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Recent Cases

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CONFLICT OF LAWS—DIVORCE—SUPPORT OF CHILDREN—RES JUDICATA—LEGISLATION—Plaintiff brought suit in the District of Columbia, defendant's domicile, for the enforcement of the support obligation of their Florida divorce decree and for an increase in the support provided therein for their children, who were in her custody by court order. Because the children were not residents of the District of Columbia, the District Court dismissed the suit for lack of jurisdiction. This was affirmed on appeal. The court has jurisdiction because the defendant is domiciled in the District of Columbia, but since the full faith and credit clause bars an increase in the support provided by the Florida decree, the only remedy on behalf of the children is a suit in debt for the amount of accrued installments thereunder. *Scholla v. Scholla,* 201 F. 2d 211 (D. C. Cir. 1953).

The dissent states that in situations like the present one the wife and children must survive until enough arrearages accrue to make it worth suing. The end result of the majority holding is that the children and wife have no independent or additional right to maintenance under District of Columbia law and that any pre-existing right to maintenance is cut off by the doctrine of res judicata and full faith and credit once their right to maintenance under foreign law is adjudicated. Judge Washington in his dissent states that if the courts fail to provide the judicial relief necessary, the community has no alternative but to apply to Congress for necessary relief.

In an attempt to prevent the existence of this type of a situation, a bill entitled "To Make Uniform the Law of Reciprocal Enforcement of Support in the District of Columbia" was introduced in the House of Representatives on January 29, 1953 and referred to the Committee on the District of Columbia. H. R. 2287, 83rd Cong., 1st Sess. (1953). [Analogous to the Uniform Reciprocal Enforcement of Support Act adopted by a number of states.] The purpose of the bill is to improve and extend by reciprocal legislation the enforcement of duties of support, which includes any duty of support imposed or imposable by law, or by court order, decree, or judgment, whether interlocutory or final, whether incidental to a divorce proceeding, judicial separation, separate maintenance, or otherwise. It further states that duties of support arising under the law of the District of Columbia bind the obligor, *present* in the District of Columbia, regardless of the presence or residence of the obligee.

It was settled in *Sistare v. Sistare,* 218 U. S. 1 (1910), that the full faith and credit clause applies to an unalterable decree for alimony for a divorced wife, likewise to an unalterable decree for maintenance for a minor child. *Cowles v. Cowles,* 203 App. Div. 405, 196 N. Y. S. 617 (1922). The decision in the *Sistare* case *supra,* lends no support to the contention that the District of Columbia can be precluded by a judgment of another state from providing for the future maintenance and support of a child out of the property of the father located here. The

Florida decree did not end the relationship of parent and child, as a decree of divorce may end the marriage relationship.

Issues of res judicata and the full faith and credit clause should not plague the disposition of such cases as we are here dealing with. The common law obligation of a man to support his wife and children follows him wherever he goes, and if a man comes to the District of Columbia he should be liable for the support of his children while here. If the court can secure jurisdiction against his person or property located in the District of Columbia, it should enforce this obligation against his person or property, whether the wife or children be domiciled in Virginia or elsewhere. "State boundaries do not make court barriers." *Gasteiger v. Gasteiger,* 5 N. J. Mis. 315, 136 Atl. 497 (1927). An enforceable foreign decree for maintenance can exist side by side with an obligation under District law. Cf. *Goodman v. Goodman,* 194 Atl. 866 (N. J. 1937). The obligation to support under the District law is separate and distinct from any obligation under the law of any other state, and should be separately enforced. Cf. *Industrial Commission of Wisconsin v. McCartin,* 330 U. S. 622 (1947). The decision in *Yarborough v. Yarborough,* 290 U. S. 202 (1933) left open the question of the power of a court in the jurisdiction of the father's domicile to make him provide fully and adequately for the support of his children, notwithstanding the terms of a foreign decree. Subsequent decisions tend to indicate that the Supreme Court will find that such power does exist. *Halvey v. Halvey,* 330 U. S. 610 (1947); *McCartin* case, *supra.*

The question whether a foreign decree for alimony is locally enforceable by equitable remedies, such as sequestration, receivership, injunction, or contempt for disobedience of an order of a court of equity has much perplexed our courts. One group of cases has taken the view that alimony payable under a foreign decree is merely a debt, collectible by execution upon a judgment recovered locally upon the foreign decree, and the remedy at law for its enforcement being plain, adequate, and complete, equity has no jurisdiction to undertake its enforcement. *Lawrence v. Lawrence,* 196 Ga. 204, 26 S. E. 2d 283 (1943); *German v. German,* 122 Conn. 155, 188 Atl. 429 (1936); *Grant v. Grant,* 64 App. D. C. 146, 75 F. 2d 665 (1935); *Worsley v. Worsley,* 64 App. D. C. 202, 76 F. 2d 815 (1935). Other courts have held that a decree for alimony represents something more than a mere debt, that it embodies an obligation of the husband to support his wife and children, which is a matter of public concern no matter when the obligation has arisen, that the urgency of its enforcement is as great in one state as in another, therefore, it should be enforced by the same remedies as are applicable to domestic decrees for alimony. *Tompkins v. Tompkins,* 89 Cal. App. 2d 243, 200 P. 2d 821 (1948); *Cogswell v. Cogswell,* 178 Ore. 417, 167 P. 2d 324 (1946); *McKeel v. McKeel,* 185 Va. 108, 37 S. E. 2d 746 (1946); *Ostrander v. Ostrander,* 190 Minn. 547, 252 N. W. 449 (1934).

