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Recent Decisions

RECENT DECISIONS

ADMINISTRATIVE LAW—RIGHT TO JUDICIAL REVIEW OF SUPERINTENDENT'S ACTION PURSUANT TO SECTION 81 OF NEW YORK INSURANCE LAW.—Petitioner, a New York domestic insurance company, purchased property in the County of Westchester for the purpose of investment and for possible later use in its own business. An application for approval of the purchase was denied by the Superintendent of Insurance on his finding that the property was not required for the convenient accommodation of the company's business. The insurance company petitioned for an order annulling the Superintendent's determination, which was refused by the Supreme Court and the Appellate Division. Upon appeal, *held,* the decision of the Superintendent is not open to review because of a legislative intent to proscribe such review, even though such review is not expressly excluded by the Insurance Law. *Guardian Life Insurance Company v. Bohlinger,* 308 N.Y. 174, 124 N.E. 2d 110 (1954).

Under section 81 of the New York Insurance Law,[1] the approval of the Superintendent of Insurance is not required for the purchase of real estate as an investment by a domestic insurer, but such approval is necessary where the insurer wishes to purchase real estate for use in its own business. Section 34 of the Insurance Law provides that whenever an order or an act of the Superintendent is declared to be subject to judicial review, an action may be brought under article 78 of the Civil Practice Act. Certain sections of the Insurance Law provide for such review,[2] while others[3] do not. The court reached the conclusion that it was the intent of the legislature to proscribe judicial review wherever the right to review was not specifically granted,[4] saying, "The legislature thus reflected its design that the decisions of the Superintendent involving investments and finances . . . should be final and that he should not be subjected to judicial review to justify the action taken by him."[5]

The power of the legislature to preclude judicial review of certain actions of administrative officers and boards would appear to be settled.[6] However, the Court

1. N.Y. Insurance Law, § 81 (1949) provides: "The reserve investments of a domestic insurer shall consist of the following: . . . 7. Real Estate. Real Estate only if acquired or used for the following purposes and in the following manner: (a) The land and building thereon in which it has its principal office. (b) Such as shall be requisite for its convenient accommodation in the transaction of its business. . . . (h) Such real property . . . as may be acquired, as an investment for the production of income. . . . No real property shall be acquired by any domestic insurer pursuant to paragraphs (a), (b), (d), or (e) of this subsection seven, except with the approval of the superintendent."

2. N.Y. Insurance Law, §§ 40(7) (1949), 51(5) (1930).

3. N.Y. Insurance Law, §§ 81 (1954), 85 (1942).

4. The court did not rule out all judicial scrutiny, for it stated: "Even where judicial review is proscribed by statute, the courts have the power and duty to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature." Guardian Life Insurance Company v. Bohlinger, 308 N.Y. 174, 183, 124 N.E. 2d 110, 114 (1954).

5. Id. at 183, 124 N.E. 2d at 114.

6. Millman v. O'Connell, 300 N.Y. 539, 89 N.E. 2d 255 (1949); Schwab v. McElligott, 282 N.Y. 182, 26 N.E. 2d 10 (1940); Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943).

of Appeals in *Schwab v. McElligott*,[7] while recognizing the power of the legislature to proscribe review where it deems it necessary, stated that the legislative intent would have to be clearly expressed before the court would bow to such an intent.[8] An article written on the instant case after it had been decided in the Appellate Division,[9] cogently argues that legislative silence under the circumstances merely means that a non-statutory action must be brought in a court of general jurisdiction.[10]

The court in the present case cited *Millman v. O'Connell*[11] as a basis for its decision. In that case, the refusal of the State Liquor Authority to permit the appellant to transfer a retail liquor license to different premises was declared not reviewable since the right to review was not granted by section 121 of the Alcoholic Beverage Control Law.[12] It is significant to note, however, that it was not necessary for the court to imply that judicial review was proscribed where not specifically granted, since the legislature provided that the State Liquor Authority was empowered to determine ". . . whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, . . . and the location of premises licensed thereby, *subject only to the right of judicial review hereinafter provided for.*"[13] The legislature thus expressed its intent to preclude review by the clear expression which *Schwab v. McElligott* calls for.

One of the arguments advanced by the Court of Appeals in support of its decision was first propounded in the Appellate Division when the case in question was reviewed by that court. It was there stated, that while section 34 of the Insurance Law did not specifically preclude review, ". . . any other construction would stamp Section 34 as a meaningless and unnecessary reaffirmation of the rights of an aggrieved party. . . ."[14] However, if it was the intent of the legislature to proscribe review where not expressly granted, it could have easily followed the example it set some five years earlier in 1934 when it passed the Alcoholic Beverage Control

7. 282 N.Y. 182, 26 N.E. 2d 10 (1940).

8. "In the absence of a clear expression by the legislature to the contrary, the courts may review the exercise of a discretionary power vested in an administrative officer or body. . . ." 282 N.Y. at 186, 26 N.E. 2d at 12. Cf. H. Kauffman & Sons Saddlery Co. v. Miller, 298 N.Y. 38, 44, 80 N.E. 2d 322, 325 (1948): "Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results."

9. Guardian Life Insurance Company v. Bohlinger, 284 App. Div. 110, 130 N.Y.S. 2d 705 (1st Dep't 1954). Botein and Breitel, J.J., held that the action was not reviewable and that the facts did not warrant annulment of the Superintendent's decision. Callahan, J., while not making any determination on the question of review, concurred in result. Dore, J. P., and Cohn, J., held that the case was reviewable and that on the facts the order of the Superintendent should have been annulled.

10. Schwartz, Administrative Law, 29 N.Y.U.L. Rev. 1534, 1538 (1954). Cf. Estep v. United States, 327 U.S. 114, 120 (1946), where the Court said: ". . . the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress had conferred upon them."

11. 300 N.Y. 539, 89 N.E. 2d 255 (1949).

12. Section 121 specified five instances where the action of the liquor authority was reviewable. Since the decision in the Millman case, the section has been amended to include cases concerning the transfer of a license.

