



## Kentucky Law Journal

Volume 41 | Issue 4

Article 8

1953

# Arrest Without a Warrant

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### Recommended Citation

Boster, Norma D. (1953) "Arrest Without a Warrant," *Kentucky Law Journal*: Vol. 41 : Iss. 4 , Article 8.  
Available at: <https://uknowledge.uky.edu/klj/vol41/iss4/8>

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The United States Supreme Court has also taken a position in agreement with the Kentucky court, holding that such provisions are consistent with the Bankruptcy Act. In *Stellwagen v. Clum*<sup>20</sup> the Supreme Court had before it a provision similar to the Ohio general assignment laws which provided in effect that any transfer by a debtor to prefer creditors, or with intent to hinder, delay, or defraud them shall, if the transferee knew of such intent, be declared void at the suit of any creditor and a receiver appointed to administer the debtor's assets pro rata for the benefit of all creditors. The court held that such provisions were consistent with the Bankruptcy Act in that their purpose was the avoidance of fraudulent and preferential transfers, thus promoting equality of distribution. The court further observed: "Our decisions lay great stress upon this feature of the law (discharge of the debtor) . . . which is wholly wanting in the Ohio statutes under consideration."

Furthermore, the U. S. Supreme Court held that the general provisions of assignment statutes resembling those of Kentucky are to be held valid as against the contention that they were in conflict with the national act.<sup>21</sup>

In conclusion, the Kentucky general assignment law merely regulates the trust created by the deed of assignment, providing for pro rata distribution of the debtor's assets, while not providing for his discharge and, therefore, is not in conflict with the National Act.

WILLIAM S. TRIBELL

## ARREST WITHOUT A WARRANT

There are two basic types of arrest—those made under a warrant and those made without a warrant. Since those made with a warrant are generally lawful insofar as the act of arrest itself is concerned and the usual fault to be found with them is in the warrant rather than the arrest, the more complex situation of arrest without a warrant will be dealt with.

The law of arrest without a warrant may be neatly divided into two categories depending upon whether the crime for which the arrest

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may still proceed against the debtor on his claim, but only waives his right to share in the assets of the assigned estate. This is not the type of discharge contemplated by the Bankruptcy Act.

<sup>20</sup> See 245 U. S. 605 (1917).

<sup>21</sup> See *Boese v. King*, 108 U. S. 379 (1883), where the Supreme Court construed the New Jersey statutes which are almost identical with those of Kentucky.

is made is a felony or a misdemeanor, and further may be subdivided by determining whether the person making the arrest is a peace officer or a private person.

#### A. Arrest for a Felony by a Peace Officer

A peace officer may arrest for a felony committed in his presence. This is probably the most non-controversial statement that can be made in regard to any phase of the law of arrest without a warrant. There seems to be no authority to the contrary. Even so simple and well-established a statement as this must be interpreted. Courts have been called upon many times to construe the phrase "in his presence." Generally, an offense is considered to have been committed in the presence of the person making the arrest if he can see the offense being committed,<sup>1</sup> if he can hear the offense being committed or the effects of its commission,<sup>2</sup> or even if he can smell the offense being committed.<sup>3</sup> From these decisions anytime a person's attention is directed to the crime at the time of its commission through one of his own senses, it may be said to have been committed in his presence.

An officer may also arrest without a warrant when the person arrested has committed a felony although it was not committed in the presence of the officer.<sup>4</sup> This proposition is generally accepted and usually the grounds of the officer's belief that the felony was committed is not questioned so long as the person arrested did actually commit it.

Further, it is well settled at common law and is the generally accepted rule in this country today that an officer may arrest when a felony has in fact been committed although not by the person arrested if the officer had reasonable ground for believing that it was committed by the person arrested.<sup>5</sup> Once again a very difficult problem of construction arises. What constitutes "reasonable grounds" for believing that the person arrested did commit a felony? The question of reasonableness is held to be a question of law for the court.<sup>6</sup> The Kentucky Court of Appeals has stated the proposition thus: ". . . This court has without exception held that, where the facts are in dispute, the issue

<sup>1</sup> State v. Lutz, 85 W. Va. 330, 101 S.E. 434 (1919).

