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Criminal Law and Procedure

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The court denied relief, pointing out that on the face of it the action of the board was perfectly legal. The pre-emptive rights of the majority were not violated inasmuch as the pre-emptive rights were waived by the articles. In addition, the articles gave the board the power to issue new shares and to fix the sales price. The court, tacitly approving of the director who purchased the new issue voting on the resolution, held that there was no fraud, since an outside appraiser had valued the shares at $37.50. The court's analysis thus far seems correct. However, there is one additional fact which might have justified a different result. The court mentions that one of the majority group had offered $40.00 per share for the new issue, or $2.50 per share more than the sales price. If this was a valid offer which was before the board at the time of the sale it would seem to be a breach of fiduciary duty for the board to accept a lower offer. The board owed an obligation to all of the shareholders and to the corporation to get the best price possible on a new issue of shares. Several cases from outside of Ohio have held that directors are under a fiduciary duty not to manipulate share issues for the benefit of any one group of shareholders.[9]

Whether the decision was right or wrong, the fact situation clearly illustrates the following points:

1. As a practical matter, in a closely held corporation, pre-emptive rights should not be waived in advance.
2. A majority group of shareholders should keep control over a majority of the board, or their voting control may prove worthless.
3. In a situation such as the above case, where the majority of the board is in opposition, the new issue might be blocked by prompt self-help. The majority group could call a special shareholders meeting on as little as seven days notice.[10] The majority could then oust the entire board without assigning cause,[11] and elect a new board at the same meeting. By the use of cumulative voting,[12] the majority group would then be able to elect three members of the five-man board.

HUGH ALAN ROSS

CRIMINAL LAW AND PROCEDURE

During the past year, Ohio courts made notable contributions to the criminal law in cases arising out of the operation of motor vehicles. Returning to his home from a trial at which he was convicted on the charge of driving while intoxicated, William Mingo was

9. Schwab v. Schwab-Wilson Mach. Corp., 13 Cal. App. 2d 1, 55 P.2d 1268 (1936); Ross Transport, Inc. v. Crothers, 185 Md. 573, 45 A.2d 267 (1946); Elliott v. Baker, 194 Mass. 518, 80 N.E. 450 (1907); Dunlay v. Avenue M Garage & Repair Co., 253 N.Y. 274, 170 N.E. 917 (1930).

10. OHIO REV. CODE §§ 1701.40(A)(3), .41(A) (Supp. 1959).

11. OHIO REV. CODE § 1701.58(C) (Supp. 1959).

12. OHIO REV. CODE §§ 1701.55(C), (D) (Supp. 1959).

stopped, arrested, and jailed for driving through a red light. He sought dismissal on the ground that he was privileged from arrest under Ohio Revised Code section 2331.11, which grants such a privilege to "suitors . . . and witnesses while going to, attending, or returning from court." The supreme court modified a previous decision[1] and ruled that section 2331.11 applies only to civil arrest and does not immunize witnesses, attorneys, or parties from arrest for crimes or misdemeanors while going to or coming from court.[2] The basis for the court's ruling was its interpretation of Ohio Revised Code section 2331.13. This section, which provides that "sections 2331.11 to 2331.14, inclusive, of the Revised Code do not extend to cases of treason, felony or breach of the peace . . . ." was held to encompass all criminal cases and proceedings, and thus to exclude from the privilege all arrests and prosecutions for criminal offenses.[3]

Two further matters involving traffic violations are worthy of mention. In the first case,[4] a citation issued by a policeman to a motorist was found to be an inadequate statement of the charge. The citation read "unsafe operation 4511.20 . . . 60/50 m.p.h." The court considered the charge a "cryptic notation . . . understandable to members of the enforcement agency involved and without real meaning to anyone else."[5] The court further found the command to the motorist to appear at a certain time and date "and stand trial" to be an abuse of process when the officer knew that forty other motorists would be present at the same time, making a trial an impossibility. In the second matter,[6] the supreme court resolved that the demonstration by independent expert testimony of the function and reliability of speed meters is unnecessary to support the introduction of the speed recorded on the meter of a radar device in a prosecution on a speeding charge. While disposing of this issue, Judge Bell raised, but did not consider, a potential problem: May an officer make an arrest without a warrant in reliance only upon information radioed by the officer in the radar car, when Ohio Revised Code section 2935.03 authorizes such an arrest of a person *found violating* a law?

