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MILITARY LAW-PROVISION OF UNIFORM CODE OF MILITARY JUSTICE WHICH ALLOWS TRIAL BY COURT MARTIAL OR DISCHARGED SERVICEMEN HELD UNCONSTITUTIONAL

NOTES

MILITARY LAW—PROVISION OF UNIFORM CODE OF MILITARY JUSTICE WHICH ALLOWS TRIAL BY COURT MARTIAL OF DISCHARGED SERVICEMEN HELD UNCONSTITUTIONAL.—The United States Supreme Court has held, three justices dissenting, that Article 3a of the Uniform Code of Military Justice which empowers military tribunals to try dischargees for crimes committed in service, deprives discharged soldiers of their constitutional safeguards and violates the Fifth and Sixth Amendments.[1]

Five months after being honorably discharged from the United States Air Force, Robert Toth was arrested in Pittsburgh by military authorities, and charged with the murder of a Korean civilian, committed during his period of services in Korea. At the time of arrest, he no longer had any relationship with the military service, but nevertheless was taken to Korea for a military court martial, pursuant to Article 3a of the Uniform Code of Military Justice.[2]

Habeas corpus proceedings were instituted, and Toth was discharged from custody on the ground that even if the Air Force had authority to apprehend him, the Military Code contained no provision authorizing, without a hearing, his transportation to a point distant from the place where he was apprehended for trial by court martial.[3] The District Court, therefore, found it unnecessary to pass on any constitutional questions. On appeal, the case was reversed, the Court of Appeals holding that the Uniform Code of Military Justice governed, and therefore a preliminary hearing before a civilian tribunal was not a constitutional prerequisite, because the Military Code provided all the necessary machinery for apprehension and transportation for trial.[4]

Article I of the United States Constitution gives to Congress the power to "make Rules for the Government and Regulation of the land and naval Forces."[5] This has been interpreted as giving to Congress "the power to provide for the trial and punishment of military and naval offenses."[6] Court martials, consequently, derive their jurisdiction from and are regulated by Acts of Congress.[7] However, this clause is subject to the operation of the Fifth Amendment, which provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except* in cases arising *in* the land or naval forces."[8] (Emphasis supplied.)

The Supreme Court, in the instant case, held that the exception in this amendment restricts court martial jurisdiction to persons who are *actually members* or part of the armed forces and does not grant Congress general court martial power. It is the business

[1] United States *ex rel.* Toth v. Quarles, 350 U. S. 11, 76 S. Ct. 1, 100 L. Ed. 4 (1955).

[2] Uniform Code of Military Justice, 64 STAT. 109 (1950), 50 U. S. C. § 553 (1952). Article 3(a) provides: ". . . any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

[3] Toth v. Talbott, 114 F. Supp. 468 (D. D. C. 1953).

[4] Talbott v. United States *ex rel.* Toth, 215 F. 2d 22 (D. C. Cir. 1954); see Note, 1 N. Y. L. F. 101 (1955).

[5] U. S. CONST. art. I § 8.

[6] Dynes v. Hoover, 61 U. S. 65, 15 L. Ed. 838 (1858).

[7] *Ibid.*

[8] U. S. CONST. amend. V.

of the federal courts to try such criminal cases, and the trial of civilian ex-servicemen by court martial was held to be an encroachment on the jurisdiction of such federal courts.[9]

Justice Black, speaking for the majority of the court, found "compelling reasons" for construing Article I and the exception to the Fifth Amendment as limiting court martial jurisdiction to those persons actually *in* the armed services. Historically, "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any summary curtailments of the right to a jury trial should be scrutinized with utmost care."[10]

The court found that there were "dangers lurking in military trials" and that military justice does not provide the constitutional safeguards found in Article III of the Constitution[11] and in the Sixth Amendment, which provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ."[12] Civil courts have more independence in passing on life or death than do military tribunals, which do not have the same qualifications that are deemed necessary in the Constitution to afford a fair trial to civilians in federal courts. Military judges are appointed and removed at will, their salaries are not fixed, and in general they are "subject to the will of the executive department which appoints, supervises, and ultimately controls them." There is also a "great difference between trial by jury and trial by selected members of the military forces." Although conceding that "military personnel, because of their training and experience, may be especially competent to try soldiers for infractions of military rules," the Court maintains that "right or wrong, the premise underlying the constitutional method for determining guilt or innocence in the federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury."[13]

The wide coverage of this Act, as well as the vast number of offenses involved, gave the court additional cause for concern. Over three million persons who have become veterans since the Act became effective could be made subject to military jurisdiction and deprived of jury trials, and this number is bound to grow from year to year. Furthermore, a vast variety of offenses are covered by the Act, *e.g.*, murder, conspiracy, contempt toward officials, neglectful loss, damage, or destruction of government property, forgery, assault, fraud, and many others.[14] Noting "the enormous scope of a holding that Congress could subject every ex-serviceman and woman in the land to trial by court martial for any alleged offense committed while in the armed forces," they found "no justification for treating the Act as a mere minor increase of Congressional power to expand military jurisdiction. It is a great change, both actually and potentially."[15]

The Court, therefore, held that the constitutional grant of power to Congress to regulate the armed forces does not empower Congress to deprive persons of trials under constitutional safeguards, and "we are not willing to hold that power to circumvent those safeguards should be inferred . . . military trials should be restricted to the

[9] See note 1, *supra*.

