

Comment on Recent Decisions

CRIMINAL LAW—ARRESTS.—Defendant, who had offered a reward to officers of any bank for the apprehension of persons “undertaking to rob or burglarize said bank,” claimed the arrest made by plaintiffs, who were officers of the bank and hence private individuals, was illegal, which arrest had been made immediately after the robbery, before the thief succeeded in creating the loss to the bank for which the insurer would have been liable. *Held*, the arrest was legal under Code Cr. Proc. (Tex.) 1925, art. 325, which provided that the owner or lawful custodian of stolen property has the right to pursue and arrest the thief without warrant and take him to a magistrate, if done openly and without delay, said person being officer de facto, invested with all privileges and burdened with all penalties of officer de jure, for the time being. *Henderson v. United States Fidelity and Casualty Co.* (Tex., 1927), 298 S. W. 404.

This decision involves the validity of an arrest made by a person acting without authority of law, and it is interesting to note that the statute by which the case was decided is one which, for the most part, adequately expresses the spirit of the common law, though it is in fact a specialized provision, relating, as can be seen, to the recovery of stolen property. The only departure in this statute from the principle set forth in many decisions at common law and in a few criminal codes, is the omission of the clause requiring the felony to have been committed in the presence of the private person. *Russell v. State* (1897), 37 Tex. Cr. A. 314, 39 S. W. 674, Smith-Hurd Rev. Stat. Ill. Ch. 38 S. 657. Indeed, it was on this point that the insurer, in the principal case, contested the validity of plaintiffs' claim, since the Texas Code of Criminal Procedure contains another provision (art. 212), which states that “a peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view. . . .” But the court found this section did not conflict with art. 325 *supra*, authorizing the capture of a thief by the lawful owner of the stolen property when such arrest is done openly and without delay. The facts of the case conform to the statutory provision, as the plaintiffs pursued the thief in a motor car immediately after the alarm was given, and were in the vicinity of the bank at the time of the crime.

There are but few early English decisions concerning the right of private individuals to arrest in case of felony, without a warrant. *Adams v. Moore* (1780), 2 Selw. N. P. 910, *Samuel v. Payne*, 1 Doug. 359, *Regina v. Price* (1838), 8 Car. and P. 282. These cases, however, recognize the right very clearly, and seem, for the most part, to be based on the Malicious Injuries Act of 7 and 8 Geo. 4 ch. 30. In *Samuel v. Payne*, *supra*, Lord Mansfield looked upon the true rule to be “that, if a felony has actually been committed, any man, upon reasonable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot

be justified by anybody." It is interesting to note here that the court in *Handcock v. Baker* (1800), 2 B and P. 260, held that a man was justified in breaking into another's house and imprisoning him in order to prevent the latter from committing a felony, viz., the murder of his wife. The general principles running through the American cases, supported by abundant authority (2 R. C. L. 449) are: I. A felony must have in fact been committed. *Davis v. United States* (1900), 16 App. D. C. 442; *Jacques v. Child's Dining Hall Co.* (1923), 244 Mass. 438, 138 N. E. 803, 26 A. L. R. 1329; *Martin v. Houck* (1906), 141 N. C. 317, 54 S. E. 291. II. Private person must have had reasonable grounds for suspicion. *Maliniemi v. Gronlund* (1892), 92 Mich. 222, 52 N. W. 627; *American Ry. Express Co. v. Summers* (1922), 208 Ala. 531, 94 S. 737. III. The privilege is restricted to the arrest of those committing felonies. *Siegel, Cooper & Co. v. Connor* (1898), 171 Ill., 572, 49 N. E. 728; *contra, Tobin v. Bell* (1902), 73 App. Div. 41, 76 N. Y. S. 425.

It is a noteworthy fact, and one not a little surprising, that many criminal codes contain no reference to the arrest of criminals by private individuals, but these states follow the old rule authorizing the arrest when the felony has been in fact committed and there are reasonable grounds to believe the person arrested to be the offender. The criminal codes expressly treating the subject of arrest by private individuals are merely declaratory of the rule referred to, and would logically justify the result reached in the Texas case, since none of them, with the exception of Illinois (Smith-Hurd Rev. Stat. Ill. Ch. 38 S. 657) contain a clause requiring the felony to have been committed in the presence of the individual. Code of Iowa, 1924, sec. 13469; Comp. Stat. of Neb., 1922, sec. 9962; Gen. Stat. Minn., 1923, sec. 10573; 2 R. C. L. 449.

Hence it can be seen that although this decision is a departure from the strict letter of some of the common law decisions and of a few codes requiring the felony to have been committed in the presence of the person making the arrest, the decision is within the spirit of the common law when the circumstances of the case are considered; and despite the fact that the Texas case is based more immediately on the special statute relating to the recovery of stolen goods and the arrest of the thief thereof, the result is in accord with the more liberal provisions of most modern codes, and is a logical amendment to the former rule. The most representative statute on this subject is found in the Criminal Code of Minnesota (sec. 10573) *supra* and is framed in the following language: "A private person may arrest another: 1, For a public offense committed or attempted in his presence; 2, When such person has committed a felony, although not in his presence; or 3, When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." W. V. W., '30.

CRIMINAL LAW—KIDNAPPING—INTENT.—An *ex parte* decree awarded custody of two minor children to the mother. The father of the children later took them away without the consent of the mother. There was evi-