Finally, the use of "vile and offensive" language by a citizen when forcibly detained by three plainclothesmen was held not to constitute disorderly conduct.[7] Guidotti, who had "committed no offense prior to his detention . . . was justified in resisting them [the plainclothesmen] by any manner or means which may have been reasonably necessary to retain his freedom."[8]

1. Zumsteg v. American Food Club, Inc., 166 Ohio St. 439, 143 N.E.2d 701 (1957).
2. City of Akron v. Mingo, 169 Ohio St. 254, 160 N.E.2d 225 (1959).
3. For a further discussion of this case, see *Civil Procedure* section, p. 351 *supra.*
4. State v. Wheeler, 157 N.E.2d 763 (Ohio Munic. Ct. 1958).
5. *Id.* at 765.
6. City of East Cleveland v. Ferrell, 168 Ohio St. 298, 154 N.E.2d 630 (1958).
7. City of Columbus v. Guidotti, 160 N.E.2d 355 (Ohio Ct. App. 1958).
8. *Id.* at 357.

CONFLICTS

The hierarchical structure of government in the United States is conducive to conflicts of jurisdiction and applicable law. Two such problems were faced by Ohio courts this past year. In the first case,[9] the court found that a grand jury might indict a defendant although a charge for the same offense was pending in a municipal court, in which proceeding the accused had entered a plea of not guilty and had requested a jury trial. The court reasoned that Ohio Revised Code section 2939.08, commanding the grand jury to "inquire of and present all offenses committed within the county," is without restriction.

A second clash involved a municipal ordinance and a statute. The supreme court nullified a municipal ordinance which made the offense of carrying a concealed weapon a misdemeanor since it was in conflict with Ohio Revised Code section 2923.01, which made the act a felony.[10] Declaring that a municipality "may not validly contravene a statutory enactment of general application throughout the state,"[11] the court reasoned that:

> Although the ordinance in issue does not permit what the statute prohibits, and vice versa, it does contravene the expressed policy of the state with respect to crimes. . . . Conviction of a misdemeanor entails relatively minor consequences, whereas, the commission of a felony carries with it penalties of a severe and lasting character.[12]

"THE MOVING FINGER WRITES . . ."

In a court of appeals decision,[13] it was declared that a party may not enter a plea of guilty in the hope of gaining the compassion of the court and then seek to withdraw it for the first time subsequent to the imposition of sentence. Said the court:

> . . . Where it appears that defendant was not misled . . . , was fully advised of his right to a jury trial, was advised of the charge and the penalty . . . the administration of justice does not countenance the right of a person who formally declares his guilt to gamble with fate . . . .[14]

MENS REA

Ohio's formidable array of liquor laws received added sustenance in 1959 through a decision of the supreme court.[15] The tribunal determined that since Ohio Revised Code section 4301.22(B) makes

9. State v. Karr, 161 N.E.2d 559 (Ohio C.P. 1959).

10. City of Cleveland v. Betts, 168 Ohio St. 386, 154 N.E.2d 917 (1958).

11. *Id.* at 388, 154 N.E.2d at 918 (citing OHIO CONST. art. XVIII, § 3).

12. *Id.* at 389, 154 N.E.2d at 919. For a further discussion, see *Municipal Corporations* section, p. 410 *infra.*

13. State v. Gardner, 158 N.E.2d 413 (Ohio Ct. App. 1958).

14. *Id.* at 416.