13. Alcoholic Beverage Control Law § 2. (Emphasis added.)

14. Guardian Life Insurance Company v. Bohlinger, 284 App. Div. 110, 114, 130 N.Y.S. 2d 705, 708 (1st Dep't 1954).

Law, and stated in section 34 of the Insurance Law, as was done in section 2 of the Alcoholic Beverage Control Law, that the finding of the superintendent would be final, "subject only to the right of judicial review hereinafter provided for."[15] Had it been the intent of the legislature to preclude review where not expressly provided for, section 2 of the Alcoholic Beverage Control Law would have been unnecessary, if not meaningless.

The fact that the legislature rejected a suggestion of the Association of Life Insurance Companies that section 34 include language that would grant a right of review whenever any person felt aggrieved by the Superintendent's orders or acts,[16] ". . . does not mean that the act of the superintendent before us is not reviewable. . . . To sustain the right here to review, it is not necessary to contend that *all ministerial* acts of the superintendent are reviewable. Many trivial ministerial acts depending on solely discretionary matters may not be subject to review. But the action here in question relates not to a trivial ministerial matter. . . ."[17]

As the court in its opinion observed, legislative committees have uncovered abuses existent in the insurance investment and financial field.[18] Nevertheless, it is difficult to understand why, as the court apparently concludes, the legislature would have deemed it necessary, in order to correct such abuses, to place the power of correction in the hands of one man and deny to the courts whose duty it is to safeguard the public interests, the power of review.

While this is not the first time an act or order of the head of an administrative agency has been declared not open to review,[19] it is the first time review has been declared to be proscribed by implication. It is submitted, that in view of the steadily growing power and importance of administrative agencies, the right to review of decisions of such agencies should be upheld, unless, as stated in *Schwab v. McElligott*, there is a clear expression by the legislature to the contrary. There being no such clear expression in the instant case, review should have been granted.

CONFLICT OF LAWS—CONTRACTS—GROUPING OF CONTACTS THEORY.—Plaintiff-wife and defendant-husband were married in England in 1917. Fourteen years later the defendant left his wife and children and came to this country. The wife afterwards followed him to discuss their differences and to secure maintenance. A separation agreement was executed in New York in 1933, in which the husband promised to make support payments to a New York trustee. The wife returned to England and the husband remained in this country. About one year after the agreement had been executed, the wife instituted an English action for separation; although she was awarded temporary alimony that action never proceeded to trial. Almost from the start, the husband failed in the support payments for which reason the wife brings the present action. The husband here sets up the English separation action as a

15. Cf. Noel Associates v. Merrill, 184 Misc. 646, 655, 53 N.Y.S. 2d 143, 152 (Sup. Ct 1945): "There is no reason why the court should read something into a statute which is not there and which the legislature easily could have included, if it had desired to do so."

16. Guardian Life Insurance Company v. Bohlinger, 308 N.Y. 174, —, 124 N.E. 2d 110, 113 (1954).

17. Guardian Life Insurance Company v. Bohlinger, 284 App. Div. 110, 118, 130 N.Y.S. 2d 705, 712-713 (1st Dep't 1954) (dissenting opinion).

18. Guardian Life Insurance Company v. Bohlinger, 308 N.Y. 174, 183, 124 N.E. 2d 110 114 (1954).

19. Millman v. O'Connell, 300 N.Y. 539, 89 N.E. 2d 255 (1949).

repudiation by the wife of the separation agreement. The trial court, affirmed by the Appellate Division, dismissed the complaint on the ground that under New York law, which both courts deemed applicable, the wife's actions constituted rescission and repudiation. Upon appeal, *held*, reversed and remitted for application of English law because of that jurisdiction's paramount interest. *Auten v. Auten*, 308 N.Y. 155, 124 N.E. 2d 99 (1955).

Many authorities have noted that no rules of law are more confused and confusing as the conflict of laws rules governing contracts.[1] Although it has been frequently held that matters pertaining to the execution of a contract are determined by the law of the place of making (*lex loci contractus*),[2] and that questions relating to performance will be answered by the law of the place of performance (*lex loci solutionis*),[3] not a few courts have shown a willingness to seek out the intention of the parties respecting the choice of law.[4] More recently, some decisions have suggested a "grouping of contacts" theory, or so-called center of gravity rule, by which a choice of the applicable law is made.[5] Among the cases there prevails an atmosphere of uncertainty because no rule or test has been employed to the exclusion of the others.[6] The Restatement selects the place of making to determine the validity of a contract, and the place of performance for matters of performance.[7] None the less, these fixed rules have been criticized for their lack of flexibility and disregard for intention.[8] An early New York decision, in stressing intention of the parties, held that the *lex loci contractus* and the *lex loci solutionis* rules should be considered together, ". . . neither of itself being conclusive, but the two must be considered in connection with the whole contract, and the circumstances under which the parties acted in determining the question of their intent."[9] However,

1. Morris, The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded, 6 Vand. L. Rev. 505 (1953).

2. Straus & Co. v. Canadian Pac. Ry. Co., 254 N.Y. 407, 173 N.E. 564 (1930); 2 Beale, Conflict of Laws § 332.39 (1st ed. 1935).

3. Miller v. Tiffany, 68 U.S. (1 Wall.) 298 (1863); Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E. 2d 992 (1939); Richard v. American Union Bank, 241 N.Y. 163, 149 N.E. 338 (1925).

4. Wilson v. Lewiston Mill Co., 150 N.Y. 314, 44 N.E. 959 (1896); In re Rosenbergers' Estate, 131 N.Y.S. 2d 59 (Surr. Ct. 1954); Dicey's Conflict of Laws 579 (6th ed. 1949).

5. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E. 2d 417 (1945); Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 31 Yale L.J. 53, 62 (1921); Harper, Policy Bases of the Conflict of Laws, 56 Yale L.J. 1155, 1161-1167 (1947).

6. "In the infinite variety of circumstances presenting choice of law problems relating to contracts, it is safe to say that there is no simple and dependable rule of thumb by which the choice may be unerringly made." Jansson v. Swedish American Lines, 185 F. 2d 212, 219 (1st Cir. 1950).

