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ARREST WITHOUT A WARRANT IN WEST VIRGINIA

MARLYN E. LUGAR*

THIS study deals only with the right of private persons and peace officers, of their own accord, to make arrests without warrants in order to bring actual or supposed criminals into their custody for the purpose of administering the law. It does not purport to consider the manner in which these arrests are to be made, the place or the time thereof, or the conduct of the actors after the arrests. The purpose is primarily to examine the holdings, as well as the language, of the West Virginia cases dealing with this subject; secondarily, to supplement these points which have been discussed by our court with the opinions expressed by the American Law Institute;¹ and last, to observe any statutory changes.

“ ‘The right of personal liberty consists in the power of locomotion, of changing situation, of moving one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due process of law.’ ”²

Both the federal and state constitutions prohibit unreasonable search and seizure of persons as well as the issuance of warrants except upon probable cause, supported by oath, particularly describing the person to be seized.³ These provisions have generally been regarded as having no effect on the right to arrest without a warrant, although legislative extensions of the common law rules may be restricted by other constitutional provisions.⁴ The West Virginia statutory extensions do not seem to be questionable; therefore, this discussion will be limited, first, to pointing out the common law rules and, then, the statutory extensions.

FELONY.

At common law a private person is privileged to arrest without a warrant if the other has committed a felony,⁵ punishable at the

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¹ The Restatement is rapidly becoming accepted as the authoritative statement of the common law; it has been cited by the West Virginia court forty-eight times. Goodrich, *Proof of the Pudding* (1941) 27 A. B. A. J. 771.

² *State v. Hatfield*, 112 W. Va. 424, 427, 164 S. E. 518 (1932).

³ U. S. CONST. Amend. IV; W. VA. CONST. art. III, § 6.

⁴ 4 AM. JUR., Arrest § 23. The type of statute which might be questionable is one giving a right to arrest without a warrant for a mere misdemeanor *not* committed in the officer’s presence, *id.* at § 26.

⁵ RESTATEMENT, TORTS (1934) § 119(a).

time of the arrest,⁶ especially if he sees it committed;⁷ or if a felony has been committed and he reasonably suspects that the other has committed it,⁸ but under no circumstances (under neither a mistake of law nor fact), can a private person justify such an arrest by himself, or by an officer at his instance, unless the felony has actually been committed;⁹ or if the other has attempted to commit a felony in his presence and the arrest is made at once or upon fresh pursuit.¹⁰

Likewise, a peace officer is privileged to arrest another without a warrant if the other has committed a felony,¹¹ punishable at the time of the arrest,¹² especially if he sees it committed¹³ or knows through his senses that it is being committed in his presence¹⁴ or if he, upon reasonable grounds, believes that the other has committed a felony though it afterwards appears that no felony was actually perpetrated;¹⁵ nevertheless, in *State v. Day*,¹⁶ our court held that, even though a felony has been committed, a peace officer, who is mistaken as to the identity of the person he endeavors to arrest and injures him, is liable on his bond even though he has reasonable grounds for believing that person to be the felon and that it is necessary to shoot in order to prevent

⁶ *Id.* at comment *f*.

⁷ See *State v. Sutter*, 71 W. Va. 371, 373, 76 S. E. 811, 43 L. R. A. (N. S.) 399 (1912).

⁸ RESTATEMENT, TORTS § 119(b).

⁹ See *Allen v. Lopinsky*, 81 W. Va. 13, 15, 94 S. E. 369 (1917); RESTATEMENT, TORTS § 119, comments *h* and *i*. The Restatement does not give him this privilege even though an act has been committed and the actor reasonably believes it to be a felony through a mistake of law or fact, and it makes no difference that the act is in fact a breach of the peace or a misdemeanor. Even though no felony had been committed, at common law an arrest might be made by a private person taking part in a "hue and cry" against another.

¹⁰ RESTATEMENT, TORTS § 119(d). It will be noticed that this privilege is broader than one to arrest for a breach of the peace, *id.* at 119(c) and comment *p*. "Fresh pursuit" is one promptly begun and continuously maintained, but the continuity is not broken by temporary and unavoidable interruptions, *id.* at comment *q*.

¹¹ *Id.* at § 121, referring to § 119(a).

¹² *Id.* at § 119, comment *f*.

¹³ *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. (N. S.) 399 (1912); *State v. Hammond*, 96 W. Va. 96, 122 S. E. 363 (1924).

¹⁴ *State v. Thomas*, 105 W. Va. 346, 143 S. E. 88 (1928).

¹⁵ *State v. Spangler*, 120 W. Va. 72, 197 S. E. 360 (1938); see *Allen v. Lopinsky*, 81 W. Va. 13, 15, 94 S. E. 369 (1917), where he has reasonable grounds to believe the offense so committed was a felony though it was not; *Marchuchi v. Norfolk & W. Ry.*, 81 W. Va. 548, 553, 94 S. E. 979 (1918); RESTATEMENT, TORTS § 121(a), referring to 119 (b), where a felony has been committed, and the actor reasonably suspects that the other has committed it; *id.* at § 121(b), where no felony has been committed, but the officer reasonably suspects that a felony has been committed and that the other has committed it.

¹⁶ 120 W. Va. 412, 198 S. E. 609 (1938).

an escape.¹⁷ Apparently no distinction is to be made between capital felonies and inferior felonies in the matter of arrest.¹⁸ A peace officer has also the privilege to arrest without a warrant where the other has attempted to commit a felony in his presence and the arrest is made at once or upon fresh pursuit.¹⁹ For a past offense lower than a felony, an officer cannot legally make an arrest without a warrant; a possible exception being a dangerous assault that may end in a felony, by the death of the injured person.²⁰

“Reasonable grounds to believe” would seem to be more than mere suspicion, that is, there must be a reasonable suspicion. What is sufficient to satisfy this test will depend upon the facts in each case. The American Law Institute names the following as important factors to be considered in determining whether the suspicion is sufficiently reasonable: (1) the nature of the crime involved, (2) the chance of escape of the one suspected, (3) the harm to others to be anticipated if he escapes, and (4) the harm to him if he is arrested;²¹ and states that it is a question for the court as to what constitutes a reasonable suspicion upon a given set of facts.²² This question was before our court in *State v. Spangler*,²³ wherein it was held that the evidence was not sufficient to show that the officer had reasonable grounds to believe that the other had committed a felony, the evidence on this issue being very meager. Our court has often considered an analogous question with respect to whether the facts were sufficient to give an officer reasonable grounds to suspect that an offense was being committed in his presence; these cases will be discussed later.

