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The Federal Civil Rights Act: A Judicial Repeal

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The great import of the *Rylander* case is not found in the definitive words of the court but rather the impetus it provided the state legislature. After forty-six years of existence the phrase "was not proximately caused by the negligence of the employer or his employees" was omitted in the 1959 statute.[33] The section was not otherwise changed. This legislative action is in complete accord with the previous decisions of the Illinois Supreme Court. The question is now absolutely resolved.

[33] Ill. Rev. Stat. (1959) c. 48, § 138.5(b).

THE FEDERAL CIVIL RIGHTS ACT A JUDICIAL REPEAL

INTRODUCTION

Section 1983[1] and Section 1985[2] of the Civil Rights Act were originally enacted in 1871.[3] In the years following, they have been the subject of a great amount of discussion.[4] They have been called "a powerful piece of legislation,"[5] however, recent decisions involving law enforcement officials have tended to repeal any powerful effect they may have had.

Section 1983 gives a cause of action for denial of due process[6] while

[1] 42 U.S.C.A. § 1983 (Supp., 1959) 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 within 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."

[2] 42 U.S.C.A. § 1985 (Supp., 1959) provides: "(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

[3] 17 Stat. 13 (1871), "An Act to Enforce the Provisions of the Fourteenth Amendment."

[4] Consult: Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323 (1952).

[5] Cooper v. Hutchinson, 184 F.2d 119 (C.A. 3rd, 1950).

[6] Ortega v. Ragen, 216 F.2d 561 (C.A.7th, 1954), cert. den. 349 U.S. 940 (1955); McShone v. Moldovan, 172 F.2d 1016 (C.A.6th, 1949); Bottone v. Lindsley, 170 F.2d 705 (C.A.10th, 1948), cert. den. 336 U.S. 944 (1948).

Section 1985 gives a cause of action for denial of equal protection of the laws,[7] but not for denial of due process.[8]

Section 1983 does not mention conspiracy, while Section 1985 does, therefore the Act creates a cause of action for conspiracy to deny equal protection, but not for conspiracy to deny due process.[9]

Neither diversity of citizenship, nor amount in controversy are prerequisite to federal court jurisdiction of the cause of action asserted under the Civil Rights Act.[10] The right to maintain an action under the Act is conferred by the due process clause of the Fourteenth Amendment[11] and by statute.[12] Section 1343[13] provides jurisdiction for the benefit of a plaintiff who otherwise cannot meet the requisite amount in controversy for federal jurisdiction. While most courts have relied on it for jurisdiction, a few courts have entertained an action by basing jurisdiction on Section 1983 itself.[14]

SUFFICIENCY OF THE COMPLAINT

Civil proceedings in vindication of civil rights are governed by the Federal Rules of Civil Procedure.[15] Under these rules the theory of the plaintiff in stating his claim is not of utmost importance.[16] The complaint should not be dismissed on motion of the defendant unless, upon any theory, it appears that the plaintiff would be entitled to no relief under any state of facts that could be proved in support of his claim.[17]

[7] Collins v. Hardyman, 341 U.S. 651 (1951); Whittington v. Johnston, 201 F.2d 810 (C.A.5th, 1953); McNutt v. United Gas, Coke & Chemical Workers of America, 108 F. Supp. 871 (W.D. Ark., 1952).

[8] Lewis v. Brautigam, 227 F.2d 124 (C.A.5th, 1955); Dunn v. Gazzola, 216 F.2d 709 (C.A.1st, 1954).

[9] Mitchell v. Greenberg, 100 F.2d 184 (C.C.A.9th, 1938).

[10] Ortega v. Ragen, 216 F.2d 561 (C.A.7th, 1954), cert. den. 349 U.S. 940 (1955).

[11] Oppenheimer v. Stillwell, 132 F. Supp. 761 (S.D. Cal., 1955).

[12] 28 U.S.C.A. § 1343 (Supp., 1959); 42 U.S.C.A. § 1983 (Supp., 1959).

[13] 28 U.S.C.A. § 1343 (Supp., 1959) provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[14] See Dyer v. Kayuhisa Abe, 138 F. Supp. 220, 227 to 229 (D. Hawaii, 1956); Compare: Kenny v. Fox, 232 F.2d 288 (C.A.6th, 1956), cert. den. 352 U.S. 856 (1956) (jurisdiction based on § 1343); with Geach v. Moynahan, 207 F.2d 714 (C.A.7th, 1953) (jurisdiction based on § 1983).

[15] 28 U.S.C.A. Federal Rules of Civil Procedure, Rule 1 (Supp., 1959); 2 Moore's Federal Practice, para. 1.03, p. 14 (2nd ed., 1959).

[16] Driggers v. Business Men's Assurance Co. of America, 219 F.2d 292 (C.A.5th, 1955).