7. Restatement, Conflict of Laws § 332 (1934): "The law of the place of contracting determines the validity and effect of a promise . . ."; § 358 (1934): "The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to: . . . (d) the sufficiency of performance; (e) excuse for non-performance."

8. Nussbaum, Conflict Theories of Contracts: Cases Versus Restatement, 51 Yale L.J. 893 (1942); Cook, 'Contracts' and the Conflict of Laws: 'Intention' of the Parties, 32 Ill. L. Rev. 899 (1938).

9. Wilson v. Lewiston Mill Co., 150 N.Y. 314, 323, 44 N.E. 959, 962 (1896). But see this dictum: "Where a contract is, either expressly or impliedly, to be performed in any

a single concern for intention is also criticized for its vagueness of presumption and its "delegation of the law-making power to the citizen."[10]

The grouping of contacts theory is of comparatively recent development, and has received greater impetus from academic sources than from judicial decision. Its purpose is to permit the operation of that law which is intimately concerned with the legal relations arising out of the alleged or proved contract. "The merit of its approach is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual contest, . . . it enables the court, not only to reflect the relative interests of the several jurisdictions involved . . . but also to give effect to the probable intention of the parties. . . ."[11] This Olympus-like consideration of a contract is said to be a natural emergence from the more restricted rules—a rationalization of the results achieved by the courts in decided cases.[12] The instant decision concedes that this transaction-as-a-whole technique may afford less certainty and predictability than do the stricter rules. In applying this rule in the principal case, the court found that the *effect of the wife's institution of the separation suit,* must be determined by the law of England because that country had all the significant contacts with the agreement. Some of the contacts the court cited were: the parties were British subjects; England was the marital domicile and place of 14 years' residence, with wife's continued residence there; payments under the agreement were to be made in pound currency. The court did not undertake to say whether or not the same center of gravity would apply if the issue concerned the validity of the contract or that of the *husband's* performance. The court also noted that the wife's place of performance was in England. Therefore, applying the place of performance rule to the issue of her alleged repudiation, the same result obtains as with application of the center of gravity rule.

Though the court does not explicitly declare the present decision to be a holding of first instance in New York, it appears to be such. A prior New York decision (*Rubin v. Irving Trust Co.*)[13] has recognized the grouping of contacts doctrine. In this case the court was presented with the question of whether an oral promise not to alter a will, made in Florida and valid under Florida law, could be enforced in New York where such a contract would be violative of the Statute of Frauds. The court held that because the contract was in effect a testamentary disposition, the law of New York should apply inasmuch as that jurisdiction was the testator's last domicile. This holding pointedly demonstrates the difference between a contract to make a will and a commercial contract with respect to a conflict of laws problem;[14] for this reason alone, the *Rubin* case is distinguishable from the instant case. However, the *Rubin* case heralded the present decision by citing the center-of-gravity test with warm approval.

Even conceding that the *Rubin* decision applied the grouping of contacts rule, it

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other place than that where made, the general rule is that it is to be presumed that the parties intended that the contract should be governed by the law of the place of performance." Zwirn v. Galento, 288 N.Y. 428, 433, 43 N.E. 2d 474, 477 (1942).

10. Harper, Policy Bases of the Conflict of Laws, 56 Yale L.J. 1155, 1164 n. 28 (1947).

11. Auten v. Auten, 308 N.Y. 155, 161, 124 N.E. 2d 99, 102 (1954).

12. Barber Co. v. Hughes, 223 Ind. 570, 586, 63 N.E. 2d 417, 423 (1945).

13. 305 N.Y. 288, 113 N.E. 2d 424 (1953). An earlier decision that alluded to the grouping of contacts rule was Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp. 4 (Sup. Ct. 1936).

14. "It should be realized at the outset that we are not dealing with the ordinary contract." Rubin v. Irving Trust Co., 305 N.Y. 288, 298, 113 N.E. 2d 424, 427 (1953).

did so on a matter relating to the execution of the contract and not on an issue of performance, as does the instant decision. Matters of performance encompass the bulk of contract litigation. Thus, adoption of the grouping of contacts rule in the present case has sweeping significance, and represents such a complete departure from the orthodox rules as to justify the inference that in New York the center of gravity rule will now apply to any contract issue within conflict of laws.

The court also noted, in point of fact, that under English law, the wife's institution of the separation agreement would not bar her present action. Under New York law, her actions undoubtedly would constitute rescission of the agreement, so the lower courts thought. The Court of Appeals would not commit itself, but if the converse were true, would the court have so resolutely applied the grouping of contacts doctrine? Would the sympathy which the court obviously felt for the wife's plight have then prompted the court to locate the center of gravity in New York? Furthermore, it is now uncertain whether an express or implied intention in a contract will prevail over the center of gravity rule or only fit in as a point of contact. Or, if the center of gravity is equidistant from the opposing jurisdictions, will the rule allow an indulgence in the *lex loci contractus* or *lex loci solutionis* rules.

Thus it would seem the grouping of contacts theory does not improve on the certainty of the settled rules, but a search for certitude may be well-nigh unprofitable, especially where it leads to a hard and fast rule which may well restrict the working of substantial justice. The rule of the instant case is a noteworthy attempt to synthesize the maze of differences in an inherently complex field of law.

CRIMINAL LAW—EXCLUSION OF GENERAL PUBLIC AND PRESS FROM CRIMINAL PROSECUTION HELD UNWARRANTED.—Defendant was convicted of compulsory prostitution. During the presentation of the People's case, the trial court excluded the general public and press because of the obscene nature of the testimony. Leave was granted the defendant to have present in the courtroom such friends and relatives as he felt necessary to insure his protection. The Appellate Division, two justices dissenting, reversed the conviction and ordered a new trial. Upon appeal, *held*, two judges dissenting, affirmed. The exclusion of the general public and the press was unwarranted and deprived the defendant of a public trial. *People v. Jelke*, 308 N.Y. 56, 123 N.E. 2d 769 (1954).

