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Constitutionality of Special Bills for Private Relief

Harold L. Mai

a foreign country in which he is staying temporarily unless he makes his home temporarily therein, identifying himself in some degree with the customs and lives under and within such customs."[20]

The United States District Court for the District of Wyoming, speaking through Kennedy, D. J., said that "in all questions touching the determination of residence or domicile of an individual it has always been a cardinal principle laid down by the courts that the intention of the person whose residence is being considered, is most persuasive."[21] Weight is given to declarations and motives. However, statements and declarations even if made under oath, for example, for immigration purposes or in income tax returns, are disregarded if they appear to be in conflict with a person's conduct.[22] A declared intention to become a citizen is material,[23] but an intent not to settle permanently is not sufficient to keep one from being a resident.[24]

It has been seen that the intent of Congress in providing section 116 (a) was to promote free competition with other countries whose nationals were exempt from income tax and to simultaneously avoid an undesirable escape from taxation. The cases are all decided on a fine line. Though the facts of a case may cause it to fall within the exemption regulation physically, they must also fall within the regulation mentally, that is to say; certain facts which would otherwise tend to establish residency, must be consistent with the intent to become a resident, within the intent and meaning of section 116 (a). In the instant case the taxpayer was not concerned with becoming a resident and, under the facts, did not compete with nationals of other countries, who were exempt, but rather he was concerned only with acquiring enough money, which would be tax exempt, for the purpose of buying a farm in Oklahoma. In conclusion then, it seems the practice to exempt only those who inadvertently fall within section 116 (a), as the normal events of international commerce and trade transpire, rather than to exempt those who with premeditation seek to accumulate tax exempt income.

EDWARD MURRAY.

CONSTITUTIONALITY OF SPECIAL BILLS FOR PRIVATE RELIEF

Action by Lucero against the State Highway Department of New Mexico to recover for injuries sustained when he was struck by a tire which blew out on the wheel of a highway department grader being operated by a state employee. The action was brought under Chapter 162, Laws of

20. Hoofnel v. C. I. R., 334 U.S. 833, 68 S.Ct. 1346, 92 L. Ed. 1760 (1948)
21. Cooper v. Reynolds, 24 F. (2d) 150 (D.C. Wyo., 1927).
22. Texas v. Florida, 306 U.S. 398, 59 S.Ct. 563, 83 L. Ed. 817 (1939).
23. Stallforth v. Helvering, 77 F. (2d) 548 (D.C. Cir. 1935).
24. Bowring v. Bowers, 24 F. (2d) 918 (2d Cir. 1928).

1947, which evpressly authorized Lucero to bring suit for damages against the State of New Mexico, waiving its sovereign immunity from suit. *Held,* that the act violates article 4, section 24 of the Constitution of New Mexico relating to special legislation. The legislative authorization for the suit by Lucero was a special act and a general law could have been enacted. "If the legislature desires that compensation be paid to persons suffering injuries because of negligence of its officers or employees, it will have to open the door to all alike." *Lucero v. New Mexico State Highway Department,* 55 N.M. 157, 228 P. (2d) 945 (1951).

Wyoming[1] and many other states, including New Mexico, have constitutional provisions to the effect that the state legislature "shall not pass local or special laws" in certain enumerated cases, and that "In all other cases where a general law can be made applicable no special law shall be enacted." This latter is sometimes called "the sweeping clause." Article 4, Section 24 of the New Mexico Constitution, which was applied in the *Lucero* case, contains this exact language. Such provisions were made part of many state constitutions to correct the serious evil of legislatures giving certain individuals special privileges.[2] The sweeping clause is generally construed as a separate and independent prohibition from those specifically enumerated.[3] It is obviously so general that it does not afford much help in determining when a special law can be enacted. Although the constitutionality of many acts has been tested by the general standard set forth in the sweeping clause, there have been no writings which attempt to classify the types of acts to which it applies. The *Lucero* case presents one type of situation in which the problem of the application of the sweeping clause arises.

