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Constitutional Law--Who May Constitutionally Issue a Warrant?

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ginia has been to "protect and reclaim" by allowing a great deal of discretion with the juvenile court judge.[21] It would appear that West Virginia procedure is anomalous to the holdings in *Gault.*

The guidelines for future juvenile proceedings in West Virginia must be revised to conform with the rulings in *Gault.* This can be accomplished either by the Legislature, as part of a comprehensive statutory overhaul, or by the Supreme Court of Appeals on a case by case basis. Regardless of the method of revision, it is clear that accused juveniles in juvenile court proceedings now have the right to counsel, the right of cross-examination, protection against self-incrimination, and timely notice of "charges" against them. *Gault* requires "due process of law" in juvenile court proceedings.

John Hampton Tinney

Constitutional Law—Who May Constitutionally Issue A Warrant?

P, arrested on a warrant issued by a lieutenant of police, was charged with disorderly conduct and resisting arrest. The city charter authorized captains and lieutenants of police, in the absence of the chief of police, to issue warrants for offenses in violation of ordinances of the city. *P* claims that the ordinance constitutes an unconstitutional delegation of judicial authority in contravention of the separation of powers provision of the state constitution.[1] The lower court upheld the constitutionality of the ordinance and the validity of the warrants. *Held,* affirmed. The court held in a 3-2 decision that, at the lower levels of government, there must necessarily be an overlapping of functions in responsible officials and that issuance of a warrant is the type of an act which does not require or involve the exercise of supreme judicial power within the meaning of that term as used in the constitution. *State ex rel. Sahley v. Thompson,* 151 S.E.2d 870 (W. Va. 1966).

The factual situation of this case presents succinctly a basic constitutional issue which the courts of this country have had to resolve in the past and most certainly will be confronted with in the future.

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[21] 50 OPS. W. VA. ATT'Y GEN. 257 (1963).

[1] "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time . . . ." W. VA. CONST. art. V, § 1.

The West Virginia court was called upon to decide between a *strict interpretation* of the West Virginia constitutional provision[2] calling for separation of powers, and a more liberal interpretation which might in essence involve a slight but expedient encroachment. The impact of this decision on West Virginia's legal system and society in general merits comment.

The ultimate issue before the court was whether the issuance of a warrant by a lieutenant of police, who both parties concede is not a judicial officer, violates the constitutional provision calling for separation of powers. Before a decision can be reached, that issue must be broken down into two more specific issues. The first is whether the issuance of a warrant is a judicial act so as to preclude issuance by a non-judicial officer, and, second, whether West Virginia will sanction a liberal interpretation of the separation of powers provision and thus allow a slight overlapping of functions at the lower levels of government.

Considering the first issue, the majority opinion in the principal case conceded that the issuance of a warrant is *in essence* a judicial act. The court then proceeded to discuss whether the finding of probable cause incident to the issuance of an arrest warrant was a judicial function or only a quasi-judicial function. The West Virginia Supreme Court cited the United States Supreme Court in *Ocampo v. United States*[3] which stated: "[I]n short, the function of determining that probable cause exists for the arrest of a person accused is only *quasi-judicial,* and not such that, because of its nature, it must necessarily be confined to a strictly judicial officer or tribunal."[4]

Many seemingly unsatisfactory attempts have been made to define the term "quasi-judicial." The West Virginia court quoted Black's Law Dictionary which has defined it as action or discretion by an administrative officer whereby this officer is required to investigate or ascertain the existence of facts and draw conclusions

[2] *Id.*

[3] 234 U.S. 91, 100 (1914).