<sup>2</sup> Carrolton v. State, 63 Fla. 1, 58 So. 486 (1912); Brooks v. State, 114 Ga. 6, 39 S.E. 877 (1901); Dilger v. Commonwealth, 83 Ky. 550, 11 S.W. 651 (1889).

<sup>3</sup> McBride v. U. S., 284 Fed. 416 (C.C.A. 5th 1922).

<sup>4</sup> A number of states have statutes which contain this provision, see RESTATEMENT, CRIMINAL PROCEDURE, commentary to sec. 21, subsec. (B), p. 234 (1931).

<sup>5</sup> Waite, *The Law of Arrest*, 24 TEX. L. REV. 293 (1946).

<sup>6</sup> People v. Kelvington, 104 Cal. 86, 37 P. 799 (1894); Filer v. Smith, 96 Mich. 347, 55 N.W. 999 (1893); State v. Grant, 79 Mo. 113 (1883); Diers v. Mallon, 46 Neb. 121, 64 N.W. 722 (1895).

should be submitted to the jury under the appropriate instruction; but, where the facts alleged are undisputed, it becomes a question of law for the court."<sup>7</sup> In other words the actual happenings are determined by the jury but where these events constitute reasonable ground for the belief that the person committed the felony is to be decided by the court. The writer is somewhat puzzled by this approach to the problem. Certainly the test applied is one of reasonableness—would a reasonable man or a reasonable officer have thought from the circumstances that the felony was committed by the person arrested? It would appear that twelve reasonable men, as jurors are assumed to be, would be in a better position to determine what is reasonable than a judge who has heard many such cases and is perhaps too familiar with the usual circumstances which lead to arrest to be able to accept each particular case upon its facts and to isolate it from similar cases which have come within his experience. Thus he would find it difficult to put himself in the place of either the police officer or the private person faced with the problem. "Probable cause" is belief fairly arising out of facts known to the officer that the party is engaged in the commission of the crime.<sup>8</sup> Mere suspicion or information is not enough.<sup>9</sup> The knowledge which gives rise to probable cause must be known at the time of the arrest and must not be knowledge gained after the arrest or from events subsequent thereto.<sup>10</sup>

Generally an officer may make an arrest when he has reasonable grounds to believe that a felony has been or is being committed and reasonable grounds to believe that the person to be arrested has committed or is committing it,<sup>11</sup> although neither factor exists. For convenience this proposition gives rise to a situation which may be referred to as "double mistake" in that the officer making the arrest is mistaken both as to the commission of the felony and as to the guilt of the person arrested. Various types of statutes have been enacted in this country dealing with this phase of the problem. Many of them are merely a codification of the common law.<sup>12</sup> A few state that an

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<sup>7</sup> *Grau v. Forge*, 183 Ky. 521, 209 S.W. 260, 271 (1919).

<sup>8</sup> *Frosta v. U. S.*, 51 F. 2d 830 (C.C.A. 8th 1931).

<sup>9</sup> *Poldo v. U. S.*, 55 F. 2d 866 (C.C.A. 9th 1932).

<sup>10</sup> *U. S. v. Gowen*, 40 F. 2d 593 (C.C.A. 2d 1930).

<sup>11</sup> *People v. Bressler*, 223 Mich. 597, 194 N.W. 559 (1923); *Diers v. Mallon*, 46 Neb. 121, 64 N.W. 722 (1894); *State v. Huglett*, 124 Wash. 366, 214 P. 841 (1923); *Allen v. Lopinsky*, 81 W. Va. 13, 94 S.E. 269 (1917).