The question is neither one of constitutional obligation, nor of comity to the decree rendered by the foreign court, but rather one of local policy. The rationale of this decision, while in accord with strict law, is open to the challenge that it violates the fundamental principles of justice. The courts should be unwilling to permit a husband to evade the obligation imposed upon him by the foreign decree to support his wife and children by merely crossing state lines and thereby allowing the beneficiaries of such obligation to become public charges.

DONALD J. LETIZIA

CONFLICT OF LAWS—SERVICE OF PROCESS—PRIVILEGE—NON-RESIDENT NOT IMMUNE FROM CIVIL PROCESS WHILE UNDER ARREST ON A CRIMINAL CHARGE—Petitioner, a non-resident of the county, injured several children while driving his automobile. He was arrested and jailed on a criminal charge. While awaiting trial, petitioner was served with process in a civil action commenced by the next friend of one of the injured children.

In the civil action petitioner appeared specially and filed a plea in abatement, alleging that the lower court was without jurisdiction. To support this contention he claimed that, at the time he was served with process, he was a non-resident of the county and a prisoner in the county jail. The lower court sustained a demurrer to the petitioner's plea in abatement. He then applied to the Supreme Court of Appeals for a writ of prohibition against further proceedings in the civil action. *Held:* The writ was denied. Petitioner, although a non-resident of the county, was not immune from civil process while incarcerated. *State v. Duffy,* 71 S. E. 2d 113 (W. Va. 1952).

"The foundation of jurisdiction is physical power." *McDonald v. Mabee,* 243 U. S. 90 (1917). (per Holmes). "Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer v. Neff,* 95 U. S. 714 (1878). A judgment may be rendered against a person properly served within the state. *Pennoyer v. Neff, supra.*

However, since the reign of Edward VI, the English common law has held that a non-resident party while attending a civil proceeding was immune from service of civil process. *Brooks v. State,* 3 Boyce (Del.) 1, 79 Atl. 790 (1911). The prime purpose of the rule was for the protection of the court from interference with its judicial process. *Whited v. Phillips,* 98 W. Va. 204, 126 S. E. 916 (1925). This immunity rule has been generally adopted in the United States. *Stewart v. Ramsey,* 242 U. S. 128 (1916). Some states have extended the privilege to cover non-residents of the county. See 42 Am. Jur. 127 (1942).

There is considerable dispute, as to whether the immunity rule applies to non-resident defendants in criminal cases.

Two problems in regard to service of civil process on a criminal defendant will be discussed here.

First, whether a non-resident defendant of a state or county is immune from service of civil process *while attending* a criminal proceeding.

Second, whether a non-resident of a state or county who is *already present* in the jurisdiction, and while there, is arrested and jailed, is privileged from service of civil process.

In regard to the first problem, there are five principal views.

1. A non-resident defendant is privileged from service of civil process when he appears voluntarily to attend a criminal proceeding. *Cook v. Cook*, 132 N. J. Eq. 352, 28 A. 2d 178 (1942). The criminal defendant is encouraged to appear voluntarily to face the criminal charge, thereby saving time and expense of extradition. *Cummings Admr. v. Scherer*, 231 Ky. 518, 21 S. W. 2d 836 (1929); *Whited v. Phillips*, 98 W. Va. 204, 126 S. E. 916 (1925).

2. Georgia holds that a non-resident defendant who enters the jurisdiction voluntarily, to attend a criminal proceeding, is not immune from service of civil process. *Rogers v. Rogers*, 138 Ga. 803, 76 S. E. 48 (1912). The decision was based on the ground that only witnesses are exempt under the rule, and since defendant was not a witness, he could be validly served.

3. A non-resident who enters the jurisdiction involuntarily to answer a criminal charge is immune from service of civil process while within the jurisdiction in connection with the criminal proceeding. *Alla v. Kornfeld*, 84 F. Supp. 823 (N. D. Ill. 1949). The reasoning of this view is based upon the opinion that the defendant in the criminal proceeding should not be vexed with process while in court to protect his rights. *Silvey v. Koppel*, 107 S. C. 106, 91 S. E. 975 (1917).

4. A non-resident defendant appearing involuntarily to attend a criminal proceeding, is not immune from service of process. *Braddus v. Patrick*, 177 Tenn. 335, 149 S. W. 2d 71 (1941). Adherents of this view justify it by contending that the only reason for the rule is in aid of the administration of justice. If the non-resident defendant has not subjected himself in order to aid the administration of justice, he cannot claim immunity under the rule. *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962 (1910).

5. A non-resident defendant who attends a criminal proceeding, whether voluntarily or involuntarily, is privileged from service of civil process. *Bramwell v. Owen*, 276 Fed. 36 (D. C. Ore. 1921). The reasoning of this view is based on the ground that the courts should always be "open, accessible, free from interruption," as to afford protection to every individual who approaches them. The privilege from process is the privilege of the court rather than of the criminal defendant. This privilege is founded in the "necessities of judicial administration" which would be interrupted if the defendant could be served with civil process while he was in court. *Morris v. Calhoun*, 119 W. Va. 603, 195 S. E. 341 (1938); *Church v. Church*, 270 Fed. 361 (D. C. Cir. 1921).

In regard to the second problem, although there is a dearth of authority, it would appear that a non-resident of a state or county is not exempt from service of process. *Husby v. Emmons,* 148 Wash. 33, 268 Pac. 886 (1928). (State); *Mosier v. Aspinwall,* 151 Okla. 97, 1 P. 2d 633 (1931). (County). To be privileged from civil process, the non-resident defendant must submit himself to the jurisdiction of the court to aid the administration of justice. *Rosenblatt v. Rosenblatt,* 110 Misc. 525, 180 N. Y. S. 463 (1920). It would be "unjust and unreasonable" to extend immunity to a non-resident already in the jurisdiction because the exemption does not fulfill the prime purpose of the rule, i.e. to promote or encourage voluntary submission to judicial proceedings. *White v. Underwood,* 125 N. C. 25, 34 S. E. 104 (1899).