[4] *Id.* The Supreme Court also stated: It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally . . . as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest.

therefrom as a basis for official action, and for the exercise of judicial discretion.[5] Similarly, another court held that when a law commits to an officer the duty of looking into facts and acting on them through discretion in its nature judicial, the function is "quasi-judicial," and does not violate the constitutional provision calling for separation of powers.[6] As to what acts are considered quasi-judicial, the Illinois court has stated that "where a power vests in a judgment or discretion so that it is of a judicial character or nature, but does not involve the exercise of the functions of a judge, or is conferred upon an officer having no authority of a judicial character, the expression used is generally 'quasi-judicial'."[7] To further the contention that the issuance of a warrant is in essence only a quasi-judicial act so that non-judicial officers may be authorized to issue them, the Alabama court upheld the validity of a warrant issued by a county solicitor.[8] The Alabama court although not using the term "quasi-judicial" held that the issuance of a warrant was a judicial function as distinguished from merely administrative or ministerial powers but that the legislature may commit such functions to ministerial officers because it is not a final judicial determination.[9] Rather than define the term, it appears the courts have merely been able to point out that where administrative officers perform judicial type acts, they will term them "quasi-judicial," *i.e.*, the term has been defined by describing what functions shall be included within it. Then, by bootstrap reasoning, the courts proceed to say it is proper for administrative officials to perform these quasi-judicial acts.

It seems apparent that there are differences of opinion on whether issuance of a warrant is a judicial or a quasi-judicial act. However, the majority in the principal case relied heavily on the decision in *State v. Furmage*[10] which held that whether the issuance of a warrant was regarded as a judicial, quasi-judicial or a ministerial act, it does not require or involve the exercise of *supreme* judicial power within the meaning of that term as used in the state constitutional provision calling for separation of powers.[11]

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[5] United States Steel Corp. v. Stokes, 138 W. Va. 506, 512, 76 S.E.2d 474, 477 (1953).
[6] Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 429, 41 N.W.2d 397, 410 (1950).
[7] Parker v. Kirkland, 298 Ill. App. 340, 349, 18 N.E.2d 709, 714 (1939).
[8] Holloman v. State, 37 Ala. App. 599, 74 So. 2d 612 (1954).
[9] *Id.* at 601, 74 So. 2d at 614.
[10] 250 N.C. 616, 109 S.E.2d 563 (1959).
[11] *Id.* at 627, 109 S.E.2d at 571.

The opposing view, as set forth by the dissenting judges, contends that issuance of a warrant is clearly a judicial act and thus can only be performed by an authorized judicial officer.[12] In accord with this view, the New York court, in ruling that a warrant of arrest is a judicial order and must be signed by an authorized judicial officer, stated that "criminal process leading to a trial must be issued by a court or magistrate on sworn information, not by an executive, such as a policeman, on his own motion."[13]

To further complicate this issue, the states have differed considerably in ruling on who may be authorized to issue warrants. While the power to issue warrants is most frequently exercised by justices of the peace and police magistrates, it can be conferred on other officials.[14] Generally, local laws prescribe who shall issue warrants. Many federal and state officers, departments and bodies may issue them.[15] In *Bowen v. State*[16] the Oklahoma court ruled that a clerk of a county court has no authority to issue a warrant.[17] Diametrically opposed is a decision by the Alabama court that statutes which confer power upon clerks of court to issue warrants of arrest are constitutional and the warrants thus issued are valid.[18] Likewise, the Kansas court upheld the validity of a warrant issued by a coroner.[19]

The foregoing authorities indicate clearly the diversity of opinion concerning whether the issuance of a warrant is a judicial act, and whether it must be confined to a strictly judicial officer. The desire for a logical and legally sound result forces us to a consideration of the second specific issue, whether the courts of West Virginia will sanction a liberal interpretation of the separation of powers provision and thus allow a slight overlapping of functions at the lower levels of government. One excellent explanation of what is meant by the constitutional doctrine of separation of powers and

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[12] State v. McGowan, 243 N.C. 431, 90 S.E.2d 703 (1956). *See also,* State *ex rel.* Staley v. Hereford, 131 W. Va. 84, 86, 45 S.E.2d 738, 739 (1947); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 6.03 (1966).

[13] Bienenstock v. McCoy, 194 Misc. 927, 8 N.Y.S.2d 279 (1949).

[14] 5 AM. JUR. 2d *Arrest* § 10 (1962).

