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It is respectfully submitted that the Florida Supreme Court, in weighing these two principles, may have placed too much emphasis on the protection of the public welfare to the detriment of an individual's constitutional right. There is no question that a reasonable inspection of apartment houses, restaurants, and hotels is necessary for the protection of public welfare.<sup>22</sup> But laws which authorize such inspections must respect the individual's guaranties against unreasonable search and seizure.

Since the "reasonable" test depends upon the facts and circumstances—"the total atmosphere of the case,"<sup>23</sup> and since this Court has held that a statute which purports to delegate authority to certain officers be strictly construed,<sup>24</sup> it is difficult to say that when a state officer commits a physical assault on an individual and subjects him to verbal abuse that the search was reasonable.<sup>25</sup> Certainly, no broad power bestowed upon the law enforcement officer warrants an assault upon the person. As Justice Brandeis so ably stated:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands of the citizen. . . . To declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.<sup>26</sup>

I. G. Christie

## WORKMEN'S COMPENSATION UNLAWFULLY EMPLOYED MINORS

An unlawfully employed minor attempted to sue at law for injuries sustained in the course of the employment. *Held*, the minor is limited to an exclusive remedy under the Workmen's Compensation Act. *Winn-Lovett Tampa v. Murphree* 73 So.2d 287 (Fla. 1954).

Workmen's Compensation statutes fall into four general types as regards the treatment of unlawfully employed minors.

Type one makes no provision for minors unlawfully employed. Under this type statute, one group of decisions permits the minor to sue at law,<sup>1</sup> the

22. *Elliot v. Haskins*, 20 Cal. App. 2d 591, 67 P. 2d 698 (1937); *Camden Country Beverage Co. v. Blair*, 46 F. 2d 648 (2d Cir. 1930); *Kelleher v. Minshull*, 11 Wash. 380, 119 P.2d 302 (1941).

23. See note 7 *supra*. See *Matherne, Search and Seizure—U.S. v. Rabinowitz*, 21 TENN. L. REV. (1951).

24. See note 9 *supra*.

25. *People v. Fields*, 15 N.Y.S. 2d 561 (1939); *Marshall v. Commonwealth*, 140 Va. 541, 125 S.E. 329, (1924); *cf.* *Reininger v. State*, 49 Okl. Crim. 463, 60 P.2d 629 (1936).

26. *Olmstead v. U.S.*, 277 U.S. 438,485 (1928).

1. *Widdoes v. Laub*, 33Del.4, 129 Atl. 344 (1952); *Lee v. Kansas City Public Service Co.*, 137 Kan. 759, 22 P.2d 942 (1933); *Wm. B. Tilghman Co. v. Conway* 150 Md. 525, 133 Atl. 593 (1926); *Rock Island Coal Mining Co. v. Gilliam*, 89 Okl. 49, 213 Pac. 833 (1923); *Knoxville News Co. v. Spitzer*, 152 Tenn. 614, 279 SW 1043 (1926); *Wlock v. Fort Drummer Mills*, 98, Vt. 449, 129 Atl. 311 (1925).

rationable being that no contract exists which can bring the minor under the act.<sup>2</sup> A second group of decisions places the minor under the act with a consequent exclusive remedy;<sup>3</sup> the rationales of these decisions presenting one or a combination of three theories: first, that a voidable contract of employment exists which the minor can assert for his own benefit;<sup>4</sup> second, that the employer-employee relationship exists "in fact" and therefore the minor should be within the act;<sup>5</sup> third, that the legislative intent and public policy demand that the minor should be under the act.<sup>6</sup> Decisions within the first group have been rendered where the minor sought to sue at law;<sup>7</sup> decisions in the second group under the voidable contract theory have occurred where the minor sought compensation and the insurer was defending. These decisions seem compatible: the minor may assert the contract and claim compensation, but the employer does not have the contract, void as to him, as a defense to the minor's common law suit. Unfortunately courts do not recognize this distinction, as in *Giuliano v. Greenberg*,<sup>8</sup> where the minor was denied a suit at law, the holding being based on a case<sup>10</sup> where the minor sought compensation and was allowed to assert the voidable contract. The theory that the employer-employee relation existed "in fact" and that the minor was therefore under the act may be placed in proper perspective by reference to the decisions holding that Workmen's Compensation is based solely on the contractual relation between the parties.<sup>11</sup> As to the legislative intent and public policy theory, whatever that intent may be in general, it is hard to believe that it should be so construed as to permit a guilty employer to use his own criminal act against a child.

