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Abstracts of Recent Cases

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Newton v. Pedrick, 212 F.2d 357 (2d Cir. 1954), concerns a related problem, *i.e.*, whether certain alimony payments were incident to a divorce. The court said that the Code contemplated a "divorce status" rather than a strictly valid decree as interpreted by the courts of the marital domicile.

In 1954 Congress liberalized the requirements for deducting alimony payments by providing for consensual agreements which permit the separated parties to adjust their tax status without a prior court decree. INT. REV. CODE OF 1954, § 71(a)3. As observed in *Mavity v. Commissioner*, 341 F.2d 865 (2d Cir. 1965), if a husband can have the benefit of the deduction by a mere written separation agreement, surely an invalid divorce should be sufficient when the husband and wife are in fact separated.

Soon after the principal case was decided the Tax Court was again reversed. *Wondsel v. Commissioner*, 350 F.2d 339 (2d Cir. 1965). *Wondsel* relied on the principal case. "We adopt the reasoning in *Borax*." The circuit court observed that the decree cannot be said to lack validity completely even though held invalid by the court of the marital domicile because it is a valid divorce in the rendering jurisdiction of Florida.

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ABSTRACTS

Conflict of Laws—Statute of Limitations

P, a resident of Ohio, received personal injuries in an accident in Virginia caused by the negligence of *D*, a resident of North Carolina. *P* brought an action for personal injuries and for property damage in a federal district court in North Carolina. The action was brought more than two but fewer than three years after the accident. The statute of limitations as to negligent torts was two years in Virginia and three years in North Carolina. *D* contended that the law of Virginia where the cause of action arose, the *lex loci delicti*, should have been used rather than the law of North Carolina, the *lex fori;* therefore, the action was barred by the Virginia statute of limitations. *D's* motion to dismiss was denied. *Held*, affirmed. Where a claim arises in a state other than the state in which the action is brought, the general rule is that the *lex fori* is

applied to procedural matters and *lex loci* is applied to substantive matters. In other words, the *lex fori* governs all that is connected merely with the procedure, and the *lex loci* governs matters going to the basis of the right of action itself. *Snyder v. Wylie,* 239 F. Supp. 999 (W.D.N.C. 1965).

This case was tried in a federal district court because of the diversity of citizenship. *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938) requires that a federal court apply the law of the state in which it is sitting; therefore, the court necessarily looked to the law of North Carolina.

The forum generally applies its own statute of limitations because a general statute of limitations is procedural only and has no extraterritorial force. *Tieffenbrun v. Flannery,* 198 N.C. 397, 151 S.E. 857 (1930). The *lex fori* determines the time within which a cause of action may be brought. However, if the "statute of limitations" is a part of the right to bring the action, as in wrongful death, the law of the *lex loci* must be applied because the matter is substantive and a part of the right to bring the action. *California v. Copus,* 158 Tex. 196, 309 S.W.2d 227 (1958).

In the principal case *D* contended that North Carolina had a borrowing statute which made the Virginia statute of limitations applicable. However, the court found that the borrowing statute was only a proviso of a tolling statute. The tolling statute did not apply to the facts of the case; therefore, the borrowing statute was not effective.

A court will assume a case is to be governed by the laws of the forum unless it is expressly shown that a different law is to be applied. In case of doubt as to whether *lex loci* or *lex fori* should apply, the court will naturally prefer to use the law of its own state. *Smith v. New York Life Ins. Co.,* 208 F. Supp. 240 (S.D. Iowa 1962).

West Virginia has no problem in this area as it has been dealt with by the Uniform Statute of Limitations on Foreign Claims Act which provides that the period of limitation applicable to a claim arising outside West Virginia shall be prescribed either by the law of the state where the claim arose or by the law of West Virginia, whichever bars the claim. W. VA. CODE ch. 55, art. 2A, § 2 (Michie 1961).

Criminal Law—Nondisclosure of Informant

D was arrested without a warrant on charges of violating the narcotics law by officers who were acting on information given by an informant known by them to be reliable. He was convicted of unlawful possession of narcotics. On appeal *D* contended that the trial court erred in permitting introduction into evidence of narcotics found on his person at the time of his arrest, without requiring the arresting officers to reveal the identity of the informants upon whom they had relied in finding "reasonable grounds" for the arrest. *Held,* affirmed. If an arrest is lawful it is clear that a search of the person without a warrant is proper, and evidence which is found is admissible. In order for an arrest without a warrant to be lawful, the officer must have reasonable grounds for believing that the person to be arrested has committed a criminal offense. The reasonable grounds may be based on information supplied to the officer by an informant, whose identity need not be disclosed, if the reliability of the informant has been previously established or is independently corroborated. *People v. McCray,* 210 N.E.2d 161 (Ill. 1965).

Since the fourteenth amendment was added to the United States Constitution, the states watch very closely the decisions of the United States Supreme Court concerning the fourteenth amendment and the Bill of Rights. It has been held that the fourteenth amendment makes the fourth and the first amendments applicable to the states. *Mapp v. Ohio,* 367 U.S. 643 (1961); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943). It also has been stated that state courts, equally with federal courts, are under an obligation to guard and to enforce every right secured by the federal constitution. *Mooney v. Holohan,* 294 U.S. 103 (1935).

In the principal case the Illinois court was bound by at least two United States Supreme Court decisions although it did not cite them. In *Mapp v. Ohio, supra,* the Supreme Court held that the fourth amendment requiring exclusion of evidence obtained by unlawful search and seizure applied to the states through the fourteenth amendment. In *Ker v. California,* 374 U.S. 23 (1963), it was held that the question of reasonableness of a state search and seizure is governed by federal constitutional standards as expressed in the fourth amendment and the decisions of the Court applying that amendment.

