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Although Judges and Quasi-Judicial Officers Are Immune from Action for Damages under the Civil Rights Statutes for Acts Accomplished in the Discharge of Their Official Duties, When a Class Discrimination Is Alleged, Both Judicial and Quasi-Judicial Officers May Be Mandatorily Enjoined from Further Infringement upon the Rights of the Complaining Class.

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JUDICIAL IMMUNITY—INJUNCTIVE RELIEF—ALTHOUGH JUDGES AND QUASI-JUDICIAL OFFICERS ARE IMMUNE FROM ACTION FOR DAMAGES UNDER THE CIVIL RIGHTS STATUTES FOR ACTS ACCOMPLISHED IN THE DISCHARGE OF THEIR OFFICIAL DUTIES, WHEN A CLASS DISCRIMINATION IS ALLEGED, BOTH JUDICIAL AND QUASI-JUDICIAL OFFICERS MAY BE MANDATORILY ENJOINED FROM FURTHER INFRINGEMENT UPON THE RIGHTS OF THE COMPLAINING CLASS. *Littleton v. Berbling,* 468 F.2d 389 (7th Cir. 1972), *cert. granted,* 41 U.S.L.W. 3432 (U.S. Jan. 3, 1973) (No. 72-953).

Plaintiffs, black citizens of Cairo, Illinois, initiated this class action in the name of themselves and all other persons similarly discriminated against on the basis of race and poverty. The action was brought under the appropriate sections of the 1871 Civil Rights Act[1] and sought injunctive relief against the defendant county officials who allegedly systematically applied Illinois' criminal laws so as to discriminate against the plaintiffs. Named as defendants in the complaint were two Alexander County judges, the state's attorney, and an investigator for the state's attorney (although the investigator was not an assistant state's attorney).[2] Plaintiffs' original complaint was brought in the United States District Court for the Eastern District of Illinois, but was dismissed for want of jurisdiction by reason of the doctrine of judicial immunity. In the Court of Appeals for the Seventh Circuit, appellants alleged discrimination in the application of criminal laws which thereby

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Benevolent Ass'n, 111 Tex. 191, 230 S.W. 978 (1921) (exemption denied due to the fact that the use of the property for other than charitable purposes rendered such use only partly charitable; the other than charitable use was to pursue the work of the Masonic order); Morris v. Lone Star Chapter No. 6, 68 Tex. 698, 5 S.W. 519 (1887) (exemption denied because two floors of the lodge were rented to others, even though the proceeds were devoted to charity); Benevolent & Protective Order of Elks, Lodge No. 151 v. City of Houston, 44 S.W.2d 488 (Tex. Civ. App.—Beaumont 1931, writ ref'd) (use of lodge was not exclusively for charitable purposes); Masonic Temple Ass'n v. Amarillo Ind. School Dist., 14 S.W.2d 128 (Tex. Civ. App.—Amarillo 1928, writ ref'd) (lodge was used for social activities by lodge members, and this was held to be only partly charitable).

1. 42 U.S.C. §§ 1981, 1983, 1985 (1970); originally the measure which became § 1983 was the Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13; § 1981 was the Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144; and § 1985 was the Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.

2. Specifically defendants were claimed to have denied black citizens the right to give evidence of criminal conduct committed by whites upon blacks. The state's attorney refused to initiate criminal proceedings against whites when complaints were received by his office from blacks, and even when such complaints were acted upon, the state's attorney engaged in the practice of inadequate prosecution so as to deny complainants an adequate remedy. Defendant judges were charged with engaging in discriminatory practices based upon race by setting higher bond for blacks in criminal cases and by sentencing blacks to longer prison terms, under harsher conditions, than those accorded to whites.

interfered with their constitutional rights. Held—*Reversed and remanded.* Although judges and quasi-judicial officers are immune from action for damages under the civil rights statutes for acts accomplished in the discharge of their official duties; when a class discrimination is alleged, both judicial and quasi-judicial officers may be enjoined from further infringement upon the rights of the complaining class.

