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Problems of Arrest Without Warrant in Nebraska

The basic authority of a police officer to arrest in Nebraska without a warrant as set forth by statute is confined to those situations in which the arrestee is found committing a crime.¹ In addition, private persons are by statute authorized to arrest if a felony or petit larceny has in fact been committed and there exist reasonable grounds for believing that the person arrested is guilty.²

However, an examination of past decisions concerning the authority of an officer to arrest for a crime not committed within his presence, and for which he has no warrant, points out the uncertainty in the existing law.

The early cases of *Simmerman v. State*³ and *Nelson v. State*⁴ held that an officer without a warrant acted as an individual without police authority unless he witnessed the criminal act. The requirements were set forth that the officer must have notice that a felony or a petit larceny has been committed, and there must be reasonable ground for believing that the person to be arrested is guilty. Otherwise, the arrest is illegal.

The requirement that a felony or petit larceny must in fact have occurred for the arrest to be justified was seemingly removed by the decision of *Diers v. Mallon*,⁵ the court making a distinction between the powers of police and those of private persons. It was held that an arrest based upon reasonable belief that a felony had been committed, even though there had been no felony, was not illegal when made by a peace officer. As authority for this point, the court relied upon the *Simmerman* case, seemingly mistaking the ruling of that case. The *Diers* case gave police officers greater power than that conferred by any of the statutes involved,⁶ but the holding's basic premise of a distinction between the powers of an officer and those of private persons was upheld by the decision of *Kyner v. Laubner*⁷ shortly thereafter.

¹ Neb. Rev. Stat. § 29-401 (Reissue 1948): "Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." (emphasis added). See *Fry v. Kaessner*, 48 Neb. 233, 66 N.W. 1126 (1896).

² Neb. Rev. Stat. § 29-402 (Reissue 1948): "Any person not an officer may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there is reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained."

³ 16 Neb. 615, 21 N.W. 387 (1884).

⁴ 33 Neb. 528, 50 N.W. 679 (1891).

⁵ 46 Neb. 121, 64 N.W. 722 (1895).

⁶ See notes 1 and 2 supra.

⁷ 3 Neb. (Unof.) 370, 91 N.W. 491 (1902).

The only subsequent decision concerning this problem was in *Halsey v. Phillips*⁸ where the court, without citing any of the four previous decisions on the question, stated:

When an arrest without a warrant is sought to be justified, it must appear that a crime has been committed, and there must be reasonable grounds to believe that the person arrested is guilty of the offense.

Since the language was applied to the authority of a police officer, it seemingly reinstated the test of an actual felony or petit larceny having been committed as prerequisite to the arrest. However, it certainly does not expressly overrule any of the prior decisions, and thus adds to the confusion.

Although there has been no litigation directly concerning this issue since the *Halsey* case, it is evident that the rule of the *Diers* case is regarded as authority in Nebraska.⁹ The idea that a police officer has "inherent" or "common law" power apart from statute is widely accepted,¹⁰ but there is considerable doubt as to the soundness of this position. The modern police force did not exist at common law, having originated in England in 1829, and the common law watchman bears little similarity to the modern police officer.¹¹ The status of all present police officers in Nebraska is created by statute,¹² and they are generally considered to be "public officers."¹³ It is generally conceded that most public officers may exercise only such authority as is granted by statute,¹⁴ and police officers have been included within this classification.¹⁵ In Nebraska, it has been held that the acts of a public officer which are beyond the express authorization of statute are void,¹⁶ and that custom or usage will not be allowed to enlarge or extend powers defined by statute.¹⁷ Although the question has never been before the courts in Nebraska, it is evident that the reasoning of the *Diers* and *Kyner* cases is not immune to attack, especially since other Nebraska decisions are not in accord with the position they support.

⁸ 104 Neb. 648, 178 N.W. 218 (1920).

⁹ 2 Fisher, Courts of Limited Jurisdiction § 489, p. 921 (1950); A.L.I. Code of Criminal Procedure 236 (1931). The conflict of Nebraska decisions is pointed out in 6 C.J.S., Arrest § 6, p. 588 (1937).

¹⁰ See cases collected in authorities cited supra note 9.

¹¹ For a detailed history of the law of arrest and police officers see Hall, Legal and Social Aspects of Arrest, 49 Harv. L. Rev. 566 (1936).

¹² Neb. Rev. Stat. §§ 14-601 et seq., 15-306, 16-308, 17-107 (1943); §§ 60-432, 60-401, 84-106 (Reissue 1950).

¹³ See cases collected in Note, 84 A.L.R. 309 (1933); Note, 156 A.L.R. 1936 (1945).

¹⁴ See cases collected in Note, 65 A.L.R. 811 (1930).

¹⁵ *James v. Atlantic & E. Carolina R.R.*, 233 N.C. 581 65 S.E.2d 214 (1951).