State legislatures have frequentlly provided for compensation to individuals who have been injured by the state and in all fairness should be assisted. An examination of the cases indicates that attempts to provide compensation by special legislation have generally been in two forms: By means of direct appropriation to the individual, or, by waiver of immunity of the state from suit for damages by an individual. The courts do not, in fact, make any exact distinction between these two types of legislation and often use the same language whether discussing one or the other. In *Sandel v. State,*[4] the court said, with regard to a special act permitting an individual to sue the state:

> "The state, acting through the legislature has the power, which it always has and should exercise on proper occasion, to recognize claims against it, founded on justice and equity."

In the case of *State v. Carter,*[5] the Wyoming court when referring to an appropriation for a particular individual said:

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1. Wyo. Const., Art. 3, sec. 27.
2. Anderson, Special Legislation in Minnesota, 7 Minn. L. Rev. 133 (1922).
3. See Note 2 supra.
4. 115 S.C. 168, 104 S.E. 567, 13 A.L.R. 1268 (1920).
5. 30 Wyo. 22, 215 Pac. 477, 28 A.L.R. 1089 (1923).

> "The legislature has the right to recognize a moral claim. It is not, however, compelled to do so. And if it acknowledges any one particular claim as just and equitable, we do not think that the court has the right to say it must also recognize claims of a similar nature, and do so by passing a general law. . . . The legislature might hesitate and refuse, to pass a general law of that kind, and to that extent change the general principle of non-liability of the state. It may, however, be willing to give compensation in special cases, which demand special relief."

Bills for private relief, whether providing for an appropriation or giving the individual the right to sue the state, are thus based on the same policy of justice and equity. Although different courses are followed, the legislature which waives immunity of the state from suit is actually providing for compensation to the injured person almost as surely as the legislature which enacts a bill providing for a direct appropriation in favor of that injured person. Since both types of bills are obviously enacted for the same purpose, it would seem that they should be treated the same by the courts.

However, the appropriation measure may have very different legal consequences from the bill waiving immunity. The reason for the difference is the sweeping clause already referred to. An appropriation bill, although it may be invalid for some other reason, is constitutional under the sweeping clause,[6] the theory being that a law making an appropriation to a private individual or corporation is not and can not be made general, and therefore must be recognized as constitutional.[7] Therefore, there is no problem of constitutionality under the sweeping clause when the first type of bill, the one which provides for an appropriation to an individual, is questioned.

A more troublesome problem arises when the court is called upon to decide the constitutionality of an act waiving state immunity from suit. The courts will hold such an act constitutional in many cases, but unconstitutional in others, as will appear in the following analysis. They are consistent, however, and there is a valid distinction for their holdings. The courts distinguish between acts which waive immunity from suit and allow the individual to sue on a pre-existing debt or obligation, and acts which *create liability* on the part of the state *in addition to* waiving immunity to suit.

The rule generally recognized is that an act which authorizes an individual to sue the state on account of a pre-existing obligation is not a special act covering a matter to which a general act could be made applicable.[8] A common situation in which this may arise is when the state has,

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6. State v. Carter, 30 Wyo. 22, 215 Pac. 477, 28 A.L.R. 1089 (1923).
7. McSurely v. McGrew, 140 Iowa 168, 118 N.W. 415, 13 Am.St.Rep. 248 (1908); Merchants' Co. v. Brown, 64 Iowa 275, 20 N.W. 434 (1884)
8. Jack v. State, 183 Okla. 375, 82 P.(2d) 1033 (1938); State v. Ward, 189 Okla. 532, 118 P.(2d) 216 (1941); Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938); Sandel v. State, 115 S.C. 168, 104 S.E. 567, 13 A.L.R. 1268 (1920).

