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## Arrest--Mistaken Identity--Liability of Officer Without Warrant Attempting to Apprehend Known Felon

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## RECENT CASE COMMENTS

ARREST — MISTAKEN IDENTITY — LIABILITY OF OFFICER WITHOUT WARRANT ATTEMPTING TO APPREHEND KNOWN FELON. — A felony had been committed at night and *X*, the known felon, had fled. *D*, a constable, acting without a warrant, took up the search for the felon whose identity was known to him and, still at night, and within one-half mile of the scene of the felony encountered *P*; upon *P*'s taking flight *D* under the mistaken belief that *P* was the felon fired at and wounded *P*, an innocent man.<sup>1</sup> Held, that an instruction, that if *D* had reasonable grounds for believing that *P* was the fleeing felon and that it was necessary to shoot in order to prevent an escape such belief would require a verdict for *D*, was properly refused and that *D* was liable on his bond<sup>2</sup> for the injury inflicted. *State v. Day*.<sup>3</sup>

The problem presented by the instant case, *i. e.*, the relative importance of encouraging attempts to apprehend supposed law violators as contrasted with that of affording personal security to the individual, is of no slight public importance. It is well-established law that for misdemeanors an officer acts at his peril in arresting or attempting to arrest and is liable for harm done to one mistaken for the person sought.<sup>4</sup> Likewise, courts almost uniformly have held that where an officer holds a warrant for one charged with a felony and by mistake arrests another, one not named in the warrant, the officer must respond in damages for his mistake in identity,<sup>5</sup> irrespective of how reasonable the officer's

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<sup>1</sup> The felony was murder, later confessed as such by a plea of guilty to second degree. That the officer was acting without a warrant and that the felon was known to the officer at the time of the attempted arrest is not set forth in the report of the case. This supplementary information was gained from counsels' briefs; it is included here for any significance that it may have.

<sup>2</sup> W. VA. REV. CODE (Michie, 1937) c. 6, art. 2, § 10, prescribes official bond. Standard Rate Manual, Fidelity, Forgery and Security Bonds, W. Va., Oct. 1932, lists premiums per thousand per annum on peace officers' official bonds: constable, \$10; deputy constable, \$10; town marshall, \$5; policeman, \$5; sheriff, \$7.50; deputy sheriff, \$7.50.

The bonding company paying a judgment returned against an officer's bond seems to have a right of subrogation against the officer. See *Woodyard v. Sayre*, 90 W. Va. 295, 110 S. E. 689 (1922); *Myers v. Miller*, 45 W. Va. 595, 31 S. E. 976 (1898).

<sup>3</sup> 198 S. E. 609 (W. Va. 1938).

<sup>4</sup> *State v. Cunningham*, 113 W. Va. 244, 167 S. E. 595 (1933); *Gold v. Armer*, 124 N. Y. Supp. 1069, 140 App. Div. 73 (1911); *Price v. Tehan*, 84 Conn. 164, 79 Atl. 68 (1911); Note (1911) 34 L. R. A. (N. S.) 1182; HARPER, LAW OF TORTS (1933) § 55.

<sup>5</sup> *Johnson v. Williams*, 111 Ky. 289, 63 S. W. 759 (1901); *West v. Cabell*, 153 U. S. 78 (1894); *Hays v. Creary*, 60 Tex. 445 (1883); *Griswold v. Sedgwick*, 6 Cow. 460 (N. Y. 1826).

belief in the matter may have been,<sup>6</sup> even though the arrested person be of the same name<sup>7</sup> or description<sup>8</sup> as the one designated in the warrant,<sup>9</sup> so long as the person arrested has not misled the officer by word or conduct.<sup>10</sup>

On the other hand—standing as what seems to be almost a paradoxical doctrine<sup>11</sup>—at common law an officer, *without a warrant*, is privileged to arrest one whom he reasonably suspects to be a felon;<sup>12</sup> the officer may employ an amount of force reasonably necessary to effect the arrest, provided that deadly force may be resorted to only in case the felony is one that “normally causes or threatens death or serious bodily harm”,<sup>13</sup> and no liability attaches to the officer’s conduct under such circumstances, even though the person arrested be innocent.<sup>14</sup>

The present case embraces elements of both the strict rule of liability for mistaken identity and that of privileged discretion, as to the person to be arrested and the amount of force to be employed, accorded an officer acting without a warrant and upon reasonable suspicion only. The decision of the instant case expressly refuses to admit any distinction between the right to arrest for a misdemeanor and the right to arrest for a felony as being decisive. By implication, moreover, it holds that whether the officer acted with or without a warrant at the time of the attempted arrest is immaterial. The instant case in both its express holding and in its further implications seems to be in accord with the general tenor

<sup>6</sup> *Johnson v. Williams*, 111 Ky. 289, 63 S. W. 759 (1901); *Holmes v. Blyler*, 80 Iowa 365, 45 S. W. 756 (1890); *Formwalt v. Hylton*, 66 Tex. 288, 1 S. W. 376 (1886). *Contra*: *Kopplekom v. Huffman*, 12 Neb. 95, 10 S. W. 577 (1881).