Furthermore, not even a peace officer is protected who, however reasonably, acts under a mistake of law, other than a mistake as to the validity of a statute or ordinance, and as to the latter type of mistake no opinion is expressed by the American Law Institute where the legislation is declared to be invalid subsequent to the arrest.²⁴

¹⁷ Comment (1939) 45 W. VA. L. Q. 173.

¹⁸ See *Thompson v. Norfolk & W. Ry.*, 116 W. Va. 705, 711, 182 S. E. 880 (1935). The statement was made really with respect to the amount of force which might be used in effecting an arrest.

¹⁹ RESTATEMENT, TORTS § 121(b), referring to § 119(d). It will be noticed that this privilege is broader than one to arrest for a breach of the peace, *id.* at § 119(c) and comment *q*.

²⁰ See *State v. Gum*, 68 W. Va. 105, 108, 69 S. E. 463 (1910).

²¹ RESTATEMENT, TORTS § 119, comment *j*.

²² *Id.* at comment *k*.

²³ 120 W. Va. 72, 197 S. E. 360 (1938).

²⁴ RESTATEMENT, TORTS § 121, comment *i*.

A peace officer, designated to act only within a limited district or to make arrests only for certain acts, has no greater privilege outside such district or for acts other than those named than has a private person.²⁵

MISDEMEANOR — BREACH OF THE PEACE.

At common law a private person or a peace officer is privileged to arrest without a warrant one who in his presence is committing a breach of the peace or, having so committed a breach of the peace, he is reasonably believed by the actor to be about to renew it;²⁶ although there is a *dictum* to the effect that a private person under no circumstances can justify such an arrest for a misdemeanor.²⁷ However, not even a peace officer has authority to make such an arrest for a misdemeanor, even though committed in his presence, unless it involves a breach of the peace.²⁸ But, attempts to commit felonies are at common law only misdemeanors,²⁹ and for this type both private persons and peace officers are privileged to arrest without warrants if committed in their presence, as pointed out above. Our court has extended the above rule as to a peace officer's authority to arrest without a warrant for a breach of the peace committed in his presence to include also misdemeanors committed in his presence which cannot be stopped or redressed without immediate arrest,³⁰ and the test applicable to this extension seems to be whether the officer can or cannot later have the misdemeanor arrested upon a warrant.³¹ Our court has also stated this rule, as to a breach of the peace in the officer's presence, with the following variations: a misdemeanor which amounts to a breach of the peace or which "may likely lead to a breach of the peace;"³² a misdemeanor where the offense was committed or "attempted" in his presence;³³ where "immediately before" the arrestee was committing a breach of the peace.³⁴ To create this privi-

²⁵ *Id.* at § 121, comments *a* and *c*.

²⁶ *Id.* at § 121(a) and § 119(c).

²⁷ See *Allen v. Lopinsky*, 81 W. Va. 13, 15, 94 S. E. 369 (1917).

²⁸ *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434 (1919).

²⁹ CLARK & MARSHALL, CRIMES (4th ed. 1940) § 113.

³⁰ *State v. Whitt*, 96 W. Va. 268, 122 S. E. 742 (1924); *State v. Dean*, 98 W. Va. 88, 126 S. E. 411 (1925).

³¹ *State v. Dean*, 98 W. Va. 88, 126 S. E. 411 (1925).

³² *State v. Whitt*, 96 W. Va. 268, 275, 122 S. E. 742 (1924).

³³ *State v. Spangler*, 120 W. Va. 72, 78, 197 S. E. 360 (1938).

³⁴ *State v. Long*, 88 W. Va. 669, 688, 108 W. Va. 279 (1921); *of. State v. Stockton*, 97 W. Va. 46, 51, 124 S. E. 509 (1924), the fact that the disturbance of the peace had ceased at the time one orally appointed arrived to make the arrest could not nullify his appointment or affect his authority to make the

lege it is said not to be enough that either a private person or a peace officer reasonably suspects that the other is committing a breach of the peace, except where the other knowingly causes the actor to believe such facts exist, and if in fact no breach of the peace has been committed, a mistaken belief whether induced by a mistake of law or of fact creates no privilege.³⁵ However, our court seems to approve a policy of permitting an arrest without a warrant by a peace officer where he has reasonable grounds to suspect that such an offense is being committed.³⁶

Of course, it is immaterial whether an officer has authority to arrest for a misdemeanor not involving a breach of the peace if he is only present with an officer who has such authority and makes the arrest.³⁷

AN AFFRAY.

The American Law Institute states that a peace officer is privileged to arrest another without a warrant where an affray is being or has been committed in the officer's presence and he reasonably suspects that the other is or has been participating therein and the arrest is made at once or on fresh pursuit.³⁸ The principal distinction between such an arrest and one for a breach of the peace seems to be that here the officer is protected where he acts under a reasonable mistake as to the existence of facts; for example, a peace officer, coming upon the scene of a riotous affray, would under this rule be privileged to arrest persons subsequently discovered to be bystanders who were taking no particular part in the affray but were merely trying to force their way out of the mob.³⁹ Our court seems never to have made any distinction between an affray and a breach of the peace in this respect.

DECEPTIVE ARRESTEE.

