Indiana Law Journal

Volume 8 | Issue 5 Article 3

2-1933

Appeal and Error-Raising Constitutionality of a Statute in Criminal Cases

RECENT CASE NOTES

APPEAL AND ERROR—RAISING CONSTITUTIONALITY OF A STATUTE IN CRIMINAL CASES—Appellant was charged by affidavit in two counts, was arraigned on the first count charging arson in the first degree and entered a plea of not guilty. Subsequently, a second count was filed. Appellant went to trial without being arraigned or without a plea being entered as to the second count charging second degree arson. On trial by the court, appellant was found guilty as charged in the second count and sentenced for one to ten years. Motion for a new trial, was overruled, which was assigned for error. *Held*, conviction affirmed. Section 2232, Burns' Ann. St. 1929, provides that "any conviction shall not be invalidated by failure to show an arraignment and plea or either of them, unless the record shall show that the defendant before the trial objected to entering upon the trial for lack of such arraignment or plea." Appellant contests the validity of such statute if it is applicable to this case. The court, however, held "that the constitutionality of a statute must be raised either by a motion to quash or a motion in arrest, and not by a motion for a new trial."[1]

The court cites as authority therefor *Ellwanger v. State*,[2] which was followed in *Cox v. State*.[3] In the latter two cases the statute whose constitutionality appellant sought to question was the one on which the affidavit or indictment was based. No motions to quash or in arrest of judgment were filed, and the sole assignments of error were in overruling appellant's motion for new trial. The decisions in the latter two cases are in line with the authority.[4]

In general, every litigant in any judicial proceeding has the right to raise a question as to the constitutionality of any statute that may operate adversely to his interests; the denial of such right is in violation of due process of law.[5] Fundamentally, however, the party raising the question must be interested in and affected adversely by the act in question before the court will consider it.[6] Further, courts will only decide constitutional questions when they are in the record, and are manifestly necessary to a final determination of the case.[7] Thus the right to contest the constitutionality of statutes is limited by rules to procedure. It is uniformly held that the constitutionality of a statute cannot properly be raised for the first time in a court of review, but must have been called to the attention of the

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[1] *Knapp v. State*, Supreme Court of Indiana, June 24, 1932, 181 N. E. 517.

[2] Supreme Court of Indiana, 1932, 180 N. E. 287.

[3] Supreme Court of Indiana, 1932, 181 N. E. 469.

[4] *De La Tour v. State* (1929), 201 Ind. 14, 165 N. E. 753; *Guetling v. State* (1928), 199 Ind. 630, 158 N. E. 593; *Moore v. State* (1927), 199 Ind. 578, 159 N. E. 154; *Hunt v. State* (1921), 191 Ind. 406, 133 N. E. 8; *Bradley v. Onstatt* (1914), 180 Ind. 687, 103 N. E. 798; *State v. Beach* (1897), 147 Ind. 74, 46 N. E. 145; *Alderson v. State* (1929), 201 Ind. 359, 168 N. E. 481; *State v. Winehill & Rosenthal* (1920), 147 La. 781, 86 So. 181; *State v. Jackson* (1922), 152 La. 656, 94 So. 150.

[5] Willoughby: United States Constitutional Law (2d Ed.), Sec. 12 (1929).

[6] Willoughby: United States Constitutional Law (2d), Sec. 15 (1929), and cases cited.

[7] Elliott: Appellate Procedure, Sec. 32 (1892); *State ex rel. Taylor v. Lord* (1896), 28 Ore. 498, 43 Pac. 471.

trial court and the proper exception reserved to the court's rulings.[8] Even where the proper method has been followed to raise such questions, yet the objections to the statute must be definitely and specifically stated so as to clearly present the question to the upper court; "a finger must be placed upon the provisions of the constitution alleged to be violated before the question is sufficiently raised to require notice."[9] General allegations in a motion to quash[10] or a motion to arrest[11] that the statute on which the affidavit is based is unconstitutional, although the proper motions to raise the questions, are too vague and uncertain to require the notice of the upper court. Where a party requests a court to hold a proposition of law applicable to his case, he may not afterwards question the validity of such proposition in the appellate court.[12] Nor will the court of review entertain an appeal or writ of error to raise a constitutional question previously decided.[13]

