Volume 61 | Issue 3 Article 13

April 1959

Abstracts of Recent Cases

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ABSTRACTS OF RECENT CASES

EVIDENCE—JUDICIAL NOTICE OF MUNICIPAL ORDINANCE.—*P* was arrested for driving a motor vehicle while under the influence of alcohol in violation of a municipal ordinance. *P* was convicted in the justice court and appealed to the circuit court which took judicial notice of the municipal ordinance and entered judgment upon a finding of guilt. On writ of error to the supreme court, *held,* that the circuit court may not take judicial notice of an ordinance of a municipal corporation, but such ordinance, like other material facts, must be pleaded and proved. However, municipal and justice courts must take judicial notice of all such ordinances within their own territorial jurisdiction. *Sisk v. Town of Shenandoah,* 105 S.E.2d 169 (Va. 1958).

The court in the principal case adhered to the general rule in holding that courts of record will not take judicial notice of ordinances of municipal corporations and counties, and that such ordinances like other material facts must be pleaded and proved. 20 AM. JUR. *Evidence* § 37 (1939).

In West Virginia it has been held that a city court may take judicial notice of municipal ordinances. *Town of Moundsville v. Velton,* 35 W. Va. 217, 13 S.E. 373 (1891); *City of Wheeling v. Black,* 25 W. Va. 266 (1884).

In *Elswick v. Charleston Transit Co.,* 128 W. Va. 241, 45 S.E.2d 499 (1945), the court stated in point one of the syllabus, "except that the courts of a municipal corporation will take judicial notice of the ordinances of such corporation, courts do not judicially take notice of the ordinances of a municipal corporation, ..." See also, *Barniak v. Grossman,* 141 W. Va. 760, 93 S.E.2d 49 (1956). However, the court may be directed to take judicial notice by statute and that will be controlling. *Cf. City of Huntington v. Salyer,* 135 W. Va. 397, 63 S.E.2d 575 (1951); *Rich v. Rosenshine,* 131 W. Va. 30, 45 S.E.2d 499 (1947).

EVIDENCE—SEARCH AND SEIZURE—ADMISSIBILITY WHEN OBTAINED INCIDENT TO ARREST WITHOUT A WARRANT.—*D,* was convicted in a district court of housebreaking, larceny and unlawful possession of dangerous drugs. Certain informants described and identified *D* to police and told where *D* could be found selling certain stolen drugs

Upon arriving at this place an officer found *D* engaging persons in whispered conversation. *D* was seen by the officer carrying a small brown paper bag which *D* set down while he put on his coat. He was arrested before he picked the bag up again. *D* claimed illegal search and seizure and moved to suppress the introduction of the evidence thus obtained. From an adverse ruling, *D* appealed. *Held,* that as a result of the advance "tip" along with the officer's observations of *D*'s appearance and conduct there was probable cause for making the arrest and property taken from *D* incidental to the arrest was admissible. *Christensen v. United States,* 259 F.2d 192 (D.C. Cir. 1958).

The holding of the principal case has been substantiated in an analogous case recently decided by the United States Supreme Court. *Draper v. United States,* 79 Sup. Ct. 329 (1959). In the *Draper* case the court held that where a federal officer has probable cause to believe that the accused has committed or is committing a violation of narcotics laws then the officer may lawfully arrest the accused without a warrant. The court further held that the officer may, without constitutional objections, search the accused as an incident to a lawful arrest, and evidence obtained during the search is admissible.

In West Virginia an officer may, without a warrant, lawfully arrest any person whom the officer, on reasonable grounds, believes has committed a felony. *Brown v. Spangler,* 120 W. Va. 72, 197 S.E. 360 (1938). Evidence obtained as an incident to a lawful arrest, though without a search warrant, is admissible. *State v. Wills,* 91 W. Va. 659, 114 S.E. 261, 24 A.L.R. 1398 (1922).

In the *Will* case, *supra,* the court stated in point four of the syllabus, "It is unlawful, under section 6 of article 3 of the Constitution of this State, forbidding unreasonable searches and seizures for an officer, without a warrant authorizing it, to search a person, except that one legally arrested may be searched for property connected with the offense that may be used as evidence against him. . . ."

Therefore, on the basis of these decisions, a result similar to that reached in the principal case would also be reached in West Virginia.