[10] Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1935); Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930); Duncan v. Kahanamoku, 37 U. S. 304, 66 S. Ct. 606, 90 L. Ed. 688 (1946).

[11] U. S. CONST. art. III.

[12] U. S. CONST. amend. VI.

[13] See note 1, *supra*.

[14] Uniform Code of Military Justice, 64 STAT. 133-143 (1950), 50 U. S. C. §§ 671-728 (1952).

[15] United States *ex rel.* Toth v. Quarles, Note 1, *supra*.

narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[16]

Justice Reed, in the dissenting opinion, in which Justices Burton and Minton concurred, interpreted the Fifth and Sixth Amendments as not being applicable to cases *"arising"* in the land or naval forces, and that any other considerations, such as the preferability of civilian courts, or the dangers lurking in military trials, were not valid. "If a case is claimed to exist only after institution of legal proceedings, nevertheless, it arises in the events that give life to the cause of action."[17]

It seems well settled that one who is under sentence for a military offense is subject to military law and trial by court martial for offenses committed during such imprisonment, even when the prior sentence resulted in discharge as a soldier.[18] However, in these cases "the court martial jurisdiction first attached before separation from the service in which event jurisdiction continues until fully exhausted."[19] But the courts have refused to recognize any military jurisdiction over a draftee before his "actual" induction so as to deprive him of the protection of civilian status,[20] and likewise, in the instant case, the court refused to allow military jurisdiction to be extended to civilian ex-soldiers after they had severed *all* relationship with the military and its institutions.

The effect which this decision might have on the morale of those soldiers remaining in service, and the desire for uniform treatment for all accused of crimes committed in service were not regarded by the majority of the court as being controlling considerations. "It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly process disturbed, by giving ex-servicemen the benefit of a civilian court trial . . . army discipline will not be improved by court martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years, or perhaps decades. . . . Consequently, considerations of discipline provide no excuse for new expansion of court martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury."[21]

The decision in the *Toth* case leaves a gap in the law, in that some servicemen can now escape punishment completely, since no court has jurisdiction over them for crimes committed in foreign areas but discovered subsequent to their discharge. The court suggests that Congress can confer jurisdiction upon the federal courts to try such discharged soldiers. Such a statute would be consistent with the Fifth Amendment and would preserve the constitutional separation of military and civil courts.

However, there remains the question of military jurisdiction over civilians who are attached to the military service in official capacities, and of civilian dependents of armed forces personnel, who accompany them in foreign stations. In a recent case, the District Court for the District of Columbia interpreted the decision in the *Toth* case as wiping out all court martial jurisdiction over civilians, and therefore barred a court martial of a serviceman's wife under Article 2(11), who killed her husband in England where he was stationed.[22] Faced with similar facts, a Virginia District Court has reached the opposite conclusion.[23] In view of this conflict, the Supreme Court has granted review in both cases.[24]

[16] *Ibid.*

[17] *Ibid.*

[18] Carter v. McClaughery, 183 U. S. 365, 22 S. Ct. 181, 56 L. Ed. 236 (1902); Kahn v. Anderson, 255 U. S. 1, 41 S. Ct. 224, 67 L. Ed. 469 (1920).

[19] Mosher v. Hunter, 143 F. 2d 745 (10th Cir. 1944).

[20] Billings v. Truesdell, 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917 (1944).

[21] See note 1, *supra.*

[22] Reid v. Covert, 24 U. S. L. WEEK 2238 (D. D. C. Nov. 22, 1955).

[23] Kinsella v. Krueger, 24 U. S. L. WEEK 2317 (S. W. D. Va. Jan. 16, 1956).

[24] 24 U. S. L. WEEK 3239 (Mar. 13, 1956).

CONTRACTS—CORPORATIONS—AGREEMENT DEFINING "BOOK VALUE" OF STOCK CONSTRUED IN LIGHT OF INTENTION OF PARTIES, RATHER THAN IN ACCORD WITH LITERAL MEANING OF LANGUAGE USED IN CONTRACT.—The New York Court of Appeals has recently held, in a case in which it was called upon to interpret a contract which attempted to define the term "book value" as applied to stock in a closely held corporation, that such value should not be established by reference to the literal meaning of the words used in the contract, if such interpretation would be contrary to the obvious intention of the parties.[1]

Two parties, who between them owned all the shares in a corporation, entered into a formal written contract whereby, upon the death of one, his shares would be sold to the survivor "at the book value thereof." In the contract, "book value" was to be determined by the "most recent audit of the books of the corporation provided that such an audit has been made not more than sixty days before the death of such individual."

