Kentucky Law Journal

Volume 42 | Issue 1 Article 8

1953

# Criminal Procedure--Protection Accorded the Officer Who Arrests Under a Defective Warrant

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personally receive the proceeds.[27] But, this was not the settlor's intention; we have shown that he had the association in mind when he created the trust and not the individual members. It would be his intention that if and when the trust was properly terminated the proceeds should go to the association and to no one else.

It would seem that to recognize an unincorporated association as a separate entity capable of holding equitable title would be the most simple and direct solution of our problem.[28] The settlor's intentions would be satisfied since the beneficial interest is in the association where he intended it to be and the trust will exist as long as he intended. It will be subject to the will of the association in exactly the manner which he had in mind, i.e., the association can control the trust according to its customary procedures without any objections by individual members of infringment of their "personal rights." The title vests once and for all in the association and is not even ambulatory. The rule against perpetual trusts is not violated because the unincorporated association, as in the case of corporations, should be permitted to be the beneficiary of a private trust despite the fact that it might exist in perpetuity.[29] We assume, of course, that the trust could not of its terms be one of perpetual indestructibility. A trust set up for the benefit of an unincorporated association should conform to the normal rules governing private trusts so far as destructibility is concerned.[30] The mere fact that the trust has a potential existence of infinity should not vitiate it.

In conclusion it would seem that to recognize the ability of an unincorporated association to be its own beneficiary is the most desirable solution of the problems presented by such private trusts. It squares with the intention of the parties involved and it is the easiest to legally justify and administer. Unquestionably it represents the modern attitude toward unincorporated associations.

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## CRIMINAL PROCEDURE—PROTECTION ACCORDED THE OFFICER WHO ARRESTS UNDER A DEFECTIVE WARRANT

In any examination of the effect of an arrest under a defective warrant upon the rights of the arresting officer it is necessary to give some consideration to the nature of the warrant. Though there are numerous

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[27] As was done to no avail by the individual members in Crawford v. Gross, 140 Pa. 297, 21 A. 356 (1891).

[28] See cases *supra* note 4.

[29] See I SCOTT, THE LAW OF TRUSTS 589 (1939).

[30] *Ibid.* at 392-393.

requisites which a valid warrant must meet,[1] these requisites, it is believed, may be broken down into five basic requirements. A warrant to be valid must: (1) satisfy the requirements of jurisdiction; (2) set forth substantially the nature of the offense with which the accused is charged; (3) contain a reasonable description of, or name, the person to be arrested; (4) be issued on oath; and (5) be issued upon probable cause. The last three requisites are covered in the Constitution of the United States in the following words:

> [N]o warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons . . . to be seized.[2]

Various state constitutions contain similar provisions.[3]

Considerable difficulty is encountered when one attempts to discuss the various defects in a warrant. Clearly a warrant is either valid or invalid, i.e. defective. The courts, however, have recognized that there may be two types of defects—those apparent on the face of the process and those which, though present, are not apparent on the face of the warrant. In discussing the rights of the parties involved in an attempted arrest under a defective warrant it is necessary that a distinction be made between these two types of defects. Those warrants in which the defect is apparent on the face of the process will hereafter be designated patently defective warrants; and those warrants which, though valid and fair on their face, are burdened with some unseen defect will be called latently defective warrants.[4]

A duly authorized officer who executes a latently defective warrant in a proper manner is protected to the same degree as if he were executing a valid warrant.[5] In *Bullock* v. *State* where a constable was killed while executing a warrant regular on its face, but which had been sworn out for illegal purposes, it was said:

> [I]f the process be regular and legal upon its face, and within the jurisdiction of the magistrate to issue, the officer will be protected in its service. . . .[6]

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[1] RESTATEMENT, CRIMINAL PROCEDURE, sec. 3 (1931).
[2] U. S. CONST. AMEND. IV.
[3] ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 10 (1947).
[4] See generally note, 34 KY. L. J. 73 (1945). An officer's obvious right to arrest when armed with a valid warrant will not be discussed herein, nor will the situation be treated where an arrest is attempted under a defective warrant, when such an arrest would have been legal without any warrant whatsoever. The problem to be discussed arises when an arrest which requires a warrant is attempted under a warrant which is defective in some way.
[5] State v. Gupton, 166 N.C. 257, 80 S.E. 989 (1914); State v. Henry Jones, 88 N.C. Rep. 648 (1883); RESTATEMENT, TORTS, sec. 124, comment (a) (1934).
[6] Bullock v. State, 65 N. J. L. 557, —, 47 Atl. 62, 67 (1900).