According to the American Law Institute either a private person or a peace officer is privileged to arrest another without a warrant if the other knowingly causes the actor to believe that

arrest. *Accord*: *Town of Hartford v. Davis*, 107 W. Va. 693, 150 S. E. 141 (1929), if the officer acts promptly, he may arrest without a warrant for a breach of the peace committed in his presence; otherwise, he must procure a warrant.

³⁵ RESTATEMENT, TORTS §119(e), comment o.

³⁶ *State v. Koil*, 103 W. Va. 19, 22, 136 S. E. 510 (1927); *State v. Olivetti*, 107 W. Va. 357, 361, 143 S. E. 205 (1929); *State v. Fidelity & Casualty Co. of N. Y.*, 120 W. Va. 593, 597, 199 S. E. 884 (1938).

³⁷ See *State v. Brown*, 101 W. Va. 160, 164, 132 S. E. 366 (1926).

³⁸ RESTATEMENT, TORTS §121c.

³⁹ *Id.* at §121, illustration 7.

facts exist which would create in him such a privilege to arrest.⁴⁰ To create this privilege, though, the other must either intend his conduct to induce the actor to believe in the existence of such facts or as a reasonable man should realize that his conduct creates a substantial probability of inducing the other so to believe.⁴¹ Apparently no case involving such facts has been considered by our court with respect to the privilege to arrest.

IN THE PRESENCE OF THE ACTOR.

“In the presence of the actor” means that the actor by the use of his senses knows that the other is committing the act which constitutes the breach of the peace or the attempt to commit a felony; the act need not be done in the actor’s immediate neighborhood, but he must be aware of its commission by the use of one or more of his senses, and upon immediate investigation find that it constitutes an act for which he is privileged to arrest.⁴² Our court holds that an offense is committed in the presence of an officer when he sees it with his eyes or sees some one or more of a series of continuous acts which constitute the offense,⁴³ and is aided by his other senses or by information as to the others.⁴⁴ Another test sometimes applied by our court is that a crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what under the circumstances may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case.⁴⁵ The facts observed by the officer need not be through any one of his senses—information coming to an officer through one of his senses may indicate that an offense is being committed.⁴⁶

⁴⁰ *Id.* at §119 and §121(a).

⁴¹ *Id.* at §119, comment r.

⁴² *Id.* at §119, comment m.

⁴³ *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434 (1919). This part of the statement appears in the opinion of the case; whereas the complete statement appears in point nine of the syllabus, and the test as laid down in the syllabus has been generally applied by the later cases.

⁴⁴ *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434 (1919); *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922); *State v. Stockton*, 97 W. Va. 46, 124 S. E. 509 (1924), a justice of the peace had been informed of a disturbance of the peace and he saw a portion, at least, of it; *State v. Fidelity & Casualty Co. of N. Y.*, 120 W. Va. 593, 199 S. E. 884 (1938).

⁴⁵ *State v. Koil*, 103 W. Va. 19, 136 S. E. 510 (1927), it is also stated in this case that an offense takes place within the view of an officer where his senses afford him knowledge that one is being committed; *State v. Tatar*, 108 W. Va. 709, 152 S. E. 748 (1930); *State v. Fidelity & C. Co. of N. Y.*, 120 W. Va. 593, 199 S. E. 884 (1938).

⁴⁶ *State v. Thomas*, 105 W. Va. 346, 143 S. E. 88 (1928) (sense of smell held sufficient); *State v. Olivetti*, 107 W. Va. 357, 148 S. E. 205 (1929) (odor

These tests are not broad enough to include merely observing a fulness or bulge in the other's pocket as sufficient evidence of the concealing of liquor on his person in the presence of the officer,⁴⁷ nor merely seeing the other carrying a sack who, upon a command to stop, replies, "You got me, Mike."⁴⁸ Nor is an act of adultery committed in the officer's presence where he finds one with another's wife, both persons being fully dressed, and this one merely picks up his cap and leaves by a different door from the one the officer entered, his car being in the road on that side of the house.⁴⁹

On the other hand, an offense is committed in an officer's presence when he lawfully stops a car and his searchlight reveals an exposed jug, whereupon he inquires as to its contents and is informed by the other that it is "moonshine liquor"—this admission is sufficient to authorize the arrest.⁵⁰ Likewise, the crime is committed in the officer's presence if he lawfully stops an automobile, whereupon an occupant throws something over the bank which is found to be a pistol.⁵¹ But, if, before the officer makes an arrest, he commits a trespass upon the other, by putting his hands on the other's pockets, thereby eliciting from him a confession that he has on him "three pints"; this is not the same as a voluntary disclosure, and the offense cannot be said to have been committed in his presence.⁵²

Furthermore, where one is privileged to arrest without a warrant for an offense committed in his presence, he cannot arrest merely upon a suspicion that such offense is being committed in his presence;⁵³ and it makes no difference that his suspicion is justified, the offense having been committed actually in his presence,⁵⁴ which is disclosed by a search of the one arrested.⁵⁵

of liquor plus the other's appearance may be sufficient); see *State v. Snodgrass*, 91 W. Va. 553, 558, 114 S. E. 136 (1922) (information communicated through any of his senses is proper matter of evidence).

⁴⁷ *State v. Tatar*, 108 W. Va. 709, 152 S. E. 748 (1930); Note (1922) 20 A. L. R. 652, deals with the transportation of concealed liquor.

⁴⁸ *State v. Koil*, 103 W. Va. 19, 136 S. E. 510 (1927).

⁴⁹ *Noce v. Ritchie*, 109 W. Va. 391, 155 S. E. 127 (1930).

⁵⁰ *State v. Brown*, 101 W. Va. 160, 132 S. E. 366 (1926).

⁵¹ *State v. Hatfield*, 112 W. Va. 424, 164 S. E. 518 (1932).

⁵² *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434 (1919).

⁵³ *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922); *State v. Koil*, 103 W. Va. 19, 136 S. E. 510 (1927).