It is well settled that in certain circumstances a trial judge may exclude individuals or segments of the public, without depriving the defendant of his right to a public trial. An exclusion is warranted where individuals fail to observe proper courtroom decorum[1] or where failure to exclude would cause the courtroom to be overcrowded.[2] Where testimony is apt to be obscene, an exclusion of youthful spectators is warranted,[3] as is a temporary exclusion of spectators where such exclusion is necessary to enable an emotionally disturbed witness to testify.[4]

In the principal case, however, it was decided that where a defendant is on trial for the commission of a crime not specifically set forth in section 4 of the Judiciary Law,[5] an exclusion of the general public and the press because of the obscene

1. Crisfield v. Perine, 15 Hun 200, aff'd without opinion, 81 N.Y. 622 (1880).
2. People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931).
3. State v. Adams, 100 S.C. 43, 84 S.E. 368 (1915).
4. State v. Utecht, 221 Minn. 145, 21 N.W. 2d 328 (1946).
5. N.Y. Judiciary Law art. 4, § 2.

nature of the testimony is violative of the defendant's right to a public trial. Section 4 of the Judiciary Law is to be read together with section 8 of the Code of Criminal Procedure[6] and section 12 of the Civil Rights Law,[7] which also provide for a public trial.[8] It states: "The sittings of every court within this State shall be public, and every citizen may freely attend the same, except . . . in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."

This statute would seem to make it clear that an exclusion, such as the one involved in the principal case, would be warranted during the trial of any one of the type of cases set forth therein. Since it provides that all persons may be excluded except those enumerated, the only question is whether or not the general public or the press are "directly interested" parties. Such a holding would appear to render the statute a vain and useless act on the part of the legislature. In *Matter of United Press Ass'n v. Valente*,[9] an action arising out of the same exclusion involved in the principal case, the Court of Appeals, during the course of an opinion holding that the press had no enforceable right of its own, under that part of section 4 which provides that "every citizen may freely attend", referred to the press as being a party "not directly concerned."[10]

In holding that the statute must be " 'strictly construed in favor of the general principle of publicity' "[11] so as to permit exclusion only in trials of the cases specified, the court thereby rejected the manner in which the statute (then section 5 of the Code of Criminal Procedure) was construed in *People v. Hall*,[12] a case which had been universally recognized as the law of New York.[13] In the *Hall* case the defendant was tried for extortion. He exacted money from his victim by threatening to reveal an alleged act of sodomy which was not then specified in the statute as a crime, during the trial of which, the court might exclude the public.[14] Nevertheless, the trial court excluded the general public and the press but permitted the defendant to have present such friends as he desired. In holding that the defendant was not thereby deprived of his right to a public trial, the appellate court said that the statute was not restricted in application to the cases enumerated therein, but rather that it embraced all cases where the testimony would tend to be obscene. "Careful as our lawmakers have always been of the rights of the defendant, by this section the court is expressly vested with the authority to exclude people generally from the trial. The present case is within the spirit of this statute. . . ."[15]

Subsequent to the *Hall* case, section 5 of the Code of Criminal Procedure was repealed and re-enacted as section 4 of the Judiciary Law, without change.[16] While

6. N.Y. Code Crim. Proc. § 8.

7. N.Y. Civil Rights Law § 12.

8. The Sixth Amendment to the United States Constitution providing for a public trial in criminal prosecutions, applies only to criminal prosecutions by the Federal Government, and has no applicability to those initiated by a state. In re Sawyer, 124 U.S. 200 (1888); Spies v. Illinois, 123 U.S. 131 (1887).

9. 308 N.Y. 71, 123 N.E. 2d 777 (1954).

10. Id. at 81, 123 N.E. 2d at 780.

11. People v. Jelke, 308 N.Y. 56, 65; 123 N.E. 2d 769, 773 (1954).

12. 51 App. Div. 57, 64 N.Y. Supp. 433 (4th Dep't 1900).

13. See Matter of Oliver, 333 U.S. 257, 272 (1948).

14. N.Y. Laws c. 210 (1879).

15. People v. Hall, 51 App. Div. 57, 63; 64 N.Y. Supp. 433, 437 (4th Dep't 1900).

16. N.Y. Laws c. 35 (1909).

this factor was not considered by the court, it is indicative of the legislative intent. Where a statute has been judicially construed and it is replaced by a new law containing the same provisions, the legislature is deemed to have had knowledge of such construction and the fact that no change in the wording is made, creates the presumption that no change in meaning was intended.[17] The majority of the court, in support of its construction of the legislative intent stated that the addition of sodomy and filiation to section 4 by the legislature in 1945 was confirmation of such intent.[18] But sodomy was added to the statute upon the recommendation of the Judicial Council which reported that the amendment was "to meet the dictum in the Hall Case."[19] This fact would seem to be a strong indication of a legislative intent contrary to that found by the majority.

Aside from the question of the proper interpretation of section 4, the majority opinion adapted what is perhaps the majority rule;[20] that a trial court does not have the inherent power, independently of statute, to exclude the general public and press in the interests of public morals. There is, however, considerable authority to the contrary.[21] Cooley, the most widely quoted author on this subject, after discussing the purpose of the requirement of a public trial and how it is met, upholds such exclusionary power.[22]

The New York legislature in the interest of public morality[23] should give trial courts discretionary power of exclusion in cases such as the principal one.

CRIMINAL LAW—GUILT FOR UNLAWFUL ACT CAUSED BY MENTAL DEFECT OR DISEASE.—The defendant, being tried without jury, for the crime of housebreaking, interposed the defense of insanity. The trial court rejected the defense notwithstand-

17. 1 McK. Statutes 75; Warner v. Jaffray, 96 N.Y. 248 (1884); People v. Green, 56 N.Y. 466 (1874); Doehler v. Real Estate Board of New York Bldg. Co., 150 Misc. 733, 270 N.Y. Supp. 386 (Sup. Ct. 1934); Canelli Wire Co. v. Tassi, 88 Misc. 573, 151 N.Y. Supp. 46 (Sup. Ct. 1915).