The doctrine of judicial immunity has long been established as a defense to civil action for members of the judiciary.[3] It is a doctrine which had its inception in the common law.[4] In *Yates v. Lansing*,[5] the court traced the development of the doctrine as far back as Edward III. In discussing the immunity doctrine the court stated, "It is to be found in the earliest judicial record, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government."[6]

The doctine of judicial immunity from civil action progressed along similar lines in the United States. As many as nine reasons have been suggested by one legal scholar as the basis for the adoption of such a sweeping doctrine of immunity.[7] His reasoning suggests that without the application of the doctrine, men of property and responsibility would tend to decline service in the judiciary. It is further argued that the threat of litigation for every judicial action would destroy the independence of the judiciary.[8]

One of the landmark cases dealing with the doctrine and the extent of its effect was *Bradley v. Fisher*.[9] There an attorney filed suit for damages against a judge who had denied him the right to continue practicing law within the court's jurisdiction. The Court held that judges are immune from civil actions for their judicial functions, even when such functions are in excess of designated jurisdictions, or are performed maliciously and corruptly.[10] This case established the rule that liability for damages will lie

3. Harvey v. Sadler, 331 F.2d 387 (9th Cir. 1964); Spruill v. O'Toole, 74 F.2d 559 (D.C. Cir. 1934); Fawcett v. Dole, 29 A. 693 (N.H. 1892).

4. Allen v. Biggs, 62 F. Supp. 229, 230 (E.D. Pa. 1945); United States v. Chaplin, 54 F. Supp. 926, 933-34 (S.D. Cal. 1944).

5. 5 Johns. 1020, 1022-23 (Sup. Ct. 1810).

6. *Id.* at 1023.

7. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937).

8. Jennings further suggests that the judiciary owes its sole duty to the public collectively; that the doctrine results in the saving of judicial time; that absolute finality in litigation of controversies exists because of the doctrine; and, that it would be grossly unfair to require a judge to give his opinion and then penalize him for the expression of that opinion.

9. 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1872).

10. *Id.* at 354, 20 L. Ed. at 651. The Court in its holding distinguished between those acts in excess of jurisdiction and those where there was a clear and complete absence of all jurisdiction over the subject matter. It was found that in the former instance judicial immunity would apply, whereas in the latter it would not.

against judicial officers only when the action taken is outside the limits of his jurisdiction.[11]

Under the common law, the doctrine of judicial immunity had expanded to include quasi-judicial officers.[12] In an action against a special assistant to the attorney general, one court included within the scope of judicial immunity, quasi-judicial officers acting in the exercise of their duties.[13] However, it has been held that when such an officer acts in some capacity other than his quasi-judicial role, the immunity doctrine does not apply.[14]

Although the immunity of judicial and quasi-judicial officers applied without challenge under the common law, the civil rights statutes provided an area wherein the application of the doctrine was questioned. Upon conclusion of the Civil War, it became apparent that many white, local officials in southern states were utilizing their positions to deny blacks and their sympathizers an equal access to the courts, their remedies, and the freedom granted under the thirteenth amendment.[15] The Congress, through legislation, sought to curtail such exclusions by eliminating both state laws and private conduct which indulged in racial discrimination. In 1866 two acts were passed, over President Andrew Johnson's veto, which provided for criminal sanctions against "any person" who, under color of law subjected another to the deprivation of any right.[16] The intent of Congress in the area of criminal liability was clear. Judicial immunity had been eliminated as a defense under the acts.[17]

The Congress likewise sought to provide civil remedies for racially discriminatory acts by enacting the Ku Klux Klan Act of 1871.[18] The key to the act was section 2 which provided that "every person" who caused another to be subject to the deprivation of his rights would be liable, either in

11. *Id.* at 352, 20 L. Ed. at 651.

12. Booth v. Fletcher, 101 F.2d 676, 680 (D.C. Cir. 1939).

13. Yaselli v. Goff, 12 F.2d 396, 404 (2d Cir.), *aff'd*, 275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395 (1927) (per curiam). The court found that a United States attorney, if not a judicial officer, was at least a quasi-judicial officer with immunity extending to duties necessary in their role as public prosecutors.

14. Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965). The court reversed the lower court's holding and found that the county attorney had directed certain police activity in such a manner so as to coerce and intimidate the appellant into making a confession. *Id.* at 537. Basically the rule as expressed in Fletcher v. Wheat, 100 F.2d 432, 434 (D.C. Cir.), *cert. denied,* 307 U.S. 621 (1939), has been that neither judges nor quasi-judicial officers are subject to harassment by retaliatory actions for injuries alleged to have resulted from the performance of official duties.

15. Littleton v. Berbling, 468 F.2d 389, 396 (7th Cir. 1972).

16. 18 U.S.C. § 242 (1970) became the crucial section of the act; for the reasoning of President Johnson's veto pertaining to the independence of the judiciary. *See* CONG. GLOBE, 39th Cong., 1st Sess. 475-76 (1866).

17. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866), wherein the remarks of Congressman Lawrence indicated the attitude of the Congress concerning criminal liability for judicial officers under the act.

18. 42 U.S.C. §§ 1983, 1985 (1970).

law or equity, to the party so injured.[19] Although these civil statutes were similar in tone and intent to the criminal provisions, there was neither an express nor implied indication as to whether "every person" included judicial officers.[20]

Although numerous courts had determined that civil rights violations by judicial and quasi-judicial officers could not be prosecuted due to judicial immunity,[21] the issue had not been finally and judicially determined until the Supreme Court ruled in the case of *Pierson v. Ray*.[22] In *Pierson* a state court judge was sued for damages for his adjudging certain clergymen, demonstrating on behalf of civil rights, guilty of violating "whites only" restrictions in waiting areas and lunchcounters. The court recounted the doctrine of judicial immunity and stressed its role as the guardian of an independent judiciary. A thorough investigation of the relevant statutes uncovered no specific congressional intent to eliminate the doctrine.[23] It was held that the civil rights statutes did not abolish the immunity of judges for acts accomplished within their judicial role and therefore a state judge could not be found liable for damages for his unconstitutional convictions.[24] *Pier-*

19. *Id.* § 1983. 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.—The precise statement of the section.

20. In Tenney v. Brandhove, 341 U.S. 367, 377, 71 S. Ct. 783, 788, 95 L. Ed. 1019, 1027 (1951), the Court found that "every person" did not include legislators. In that case a California legislator was sued for statements made while acting as a committee chairman. The Court ruled that Congress could not have intended to eliminate legislative immunity. *Id.* at 376, 71 S. Ct. at 788, 95 L. Ed. at 1023. The holding in *Tenney* was the basis upon which Picking v. Pa. R.R., 151 F.2d 240, 250 (3d Cir. 1945), was overruled. The *Picking* case was one of the few cases to have held a judicial officer liable for damages, but such a holding lasted only until Bauers v. Heisel, 361 F.2d 581 (3d Cir.), *cert. denied*, 386 U.S. 1021 (1967), where the Court of Appeals for the Third Circuit sitting en banc overruled *Picking*.

21. *See* Peckham v. Scanlon, 241 F.2d 761, 763 (7th Cir. 1957); Mackey v. Nesbett, 285 F. Supp. 498, 502 (D. Alas. 1968); Garfield v. Palmieri, 193 F. Supp. 582, 585 (E.D.N.Y. 1960).

22. 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

23. *Id.* at 554, 87 S. Ct. at 1218, 18 L. Ed. 2d at 295.

24. *Id.* at 554, 87 S. Ct. at 1218, 18 L. Ed. 2d at 294. A recent case indicative of the vast extent of the doctrine with regard to damages is that of McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972). In this case, appellants, who were the elderly parents of a son scheduled to stand trial on criminal charges, went to the Grayson County, Texas Courthouse with the intention of providing fresh clothing for their son to wear in court. While in the courthouse appellants inquired in the office of the district judge the time for commencement of the trial. When the judge learned of the reason for their presence, he lost his temper and ordered appellants out of his office and threatened to have the couple thrown in jail. Because of their age and the confusion resulting from the attitude of the judge, the couple did not move quickly enough for the judge who left to find a deputy sheriff. The judge returning with a deputy apprehended the couple in the corridor and ordered the deputy to arrest Mr. McAlester

son thus settled the issue of judicial immunity with regard to damages; however, no mention was made in the decision concerning injunctive relief and its relationship to the doctrine.[25]