⁵⁴ *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434 (1919); *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922); *State v. Koil*, 103 W. Va. 19, 136 S. E. 510 (1927); *State v. Tatar*, 108 W. Va. 709, 152 S. E. 748 (1930).

⁵⁵ *State v. Wills*, *State v. Tatar*, both *supra* n. 54; but see, *Clairborne v. Chesapeake & O. Ry.*, 46 W. Va. 363, 372, 33 S. E. 262 (1899), stating that after a razor was revealed by the search, it was the duty of the officer to detain him.

BREACH OF THE PEACE.

The American Law Institute defines a breach of the peace as a public offense done by violence or one causing or likely to cause an immediate disturbance of public order.⁵⁶ The term is generic and has been said by our court to include "all violations of the public peace, order or decorum, such as to make an affray; threaten to beat, wound or kill another, or commit violence against the person or property; contend with angry words to the disturbance of the peace; appear in a state of gross intoxication in a public place; recklessly flourish a loaded pistol in a public place while intoxicated; and the like."⁵⁷

In *State v. Steger*,⁵⁸ our court held that the use of abusive, profane and insulting language, unaccompanied by threats and causing no expectation or fear of personal violence, was not a breach of the peace. (Here the court was considering the sufficiency of an indictment for a breach of the peace at common law, and the *Restatement* provides that it is not conclusive so far as the law of arrest is concerned that a statute or court has for other purposes described particular conduct as a breach of the peace). This test of actual or threatened violence as an essential element was approved in *State v. Whitt*,⁵⁹ but in *State v. Dean*,⁶⁰ our court pointed out that this was not limited to personal violence but might also be violence to the public peace, order, decorum or repose, and approved the following definition :

"The term "breach of the peace" is generic, and includes all violations of the public peace or order or decorum; in other words, it signifies the offense of disturbing the public peace or tranquillity enjoyed by the citizens of a community. . . . By peace, as used in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or a community where good order reigns."⁶¹

Later our court said generally that the phrase includes every act of violence which tends to disturb that sense of security which every person feels necessary to his comfort and to secure which the government is instituted and maintained.⁶²

⁵⁶ RESTATEMENT, TORTS §116.

⁵⁷ *State v. Long*, 88 W. Va. 669, 108 S. E. 279 (1921). See also, *State v. Clark*, 64 W. Va. 625, 640, 63 S. E. 402 (1908); *Marchluchi v. Norfolk & W. Ry.* 81 W. Va. 548, 553, 94 S. E. 979 (1918).

⁵⁸ 94 W. Va. 576, 119 S. E. 682, 34 A. L. R. 570 (1923).

⁵⁹ 96 W. Va. 268, 276, 122 S. E. 742 (1924).

⁶⁰ 98 W. Va. 88, 92, 126 S. E. 411 (1925).

⁶¹ *Id.* at 91.

⁶² *State v. Mills*, 108 W. Va. 31, 35, 150 S. E. 142 (1929).

The following acts have been considered by our court with reference to their being breaches of the peace. Stating to another that, "By God . . . he didn't have to go away and . . . he couldn't make him go away," when the occurrence takes place on a public road, tends to a breach of the peace, the words being well calculated to provoke a conflict and to bring about blows.⁶³ A breach of the peace is committed where, prior to the time of an attempted arrest, one is intoxicated, is driving his car recklessly through the streets, draws his pistol on the officer and threatens to shoot him, enters a store and throws out sample shoes, and immediately before the attempted arrest, curses the officer and calls him vile names in a loud and angry voice.⁶⁴ One who is not related to another about to be arrested by an officer for an offense, whether with or without a warrant, commits a breach of the peace if he interferes to resist such arrest and commits an assault upon the officer when the one about to be arrested offers no resistance.⁶⁵ An officer, who is informed of a disturbance of the peace, and upon arrival at the scene sees another with a stone in his hand running after a woman who is retreating from him, may arrest without a warrant for a breach of the peace.⁶⁶ But, simple larceny is not a breach of the peace unless committed under circumstances which might immediately lead to a breach of the peace.⁶⁷ One who is unlawfully gambling and playing a certain game of chance for money with cards, commonly called "poker", is not committing a breach of the peace if the public is not in any way disturbed thereby.⁶⁸

PEACE OFFICERS' STATUTORY AND COMMON LAW PRIVILEGES.

Having referred to the common-law rules with respect to the privileges of private persons and peace officers to arrest others without warrants, the more generally applicable statutes will be reviewed in connection with an examination of the West Virginia cases dealing with the privileges of certain designated officers. This special treatment is undertaken because there is no general statute applicable to all officers with respect to the right to arrest without

⁶³ *State v. Clark*, 64 W. Va. 625, 640, 63 S. E. 402 (1908). *Accord*: *Marchuchi v. Norfolk & W. Ry.*, 81 W. Va. 548, 552, 94 S. E. 979 (1918); *cf. State v. Gum*, 68 W. Va. 105, 69 S. E. 463 (1910), wherein similar language was used toward an officer in the other's home and where the language was partially provoked by the officer—the arrest was held unlawful.

⁶⁴ *State v. Long*, 88 W. Va. 669, 683, 108 S. E. 279 (1921).

⁶⁵ *State v. Best*, 91 W. Va. 559, 113 S. E. 919 (1922).

⁶⁶ *State v. Stockton*, 97 W. Va. 46, 50, 124 S. E. 509 (1924).

⁶⁷ *State v. Whitt*, 96 W. Va. 268, 276, 122 S. E. 742 (1924).

⁶⁸ *State v. Dean*, 98 W. Va. 88, 92, 126 S. E. 411 (1925).

a warrant and because there may be some question at common law as to who are peace officers. Furthermore, no West Virginia case has been found specifically holding that a private person has any such right; therefore, our cases are more important from the viewpoint of the privileges of different officers. Since the rights with respect to arrests for felonies have not often been considered by our court and since the rules mentioned above are rather well established with respect thereto, the following study will be largely limited to lesser offenses.