A second type of statute provides that only minors lawfully employed shall be under the Workmen's Compensation Act. Decisions under this type statute hold there must have been an employment which was lawful in all respects, or else the minor must sue at law.<sup>12</sup>

2. See the compelling opinion in *Wolff v. Fulton Bag and Cotton Mills*, 185 App. Div. 436, 173 N.Y.S. 75 (1918).

3. *Greenberg v. Giuliano*, 131 Conn. 157, 38 A2d 436 (1944); *Pierce's Case*, 267 Mass. 140, 166 N.E. 636 (1929); *Kociolowicz v. Tonowanda Corrugated Box Co.*, 252 App. Div. 716, 298 N.Y.S. 844 (1937); *Noreen v. William Vogel & Bros.*, 231 N.Y. 317, 132 N.E. 102 (1921); *Humphries v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926); *Rasi v. Howard Mfg. Co.*, 109 Wash. 524, 187 Pac. 327 (1920).

4. *Kenez v. Novelty Compact Leather Co. et. al.*, 111 Conn. 229, 149 Atl. 679 (1930); *Pierce's Case*, 267 Mass. 140, 166 NE 636 (1929).

5. *Noreen v. Wm. Vogel & Bros.*, 231 N.Y. 317, 132 N.E. 102 (1921).

6. *Humphries v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926).

7. *Widdoes v. Laub*, 33 Del. 4, 129 Atl. 344 (1925); *Lee v. Kansas City Public Service Co.*, 137 Kan. 759, 22 P.2d 943 (1933); *Wm. B. Tilghman Co. v. Conway*, 150 Md. 525, 133 Atl. 593 (1926); *Wlock v. Fort Drummer Mills*, 98 Vt. 499, 129 Atl. 311 (1925).

8. *Kenez v. Novelty Compact Leather Co.*, 111 Conn. 229, 149 Atl. 679 (1930). *Pierce's Case*, 267 Mass. 140, 166 N.E. 636 (1929).

9. 131 Conn. 157, 38 A.2d 436.

10. *Kenez v. Novelty Compact Leather Co.*, 111 Conn. 229, 149 Atl. 679 (1930).

11. *Stulginski v. Cizauskas*, 125 Conn. 293, 5 A2d 10 (1939).

12. *Kruczkowski v. Polonia Pub. Co.*, 203 Mich. 211, 168 N.W. 932 (1918); *Westlund v. Kettle River Co.*, 137 Minn. 24, 162 N.W. 680 (1917); *Acklin Stamping Co. v. Kutz*, 98 Ohio St. 61, 120 N.E. 229 (1918); *Stetz v. F. Mayer Boot and Shoe Co.*, 163 Wis. 151, 156 N.W. 971 (1916); (permitting suit at law); *Messmer v. Industrial Board of Illinois*, 282 Ill. 502, 118 N.E. 993 (1918) (denying compensation claim).

Type three statutes include minors whether lawfully or unlawfully employed. Most decisions put the minor under the act;<sup>13</sup> each statute and the decisions appertaining thereto should be examined, however, since variations in wording may permit or compel a rationale peculiar to the jurisdiction.

The fourth type of statute also includes minors lawfully or unlawfully employed, but gives the minor unlawfully employed the option of claiming compensation or suing at law. Under this type statute the court is relieved of the burden of deciding the minor's position under the act.<sup>14</sup>

The position of an unlawfully employed minor under the Florida Workmen's Compensation Act<sup>15</sup> has been determined once before;<sup>16</sup> the court held that although the legislature mentioned minors lawfully or unlawfully employed, they meant only those minors lawfully employable. The court was criticized for equitable legislation.<sup>17</sup> Good or bad, the rationale in *Smith v. Arnold* 172 no longer exists, since with the enactment in 1953 of Florida Statutes Section 450.111 (4) minors became lawfully employable for any purpose in the discretion of Industrial Commission.<sup>18</sup>

In *Winn-Lovett Tampa v. Murphree*, the court bases its holding on the theory that since the minor is included in the definition of "employee" in the Workmen's Compensation Act,<sup>19</sup> and that Act contains provisions for additional compensation to minors injured while employed in violation of the Child Labor Law,<sup>20</sup> plus a provision for the exclusiveness of liability of the employer,<sup>21</sup> the conclusion follows that the minor comes within the Workmen's Compensation Act, and therefore has an exclusive remedy under it.