It should be noted that when a criminal proceeding is used as a pretext for obtaining service of civil process upon a non-resident, the service will be struck down as invalid. *Crusco v. Strunk Steel Co.,* 365 Pa. 326, 74 A. 2d 142 (1950). Such action is a "perversion of process." *Smith v. Canal Zone,* 249 Fed. 273 (5th Cir. 1918). To permit it to be used for private interests is an "abuse and misuse" of criminal process, *Compton v. Wilder,* 49 Ohio 130, Aff'g 6 Ohio Dec. Rep. 630 (1883), and would amount to legal fraud. *Bowman v. Neblett,* 24 S. W. 2d 697 (Mo. App. 1930).

Petitioner's contention in the principal case cannot be upheld. It is clear from the foregoing authorities that he does not fall within the immunity rule. As it has been pointed out by the courts, there is no sound logical reason for extending the privilege of immunity from service of civil process to a person who was already in the jurisdiction when arrested.

ANDREW CODISPOTI

CONSTITUTIONAL LAW—ILLEGAL SEARCH AND SEIZURE—WIRE TAPPING—Jarrett and Bennett, escaped convicts, entered into a conspiracy of robbery with the petitioner, Schwartz, a pawnbroker. Pursuant to the plan a woman in Dallas, Texas, was robbed at gunpoint of her diamond rings and the loot was taken to the petitioner. He repeatedly delayed settlement with the thieves and finally informed the police where they could find Jarrett. After Jarrett had been incarcerated about two weeks, at the request of the District Attorney, he consented to telephone the petitioner, and acquiesced to have a professional operator wire-tap and record the conversation. These records were admitted in evidence and resulted in the conviction of the petitioner as an accomplice to the crime of armed robbery. *Schwartz v. State,* 246 S. W. 2d 174 (Texas 1951).

Petitioner contended on appeal that Section 605 of the Federal Communications Act, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.* (1934), made inadmissible the records of the intercepted conversation without his consent.

> . . . *no person* not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication *to any person.* . . . § 605 (*Emphasis* added).

Further, a Texas statute, Vernon's Tex. Stat. 1929, (Code Criminal Procedure) Art. 727a, rendered inadmissible in criminal trials evidence obtained in violation of any provision "of the Constitution of the United States."

The United States Supreme Court granted certiorari and sustained the conviction, *Schwartz v. Texas*, 344 U. S. 199 (1953). Mr. Justice Burton, speaking for the Court, added another limitation to the illegal search and seizure cases when he stated:

> We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings.

In the absence of a statute to the contrary, it is well established adjective law that evidence obtained auditorily does not constitute an illegal search and seizure so as to violate the Fourth Amendment to the United States Constitution. Pertinent illustrations include evidence obtained by means of a dictaphone where no trespass is involved, Wigmore, *Evidence,* §§ 2184c, 669c; the use of a detectaphone (vibrations from a wall), *Goldman v. United States,* 316 U. S. 129 (1942); a man wearing a portable microphone on his person and communicating a conversation to federal agents, *On Lee v. United States,* 343 U. S. 747 (1952); and the employment of wire-tapping, *Olmstead v. United States,* 277 U. S. 438 (1928). Hence, the common law rule prevails, specifically, that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. Cf. Wigmore, *supra* at § 2184b, n. 2.

The universal rule condoning the admissibility of illegally obtained evidence dominated the courts until the second decade of the 1900's. In that decade the Supreme Court of the United States made an important modification of the rule for cases where the illegal act consisted of a violation of the Fourth Amendment. Evidence secured by a federal officer without authority in violation of the United States Constitution is clearly inadmissible in a federal court. *Weeks v. United States,* 232 U. S. 383 (1914). Although the Federal Communications Act, *supra,* does not expressly bar evidence obtained by wire-tapping, it has been construed to render it inadmissible in the United States courts. *Nardone v. United States,* 302 U. S. 379 (1937). This is true even where the communications were intrastate telephone calls. *Weiss v. United States,* 308 U. S. 321 (1939). Authorization necessary to render evidence of telephone messages intercepted by wire-tapping admissible, must be secured from both participants and not only one. *United States v. Coplon,* 88 F. Supp. 921 (S. D. N. Y. 1950). "Interception", within the meaning of Section 605, indicates taking or seizing along the way or before arrival at the destined place, and does not ordinarily connote obtaining of what is sent before, or at the moment it leaves, or after, or at the moment it comes into the possession of the intended receiver. *Goldman v. United States, supra.* However, in a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of relevant evidence even though obtained by unreasonable search and seizure. Thus, the doctrine of the *Weeks* case is not imposed upon the several states by the Fourteenth Amendment. *Wolf v. Colorado,* 338 U. S. 25 (1948). Cf. Westin, *The Wire-Tapping Problem,* 52 Col. L. Rev. 165, 172-181 (1952).

It is submitted, as Mr. Justice Douglas observed in his dissent, that the question of whether the Fourth Amendment or Section 605 is applicable to the several states need not have been reached because a Texas statute has excluded evidence obtained in violation of the United States Constitution. The issue, then, should have resolved itself into whether or not wire-tapping *per se* would abridge the illegal search and seizure clause of the Fourth Amendment? The matter could have been disposed of merely by reference to the *Olmstead* case, *supra.* In 1928, before the enactment of the Federal Communications Act, the Supreme Court, divided 5-3, held at 464 in regard to wire-tapping:

> The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

In the principal case, the Supreme Court did not even pay deference to the *Olmstead* decision by citing it. Abandoning its habit, in dealing with constitutional questions, not to go beyond the limits of what is required by the exigencies of the case, the Court sought to do more and held:

> Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the *laws* of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. *Schwartz v. Texas, supra* at 202. (Emphasis added).