¹⁶ *Witzenburg v. State*, 140 Neb. 171, 299 N.W. 533 (1941).

¹⁷ *Shambaugh v. City Bank of Elm Creek*, 118 Neb. 817, 226 N.W. 460 (1929).

A problem may also arise concerning the effect of a statute which confers "common law" powers upon an officer, when the actual extent or existence of such powers is in doubt. See Neb. Rev. Stat. § 25-2217 (Reissue 1948).

Even accepting the decision of the *Diers* case as the existing rule in Nebraska, it is apparent that a tremendous gap exists between police practices and statutory authority.¹⁸ Officers in Nebraska have authority to arrest without warrant in special situations expressly covered by particular statutes,¹⁹ but such statutes represent a patchwork attempt at protection, and officers still have no power to arrest for most misdemeanors unless the crime is committed in their presence, or unless they possess a warrant.²⁰ Even if a warrant has been issued for the arrest of a misdemeanant, it is impossible for all officers concerned to have actual possession of the warrant, and the authorized arrest may be considered illegal.²¹

The existence of this questionable state of the law has many implications since the legality of the arrest may become an issue in almost any proceeding involving the arrested party.

An outstanding example of this problem in Nebraska arises in connection with the privilege to resist an illegal arrest. Although it is the duty of a person being lawfully arrested to submit to the authority of the arresting officer,²² he may go so far as to kill the officer if necessary to prevent an illegal arrest, and the killing will not amount even to manslaughter.²³ A technicality such as this might allow a criminal to escape punishment for a murder committed while the criminal was being unlawfully arrested, even though the officer acted in good faith. Such a situation is hardly consistent with the best interests of any society attempting to promote law enforcement.

¹⁸ For example, see Warner, *Investigating the Law of Arrest*, 28 A.B.A.J. 151 (1940).

¹⁹ Neb. Rev. Stat. § 2-220 (1943) (in certain cases of gambling); § 28-565 (Reissue 1948) (person charged with cruelty to animals); § 28-1118 (Reissue 1948) (tramps); § 23-1811 (1943) (upon order of coroner); § 32-466 (Reissue 1952) (persons disturbing elections); § 28-805 (Reissue 1948) (rioters); § 28-1238 (Reissue 1948) (persons stealing rides on trains); § 29-413 (Reissue 1948) (on verbal order of magistrate). Many of these and similar provisions are unnecessary since the situations involved are covered by the provisions of §§ 29-401, 29-402 (Reissue 1948).

²⁰ *Halsey v. Phillips*, 104 Neb. 648, 178 N.W. 218 (1920).

²¹ *Crosswhite v. Barnes*, 139 Va. 471, 124 S.E. 242 (1924); *McCullough v. Greenfield*, 133 Mich. 463, 95 N.W. 532 (1903); *People v. McLean*, 48 Mich. 480, 36 N.W. 231 (188). This problem has been remedied by statute in Louisiana; See La. Rev. Stat. § 15:69 (1951).

²² Neb. Rev. Stat. § 29-729 (Reissue 1948).

²³ *Simmerman v. State*, 14 Neb. 568, 17 N.W. 115 (1883), appeal from second trial, 16 Neb. 615, 21 N.W. 387 (1884). Although resistance may be offered against an illegal arrest, no cases go so far as to allow the resisting party to lawfully kill the officer; see *Bad Elk v. United States*, 177 U.S. 529 (1900); *State v. Rousseau*, 40 Wash.2d 92, 241 P.2d 447 (1952); *Davis v. State*, 53 Okla. Crim. Rep. 411, 12 P.2d 555 (1932); *Howell v. State*, 163 Ga. 14, 134 S.E. 59 (1926); *State v. Gum*, 68 W.Va. 105, 69 S.E. 463 (1910); *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901); *State v. Spaulding*, 34 Minn. 361, 25 N.W. 793 (1885).

A problem also exists where a person who is actually guilty of a crime is arrested without a warrant, but there are no reasonable grounds for the arresting officer to believe that the person is guilty of the crime. The state might profit by the use of evidence obtained in the arrest,²⁴ but such an arrest is unlawful and the evidence obtained does not justify the action of the officer.²⁵

Witnesses to a crime or accident cannot be compelled to tell an officer even their name, and the only means by which this information might be obtained would be for the officer to arrest the prospective witness.²⁶ Any person taken into custody without a warrant and then released without having been brought before a magistrate has been falsely arrested, because an arrest, by definition, is the taking into custody of a person so that he may be brought before a magistrate to answer for an alleged crime,²⁷ and legal power to release is in most cases in the magistrate alone.²⁸ The procedure involved may be important in cases involving major offenses, but it is certainly not necessary if the party arrested is an innocent bystander to a crime, or perhaps a drunk receiving a free nights lodging.²⁹

Numerous complications may arise in cases involving search of a party who has not been first arrested.³⁰ An excellent example of police practice of doubtful legality is the "frisking" of suspicious characters who have not been placed under arrest by an officer,³¹ and justification for such action cannot be made by an officer on the grounds that the search was made in the interest of self-preservation, or that the officer was only following instructions.³²

These are illustrations of only a few complications among the many which exist due to the fact that the present law of arrest was formulated prior to the advent of modern police practices and organized crime. The consequences of illegal arrest are placed upon police officers themselves more than anyone else, for if guilty of any illegal action,

²⁴ *Billings v. State*, 109 Neb. 596, 191 N.W. 721 (1923).