18. 308 N.Y. at 65.

19. Tenth Annual Report, 1944, at 175. It is submitted that the language of the court in the Hall case construing what is today section 4 was not dictum in that, on the facts it was essential for affirmation of the conviction.

20. State v. Kobli, 172 F. 2d 919 (3d Cir. 1949).

21. Reagan v. United States, 202 Fed. 488 (9th Cir. 1913); People v. Stanley, 33 Cal. App. 624, 166 Pac. 596 (1917); People v. Swafford, 65 Cal. 223, 3 Pac. 809 (1884); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896); Robertson v. State, 64 Fla. 437, 60 So. 118 (1912); State v. Johnson, 26 Idaho 609, 144 Pac. 784 (1914); State v. Croak, 167 La. 92, 118 So. 703 (1928); State v. Nyhus, 19 N.D. 326, 124 N.W. 71 (1909).

22. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." 1 Cooley, Constitutional Limitations 647 (8th ed. 1927).

23. There are reasons other than public morality to justify such legislation. Where such discretion is exercised, witnesses will come forth more readily and will be less recalcitrant in testifying.

ing evidence of defendant's confinement and treatment for mental illness, and found the defendant guilty of the crime charged. The defendant appealed on the ground that, inter alia, existing tests of criminal responsibility are obsolete and should be superseded. Upon appeal, *held,* reversed and remanded. If defendant's unlawful act was the product of mental disease or defect, he was not criminally responsible. *Durham v. United States,* 214 F. 2d 862 (D.C. Cir. 1954).

This decision, which immediately stirred much discussion pro and con both in legal and lay circles,[1] adds another chapter to what is perhaps one of the most controversial topics in the whole realm of the law, namely, the standard of determining mental responsibility for criminal acts.[2]

Insanity as a legal defense did not appear in the common law of England until the beginning of the fourteenth century,[3] but it was not until over three hundred years later that mental disorders constituting such a defense were separated from those that did not.[4] In the English case of *Rex v. Arnold,*[5] the so-called "wild beast" test was utilized to the effect that an accused is not criminally responsible if he "doth not know what he is doing, no more than . . . a wild beast."[6] This statement was a figurative way of saying that an accused escaped punishment if he could not distinguish between "good and evil".[7] Later in the same century (the eighteenth) the "good and evil" test was replaced by the "right and wrong" test in *Earl Ferrer's Case.*[8] Toward the middle of the nineteenth century in the famous *M'Naghten's Case,*[9] the "right and wrong" test was stated in a form which has been followed, not only in England[10] but in most American jurisdictions,[11] as an exclusive test of criminal responsibility: ". . . to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know, that he did not know he was doing what was wrong."[12]

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1. Insanity and the Criminal Law, A Critique of Durham v. United States, 22 U. Chi. L. Rev. 317 (1955) (exhaustive study by eminent lawyers and psychiatrists). See also: Easier to Get Away with Murder?, U.S. News and World Report (February 11, 1955), p. 62.

2. In the substantive law of torts, this problem is generally avoided by holding an insane person liable for his torts because of " . . . perhaps an unexpressed fear of introducing into the law of torts the confusion and unsatisfactory tests attending proof of insanity in criminal cases." Prosser, Torts 1090 (1941). See also Bohlen, Liability in Torts of Infants and Insane Persons, 23 Mich. L. Rev. 9 (1924); 22 Minn. L. Rev. 853 (1938).

3. Weihofen, Mental Disorder as a Defense to Crime 53 (1954).

4. 1 Hale, History of the Pleas of the Crown 14-15 (1st Am. ed. 1847).

5. 16 How. St. Tr. 695 (1724).

6. Id. at 764.

7. Glueck, Mental Disorder and the Criminal Law 138-139 (1925).

8. 19 How. St. Tr. 886 (1760).

9. 8 Eng. Rep. 718 (1843).

10. Report of the Royal Commission on Capital Punishment 1949-1953 (Cmd 8932) 79 (1953).

11. Leland v. State of Oregon, 343 U.S. 790, 800 (1952); Weihofen, The M'Naghten Rule in Its Present Day Setting, Federal Probation 8 (1953); Weihofen, Insanity as a Defense in Criminal Law 15, 64-68, 109-47 (1933).

12. 8 Eng. Rep. 718, 722 (1843). The District of Columbia adopted this test in United States v. Guiteau, 10 F. 161 (D.C. Sup. Ct. 1882). The M'Naghten rule is codified in § 1120 of the N.Y. Penal Law (1882). The word "wrong" as used in the rule is not limited

Criticism of the "right and wrong" test to the effect that it is a "fallacious" test of criminal responsibility appeared as early as 1838,[13] and with the progress of medical science has been heightened.[14] In response to scientific protests that the "right and wrong" test was an inadequate criterion for determining criminal responsibility, some jurisdictions adopted the irresistible impulse criterion as a supplementary test.[15] According to this standard the accused is not criminally responsible if he was impelled to commit the unlawful act by an irresistible impulse, which impulse obliterated his sense of moral consciousness to the extent that he was unable to choose between right and wrong.[16] However, as pointed out by the Court of Appeals in the principal case, this test has also been the subject of scientific criticism.

The court in this case categorically rejected these two older tests, and stated that an accused is not criminally responsible if the unlawful act was caused by a mental defect or disease.[17] The court based its position on both medical and legal authorities[18] in holding that both the "right and wrong" and "irresistible impulse" tests were inadequate, the former because it failed to take sufficient account of the advances in scientific knowledge, the latter because it did not include within its scope mental illnesses characterized by brooding and reflection.

Analysis of the test formulated by the court[19] discloses that it consists of two

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to legal as opposed to moral wrong. People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915); but the term "wrong" is that which is understood according to generally accepted moral standards and not as to those of the alleged lunatic. People v. Irwin, 166 Misc. 751, 4 N.Y.S. 2d 548 (Gen. Sess. 1938).

