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Criminal Law - Police Officer Held Guilty of Official Misconduct for Soliciting Theft - State v. Cohen, 32 N.J. 1, 158 A.2d 497 (1960)

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action profited thereby, and his vote was necessary, the transaction would be tainted with the same illegality and fraud as though they were all interested.

In the instant case there was a situation of a controlling group common to both corporations—*i.e.*, interlocking directorates. A situation of this sort was resolved in the leading case of *Geddes v. Anaconda Copper Mining Co.*[15] The *Geddes* court stated the rule as follows:

> The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon *those who would maintain them* to show their entire fairness and where a sale is involved, the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy.[16]

It must be noted that the instant case adopted the rule of the *Geddes* case, and thus established it as the law in Illinois regarding the burden of proof in cases involving interlocking directorates. The wording of the *Geddes* rule is exactly contra to the dictum in the *White* case. However, the practical effect of the Illinois Court's adoption of *Geddes* is not to eradicate *White*. Since the *Geddes* rule is applied where a director or directors have excessive control over two corporations, the dictum in the *White* case might be adopted where a single director, not dominating in influence, is common to two corporations.

The Supreme Court of Illinois in deciding *Shlensky* according to the principles of the *Geddes* and *Winger* cases not only has followed the trend of protecting shareholders from exploitation, but also has provided corporations with freedom in their dealings on the assumption that honest dealings will be proven fair if challenged. This is entirely sensible and even necessary in view of the increasing complexity of corporate affairs and the growth of interlocking directorates.

[15] 254 U.S. 590 (1921).

[16] Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 599 (1921). (Emphasis added.)

CRIMINAL LAW—POLICE OFFICER HELD GUILTY OF OFFICIAL MISCONDUCT FOR SOLICITING THEFT

Defendant, a police officer, was convicted of misconduct in office due to his solicitation of others to steal parking meter receipts. The appellate

court affirmed the conviction, and the Supreme Court of New Jersey affirmed the decision of the appellate court. The concurring judge disagreed, however, stating that although the elements for solicitation were present, there was no violation of an official duty of office. *State v. Cohen*, 32 N.J. 1, 158 A. 2d 497 (1960).

> "Misconduct in office," or "official misconduct," means . . . any unlawful behavior in relation to *official duties* by an officer intrusted in any way with the administration of law and justice, or, as otherwise defined, any act or omission in breach of a duty of public concern, by one who has accepted public office.[1]

The troublesome area appears to be the difficulty of distinguishing between "official duties" and "individual" acts. In other words, it is not clear at what point a policeman ceases to act in his official capacity and begins to act as an ordinary citizen. In *Cohen*, the heart of the problem was whether the defendant had violated his official duty when he solicited others to commit larceny. The majority opinion failed to raise this problem. Considering this writer's research, and the concurring judge's statement that neither counsel nor any member of the court had uncovered a precedent to support an indictment for misconduct in office under the facts of the *Cohen* case, it appears that only limited sources and authorities can be found on this problem.

Official misconduct within the meaning of the constitutions and statutes has been held to include adultery,[2] the collection of illegal fees,[3] and the presentation of unfounded claims for service.[4] Since, by definition, misconduct in office is unlawful behavior in relation to official duties, it follows by implication that either the last three holdings cited involve violations of an official duty, or else the courts are not applying their definition. The factual situations in these three cases were as follows. In *State v. Sanders*,[5] a policeman testified that he happened to go home unexpectedly, and discovered the defendant, a sheriff, in a bedroom with the policeman's wife. The sheriff admitted that he was guilty of illicit sexual relations. The court held that the defendant's misconduct was of such a nature as to affect the administration of his office, and that therefore, he was guilty

[1] State v. Weleck, 10 N.J. 355, 365, 91 A.2d 751, 756 (1952) quoting 1 BURDICT, LAW OF CRIME § 272 at 388 (1946). (Emphasis added.) "The phrase 'misconduct in office' is broad enough to embrace any wilful malfeasance, misfeasance, or nonfeasance in office, [including any act involving moral turpitude, or which is contrary to justice, honesty, principles, or good morals, if performed by virtue or authority of office; but] it does not necessarily imply corruption or criminal intent:" Stanley v. Jones, 197 La. 627, 636, 2 So. 2d 45, 51 (1941).

[2] State v. Sanders, 118 S.C. 498, 110 S.E. 808 (1920).

[3] McDaniel v. State, 9 S.W. 2d 478 (Tex. Civ. App. 1928).

[4] State v. Megaarden, 85 Minn. 41, 88 N.W. 412 (1901).