15. State v. Morello, 169 Ohio St. 213, 158 N.E.2d 525 (1959).

no reference to *scienter*, one may be convicted of the offense of selling intoxicants to one already intoxicated, without proof of knowledge of the person's intoxication. In so holding, the court overruled an early case[16] which had imposed the necessity of proof of knowledge of the state of intoxication, or of the habit of intoxication, as a condition precedent to conviction, although no proof of this nature was required by the statute. The court stated that the requirement of *scienter* was no longer "within the spirit of the present liquor control laws . . . [which were] intended to inflict the penalty, irrespective of the knowledge or motives" of the violator.[17] In a concurring opinion,[18] Mr. Justice Taft demonstrated that the rule making *scienter* a necessary element had for many years been ignored by Ohio courts of appeals and was in conflict with a later supreme court pronouncement[19] that the legislature could make the doing of an act a crime without the element of knowledge.

In contrast to the foregoing, intent was considered essential by a municipal court which found that the intent to do a civil wrong cannot be made the basis of the presumption of criminal intent.[20] Acting on the instructions of his employer, the defendant destroyed identification tags supplied by a rival refuse collector, and placed on garbage cans by their owners. In acquitting defendant of a charge of malicious mischief,[21] the court, citing a Victorian English case,[22] stated that "to constitute a crime there must be a criminal act plus criminal intent, concurring at the time of commission."[23] Where but in the law can a backwater run at odds with the mainstream?

APPEALS

That judges feel compelled to follow the letter of the law despite the results is illustrated by a recent municipal court case in which a judge found the out-of-season mercy killing of an injured fox squirrel to be a violation of the game laws "without bringing in the moral aspect of his deed . . . ."[24]

The previous case is a prologue to the issues raised by two appeals cases: the degree to which a court of appeals will reconsider the facts found by the trial court, and the flexibility or stringency with which the court will apply the law to these facts.

16. Miller v. State, 3 Ohio St. 476 (1854).
17. State v. Morello, 169 Ohio St. 213, 216, 158 N.E.2d 525, 528 (1959).
18. *Id.* at 217, 158 N.E.2d at 529 (concurring opinion).
19. State v. Kelly, 54 Ohio St. 166, 43 N.E. 163 (1896).
20. State v. Wonder, 155 N.E.2d 734 (Ohio Munic. Ct. 1957).
21. OHIO REV. CODE § 2909.01.
22. Regina v. Franklin, 15 Cox Crim. Cas. 163 (Sussex Assizes 1883).
23. State v. Wonder, 155 N.E.2d 734, 736 (Ohio Munic. Ct. 1957).
24. State v. Hoaglin, 160 N.E.2d 440, 441 (Ohio Munic. Ct. 1959).

The first case[25] was an appeal on law from a conviction of the charge of sodomy.[26] The court of appeals found that the defendant was legally convicted "upon the uncorroborated testimony of a witness who participated with the defendant in the criminal act charged."[27] The conviction was founded upon the testimony of four delinquent youths, one of whom had participated in the robbery of the accused's gasoline station. The youths testified that each was a "willing accomplice to the crime of sodomy with the defendant."[28] The court alluded to the fact that the defendant, "a man with such an excellent social background, a former soldier who served his country with distinction in World War II, and the head of a splendid family . . ."[29] may have been "framed" by the delinquents. However, the "Court of Appeals in its review of a case on questions of law can look only to the record presented to it from the lower court. It must draw the line between trying the facts and determining the credibility of witnesses, and passing upon the record as a matter of law."[30] A dissenting judge, citing the principle that an accomplice's testimony is subject to grave suspicion, indicated that in his opinion the evidence was not credible and did not support a conviction.[31]

In contrast with this case was an appeal on law by an eighteen year old youth from West Virginia who was convicted of two counts of murder in the first degree[32] for his participation in a robbery which terminated in the killing of the apprehending police officer by one of his accomplices.[33] The skeletal facts are that the defendant, Milam, was awakened by Davis and Lyons, with whom he had played poker on previous occasions, and was asked to go with them to recover money lost at cards. They had discovered that their host on these occasions, Buchanan, had cheated and played with marked cards. Upon arriving, Davis and Lyons proceeded to rob the Buchanans of money and valuables. Milam passively participated by picking up a revolver found on the premises and carrying both the gun and the money from the building. The three drove away in Milam's car. A short distance from the scene of the robbery, they were detained by Lieutenant Lentz. Milam stopped the car and remained with it. Lyons attempted to escape and shot Lentz to death when accosted by him.