The American Law Institute defines a peace officer as a person designated by a public authority, by appointment or election, whose duty it is to keep the peace and arrest persons guilty or suspected of crime, and does not attempt to state who are peace officers.⁶⁹ In England under the common law, sheriffs, justices of the peace, coroners, constables, and watchmen were entrusted with special powers as conservators of the peace.⁷⁰

STATE TROOPERS.

“The superintendent and each of the officers and members of the department of public safety are hereby authorized and empowered as follows:

“(a) . . . when a witness to the perpetration of any offense or crime, or to the violation of any law of this State, or of the United States, may arrest without warrant. . . .

“(d) . . . and shall exercise all of the powers conferred by law upon a sheriff, constable or any other peace officer of this State. . . .”⁷¹

This statute broadens the privilege of arrest without a warrant to *any* offense or crime or to the violation of any law of this state, but even here it may only be exercised when the offense is witnessed by such officers (usually referred to as state troopers). They cannot without a warrant lawfully arrest another on mere suspicion that he is committing a misdemeanor in their presence;⁷² but if they are aware, by the use of any of their senses, of the commission of a crime they may investigate and arrest without a war-

⁶⁹ RESTATEMENT, TORTS (1934) §114.

⁷⁰ 4 AM. JUR., Arrest §24.

⁷¹ W. VA. CODE (Michie, 1937) c. 15, art. 2, §11. This statute also provides that under certain circumstances citizens and other officers shall be considered members of the department of public safety.

⁷² State v. Wills, 91 W. Va. 659, 114 S. E. 261 (1922).

rant,⁷³ even though the offense is a misdemeanor not involving a breach of the peace.⁷⁴

This statute also authorizes these officers "to arrest and detain any and all persons suspected of the commission of any felony or misdemeanor whenever complaint is made and a warrant is issued thereon for such arrest."⁷⁵ This would seem to be merely declaratory of the common law and should not be construed as preventing an arrest without a warrant for a felony, not committed in their presence, if they upon reasonable grounds believe that the other has committed a felony, though it afterwards appears that no felony was actually perpetrated; especially since the part of the statute first quoted above gives them all the powers conferred by law upon any peace officer of this state.⁷⁶

The statute contains no extension of the right to arrest without a warrant for an offense of a lesser grade than a felony not committed in the officer's presence. Generally our court has applied the same tests to determine when a state trooper is "a witness" to an offense as it has applied to determine whether an offense is committed "in the presence of" a peace officer, without expressly stating that the same rules apply.⁷⁷

SHERIFFS AND DUPUTY SHERIFFS.

Our court recognizes that sheriffs and deputy sheriffs are conservators of the peace or peace officers,⁷⁸ and that as such they have the common law privilege to arrest without a warrant for misdemeanors committed in their presence but only if the acts amount to breaches of the peace or are likely to lead thereto, or are such as cannot be stopped or redressed without immediate arrest⁷⁹—this would seem to include such arrests to prevent the commission of breaches of the peace.⁸⁰ Their power to arrest for other types of misdemeanors without warrants has not been extended generally by

⁷³ *State v. Thomas*, 105 W. Va. 346, 143 S. E. 88 (1928); *State v. Olivetti*, 107 W. Va. 357, 148 S. E. 205 (1929).

⁷⁴ *State v. Brown*, 101 W. Va. 160, 132 S. E. 366 (1926); see *State v. Whitt*, 96 W. Va. 268, 275, 122 S. E. 742 (1924).

⁷⁵ W. VA. CODE (Michie, 1937) c. 15, art. 2, §11.

⁷⁶ *Supra* n. 15 contains the West Virginia cases on this point as to peace officers, but no West Virginia case involving state troopers has been found.

⁷⁷ For example, in *State v. Thomas*, and *State v. Olivetti*, both *supra* n. 73, the court relied upon earlier West Virginia cases in which the question was whether any offense had been committed in the officer's presence.

⁷⁸ *State v. Whitt*, 96 W. Va. 268, 274, 122 S. E. 742 (1924); *State v. Dean*, 98 W. Va. 88, 91, 126 S. E. 411 (1925); *State v. Koil*, 103 W. Va. 19, 22, 136 S. E. 510 (1927).

⁷⁹ *State v. Whitt*, *State v. Dean*, both *supra* n. 78

⁸⁰ See *State v. Whitt*, 96 W. Va. 268, 277, 122 S. E. 742 (1924).

statute, but neither has their power to arrest in this manner persons whom they upon reasonable grounds believe to have committed felonies been taken away by statute.

JUSTICES OF THE PEACE AND CONSTABLES.

Under our constitution justices of the peace and constables are conservators of the peace throughout the county.⁸¹ By statute where an offense of which a justice of the peace has jurisdiction is committed in his presence, or in that of a constable, either may forthwith apprehend the offender or cause him to be apprehended, and in such case he may be tried without a warrant.⁸² Another statute gives a constable the power to arrest without a warrant any person who, in his presence and within his county, shall "make an affray, or threaten to beat, wound or kill another, or to commit violence against his person or property; or contend with angry words to the disturbance of the peace; or improperly or indecently expose his person; or appear in a state of gross intoxication in a public place."⁸³ In *State v. Lutz*,⁸⁴ our court, in referring to this latter statute, said that it amounts to little if anything more than an affirmance of the common law, unless the three classes of offenses lastly mentioned constitute exceptions;⁸⁵ while it was recognized that the former statute authorizes justices and constables to arrest without a warrant for misdemeanors, other than those involving breaches of the peace, when committed in their presence if the justice has jurisdiction of the offenses.⁸⁶ These statutes do not seem to take away these officers' common law right to arrest as conservators of the peace without a warrant for felonies;⁸⁷ however, it must be remembered that our court has held a constable liable on his bond who wounded an innocent person through a mistake as to identity even though he had reasonable grounds for be-

⁸¹ W. VA. CONST. art. VIII, §28 and art. IX, §7.

