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Civil Rights - Action for Damages - Personal Liability of Police Officers for Violation of Civil Rights under Color of State Law

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resulting from a Sheriff's Deed[14] in an foreclosure action.[15] However, this does not result in a harmonizing reasoning, inasmuch as the severance of the title of the mineral estate from the surface estate creates two distinct and separate parcels of land, and it therefore naturally follows that title to one cannot be adverse to the other regardless of the method by which possession was authorized to the surface estate.

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CIVIL RIGHTS — ACTION FOR DAMAGES — PERSONAL LIABILITY OF POLICE OFFICERS FOR VIOLATION OF CIVIL RIGHTS UNDER COLOR OF STATE LAW. Defendants, thirteen Chicago police officers, broke into plaintiff's home in the early morning forcing plaintiff and his family to stand naked in the living room while conducting an extensive search of the premises. Plaintiff was then taken to the police station, as a suspect, and held for ten hours of interrogation, was not allowed to call an attorney or be taken before a magistrate, and was subsequently released without criminal charges being preferred against him. Alleging that the defendants, though lacking a search warrant or warrant of arrest, acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and the City of Chicago, plaintiff sued defendants for violation of his civil rights.[1] On writ of certiorari the Su-

14. North Dakota Horse & Cattle Co. v. Serumgard, 17 N.D. 466, 117 N.W. 453 (1908); See N.D. Cent. Code § 32-10-09 (1961).

15. Knowlton v. Coye, 76 N.D. 478, 37 NW.2d 343 (1949), ". . . Conveys to the grantee the same title which the mortgagor possessed at time of execution of the mortgage . . .," Stewart v. Berg, 65 N.W.2d 621 (N.D. 1954), ". . . Does not invalidate the proceedings against unknown defendants . . .;" See N.D. Cent. Code § 32-17-06 (1961).

1. The action was based on 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952), which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In determining the civil liability of the defendants the Court was not primarily concerned with whether they had acted in accordance with their authority or had misused it, see Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913), but was concerned with the narrower issue of whether "Congress, in enacting (17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952)), meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." (81 Sup. Ct. 473, 476 (1961)). Previous cases relative to this question have been brought on the basis of 62 Stat. 683 (1948), 18 U.S.C. § 242 (1948), which is the criminal counterpart of 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952), and in supporting jurisdiction of the federal courts under 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952) in the immediate case, the Court relied entirely on cases dealing with interpretation of the "under color of" clause

preme Court of the United States held,[2] that even though the actions of defendants were not taken in conformity with the statutes of Illinois they were acting "under color of state law" by reason of their position as police officers and hence were individually liable to plaintiff in damages for breach of plaintiff's constitutional rights.[3] Monroe v. Pape, 81 Sup. Ct. 473 (1961).

In deciding that 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952) of the Civil Rights Act gives a remedy in federal courts to parties deprived of constitutional rights, privileges and immunities by a state official's abuse of his position, the Supreme Court has established a rule which may conceivably overrule a great many prior cases dismissing complaints against state law enforcement officers on the basis of insufficient jurisdiction.[4] This is the Court's most affirmative statement that federal jurisdiction is not merely limited to action taken by officials pursuant to state law,[5] a clearly expansionary interpretation of the statute. Justices Harlan and Stewart in their concurring opinion contended that there should be no distinction between "use" and "misuse" of state power in regard to interpretation of the "color of state law" clause of § 1983.[6] Thus whether the deprivation of rights alleged results from an application of authority vested directly by state law or whether the deprivation results from a misuse of authority granted by state law (in which case there would be

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in 62 Stat. 683 (1948), 18 U.S.C. § 242 (1948). Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

2. The district court had dismissed the case on the ground that the complaint failed to state a claim, and this ruling was upheld by the circuit court of appeals. Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959). Justice Frankfurter alone dissented in an opinion cited at 81 Sup. Ct. 473, 492 (1961). Also separtely attacked concurring opinion by Justices Harlan and Stewart at p. 516.

3. While reversing the decision as to liability of the individual police officers the court affirmed dismissal of the municipality of Chicago on the ground that the statute was not intended to include city corporations for acts committed in performance of its governmental functions. See O'Connor v. City of Minneapolis, 182 F. Supp. 494 (D. Minn. 1960); Graves v. City of Bolivar, 154 F. Supp. 625 (W. D. Mo. 1957).

4. Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959); Curry v. Ragen, 257 F. 2d 449 (5th Cir. 1958), **cert. denied** 358 U.S. 851 (1958); Mackey v. Chandler, 152 F. Supp. 579 (W.D.S.C. 1957); Agnew v. Compton, 239 F.2d 226 (9th Cir. 1956), **cert. denied** 353 U.S. 959 (1957). See also Hoffman v. Halden, 268 F. 2d 280 (9th Cir. 1959); Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956), **cert. denied** 353 U.S. 964 (1956); Dye v. Cox, 125 F. Supp. 714 (7th Cir. 1953).

5. See United States v. Jackson, 235 F.2d 925 (8th Cir. 1956); Brown v. United States, 204 F.2d 247 (6th Cir. 1953); United States v. Lynch, 94 F. Supp. 1011 (N.D. Ga. 1950), **aff'd** 189 F.2d 476 (5th Cir. 1951), **cert. denied** 342 U.S. 831 (1951); Screws v. United States, 325 U.S. 91 (1945); Culp v. United States, 131 F.2d 93 (8th Cir. 1942); Taylor v. DeHart, 22 F.2d 206 (W.D. Mo. 1926), **aff'd** 274 U.S. 726 (1927).

6. See generally the cases cited at footnote 9, **infra.**

an obvious ground for a state action) the injured party may seek redress initially in the federal courts under § 1983. As Justice Douglas states in the majority opinion: "It is no answer that the State has a law which if enforced would give relief. The Federal remedy is supplementary to the State and the state remedy need not be first sought and refused before the Federal one is invoked."[7]

One of the earliest decisions which denied federal jurisdiction for alleged violations of constitutional rights was *Barney v. City of New York*,[8] which held that the 14th Amendment did not apply to action by a state official which violates state law, since such action did not constitute the act of the state. More recent decisions, however, in interpreting the "color of state law" clause of the Civil Rights Statutes in regard to violations by law enforcement officers of constitutional rights, have more liberally defined it to include "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law."[9] Indeed there can be an express intention not to act in an official capacity[10] or the act can be directly violative of a state law[11] and the conduct can still be considered to be under color of law for purposes of applying the Civil Rights Statutes. Although there seems to be little uniformity in the interpretation and application of the Civil Rights Statutes,[12] the principal case seems to be following the more liberal trend as indicated by affirmative application of the statutes in many varying cases.[13]

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7. 81 Sup. Ct. 473, 482 (1961).

8. 193 U.S. 430 (1904). Nine years later this theory was seemingly rejected in Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913), which reinstated the original view taken in Ex parte Virginia, 100 U.S. 339 (1880). Also see Snowden v. Hughes, 321 U.S. 1 (1944) which questioned the reasoning of the Barney case. For a thorough history of the cases dealing with the Civil Rights Statutes, see Frantz, **The New Supreme Court Decisions on the Federal Civil Rights Statutes,** 11 Law. Guild Rev. 142 (1951).

9. United States v. Classic, 313 U.S. 299, 326 (1941), based on 62 Stat. 683 (1948), 18 U.S.C. § 242 (1948), the criminal section of the Civil Rights Statutes. See also Davis v. Turner, 197 F.2d 847 (5th Cir. 1952) which is similar to the immediate case factually, and Screws v. United States, 325 U.S. 91 (1951). And see cases based on 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1952) supporting this statement: Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953); and generally cases in footnote 4, **supra.**

10. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

11. See United States v. Walker, 216 F.2d 683 (5th Cir. 1954), **cert. denied** 348 U.S. 959 (1955); United States v. Jones, 207 F.2d 785 (5th Cir. 1953); Screws v. United States, 325 U.S. 91 (1945).

12. See **Federal Civil Rights Act: A Judicial Repeal,** 9 DePaul L. Rev. 230 (1961). This article was stimulated by the opinion of the circuit court of appeals in dismissing the principal case. Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959).

13. As where confessions were exacted by law officers by means of vio-

Justice Frankfurter, in conformity with his previous opinions,[14] contends that the Civil Rights Statutes have no application to cases where the state law has been violated and consequently where the injured party has ample remedy available in the state courts.[15] In a word Frankfurter would restrict the application of § 1983 and claim that it "was not designed to cure and level all the possible imperfections of local common-law doctrines, but to provide for the case of the defendant who can claim that some particular dispensation of state authority immunizes him from the ordinary processes of the law."[16]

In an interesting side-light Frankfurter pointed out that under the doctrine of *Hurn v. Oursler*[17] a federal court might retain jurisdiction of a claim based on § 1983 even though the court finds that the defendant's conduct is not under color of state law.[18] Future litigation of claims based on the Civil Rights Statutes may possibly be expanded by combined application of the precedents established in the *Hurn* case with the principal case to include individuals acting with-