25. State v. Harmon, 107 Ohio App. 268, 158 N.E.2d 406 (1958).

26. OHIO REV. CODE § 2905.44.

27. State v. Harmon, 107 Ohio App. 268, 158 N.E.2d 406 (1958) (syllabus 1).

28. *Id.* at 269, 158 N.E.2d at 408.

29. *Id.* at 273, 158 N.E.2d at 410.

30. *Id.* at 271, 158 N.E.2d at 409.

31. *Id.* at 274, 158 N.E.2d at 410 (dissenting opinion).

32. The first count was for the killing of a person while in the perpetration of a robbery, OHIO REV. CODE § 2901.01; the second count was for the killing of a policeman while in the discharge of his duties, OHIO REV. CODE § 2901.04.

33. State v. Milam, 108 Ohio App. 254, 156 N.E.2d 840 (1959).

The court characterized Milam "as a guileless tyro of metropolitan life who unwittingly associated himself with some villainous characters."[34] The court commented, as in the previous case, that his family life was satisfactory and that he had had no previous criminal record. The majority then resolved that Milam "was a mere spectator" to the robbery, and that he was drawn into going with Davis and Lyons. The court concluded, "the record tends to show that the defendant did not participate in the robbery of his own volition but because of a well-grounded apprehension of present imminent and impending death or serious bodily injury at the hands of . . . [Davis and Lyons] if he did not . . . [and] that he seized the first opportunity reasonably safe for him to desist from such participation . . . ."[35] Construing the fact that he did not attempt to flee from Lentz, the court added, "the law should . . . permit the inference that a person refusing to flee from crime, though opportunity offers, does so because of no consciousness of guilt."[36] The court found that the triers of fact had failed to pass upon the questions of whether Milam had submitted to arrest, and, if so, whether his submission terminated his participation in the conspiracy prior to the killing of Lentz. The court held that the omission was error prejudicial to the substantial rights of Milam, justifying reversal.

A dissenting judge came to a different conclusion regarding the facts.[37] The judge indicated that in Ohio, the burden is on the defendant to prove duress by a preponderance of the evidence when it is proved that defendant was present at the time and place of the crime and participated in the robbery. The judge continued:

> At no place in the evidence does the defendant say or act in such a way or fashion as to indicate a withdrawal of support from the robbery, nor is there any evidence that his co-conspirators threatened his physical safety if he attempted a withdrawal. . . . The claim that this defendant acted in fear (which is not a legal defense) is almost completely destroyed by his own testimony and police statement.[38]

The judge concluded that under Ohio law[39] an escape following the perpetration of a crime does not terminate the crime, and that a killing committed during the escape, although not part of the original plan, is a part of the res gestae of the crime. The dissent concluded that Milam remained a co-conspirator at the time of the shooting and was properly found guilty of the murder.[40]

34. *Id.* at 264, 156 N.E.2d at 846.

35. *Id.* at 265, 156 N.E.2d at 846.

36. *Ibid.*

37. State v. Milam, 108 Ohio App. 254, 276, 156 N.E.2d 840, 853 (1959) (dissenting opinion).

38. *Id.* at 285, 156 N.E.2d at 858 (dissenting opinion).

39. State v. Habig, 106 Ohio St. 151, 140 N.E. 195 (1922).

40. Subsequent to the completion of this article, Milam was acquitted of the charges against him. State v. Milam, 163 N.E.2d 416 (Ohio C.P. 1959). [Ed.]