⁸² W. VA. CODE (Michie, 1937) c. 50, art. 18, §2. Section 1 of this article specifies generally the offenses over which a justice has jurisdiction, although other sections of the code give him jurisdiction over other offenses. See *State v. Fidelity & Casualty Co. of N. Y.*, 120 W. Va. 593, 597, 199 S. E. 884 (1938), wherein the court cites section 2, for the statement that a constable has the right to make an arrest for a misdemeanor committed in his presence.

⁸³ W. VA. CODE (Michie, 1937) c. 62, art. 10, §6.

⁸⁴ 85 W. Va. 330, 341, 101 S. E. 434 (1919).

⁸⁵ But see *State v. Clark*, 64 W. Va. 625, 638, 63 S. E. 402 (1908), the court felt that contending with angry words to the disturbance of the peace might also be a breach of the peace.

⁸⁶ See also, *State v. Whitt*, 96 W. Va. 268, 275, 122 S. E. 742 (1924).

⁸⁷ *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811 (1912), wherein a constable saw a felony committed; see *State v. Emsweller*, 78 W. Va. 214, 224, 88 S. E. 787 (1916), wherein the court said an arrest might be without a war-

lieving that such person was the felon and that it was necessary to shoot in order to prevent an escape.⁸⁸ Clearly, a constable cannot legally arrest without a warrant for a misdemeanor not committed in his presence.⁸⁹

MUNICIPAL OFFICERS.

The leading case in West Virginia as to municipal police officers' right to arrest without a warrant is *State v. Lutz*,⁹⁰ wherein our court, finding no statute changing, affirmed the common law rule that such an officer could not legally arrest without a warrant for a misdemeanor even though committed in his presence unless it involved a breach of the peace. In this case the officer attempting to make the arrest was the chief of police of a city organized under a charter which did not specify any powers for this officer, and the city had not attempted to give him any additional power to arrest without a warrant; further, the court held that a general statute making it the duty of municipal police to enforce the prohibition law, independently of any ordinance, conferred no additional authority since it might be complied with, without resorting to arrest without a warrant. This latter statute is similar to our present statute making it the duty of the mayor and the police of a municipality to aid in the enforcement of the criminal laws of the state and to arrest any offender.⁹¹

In this case the only provision in the general law applicable to municipal corporations⁹² referred to as a possible basis for broadening the power to arrest was one similar to our present statute⁹³ authorizing the town council to appoint when necessary

rant if a justice has jurisdiction of the offense committed in his presence or a constable's presence; otherwise there must be a warrant—on the facts only a misdemeanor was involved and it had not been committed in the presence of either.

⁸⁸ *State v. Day*, 120 W. Va. 412, 198 S. E. 609 (1938).

⁸⁹ *Noce v. Ritchie*, 109 W. Va. 391, 155 S. E. 127 (1930).

⁹⁰ 85 W. Va. 330, 101 S. E. 434 (1919).

⁹¹ W. VA. CODE (Michie, 1937) c. 8, art. 4, §25.

⁹² W. VA. CODE (Michie, 1937) c. 8, sets forth generally the powers of municipal corporations and their officers; art. 1, §2 thereof specifying that, except as otherwise provided in the code or by special charter, all municipal corporations may exercise the powers conferred by this chapter although they are not conferred by their charters, and that so far as this chapter confers power on municipal authorities, not conferred by the charters thereof, this chapter constitutes an amendment to said charters, and also containing another provision whereby municipal corporations may adopt the provisions of this chapter where inconsistent with their charters. W. VA. CODE (Michie, 1937) c. 8A, dealing with the powers of municipalities under "home rule", will not be considered since the writer does not know of any municipality which has yet taken advantage of this plan.

⁹³ W. VA. CODE (Michie, 1937) c. 8, art. 4, §10.

a police force to assist the sergeant in the discharge of his duties — the court said that the council might under this statute enlarge the chief of police's power, but the question was not decided. However, there was another statute, apparently not called to the attention of the court, in effect at that time,⁹⁴ and in force today,⁹⁵ providing that "the sergeant shall have all the powers, rights and privileges within the corporate limits of the town in regard to the arrest of persons . . . that can legally be exercised by a constable of a district within the same."⁹⁶ In *State v. Gum*,⁹⁷ a town sergeant was apparently held not to have the same privilege to arrest as a constable, although the court in this case again did not consider the statute last quoted, which was in effect at that time also.⁹⁸ Nevertheless, the wording of this statute would seem to give the town sergeant the privilege to arrest without a warrant, not only for those misdemeanors involving a breach of the peace but also for all those over which a justice has jurisdiction, if committed in the sergeant's presence, since we have seen that a constable has this privilege.⁹⁹ Whether officers designated under special charters have this additional privilege would depend upon a construction of that particular charter as read in connection with the statutes generally applicable to the powers of municipality authorities.¹⁰⁰

Our court has expressly held that municipal police officers, irrespective of town ordinances, have the authority under the common law to make arrests, without warrants, for misdemeanors committed in their presence which are breaches of the peace;¹⁰¹

⁹⁴ W. VA. CODE (Barnes, 1917) c. 47, §35.

⁹⁵ W. VA. CODE (Michie, 1937) c. 8, art. 4, §5.

⁹⁶ *Ibid.*

⁹⁷ 68 W. Va. 105, 69 S. E. 463 (1910); but see *Claiborne v. Chesapeake & O. Ry. Co.*, 64 W. Va. 363, 369, 33 S. E. 262 (1899), to the effect that a police is a constable within the corporate limits, with the same powers in criminal cases.

⁹⁸ W. VA. CODE (1906) c. 47, §35.

⁹⁹ *Supra* n. 82.

¹⁰⁰ *Supra* n. 92.