Taking this pronouncement at face value and utilizing the argumentation of Mr. Justice Frankfurter, concurring, it is submitted that the principal case did not raise a federal question. If the limitation imposed by the Texas statute required the state court to construe what is or is not a violation under the United States Constitution, it is difficult to determine in what manner a federal court could obtain jurisdiction. However, if, as Mr. Justice Frankfurter observed, the Texas court was bound by what the Supreme Court of the United States deemed an abridgment of the Constitution, *State Tax Commission v. Van Cott,* 306 U. S. 511 (1939), then federal jurisdiction posed no problem. The point is, however, that the Texas Court of Appeals, *Schwartz v. State, supra,* did not cite nor make any reference, whatsoever, to the decisions of the United States Supreme Court in sustaining the conviction in the instant case.

Furthermore, the Supreme Court, not content to limit its decision to the specific case at bar under the unique provisions of the Texas statute, took the final step and unequivocally pronounced that Section 605 does not exclude evidence secured by wire-tapping in any state court proceeding. The Court supported this conclusion by deciding that it will not be implied that a federal statute was intended to supersede the exercise of the police power of the states unless there is a clear manifestation of intention to do so. *Atchison T. & S. F. Ry. v. Railroad Commission,* 283 U. S. 380 (1931). Also Cf. *Reid v. Colorado,* 187 U. S. 137 (1902).

While the Federal Communications Act does not extend to intrastate telephone conversation, *Bruno v. United States,* 308 U. S. 287 (1939), in the *Weiss* case, *supra,* the Court had no difficulty deciding that the phrase "any communication" in Section 605 extended *by implication* so far as to prohibit interception of intrastate messages. Mr. Justice Roberts held:

> And, as Congress has power, when necessary for the protection of interstate commerce, to regulate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications. *Weiss v. United States, supra* at 327.

In *Nardone v. United States, supra* at 382, the Court specifically stated that "the ban on communication to 'any person' bars testimony to the content of an intercepted message." Moreover, the Court maintained that "to recite the contents of the message in testimony before a court is to divulge the message" within the meaning of Section 605. It is submitted that prima facie there is no reason why the all-inclusive terms "no person" and "any person" should not be applicable to a witness in a state court.

It has been answered to this line of reasoning, by the majority of state courts as cited with approval by the Supreme Court in the instant decision, *People v. Channell,* 107 Cal. App. 2d 192, 236 P. 2d 654 (1951); *People v. Stemmer,* 298 N. Y. 728, 83 N. E. 2d 141 (1948); *Hubin et al v. State,* 180 Md. 279, 23 A. 2d 706 (1942), that Section 605 was not intended to regulate state tribunals inasmuch as Congress was not empowered to enact a procedural law of such scope. If these cases offered any authority at all for their reasoning, it was predicated on Supreme Court decisions holding that the Fourteenth Amendment does not limit the state police power in regard to procedural Due Process. Cf. *People v. Kelly,* 122 P. 2d 655, 659 (Cal. App. 1942), *appeal dismissed sub nom.,* 320 U. S. 715 (1943). Nowhere is the *power* of the Federal Government to legislate in this field rebutted. On the contrary, there is evidence that as early as 1815 there was a direct attempt by Congress to regulate proceedings in state courts and to abrogate state laws applying to them. Cf. Warren, *Federal Criminal Laws and the State Courts,* 38 Harv. L. Rev. 545, 572 (1925). Other instances include the Bankruptcy Act, 30 Stat. 548, 11 U. S. C. § 25a (10) (1940), which provides that no testimony of the bankrupt "shall be offered in evidence in any criminal proceeding." This section has been held applicable to proceedings in state courts. *People v. Elliott,* 123 Misc. 602, 206 N. Y. S. 54 (1924); *People v. Lay,* 193 Mich. 17, 159 N. W. 299, 303 (1916); *United States v. Goldstein,* (D. C.) 132 Fed. 789, 791 (1904). In *Boske v. Comingore,* 177 U. S. 459 (1900), it was decided that a Treasury Department regulation preventing internal revenue agents from divulging official information, was binding on state courts. Cf Rosenzweig, *The Law of Wire-Tapping,* 33 Corn. L. Quar. 73, 77-79 (1948).

Further, it cannot be doubted that the instant statute is penal in nature. "Section 501 of 47 U. S. C. provides a penalty for the violation of Section 605", *Schwartz v. Texas, supra* at 201. It is difficult to reconcile the principal decision with the late case, *Testa v. Katt,* 330 U. S. 386, 391 (1947), in which the Supreme Court decided:

> It [*Claflin v. Houseman,* 93 U. S. 130 (1876)] asserted that the obligation of a state to enforce these laws is not lessened by reason of the form in which they are cast or the remedy which they provide. . . . if an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not otherwise provided by some act, by proper action in a state court.

Also Cf. *Mondou v. New York,* 223 U. S. 1, 57 (1911); Goodrich, *Conflict of Laws,* (3rd ed. 1949) pp. 24-29.

The principal case has so limited the effect of Section 605 that the protection afforded by it is narrowed to the vanishing point, for the bulk of criminal prosecutions occur in state courts. Illegal search and seizure cases concerning wire-tapped evidence in federal courts have been confined to antiquated prohibition cases, decisions involving fraudulent use of the mails, and narcotic convictions. Moreover, it has been observed that many criminal offenses normally prosecuted in federal courts, could by technical changes in the indictments be prosecuted in state courts, and all the wire-tapped evidence secured by Federal officers would be admissible.