Defendant's intestate, one of the stockholders, died within 60 days of such an audit, and the plaintiff survivor obtained a decree of specific performance, which was affirmed by the Appellate Division.[2] The case reached the Court of Appeals on the sole issue of the price at which the sale was to be made.

The valuation of two items, inventory and taxes, as related to the term "book value"[3] and this particular "audit of the books"[4] was considered on appeal by the Court of Appeals. The balance sheet resulting from the audit contained, among the current assets, an item, "Merchandise Inventory-estimated . . . $12,001.15." This figure was admittedly not determined by audit, both parties conceding that the actual inventory value at the time was $51,058.00. The so-called "estimated inventory" was submitted to the accountant by the defendant's intestate, and the accountant conceded that he did not audit this item.

At the foot of the balance sheet in issue appeared the following: "Note: Subject to Federal and State Income Taxes and year end adjustments." This note or one of like import appeared wherever the audit report referred to the profit of the interim period involved. The court decided that the valuation of both of the items in question should be governed by well-established fundamentals of contract construction, such as the circumstances surrounding the execution, the purpose of the parties, and a fair and reasonable interpretation of the agreement.[5]

Applying these rules, the court found that the "concededly accurate inventory" should be used. The court reasoned that the parties hereto had attempted to arrange a fair and equitable method whereby the surviving party would buy out the other's interest. Consequently, the court logically inferred that the parties must have intended by this pricing clause to establish a predictable valuation basis, and concluded that an arbitrarily estimated inventory figure would clearly defeat the intent of the parties.

[1] Aron v. Gillman, 309 N. Y. 157, 128 N. E. 2d 284 (1955).

[2] 284 App. Div. 1065, 136 N. Y. S. 2d 291 (2d Dep't 1954).

[3] For the mechanical procedure involved in computing this value, see GERSTENBERG, FINANCIAL ORGANIZATION AND MANAGEMENT, 662 (2d ed. New York 1946). See also, Steinbugler v. Atwater, 289 N. Y. 816, 47 N. E. 2d 432 (1943), which imposes the requirement that book entries be correct, complete, and not in entire disregard of accepted accounting principles.

[4] "Auditing is the systematic and scientific examination and verification of accounting records . . . for the purposes of (1) ascertaining the accuracy and integrity of the accounting. . . ." HOLMES, AUDITING PRINCIPLES AND PROCEDURE, 1 (Rev. ed. New York 1946).

[5] 3 WILLISTON, CONTRACTS §§ 1780-788 (2d ed. New York 1936); RESTATEMENT, CONTRACTS §§ 235, 236 (1932).

The court applied similar reasoning to the problem of income tax liability. It considered taxes on income as a present-day fact of economic life, and found that the entire predictable federal and state income tax liability on the balance sheet date should be deducted as a liability before computing book value. The phase of the decision concerning tax liability is straightforward and does not resolve any novel questions (the two dissenting justices concurring with the majority on this issue), inasmuch as the audit report as presented was expressly made "Subject to Federal and State Income Taxes. . . ." From this point of view the book value as shown by audit could easily be interpreted to mean net asset value less the accurately determinable taxes to which the report is subject. The inclusion of taxes on income as liabilities on an interim balance sheet follows the line of generally accepted accounting practice.[6]

A more difficult problem left open by this decision might arise if the inventory discrepancy were known to have existed prior to the most recent tax closing. In such a situation, the necessity of considering prior tax arrearages as an additional liability would also have to be weighed.[7] Moreover, if the business involved were highly seasonable, accurate determination at an interim date, of the actual tax liability incurred during that interim period, would be difficult, if not impossible.

In deciding to discard the estimated inventory figure contained in the audit report, the court was faced with another problem. The term "book value" is difficult to define practically. An accepted method of computing book value per share is to add surplus to capital stock and divide the total by the number of shares.[8] However, this general solution was of little help in this case. The problem was not how to calculate book value using the figures as shown on the audit report, but rather whether the figures as shown by the audit report were to govern in the determination of book value in light of two facts. First, the parties had a legally binding agreement that the book value "shall be determined by the most recent audit of the books." Second, the valuation in this audit report of a material item was admittedly not in keeping with the facts.

Prior decisions give no clear-cut answer to this problem. Authority could be cited to support the proposition that the courts should look beyond the books of account to give effect to assets or liabilities known to be in existence but not recorded on the books.[9] However, none of these decisions had the effect of altering book value in the face of an agreement that expressly defined the term by referring to a particular report, one of the purposes of the report being to implement that very agreement.

This decision emphasizes the necessity for precise draftsmanship in agreements of this type. If the parties at the time of making their contract desire to be bound by the value as shown in a designated report, or if they desire to agree upon an arbitrarily stated figure, this fact must be clearly set forth in the agreement. If this is not done the parties may find the court questioning the value they have previously agreed upon by their express contract.