The present case, *Littleton v. Berbling*,[26] addressed itself directly to the question of judicial immunity from injunctive relief under the civil rights statutes. The court admitted that the issue had only been considered by a few lower courts, but that all the cases directly involved alleged discriminations against a cognizable class by a judicial officer. After examining the history of the doctrine, as well as the progression of cases leading to *Pierson*, the court found no dispute with the decision there. It relied, however, upon an interpretation by the Court of Appeals for the Fifth Circuit which held that *Pierson* did not indicate that judges could not be enjoined from pursuing a course of unlawful conduct.[27]

The Court of Appeals for the Seventh Circuit mentioned two cases from the district courts of the Fifth Circuit which upheld the rationale of the *Littleton* decision.[28] In seeking a unity among these few prior decisions available,

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and place him in jail. The appellant was incarcerated for the remainder of the day and was later found by the judge to be in contempt of court. In an action for damages brought by the McAlesters against the judge, the Court of Appeals for the Fifth Circuit affirmed the dismissal of the action based upon the doctrine of judicial immunity from actions for damages. The court pointed out that immunity applies even where there is malice. *Id.* at 1282. The court also found the judge to be acting within his judicial jurisdiction since the act occurred within his chambers, the controversy arose from a case pending before the judge, and the confrontation arose directly out of a visit to the judge in his official capacity. *Id.* at 1282.

25. In dissenting, Justice Douglas argued that generally, "'every person' would mean *every person*, not every person *except* judges." *Id.* at 559, 87 S. Ct. at 1220, 18 L. Ed. 2d at 297 (emphasis by J. Douglas).

26. 468 F.2d 389 (7th Cir. 1972).

27. United States v. McLeod, 385 F.2d 734, 738 n.3 (5th Cir. 1967) (citations omitted), which stated, "In Pierson v. Ray, the Supreme Court held that judges are immune from liability for *damages* in suits under 42 U.S.C. § 1983. The case does not, of course, mean that they may not be enjoined from pursuing a course of unlawful conduct." *Accord*, United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965), where a three-judge federal court was faced with a similar complaint of judicial discrimination concerning voter registration. Injunctive relief was sought and granted with the court holding that the judicial immunity doctrine had no application where the relief sought is preventive. *Id.* at 727.

28. Phillips v. Cole, 298 F. Supp. 1049, 1051 (N.D. Miss. 1968), where a suit was brought by black indigent juveniles seeking enjoinment of state prosecution from charges of delinquency, the court found that federal injunctive relief may be utilized over state law in those cases where it is the only means for avoiding grave and irreparable injury upon constitutional rights. In Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969), the court considered a suit in behalf of all indigent persons denied certain constitutional rights because of their impoverished condition, specifically rights arising under the sixth amendment. The court in granting the relief held that judicial immunity does not apply to suits for injunctive and protective relief. The court therefore enjoined the defendants from failure to effectuate the sixth amendment's right to counsel guaranteed to plaintiffs and members of their class, through the adoption of adequate procedures to assure indigents the availability of counsel in misdemeanor cases. *Id.* at 1322.

the court stated: "In sum, those courts which have considered the issue have held that when a class-discrimination is alleged, judicial officers may be enjoined."[29]

With regard to the question of quasi-judicial immunity, the court concluded that a similar holding was in order. The court agreed that under *Pierson* a quasi-judicial officer is immune from suits for damages under the civil rights acts. The point was expressed that in order for such officers to come under the immunity doctrine, their actions had to come within the scope of their prosecutorial discretion. The conclusion was enunciated that even though the immunity doctrine remained for suits for damages, the doctrine did not extend to protect quasi-judicial officers, or judges, from freedom from injunctive relief.[30]

In his dissent, Judge Dillin expressed the belief that the court had mistakenly extended to a federal district court the power to supervise and regulate, through mandatory injunction, the discretion of state court judges. He argued that no such power existed, and the majority's holding would upset the relationship between the state and federal judiciary with the federal courts acting as watchdogs for violations of judicial discretion in the state courts.[31]