13. "That the insane mind is not entirely deprived of this power of moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established, that to question it would only betray the height of ignorance and presumption." Ray, Medical Jurisprudence of Insanity 32 (1st ed. 1838).

14. Zilboorg, Legal Aspects of Psychiatry in One Hundred Years of American Psychiatry 1844-1944, 507, 552 (1944). "If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method [M'Naghten's Rule] is neither good morals nor good law." Selected Legal Writings of Benjamin Nathan Cardozo 387 (1947).

15. Smith v. United States, 36 F. 2d 548, 550 (D.C. Cir. 1929). N.Y. Penal Law § 34 (1881) specifically rejects the irrersistible impulse test. People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915); Flanagan v. People, 52 N.Y. 467 (1873).

16. Smith v. United States, 36 F. 2d 548, 549 (D.C. Cir. 1929). Cf. Keedy, Irresistible Impulse as a Defense in Criminal Law, 100 U. Pa. L. Rev. 956 (1952).

17. The new test has been criticized as implicitly denying the freedom of the will. McDonnell, The Right-Wrong Test, 71 J. Bar Ass'n D.C. 389 (1954). The court, in its conclusion, emphatically pointed out that it was not denying that a sane person is morally culpable for unlawful acts.

18. Guttmacher & Weihofen, Psychiatry and the Law (1952); Glueck, Psychiatry and the Criminal Law, 12 Mental Hygiene 575 (1928); Deutsch, The Mentally Ill in America (2d ed. 1949); Menninger, The Human Mind (1937); Report of the Royal Commission on Capital Punishment 1949-1953; Preliminary Report by the Committee on Forensic Psychiatry for the Advancement of Psychiatry, and other authorities cited throughout the circuit court's opinion.

19. A test for criminal responsibility, substantially similar to that enunciated by the court in this case has been followed in New Hampshire in State v. Pike, 49 N.H. 399 (1870). The Court of Appeals of Maryland in Thomas v. State, 23 U.S.L. Week 2491 (Md. Ct. App.

elements: first, the jury must determine whether the accused was suffering from a mental defect[20] or disease[21] at the time the alleged crime was committed, and second, they must determine whether there exists causal relation between the mental condition and alleged unlawful act. In other words even though the accused was suffering from a mental defect or disease at the time of the alleged crime, if the unlawful act was not caused by such mental condition, the accused would be legally capable of committing crime.

Under the older tests a psychiatrist was restricted in his findings as to the accused's criminal responsibility by being forced to state whether the accused could distinguish right from wrong—the jury was free only to accept or reject his testimony. Clearly, if modern psychiatry demonstrates that there are few insane persons who cannot distinguish right from wrong,[22] a legal test of responsibility consonant with up-to-date medical knowledge is necessary. The rule of the *Durham* case supplies such a test. Under the new rule the expert will be permitted to testify to his complete findings, leaving to the jury the ultimate determination of the accused's responsibility.

Of course the new standard has not solved all the intricate problems interwoven in the determination of criminal responsibility. The problems revolve mainly around the "causal connection" part of the rule. If there is no causal relationship between the mental condition and the act, the accused cannot benefit from the rule.[23] Whether the test will be applied if the act was only partially caused by the mental disorder is a question that will have to be determined by the courts. Undoubtedly as the cases present themselves, the courts will alter and modify the rule to meet the peculiarities of each factual situation.

CRIMINAL LAW—JURISDICTION OF CRIMINAL COURT OVER JUVENILE OFFENDER—RETROSPECTIVE EFFECT OF A JUDICIAL DECISION.—Petitioner, in 1944, was indicted for homicide committed subsequent to his fourteenth birthday but before his fifteenth birthday. He entered a plea of *non vult* and was sentenced to life imprisonment by the County Court. Claiming that the County Court had no jurisdiction to impose the sentence, petitioner sought a writ of habeas corpus before the Superior Court. *Held,* application denied and writ dismissed. *In re Johnson,* 31 N.J. Super. 382, 106 A. 2d 560 (Super. Ct. 1954).

The New Jersey legislature has enacted that "A person under the age of sixteen

March 25, 1955) refused to adopt the "mental cause or defect" test on the ground that the "right and wrong" standard should not be changed unless the court is convinced it is not a true test (D.C. Cir. 1954).

20. "We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease." Durham v. United States, 214 F. 2d 862, 875 (D.C. Cir. 1954).

21. "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating." Ibid.

22. "Examination of a number of individual cases in which a verdict of guilty but insane [the nearest English equivalent of our acquittal by reason of insanity] was returned, and rightly returned, has convinced us that there are few indeed where the accused can truly be said not to have known that his act was wrong." Report of the Royal Commission on Capital Punishment 1949-1953 (Cmd 8932) 103 (1953).

23. Durham v. United States, 214 F. 2d 862 (D.C. Cir. 1954).

years is deemed incapable of committing a crime . . ."[1] and has defined juvenile delinquency as the ". . . commission by a child under eighteen years of age (1) of any act which when committed by a person of the age of eighteen years or over would constitute (a) A felony, high misdemeanor, misdemeanor, or other offense. . . ."[2] In *In re Mei*[3] the question was raised as to whether a fifteen year old could be tried for murder in the same manner as an adult. Notwithstanding the express terms of the statute, the court held that he could, on the ground that murder is so heinous that it remains a crime no matter what name may be appended to it by the legislature.[4] This was the law when petitioner was sentenced in 1944.

In 1954, the issue was again raised as to whether a fifteen year old defendant could be tried in the County Court on a first degree murder charge or was to be proceeded against in the Juvenile Court. In *State v. Monahan*[5] the New Jersey Supreme Court re-examined and overruled the decision in the *Mei* case and the cases which had reiterated that decision,[6] setting aside an order denying a motion to transfer the proceeding to the Juvenile and Domestic Relations Court and remitting the matter to that court for further proceedings.[7] The argument in behalf of petitioner in the present proceeding was based on the contention that in light of the *Monahan* case and its retrospective effect, the County Court in this instance had no jurisdiction to impose the sentence that it did, and that petitioner's confinement by an order of a court without jurisdiction is in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.[8] This argument was summarily dismissed by the court on the ground that *State v. Monahan* was not entirely applicable to the case at hand. The court did not find any violation of the Fourteenth Amendment since, in its own words, ". . . the defendant was sentenced by the judge of the Court

1. N.J.S.A. 2A:85-4.

2. N.J.S.A. 2A:4-14.

3. 122 N.J. Eq. 125, 192 Atl. 80 (Ct. Err. & App. 1937).