The court holds, "The contract of employment under the Workmen's Compensation Act is statutory, and the act is implicit in every employer-employee relationship, irrespective of the nature of the employment or the age of the parties. Such statutory contact arises *not by consent or agreement of the parties*, but comes into being whether or not consent to be employed can be given under the Child Labor Law."<sup>22</sup> (Italics added). These statements seem directly contrary to a rule well established in Florida, that the

13. *S.H. Kress & Co. v. Superior Court of Maricopa County*, 66 ARIZ. 67, 182 P.2d 931 (1947); *Cummins v. J. J. Newberry Co.*, 211 ARK. 854, 203 S.W. 2d 187 (1947); *Haskins v. Cherry*, 133 ARK. 206, 202 S.W. 691 (1918); *Tarant v. Helena Bldg. & Realty Co.* 116 MONT. 319, 156 P.2d 168 (1945).

14. *Kijowski v. Times Publishing Corp.*, 298 ILL. APP. 236, 18 N.E. 2d 754 (1938) *Aff'd*, 372 ILL. 311, 23 N.E. 2d 703 (1939); *Frye's Guardian v. Gamble Bros.*, 188 KY. 283, 221 S.W. 870 (1920); *Damato v. DeLucia*, 110 N.J.L. 380, 166 ATL. 173 (1933) (holding recovery either at law or under Workmen's Comp. Act is a complete bar to recovery in the other).

15. FLA. STAT. c. 440.

16. *Smith v. Arnold*, 60 So.2d 281 (Fla. 1952).

17. 7 MIAMI L.Q. 278; 38 CORN. L.Q. 476.

17a. 60 So.2d 281 (Fla. 1952).

18. Save in pool rooms and other places specified in FLA. STAT. § 450.071, which employments are absolutely prohibited.

19. FLA. STAT. § 440.02 (2); "The term 'employee' means . . . minors whether lawfully or unlawfully employed."

20. FLA. STAT. § 440.54.

21. FLA. STAT. § 440.11.

22. *Winn-Lovett Tampa v. Murphree*, 73 So.2d at 291 (Fla. 1954).

contract arises upon acceptance by the parties involved.<sup>23</sup> In view of the cases cited, and in view of the statute itself, which makes Workmen's Compensation optional,<sup>24</sup> it is difficult to see how the contract can be statutory, or how it can arise without the consent of the parties.

The court is concerned with the consent to be employed. However, the Child Labor Law is directed toward preventing the consent to employ; the prohibition is pointed at the employer.<sup>25</sup> Furthermore, the exclusiveness of liability provided for in the Workmen's Compensation Act<sup>26</sup> is contingent upon the employer's bringing himself *within the Act*.<sup>27</sup> If a contract, or at any rate an acceptance or consent by the employer is necessary, and that acceptance consent or contract is prohibited by statute, is illegal, criminal and void as to the employer, *it is difficult to see how he can assert it to bring himself within the Workmen's Compensation Act as a defense to the minor's suit*. Therefore, it appears that the minor should be able to claim compensation or sue at law. Optional remedies in this case do not appear inconsistent with the statute, because the employer's position under the Act should depend on the action taken by the minor.

This space is too short for a detailed analysis of the problem; but enough appears to warn the reader of so-called trends: differences and changes in a statute, complicated by glossed-over decisions too often form the basis for inequitable conclusions. It would seem that those jurisdictions having statutes giving the minor his option to claim compensation or sue at law have reached the conclusion most compatible with the purpose of workmen's compensation, the desire to give the minor maximum protection and the maxim advanced by Lord Mansfield, *ex dolo malo non oritur actio*.<sup>28</sup>

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23. *Fidelity and Casualty Co. of New York v. Beddingfield*, 60 So.2d 489 (Fla. 1952); *Florida Forest and Park Service et.al. v. Strickland*, 154 Fla. 472, 18 So.2d 251 (1944); *Stansell v. Marlin*, 153 Fla. 421, 14 So.2d 892 (1943); *Chamberlain v. Florida Power Corp.*, 144 Fla. 719, 198 So.486 (1940).

24. FLA. STAT. § 440.05. See *Vanlandingham v. Fla. Power and Light Co.*, 154, Fla. 629, 18 So.2d 678 (1944), (holding Workmen's Compensation optional).

25. FLA. STAT. §§ 450.141, 450.151 (providing penalties for employer); FLA. STAT. §§ 450.121, 450.141, 450.051, 450.061 (prohibiting the employment: "No minor... shall be employed...").

26. FLA. STAT. § 440.11: "The liability of an employer *prescribed in section 440.10* shall be exclusive...." (Italics added).

27. FLA. STAT. § 440.10 (1): "Every employer *coming within the provisions of this chapter*...." (Italics added). Obviously the liability prescribed is limited to employers who are within the act.

28. *Holcomb v. Jounson*, Cowp. 341, at 343 (1775).