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PUBLIC OFFICERS-SHERIFF'S REMOVAL FROM OFFICE- USE OF THIRD DEGREE

PUBLIC OFFICERS — SHERIFF'S REMOVAL FROM OFFICE — USE OF THIRD DEGREE — In a quo warranto proceeding instituted under a Kansas statute providing that an officer of this state "who shall willfully misconduct himself in office, or who shall willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state . . . shall forfeit his office and shall be ousted from such office," [1] it was *held*, that a sheriff who assaulted and used other third degree practices on a prisoner to force a confession from him had misconducted himself in office and should be removed. *State ex rel. Boynton v. Jackson*, (Kan. 1934) 33 Pac. (2d) 118.

This case, a true reflection of the widespread condemnation of police illegalities,[2] has definite precedent.[3] At common law a police officer indulging in third

[5] Paist v. Aetna Life Ins. Co., (E. D. Pa. 1931) 54 F. (2d) 393; Harloe v. California State Life Ins. Co., 206 Cal. 141, 273 Pac. 560 (1928); Continental Casualty Co. v. Pittman, 145 Ga. 641, 89 S. E. 716 (1916).

[6] Harris v. Maryland Casualty Co., (W. D. Pa. 1931) 2 F. Supp. 188; Continental Casualty Co. v. Bruden, 178 Ark. 683, 11 S. W. (2d) 493, 61 A. L. R. 1192 (1928); U. S. Fidelity & Guaranty Co. v. Hoflinger, 185 Ark. 50, 45 S. W. (2d) 866 (1932); Tate v. Benefit Ass'n of Ry. Employees, 186 Minn. 538, 243 N. W. 694 (1932); Elsey v. Fidelity & Casualty Co. of N. Y., 187 Ind. 447, 120 N. E. 42 (1918).

[7] Mr. Justice Cardozo, before his appointment to the United States Supreme Court, laid down this average-man test in Lewis v. Ocean Accident and Guarantee Corp., Ltd. of London, 224 N. Y. 18, 120 N. E. 56 (1918). See also Wiger v. Mutual Life Ins. Co. of New York, 205 Wis. 95, 236 N.W. 534 (1931), noted in 30 MICH. L. REV. 310 (1931); Farmer v. Ry. Mail Ass'n, (Mo. 1933) 57 S. W. (2d) 744.

[8] Mr. Justice Cardozo's dissent in the instant case.

[9] 78 UNIV. PA. L. REV. 762 (1930).

degree practices is liable for assault and battery, civilly [4] and criminally,[5] with certain states having express legislation to supplement this criminal liability,[6] while one guilty of illegal search is amenable in common law trespass,[7] with civil and criminal liability for assault and battery also a possibility.[8] These liabilities would doubtless be sufficient to stamp out lawbreaking among the police if more frequently resorted to; but when we note that the civil actions demand private litigation and result for the most part in uncollectible judgments, their rarity becomes easily understandable. The natural hesitancy of one official to procure the conviction of one of his fellows probably explains the absence of numerous criminal prosecutions. Turning to the courts, we find them trying to suppress the prevalent evils by varied degrees of strictness in their application of the constitutional guaranties against self-incrimination [9] and unreasonable search,[10] and the now universally accepted rule that confessions extricated by force or fear will not be received in evidence.[11] Conceding a certain amount of incidental success along these lines, the fact that these indirect restrictions distinctly hamper criminal procedure, by frequently requiring the discharge of guilty persons after the only convincing evidence against them has been rejected,[12] virtually nullifies their effect as a restraining influence. It seems that the penalty for illegality under the latter practice is imposed not on the wrongdoer, but upon society. In the instant case the Kansas court departs from the conventional mode of dealing with police abuses and offers a remedy which partakes of none of the weaknesses of the more customary measures previously considered. The quo warranto proceeding may not only be instituted by the state directly against the offending official, but it possesses an added advantage in that it provides a vital and immediate penalty, the loss of the wrongdoer's job, the threat of which alone is quite likely to purge future police activity. This writer feels that if police illegalities are to be checked,

[4] 1 TORTS RESTATEMENT, sec. 132 (d), p. 308 (1934); Farmer v. Rutherford, 136 Kan. 298, 15 Pac. (2d) 474 (1932); Firestone v. Rice, 71 Mich. 377, 38 N. W. 885 (1888); Atwood v. Atwater, 43 Neb. 147, 61 N. W. 574 (1895).

[5] Bonahoon v. State, 203 Ind. 51, 178 N. E. 570, 79 A. L. R. 453 (1931); People v. Tombaugh, 303 Ill. 591, 136 N. E. 453 (1922); United States v. Pabalan et al., 37 Phil. Rep. 352 (1917).

[6] Statutes collected in National Commission on Law Observance and Enforcement, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT, pp. 213 ff. (1931).

[7] CORNELIUS, SEARCH AND SEIZURE, secs. 10, 326 (1926); Ingraham v. Blevins, 236 Ky. 505, 33 S. W. (2d) 357 (1930); State v. Tonn, 195 Iowa 94, 191 N. W. 530 (1923); Banfill v. Byrd, 122 Miss. 288, 84 So. 277 (1920).

[8] State v. Leathers, 31 Ark. 44 (1876). See also 32 W. VA. L. Q. 68 (1925).

[9] 4 WIGMORE, EVIDENCE, 2d ed., sec. 2250 *et seq.* (1923); Davison v. Guthrie, 186 Iowa 211, 172 N. W. 292 (1919); Doyle v. Hofstader, 257 N. Y. 244, 177 N. E. 489 (1931).

[10] Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341 (1914); People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).

[11] 2 WIGMORE, EVIDENCE, 2nd ed., secs. 822, 833, 851 (1923); Ziang Sung Wan v. United States, 266 U. S. 1, 45 Sup. Ct. 1 (1924).

[12] People v. Stein, 265 Mich. 610, 251 N. W. 788 (1933); 32 MICH. L. REV. 88 (1933); Waite, "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933).

direct action against the offenders must be taken; [13] the courts and prosecutors should avail themselves of this natural weapon, the action to oust from office, which is available in all states.[14]

J. E. O'B.

[13] See Wigmore, "The Bill to Regulate the Use of Accused's Confessions," 5 ILL. L. REV. 575 (1911).

[14] MECHEM, LAW OF PUBLIC OFFICES AND OFFICERS, sec. 478 (1890); HIGH, EXTRAORDINARY LEGAL REMEDIES, 3rd ed., sec. 618 (1896); Gladish v. Lovewell, 95 Ark. 618, 130 S. W. 579 (1910); Bradford v. Territory ex rel. Woods, 2 Okla. 228, 37 Pac. 1061 (1894); Royall v. Thomas, 69 Va. 130, 26 Am. Rep. 335 (1877); State ex rel. Johnston v. Foster, 32 Kan. 14 (1884).