by some activity, whether negligent or not,[9] damaged privately owned real or personal property. In this case the courts often hold a special act waiving immunity from suit by an individual constitutional, as an act allowing suit on a pre-existing obligation arising under a section of the state constitution similar to Article 1, Section 33 of the Wyoming Constitution: "Private property shall not be taken or damaged for public or private use without just compensation." The Oklahoma court followed this reasoning in a case where sewage from a state tuberculosis sanitorium entered a stream flowing through a dairy farmer's land from which cattle drank. As a result he was forced by the State Board of Health to give up his dairy business because of the danger of spreading the tuberculosis germ.[10] The court sustained an act of the legislature permitting the farmer to sue the state for his consequent damages. The Oklahoma court followed this reasoning in another case in which a bridge negligently constructed resulted in inundation of much of plaintiff's property and the legislature enacted a bill allowing the plaintiff to sue the state.[11] Admitedly the courts cannot always find a pre-existing obligation on the basis of this clause in the state constitution, but often they will search far to do so.

On the contrary, in cases in which an officer or employee of the state has been negligent in performance of his job, and injury to an individual or his property results, a special act waiving state immunity for the benefit of the individual is usually held unconstitutional.[12] The courts arrive at this result by reasoning that such an act creates a liability rather than recognizing a pre-existing obligation. The case of *Sandel v. State* stands alone as a case upholding the constitutionality of such a bill. The South Carolina court there held that an act providing that the parents of small children killed by impure vaccine used in innoculation could sue the state for negligence, was constitutional. The court said that a general law could not be made applicable to this specific factual situation since it had never previously happened and probably would never happen again in the future—a somewhat unsatisfactory basis for the court's conclusion. It said that the act did not create a new liability, which did not exist before its passage, but rather removed the obstacle of immunity from suit without the state's consent. But the court reached the conclusion only by holding that the state was liable for the torts of its officers and employees. This view is certainly contrary to orthodox law. The judges obviously felt that they ought to find some way to uphold an act allowing parents to recover something as a result of the death of their children. About five years later, the South Carolina court in *Sirrine v. State*[13] expressly overruled the *Sandel* rule that there was an existing common law liability on the state

9. State v. Horn, 187 Okla. 605, 105 P.(2d) 234 (1940); State v. Adams, 187 Okla. 673, 105 P.(2d) 416 (1940).
10. State v. Fletcher, 168 Okla. 538, 34 P.(2d) 595 (1934).
11. State v. Horn, 187 Okla. 605, 105 P.(2d) 234 (1940).
12. Jack v. State, 183 Okla. 375, 82 P.(2d) 1033 (1938); State v. Horn, 187 Okla. 605, 105 P.(2d) 234 (1940); Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938); Sirrine v. State, 132 S.C. 241, 128 S.E. 172 (1925).
13. 132 S.C. 241, 128 S.E. 172 (1925).

for torts of its officers and employees. The court held that the liability was not pre-existent, and that without a pre-existing obligation the legislature cannot confer the right to sue upon one person without passing a general law which applies to all persons falling within that class. The facts and result of the *Sirrine* case were similar to the *Lucero* case.

The New Mexico and South Carolina courts both suggested that in such a case a general law should be enacted. General laws on such subjects are not uncommon. In 1928, the South Carolina legislature passed a general law which authorized suit against the state for damages to person or property resulting from defects in highways, negligent repair of highways, and negligent operation of vehicles operated by the highway department;[14] and it has been held constitutional.[15] Thus the rule of the *Sirrine* case was expressly overruled by statute. (Such a statute is but the first step toward the ultimate goal of complete liability of the state for the torts of its employees, which is the desire of many text writers and judges. The steps must, however, be taken by the legislature rather than the courts.)

Thus, the only situation in which the courts have found it difficult to uphold a special bill for private relief is that in which state officers or employees have committed a tort and the legislature has authorized a special suit to recover for it. If compensation is desirable in such a case, there is no reason why a general law similar to that passed by the South Carolina legislature creating liability and waiving immunity should not be enacted. A fair result may then be reached in a constitutional manner.