The above rule—that the constitutional question must be first presented to the lower court—is subject to several limitations and exceptions. In New York, Michigan and Illinois, the courts have established a definite exception to relieve undue hardship on the appellant, especially in the case of an infant, where he was poorly represented in the court below,[14] or where the error was so grave and its prejudicial character so manifest that it cannot be overlooked.[15] The courts will take such notice, however, only in extreme cases, and the rule is a "matter of grace."[16] Under federal appellate procedure in the second circuit, if the error is plain, it will be considered though not properly raised.[17] Obviously, also, if the statute in

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[8] *Lindsay v. State* (1924), 195 Ind. 333, 145 N. E. 438; *People v. Raport* (1920), 93 App. Div. 135, 183 N. Y. S. 589; *Volderauer v. State* (1924), 195 Ind. 415, 143 N. E. 674, where court considered the validity of a statute when the question was presented by an assignment of error in overruling appellant's motion to quash, refusing to consider an independent assignment of error that the affidavit was based on an unconstitutional statute. *Public Utilities Co. v. Reader, Adm'x.* (1919), 71 Ind. App. 485, 122 N. E. 26; *Pittsburgh, C. C. & St. L. Ry. Co. v. Town of Wolcott* (1904), 162 Ind. 399, 69 N. E. 451; *Pittsburgh, C. C. & St. L. Ry. Co. v. Collins* (1907), 168 Ind. 467, 89 N. E. 415; *Standish v. Bridgewater* (1902), 159 Ind. 386, 65 N. E. 189; *Chism v. State* (1932), — Ind. —, 179 N. E. 718; *McNeil & Higgans Co. v. Neenah Cheese & Cold Storage Co.* (1919), 290 Ill. 449, 125 N. E. 251, 14 Ill. L. Rev. 666 (1920); *Griveau v. So. Chicago City Ry. Co.* (1905), 213 Ill. 633, 73 N. E. 309; *Moses v. Royal Indemnity Co.* (1916), 276 Ill. 177, 114 N. E. 554; *People v. Breglin* (1923), 309 Ill. 488, 141 N. E. 295, 18 Ill. L. Rev. 476 (1924).

[9] *State ex rel. Franklin County v. Tibbe Electric Co.* (1913), 250 Mo. 522, 157 S. W. 635; *Lohmeyer v. St. Louis Cordage Co.* (1908), 214 Mo. 655, 113 S. W. 1108, and cases cited; *Street v. School District of St. Joseph* (1909), 221 Mo. 663, 120 S. W. 1159; *Commercial Bank v. Blessinghame* (1918), 147 Ga. 636, 95 S. E. 222.

[10] *State v. Rosborough* (1922), 152 La. 945, 94 So. 858; *State v. Richardson* (1924), — Mo. —, 267 S. W. 841.

[11] *Armond v. State* (1916), 18 Ga. App. 116, 88 S. E. 990; *State v. Sonier* (1902), 107 La. 794, 32 So. 175.

[12] *Cummings v. People* (1904), 211 Ill. 392, 71 N. E. 1031.

[13] *People v. Fensky* (1919), 290 Ill. 612, 125 N. E. 292; *People v. Blenz* (1925), 317 Ill. 639, 148 N. E. 249.

[14] *People v. Gardiner* (1922), 303 Ill. 204, 135 N. E. 422.

[15] *People v. Weiss* (1908), 129 App. Div. 671, 114 N. Y. S. 236; *People v. Brott* (1910), 163 Mich. 150, 128 N. W. 236. See also 40 Harv. L. Rev. 999 (1927).

[16] 36 Harv. L. Rev. 103 (1923); *People v. Brott* (1910), 163 Mich. 150, 128 N. W. 236.