4. ". . . A charge which is in effect that of murder . . . remains a crime within the purview of the constitution, whatever name and whatever treatment may be appended to it by the Legislature." Id. at 129, 192 Atl. at 83.

5. 15 N.J. 34, 104 A. 2d 21 (1954).

6. State v. Goldberg, 125 N.J.L. 501, 17 A. 2d 173 (1940).

7. "A majority of the court is satisfield that our present legislation lawfully vests exclusive jurisdiction in the juvenile court over misconduct by children under sixteen, including misconduct which would constitute murder or other heinous crime if committed by an adult." Supra note 5, at 46, 104 A. 2d at 27. See 9 Rutgers L. Rev. 480 (1954).

8. Petitioner's objection on the basis of a denial of due process under the Fourteenth Amendment is ill founded. The case does not involve a real constitutional question. In Gibson v. Mississippi, 162 U.S. 565, 591 (1896), the Court stated: ". . . The conduct of a criminal trial in a state court cannot be reviewed by this court [United States Supreme Court], unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Mere error in administering the criminal law of a State or in the conduct of a criminal trial—no Federal right being invaded or denied—is beyond the revisory power of this court under the statutes regulating its jurisdiction." In Brown v. New Jersey, 175 U.S. 172, 175 (1899), the Court stated: "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

of Oyer and Terminer, who is the same judge who would sit in Juvenile and Domestic Relations Court."[9]

The State of New Jersey has jurisdiction over the matter at hand, and can determine which court will have jurisdiction. The legislature has provided that the Juvenile and Domestic Relations Court shall have exclusive jurisdiction to hear and determine all cases of juvenile delinquency,[10] with the exception that a juvenile of the age of sixteen or seventeen years may be referred by the court to the county prosecutor or may demand a trial by jury.[11] The question of jurisdiction has been resolved by statute.

The court's finding that the Fourteenth Amendment was not violated, since the judge who sat in the County Court was the same man who would have sat in the Juvenile Court, erroneously vests jurisdiction in the person of the judge, rather than in a court. Because the same judge would sit in either court, it does not follow that there would be no substantive difference in the rights of the accused. Children under eighteen years of age, who appear before the Juvenile and Domestic Relations Court in any capacity, shall be deemed to be wards of the court, and protected accordingly.[12] It is expressly declared to be a principle governing the law of the state that such children are its wards, subject to the discipline and entitled to the protection of the state.[13] All cases are to be heard and determined by the court without a jury.[14] The trial is to be private, not public,[15] and the child at no time is to be placed in any prison or jail.[16] As for the disposition of the juvenile offender, the court may place him on probation, or commit him to the care of the state board of child welfare or of a public institution established for his instruction and rehabilitation.[17] Finally, no adjudication upon the status of a child under eighteen shall impose any of the civil disabilities ordinarily imposed by conviction, nor shall he be deemed a criminal thereby, nor shall such adjudication be deemed a conviction.[18]

In view of the above differences, which evidence the fact that the administration of the Juvenile and Domestic Relations Court is essentially rehabilitative, not penal, in character, petitioner's contention that *State v. Monahan* is retrospective in its effect would appear to be worthy of more consideration than the one sentence dismissal afforded it by the court. The courts of New Jersey have followed the rule as stated in *Stockton v. Dundee Manufacturing Company*,[19] that: "A change by statute is only for the future. A change by decision is retrospective and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it."[20]

In 1948 the New York legislature amended the Children's Court Act, giving that

9. In re Johnson, 31 N.J. Super. 382, 384, 106 A. 2d 560, 562 (Super. Ct. 1954).
10. N.J.S.A. 2A:4-14.
11. N.J.S.A. 2A:4-15.
12. N.J.S.A. 2A:4-34.
13. N.J.S.A. 2A:4-2.
14. N.J.S.A. 2A:4-35.
15. N.J.R.R. 6:2-6.
16. N.J.S.A. 2A:4-33.
17. N.J.S.A. 2A:4-37.
18. N.J.S.A. 2A:4-39.
19. 22 N.J. Eq. 56 (Ch. 1871).
20. Id. at 57. See also, Ross v. Board of Chosen Freeholders, 90 N.J.L. 522, 102 Atl. 397 (Ct. Err. & App. 1917).

court exclusive jurisdiction in the case of persons under sixteen charged with juvenile delinquency, except a child fifteen years of age who commits any act which if committed by an adult would be a crime punishable by death or life imprisonment. Such a child is to be tried in the Children's Court, unless an order removing the action to the criminal court has been made and filed.[21] The decisions have interpreted the amendment as extending the jurisdiction of the Children's Court to all cases involving children under the age of fifteen regardless of the offense committed,[22] and is indicative of a trend in New York to the position stated by the New Jersey Supreme Court in the *Monahan* case.

It is submitted that in passing over the decision in the *Monahan* case, the Superior Court apparently failed to recognize what has become the established policy of New Jersey with regard to the juvenile offender.

CRIMINAL LAW—LARCENY BY HUSBAND OF WIFE'S PROPERTY.—Defendant was indicted for grand larceny for stealing property belonging to his wife. The trial court dismissed the indictment, holding that the common law rule that a spouse could not commit larceny with respect to the property of the other was effective in New York. The Appellate Division for the Second Department reversed. On appeal, *held*, affirmed. The common law rule has been abrogated by statute, and a husband may be convicted for appropriating the separate property of his wife. *People v. Morton*, 308 N.Y. 96, 123 N.E. 2d 790 (1954).