[17] Des Isles v. Evans, 200 F.2d 614 (C.A.5th, 1952).

In recent years, many complaints alleging violations of civil rights by state law enforcement officers have been dismissed as insufficient.[18] The most recent example of a complaint being dismissed as insufficient is *Monroe v. Pape*.[19] Plaintiff alleged an unreasonable search in the night time, assault and battery, illegal detention for a ten-hour period, and denial of counsel during that period. In dismissing the complaint the district court said that an unreasonable search and seizure by state officers acting under color of law was not a violation of due process, unless evidence was obtained by the search which might later be used against the plaintiff.[20] In so holding the court completely misconstrued the rule on unreasonable searches and seizures as stated in *Wolf v. Colorado*,[21] where although the court was divided on the issue of the admissibility of illegally obtained evidence in a state prosecution, all nine Justices agreed with Justice Frankfurter when he stated:

> The security of one's privacy against arbitrary intrusion by the police . . . which is at the core of the Fourth Amendment . . . is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.[22]

This position of the Court has been reaffirmed in *Irvine v. California*[23] where two Justices recommended immediate criminal prosecution, under the Civil Rights Act,[24] of the state police officers who perpetrated the illegal search and seizure.[25]

[18] Monroe v. Pape, 272 F.2d 365 (C.A.7th, 1959) (alleging unreasonable search, assault and battery, illegal detention); Deloach v. Rogers, 268 F.2d 928 (C.A.5th, 1959) (alleging false arrest and beating by officers acting pursuant to a peace warrant); Stift v. Lynch, 267 F.2d 237 (C.A.7th, 1959) (alleging false arrest and two hour secret detention); Curry v. Ragen, 257 F.2d 449 (C.A.5th, 1958), cert. den. 358 U.S. 851 (1958), reh. den. 358 U.S. 914 (1958) (alleging malicious institution of forcible entry and detainer action by a private citizen. Three policemen acting pursuant to a court order assisted in ejecting plaintiff from his home); Agnew v. Compton, 239 F.2d 226 (C.A.9th, 1956), cert. den. 353 U.S. 959 (1957) (alleging false arrest); Dineen v. Williams, 219 F.2d 428 (C.A.9th, 1955) (alleging false arrest and a twenty hour secret detention); Jennings v. Nester, 217 F.2d 153 (C.A.7th, 1954), cert. den. 349 U.S. 958 (1955) (alleging unreasonable search, secret detention, beating to obtain a confession); Gladstone v. Galton, 145 F.2d 742 (C.C.A.9th, 1944) (alleging arrests, searches and prosecution of plaintiff pursuant to an allegedly unconstitutional ordinance); Egan v. Aurora, 174 F. Supp. 794 (N.D. Ill., 1959), aff'd No. 12738 (C.A.7th, 1960) (alleging false arrest of a political speaker); Mackey v. Chandler, 152 F. Supp. 579 (W.D. S.C., 1957) (alleging unreasonable search and seizure, secret detention and brutality).

[19] 272 F.2d 365 (C.A.7th, 1959).

[20] Transcript of Proceedings on Motion to Dismiss Complaint, 59 C 329 (N.D. Ill., 1959).

[21] 338 U.S. 25 (1949). [22] Ibid., at 27, 28. [23] 347 U.S. 128 (1954).

[24] 18 U.S.C.A. § 242 (Supp., 1959) (The criminal counterpart of § 1983).

[25] Irvine v. California, 347 U.S. 128, 132 (1953); See Frank v. Maryland, 359 U.S. 360 (1959); Brown v. Allen, 344 U.S. 443 (1953); Hanna v. United States, 260 F.2d 723 (App.D.C., 1958); United States v. Benanti, 244 F.2d 389 (C.A.2d, 1957); Jones v. United

In *Stefonelli v. Minard*,[26] although refusing to enjoin the introduction of evidence obtained by an unreasonable search and seizure in a state court proceeding, the Court stated: "[U]nder the very section now envoked [Section 1985(3)], we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages."[27]

Nonetheless the court in *Monroe* relied on *Mackay v. Chandler*[28] and *Jennings v. Nester*.[29] *Mackay* treated the unreasonable search in the following manner:

> The exemption from unreasonable searches and seizures is not one of the privileges and immunities of the citizens of the United States which the Fourteenth Amendment forbids the state to abridge, *nor is it an element of due process of law guaranteed by the latter amendment against state action.*[30]

Jennings held that since the defendant had been retried and the whole record indicated a fair trial, the plaintiff had been accorded due process as required by the Fourteenth Amendment.[31] This position is irreconcilable with both the history of unreasonable searches[32] and with the holding of the Supreme Court in *Wolf*. In fact, such decisions have led writers to state that: ". . . Wolf's intermediate finding signifies little if anything. . . ."[33] "It would seem that the practical effect of the *Wolf* case is virtually to leave for local determination, unimpeded by federal judicial supervision, the matter of making effective a federal guarantee of a basic constitutional immunity."[34] "The net effect of the *Wolf* decision was the recognition of a *basic* constitutional right without any corresponding remedies, a privilege without substance, an immunity without force."[35]

States, 217 F.2d 381 (C.A.8th, 1954); Brown v. United States, 204 F.2d 247 (C.A.6th, 1953); Matter of Woods, 154 F. Supp. 932 (N.D. Cal., 1957); Collins v. Webb, 133 F. Supp. 877 (N.D. Cal., 1955).