[17] *Oppenheim v. United States* (1917), 241 Fed. 625; Zoline: Federal Appellate Jurisdiction and Procedure (3d Ed.) Sec. 107, and cases cited. See also *Schwartz v.*

question is necessary to the jurisdiction of either the reviewer or trial court, the question will be considered though not raised below.[18] Also, in the rather unusual instance where the constitutionality of the same statute was before the same court in another case at the same time, the court considered the question, though not properly presented.[19]

The courts' regulation of the right to contest the validity of statutes having been firmly established, the theory of the rule in the *Cox case*, that the constitutionality of the statute upon which the affidavit is based is not raised on motion for new trial, is this: The motion for new trial sets out certain grounds (See Burns' Ann. St. 1926, sec. 2323), one being that the verdict is contrary to law. "This phrase, as used in the statute, we interpret as meaning contrary to the principles of law as applied to the facts or issues which the jury were called upon to try. * * * At most, it cannot be extended to include matters not proper to be considered in support of the motion for a new trial, nor to embrace any of the other distinct and separate grounds of the motion which are specified in the act."[20] The constitutionality of the statute is not contrary to the "principles of law as applied to the facts, etc.," but is outside the trial proper and is a question as to the sufficiency of the affidavit, that is, that it does not state facts sufficient to constitute a public offense. Thus, being a question of pleading and not in the trial proper, it should not be presented in a motion for a new trial, since it would not be rectified by the granting thereof.[21] It is perfectly obvious that if the only error were that the statute was unconstitutional, a new trial based on the same affidavit would not change the result nor bring about justice. The decisions are all in accord. Rulings on a plea in abatement,[22] or on a motion to quash[23] being no part of the trial on the merits, may not be presented by alleging such ruling as error in a motion for new trial. Only those errors committed in the trial itself may be presented on motion for new trial. Thus rulings on pleadings before arraignment, though erroneous, are not challenged by a motion for a new trial.[24]

The rule that the validity of the statute on which the affidavit is based must be raised by a motion to quash or motion in arrest is entirely logical and supported by good reason. The sole question raised is as to the sufficiency of the affidavit, since if the statute is unconstitutional the affidavit does not state facts constituting a public offense. However, one is not relieved from such charge without assailing the statute by some recognized method. And the proper method of testing the sufficiency of the affidavit is not by a motion for new trial, but by a motion to quash,[25] or by a motion

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People (1909), 46 Colo. 239, 104 Pac. 92, where court considered question not raised below when it *clearly appeared on the face of the record* to be involved.

[18] *State ex rel. Vandiver v. Burke* (1912), 175 Ala. 561, 57 So. 870. Applying the same principles to criminal cases, *Griggs v. State* (1908), 130 Ga. 15, 60 S. E. 103; *Cosper v. State* (1913), — Ga. —, 79 S. E. 94.

[19] *Van Pelt v. Hilliard* (1918), 75 Fla. 792, 78 So. 693.

[20] *Ellwanger v. State*, Supreme Court of Indiana, 1932, 180 N. E. 287.

[21] Elliott: Appellate Procedure, Sec. 350 (1892).

[22] *Moore v. State* (1927), 199 Ind. 578, 159 N. E. 154.

[23] *Nafe v. Leiter* (1885), 103 Ind. 138, 2 N. E. 317; *Utley v. State* (1924), 194 Ind. 186, 142 N. E. 377.

[24] *Hunt v. State* (1921), 191 Ind. 406, 133 N. E. 8.

[25] Burns' Ann. Stat. 1926, Sec. 2227. *State v. Beach* (1897), 147 Ind. 74, 46 N. E. 145; *Terrell v. State* (1905), 165 Ind. 443, 75 N. E. 884; *Scott v. State* (1911), 176 Ind. 382, 96 N. E. 125.

in arrest of judgment.[26] Further, it is an elementary principle that where precise grounds for review have been prescribed, appellant must show that he has complied strictly with such rules. The rule in the *Cox case* has not only been stated by the courts, but has been applied by them in practice.[27]

Having arrived at the conclusion that the rule set out in the *Cox* and *Ellwanger cases* is sound and well supported by authority, the next question that is presented is whether or not the rule should have been applied in the *Knapp case*. There is considerable doubt in the mind of the writer as to the propriety of so doing. In that case the statute whose validity was doubted was not the one on which the affidavit was based, but was one applicable to arraignment and the entering of pleas providing a waiver of the right to arraignment and pleading by entering upon the trial without objection. The court laid down our rule that such statute should have been questioned not by motion for new trial, as appellant sought, but by motion to quash or motion in arrest. But could appellant have raised the question by either of the latter two motions? By Burns' Ann. Stat. 1926, Sec. 2227, defendant may move to quash when it appears on the face of the affidavit that the grand jury had no legal authority, and the facts stated do not constitute a public offense, that the affidavit contains any matter constituting a legal bar to the prosecution, or that the offense is not stated with sufficient certainty. Merely the jurisdiction of the grand jury or the sufficiency of the affidavit is questioned by such motion, and it has been held that since the statute specifies the grounds available for a motion to quash, nothing outside of the grounds specified is available.[28] The statute in question here does not seem to come within the grounds specified in Sec. 2227, since it applies neither to the authority of the grand jury nor to the sufficiency of the affidavit. If the court will continue to construe Sec. 2227 that nothing outside the grounds specified may be considered, and that it questions the sufficiency of the affidavit, how may such motion to quash raise the question as to the constitutionality of a statute which is not connected with the affidavit, whose application in time occurs after the affidavit has been filed, and opportunity to question it has been given, and which is not set out in the grounds for a motion to quash?

