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Prohibition Searches by New York State Police [Gambino v. United States, 48 Sup Ct 137]

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Recommended Citation

James Parker Hall, "Prohibition Searches by New York State Police [Gambino v. United States, 48 Sup Ct 137]," 1 Lincoln Law Review 7 (1928).

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lously enforced the principle that a public officer may not make a contract in his official capacity in which he is personally interested. (124 M. 761.) Such contracts entered into by officials in their individual capacity are against public policy.

In *Ryszka vs. Board of Education* (126 Misc. 622) a member of the school board in the city of Lackawanna sold his services indirectly to the school board in repairing and repainting the school house. Judge Harris says concerning such a contract:

"In my opinion the arrangement made in reference to the employment of Bromley (member of school board) was one that should not have been made, as it violated the law that a public servant while in the discharge of his public duty may not assume a private duty in conflict with his duty to the public. And if this were an action on the contract for payment of the contract price I would feel compelled to dismiss the complaint." However, this was not the issue and is only *dicta* here.

In *Heughes vs. Board of Education* (37 A. D. 180) Young, a member of the school board of the city of Rochester, indirectly entered into a contract with the defendant to furnish a number of iron gates for a public school in said city. A similar provision to Sec. 1868 of the Penal Law was contained in the charter of the city of Rochester. After citing this and Sec. 1868 of the Penal Law, the court in holding such contract was an unlawful act interpreted such provisions as being "manifestly for the protection of the public and to relieve persons who occupy positions of public trust from any temptation to encourage by their official action and expenditure of public moneys in an extravagant, wasteful and unnecessary manner in order that some profit may thereby accrue to themselves as individuals. It is consequently a provision which is founded upon principles of public policy, and one which the courts should enforce with the greatest rigor without regard to the effects of its enforcement upon individual suitors."

In construing the last part of Sec. 1868 of the Penal Law relative to audit or approval by the commissioner of education an opinion of the Attorney General in 1914 holds in substance that a trustee of a State Normal School who is interested in contracts to furnish services and supplies to the school does not violate this section

where his bill is subject to audit by the commissioner of education.

There are any number of cases in which a member of the board of supervisors in his individual capacity cannot sell goods to the board. By analogous reasoning this rule might also apply to a member of the school board.

A typical case is *People ex rel Schenectady Illuminating Co. vs. Board Supervisors*. 166 A. D. 758, affirming 88 Misc. 226. Here one Carr who is a member of the board of supervisors is also a stockholder, secretary and treasurer of the Schenectady Illuminating Co. The defendant corporation sold Mazda lamps at the fair market value of \$7.44 to the supervisors. No fraud is charged. The court here sets aside the contract as void but does not find Carr guilty of a misdemeanor Sec. 1868 of the Penal Law, on the grounds that

"A law, which existed before the statute existed, forbade the contract. A principle, if not a statute, has been violated in this instance."

See also:

Matter of Plattsburg Pub. Co. vs. Looby
124 M. 761.

Beebe vs. Supervisors of Sullivan Co.
64 Hun. 277.

In *Matter of Contracts made by Town Officers*, 32 St. Reports 471.

People vs. Stoll 243 N. Y. 453.

Matter of Lane, 34 St. Reports 552.

RECENT CASES OF INTEREST

CIVIL RIGHTS

Gambino vs. United States,
72 L. ed (139)

New York state troopers, without warrant, searched Gambino's automobile (while it was occupied by Gambino) and found and seized intoxicating liquor. Held for violation of the National Prohibition Act, the defendants moved for suppression of the liquor as evidence, asserting the search to be in violation of the 4th, 5th and 6th Amendments to the Federal Constitution. It was decided that although the troopers were not agents of the United States, their relation to the Federal prosecution was such as to require the exclusion of the

evidence wrongfully obtained. The circumstance that from the decision appeared controlling was that New York State had no prohibition act and the troopers were acting *solely* in prosecution of the Federal offense. The result, it seems, would have been otherwise if New York had not repealed its enforcement act. The distinction, although convenient, is somewhat artificial.

Evidence—Res Gestae—Hill vs. Erie R. Co.—A. D.—224 N. Y. S. 640.

Plaintiff's intestate was shot in defendant's freight yard. In response to call the ambulance and chaplain of the Emergency Hospital were at the freight yard five minutes after the call was received. A detective of defendant approached the ambulance and guided the chaplain to the injured boy who was obviously in great pain and the chaplain was permitted to testify over objection and exception that the boy then said to the detective, "What did you shoot me for? I didn't do nothing."

Judge Crouch writing for the majority of the court sets forth at great length that various periods of time might have elapsed after the shooting; and the statement, concerning which there is no evidence that "the boy's will during a very considerable interval was not dormant, was therefore narrative." Presiding Judge Hubbs and Judge Sears dissent.

HUSBAND AND WIFE — ACTION FOR PERSONAL INJURY

Allen vs. Allen, 246 N. Y. (Adv.)

The question arose whether an action by a wife against her husband for malicious prosecution could be maintained under Section 57 of the Domestic Relations Law. Five Judges voted *without opinion* that such an action could not be maintained and that the rule imposed in *Schultz vs. Schultz* (89 N. Y. 644), also *without opinion*, remains unchanged.

The dissenting opinion of Judge Pound, in which Judge Andrews concurred, is an interesting and spirited assumption of "the gallant duty of setting the law free to redress, by civil actions, all the domestic disputes of husband and wife."

A most vigorous and persuasive portion of Judge Pound's opinion is that in which he discusses the *stare decisis* rule: "We are now . . . enjoined to refer to cases already adjudicated. The law is said to be established by the express decision of this Court that the action cannot be maintained. This argument, if applicable, is weighty but not conclusive . . . When time makes ancient rules of personal rights and remedies uncouth, illogical and productive of harm, they need not be inexorably insisted upon. Better protection may be given to such rights in the future."

The *Schultz vs. Schultz* case had under consideration a provision of the Married Women's Act of 1860 which was repealed in 1880, while the *Allen vs. Allen* case arose under a law passed in 1890, now Section 57 of the Domestic Relations Law. "The Court is thus set free to examine the question not primarily by the silence of the majority in the *Schultz* case, the lapse of time and the conflict of authority . . . but by the subsequent change in the language of the statutes, which requires a new consideration of the factors that determine the present legislative intent."

There is much force in Judge Pound's declaration that "consistency would seem to dictate that with the wide grant of a legal entity to the wife" (conferred by Section 57 of the Domestic Relations Law) "the legislature should have excluded her right of action against her husband by clear words." It would have been easy for the Legislature to have made an exception if it had intended one. A husband may not "lawfully beat his wife, maliciously injure her reputation or prosecute her criminally to gratify his malice." When then should the wife be denied a remedy by the "exaggerated influence of an outgrown fiction" that husband and wife are one?

The discussion of the language of the statutes referred to in the opinion of Judge Pound is somewhat general but it would seem that the Court of Appeals might have voted with Judges Pound and Andrews in this matter, especially since the case on which they had otherwise to rest, *Schultz vs. Schultz*, *supra*, was one in which the Court had without opinion by a divided vote reversed an Appellate Division finding. To the Legislature now is left the "gallant duty."