<sup>12</sup> For example, see 10 OHIO GEN. CODE ANN. sec. 13432-2 (Page, 1938) which provides: "When a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained." Note that this statute extends the "double mistake" proposition to private persons making the arrest, most statutes do not.

officer may arrest on a charge made, upon reasonable cause, of the commission of a felony by the person arrested<sup>13</sup> while others allow "double mistake" only at night time.<sup>14</sup> Only one or two states have more rigid requirements and do not allow "double mistake".<sup>15</sup>

Officers also have the authority to take steps to prevent the commission of a felony by arresting a person when there are reasonable grounds to believe that the latter is about to commit a felony.<sup>16</sup>

### *B. Arrest of a Felon by a Private Person*

A private person may arrest without a warrant for a felony committed in his presence. Beyond this one fundamental rule, the law of arrest by a private person without a warrant is neither uniform nor clear. It is the almost universal rule, either by decision or by statute, that a private person may arrest without a warrant when a felony is actually committed by the person arrested upon reasonable belief even though it was not committed in his presence. A few states stop at this point.<sup>17</sup> More generally, however, an arrest is valid if a felony was actually committed even though not by the person arrested, if there is a reasonable belief that he committed it.<sup>18</sup> A few states allow the "double mistake"—no felony at all and no wrong by the person arrested—even on the part of a private person.<sup>19</sup>

A private person also has the right of making an arrest without a warrant for the purpose of preventing the commission of a felony.<sup>20</sup>

### *C. Arrest for Misdemeanor by Officer*

The right to arrest a person who has committed or is suspected of having committed a misdemeanor is much more limited than the right to arrest felons or suspected felons. By weighing interests, it is readily seen that the risk of arresting an innocent person for a felony is of little importance in comparison with the necessity of bringing the

<sup>13</sup> See 2 TENN. CODE ANN. sec. 11536 (4) (Williams, 1934).

<sup>14</sup> 6 UTAH CODE ANN. T. 105, ch. 13, sec. 3 (1934); "A peace officer . . . may, without a warrant, arrest a person . . . (5) at night, when there is reasonable cause to believe that he has committed a felony."

<sup>15</sup> See N. Y. CRIM. CODES, sec. 177 (3) (Thompson, 1939) which provides for arrest when a felony has actually been committed though not by the person arrested and section 179 which makes the same provision for night time arrests.

<sup>16</sup> See *State v. Huglett*, 124 Wash. 366, 214 P. 841 (1923).

<sup>17</sup> *Lindquist v. Friedmans* (Ill. App.) 1 N.E. 2d 529 (1939); *People v. Governale*, 193 N. Y. 581, 86 N.E. 554 (1908).

<sup>18</sup> *Martin v. State*, 97 Ark. 212, 133 S.W. 598 (1911); *Imler v. Yeager*, 245 S.W. 200 (Mo. 1922).

<sup>19</sup> *Brady v. U. S.*, 300 F. 540 (C.C.A. 6th 1924); *State v. Griffin*, 74 S. C. 412, 54 S.E. 603 (1906).

<sup>20</sup> *Cobb v. Bailey*, 35 Ga. App. 302, 133 S.E. 42 (1926).

felon to custody while he is available, while an unlawful arrest of a person upon suspicion of having committed a misdemeanor may lead to a wrong as bad or worse than the misdemeanor itself. For that reason the occasions upon which either an officer or a private person may arrest for a misdemeanor without a warrant are limited.

Most states hold, either by statute or decision, that an officer may arrest for a misdemeanor committed *in his presence*.<sup>21</sup> However, at common law and in a few states today only a misdemeanor amounting to a breach of the peace or one for which special statutory provision is made justifies an arrest without a warrant.<sup>22</sup> Statutes which provide that an officer may arrest for an "offense" committed in his presence have generally interpreted the term "offense" to include a misdemeanor.<sup>23</sup> An arrest for a misdemeanor without a warrant must be made at the time of the act or on fresh pursuit.<sup>24</sup>

#### *D. Arrest for a Misdemeanor by a Private Person*

The general rule is that a private person may arrest for a misdemeanor committed in his presence if the misdemeanor amounts to a breach of the peace. This was the common law rule. However, there is an increasing tendency toward permitting a private person to arrest for any misdemeanor committed in his presence. The conspicuous exception to both the rule and the exception is found in Kentucky,<sup>25</sup> and possibly West Virginia,<sup>26</sup> where a private person may not arrest for any misdemeanor. No state has as yet allowed an arrest by a private person without a warrant for a misdemeanor not committed in his presence.