Civil or criminal action by the accused against the offending police officers provides no solution and little consolation. Further, it is not the criminal that merits consideration but every professional and business man who by necessity

and practice conducts many of his daily transactions by telephone. Mr. Justice Brandeis, citing *Boyd v. United States,* 116 U. S. 616, 627-630 (1886) with approval, succinctly highlighted the problem, dissenting in *Olmstead v. United States, supra* at 474-475:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employes of the sanctities of a man's home and privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forceable and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

It is, therefore, urged that the policy and the wording of the statute indicate that Section 605 should render inadmissible illegally obtained evidence secured by means of wire-tapping in state as well as federal court proceedings.

FRANCIS A. PACIENZA, JR.

CONSTITUTIONAL LAW—SUNDAY CLOSING LAWS—SEPARATION OF CHURCH AND STATE—Plaintiffs, used car dealers, sought to enjoin defendants, Florida state officials, from enforcing the state Sunday Closing Laws which compelled "the closing of all business houses on Sunday," with certain enumerated exemptions. Fla. Stat. Ann. §§ 855.01 and 855.02, as amended by Laws of Florida 1951. The Florida Supreme Court held, *inter alia,* that the Sunday Closing Laws are a reasonable exercise of state police power, since the object of the legislature was to protect citizens "from the evils attendant upon uninterrupted labor." The Laws cannot be sustained on religious belief or principles, the court added, because both Section 5 of the Florida Declaration of Rights and the First Amendment of the Federal Constitution require a separation of church and state. The injunction was granted, however, on other grounds. *Henderson v. Antonacci,* 62 So. 2d 5 (Fla. 1952).

Sunday observance of the Sabbath day was first established by Emperor Constantine's edict promulgated in 321 A. D. *Richardson v. Goddard,* 23 How. 28, 41 (1859). At common law, acts performed on Sunday were valid unless expressly prohibited, *Amis v. Kyle,* 2 Yerg. 31 (Tenn. 1831), the sole exception being judicial acts or proceedings, which were void even in the absence of statute. *Eyer v. State,* 112 Ark. 37, 164 S. W. 756 (1914). Today, Sunday prohibitions cannot be upheld in civil suits unless there be a statute, judicial decision, general usage within a certain trade, or special custom within a certain locality. *Richardson v. Goddard, supra.*

The purpose of most penal statutes prohibiting Sunday labor was the legislature's desire "to protect the religious observance of the day." 24 A. L. R. 2d 814. However, since most state constitutions guaranteed a separation of church and state, the Sunday Laws were upheld as a civil regulation within the state's police power, because the states have the right to prescribe a day of rest for the laboring

class. *Pirkey Bros. v. Commonwealth,* 134 Va. 713, 114 S. E. 764 (1922). The dissenting opinion of Judge Field in *Ex parte Newman,* 9 Cal. 502 (1858) is often seized upon to uphold the constitutionality of the Laws, on the principle that the statute's:

> . . . requirement is a cessation from labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of perodical cessation from labor. One day in seven is the rule, founded in experience and sustained by science. P. 520.

In *Hennington v. Georgia,* 163 U. S. 299 (1896), the United States Supreme Court upheld the constitutionality of a Georgia Sunday Law on the grounds that it was within the state's police power over the subject of labor. The fact that Sunday was chosen as the day of rest, the Court said, was immaterial, as this was within the province of the legislature; the people, if in disagreement with the legislature's choice of day, could remedy the situation at election time.

Most states have followed the above reasoning. Others have added that Christianity is part of the state's common law, and that Sunday is the holy day amongst Christians, *Commonwealth ex rel. Woodruff v. American Baseball Club,* 290 Pa. 136, 138 Atl. 497 (1927); or, that Sunday, as the Christian Sabbath, has been usually the day chosen for rest, and it is merely coincidental that the day of rest happens to be the Christian Sabbath. *District of Columbia v. Robinson,* 30 App. D. C. 283 (1908).

In *State v. Justus,* 91 Minn. 447, 98 N. W. 325 (1905), defendant was imprisoned for opening his butcher shop on a Sunday in violation of the Minnesota Sunday Closing Law. The conviction was upheld, the court declaring that the statute was constitutional as a protection for those engaged in servile labor from imposition by their employers, as "He who ordained the Sabbath loves the poor." On the other hand, *Ex parte Jentzsch,* 44 Pac. 803 (Cal. 1896) contradicted this reasoning by holding that the Laws were against the state constitution. The California Supreme Court stated that it was folly to maintain that the statute was enacted for the protection of the laborer, when it had the effect of punishing him for working. This is one of the few cases declaring a Sunday Closing Law invalid even as a civil regulation. When a Sunday Law is declared unconstitutional it is usually for the reason that an unreasonable classification was found, as was held in the principal case.

Recent Supreme Court decisions have indicated that the wall of separation between church and state must be kept high and impregnable. *Everson v. Board of Education,* 330 U. S. 1 (1947); *McCollum v. Board of Education,* 333 U. S. 203 (1948); *Zorach v. Clauson,* 343 U. S. 306 (1952). Therefore, it is quite evident that Sunday Closing Laws will continue to be declared constitutional only as an exercise of the state's police power to regulate labor, and not as the setting aside of a day for Christian worship.

KENNETH LAPRADE

CRIMINAL LAW—LOTTERIES—GIVE-AWAY PROGRAMS—The three major broadcasting companies brought an action to enjoin and set aside an order of the Federal Communications Commission determining what types of radio and television "give-away" programs were considered to be lotteries and therefore in violation of the Federal lottery statute. 18 U. S. C. § 1304 (1948). The Commission's order stated that a license for operation will be denied any broadcasting station permitting the broadcast of any advertisement of, or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance. See: 18 U. S. C. § 1304 (1948). The order then outlined what type of program came within the prohibition of the order.