By Burns' Ann. Stat. 1926, Sec. 2326, the grounds for a motion in arrest of judgment are that the grand jury had no legal authority to inquire into the offense charged since such offense was not within the jurisdiction of the court, and that the facts stated in the indictment or affidavit do not constitute a public offense. It has been held that a motion in arrest of judgment can only be made for want of jurisdiction and insufficiency of the affidavit.[29] Although a motion in arrest and a motion to

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[26] Burns Ann. Stat. 1926, Sec. 2326; *Hoover v. State* (1886), 110 Ind. 349, 11 N. E. 434; *Woodsmall v. State* (1913), 179 Ind. 382, 96 N. E. 125.

[27] Motions to Quash—*Volderauer v. State* (1924), 195 Ind. 415, 143 N. E. 674; *Eller v. State* (1925), 196 Ind. 562, 149 N. E. 62. Motion in arrest—*Lindsay v. State* (1924), 195 Ind. 333, 145 N. E. 438; *State v. Winehill & Rosenthal* (1920), 147 La. 781, 86 So. 181.

[28] *State v. Jackson* (1918), 187 Ind. 694, 121 N. E. 114; *Ratzen v. State* (1922), 192 Ind. 476, 137 N. E. 29.

[29] *Pittsburgh, C. C. & St. L. Ry. Co. v. State* (1912), 178 Ind. 498, 99 N. E. 801; *Lay v. State* (1913), 180 Ind. 1, 102 N. E. 294; *Bass v. State* (1919), 188 Ind. 21, 120 N. E. 657; *Rowe v. State* (1922), 191 Ind. 536, 133 N. E. 2.

quash are not the same thing,[30] for the purpose of this discussion they may be treated alike. Since the motion in arrest tests only the authority of the grand jury or the sufficiency of the affidavit, like the motion to quash, how then can it, any more than the motion to quash, raise a question as to the constitutionality of the statute sought to be questioned in the *Knapp case?* If the court is correct in holding that appellant may not contest the statute by motion for new trial, it would seem that he is prevented from raising the question at all.

Under Sec. 2325, Burns' Ann. Stat. 1926, the court is empowered to grant a new trial for "irregularities in the proceedings of the court or jury, or for any order of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial." Prior to the enactment of Sec. 2232, Burns' Ann. Stat. 1929, the statute in question, it was held under this section (2325) that failure to arraign the defendant and have him plead is cause for a new trial.[31] Of course, if Sec. 2232 is constitutional, then such failure is no longer cause for a new trial. But appellant still has his right to question the constitutionality of the statute[32] so long as it has not already been held constitutional,[33] and it would seem such question should be raised under Sec. 2325, *supra*, since if the statute is unconstitutional, appellant would be entitled to a new trial under previous decisions of the court.[34] Unless he is to be denied altogether the right to question the validity of the statute, which denial would be in violation of due process clause of the Constitution, it must be under a motion for a new trial.

There is no doubt but that a constitutional question may be raised during the trial which must be considered on motion for a new trial, and could not be raised by a motion in arrest or a motion to quash. In *Lohmeyer v. St. Louis Cordage Co.*,[35] although affirming the general rule that the constitutional question must be raised at the earliest opportunity on the pleadings as by a motion to quash, the court stated that a constitutional question might be raised during the trial regardless of the pleadings through some unanticipated ruling on admission of evidence, where the trial court had the opportunity to correct the error on motion for new trial, or by a clause in the motion for new trial, when it did not appear elsewhere on the record, as in an instruction involving the Constitution, as permitting nine jurors out of twelve to return the verdict.[36] It is conceivable that other constitutional questions might be raised during the trial itself incapable of being raised by a motion to quash or a motion in arrest, such as a statute regulating searches and seizures and admissions of evidence obtained thereby which might be contested as violating the constitutional guarantee of freedom from unreasonable searches and seizures, or statutes destroying or limiting certain privileges guaranteed by the constitution, as the privilege against self-incrimination.