The law is well settled that for the proper execution of such process the officer incurs no liability.[7] This rule is the most rational which could be reached. An officer is duty bound, and his duty is wholly inconsistent with any rule which would require him to delve into the circumstances behind every warrant he might be directed to execute.[8] In *Hoppe* v. *Klopperich* where it was alleged that a warrant for the plaintiff's arrest was procured knowingly, wrongfully, maliciously, and without probable cause, it was said:

> It was the sheriff's imperative duty to execute the warrant, . . . and he was not obliged to go behind warrant to determine the validity of the prior proceedings. . . .[9]

Further, under the majority rule, the mere fact that the officer knows that the warrant was obtained for an unlawful purpose, or was illegally issued, does not give him the right to refuse to execute it.[10] The officer must be governed by the instrument alone.

While an officer is protected against defects which are not apparent on the face of the warrant, he is bound to know if it lacks the formal requirements of such instruments or contains any other defects which are apparent on its face. Thus, it is said that "when the warrant fails to state some fact which by common law or statute is required to be stated therein, the warrant lacks a formal requirement and one serving a process is at his peril bound to know the formal requirements of a valid warrant."[11] An example of a formal requirement which generally, by statute, must appear on the warrant, is the oath. If it is issued without recital of such oath, it is patently defective and all persons concerned in an arrest thereunder will be liable for an illegal arrest.[12] This recital of an oath, however, is probably not necessary under the statutes of some jurisdictions.[13]

It may further safely be said that the officer is bound to know that the offense for which the warrant is issued is an offense within the jurisdiction of the issuing authority, that is to say an offense over which the issuing officer has jurisdiction.[14] A process which shows on its face that it was issued for an offense not within the jurisdiction of

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[7] Wilson v. Lapham, 196 Iowa 745, 195 N.W. 235 (1923).

[8] Spear v. State, 120 Ala. 351, 25 So. 46 (1899); Malone v. Carey, 17 Cal. App. 2d 505, 62 P. 2d 166 (1936).

[9] Hoppe v. Klapperich, 224 Minn. 224, —, 28 N.W. 2d 780, 789 (1947).

[10] Watson v. Watson, 9 Conn. 140 (1832); State v. Weed, 21 N.H. 262 (1850); CLARK, CRIMINAL PROCEDURE 43 (2d ed. 1918).

[11] RESTATEMENT, TORTS, sec. 124, comment (b) (1934).

[12] Grumon v. Raymond and Betts, 1 Conn. 40 (1814); Bissell v. Gold, 1 Wend. (N. Y.) 213 (1828).

[13] CLARK, CRIMINAL PROCEDURE 35 (2d ed. 1918).

[14] RESTATEMENT, TORTS, sec. 124, comment (c) and (d) (1934).

the issuing body is also considered patently defective and the officer serving it is denied the protection generally given him.

Another factor which must here be considered is the requirement as to the name or description of the party to be arrested. The warrant, in this respect, must be specific and correctly name the person to be arrested, or if his name is unknown it must so state and must describe him so that he may be identified with reasonable certainty.[15] Thus, a general warrant to apprehend all persons suspected of a crime is a patently defective warrant in the execution of which an officer will not be protected.[16]

As stated above, one of the fundamental requisites of a warrant is that it sufficiently charge the crime for which the warrant is issued. However, the officer is not bound to sit as a court of appeals over the issuing body, but is entitled to assume that the issuer knows the law and is not exceeding his authority, and therefore to assume that the conduct described constitutes a crime at common law or a crime arising from statute,[17] unless the offense charged or the acts alleged would clearly indicate to a reasonable man in the offiicer's position that no crime had occurred. In *State* v. *Jones* it was said:

> [I]f the warrant is for an offense within the jurisdiction of the justice, and the crime charged is described with sufficient precision to apprize the accused of the offense with which he is charged, the warrant is good and will protect the officer.[18]

This rule appears to the writer to be more logical than a rule which would require the executing officer to know thoroughly all the technical elements necessary to constitute each crime which might be charged in warrants directed to him. An officer of the law is not a "barrister" and should not be held to the knowledge of one in the legal profession.

Thus, it may be said by way of summary that in the proper execution of a latently defective warrant, that is, a warrant fair on its face, an officer is protected; but an officer is bound to know the formal re-

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[15] Johnston v. Riley, 13 Ga. 97, 137 (1853); Commonwealth v. Crotty, 10 Allen (Mass.) 403 (1865); but it has been held that under statutes allowing amendments in criminal proceedings and process where a person has been arrested under a complaint and warrant giving the wrong name, they may be amended so as to give the name correctly; Keehn v. Stien, 72 Wis. 186, 39 N.W. 372 (1888).