[6] PATON, ACCOUNTANTS' HANDBOOK, 143 (3d ed. New York 1946).

[7] *Cf.* Succession of Warren, 162 La. 649, 110 So. 891 (1927), in which the court considered disputed income tax claims as liabilities in determining book value.

[8] See note 3, *supra.*

[9] Edhart v. Rott, 36 N. D. 221, 162 N. W. 302 (1917) (Accrued interest included in bank's assets); Gurley v. Woodbury, 177 N. C. 70, 97 S. E. 754 (1919) (Worthless assets on books excluded); Hollister v. Fiedler, 22 N. J. Super. 439, 92 A. 2d 52 (1952) (Value of corporate records and lists added to assets); Hagan v. Dundore, 187 Md. 430, 59 A. 2d 570 (1947) (Abnormal depreciation allowed by tax laws adjusted in computation of book value).

TORTS—UNITED STATES LIABLE UNDER FTCA FOR COAST GUARD'S NEGLIGENCE IN MAINTAINING LIGHTHOUSE.—The United States Supreme Court, reversing a judgment of the United States Court of Appeals for the Fifth Circuit, has held that the United States is liable under the Federal Tort Claims Act for damages caused by the negligence of the Coast Guard in maintaining and operating a lighthouse near the mouth of the Mississippi.[1]

The Indian Towing Company brought an action under the Federal Tort Claims Act[2] for property damages resulting from the "failure of responsible Coast Guard personnel to check the battery and the sun relay system which operated the light; the failure of the Chief Petty Officer who checked the lighthouse on September 7, 1951, to make a proper examination of the connections which were out in the weather; the failure to repair the light or give warning that the light was not operating; and that there was a loose connection which could have been discovered upon proper inspection."

The United States moved to dismiss this suit on the ground that it had not waived its immunity from such an action by passage of the Federal Tort Claims Act. The United States District Court for the Eastern District of Louisiana granted this motion, and the dismissal was affirmed by the Court of Appeals for the Fifth Circuit.[3] This judgment was first affirmed by an equally divided Supreme Court,[4] but on rehearing, was reversed and the case remanded to the District Court for further proceeding.[5]

The question involved here was the extent of the government's liability under the FTCA[6] at what this court has characterized the "operational level" of government activity.

The Government contended that the language of sections 2674 and 2680 imposing liability "in the same manner and to the same extent as a private individual under like circumstances . . ."[7] must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of "uniquely governmental functions." The District Court upheld the Government's position, relying on the cases of *Dalehite* v. *United States*,[8] and *Feres* v. *United States*.[9]

[1] Indian Towing Co. v. United States, 350 U. S. 61 (1955).

[2] Federal Tort Claims Act, 63 STAT. 101 (1949), 28 U. S. C. §§ 1346(b), 2784, 2680(a) (1952).

[3] 211 F. 2d 886 (5th Cir. 1954).

[4] 349 U. S. 902, 75 S. Ct. 575, 99 L. Ed. 1239 (1955).

[5] See note 2 *supra*, § 1346(b): ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[6] Sec. 2674: "The United States shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

[7] Sec. 2680(a): "The provisions of this chapter and section 1346(b) of this title shall not apply to:

(a) Any claim based on an act or omission of an employee of the government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty or the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

[8] Dalehite v. United States, 346 U. S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).

[9] Feres v. United States, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

In *Feres* v. *United States,* the Court passed upon the applicability of the Act to claims by members of the armed services injured through the negligence of other servicemen. The court in that case said: "One obvious shortcoming in these claims is that the plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know no American law which ever has permitted a soldier to recover for negligence, against either his superior officer or the government he is serving. Nor is there any liability 'under like circumstances,' for no private individual has the power to conscript or mobilize a private army with such authorities over persons as the government vests in echelons of command. . . . But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few circumstances might create. We find no parallel liability before, and we think no new one has been created by this act."[10]

Dalehite v. *United States* was a case involving the liability of the United States for negligence of the Coast Guard in fighting fire. The Coast Guard had been found negligent in its fire-fighting duties by the trial court. The court said, in holding the United States not liable, that the FTCA "did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. . . ." The act limited United States liability to "the same manner and to the same extent as a private individual under like circumstances."[11]

However, when the case reached the Supreme Court, these arguments and analogies were not viewed as controlling. The high court said that "if the United States were to permit the operation of private lighthouses, the govenment's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operates a lighthouse and this Court would be attributing bizarre motives to Congress to assert that it was predicating liability on such a completely fortuitous circumstance, the presence or absence of identical private activity."[12]

The Court felt that while all Government activity can be characterized as "uniquely governmental" in the sense that it is performed by the Government, it is still difficult to think of any government activity on the "operational level," which is "uniquely governmental," in the sense that it has not at one time or another been, or could not conceivably be, privately performed.

In considering legislative intent and history, the Court said that the broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances similar to those in which a private person would be liable, and to avoid the legislative burden of individual private laws. In the tradition of John Marshall, Justice Frankfurter said that the court must not promote profligacy by careless construction, but neither should it be a self-constituted guardian of the Treasury.