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[30] *Boos v. State* (1914), 181 Ind. 562, 105 N. E. 117; *Bass v. State* (1910), 188 Ind. 21, 120 N. E. 657.

[31] *Pritchard v. State* (1920), 190 Ind. 49, 127 N. E. 545.

[32] Willoughby: United States Constitutional Law (2d ed.), Sec. 12 (1929).

[33] *People v. Fensky* (1919), 290 Ill. 612, 125 N. E. 292; *People v. Blenz* (1925), 317 Ill. 639, 148 N. E. 249.

[34] *Pritchard v. State* (1920), 190 Ind. 49, 127 N. E. 545.

[35] (1908) 214 Mo. 685, 113 S. W. 1108.

[36] *Logan v. Field* (1905), 192 Mo. 66, 90 S. W. 127.

It is submitted that the doctrine of the *Cox case* seems to have been extended beyond its logical and reasonable limits in applying it to the *Knapp case;* the rule, though proper, should be limited. However, even though the holding of the court in the latter case refusing to consider the statute of waiver of arraignment and pleading should prove to be an erroneous application of the rule, nevertheless, under the facts in that case, and considering the statute involved, there was no substantial or prejudicial error to the rights of the appellant. In the first place, appellant in his motion for new trial did not assign as grounds therefor "irregularities in the proceedings of the court and jury * * *" as provided in Sec. 2325, (1). Further, there should be no question as to the constitutionality of Sec. 2232, *supra,* since such regulation of procedure has always been held to be due process of law, and further, by entering upon trial without objection, presenting a defense, and following through the entire trial, the defendant should be estopped from asserting that no issue had been formed by the failure to arraign and plead, and that he was not informed of the character of the charge against him. Although the constitutionality of the statute has not been directly attacked, yet it has been frequently applied since its enactment with no serious questions as to its validity.[37] Consequently, the same result would have been reached had the constitutionality of the statute been considered, and under the facts in this case, at any rate, the discussion is of a purely academic question. A failure to recognize the rule, its reasons and limitations, might, however, under other facts, bring about a different result, and prejudice the rights of a defendant. P. C. R.

OFFICERS—TORT LIABILITY—MINISTERIAL DUTY—Action to recover property damages. The appellants, who were state entomologists and engaged in the eradication of the corn borer, plowed the appellee's oat field to cover over old cornstalks and other refuse, which the appellee had failed to dispose of when so ordered. The plowing was done at a time when the soil was over saturated with moisture, and the crop of oats were eight inches in height, causing injury to the fertility of the soil and destroying the crop of oats. There was no evidence of any traces of the corn borer in the appellee's field, or within the immediate vicinity. The jury found the plowing unwarranted and unreasonable, and held the appellants liable for the damage. The appellants contend that as officers of the state, acting under authority from the conservation department, they are not personally liable for injuries sustained as a result of their acts. *Held,* public officers are personally liable for the wrongful performance of their ministerial duties.[1]

The principal case presents the question as to what extent a public office affords protection from personal liability, in the performance of ministerial duties. A ministerial duty is absolute, certain and imperative, involving the mere execution of a designated task, the law prescribing the mode of performance so that very little, if any, discretion remains in the officer.[2] Duties and acts which the courts have held to be ministerial are: dipping for the eradication of the cattle tick;[3] levying of a tax by a board

[37] *Tokas v. State* (1930), 202 Ind. 259, 173 N. E. 453; *Lee v. State* (1929), 90 Ind. App. 43, 167 N. E. 543.

[1] *Wallace v. Feehan,* Appellate Court of Indiana, June 3, 1932, 181 N. E. 862.

[2] *Roberts v. United States* (1899), 176 U. S. 221, 20 Sup. Ct. 376.

[3] *McClellan v. Carter* (1923), 30 Ga. App. 150, 117 S. E. 118.