#### *Recommendations*

It is apparent that the law of arrest without a warrant varies in the several jurisdictions to a considerable degree. The reason for this variance in the laws of the various states is not apparent. It is the writer's opinion that in almost every instance the majority rule is the

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<sup>21</sup> Robertson v. State, 53 Ark. 516, 14 S.W. 902 (1890); Franklin v. Amerson, 118 Ga. 860, 45 S.E. 698 (1903); People v. Craig, 152 Cal. 42, 91 P. 997 (1907); State v. Mills, 6 Del. 497, 69 Atl. 841 (1908); Caffini v. Hermann, 112 Me. 282, 91 Atl. 1009 (1914).

<sup>22</sup> Lee v. State, 45 Tex. Cr. 94, 74 S.W. 28 (1903); Stittgen v. Rundle, 99 Wis. 78, 74 N.W. 536 (1898).

<sup>23</sup> Sims v. Smith, 115 Conn. 297, 161 Atl. 239 (1932); People v. Ford, 356 Ill. 572, 191 N.E. 315 (1934).

<sup>24</sup> People v. Johnson, 86 Mich. 175, 48 N.W. 870 (1891); State v. Lewis, 50 Ohio St. 179, 33 N.E. 405 (1893). Cf. Stevens v. Gilbert, 120 N. Y. S. 114 (1909).

<sup>25</sup> Reich v. Bailey, 123 Ky. 827, 832, 97 S.W. 747, 748 (1906).

<sup>26</sup> Allen v. Lopinsky, 81 W. Va. 13, 94 S.E. 369 (1917).

best rule. There are, however, two situations in which a minority rule is sounder. A private person should, contrary to the majority rule, be able to make an arrest for a felony upon reasonable belief that one has been committed. Further a private person should not be allowed to arrest for a misdemeanor committed in his presence not amounting to a breach of the peace. It is contended that public interest is great enough in the first situation to warrant arrest by a private person, while in the second situation these lesser offenses are not a serious enough threat to the public to afford the right of arrest by a private person.

The result reached by accepting the majority view with these two exceptions could be codified briefly as follows:

A police officer may arrest without a warrant:

- (1) for a felony committed in his presence;
- (2) upon reasonable belief that a felony has been committed and reasonable belief that the person arrested committed it;
- (3) to prevent the commission of a felony;
- (4) for a misdemeanor committed in his presence.

A private person may arrest without a warrant:

- (1) for a felony committed in his presence;
- (2) upon reasonable belief that a felony has been committed and reasonable belief that the person arrested committed it;
- (3) to prevent the commission of a felony;
- (4) for any misdemeanor amounting to a breach of the peace committed in his presence.

NORMA D. BOSTER

## CRIMINAL LAW—THE USE OF FORCE IN DEFENSE OF PROPERTY

In most civilized countries, the right to acquire and own property is recognized by law. Therefore, it would seem reasonable to assume that in connection with the right to own, a property owner should have a right to defend his property against an aggressor. Nevertheless, it is axiomatic that the law places a higher value on life than on property. Consequently there exists a basic principle that one is not privileged to kill in order to protect property.<sup>1</sup> However, certain ex-

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<sup>1</sup> Russell v. State, 219 Ala. 567, 122 So. 683 (1929); 1 BISHOP, CRIMINAL LAW 610 (9th ed. 1923); MAY, CRIMINAL LAW 76 (4th ed. 1938); 26 AM. JUR. 272 (1940); 40 C. J. S. 977 (1944).