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Civil Rights--Applications of Judicial Immunity and Volenti Non Fit Injuria

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Civil Rights—Application of Judicial Immunity and Volenti Non Fit Injuria

Ps sought damages for their detention in the Jackson, Mississippi jail under the common law tort of false imprisonment and also initiated a civil action for deprivation of rights granted by the federal Civil Rights Acts. They were civil rights workers on a "prayer pilgrimage." When they attempted to enter a segregated bus terminal restaurant, they were halted by police officers and were arrested when they refused to disburse. There was evidence indicating that the purpose of their trip was to challenge the segregation policy of the restaurant, and that in doing so, they contemplated being arrested. *Ds* were the arresting officers and the police justice before whom *Ps* were tried and convicted. A jury trial in the Southern District of Mississippi resulted in a verdict for *Ds* and *Ps* appealed. *Held,* reversed. The police justice and the policemen are immune from suit for false arrest. The police justice is immune from suit under the federal act. The cause against the officers was remanded to the district court for a factual determination of whether the *Ps* had "a plan and purpose of being arrested". Such a showing would preclude *Ps'* recovery under the federal act. *Pierson v. Ray,* 352 F.2d 213 (5th Cir. 1965).

The subject of this note is the court's application of the doctrines of judicial immunity and volenti non fit injuria to the federal cause of action. 42 U.S.C. 1983 (1959). The act provides that anyone who under color of state law deprives a citizen of any civil right shall be liable to the injured party. The civil rights act creates a right of recovery which is analogous to a tort action, but the act does not indicate whether defenses or immunities applicable to similar tort action apply to suits under it.

In cases where legislative gaps appear, such as this one, the courts essentially legislate by applying the law they think best suited to the statute. WRIGHT, FEDERAL COURTS § 60 (1963).

The courts have not been consistent as to the sources of the law they apply in a particular case. In general, they apply either the general principles of the common law or "federal" law which is derived from the intent of Congress or the federal policy they

wish to enact by the law. No clear basis has emerged which would assist in determining when general common law or federal law should be applied. The principal guide the courts have chosen is the furtherance of the federal policy the Congress intended to effectuate. The courts have chosen to apply state law to the statute when it appears that the federal policy would be better achieved by doing so or where the statute implies that state law should govern. IA MOORE, FEDERAL PRACTICE ¶ 10. 323 [22] (2d. ed. 1965).

The first problem, whether judicial immunity should have been applied, might have been resolved differently by the court in the principal case had federal law been chosen. The question of immunity often has arisen under the statute, and although the circuit and district courts are split, the question has never been decided in the United States Supreme Court. A leading case denying judicial immunity from suits brought under the statute is *Picking v. Pennsylvania RR. Co.*, 151 F.2d 240 (3d Cir. 1945). In support of denying this immunity, the court in the *Picking* case cited *Sola Elec. Co. v. Jefferson Co.*, 317 U. S. 173 (1942). The court stated at 176,

> When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation . . . are . . . federal questions, the answers to which are to be derived from the statute and the federal policy which is adopted. To the federal statute and policy conflicting state law and policy must yield.

The Third Circuit court felt that a state grant of judicial immunity should yield to the federal policy of compensating individuals for state actions, or for colorably state authorized actions which deprived them of their civil rights. Professor Moore agrees with this case. 1A MOORE, FEDERAL PRACTICE ¶ 0.323 [3] (2d ed. 1965).

The vast majority of decisions on this question grants judicial or quasi-judicial officers immunity from suit under the statute. The grounds for this holding are usually: (1) the prevalence of the doctrine of judicial immunity from tort actions in the federal courts, *Gateway v. Sutton*, 310 F.2d 107 (10th Cir. 1962); or (2) the interest in keeping judges free to act without worries of civil liability, *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir. 1957); or (3) an application of United States Supreme Court cases granting im-

munity, *Francis v. Crafts*, 203 F.2d 809 (1st Cir. 1953); or (4) some combination of the three, as in the principal case. The Supreme Court case cited as overruling *Pickway* is *Tenney v. Brandhoye*, 341 U.S. 367 (1951) which holds legislators immune from prosecution under the statute. *Monroe v. Pape*, 365 U.S. 167 (1960) holds municipal corporations immune.

The second problem presented by the principal case, whether volenti non fit injuria should be applied, involves a similar question. Should the general common law of torts be applied to the statute, or should the courts look to the federal policy Congress intended the statute to serve? In the principal case, which appears to be the first case discussing the application of consent to the statute, the law applied was the "governing common law rules" of Mississippi. It appears that a plan and purpose of being arrested would prohibit recovery for false imprisonment under the general law. PROSSER, TORTS § 102 (3d ed. 1964).

A more difficult question is whether the court in the principal case properly interpreted the intent of Congress. In *Monroe v. Pape, supra* the purposes for which the act was passed were carefully analyzed. Justice Douglas, writing the majority opinion, felt that a chief purpose was to supply a federal remedy where the peculiar situation in a state prevented a citizen from obtaining redress for the civil right which was taken from him. Justice Frankfurter felt the liability was created where redress would be barred by a statute, custom or usage which sanctioned the actions of those who deprived a citizen of civil rights.

Is the federal interest in protecting a citizen from deprivation of his civil rights strong enough to override the principle of volenti non fit injuria, as applied to common law tort actions? Did Congress intend for a person deprived for a civil right to recover even though he consented to that deprivation? These questions were not answered or apparently even considered by the court in the principal case. The opinion states simply that as (1) the act is to be read against the background of tort liability, and that (2) the source of the background in this case is the law of Mississippi. Thus, according to Mississippi law volenti non fit injuria applies to this case.

The weakness of this reasoning apparently is evident to the Fifth Circuit court. In a footnote to statement number (2) the court

in the principal case admits that questions as to liability under the statute are to be determined by federal law. Instead of taking this course, the court, citing Justice Frankfurter's dissent in *Monroe v. Pape, supra,* decided that the general background of tort liability should be the source of the law applied. When that law is found in state decisions, the footnoted rule is in effect reversed as state law becomes controlling.

The decision that judicial immunity and volenti non fit injuria apply to the federal acts will probably not have severe consequences. It is difficult to imagine a person consenting to a deprivation of his civil rights other than in a factual situation similar to the one in the principal case. However, the method the court used in arriving at the decision concerning the defense of consent does establish a questionable precedent. In applying a federal statute specifically enacted to override state law, it seems very strange that the court should look to state law.

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Constitutional Law—Apportionment of Constitutional Conventions

The Governor of West Virginia sought a writ of mandamus in the state's Supreme Court of Appeals to require the Commissioner of Finance and Administration to affix his signature to certain contracts for publishing notices of a special public election on the question of calling a convention to alter the state's constitution. *Held,* writ denied. The statute setting up the method by which delegates to the convention would be chosen and under which the expenditure of funds would be made was unconstitutional in that it violated the state's constitutional provision regulating apportionments of representation. *State ex rel. Smith v. Gore,* 143 S.E.2d 791 (W. Va. 1965).

The principal case was decided on the basis of the applicability of article II, section 4, of the West Virginia Constitution to the apportionment of a constitutional convention. The constitution provides: "Every citizen shall be entitled to equal representation in government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall, as far as practicable, be preserved." It was not necessary for the court to consider the