Volume 31 | Issue 3 Article 9

April 1925

# Sheriffs and Constables--Liability in Bond for Malfeasance of a Deputy

R. T. D.
*West Virginia University College of Law*

SHERIFFS AND CONSTABLES—LIABILITY ON BOND FOR MALFEASANCE OF A DEPUTY.—P's decedent was engaged unlawfully in a game of chance, commonly known as "poker." D and his deputy attempted to arrest him without a warrant and when the deceased resisted, the deputy shot him. P sued D and his surety on D's official bond for the unlawful killing. *Held,* Action for such wrongful death cannot be maintained on the sheriff's bond, because under the statute, the sheriff's bond is breached only by a misfeasance of the deputy. This killing was without authority and was therefore a malfeasance. *State ex rel. Sonner* v. *Dean et al,* 126 S. E. 411 (W. Va. 1925).

The ground of the decision is based upon Chapter 7, § 11 of the W. Va. Code (1923) which provides: "any default of misfeasance in office of such deputy, shall be deemed a breach of the conditions of the official bond of his principal." The act of the deputy in shooting, being positively unlawful and wrongful, without a warrant, and there being no threatened breach of the peace, was a malfeasance, and thus not within the wording of the statute. No case on all fours has been found, nor were any precedents in point cited by the court. In *Coite* v. *Lynes,* 33 Conn. 109 (1865) it was held that the sheriff was not liable for the active malfeasance, as distinguished from mere nonfeasance, of his deputy. The court admitted that the decision was against the generally accepted view, and explained it on the ground that by statute, the deputy is substantially an independent officer. In *Towle* v. *Mathews,* 130 Cal. 574, 62 Pac. 1064 (1900) it was held that where the plaintiff, while resisting arrest by a constable and his deputy, was shot by the deputy willfully, but not maliciously, the constable and his bondsmen were liable. But in this case the arrest was for a breach of the peace and in thus distinguishable from the principal one. A distinction applicable in such cases is laid down in MECHEM ON PUBLIC OFFICERS, p 177 as follows: "Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them.' " Of course there is a third class of acts which might be termend *extra officium,* where they are of such a nature as to be wholly malicious and wanton, and for these the sheriff and his sureties are not liable. MECHEM, PUBLIC OFFICERS, p 534-5. But *quaere,* according to the above definition, was not the malfeasance of the deputy in the principal case an act *colore*

*officii?* In *Lucas* v. *Locke,* 11 W.Va. 81(1877), the court said, "On common law principles governing the ordinary relation of principal and agent, the sheriff would not be responsible for an act done by his deputy *colore officii;* but on principles of public policy applying to the relation of a sheriff and his deputy, the former is liable in such case; on the same principle it would seem that he and his sureties are liable on his official bond." It is submitted that this case ought to have been followed unless Chapter 7, § 11 was intended to limit strictly the liability to acts done *virtute officii,* and not *colore officii,* and to set out the *only* instances which would constitute a breach of the condition of the bond. If such was the intent of the legislature, would it not have been stated that a *technical* misfeasance and a misfeasance only would amount to a breach of the condition? There is nothing to show that the word was not given its ordinary meaning, familiar to the layman, as "a wrong done," WEBSTER'S NEW INTERNATIONAL DICTIONARY, and as merely synonymous with "default." Also why was it not included in Chapter 10, § 6 of the Code entitled "Condition of Bond—Extent of Liability" instead of as an obscure part of Chapter 7? No mention is made in the decision of Chapter 10 *supra,* providing "when a person undertaking any office is required by law to give an official bond, the condition, unless otherwise provided, shall be for a faithful discharge by him of the duties of his office." A sheriff is responsible for the defaults or misconduct of his deputy in office, 35 CYC. 1906, *Knowlton* v. *Bartlett,* 1 Pick. 273; *Arnold* v. *Hawkins,* 79 W. Va. 205, 90 S. E. 678 (1916). It is submitted that the malfeasance of the deputy was thus a breach of the condition "for a faithful discharge by him of the duties of his office," and that Chapter 7, § 11 *supra,* was not intended to abrogate the rule of liability laid down in *Lucas* v. *Locke supra,* but was intended to be merely declaratory of certain acts, and not those acts exclusively, which would amount to a breach of the condition of the sheriff's bond. That such acts of a deputy done *colore officii* are a breach of the condition, rendering the sheriff liable, by the great weight of authority, see MECHEM ON PUBLIC OFFICERS, p. 534. It is a singular fact that neither *Lucas* v. *Locke supra,* nor chapter 10 were referred to in the opinion in the principal case. It would seem that a liability should have been imposed for two reasons, (1) There was a precedent in point which, if distinguishable, requires differentiation; (2) reasons of public policy require the protection of society from the wholly unauthorized acts of public officers. These reasons seem to outweigh the

interest of the sheriff and his bondsmen in not being held pecuniarly liable on a contract, the probable consequence of which they might well have forseen. It is believed then, that upon both principle and authority, the result reached in the principal case was undesirable, and that a contrary conclusion could well have been reached had the attention of the court been called to *Lucas* v. *Locke,* and to Chapter 10 § 6 of the Code. —R. T. D.

INTOXICATING LIQUORS—INDICTMENT FOR UNLAWFUL TRANSPORTATION—FAILING TO NEGATIVE THE EXCEPTIONS IN THE STATUTE.—The defendant was indicted under Chapter 32A, § 31a, Barnes' West Virginia Code, 1923, which reads as follows: "It shall be unlawful for any person to order, purchase, sell, or cause intoxicating liquors to be transported into the state, or from one place to another within the state, in any manner, except pure grain alcohol, for medicinal, pharmaceutical, scientific, and mechanical purposes, and wine for sacramental purposes to be used by religious bodies, as now provided by law."

The indictment against the defendant alleged, . . . ."that the defendant had unlawfully transported grain alcohol into the state, against the peace and dignity of the state." In the lower court the defendant made a motion to quash the indictment on the ground that it failed to negative the exceptions in the statute above. This motion was overruled, the defendant convicted, and an appeal taken. The West Virginia Supreme Court of Appeals held that the indictment should have been quashed for failing to negative the exceptions in the statute; and as the defendant was not indicted within one year, he was discharged. *State* v. *Taylor,* 95 W. Va. 518, 121 S. E. 573.

It is the desire of the writer to discuss this case on the point which holds that a failure to negative the exceptions in the statute furnishes sufficient grounds to quash an indictment. The purpose of this article is to show, first, that this decision fails to carry out one of the primary purposes for which the law was established; second, that the decision is decidedly against the weight of authority in this country; and, third, that it is not strictly in accord with our West Virginia decisions.

The writer feels that no authority is necessary to support him in saying that, "One of the essential purposes of the law is to