The Plaintiffs alleged that the Commission: (1) acted without authority, (2) violated the Administrative Procedure Act, (3) denied the Plaintiffs freedom of speech and due process of law, (4) that the order amounted to a Bill of Attainder, and, (5) that the Commission erroneously construed and applied section 1304 of the U. S. Criminal Code in that nothing of value was contributed by the participants towards the prize and therefore "give-away" programs cannot be properly termed lotteries.

The Court overruled all of the contentions of the Plaintiffs save the last one. The Court stated that before a gift enterprise can be held to offend the lottery statute it must be shown that some consideration is given for a prize offered dependent on chance or lot. Because the element of consideration, essential in all lotteries, was not present, as a matter of law "give-away" programs do not offend the Federal lottery statute. *American Broadcasting Co., Inc. v. United States,* 110 F. Supp. 374 (S. D. N. Y. 1953).

In a strong dissenting opinion, Judge Clark pointed out that the fundamental issue was whether "consideration is given in return for a chance at substantial and valuable prizes or financial awards." Judge Clark noted that 18 U. S. C. § 1304 (1948), is much broader than ordinary lottery statutes in that the statute also prohibits "gift enterprises, or similar schemes," and that the statute makes no reference to the requisite of consideration.

Every popular definition of a lottery includes three elements: prize, chance, and consideration. *National Conference on Legalizing Lotteries, Inc. v. Farley, Postmaster General,* 96 F. 2d 861 (D. C. App. 1938). The fact that a lottery is conducted merely to increase business or conducted for a worthy purpose and on its surface appears harmless is immaterial. *People v. Lavin,* 179 N. Y. 164, 7 N. E. 753 (1904). The element of prize and chance are undoubtedly present in most of the "give-away" programs. The element of chance is present when the outcome of a scheme depends in whole or in part upon an unknown and unpredictable future event. It is of no consequence that the distribution of a prize is not made by pure chance or chance exclusively, as long as the dominant element is chance. *People v. Lavin, supra.*

As to the question whether any consideration had been given by the participant, it is not necessary that the consideration be monetary, but merely a price or thing of value for a prize. In *State ex rel Reges v. Blumer,* 236 Wisc. 129, 294 N. W. 491 (1940), it was held that there is sufficient consideration to support a lottery if the promoters require the participants to enter their store, without requiring that any purchases be made. The fact that some participants do not give any consideration is immaterial as long as others give a thing of value for their chance to participate. *Commonwealth v. Wall,* 295 Mass. 70, 3 N. E. 2d 28 (1943). In *Maughs v. Porter,* 157 Va. 415, 161 S. E. 242 (1931), the case the Federal Communications Commission strongly relied upon, the court declared that mere attendance at a sale where an automobile was to be raffled was sufficient consideration:

> Even though persons attracted by the advertisement of the free automobile might attend only because of hoping to draw the automobile, and with the determination not to bid for any of the lots, some of these even might nevertheless be induced to bid after reaching the place of sale. We conclude that the attendance of the plaintiff at the sale was sufficient consideration for the purpose of giving an automobile, which could be enforced if otherwise legal.

In a hearing before the Federal Communications Commission to show cause why radio station WARL of Arlington, Virginia should not be denied a license to broadcast because of conducting and promoting a lottery by broadcasting a typical "give-away" program, the FCC stated that the element of consideration was present in that the participants were induced to listen to the program and thereby suffered a legal detriment, whereas a legal benefit inured to the station and to the sponsor. Federal Communications Commission, Docket No. 8559, *In the Matter of Northern Virginia Broadcaster (WARL),* 4 Radio Regulations 660 (1948).

In the instant case, however, the Court held that the technical consideration as required in the law of contracts, is not the consideration required in a criminal lottery statute. In this respect the Court relied heavily on the case of *Garden City Chamber of Commerce, Inc. v. Wagner,* 100 F. Supp. 769 (E. D. N. Y. 1951), wherein the Court concluded that consideration essential in an action upon a contract was not the only kind of consideration necessary in a lottery case:

> . . . the consideration requisite to a lottery is a contribution in kind to the fund or property to be distributed. I have found no case in which the element of consideration has resided in walking or driving to look in a window, which is manifestly not a contribution to the merchandise which is distributed; the value, if any, of the physical exercise cannot be compared to the value of the prize.

Thus if the legal detriment suffered by a participant is merely to listen to the radio or to view a television screen, this in itself would not be sufficient consideration in regard to a lottery statute.

The fact that local radio and television stations are outlets for network "give-away" programs has caused considerable consternation to the Attorney Generals of the states as to whether the state's lottery statutes were being violated. See:

Atty. Gen. Op. (Neb.) Nov. 1948; Atty. Gen. Op. (Mich.) Aug. 1948; 38 Atty. Gen. Op. (Wisc.) 374. The legislators of the state of Wisconsin, after the Attorney General expressed the opinion that "give-away" programs violated the lottery statute of the state, solved the problem adroitly by exempting such radio and television programs from the operation of the statute. Wisconsin Statute § 348.01 (2) (1951).