[5] 118 S.C. 498, 110 S.E. 808 (1920).

of official misconduct. In *McDaniel v. State*,[6] a sheriff, in presenting and collecting claims against the state, placed items and claims in his account for services which he knew that he was not entitled to be compensated for under the law. The court held that the defendant's acts constituted official misconduct. In *State v. Megaarden*,[7] the defendant, also a sheriff, had made charges against the county in excess of his legal rights, and had collected the same on verified claims presented to the board of the county commissioners. Once again the court held this to be official misconduct. In each of these cases, it would seem that the court reached its conclusion without first analyzing the problem of whether the acts of the defendant constituted *official* acts or merely individual ones.

The courts do not appear to be in conformity as to what constitutes an *official* duty. In Missouri, in order to convict under a statute by which an officer is deemed guilty of a misdemeanor if he becomes too intoxicated to perform any official act at the time, and in the manner required by law, the state must prove that the accused was so intoxicated as to be incapable of properly performing an official act, and not merely that he was intoxicated.[8] In *State v. Leach*,[9] an officer was found guilty of misconduct in office for issuing a false certificate, even though the issuance of such certificate was not a part of his official duties. Some statutes for the removal of officers are worded so as to make it necessary to decide, as the court in *Cohen* neglected to do, whether an act is "official" or merely "individual." In *Holiday v. Fields*,[10] the defendant, a sheriff, struck a crippled onlooker with his pistol and threw him into the street; the court held that the sheriff had not violated any official duty, but had acted only as a private citizen. These decisions illustrate the difficulty of differentiating between "official" and "individual" duties, and yet this differentiation—although not even considered in the majority opinion—is the real problem in *State v. Cohen*.

Although precedent may not be available to show what constitutes official and individual acts, logic seems to be on the side of the concurring judge in the *Cohen* case in his remark that the official role of a policeman is to deal with others, and that he is neither appointed to prevent himself from committing offenses, nor to arrest himself. Conceding that he would be liable as an *individual*, should a police officer be indicted for the crime of misfeasance in office if, for example, he merely parks his car too close to a fire hydrant, or on the wrong side of the street? It

[6] 9 S.W. 2d 478 (Tex. Civ. App. 1928).

[7] 85 Minn. 41, 88 N.W. 412 (1901).

[8] State v. White, 168 Mo. App. 249, 153 S.W. 523 (1913).

[9] State v. Leach, 60 Me. 58, 11 Am. R. 172 (1872).

[10] Holiday v. Fields, 210 Ky. 179, 275 S.W. 642 (1925).

would seem difficult to draw a line short of such absurdities if it were held that a policeman has the *public* duty to prevent himself from violating the law and to detect his own infractions.

DAMAGES–CALCULATION OF "LOSS OF SUPPORT" IN DEATH ACTION

A surviving widow sued under the Louisiana Civil Code for the wrongful death of her husband. After disposition of the question of liability in favor of the plaintiff, the Supreme Court of Louisiana held that factors to be considered in the calculation of damages, included, among other things, (1) the divorce rate, (2) the percentage of remarriages of widows, particularly to second husbands whose earnings are greater than those of the first, and (3) the possible retirement of the deceased husband. *Brown v. Bourg & Sons, Inc.*, 239 La. 473, 118 So. 2d 891 (1960).

In the particular area of calculation of damages for "loss of support" the law is quite clear, and *all contra* to the principal case. In the *Brown* case defendant's truck was carrying a load of pipes at night which extended beyond the rear of the truck; there was no red light attached as required by statute. The truck driver, without signal, stopped suddenly, causing a taxi to run into the truck; the pipes smashed into the head of the passenger in the taxi, resulting in his death. In the lower court it was held that the truck driver was negligent, entitling the widow to recover for damages. The trial court then went into the problem of calculation of damages. "The decedent was 52 years old . . . his life expectancy was 19.49 years. For the purpose of computation we can consider this figure to be 20 years . . . [I]t is safe to conclude that he had been providing about $500.00 per year for her support. . . ."[1] This means that the anticipated contribution was $10,000.00. To this, the trial court added $2,000.00 for love and affection, and $800.00 for the cost of the funeral. Thus, the widow was awarded $12,800.00. This was "standard operating procedure," and the manner in which courts have always computed damages in such cases. However, upon appeal, the Supreme Court of Louisiana said that the lower court was in error. The "loss of support" was not to be computed merely by multiplying the average contribution of decedent by the number of years of life expectancy. The court stated tersely:

> There are . . . other factors to be taken into consideration. The life expectancy of the survivor, *the divorce rate, the percentage of remarriages of widows, particularly to second husbands whose earnings are greater than those of the first,*

[1] Brown v. Bourg & Sons, Inc., 239 La. 473, 118 So. 2d 891, 895 (1960).