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Tort—Supreme Court Extends Immunity for Discretionary Function to Government Manufacturing

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disclosure was necessary to prevent the drying up of sources of information. No such limitation is applicable to individual conscientious objectors. In the last analysis secret government reports may not only deny them the privilege of staying out of the armed forces, but the right to stay out of jail.

Edward Schmitt

TORT—SUPREME COURT EXTENDS IMMUNITY FOR DISCRETIONARY FUNCTION TO GOVERNMENT MANUFACTURING

Plaintiffs instituted proceedings under the Federal Tort Claims Act to recover damages resulting from the alleged negligently caused explosion of fertilizer which was part of the Government's foreign aid program. *Held* (4-3): The acts of the government in formulating and carrying out the plan for the manufacture of such fertilizer were acts of discretion not resulting in liability. *Dalehite v. United States*, 346 U. S. 15 (1953).

The Federal Tort Claims Act, 28 U. S. C. §§ 1346, 2671-2678, 2680 (1946) authorizes tort suits against the Government under circumstances where a private person would be liable. It allows an exception in the case of discretionary functions whether or not the discretion be abused. 28 U. S. C. § 2680 (a).

From its legislative history the purpose of the exception appears to be twofold: (1.) to allow the government regulatory agencies to remain free from the claims of individuals effected by them, and (2.) to preclude the possibility of testing by tort action the validity of authorized government projects where no negligence is involved. *Hearings before Committee on Judiciary on H. R. 5373 and H. R. 6463*, 77th Cong., 2d Sess. 33 (1942).

In the absence of any concise definition of discretionary function in either the statute itself or the legislative history, resort must be made to the cases in which the defense was raised.

In cases involving government projects, the following acts have been held within the discretionary exception even when negligence was alleged: failure to mark a high tension wire, *Thompson v. U. S.*, 111 F. Supp. 719 (D. Md. 1953); spraying trees on government property, *Harris v. U. S.*, 106 F. Supp. 298 (E. D. Okla. 1952); planting a tree at experimental station, *Toledo v. U. S.*, 95 F. Supp. 838 (D. P. R. 1951); construction of dam, *North v. U. S.*, 94 F. Supp. 824 (D. Utah 1950); protection of migratory birds, *Sickman v. U. S.*, 184 F. 2d 616 (7th Cir. 1950);

blasting while deepening the Mississippi River, *Boyce v. U. S.*, 93 F. Supp. 866 (S. D. Iowa 1950); releasing impounded water, *Olson v. U. S.*, 93 F. Supp. 150 (D. N. D. 1950); changing the course of the Missouri River, *Coates v. U. S.*, 181 F. 2d 816 (8th Cir. 1950); and erecting dikes in the Missouri River, *Thomas v. U. S.*, 81 F. Supp. 881 (W. D. Mo. 1949).

Similarly, where the acts or decisions of administrative agencies or officials were the basis of the complaint, the exception was upheld in these instances: information given by the Weather Bureau, *Western Mercantile Co. v. U. S.*, 111 F. Supp. 799 (W. D. Mo. 1953); investigation by the Securities and Exchange Commission, *Schmidt v. U. S.*, 198 F. 2d 32 (7th Cir. 1952); refusal to issue permit to cross public lands, *Chournos v. U. S.*, 193 F. 2d 321 (10th Cir. 1951); failure of Secretary of Interior to operate coal mine, *Old King Coal Co. v. U. S.*, 88 F. Supp. 124 (S. D. Iowa 1949); release of psychotic patient by Veteran's Administration, *Kendrick v. U. S.*, 82 F. Supp. 430 (N. D. Ala. 1949); and failure to provide ambulance for service man's wife, *Denny v. U. S.*, 171 F. 2d 365 (5th Cir. 1948).

Another line of cases maintains that while discretionary acts are immune in so far as they may or may not be undertaken, once they are undertaken, due care must be exercised, e.g.: failure to provide proper guards and warning signals at road block, *Hernandez v. U. S.*, 112 F. Supp. 369 (D. Hawaii 1953); negligent treatment of patient admitted to government hospital, *U. S. v. Gray*, 199 F. 2d 239 (10th Cir. 1952); negligent marking of a wrecked vessel, *Somerset Seafood Company v. U. S.*, 193 F. 2d 631 (4th Cir. 1951); negligent maintenance of irrigation pipe line, *Ure v. U. S.*, 93 F. Supp. 779 (D. Ore. 1950); refusal to cancel prior grazing permit, after granting the successor exclusive use of the land, *Oman v. U. S.*, 179 F. 2d 738 (10th Cir. 1949); intensive grilling of a witness by an army sergeant, *Hambleton v. U. S.*, 87 F. Supp. 994 (W. D. Wash. 1949), *rev'd on other grounds*, 185 F. 2d 564 (9th Cir. 1950); and failure to exterminate rats in government leased apartment houses, *Maryland v. Manor Real Estate*, 176 F. 2d 414 (4th Cir. 1949).

In the instant case which comes before the court with a finding of negligence, both the majority and the minority agreed that the decision of Congress to *initiate* the foreign aid fertilizer program was discretionary and not subject to liability. However, disparity arose when the majority took the position that immunity should be extended to the formulation of the manufacturing plan and its execution. The minority felt this went far beyond the legislative intent which was to protect the government in its

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governmental capacity. They maintained that when the government engages in activity indistinguishable from private conduct, it should be held to the same standard of care as that of private persons under like circumstances.

The cases holding the government liable for any negligence occurring once discretion has been exercised follow a sounder approach as discretion should not include the right to act negligently. It is submitted that the court's refusal to adopt this reasoning in the instant case may have been prompted by the enormity of the damages involved and a reluctance to set a precedent of government liability for its part in a large scale disaster.

Anthony J. Vaccaro

WILLS—REVOCATION BY WRITING ON UNEXECUTED COPY

Upon the death of testatrix an unexecuted carbon copy of her original will was found at her home. In the blank space above the typewritten words of this copy, she had written "Null and Void" and signed her initials. *Held* (5-1): This was a sufficient writing to revoke her original will. In re *Kehr's Estate*, — Pa. —, 95 A. 2d 647 (1953).

The Statute of Wills provides that a written will can be revoked:

- (1) by being burnt, torn, obliterated or destroyed with the intent and for the purpose of revocation by the testator himself, or
- (2) by some other writing of the testator declaring the same and executed in the manner required of wills, or
- (3) by a subsequent will. PA. WILLS ACT OF 1947, 20 P. S. § 180.5; N. Y. DECEDENT ESTATE LAW § 34.

Where the revocation is by obliteration of the document, words indicating an intent to revoke which are written across the will, in such a manner that many words are crossed, effectuates cancellation of the will. In re *Barnes Will*, 76 Misc. 382, 136 N. Y. Supp. 940 (Surr. Ct. 1912). However, words written upon the will which do not in any way physically obliterate the same are ineffective as a cancellation of the will. *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638 (1902); *Dowling v. Gilliland*, 286 Ill. 530, 122 N. E. 70 (1919).

Writing across the words of an unexecuted copy of a will is ineffective as a cancellation of the original. In re *D'Agostino's Will*, 9 N. J. Super. 230, 75 A. 2d, 913 (1950). However, where a