State courts many times follow law which the United States Supreme Court has set out in determining a case similar to the case before the state supreme court, although it may not be bound by the Supreme Court decision. Illinois had done this in regard to the "informant's privilege." When the Illinois Supreme Court decided *People v. Mack*, 12 Ill. 2d 151, 145 N.E.2d 609 (1957), the court stated that in deciding whether the privilege of refusing to divulge the name of the informer could be properly exercised, it was benefited by the recent case of *Roviaro v. United States*, 353 U.S. 53 (1957), in which the United States Supreme Court reiterated its recognition of the government's privilege, commonly called the "informant's privilege," to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of the law. The principal case cited the *Mack* case, *supra*, as well as *Roviaro* and several other United States Supreme Court cases as authority.

The "informant's privilege" is founded on public policy and seeks to further and to protect the public interest in effective law enforcement. The privilege does not apply if the informant either participated in the defendant's crime or helped set up the commission of the crime. If the informant merely told the officer of the crime, any testimony he might give would have little relevance to the evidence proving or disproving the crime.

In order for the officer to prove he had reasonable grounds for making an arrest so as to make a search lawful, he must prove to the judge that he had grounds for believing in the informant's reliability.

In the principal case the Illinois court cited *Aguilar v. Texas*, 378 U.S. 108 (1964), as authority for the above rules. The *Aguilar* case involved application for a search warrant rather than an arrest without a warrant; however, the Illinois court stated that the language of the opinion was pertinent to the situation in the principal case. The United States Supreme Court stated in the *Aguilar* case that there must be underlying circumstances shown from which the informant concluded that the narcotics were where he claimed them to be, and the officer must show underlying circumstances on which he based his opinion that the informant was credible or his information reliable. The *Aguilar* case was reversed because the warrant merely stated the officer's conclusion that the informant was reliable.

Because of *Mapp v. Ohio, supra,* and *Ker v. California, supra,* many of the problems in illegal search and seizure cases now should be resolved, and the practices and procedures in these cases should tend to become quite uniform among all the states.

Torts—Statute of Limitations on Malpractice

D's employee, a physician, performed a hysterectomy on *P.* Following the operation *P* experienced severe pain and nervousness, both before and after her discharge from the hospital. More than ten years later, another physician took X-rays which disclosed a foreign object in *P's* abdomen, which subsequent surgery revealed to be a sponge negligently left there by *D's* employee physician. The trial court held that *P's* cause of action was barred by the one year statute of limitations in effect at the time of *P's* first operation. *Held,* reversed. In medical malpractice cases such as this, the statute of limitations does not start to run until the patient learns, or in the exercise of reasonable diligence should have learned, of the presence of the foreign object. Two judges dissented. *Morgan v. Grace Hosp., Inc.,* 144 S.E.2d 156 (W. Va. 1965).

The principal case expressly overruled previous West Virginia cases with very similar factual situations which held that the statute of limitations ran from the time the negligent act occurred. *Gray v. Wight,* 142 W. Va. 490, 96 S.E.2d 671 (1957); *Baker v. Hendrix,* 126 W. Va. 37, 27 S.E.2d 275 (1943). The holding in these previous cases still represents the weight of authority in the United States. Annot., 80 A.L.R.2d 368, 372-73 (1961).

The previous West Virginia cases had recognized the well established expection to the general rule that the running of the statute of limitations was tolled if either fraud or intentional concealment was involved. If a physician was negligent and fraudulently concealed the fact from his patient, the statute of limitations did not begin to run until the wrong was discovered or could have been discovered by the patient. In order for the statute to be tolled, the physician had to have knowledge of his negligence and there must have been an affirmative act by the physician to conceal the existence of liability; mere silence was not sufficient to toll the running of the statute. *Baker v. Hendrix, supra; Gray v. Wright, supra.*

Some states have held that the statute of limitations begins to run at the termination of the negligent physician's treatment of the

patient. *Hemingway v. Waxler,* 128 Cal. App. 2d 68, 274 P.2d 699 (1954).

The court in the principal case justified its rejection of its own precedents by comparing the situation with that of underground encroachment cases. In underground encroachment cases, the statute of limitations does not begin to run until the injured party discovers the encroachment. *Knight v. Chesapeake Coal Co.,* 99 W. Va. 261, 128 S.E. 318 (1925). The court felt that the situations are so similar that the law should be the same in both cases, and that the better view is that the statute of limitations begins to run when the tort is discovered, or by due diligence could have been discovered.

The two dissenting judges in the principal case argued against departing from the previous rule. They felt that the majority of the court (1) misconstrued the applicable statute of limitations and practically defeated its purpose of precluding the commencement of litigation after a definite period of time, (2) invaded the province of the legislature, (3) failed to consider and to recognize the valid distinction between underground encroachment cases and malpractice cases and (4) manifested little or no regard for the doctrine of stare decisis.

The dissent also argued that even under the newly announced rule, *P* should not have been granted relief in the principal case because it was obvious as a matter of law that she had not exercised reasonable diligence in discovering the tortious act of which she complained. The dissenters felt that a delay of ten years in discovering the sponge was unreasonable and highly prejudicial to *D.*

The courts in this type of case are confronted with two conflicting policies when determining when the statute of limitations should begin to run. They must determine whether they will use the rule which would protect a physician against the danger of stale lawsuits involving the possibility of missing witnesses and errors in memory, or the rule which would protect patients against the negligence of physicians which is often difficult to discover within the statutory period of limitation.

Although the holding in the principal case is the minority view, it is a growing minority and is thought by many to be the better view. See 64 W. VA. L. REV. 103 (1961). Perhaps the present minority position some day will be that of the majority.

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