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Criminal Law—Creation of A Fictional Citizen's Arrest

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without notice of such provision, purchases the goods . . . before the contract or copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale. This section shall not apply to conditional sales of goods for resale.

And as to conditional sales of goods for resale, Section 69 states:

the reservation of property shall be void against purchasers . . . for value in the ordinary course of business . . . even though the contract or a copy thereof shall be filed. . . .

From the language of the statute, the argument made by C.I.T. runs as follows:

1. Section 65 does not apply when the goods in question are sold conditionally for resale. Since Lazzaro is to be considered a conditional buyer for the purposes of this determination, and since the cars were conditionally sold for resale, the protection of Section 65 is not available to Rand.
2. Section 69 applies only to purchasers in the ordinary course of business. Rand, a chattel mortgagee, cannot therefore avail itself of this section.
3. Even though the conditional sales contracts were unrecorded, as between Rand and C.I.T., the latter's title is superior.

The Court, in deciding for Rand, followed this line of reasoning:

1. Section 65's limitation is not designed to deprive that section of its efficacy. Its purpose is to segregate a special class of purchasers and, by the mechanics of Section 69, give them superior protection (their rights are preserved even when the conditional sales contract is recorded).
2. ". . . [S]ection 65's exclusion of 'sales of goods for resale' is designed to provide anyone who comes within its compass with the greater protections of Section 69, but it is not designed to provide less protection than section 65 itself does."²²
3. Since that is the purpose of the limitation, Rand's right to the cars is established under Section 65, because C.I.T. failed to record the contract.

It would seem that student applause is superfluous in the face of such a logical and salutary result.

E. H.

CRIMINAL LAW

CREATION OF A FICTIONAL CITIZEN'S ARREST

Police officers and private citizens may make an arrest without a warrant in the instance of a misdemeanor which is committed or attempted in their

22. *Rand's Discount Co. v. Universal C.I.T. Credit Corp.*, supra note 16 at 459, 214 N.Y.S.2d at 724.

presence.¹ In the case of a citizen's arrest, the person arrested must be delivered to a magistrate or police officer immediately.²

In *People v. Foster*,³ the defendant, a sixteen-year-old Negro girl, appealed from a conviction of third degree assault committed on the person of a police officer as the result of her efforts to resist arrest. The defendant argued that her alleged assault on the police officer was in reality an effort to resist an illegal arrest, for it is settled law that a person has a right to resist an illegal arrest, provided that he use no more force than is necessary.⁴ The defendant contended that her arrest was illegal because it was made without a warrant for a misdemeanor not committed in the presence of the police officer. The particular question presented to the Court of Appeals in the present case was whether defendant's arrest was legal.

As the defendant and two girl friends were walking past Mrs. Salzberg's store, the first girl friend struck Mrs. Salzberg's daughter. Mrs. Salzberg rushed to the aid of her daughter by hitting the second girl friend over the head with a stool. The defendant then hit Mrs. Salzberg, who thereupon locked herself in the store and called the police. When the police arrived, they found the defendant kicking and screaming at the locked door. At the request of Mrs. Salzberg, the police arrested the defendant at which time the defendant resisted arrest and committed the assault on the police officer.

The Court of Appeals held that the arrest was legal and affirmed defendant's conviction of third degree assault on the police officer. The Court based its decision on two alternative grounds. The first ground was that the assault on Mrs. Salzberg was in fact a continuing assault, the last phases of which were perceived by the officer when he found the defendant kicking at the door. Therefore, the misdemeanor was committed in the officer's presence and the arrest was legal. The second ground for the decision was that Mrs. Salzberg had arrested the defendant for the assault committed in her presence and had delivered the defendant to the police officer. The arrest was, therefore, a legal arrest by a citizen.

The opinion contains a strong dissent by Judge Froessel in which he indicates that the facts demand a decision contrary to that reached by the majority, since the misdemeanor, the assault on Mrs. Salzberg, was not in fact committed in the officer's presence; there was a hiatus of time between the assault and the arrest; the presence of a locked door between the defendant and Mrs. Salzberg would negate any inference of a last phase to the assault at the time of the arrival of the police. The dissent also challenges the citizen's arrest theory on the grounds that there was no "actual restraint of the person of the defendant" by Mrs. Salzberg, as required by Section 171 of the Code of Criminal Procedure.

1. N.Y. Code Crim. Proc. §§ 177, 183.

2. N.Y. Code Crim. Proc. § 185.

3. 10 N.Y.2d 99, 217 N.Y.S.2d 596 (1961).

4. *People v. Cherry*, 307 N.Y. 308, 121 N.E.2d 238 (1954).

The majority of the Court may be setting a new trend in its novel approach to the mechanics of effecting a citizen's arrest. The language of the statute seems to be explicit: "an arrest is made by the actual restraint of the person of the defendant or by his submission to the custody of the officer,"⁵ and cases uphold as valid a citizen's arrest in which the citizen physically subdues the wrongdoer.⁶ However, a lower court case, *People v. Stewart*,⁷ presents the theory, similar to that advanced in the present case, of constructive arrest in which physical restraint by the citizen making the arrest is not necessary. In *People v. Stewart*, a policeman, called to investigate a family brawl, arrested the husband for assaulting his wife. Although the arrest was legal on other grounds, the court said in dictum that a valid citizen's arrest could have been effected by the wife for the assault committed upon her before the arrival of the policeman by her demanding the arrest of her husband when the policeman did arrive. It is difficult to see how either the wife in *People v. Stewart* or Mrs. Salzberg in the present case were physically capable of restraining her assailant to perfect a technical arrest. By creating a fictional citizen's arrest, the court is sanctioning an arrest made by a police officer upon the mere unsworn complaint of the injury party.

The Court (majority) seems to be stretching the law to reach a desirable result. Many victims have an understandable and often justifiable fear of retaliation if they swear out a warrant against their assailant. The result is that many grievances go unalleviated. Also there are many instances in which the assailant, immune from arrest because the police officer was not present when the misdemeanor was committed, departs, and since he is unknown to those present, a warrant may not be obtained. Although the decision more adequately meets present day law enforcement needs, there is a possibility that the Court is usurping a legislative function in changing the existing laws as to arrest for a misdemeanor.

P. A. L.

SINGLE OCCURRENCE SATISFIES COMMON GAMBLING AND BOOKMAKING REQUIREMENTS

Is one transaction or a single occasion sufficient to satisfy a requirement of "professionalism" under the New York bookmaking and common gambling statutes? The Court of Appeals in two recent decisions, *People ex rel. Guido v. Calkins*⁸ and *People v. Pavia*,⁹ regarded a single occasion sufficient to warrant convictions.

In the *Guido* case, relator was convicted in the Schenectady Police Court of aiding and abetting in the operation of a particular gambling establishment.

5. N.Y. Code Crim. Proc. § 171.

6. See *Bellinger v. State*, 206 Misc. 575, 134 N.Y.S.2d 104 (Ct. Cl. 1954); *People v. Ostrosky*, 95 Misc. 104, 160 N.Y. Supp. 493 (County Ct. 1916).

7. 183 Misc. 212, 47 N.Y.S.2d 349 (City Ct. 1944).

8. 9 N.Y.2d 77, 211 N.Y.S.2d 166 (1961).

9. 8 N.Y.2d 333, 207 N.Y.S.2d 659 (1960).