The Coast Guard had statutory authority to erect a lighthouse, although it had no statutory duty to do so. Once it exercised its discretion to operate a light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard is shown on a trial to have failed in its duty, and

[10] *Ibid.*

[11] See note 8, *supra.*

[12] 14 U. S. C. § 81 (1952) authorized the Coast Guard to operate the lighthouse. Operation by private citizens is forbidden, except by authority of the Coast Guard.

damage was thereby caused, the United States will be liable under the Federal Tort Claims Act.[13]

INTERSTATE COMMERCE ACT—RACIAL SEGREGATION OF INTERSTATE PASSENGERS RULED INVALID BY ICC.—The Interstate Commerce Commission has ruled that racial segregation of interstate passengers on railroad cars or in station waiting rooms is a violation of the Interstate Commerce Act, Section 3(1).[1] This section makes it unlawful for any common carrier to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[2] In so ruling, the Commission determined that such segregation caused the complaining Negro group a "prejudice or disadvantage," citing the case of *Brown* v. *Board of Education*[3] as having a direct bearing on the issue because of the United States Supreme Court's adoption in that case of the Kansas District Court's statement that "the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group."[4]

The defendant railroad's contention was that the school segregation cases[5] were confined to the field of education, and their holdings could not be extended to cover transportation.[6] The Commission, however, found a basis for such extension in the language used in *Bolling* v. *Sharpe*.[7] There, the Supreme Court warned that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence Constitutionally suspect."[8] Deciding that the prejudice and disadvantage was undue and unreasonable within the meaning of the ICA, the Commission stated that "the disadvantage to a traveler who is assigned accommodations or facilities so designated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable."

The question of segregation has a long history in the Interstate Commerce Commission, dating back to 1887, only three months after the Commission was created. At that time, the Commission upheld the "separate but equal" doctrine: segregation was permissible so long as the treatment and accommodations were on equal terms for all.[9] It was then held that segregation on equal terms did not create undue prejudice or unjust preference.[10] Ironically, the Commission, in deciding the present case, relied on these early adverse decisions to reject the railroad's contention that the functions of the Commission were "too narrow to permit a decision influenced by considerations of public policy." These early cases also took into account "present conditions", which in 1887 included segregation in District of Columbia schools, the United States Army, and trade unions. All have since been discontinued.

[13] See United States v. Union Trust Co., 350 U. S. 907 (1955), *aff'g* 221 F. 2d 62 (D. C. Cir. 1955).

[1] N. A. A. C. P. v. St. Louis-San Francisco Ry. Co., N. Y. Times, November 26, 1955; 24 U. S. L. WEEK 2235.

[2] Interstate Commerce Act § 3(1), 24 Stat. 379 (1887), 49 U. S. C. § 3(1) (1952).

[3] 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

[4] See note 3, *supra*, at 494, 74 S. Ct. at 695, 98 L. Ed. at 880.

[5] *Id.* at 497, 74 S. Ct. at 693, 98 L. Ed. at 884.

[6] See note 3, *supra*.

[7] See note 5, *supra, loc. cit.*

[8] *Ibid.*

[9] Council v. Western & Atlantic Ry. Co., 1 I. C. C. 339 (1887); Heard v. Georgia Ry. Co., 1 I. C. C. 428 (1887).

[10] See Council v. Western & Atlantic Ry. Co., note 9, *supra*, at 339.

Nine years after these Interstate Commerce Commission decisions, the Supreme Court, in *Plessy* v. *Ferguson*,[11] held that the "separate but equal" doctrine was not in conflict with either the Thirteenth Amendment[12] or the Fourteenth Amendment,[13] over the dissent of Mr. Justice Harlan. The dissent declared our Constitution to be "color-blind"[14] and urged that "the arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[15] Further, Mr. Justice Harlan prophesied that time would prove the *Plessy* v. *Ferguson* decision as pernicious as that in the *Dred Scott* case.[16]

The subsequent years produced a volume of litigation. Finally, the force of the decision in the *Plessy* case began to be lessened by the extremely strict standards of equality imposed by the Court with regard to sleeping cars[17] and dining cars.[18] Although these cases upheld the "separate but equal" doctrine, it was enforced so strictly that the railroads were forced to discontinue segregation in dining and sleeping cars, or else suffer greatly increased operating expenses. They chose the more economical course.

It should be noted that the "separate but equal" doctrine has been rejected only as applied to passengers on *interstate* carriers. The ruling does not affect intrastate carriers, which are regulated by state statutes. Many of such statutes require intrastate carriers within their jurisdiction to maintain segregation on a separate but equal basis.[19]

Therefore, as of January 10, 1956, the separation of the white and Negro races into particular waiting rooms and railroad cars was banned as applied to interstate passengers.[20] But, as pointed out above, the constitutional question is not resolved.

