true that an officer undertaking to arrest [for a misdemeanor] has a right to shoot the offender or endanger his life by shooting into his automobile to stop it and effect his arrest." In answer to a contention that the practice of shooting at fleeing automobiles is a well-recognized method of stopping miscreants and law-breakers, the court stated that this principle does not apply to persons guilty of a misdemeanor. "Apart from the peril to innocent users of the highways, such a practice endangers the lives of petty offenders not only from mis-aimed gunfire but also from wrecking the automobile in consequence of shooting down its tires, as happened in this case.... The law considers that it is better to allow him to escape altogether than to take his life or to do him great bodily harm." The court went on to observe that such an act is anti-social, ultra-hazardous and a felony under the Tennessee statutes. Thus, there is no doubt that a good cause of action was pleaded against the constable.

An additional problem in the case was whether the trial judge had properly directed a verdict for the surety on the constable's official bond. The bond was conditioned "for the faithful discharge of the duties" of the office which it was issued to cover, and, as such, was an undertaking by the surety that the officer would properly perform the duties of his office. Under common law principles, applied in many states, liability of the surety will turn on whether the officer acted "by virtue of office" or under "color of office." A majority of jurisdictions will hold the surety liable for both classes of acts; most of the remaining jurisdictions will hold the surety only where the officer has acted within the authority of his office, but improperly. Tennessee has previously adhered to the minority rule of liability only where the act is done by virtue of office. Applying this interpretation to the facts of the instant case the court said: "[I]f the occupants of the car had been guilty of public drunkeness, the constable would have had authority to arrest them, and his wrongful act in his attempt to arrest them would have been an act by virtue of his office for which he and his sureties would have been liable on his bond. But, as they were guilty of no offense, he had no authority to arrest them, and his wrongful act in his unauthorized attempt to arrest them was an act under color of office for which he and his sureties are not liable on his bond." However, Tennessee has enacted a statute, the plain meaning of which is that an officer and his sureties are liable, in addition, for any wrongful act done under color of office. Accordingly the trial judge erred in directing a verdict for the surety, and the issue of their liability should have been submitted to the jury. State v. Dunn, 282 S.W.2d 203 (Tenn. App. 1955).

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Civil Action for False Arrest and Imprison-

ment—The plaintiff sought $350,000 damages for false arrest and imprisonment by three members of the Los Angeles Police Department. He alleged that he had been falsely arrested without a warrant, that newsman had been called in by the defendants and falsely informed that plaintiff was a mobster being held under suspicion of conspiracy to commit murder, that he was held incommunicado for three days and that no charges were ever filed against him. On appeal from a judgment on the pleadings for the defendants the Supreme Court of California held that a police officer who makes an arrest without a warrant and without justification may be liable for false arrest and imprisonment in a civil action. A good cause of action is stated where an arrest without process followed by imprisonment and damages is alleged; after proof of which the burden of showing justification is shifted to the defendants. Moreover, the allegation that the defendants had made the statement that they believed the plaintiff to be a mobster and involved in a criminal conspiracy did not render the complaint defective, for it does not show as a matter of law that there was reasonable cause to make the arrest. The court also stated that where a lawful arrest is made, "subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay." *Dragna v. White*, 289 P. 2d 428 (Cal. 1955).

Law Enforcement Officer's Action Against Newspaper Publisher for False and Libelous Statements—The defendant newspaper publisher had printed an account of an occurrence in which it alleged that the plaintiff sheriff had shot a Negro without justification. Shortly after the publication of this story, to which the sheriff made no objection, the defendant published an editorial denouncing the action taken by the sheriff. The complaint averred that the facts stated in the publications falsely charged the sheriff with a crime and that as such they were libelous per se. On appeal from a jury conviction for libel the Supreme Court of Mississippi reversed on the ground that truth of the matter alleged was a good defense to an action for slander or libel. In reversing the judgment the court considered only that evidence most favorable to the sheriff. It found that the fact that no arrest had been made by the sheriff and that he had not acted in self-defense established an assault and battery upon the Negro supported the statements made in the challenged articles. *Smith v. Byrd*, 83 S.2d 172 (Miss. 1955).

Liability of the Municipality for Failure to Provide Police Protection to an Informer—The deceased had supplied information to the police leading to the arrest and conviction of a notorious criminal, Willie Sutton. Thereafter, the police widely publicized the deceased's role in the capture; the deceased and his immediate family received anonymous letters, missives, notes and telephone messages—about all of which the police department was kept informed. Initially, the police department "undertook a limited and partial protection" of the deceased's place of business and home, but thereafter discontinued the protection despite the continuance of the anonymous threats. On March 8, 1952 the deceased was shot and killed by an unidentified assailant. The administrator of the intestate's estate brought an action against the City of New York for damages resulting from the false representation that the deceased was not in danger because of the threats, whereby he was induced to go about without police protection and was consequently killed. The order of the Special Term granting a motion to dismiss the complaint was subsequently affirmed. *Schuster v. The City of New York*, 143 N.Y.S. 2d 778 (Sup. Ct., App. D. T. 1955).