MUNICIPAL CORPORATIONS—REGULATION OF STREETS.—*P* placed a large sign advertising his used car business on top of an automobile and parked the automobile during the daytime in parking meter

spaces in a downtown business section. *P* paid the meter charge, left the automobile unattended and did not negotiate or consummate any sales from the meter spaces. The city contended that this act was violative of a city ordinance prohibiting the use or occupancy of meter spaces for carrying on business. *P* sought a writ of prohibition contending that the ordinance was unconstitutional as an overextension of the police power. *Held,* that such use of meter space violated the ordinance notwithstanding the fact that *P* neither negotiated nor consummated any sales from the meter space. The court further found the statute to be constitutional in that it rested largely upon the power of the city to regulate and control its streets and not exclusively upon the police power of the city. *Cherry v. Menton,* 314 S.W.2d 566 (Ky. 1958).

The court in the principal case stated that the purpose of the ordinance was to prohibit the usurpation of meter spaces for use designated primarily to accomplish the furtherance of a business objective. The court distinguished the situation in which the use of the meter had only an incidental relation to business such as parking for the purpose of making a business visit. The test applied by the court, as to whether the ordinance has been violated or not, is whether the occupancy, itself, accomplishes the business objective rather than being merely an incident of travel for a business purpose.

The power of a city to prohibit the use of city streets as a place for the promotion of private business is firmly established. *Hodge Drive-It-Yourself Co. v. City of Cincinnati,* 284 U.S. 335 (1932).

In *Kaszer v. City of Morgantown,* 108 W. Va. 712, 152 S.E. 747 (1930), the supreme court held that, "A municipality, under its police power, may, in the interest of public safety, enforce reasonable regulations relating to the private use of its streets and sidewalks." See also, *Henderson v. City of Bluefield,* 98 W. Va. 640, 127 S.E. 592, 42 A.L.R. 279 (1925); *Beck v. Cox,* 77 W. Va. 442, 87 S.E. 492 (1915). For a more detailed discussion, see 10 McQUILLIN, MUNICIPAL CORPORATIONS § 30.39 *et seq.* (3d ed. 1950).

PROCEDURE—TRIAL JUDGE'S DISCRETION—MANDAMUS AND PROHIBITION.—*P*, was being tried for a crime in a United States district court. *P* filed an affidavit with the court alleging bias and prejudice on the part of the presiding judge and asked that the judge disqualify himself. The judge determined that the allegations of the

affidavit of bias and prejudice were insufficient to disqualify him. *P* thereupon petitioned the court of appeals for a writ of mandamus or prohibition to prevent the judge from further proceeding with the case. *Held,* that it was within the province of the district court judge to determine the sufficiency of the allegations in the affidavit, and that in so doing he must accept the allegations of the affidavit as true. Such decision was subject to review only by appeal from an adverse judgment to *P. Green v. Murphy,* 259 F. 2d 591 (3d Cir. 1958).

The court in the principal case held that mandamus and prohibition are extraordinary remedies and can only justifiably be employed under rare and exceptional circumstances.

In the federal courts it has been held that generally mandamus will issue only where there is a clear legal right and where appeal is clearly inadequate. *Bankline v. United States,* 163 F.2d 133 (2d Cir. 1947). Mandamus is proper where the lower court is without jurisdiction to take the action for which the complaint is made. *Walfenbarger v. Taylor,* 169 F.2d 626 (6th Cir. 1948). Similarly it has been held that the lower court must clearly be without jurisdiction to warrant issuance of a writ of prohibition by the appellate court. *Petition of Therianos,* 171 F.2d 886 (3d Cir. 1948).

The tendency in West Virginia, it seems, has been to enlarge the scope of the remedy of mandamus rather than to restrict its use. *Carteo v. City of Bluefield,* 132 W. Va. 881, 54 S.E.2d 747 (1949). Thus, mandamus will not be denied because there is another remedy unless the other remedy is equally as effective, beneficial and convenient. *Stowers v. Blackburn,* 141 W. Va. 328, 90 S.E.2d 277 (1955). However, prohibition may not be as easily obtainable. In *Crawford v. Taylor,* 138 W. Va. 207, 75 S.E.2d 370 (1953), the court stated in point one of the syllabus, "prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." See also, *Fisher v. Bouchelle,* 134 W. Va. 333, 61 S.E.2d 305 (1950); *Rufus v. Easley,* 129 W. Va. 410, 40 S.E.2d 827 (1946); *Lake O'Woods Club v. Wilhelm,* 126 W. Va. 447, 28 S.E.2d 915 (1944).

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