[26] 342 U.S. 117 (1951).

[27] Ibid., at 122.

[28] 152 F. Supp. 579 (W.D. S.C., 1957), criticised 10 Stanford L. Rev. 347 (1958).

[29] 217 F.2d 153 (C.A.7th, 1954), cert. den. 349 U.S. 958 (1955), criticised 103 U. of Pa. L. Rev. 1088 (1955).

[30] 152 F. Supp. 579, 582 (W.D. S.C., 1957) (emphasis supplied).

[31] 217 F.2d 153, (C.A.7th, 1954) cert. den. 349 U.S. 958 (1955).

[32] See McDonald v. United States, 335 U.S. 451 (1948).

[33] Kamisar, *Wolf* and *Lustig* Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083, 1109 (1959).

[34] Allen, The Wolf case: Search and Seizure, Federalism and the Civil Liberties, 45 Ill. L. Rev. 1, 9 (1950).

[35] Handler, The Fourth Amendment, Federalism and Mr. Justice Frankfurter, 8 Syracuse L. Rev. 166, 178 (1957).

However, the *Wolf* court did provide a remedy for unreasonable searches and seizures:

> [T]he exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action. . . .[36]

This remedy is the Civil Rights Act. Justice Learned Hand indicated that in order to show a cause of action, the plaintiff need only show a violation by state officers of a privilege secured by federal law.[37] Therefore since *Wolf* holds that freedom from unreasonable searches and seizures is a right protected against state abridgement by the due process clause of the Fourteenth Amendment, the *Monroe* court has compounded the errors of *Mackey* and *Jennings* by saying that it is not such a right. The court of appeals did not even mention *Wolf* in affirming the district court, thus it would seem that on the basis of *Monroe* and *Jennings* the *Wolf* decision has no effect in the Seventh Circuit today.

In direct contrast to *Monroe* is *Davis v. Turner*[38] where the complaint alleged that a sheriff and deputy sheriff entered and searched plaintiff's store without a warrant of any kind, found nothing unlawful, seized and arrested plaintiff and refused to allow her to consult an attorney, struck her, put her in jail and refused to tell her the crime of which she was charged. The Court of Appeals for the Fifth Circuit held the complaint was sufficient to state a cause of action for damages for deprivation of rights by the sheriff and deputy sheriff acting under color of state law. Since the allegations in *Monroe* and *Davis* are so similar it is very difficult to determine why one complaint was sufficient and the other insufficient. The *Davis* court did not consider each allegation separately, nor did the *Monroe* court of appeals. However, the district court treated each separately (e.g., unreasonable search, battery and detention). As to the assault and battery the district court held that it must be alleged that the battery was for purpose of eliciting information and/or confessions.[39] It seems odd that if the plaintiff had confessed as a result of the beatings his confession would have been ruled inadmissible as a violation of due process,[40] and yet the district court would hold that unless the inherently coercive beating produced a confession there would be no violation. Beatings by law enforcement officers acting in the course

[36] 338 U.S. 25, 30, 31 (1948).

[37] Bomar v. Keyes, 162 F.2d 136 (C.C.A. 2d, 1947), cert. den. 332 U.S. 825 (1947).

[38] 197 F.2d 847 (C.A.5th, 1952).

[39] Transcript of Record on Motion to Dismiss at 13, 59 C 539 (N.D. Ill., 1959).

[40] Fikes v. Alabama, 352 U.S. 191 (1957).

of their duties have been held to violate the criminal provisions of the Civil Rights Act.[41] Under Section 1983, it is now well settled that law officers who *do* exact confessions by violence can be held civilly liable.[42]

Although it is not specifically made to appear that the objective of the defendant deputy sheriff was to obtain a confession in the case of *Dye v. Cox*,[43] the plaintiff alleged that the deputy sheriff, acting under color of state law, but without cause, arrested the plaintiff, locked him in the county jail and kept him there overnight, refusing him an opportunity to make bail and beat him while confined to a cell. The court noted that the alleged behavior of the defendant, if true, deprived the plaintiff of the right to be free of arrest except on probable cause, and of his right to bail and to personal safety while in the hands of his jailor. But in dismissing the action, it was held, that to state a cause of action under the civil rights statute as the denial of civil rights, the denial must have been accomplished with the *purpose* of robbing the plaintiff of such rights and that the action could not be maintained in the absence of an *allegation of purposefulness* on the part of the defendant.