It is submitted that the *Lucero* case was correctly decided. It is in accord with the rules followed in other jurisdictions where the question of constitutionality of a special act waiving immunity of the state from suit by an individual has arisen.

The Wyoming court in *State v. Carter* held a special appropriation bill for private relief constituional under the sweeping clause. This is in line with the decisions of other courts. However, the decision was expressly limited by the opinion to appropriation bills. There has been no decision by the Wyoming Supreme Court on the constitutionality of an act such as that declared unconstitutional in the *Lucero* case.

Upon reason and authority, our Supreme Court should follow the rule that such an act is unconstitutional as being special. The general rule in Wyoming is that the state, being a sovereign, has no common law liability for the governmental torts of its officers and employees.[16] The legislature has not passed a general law creating that liability and granting individuals the right to sue the state, although it has the constitutional authority to do so.[17] Thus, an act passed by the legislature granting one individual the

14. Code of Laws of South Carolina 1932, sec. 5887.
15. Ouzts v. State Highway Department, 161 S.C. 21, 159 S.E. 459 (1931).
16. Utah Construction Co. v. State Highway Commission, 45 Wyo. 403, 19 P.(2d) 951 (1933).
17. Wyo. Const., Art. 1, sec. 8.

right to sue the state for injuries resulting from negligence of an officer or employee would necessarily create liability of the state for that negligence and therefore would fall exactly within the rule of the *Sirrine* and *Lucero* cases as being a special act where a general act would have been made applicable.

HAROLD L. MAI.

DISPOSITION OF PROPERTY HELD BY ENTIRETY WHERE ONE SPOUSE MURDERS THE OTHER

Recently, in the case of *Hogan v. Martin,* 52 So. (2d) 806 (Florida 1951), a question was raised which has caused a great deal of discussion and diversity of opinion among various jurisdictions and which has not, as yet, been decided in Wyoming. Husband and wife were seised of real property as tenants by the entirety. Husband murdered his wife and then purported to convey the entire property to attorneys in payment of legal services. A Florida statute[1] provides that "any person convicted of murder shall not be entitled to inherit from the decedent or take any portion of decedent's estate as a legatee or devisee." Attorneys filed a bill for a declaratory decree, naming the heirs of the deceased as defendants. *Held,* that the husband acquired but one-half interest in the real property since the husband by his wrongful act destroyed the marital status upon which the tenancy by the entirety was based.

Estates by the entirety became a part of Wyoming jurisprudence upon its adoption of the common law which has been expressly provided by statute[2] to be in force in Wyoming except where it has been modified by judicial decisions or statutes, and, as there has been no such modification of this principle, an estate by the entirety exists in Wyoming.[3] Where land is conveyed to both husband and wife an estate by the entirety was created by the common law and upon the death of one spouse the entire estate went to the other. The essential characteristic of an estate by entirety is that each is the owner of the entire estate; neither has any separate or joint interest but a unity or entirety of the whole.[4] If one spouse dies the survivor is said to be sole owner of the estate, not by reason of having taken anything from the deceased but because he has had ownership of the whole from the beginning.[5] The effect is merely to free the estate from participation by the deceased spouse.[6] This principle is generally accepted

1. F.S.A. sec. 731.31.
2. "The common law of England as modified by judicial decisions . . . or statutes . . . shall be the rule of decision in this state when not inconsistent with the laws thereof, and shall be considered as of full force, until repealed by legislative authority." Wyo. Comp. Stat. 1945, sec. 16-301.
3. In Wyoming the common law rule is still in force and estates by entirety have not been abolished either expressely or inferentially by statute. Peters v. Dona, 49 Wyo. 306, 54 P. (2d) 817 (1936), 3 Wyo. L.J. 66 (1948).
4. Ibid., 54 P. (2d) 820.
5. Ibid.
6. Ibid.