[15] 1 ALEXANDER, LAW OF ARREST § 61 (1949). These include Congress, the Secretary of Labor, Parole Boards, governors, some sheriffs, marshalls, coroners, boards of health, administrative boards and commissioners.

[16] 5 Okla. Crim. 605, 115 P. 376 (1911).

[17] *Id.* at 607, 115 P. at 376.

[18] Kreulhaus v. City of Birmingham, 164 Ala. 623, 51 So. 297 (1909).

[19] State v. Brecount, 82 Kan. 195, 107 P. 763 (1910).

a strong argument for allowing an overlapping is contained in the following:

> . . . But when we speak of a separation of the three great departments of government, and maintain, that that separation is indispensible to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence, the one upon the other, in the slightest degree. The true meaning is, that the *whole* power of one of these departments should not be exercised by the same hands, which possess the *whole* power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.[20]

The majority cited only *Wheeling Bridge & T. Ry. Co. v. Paull*[21] in support of the position that a slight overlapping was permissible. In the *Wheeling Bridge* case, the West Virginia court held that there must necessarily be an overlapping of functions in responsible officials at the lower levels of government to preclude the cost of government becoming too burdensome.[22] As opposed to that view the West Virginia court has ruled many times that the separation of powers provision is clear and free from ambiguity and must be strictly enforced.[23]

A logical conclusion from the foregoing authorities would indicate that in the past the West Virginia court has favored strict enforcement of the separation of powers provision. The courts also interpret and endeavor to preserve inviolate the intentions of our legislatures. Yet public policy, expediency and the practicability of a decision tend to color and influence this judicial interpretation. The West Virginia court held that the issuance of a warrant by a lieutenant of police was not a violation of the separation of powers provision. It thus appears that the West Virginia court was obliged to recede from its adamant determination to strictly enforce the

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[20] 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 524 (1833) (emphasis added).

[21] 39 W. Va. 142, 19 S.E. 551 (1894).

[22] *Id.* at 144, 19 S.E. at 551.

[23] State *ex rel.* State Bldg. Comm. of W. Va. v. Bailey, 150 S.E.2d 449 (W. Va. 1966). *See also,* State v. Huber, 129 W. Va. 198, 40 S.E.2d 11 (1946); Hodges v. Public Serv. Comm., 110 W. Va. 649, 159 S.E. 834 (1931); Danielley v. City of Princeton, 113 W. Va. 252, 167 S.E. 620 (1933).

separation of powers provision in order to arrive at what in essence amounted to a more expedient and practical result.

Daniel L. Schofield

Estate Tax—The Relevancy of State Court Adjudication of Property Rights

In 1930 decedent, *D*, created a revocable trust which as amended in 1931 provided his wife, *W*, with income for life and a general power of appointment over the corpus. In 1951 *W* executed an instrument purporting to change it to a special power. Upon *D's* death in 1957 the executor of the estate in paying federal estate taxes attempted to claim the value of the widow's trust as a marital deduction under section 2056(b)(5) of the 1954 Internal Revenue Code.[1] However, the commissioner determined that the trust corpus did not qualify because of the 1951 release. The respondent, who was the executor, then filed a petition for redetermination in the Tax Court. However, while this was pending the respondent filed a petition in the Supreme Court of New York asking for a determination of the validity of the release. The state court found the release to be a nullity; the Tax Court then accepted the state court judgment as being an, "authoritative exposition of New York law and adjudication of the property rights involved," and allowed the marital deduction. *Held;* reversed and remanded. When the application of a federal statute is involved the decision of the state trial court as to an underlying issue concerning relevant property rights is not controlling if there is no decision by the highest court

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[1] Int. Rev. Code of 1954, § 2056 (b) (5):

> Life estate with power of appointment in surviving spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, . . . with power in the surviving spouse to appoint the entire interest, . . . (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—
>
> (A) the interest . . . so passing, shall, for the purposes of subsection (a), be considered as passing to the surviving spouse, and (B) no part of the interest so passing shall, for the purposes of paragraph (1)(A) be considered as passing to any person other than the surviving spouse. . . .