ANTITRUST LAW—BUSINESS WHOLLY LOCAL IN CHARACTER HELD TO PRODUCE EFFECTS CONDEMNED BY SHERMAN ACT.—The Federal Government brought a civil antitrust action against the International Boxing Club of New York, Inc., a corporation engaged in the business of promoting professional championship boxing contests on a multi-state basis, and selling rights to televise, broadcast, and film such contests for interstate transmission. In determining that such activity constituted interstate commerce, and was therefore subject to Sherman Act sanctions, the United States Supreme Court held that ". . . a boxing match, like the showing of a motion picture (*United States* v. *Crescent Amusement Co.*),[1] or the performance of a vaudeville act (*Hart* v. *B. F. Keith Vaudeville Exchange*),[2] or the performance of a legitimate stage attraction (*United States* v. *Shubert et al.*),[3] is, of course, a local affair. But that fact alone does not bar application

11 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).
12 U. S. CONST. amend. XIII.
13 U. S. CONST. amend. XIV.
14 See note 11, *supra*, at 559, 16 S. Ct. at 1160, 41 L. Ed. at 263.
15 *Id.* at 562, 16 S. Ct. at 1163, 41 L. Ed. at 264.
16 See note 14, *supra*.
17 Mitchell v. United States, 313 U. S. 80, 61 S. Ct. 873, 85 L. Ed. 1201 (1941).
18 Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1302 (1950).
19 S. C. CODE § 58-719. Laws of this type are to be found generally in the Southern states.
20 See note 1, *supra*.

1 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944).
2 262 U. S. 271, 43 S. Ct. 540, 67 L. Ed. 977 (1923).
3 348 U. S. 222, 75 S. Ct. 277, 99 L. Ed. 279 (1955); see, also, Note, 1 N. Y. L. F. 362 (1955).

of the Sherman Act to a business based on the promotion of such matches if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. . . ."[4] The promoting corporation derived 25 per cent of its income from sale of interstate broadcast and film rights.

This was not the first case in which the Supreme Court has held that a business which is local in character may have a side effect on interstate commerce which is condemned by the Sherman Act. In 1953, the Supreme Court had considered the case of *United States* v. *Employing Plasterers Association of Chicago*,[5] in which the government charged a Chicago trade association of plastering contractors and a local labor union of plasterers with violation of the Sherman Act.[6] The complaint alleged that these contractors and union members employed by them did approximately 60 per cent of the plastering contracting business in the Chicago area. Substantial qualities of the necessary materials were produced in other states, bought by Illinois dealers, and shipped into Illinois, going either to the place of business of the dealers or directly to job sites for use by the plastering contractors under arrangements with the dealers. The effect was a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. The violation alleged was that since 1938 the Chicago defendants had acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area, and to bar entry of new local contractors without approval by a private examining board set up by the union.

The trial court did not question that the allegations showed a combination to restrain competition among Chicago plastering contractors, but considered these allegations to be "wholly a charge of local restrain and monopoly," not reached by the Sherman Act. However, the Supreme Court reversed, holding that the complaint plainly charged that the effect of all these local restraints was to restrain interstate commerce, because the restraint of local plastering work adversely affected the flow of materials.

An earlier Supreme Court had decided otherwise on similar facts. In *Levering and Garrigues Co.* v. *Morrin*,[7] a federal court was held to be without jurisdiction in a suit to enjoin a labor organization from conspiracy to compel complainants to employ union labor exclusively in the fabrication and erection of structural iron and steel transported from other states, the interstate shipment of steel being regarded as having only an incidental, indirect, and remote connection with the conspiracy to suppress local building operations, and therefore was held to provide no basis for federal jurisdiction.

In *Gundersheimer's* v. *Bakery and Confectionery Workers' Union*,[8] the District of Columbia Court of Appeals held that the use of conventional, peaceful activities by a union in an attempt to secure more jobs for its members was not a violation of the Sherman Act, whatever effect on interstate commerce might have been intended.

It appears that the fact that a course of activity or a particular practice is wholly local in nature does not today bar the application of the Sherman Act if there is any appreciable restraint, however collateral, on interstate commerce. What in years past was only an "incidental, indirect, and remote" effect has come to be viewed as sufficiently proximate to confer Sherman Act jurisdiction.

[4] 348 U. S. 236, 75 S. Ct. 259, 99 L. Ed. 290 (1955).
[5] 26 STAT. 209 (1890), 15 U. S. C. § 1 (1952).
[6] 347 U. S. 186, 74 S. Ct. 452, 98 L. Ed. 618 (1953).
[7] 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062 (1933).
[8] 119 F. 2d 205 (D. C. Cir. 1941).

DOMESTIC RELATIONS—COURT REFUSES TO ENJOIN HUSBAND FROM PROSECUTING FOREIGN DIVORCE ACTION WHICH CAN RESULT ONLY IN VOID DECREE, ON GROUND THAT WIFE HAS ADEQUATE REMEDY AT LAW IN ACTION FOR DECLARATORY JUDGMENT.—The New York Court of Appeals, in *Rosenbaum* v. *Rosenbaum*,[1] has sustained the dismissal of an action brought by a wife to enjoin her husband from prosecuting a divorce action in a foreign country, where the foreign court patently lacked jurisdiction.