¹⁰¹ *State v. Long*, 88 W. Va. 669, 108 S. E. 279 (1921); *State v. Best*, 91 W. Va. 559, 113 S. E. 919 (1922); *dicta* to the effect that they may legally arrest without a warrant for a *misdemeanor* committed in their presence in *Allen v. Lopinsky*, 81 W. Va. 13, 15, 94 S. E. 369 (1917) (night watchman of a town); also for an *offense* committed in their presence in *Mount v. Quinlan*, 104 W. Va. 118, 120, 139 S. E. 474 (1927) (a policeman arrests for violation of a town ordinance against driving while intoxicated). In *State v. Best*, 91 W. Va. 559, 113 S. E. 919 (1922), the first arrest without a warrant was for loitering in violation of a city ordinance, but the court did not decide its legality. In *Claiborne v. Chesapeake & O. Ry.*, 64 W. Va. 363, 369, 33 S. E. 262 (1899), the court said they may arrest any person they *know* to be guilty of an offense against the laws of the state, until a proper warrant can be issued.

and in *State v. Spangler*,¹⁰² the general rule that a peace officer may, without a warrant, arrest any person who, he, upon reasonable grounds, believes has committed a felony, was applied to a town sergeant.

CONSERVATORS OF THE PEACE.

Some of the officers already mentioned are expressly named as conservators of the peace by statute or by the constitution; others are so classified, some being given special powers as conservators of the peace. For example, the president of the county court¹⁰³ and commissioners of accounts¹⁰⁴ are so named, as well as is a notary who as such is given by the statute all the powers conferred upon justices of the peace.¹⁰⁵ What power has a conservator of the peace to arrest without a warrant?

Our court has frequently stated that the common law rules of arrest without a warrant by an officer apply to those who have authority to conserve the peace,¹⁰⁶ or who are conservators of the peace.¹⁰⁷ In *Marchuchi v. Norfolk and Western Railway Co.*,¹⁰⁸ referring to conductors named by statute to exercise the powers of conservators of the peace, the court held that they might arrest for breaches of the peace in their presence, stating that conservators are persons who have this duty and that this implies the right to intervene and intercept without the delay incidental to the procurement of a warrant; and in *Howell v. Wysor*,¹⁰⁹ the court construed the above statute applicable to notaries as giving them the powers anciently exercised by the common law officers.¹¹⁰ None of the cases in which these statements as to conservators were made involved arrests by officers other than those which have already been dealt with specifically.

OTHER STATUTORY PROVISIONS.

Space permits only an examination of the statutes already mentioned dealing generally with the right to arrest without a warrant. However, there are other statutes which confer this privi-

¹⁰² 120 W. Va. 72, 197 S. E. 360 (1938). See also, *Allen v. Lopinsky*, 81 W. Va. 13, 15, 94 S. E. 369 (1917) (night watchman).

¹⁰³ W. VA. CONST. art. IX, §7.

¹⁰⁴ W. VA. CODE (Michie, 1937) c. 44, art. 3, § 2.

¹⁰⁵ *Id.* at c. 29, art. 4, §4.

¹⁰⁶ *State v. Spangler*, 120 W. Va. 72, 77, 197 S. E. 360 (1938).

¹⁰⁷ *State v. Whitt*, *State v. Dean*, both *supra* n. 78; *cf.* *State v. Stockton*, 97 W. Va. 46, 50, 124 S. E. 509 (1924).

¹⁰⁸ 81 W. Va. 548, 94 S. E. 979 (1918).

¹⁰⁹ 74 W. Va. 589, 82 S. E. 503, Ann. Cas. 1916C 519 (1914).

¹¹⁰ *Id.* at 593.

lege upon certain persons for special purposes. No attempt will be made to enumerate all of these, but a few have been summarized below to illustrate the extent to which our legislature has gone.¹¹¹

FUGITIVE FROM ANOTHER STATE.

In *George v. Norfolk & Western Ry.*,¹¹² the second point of the syllabus states that "an offense committed in one state does not justify arrest of the perpetrator thereof in another, otherwise than upon a warrant for his arrest as a fugitive from justice." The offense involved in this case, if any, was a misdemeanor committed in West Virginia, and the arrest was made without a warrant in Virginia. It will be remembered also that, for offenses of a lesser grade than a felony, the act must have been committed in the actor's presence before he may legally arrest without a warrant. However, in *State v. Spangler*,¹¹³ our court expressly overruled the above statement "to the extent that it applies to an arrest for a felony, when such arrest is based upon reasonable grounds".¹¹⁴

¹¹¹ Within the town a mayor is a conservator of the peace and exercises all the powers vested by law in a justice of the peace, with certain exceptions as to civil cases; and it is his duty to see that the good order of the town is preserved, and to this end he may cause the arrest and detention of all riotous and disorderly persons in the town before issuing his warrant therefor, W. VA. CODE (Michie, 1937) c. 8, art. 4, §3. Game protectors may arrest on sight without a warrant any person detected by them violating any law relating to game animals, fish, frogs, wild birds and fowls, and forests, *id.* at c. 20, art. 2, §3. The state commissioner of agriculture, the consulting veterinarians and their duly appointed and authorized assistants or employees have the same powers as other peace officers of this state, *id.* at c. 19, art. 9, §5. If a constable, policeman, town sergeant, sheriff or his deputy, finds any person under the age of twenty-one years violating the statute as to smoking or possessing a cigarette or cigarette paper, who refuses to tell where he obtained the same, it is his duty to arrest such person and take him before a justice, W. VA. CODE (Michie, 1937) c. 16, art. 9, §6.

The following statutes also pertain to the right to arrest: W. VA. CODE (Michie, 1937) c. 3, art. 5, §27 (commissioner of election to preserve order); c. 3, art. 5, §26 (illegal voters); c. 27, art. 4, §10 (inmate escaping from state hospital); c. 28, art. 1, §8 (youth escaping from industrial school); c. 28, art. 3, §13 (girl escaping from industrial school); c. 50, art. 12, § 2 (order of a justice for contempt); c. 56, art. 3, §18 (to assist officer executing any process to overcome resistance); c. 60, art. 3, §24 (employee of the liquor commission as to certain acts); c. 61, art. 3, §41 (conductor, flagman or brakeman as a conservator of the peace, and special police officers for railroads appointed by the governor as conservators of the peace with the powers conferred upon constables); c. 61, art. 5, § 12 (fugitives from any state benevolent, penal or correctional institution); c. 61, art. 5, § 14 (assisting an officer in a criminal case); c. 61, art. 5, § 15 (assisting a justice in a criminal case); c. 61, art. 6, §1 (judges and justices suppressing unlawful assemblages); c. 62, art. 10, §8 (person appointed by a justice to assist in keeping the peace during the time of a fair).

