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## Criminal Law--Escape from Illegal Custody

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aluminum which Judge Hand put in a separate market in the *Alcoa* case<sup>15</sup> reasonably interchangeable with virgin aluminum?

The Supreme Court has said in the *du Pont* case that "The tests (of the market) are constant" and that the test to be used is that of the reasonable interchangeability of products. It seems certain that the Court contemplates a liberal definition of the word *reasonable*, with the result that the federal courts will no longer be able to define the "market" narrowly so as to rule against corporations whose demeanor they consider reprehensible.

The dissenting opinion, in which Chief Justice Warren says that this decision "virtually emasculates Section 2,"<sup>16</sup> is a trifle extreme. On the other hand, this decision will force the government to prove a much greater degree of "market" control by a corporation charged with a violation of Section 2 of the Sherman Act. Section 2 can no longer be used as the "catchall" section under which corporations can be punished for acts which do not quite run afoul of the more specific violations of the Clayton Act.<sup>17</sup>

WILLIAM W FALSGRAF

#### CRIMINAL LAW — ESCAPE FROM ILLEGAL CUSTODY

The defendant was indicted and tried in common pleas court for escaping from the county jail in which he was confined. The trial court directed its verdict for the defendant on the ground that his confinement was illegal, since he had been tried and convicted by a mayor's court without the jury to which he was entitled.<sup>1</sup> He had been sentenced for assault and trespass and escaped before the expiration of the sentence. The trial court said that since the confinement was illegal, the defendant could not be prosecuted for escaping. The court of appeals in the instant case affirmed the trial court's decision, holding that the defendant's confinement was illegal and that he could not be prosecuted for his escape under Ohio law.<sup>2</sup>

The issue confronting the court was whether a person who departs from illegal confinement is guilty of escape. The court's opinion is declaratory of the general law that an escape must be from *legal* custody or confinement in order to be indictable.<sup>3</sup> Early in common law, if a party broke out of prison after he had been indicted and acquitted of a crime for which he was committed, he was not to be later indicted for the

<sup>15</sup> United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

<sup>16</sup> United States v. E. I. du Pont de Nemours and Co., 351 U.S. 377, 414 (1956).

<sup>17</sup> 38 STAT. 730 (1914), 15 U.S.C. §§ 12-27 (1952)

crime of escaping from prison.<sup>4</sup> The leading case in the United States on this problem is *People v. Ah Teung*,<sup>5</sup> in which the court rejected the argument that a prisoner's sole remedy for illegal confinement is the writ of habeas corpus. The rationale was that a person's right to freedom is paramount, even if it means by-passing a regular legal process which was specifically designed for cases of this nature. Some courts have extended this doctrine to such a point that an escapee may shoot a guard in self-defense while making his escape, and yet not be guilty of a crime if he was illegally confined.<sup>6</sup> Another court ruled that when an illegally confined prisoner escapes and others who were legally confined escape with him, the illegally confined prisoner can not be tried either for escaping, or for aiding and abetting the escape of the others.<sup>7</sup>

Whether a person who departs from illegal confinement is guilty of escape was a unique question for the courts of Ohio. In order to answer it, the court had to interpret Ohio Revised Code section 2901.11, which provides:

No person in legal custody of guards or officers, shall hold a guard or officer as hostage or wound or inflict other bodily injury upon one of such guards or officers. No person shall escape, attempt to escape or aid, assist or induce others to escape from any confinement or restraint imposed as a result of a criminal, contempt, or probate proceeding, or render less secure any institution or facility, wherein he is confined, or make, procure, secrete, or have in his possession an instrument, tool, or thing with intent to kill, wound, or inflict bodily injury, or resist lawful authority of an officer or guard.

The court interpreted the second sentence of this section in the light of the first, which made *legal custody* a necessity in a subsequent prosecution for escape. The court stated that even though the legislature did not reiterate these words in the second sentence it meant this section to be read as a whole, and therefore the conditions of the first sentence also applied to the second. This being true, the statute would not apply to the defendant in the instant case and he could not be prosecuted under it.

<sup>1</sup> OHIO CONST. art. I, §§ 5 and 10.

<sup>2</sup> *State v. Ferguson*, 100 Ohio App. 191, 135 N.E.2d 884 (1955).

<sup>3</sup> *State v. Leach*, 7 Conn. 452 (1829); *State v. Beebe*, 13 Kan. 437 (1874); *Miers v. State*, 34 Tex. Crim. 161, 29 S.W. 1074 (1895); *State v. Pishner*, 73 W. Va. 744, 81 S.E. 1046 (1914); 19 AM. JUR., *Escape, Prison Breaking and Rescue* § 10 (1939); 16 OHIO JUR., *Escape and Rescue* § 3 (1931)

<sup>4</sup> 11 AM. AND ENG. ENCYC. OF LAW 304 (2nd ed. 1899)

<sup>5</sup> *People v. Ah Teung*, 98 Cal. 421, 28 Pac. 577 (1891).

<sup>6</sup> *Miers v. State*, 34 Tex. Crim. 161, 29 S.W. 1074 (1895). The Texas court held that a prisoner can shoot in self-defense, if it appears reasonably clear that the officer intends to shoot him to prevent his escape.

<sup>7</sup> See note 3, *supra*.