A wife obtained a judgment of separation in New York, which awarded her $9,000 a year for her support and the support of their two minor children. Both were New York residents. The husband subsequently went to Mexico, where he remained one day, for the purpose of instituting a divorce action, and immediately returned to New York to resume the practice of his profession. The wife thereupon brought an action to restrain him from proceeding with the Mexican divorce action, alleging that her rights would be endangered and violated by the Mexican decree and that no adequate remedy at law existed.

Upon appeal from the judgment of the Appellate Division,[2] which reversed the Supreme Court's dismissal of the action[3] and approved the granting of injunctive relief, the Court of Appeals, in a four to three decision, held that under the facts alleged in the wife's complaint, the Mexican divorce decree would be a nullity, having no effect upon her marital status and property rights under New York law, and that an adequate legal remedy would be available to her in the form of an action for a declaratory judgment.[4] Therefore, the court found no sufficient grounds for the issuance of an injunction.

Under general rules of equity, a court of one state or country, which has acquired jurisdiction over the parties, has the power to enjoin them from proceeding with an action in another state or country, particularly where the parties are citizens or residents of the State, or with respect to a controversy between the same parties where the forum's jurisdiction attached prior to the foreign litigation. This power, however, is used sparingly and only where injunctive relief is clearly required to prevent manifest wrong and injustice.[5] Attempts to invoke this power to enjoin the prosecution of foreign divorces have usually been based on one or more of the following grounds: that the foreign divorce action constitutes an evasion of the laws of the common domicil; that the attempted establishment of residence in the foreign jurisdiction by the party seeking the divorce is not bona fide and constitutes a fraud upon the foreign court and upon the rights of the other party; that the foreign divorce action is vexatious to the party seeking the injunction and will cause great and unnecessary hardship and inconvenience in defending it; that the foreign divorce decree would prejudicially affect the property rights of the party seeking the injunction and would unjustly submit that party to the indignities of a divorce not justified by the laws of the common domicil; and that the courts of the state in which the injunction is sought first acquired jurisdiction to litigate the same issues.[6]

As long ago as 1850 it was held that the courts of New York could enjoin a New York resident from prosecuting a divorce action in Pennsylvania, where the resident was at the time in New York and subject to the jurisdiction of its courts.[7] In succeeding

1 Rosenbaum v. Rosenbaum, 309 N. Y. 371 (1955).
2 Rosenbaum v. Rosenbaum, 285 App. Div. 427, 138 N. Y. S. 2d 885 (1st Dep't 1955).
3 Rosenbaum v. Rosenbaum, 136 N. Y. S. 2d 734 (Sup. Ct. N. Y. Co. 1954).
4 N. Y. CIV. PRAC. ACT § 473.
5 43 C. J. S. 499 (1945).
6 128 A. L. R. 1467 N. (1940).
7 Forrest v. Forrest, 2 Edm. Sel. Cas. 180 (N. Y. Sp. Term 1850).

years a number of injunctions were granted to restrain the prosecution of divorce actions in other states.[8] In 1927, the Appellate Division, First Department, in *Greenberg* v. *Greenberg*,[9] held that it was also proper to grant injunctive relief to restrain a husband from evading the laws of New York by obtaining a Mexican divorce on grounds not recognized in this state, despite the fact that the Mexican decree would be void in New York. Following this decision the lower courts granted injunctions with respect to divorce actions in foreign countries,[10] as well as in foreign states. But where a divorce action in a foreign state was merely threatened, with no actual steps taken to obtain a decree, injunctive relief was denied.[11]

This liberality was modified in 1940, when the Court of Appeals, in *Goldstein* v. *Goldstein*,[12] ruled that an injunction was not justified to restrain a husband from proceeding with a Florida divorce, where the wife's complaint alleged both parties were residents of New York. On these facts, said the court, a Florida decree would be a nullity and the possibility that the husband might remarry on the strength of that decree, annoying as it might be to the wife, was not sufficient reason for equitable intervention. It is to be borne in mind that at the time of the *Goldstein* decision, the rule of *Haddock* v. *Haddock*[13] was still in effect, under which a state did not have to recognize a decree of a sister state, not the matrimonial domicil, in an ex parte divorce action. However, in 1942 the United States Supreme Court, in the first case of *Williams* v. *North Carolina*,[14] overruled *Haddock* v. *Haddock* and declared that under the full faith and credit clause of the Federal Constitution,[15] such divorce decrees are entitled to a presumption of validity, even though they may subsequently be attacked collaterally on the ground that the divorcing state did not have jurisdiction because the divorcing spouse did not have a bona fide domicil there. As a result of this decision, the sister-state decree was prima facie valid until successfully attacked in the New York courts, and could be used to jeopardize the rights of the spouse remaining in New York. No longer could the New York courts refer to such decrees as "nullities." Consequently, the reasoning of the *Goldstein* case was rendered invalid as applied to sister-state divorce actions, and after the *Williams* decision the New York courts again granted injunctions in proper situations,[16] the theory being that the party seeking injunctive relief should not have to bear the burden of overcoming the foreign court's finding of domicil in the foreign jurisdiction. Injunctive relief has been approved also with respect to divorce actions in United States territories, since the decrees of territorial courts are considered to fall within the full faith and credit provision of the Constitution.[17]