²⁵ *Grau v. Forge*, 183 Ky. 521, 209 S.W. 369 (1919); *Scoopmire v. Talfinger*, 114 Ind. App. 419, 52 N.E.2d 728 (1944). It is generally assumed that good intentions constitute no defense or justification for an illegal act; see Note, 92 A.L.R. 481 (1934); Note, 20 A.L.R. 639 (1922).

²⁶ For a more detailed discussion of this problem, see Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 342 (1942).

²⁷ *Restatement, Torts* § 112 (1934); *Black, Law Dictionary* 140 (4th ed. 1951).

²⁸ Neb. Rev. Stat. § 29-410 (Reissue 1948).

²⁹ For examples and some ramifications of this problem, see Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 336 (1942).

³⁰ See cases collected in Note, 82 A.L.R. 784 (1933); Note, 74 A.L.R. 1387 (1931); Note, 51 A.L.R. 424 (1927); Note, 32 A.L.R. 68 (124).

³¹ It is generally held that a search without warrant may be made only as an incident of a lawful arrest, but there seem to be no cases directly concerning the problem of whether "frisking" constitutes an arrest or actual search. However, see *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908), on the general problem of questioning and searching suspicious persons.

³² *Supra* note 24.

they are subject to criminal actions such as false imprisonment,³³ assault and battery,³⁴ or kidnapping.³⁵ In addition, they are liable in tort for their acts,³⁶ and many officers under bond³⁷ may force their surety into the litigation.³⁸ Such liability is necessary in cases of malicious police practice, but it places a heavy burden upon well-meaning officers who innocently or mistakenly carry out their instructions.

The net result of past decisions and existing statutes is to place officers in a position of uncertainty as to their powers and duties, and leave them legally powerless to effect the efficient law enforcement demanded by the public. By taking an oath to uphold the law, they may be bound in some instances to allow those guilty of crime to escape, since they are prevented by the law they enforce from arresting the criminal. Such an anomalous result injures society as a whole and may breed contempt for "inefficient" police operations.

The entire uncertainty and inadequacy of the law points out the necessity for the formulation of a more concise statutory authority upon this subject which will bring the law into accord with modern conditions.³⁹ It is clearly not advisable to grant all officers a blank warrant or summons with which to carry out their duties, and the requirement for reasonable grounds for an arrest should always be maintained, but some attempt should be made, within constitutional limits,⁴⁰ to grant needed authority to police officers so that they may at least legally keep pace with the problems which confront them in their operations.

JOHN S. SCHAPER, '56

³³ Neb. Rev. Stat. § 28-416 (Reissue 1948).

³⁴ Neb. Rev. Stat. § 28-411 (Reissue 1948).

³⁵ Neb. Rev. Stat. § 28-417 (Reissue 1948). For an example of criminal proceedings against a police officer, see *Macomber v. State*, 137 Neb. 882, 291 N.W. 674 (1940).

³⁶ Neb. Rev. Stat. § 25-304 (Reissue 1948).

³⁷ Neb. Rev. Stat. § 14-606 (1943) (police of metropolitan cities); §§ 15-251, 15-308 (1943) (police of primary cities); § 84-106 (Reissue 1950) (state sheriff); § 60-432 (Reissue 1952) (state patrol); § 11-119 (1943) (sheriffs and constables).

³⁸ Neb. Rev. Stat. § 11-112 (1943). For example, see *Bassinger v. United States Fidelity & Guaranty*, 58 F.2d 573 (8th Cir. 1932).

³⁹ For examples of proposed statutes, see A.L.I. Code of Criminal Procedure 21 et seq. (1931); The Uniform Arrest Act, set out and discussed in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315 (1942).

⁴⁰ There are numerous problems related to the law of arrest which involve due process of law under U. S. Const. Amend XIV, § 1 and Neb. Const. Art. I, § 3. The constitutional prohibition against unreasonable search and seizure is also of importance; see U. S. Const. Amend. IV and Neb. Const. Art. I, § 7. For an example of the constitutional problems which may be involved in arrests without warrant, see Note, 1 A.L.R. 586 (1918).