The majority of the court based their affirmance of the dismissal on two grounds: first, that the police were under no duty to give an informer special protection; second, that if there were any duty, it only extended to those situations where the identity of the potential assailants was known, and from which knowledge violence might reasonably have been

anticipated. The court held that the allegations of the complaint did not support either of these propositions.

A dissent argued that since it was the duty of a citizen to inform and aid the police in capturing felons, a corresponding duty arose on the part of the government to protect the informer from "violence while so doing, or on account of so doing." Thus, the dissent reasoned, the city, by withdrawing its protection, breached its duty when it failed to furnish the informer "such protection as the circumstances and as ordinary prudence dictated." The dissent further challenged the position taken by the majority that the identity of the assailants must be known to the police, saying that "such a condition, practically impossible of fulfillment, should not be allowed to vitiate the city's positive duty of protection." Finally, the dissent raised an independent basis for sustaining the complaint. Even if there were no legal duty to protect the informer from potential violence, nevertheless, the voluntary assumption of protection for the deceased informer rendered the city responsible for its negligence in performing the duty by arbitrarily withdrawing its protection and leading the deceased to believe that he was safe to travel freely through the city.

Mandamus Does Not Lie to Compel Enforcement of Future Violations of Municipal Ordinance—Petitioners, residents and taxpayers of the municipality, filed a petition praying that a writ of mandamus issue to compel the enforcement of the city parking ordinances. It was alleged that for a substantial period of time there had been open and continuous violations of the parking ordinance; despite the fact that written notice had been served on the mayor and chief of police. The trial court dismissed the petition and this was affirmed by the appellate court which held that "mandamus will not lie where to issue the writ would put into the hands of the court the control and regulation of the general course of official conduct or enforcement or enforce the performance of official duties generally." *People v. City of Park Ridge*, 129 N.E.2d 438 (Ill. App. 1955). The court did state, however, that it might issue a writ of mandamus to command local law enforcement officials to do a specific act in relation to a past violation of the law. The theory behind the refusal to issue a writ of mandamus as to future and general violations lies in the practical difficulty the court would face in the supervision over individual derelictions of duty. The decision did not discuss the contention of the petitioners that the complexity of judicial difficulty must bow to the "superior demands of public safety."

Degree of Knowledge Necessary to Qualify as Expert Witness on the Harger Breath-O-Meter—In support of the essential element of intoxication in a drunk driving prosecution, the state introduced the testimony of the police officer who had apprehended the defendant and subsequently conducted both a manual and a Harger Breath-O-Meter test upon him. Over the objection that the witness had not been properly qualified as an expert, the trial court admitted testimony that the defendant had 0.19 of 1% alcoholic blood content according to the results of the Breath-O-Meter test. The defendant's objection was predicated on the fact that the witness had testified that he did not know the reaction of chemicals, had not had any training in mixing the ingredients used in the test and that he did not know the effects and reactions of the chemicals. However, he did state that he had had experience with the Harger Breath-O-Meter and had been trained to measure the chemicals in administering the test. On appeal the admission of this expert testimony was held to be reversible error. The court said: "We are of the opinion that an expert making the test should be competent to draw his own conclusions, based upon his own knowledge of the chemical reactions of potassium permanganate, and sulphuric acid. A conclusion predicated upon something some one else has prepared is based not on personal knowledge as an expert, but upon hearsay, and is therefore incompetent." In summary the court required that the record must establish the witness' competency to draw conclusions on his own observations—not on the basis of a

chart or guide prepared by another. *Riddle v. State*, 288 P.2d 761 (Okla.Cr. 1955).

Coroner's Fees—An action was brought by a city for a declaration of the right of the coroner to collect fees in a number of inquests held at the request of citizens. The city contended that a coroner is entitled to a fee for an inquest held upon request only where there are indications, extrinsic to the mere request, that death occurred as a result of crime, violence or other unnatural causes. The Court of Appeals of Kentucky examined the state statutes relating to the office of coroner and concluded that no fee can be paid to a coroner unless there is some basis for belief that a death warrants investigation. This conclusion was found to be consistent with the historical function of the coroner which is to aid in the administration of criminal justice by inquiring into deaths occurring under peculiar or suspicious circumstances. The coroner is not entitled to his fee for merely signing a death certificate pursuant to a request of a private citizen. *City of Ashland v. Miller*, 283 S.W.2d 195 (Ky. 1955).