[8] Gwathmey v. Gwathmey, 116 Misc. 85, 190 N. Y. Supp. 199 (Sup. Ct. N. Y. Special Term 1921); Johnson v. Johnson, 146 Misc. 93, 261 N. Y. Supp. 523 (Sup. Ct. Schenectedy Co. 1933); Dublin v. Dublin, 150 Misc. 694, 270 N. Y. Supp. 22 (Sup. Ct. Erie Co. 1934).

[9] Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. Supp. 87 (1st Dep't 1927).

[10] Jeffe v. Jeffe, 168 Misc. 123, 4 N. Y. S. 2d 628 (Sup. Ct. Kings Co. 1938).

[11] De Raay v. De Raay, 280 N. Y. 822, 21 N. E. 2d 879 (1939).

[12] Goldstein v. Goldstein, 283 N. Y. 146, 27 N. E. 2d 969 (1940).

[13] Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867 (1906).

[14] Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

[15] U. S. CONST. art. VI, § 1.

[16] Holmes v. Holmes, 46 N. Y. S. 2d 628 (Sup. Ct. Nassau Co. 1944); Ciacco v. Ciacco, 50 N. Y. S. 2d 398 (Sup. Ct. Bronx Co. 1944); Pereira v. Pereira, 272 App. Div. 104, 70 N. Y. S. 2d 763 (1st Dep't 1947); Barzilay v. Barzilay, 75 N. Y. S. 2d 428 (Sup. Ct. Kings Co. 1948); Hammer v. Hammer, 303 N. Y. 481, 104 N. E. 2d 864 (1952).

[17] Selkowitz v. Selkowitz, 179 Misc. 608, 40 N. Y. S. 2d 9 (Sup. Ct. Bronx Co. 1943); Garvin v. Garvin, 302 N. Y. 96, 96 N. E. 2d 721 (1951).

Divorce actions in a foreign country, however, are not included within the full faith and credit provisions, and while they may be recognized under the rules of comity, New York courts have the power to deny them even prima facie validity if they contravene public policy, recitals of residence on the face of the decrees notwithstanding.[18] Since the *Goldstein* decision, the lower courts of the state have denied injunctions in cases involving divorce actions brought outside the United States, both where the foreign actions were of the "mail-order" variety,[19] and where, as in the instant case, the plaintiff in the divorce action went personally to the foreign country to institute the proceedings.[20] The lower courts have reasoned that the rule of the *Goldstein* case, that an injunction will not issue to restrain the procurement of a foreign divorce void for want of jurisdiction in the foreign court, still applies, after the *Williams* decision, to these situations. This reasoning has now been approved by the Court of Appeals.

The Appellate Division was of the opinion that an injunction should be granted in the *Rosenbaum* case because even an invalid Mexican divorce decree could be used to cause the wife expense and litigation and, should the husband remarry on the strength of that decree, as he planned to do, his establishment of another household and assumption of additional obligations would endanger the social and financial security of the wife and children. The three-judge minority of the Court of Appeals contended, in addition, that the Mexican divorce decree would not be invalid until a New York court declared it to be so. But the majority of the court held that the decree would be "a clear legal nullity", and did not agree that these considerations warranted "the drastic relief of injunction."

[18] See Caldwell v. Caldwell, 298 N. Y. 146, 81 N. E. 2d 60 (1948).

[19] Newman v. Newman, 181 Misc. 256, 44 N. Y. S. 2d 525 (Sup. Ct. Kings Co. 1943); Armetta v. Armetta, 68 N. Y. S. 2d 880 (Sup. Ct. Kings Co. 1947).

[20] Hess v. Hess, 136 N. Y. S. 2d 163 (Sup. Ct. N. Y. Co. 1950); Winikoff v. Winikoff, 136 N. Y. S. 2d 161 (Sup. Ct. Bronx Co. 1950); Goodstein v. Goodstein, 134 N. Y. S. 2d 385 (Sup. Ct. Special Term Part I 1951); Borax v. Borax, 136 N. Y. S. 2d 164 (Sup. Ct. N. Y. Co. 1952); Sanguinetti v. Sanguinetti, 138 N. Y. S. 2d 312 (Sup. Ct. N. Y. Co. 1953); Lipman v. Lipman, 138 N. Y. S. 2d 310 (Sup. Ct. N. Y. Co. 1955).