It seems evident that enforcement of the Federal lottery statute against "give-away" programs is a distasteful task. As pointed out in the dissenting opinion in the principal case, there is a natural desire not to press an indictment that is unpopular. The instant statute, however, is clear, even though it does not define a lottery, and, as stated in the majority opinion of the court, should be given its usual and popular meaning. The usual and popular interpretation given to consideration in lottery cases in the past has been the same as prescribed in the law of contracts. 54 C. J. S., Lotteries § 2. While some authorities, as in the principal case, have held to the contrary and have demanded something more than the formal consideration necessary to support a contract, it is to be noted that in these cases the courts have been very liberal in an attempt to exempt seemingly harmless schemes from the purview of lottery statutes. "Give-away" programs are at the zenith of their popularity and Courts seem to be reluctant to apply what appears to be a harsh piece of legislation.

It is apparent that "give-away" programs violate the lottery statute because consideration, as interpreted in the past, has been given, and because the Federal lottery statute goes beyond such ordinary statutes and makes all gift enterprises illegal without regard as to whether consideration is contributed by the participant.

Undoubtedly application of the statute would be drastic and unpopular, nevertheless, its terms are clear and the courts should apply the statute as it reads. Unpopular legislation is the responsibility of the legislators and their dilemma can be solved easily, as it was in the State of Wisconsin, by simply exempting "give-away" programs from prosecution as a lottery.

JOSEPH M. KOLMACIC

FEDERAL PROCEDURE—FEDERAL TORT CLAIMS ACT—DISCRETION—The United States War Department was ordered to produce fertilizer grade ammonium for overseas relief shipment. In April 1947, a fire started in the hold of one of the ships loaded with the fertilizer and docked at Texas City, Texas. As a result of the fire, two of the ships exploded, causing extensive damage to property, personal injuries, and death to over 500 persons. In a consolidated suit under the Federal Tort Claims Act, plaintiffs claimed the United States was liable to the same extent as a private corporation manufacturing any dangerous commodity. The United States Court of Appeals, 5th Circuit, reversed the judgment of the trial court which held the case within the scope of the Federal Tort Claims Act, and

stated that the government was immune from liability, *In re Texas City Disaster Litigation,* 197 F. 2d 771 (5th Cir. 1952), because the specified acts of negligence came within an exception which provides that the act shall not apply to claims based "upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 62 Stat. 984 (1946), as amended 28 U. S. C. A. 2680 (a) (1949).

In the instant case the majority ruled that the question of negligence was negated because of the discretionary nature of the situation, and that the discretionary nature of the act in its inception would continue until the project had been completed. Clearly, such reasoning could be applied effectively to the majority of claims based on the Act and would thereby relieve the government from liability in the great mass of cases where Congress plainly intended liability should attach. To answer every claim of negligence with the fact that the alleged negligent act of a government employee stemmed from a discretionary act of some high federal official would surely be repugnant to the Act itself. Once the decision was made to manufacture and ship the explosive material, the question of discretion had ended and the question of exercising due care in the shipment had begun.

The dissent presents a broader view of the purpose of the Federal Tort Claims Act and appears to be supported by the weight of authority.

The area in which disagreement exists is as to the scope of the discretionary exception.

Once the discretion has been exercised to undertake a project, the question arises whether all decisions effectuating the project by various officials in the chain of command are covered by the discretionary exception. In *Boyce v. United States,* 93 F. Supp. 866 (S. D. Iowa 1950) the plaintiff's land was damaged by blasting operations in the course of a project to deepen the Missouri River. There the court held that since it was part of an over all plan approved by the Chief of the Engineers of the Army, it was a decision made in the exercise of a discretionary function and it was immaterial whether or not there was negligence.

While the purpose of the Federal Tort Claims Act was not to create new causes of action, but to waive immunity from recognized causes of action, *Feres v. United States,* 340 U. S. 135 (1950), it is apparent that the Act was not designed to enable the United States to escape liability merely because some discretionary function or duty was or was not performed. *Coates v. United States,* 181 F. 2d 816 (8th Cir. 1950). The Act specifically places the United States on the same level and under the same mandate to exercise due care as a private individual or corporation, and gives jurisdiction to United States District Courts "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his employment, under circumstances where the United States if a private person, could be liable to the claimant in accordance with the law of the place where the act or omission occurred." 62 Stat. 933 (1946), as amended 28 U. S. C. A. 1346 (b) (1949). Clearly, a *private* firm would be liable if it failed to exercise the due care required of a reasonably prudent person in giving the necessary warnings required in placing a dangerous instrumentality in the channels of commerce, and injury or death resulted from such failure. The plaintiffs' amended complaint specifically charged definite groups and individuals with negligence while acting

in the scope of their employment, and thus took the case from the protective cloak of decisions reached in *Sickman v. United States,* 184 F. 2d 616 (7th Cir. 1950); *United States v. Campbell,* 172 F. 2d 500 (5th Cir. 1949); and *Moore Ice Cream Co. v. Rose,* 289 U. S. 373 (1932).

In *Somerset Seafood Co. v. United States,* 193 F. 2d 631 (4th Cir. 1951), a case in which the proper distance of a buoy from a wreck was in issue, the court said even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in the marking, once the decision to do so has been made.

In *Denny v. United States,* 171 F. 2d 365 (5th Cir. 1948) an Army Officer and his wife sought to recover for the death of their child who was stillborn due to the failure of an Army Hospital to dispatch an ambulance. The court held that since the Army Medical Department rendered service only whenever practicable, the decision not to send the ambulance was covered by the discretionary exception. However, whether the Army had exercised its discretion to render treatment, and rendered treatment negligently, the United States was held liable. *Costly v. United States,* 181 F. 2d 723 (5th Cir. 1950).

Since the very conception of negligence involves weighing the magnitude of the risk against the utility of the act, or the particular manner in which it is to be done, it certainly appears that a court of law can and should examine evidence introduced in any given case to ascertain whether or not the due care required by the act was or was not performed. By its failure to place the aspect of *due care* above the *discretionary* nature of the case, it is submitted that the Appellate Court cast aside the true purpose of the Federal Tort Claims Act.