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lence, see **e. g.,** Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953); or where a state prison guard beats a prisoner, **e. g.,** United States v. Jackson, 235 F.2d 925 (8th Cir. 1956). Federal jurisdiction has also been granted where an officer without cause arrests or imprisons an "inhabitant" under color of state law, **e. g.,** Brown v. United State, 204 F.2d 247 (6th Cir. 1953); or perhaps even for mere nonfeasance where a state officer fails to discharge his legal duties to protect the victims of mob violence, Catlette v. United States, 132 F.2d 902 (4th Cir. 1943). But jurisdiction based on the Civil Rights Statutes was denied for false imprisonment unless such imprisonment could be shown to be in "pursuance of a systematic policy of discrimination against a class or group of persons." Truitt v. State of Ill., 278 F.2d 819, 820 (7th Cir. 1960). Or it has been denied where the complaint merely failed to allege the purposefulness of the defendant in his wrongful acts, **e. g.,** Dye v. Cox, 125 F. Supp. 714 (7th Cir. 1953). Jurisdiction has been denied where there was an unlawful search by law officers, see, **e. g.,** Jennings v. Nester, 217 F.2d 153 (7th Cir. 1954), **cert. denied** 349 U.S. 958 (1955)

14. See Frankfurter's concurring opinion in Snowden v. Hughes, 321 U.S. 1, 16 (1944) where he stated that "(the problem of jurisdiction) is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is pro tanto the state. Otherwise every illegal discrimination by a policeman on the beat would be a state action for purpose of suit in a federal court."

15. Relies primarily on Barney case cited **supra** at not 8. See also Deloach v. Rogers, 268 F.2d 928 (5th Cir 1959); Simmons v. Whitaker, 252 F.2d 224 (5th Cir. 1958); Dineen v. Williams, 219 F.2d 428 (9th Cir. 1955); Miles v. Armstrong, 207 F.2d 284 (7th Cir. 1953); Collins v. Hardyman, 341 U.S. 651 (1951). See Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949), **aff'd** 180 F.2d 785 (7th Cir. 1950), **cert. denied** 339 U.S. 990,**reh. denied** 340 U.S. 847 (1950).

16. 81 Sup. Ct. 473, 515 (1961).

17. 289 U.S. 238 (1933). Cited at footnote 73 of the opinion. The doctrine is that a federal court has jurisdiction to entertain an action alleging a "substantial federal question" in the complaint. This is not defeated by failure to state a proper cause of action, since this determination calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

18. See Bell v. Hood, 327 U.S. 678 (1946); Binderup v. Pathe Exch. 263 U.S. 291 (1923); Swafford v. Templeton, 185 U.S. 487 (1902).

in their private capacity when some technicality prevents finding their action to be "under color of" state law.

JOHN F. STONE

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — COURT INTERPRETATIONS WHEN DEPENDENT IS CHARGED FOR TWO OR MORE OFFENSES ARISING FROM THE SAME ACT. — Defendant threw gasoline into the bedroom of the victims and ignited it. He was tried and convicted on two counts of attempted murder and one count of arson. Defendant moved to vacate the sentences on the second count of attempted murder and on the count of arson alleging that he was punished three times for a single act in violation of Penal Code section 654.[1] The California Supreme Court *held,* two justices dissenting, that the conviction of both arson and attempted murder violated the statutory and constitutional protection relating to defendant as the arson was merely incidental to the primary objective of killing the victims. Consequently, defendant could only be punished for the more serious offense which was attempted murder. The dissent criticized the result on the ground that the crime of arson and that of attempted murder belonged to two separate and distinct classes, involving proof of factual elements not common to the other; therefore the arson conviction should have been affirmed. *Neal v. State,* 9 Cal. Rptr. 607 (1961).

It is an ancient principle of common law that one may not be twice put in jeopardy for the same offense.[2] The constitutional guaranties against double jeopardy are merely declaratory of the common law.[3] Some states through statutory enactment,[4] and others by judicial decision,[5] have extended this protection against double punishment for separate offenses arising from the same act. This extension is frequently called

1. Cal. Pen. Code § 654 (Deering 1949). "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other . . ."
2. State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951).
3. Kepner v. United States, 195 U.S. 100 (1904); State v. Healy, 136 Minn. 264, 161 N.W. 590 (1917); Commonwealth v. Ramunno, 219 Pa. 204, 68 Atl. 184 (1907).
4. Cal. Pen. Code § 654; N.Y. Penal Law, Consol. Laws, c. 40 § 1938 (McKinney 1949).
5. Crumley v. City of Atlanta, 68 Ga. 69, 22 S.E.2d 181 (1942; State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951); People v. Savorese, 1 Misc. 2d 305, 114 N.Y.S.2d 816 (1952).