By so holding, the court has created judicial legislation and inserted the word "wilfully" where it does not expressly exist. The court relied on *Screws v. United States*[44] where the Criminal Civil Rights Statute[45] was construed and Justice Douglas defined intent in this manner:

> [T]he specific intent required by the Act is an intent to deprive a person of a right which has been made specific, either by express terms of the Constitution or laws of the United States or by decisions interpreting them. . . . *He who defies a decision interpreting the Constitution knows precisely what he is doing.*[46]

Thus the *Dye* court created an intent where it does not exist in the civil section and also made the intent greater than that expressed in *Screws*.

CONCLUSION

Thus, it appears, that there exists in the Seventh Circuit a right without a remedy. Congress enacted the Civil Rights Act of 1871 to provide a

[41] United States v. Jackson, 235 F.2d 925 (C.A.8th, 1956); Screws v. United States, 325 U.S. 91 (1945); United States v. Walker, 216 F.2d 683 (C.A.5th, 1954); United States v. Jones, 207 F.2d 785 (C.A.5th, 1953); Gowdy v. United States, 207 F.2d 730 (C.A.9th, 1953); Clark v. United States, 193 F.2d 294 (C.A.5th, 1951); Koehler v. United States, 189 F.2d 711 (C.A.5th, 1951).

[42] Geach v. Moynahan, 207 F.2d 714 (C.A.7th, 1953).

[43] 125 F. Supp. 714 (D.C. Va., 1954).

[44] 325 U.S. 91 (1945).

[45] Note 24, Supra.

[46] Screws v. United States, 325 U.S. 91, 104, 105 (1945) (emphasis supplied).

remedy for private persons against state officials who deprived them of due process. However, the courts have indulged in mental gymnastics to deprive such persons of a congressionally enacted remedy. There exists the curious situation that a plaintiff may prepare a sufficient complaint in the Fifth Circuit,[47] if he alleges an unreasonable search and seizure, but upon the same facts he cannot prepare a sufficient complaint in the Seventh Circuit.[48] The Fourth Circuit requires a wilful intent greater than that required under the criminal counterpart of the civil action.[49] This situation certainly does not create an impression of uniform enforcement of federal legislation.

The Seventh Circuit has consistently pointed out that the plaintiff is not without remedy in the state courts.[50] However, this is not the problem at issue. The Ninth Circuit has pointed out that the existence of a state remedy under the same facts would not be a bar to the suit under the Civil Rights Act.[51] At best, the situation is in a state of great confusion.

As this paper is being written, *Monroe* is under petition for a writ of certiorari.[52] If certiorari is granted Justice Frankfurter will finally have the opportunity to completely clarify the intermediate finding in *Wolf*, and give the district courts a concrete guide to determine the sufficiency of complaints under the Civil Rights Act.

[47] Davis v. Turner, 197 F.2d 847 (C.A.5th, 1952).

[48] Monroe v. Pape, 272 F.2d 365 (C.A.7th, 1959); Jennings v. Nester 217 F.2d 153 (C.A.7th, 1954)), cert. den. 349 U.S. 958 (1955).

[49] Dye v. Cox, 125 F. Supp. 714 (E.D. Va., 1954).

[50] Egan v. Aurora, No. 12738 (C.A.7th, 1960); Monroe v. Pape, 272 F.2d 365 (C.A.7th, 1959); Jennings v. Nester, 217 F.2d 153 (C.A.7th, 1954).

[51] Romero v. Weakley, 226 F.2d 399 (C.A.9th, 1955); See United States v. Raines, —— U.S. ——, 28 Law Week 4147 (1960).

[52] 28 Law Week 3247 (February 17, 1960) (Docket No. 712).

"CAVEAT MANUFACTURER": ADVERTISEMENTS AS CONSTITUTING EXPRESS WARRANTIES

"Caveat *manufacturer*" may relegate the revered "caveat *emptor*" saw to legal limbo if the holding in a recent case receives approval. The implications of the *Cobb v. American Motors Corp.*[1] decision to big manu-

[1] 19th Judicial District Court, Louisiana, Parish of East Baton Rouge, No. 63,643, Division C (June 10, 1959), appeal pending Supreme Court of Louisiana. It will be noted that the *Cobb* case is the holding of a Louisiana court of first instance; it is being appealed to the Supreme Court of Louisiana, where it probably will be heard at some time late this year. Since the case is unreported and was orally argued without briefs, there is very little written data of an official nature available. Thanks chiefly, however, to an article in Advertising Age (see text and n. 2, infra), and materials furnished by the plaintiff, including his "Trial Memorandum," and notes taken by him and his counsel concerning the judge's reasoning for the decision, the writer was able to com-