GEORGE P. BLACKBURN

TORTS—NEGLIGENCE—PARENT AND CHILD—IMMUNITY OF PARENT TO SUIT—Plaintiff, an unemancipated child, instituted a suit against his father and another, partners, for personal injuries received when the father ran over the plaintiff with his business vehicle while the child was playing in the street. Defendant contended that the common law granted immunity to parents from suits by unemancipated minor children for injuries caused by the parent.

The court, however, stated that if an unemancipated child can sue his parent on a contract and for "property" rights, then there is no reason to prohibit a suit for personal injuries. The court, overruling the case of *Roller v. Roller,* 37 Wash. 242, 79 Pac. 788 (1905), where it was held that the parent's immunity is absolute, went on to say that the reasons advanced for granting such immunity from suits at common law are no longer valid. Therefore, the reason for the rule failing, the rule must fail. *Borst v. Borst,* 251 P. 2d 149 (Wash. 1952).

This holding is the latest expression of the courts on parent-child suits and is a considerable modification of the parental immunity doctrine. The development of this doctrine up to the year 1950, has been treated at 1 Catholic U. L. Rev. 161 (1951), in a discussion of *Mahnke v. Moore,* 77 A. 2d 923 (Md. 1951).

Since the first judicial declaration on this subject in 1891, the parent has been held to be immune from suit by the child in cases of personal tort. *Hewett v.*

George, 68 Miss. 703, 9 So. 885 (1891). In the last few years, however, the courts have gradually modified and made exceptions to this rule. In *Mahnke v. Moore, supra,* a child recovered from his parent who had injured the child by "cruel and inhuman treatment." A similar qualification to the otherwise absolute doctrine of parental immunity from personal tort suits by their children was permitted where the parent's act constituted "willful misconduct." *Cowgill v. Boock,* 189 Ore. 282, 218 P. 2d 445 (1950).

The consistency of the most recent cases has undoubtedly engrafted a qualification upon the parental immunity doctrine where the parent's willful misconduct causes the child's injuries. *Wright v. Wright,* 85 Ga. App. 721, 70 S. E. 2d 152 (1952); *Siembab v. Siembab,* 112 N. Y. S. 2d (1952).

The doctrine of absolute parental immunity originally adopted was admittedly harsh, and many courts have permitted exceptions to this rule where coexisting relationships were present along with the parent-child relationship. Some of these ancillary factors were: master-servant, *Dunlap v. Dunlap,* 84 N. H. 352, 150 Atl. 905 (1930); carrier-passenger, *Lusk v. Lusk,* 113 W. Va. 17, 166 S. E. 538 (1932). Recovery was also permitted: in those states that consider insurance a "fact", and the parents insurer as the real party in interest, *Worrell v. Worrell,* 174 Va. 11, 4 S. E. 2d 343 (1939); where the parent owned 51 percent of a corporation's stock, *Foy v. Foy Electric Co.,* 231 N. C. 161, 56 S. E. 2d 418 (1950); as well as against an employer when the child was injured by the parent employee. *Chase v. New Haven Wastepaper Co.,* 111 Conn. 377, 105 Atl. 107 (1930). The reasoning that supports these exceptions based on extrinsic relationships seems to have been carried to a logical conclusion in *Signs v. Signs,* 156 Ohio St. 566, 103 N. E. 2d 743 (1952). This case allowed a child to recover for injuries inflicted by the parent's negligence while acting in a "business or vocational capacity." Insurance was not considered a factor in this case.

Instances permitting the cause of action in negligence situations have been restricted to those cases in which a dual relationship existed between the parent and the child. These exceptions did not, however, alter the rule of parental immunity as such. The general rule admitted a qualification only when the parent's acts constituted "willful misconduct." Therefore, unless the parent was performing in one of the accepted primary relationships, the child's loss resulting from the parent's negligence was without legal redress. See 67 C. J. S., Parent and Child § 61.

The principal case goes beyond any of these exceptions by permitting a cause of action by the child even in negligent situations if, at the time of the injury, the parent was performing a "non-parental transaction." In effect, then, the court has limited the parental immunity to the sphere of parental discipline and control. By considering the underlying reasons for this immunity in contrast to its historical development, the court felt that the appropriate scope of the immunity

rule could be readily determined. The majority of cases show a concern for the *effects* upon the parent and the family following a child's suit, while here the court considered the immunity in its *cause,* i.e., the relationship giving rise to the rule. The nature of the parent-child relationship, namely, the duty to rear, discipline, etc., the children, is stressed rather than an *a priori* fear of the effects following such a suit. The familiar principle "where the reason fails the rule fails," was applied, and the reasons having been found inapplicable to the instant situation, "the mantle of immunity therefore disappears."

The extent of the immunity within the sphere of parental activity was left open by this court, stating:

> We do not determine the question of whether the immunity should be absolute or conditional with respect to the acts performed in the discharge of parental duties, as it is not before us.

However, when the rule permitting the child redress for the parent's "willful misconduct" is combined with the holding in the principle case, it appears that the immunity should be considered as conditional even within the sphere of parental activity. To allow an action for negligence or anything less than willful misconduct within this sphere of parental activity would seem to deny the immunity completely. Hence the writer believes the instant case to declare the logical extension of the parental immunity when viewed in conjunction with the willful misconduct cases. In so doing it appears to have adjusted the rule by a consideration of the parties most closely affected. If the child's rights must be sacrificed, it is submitted, they should be so only because of the parent's duty to the child and not merely by reason of parenthood.

WILLIAM T. DUCKWORTH