Judge Dillin agreed with the majority that the immunity doctrine does not preclude the granting of equitable, injunctive relief against members of the judiciary. However, he drew a distinction between those cases cited in the majority opinion and the present case, in that the former cases dealt with prohibitory injunctions, whereas here the concern was with a mandatory injunction. The judge stated: "There is a great difference between ordering an official not to do a particular act, measurable by objective standards, and in ordering him to exercise his discretion in a certain general way, measurable only by subjective standards."[32]

In his final point of dissent, it was proposed that the doctrine which protects the judiciary from damage suits equally applies to mandatory injunctions which attempt to regulate the exercise of judicial and quasi-judicial discretion. In defending such a relationship between actions for damages and mandatory injunctions, Judge Dillin concluded, "It would be cold comfort for such an official to be told by this Court: 'Be of good cheer! We will protect your pocketbook, even as we send you to jail.' "[33]

The dissent regards the distinction between a mandatory injunction and a prohibitory injunction as crucial to the result of the case. Despite his concessions that the immunity doctrine does not preclude equitable relief, Judge

29. Littleton v. Berbling, 468 F.2d 389, 408 (7th Cir. 1972).
30. *Id.* at 414.
31. *Id.* at 415.
32. *Id.* at 415.
33. *Id.* at 419.

Dillin argues that the court has no power to supervise and regulate the discretion of state judicial officers, through mandatory injunctions. The distinction between the two forms of equitable remedies is not as crucial as asserted. The general intention of any form of injunctive relief is to require the one to whom it is directed to do or to refrain from doing a particular act.[34] Although the mandatory injunction appears to be the more severe since it may order certain action to be initiated, its intent is identical with that of a preventive injunction—to assure equitable and just relief for the aggrieved party.[35] The dissent, in suggesting such a distinction, would sustain complaints of discrimination when the acts were committed upon the complaining party; however, complaints would be dismissed when the acts alleged, as here, resulted from a failure to use one's judicial or quasi-judicial discretion to the detriment of the injured party.

The terminology utilized in defining the injunction is secondary in import. The intent of the relevant statute and the courts has been to eliminate discriminatory practices, within the framework of the law. It is that factor which should guide the courts in arriving at their decisions.

The majority holding has seemingly progressed to the next logical step in the development of the doctrine of judicial immunity. It was a doctrine which was initially accepted without question as providing immunity from all civil actions.[36] There evolved the notion that such a doctrine was absolute under the common law, but did not necessarily apply under statutory law.[37] It came to be adopted as a general rule that judicial immunity applied only when the acts committed were within the judicial functions of the judiciary.[38] The dispute then arose as to the distinction between damages and injunctive relief with regard to the doctrine. *Pierson v. Ray* settled the issue as to damages, but failed to resolve the issue as to injunctive relief.[39] *Littleton* seeks to resolve the question. Although the precedent for its holding is not voluminous, due primarily to the infrequent use of such relief, *Littleton* is sound and represents the weight of authority.[40]

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34. Gainsburg v. Dodge, 101 S.W.2d 178, 180 (Ark. 1937).

35. Bailey v. Schnitzius, 16 A. 680, 681 (N.J. Ct. App. 1889).

36. Francis v. Crafts, 203 F.2d 809, 811 (1st Cir.), *cert. denied,* 346 U.S. 835 (1953).

37. *See generally Ex parte* Virginia, 100 U.S. 339, 25 L. Ed. 676 (1879). It was one of the first cases considering the doctrine under the civil rights statutes. There, a Virginia county judge was indicted for denying blacks the opportunity to serve on juries. Although the Court found that the action of jury selection was a ministerial function rather than a judicial function coming under the protection of the doctrine, the Supreme Court indicated that a judge could be held criminally liable for ministerial actions, as well as actions outside the limits of judicial discretion. *Id.* at 348-49, 25 L. Ed. at 680.

38. Fletcher v. Wheat, 100 F.2d 432, 434 (D.C. Cir.), *cert. denied,* 307 U.S. 621 (1939).

39. 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed. 2d 288, 295 (1967).

40. Jacobson v. Schaefer, 441 F.2d 127, 130 (7th Cir. 1971); *accord,* Palermo v.