[16] Grumon v. Raymond and Betts, 1 Conn. 40 (1814).

[17] RESTATEMENT, TORTS, sec. 124, comment (j) (1934); but see Reichman v. Harris, 252 F. 371 (1918); Nolan v. State, 24 Ala. 672 (1854); Luech v. Heisler, 87 Wis. 644, 58 N.W. 1101 (1894) where it was said at p. 1102, "The law under which the process issues is part of the process and the officer is bound to know the law."

[18] State v. Jones, 88 N.C. 648, 656 (1883); see also Boyd v. State, 17 Ga. 184 (1855).

quirements of a valid warrant, and is bound to know the jurisdiction of the issuing body. If one or more of the formal requirements are missing, or if the issuing body does not have jurisdiction over the offense for which the process was issued, and such fact appears on the face of the warrant, the warrant is rendered patently defective, and the officer is denied the protection given him in the execution of a latently defective warrant.

It is interesting to observe the relation of this analysis of patent and latent defects with the fundamental requisites of warrants of arrest as provided by the federal and state constitutions. These requisites are: (1) probable cause, (2) an oath, and (3) a description of the accused. It is arguable that if any of these requisites is lacking in a warrant of arrest it would constitute a patent defect. But this has not been found to be completely true. [under the above discussion.] As was stated above, the officer is only bound by what appears on the face of the instrument. If the process were not supported by oath, for example, and this factual deficiency were not apparent from a reading of the warrant, the officer would nevertheless be protected—yet one of the constitutional requisites would be lacking.

On the other hand it has been found that there are some fundamental requisites not specifically demanded by the federal and state constitutions. For example, an officer is bound, at his peril, to know that the offense charged is one over which the issuing body has jurisdiction, and this element is completely omitted from the constitutional provision. Thus, it may be concluded that in determining whether a warrant is patently or latently defective, and therefore whether or not an officer is protected in its execution, the courts cannot rely upon the constitutional provisions as an exclusive test.

It would be of value to consider, finally, whether the existing rules are fundamentally sound in the protection they bestow upon the arresting officer and the public. An officer can only be held to a standard that can reasonably be expected of one who is admittedly not particularly trained in the technicalities of the law and to a standard which is not inconsistent with the salary which the average officer receives. On the other hand the public should not be unduly and unnecessarily exposed to arrest under defective warrants. There must be a balancing of these two interests, and it is in establishing this balance that we encounter an ever present social problem.

It is submitted that, all things considered, the existing rules in some cases hold the officer to a higher standard than he should reasonably be expected to meet. Consequently, there are probably more illegal arrests than is commonly supposed. Can this situation be alleviated by

raising the level of the officer by an enforced system of education, or by paying the officer a higher salary? Both remedies would seem desirable, but whatever the solution, attention should be given to the problem, and the situation should be re-examined from time to time.

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## THE THEORIES OF JOINT BANK ACCOUNTS

The purpose of this note is to discuss the various theories by which the courts give effect to the intention with which a deposit in a joint account is made where one person contributes the entire amount deposited and expressly provides for the right of survivorship. The cases suggest three principal theories which will be examined. Some courts sustain the account on the theory that a joint tenancy with survivorship is created by a gift inter vivos, while others rely on the notion that the deposit results in a third party beneficiary type contract with the bank. A third group base the validity of these deposits on statutory provisions which explicitly authorize the deposit or raise a presumption in favor of its validity. The discussion will be confined to the rights created between the joint depositors since the rights and liabilities of the bank normally are prescribed by statute and present no substantial problem.[1]

### GIFT THEORY

Those jurisdictions which classify the joint account as a gift creating joint ownership, require that two essential elements of a valid gift inter vivos be present: an adequate manifestation of donative intent, and a delivery.[2] They do not require a *manual* delivery of possession to the donee, however, since this is impossible in this type of transaction. The physical act of depositing money under this theory amounts to a delivery to the bank for the donee and is sufficient. Neither is it required that the donor relinquish complete control of the subject matter by creating exclusive control in the donee. Since a surrender of complete control would deny the donor-depositor the right to withdraw money from the account, the cases hold that the delivery requirement is met if there is an adequate manifestation of intention to relinquish exclusive control.[3] In other words, the creation of joint con-

[1] For a compilation of statutes, see note, 9 CORNELL L. Q. 48, 49 n. 6 (1923).
[2] Bachmann v. Reardon, 138 Conn. 665, 88 A. 2d 391 (1952). For additional cases on this theory see annotation, 149 A. L. R. 879, 880 (1944).
[3] Wilt v. Brokaw, 196 F. 2d 69 (7th Cir. 1952).