<sup>7</sup> *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S. W. 915 (1898).

<sup>8</sup> *Holmes v. Blyler*, 80 Iowa 365, 45 S. W. 756 (1890); *Clark v. Winn*, 19 Tex. Civ. App. 223, 46 S. W. 915 (1898).

<sup>9</sup> Reasonable belief may be considered in reduction of damages. *Landrum v. Wells*, 7 Tex. Civ. App. 625, 26 S. W. 1001 (1894); HARPER, LAW OF TORTS § 23.

<sup>10</sup> *Hays v. Creary*, 60 Tex. 445 (1883); POLLOCK, LAW OF TORTS (12th ed. 1923) 121, 122.

<sup>11</sup> See Whittier, *Mistake in the Law of Torts* (1902) 15 HARV. L. REV. 335, 341.

<sup>12</sup> RESTATEMENT, TORTS (1934) § 121. *Bourne v. Richardson*, 133 Va. 441, 113 S. E. 893 (1923); *Rohan v. Swain*, 5 Cush. 281 (Mass. 1849).

<sup>13</sup> *Caldeen v. Reid*, 107 Wash. 508, 182 Pac. 599 (1919); *Storey v. State*, 71 Ala. 329, 339-340 (1882), quoted from RESTATEMENT, TORTS § 131; HARPER, LAW OF TORTS § 55.

<sup>14</sup> *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669 (1874); *Carr v. State*, 43 Ark. 99 (1884) syl. 7.

of the law<sup>15</sup> and carries to a logical conclusion the principle of liability for an officer's mistake in identity in making an arrest.

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INSURANCE—ACCIDENT POLICY—TOTAL DISABILITY AS EXCUSE FOR FAILURE TO FILE NOTICE AND PROOFS OF LOSS.<sup>1</sup>—*D* issued a life insurance policy to *P* which included a clause for indemnity for disability, and also a rider providing for double indemnity. *P* was injured in an automobile accident and rendered physically and mentally disabled for about ninety-seven days thereafter. The indemnity provisions were to the effect that notice of disability and proofs of loss should be filed within sixty days after disability. Because of his condition, *P* did not file notices and proofs within the time stipulated and *D* set this up as a defense to *P*'s action on the policy. After judgment on the verdict for *P*, *D* obtained a writ of error. *Held*, that such disability of the insured was an excuse for the failure to file the notice and proofs of loss within the time provided in the accident and disability clause of the policy, and that the insurer was liable since notice and proofs were filed within a reasonable time after recovery. *Neill v. Fidelity Mutual Life Insurance Company*.<sup>2</sup>

Though there is respectable authority the other way,<sup>3</sup> this rule of law has been generally accepted as the better doctrine in such cases.<sup>4</sup> The rule is based on a variety of grounds, among others, that the insurance contract is one of adhesion and calls for a liberal

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<sup>15</sup> *Vice v. Holly*, 88 Miss. 572, 41 So. 7 (1906); *Formwalt v. Hylton*, 66 Tex. 288, 1 S. W. 376 (1886); *POLLOCK, LAW OF TORTS* 121-122; *COOLEY, TORTS* (3d ed. 1906) 316; but see *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999 (1893).

<sup>1</sup> For a more complete discussion of the principles involved in this subject, see *Haymond, Physical or Mental Incapacity as an Excuse for Failure to Give Notice of Accident or Make Proof of Disability Required by Provisions of Accident and Life Insurance Policies* (1933) 5 INSURANCE COUNSEL JOURNAL, number 2, p. 15.

<sup>2</sup> 195 S. E. 860 (W. Va. 1938), *Hatcher, J.*, dissenting.

<sup>3</sup> *Egan v. N. Y. Life Ins. Co.*, 60 F. (2d) 268 (N. D. Ga. 1932); *Whiteside v. North American Accident Ins. Co.*, 200 N. Y. 320, 93 N. E. 498, 35 L. R. A. (N. S.) 696 (1911).

<sup>4</sup> *Haymond, supra* n. 1; 33 C. J. 15; Note (1916) 14 R. G. L. 1333: "Failure to give notice is excused where the insured was disabled by an accident insured against to give the required notice, according to some courts, though good authority exists for the proposition that an insured is not relieved from the obligation imposed upon him by the terms of his policy to give notice, by himself or his representative, within a certain time of the commencement of his illness, by the fact that his illness is such as to render him delirious and unable to remember that he has the policy."