¹¹² 78 W. Va. 345, 88 S. E. 1036 (1916).

¹¹³ 120 W. Va. 72, 197 S. E. 360 (1938).

¹¹⁴ *Id.* at 78.

The American Law Institute accepts this view, stating further that whether it is a felony is to be determined by the law of the state in which the act is committed and that the arrest need not be requested by the public authorities of that state.¹¹⁵ The Institute makes a special note that the word "fugitive" is not only used in its normal sense of a person who is fleeing from the state in order to avoid arrest therein, but is also applied to a person who has for any purpose come into the state in which the arrest is made.¹¹⁶

Attention is also called to two acts passed by our legislature in 1937. The Uniform Criminal Extradition Act¹¹⁷ provides that the arrest of a person may be lawfully made by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or by imprisonment for a term exceeding one year, but when exercising this privilege such actor must after the arrest follow the procedure set forth in the statute.¹¹⁸ The Uniform Act on Fresh Pursuit¹¹⁹ provides that any member of a duly organized state, county or municipal peace unit of another state who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, has the same authority to arrest such person, as has any member of such a unit of this state to arrest a person on the ground that he is believed to have committed a felony in this state.¹²⁰ "Fresh pursuit" includes fresh pursuit as defined by the common law, and it is specifically provided that it does not necessarily imply instant pursuit, but pursuit without unreasonable delay.¹²¹

PROSECUTION AFTER UNLAWFUL ARREST.

In conclusion, it is recognized that many questions arise after it is determined that an arrest without a warrant is illegal, such as, the right of the person arrested to recover damages therefor, or such person's right to resist the arrest and the amount of force that he may use, or the admissibility of evidence secured upon such

¹¹⁵ RESTATEMENT, TORTS §119, comment *e*.

¹¹⁶ *Ibid*.

¹¹⁷ W. VA. CODE (Michie, 1937) c. 5, art. 1, §§7-13.

¹¹⁸ *Id.* at §9 (e). §9 (i) of this statute provides that when a prisoner defaults on his bond, it shall be ordered that he be immediately arrested without a warrant if he be within this state.

¹¹⁹ W. VA. CODE (Michie, 1937) c. 62, art. 11.

¹²⁰ *Id.* at §1.

¹²¹ *Id.* at §5.

an arrest. It is not the purpose of this study to consider these questions generally, but one of these should be mentioned; namely, whether an unlawful arrest will render invalid the judicial proceedings in the course of which the arrest was made.

The American Law Institute does not consider this question in its *Restatement of the Law of Torts*,¹²² but as a general rule the mere fact that the arrest of an accused person is unlawful is of itself no bar to a prosecution on a subsequent indictment, by which the court acquires jurisdiction over the person of the defendant.¹²³ In *State v. Snodgrass*,¹²⁴ the record disclosed that the defendant was tried before a justice upon a warrant, issued upon a proper complaint and apparently before he was tried and convicted. The court held that, even assuming the defendant's arrest without a warrant was unlawful, this would not discharge him from prosecution for the offense, nor would it justify his discharge from custody after a proper warrant had been issued and he had been held under that warrant. The same view has been expressed in other West Virginia cases.¹²⁵ Likewise, the court's power to try a case upon a proper warrant or indictment subsequently issued or found is not impaired by the manner in which the accused is brought within the jurisdiction of the court; even though he is unlawfully arrested in an adjoining state and forcibly conveyed into this state against his will and consent.¹²⁶

On this question, however, the case of *Town of Hartford v. Davis*¹²⁷ must be considered. The defendant was charged with "reckless" driving in the warrant under which the prosecution was made. The warrant was held to be fatally defective; and the court refused to accept the contention, that it might be disregarded

¹²² RESTATEMENT, TORTS §118, comment a.

¹²³ Note (1928) 56 A. L. R. 260.

¹²⁴ 91 W. Va. 553, 114 S. E. 136 (1922).

¹²⁵ *State v. Sutter*, 71 W. Va. 371, 373, 76 S. E. 811 (1912); *State v. Henderson*, 103 W. Va. 361, 366, 137 S. E. 749 (1927); *State v. McClung*, 104 W. Va. 330, 333, 140 S. E. 55, 56 A. L. R. 257 (1927); *State v. Warner*, 111 W. Va. 694, 696, 163 S. E. 419 (1932).

¹²⁶ *State v. McAninch*, 95 W. Va. 362, 121 S. E. 161 (1924). *Accord*: *State v. Sisler*, 11 S. E. (2d) 534 (W. Va. 1940). See *Mount v. Quinlan*, 104 W. Va. 113, 120, 139 S. E. 474 (1927) wherein, upon an application for habeas corpus, the court approved a statement to the effect that, upon collateral attack of a judgment under which a prisoner is held, any irregularity in making the arrest is immaterial and quoted: "'After final judgment of conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true even though the prisoner had been kidnapped and forcibly brought before the court from a foreign jurisdiction.'"

¹²⁷ 107 W. Va. 693, 150 S. E. 141 (1929).

since the offense was committed in the presence of the officer who made the arrest, for the reason that the arrest was not made promptly, several days having apparently passed, and therefore was illegal without a warrant. This case may be distinguished in that here a valid warrant was necessary to the jurisdiction of the mayor, since the defendant did not waive this requirement and since it was not dispensed with by a valid arrest for an offense committed in the officer's presence.