The rule at common law that a husband could not be held liable for stealing from his wife was based principally on the fact that at common law title to a woman's property passed to her husband on marriage, and he could not be deemed guilty of stealing goods which he lawfully owned.[1] Conversely, neither could a wife be guilty of stealing from her husband, since under the common law theory of legal unity of spouses, they were but one person in the eyes of the law.[2] These common law rules were in effect in New York when the section of the Penal Law defining larceny was passed by the legislature.[3] It is substantially the same as our present larceny statute[4] and generally defines the crime as the felonious taking and carrying away of the personal property of another. Since the property must be that of *another*, husbands and wives obviously could not have been covered by this section at the time of its enactment, with respect to each other's property.

Since the adoption of the Penal Law, the common law as to a married woman's separate property has been completely abrogated by additions to the Domestic Relations Law.[5] Under the amendments commonly known as the Married Women's

21. N.Y. Code Crim. Proc. pt. III (Children's Court Act § 2), as amended, N.Y. Laws c. 555 (1948).

22. In re Farrell (In re Scott), 191 Misc. 582, 78 N.Y.S. 2d 679 (N.Y. Dom. Rel. Ct. 1948).

1. 2 Kent Commentaries 130-144 (14th ed. 1896).

2. Phillips v. Barnet, 1 Q.B.D. 436 (1876); Reg. v. Kenny, 2 Q.B.D. 307 (1877).

3. 2 Rev. Stat. of N.Y. 679 (1829). "Every person who shall be convicted of the felonious taking and carrying away the personal property of another" shall be guilty of grand larceny if the value of the property be more than $25.00. (Cited in People v. Morton, 284 App. Div. 413, 414, 132 N.Y.S. 2d 302, 305 (2d Dep't 1954)).

4. N.Y. Penal Law § 1290.

5. N.Y. Dom. Rel. Law §§ 50, 51.

Acts, a married woman was permitted to own property in her own name and sue and be sued with respect to it as if unmarried.[6] Because of these statutes, a married woman was given the civil right to sue her husband for conversion of her property,[7] and it would appear implicit in this grant of rights that she be afforded the further protection of the law relating to property ownership, that is, criminal prosecution by the state for its wrongful appropriation.

However, though the Married Women's Acts seemed to put the property of a married woman in the category of the "property of another" with relation to her husband, the courts of New York were still confronted with the common law doctrine of legal unity of spouses, and found in several cases that a woman could not sue her husband civilly for personal torts because of this theory.[8] Following the reasoning of these decisions, the Supreme Court of Albany County, in the case of *People* ex rel. *Troare v. McClelland*,[9] held that a wife could not be convicted of stealing from her husband because the legal unity rule was still effective in New York. It should be noted that even at this time a husband was liable criminally for personal injuries inflicted wrongfully on his wife,[10] thus showing the difficulty confronting the courts in applying this archaic fiction.

In 1937, the Domestic Relations Law was again amended to allow husbands and wives to sue each other for injuries to person or character as if unmarried,[11] thus effectively abrogating the unity theory. With the two main bases for granting a spouse criminal immunity for theft of the other's goods eradicated by statute, it might appear that the law would be automatically clarified, but the subsequent lower court decisions were in conflict.[12] One of the reasons advanced for adhering to the common law rule[13] was that penal laws must be strictly construed,[14] and at the time the larceny section of the New York Penal Law was adopted, the phrase "goods of another" did not apply to the goods of married persons. Since it could not have been the intention of the legislature at that time to make spouses liable to prosecution under the statute, it should take an express act of the legislature to so extend it, regardless of subsequent changes in civil statutes and case law.[15] This view is untenable

6. Ibid.

7. Whitney v. Whitney, 49 Barb. 319 (N.Y. 1867); Wright v. Wright, 54 N.Y. 437 (1873).

8. Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935); Shubert v. Shubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Allen v. Allen, 246 N.Y. 571, 159 N.E. 656 (1927).

9. 146 Misc. 545, 263 N.Y. Supp. 403 (Sup. Ct. 1933).

10. 1 Wharton's Criminal Law § 832 (12th ed. 1932); People v. Winters, 2 Park Cr. R. 10 (N.Y. 1823).

11. "A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury . . . , or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or to his property as if they were unmarried". N.Y. Dom. Rel. Law § 57.

12. People ex rel. Felmere v. Rapp, 180 Misc. 839, 44 N.Y.S. 2d 410 (Sup. Ct. 1943); People ex rel. Rossiter v. Rossiter, 173 Misc. 268, 17 N.Y.S. 2d 30 (Mag. Ct. 1940); People ex rel. Mattiello v. Mattiello, 200 Misc. 619, 110 N.Y.S. 2d 359 (City Ct. of New Rochelle 1951); People v. Morton, 204 Misc. 1063, 127 N.Y.S. 2d 246 (County Ct. 1954).

13. People ex rel. Felmere v. Rapp, 180 Misc. 839, 44 N.Y.S. 2d 410 (Sup. Ct. 1943). Criticized in 13 Fordham L. Rev. 117 (1944).

14. People v. Benc, 288 N.Y. 318, 43 N.E. 2d 61 (1942).

15. For a complete discussion of the problem, concluding in support of this position, see 16 St. John's L. Rev. 78 (1941).

for a number of reasons. The only requirement of the larceny statute applicable to this situation is that the goods stolen belong to someone other than the thief. No particular class of persons is mentioned or excluded, and it is therefore necessary to go outside the statute to discover the exact legal ownership of the property stolen. If, according to applicable law, the property does belong to someone other than the one taking it, the offense automatically fits into the statutory definition. It is logical then to recognize that when the laws other than the Penal Law, which determine property ownership are changed, the connotation of the phrase "goods of another" also changes, though the wording of the Penal Law remains the same. It is not contended that a change in the Penal Law, expressly including spouses, would not be within the scope of legislative authority, but only that such action is wholly unnecessary, since the legal relation of husbands and wives to each other's property has already been defined by legislative changes in the Domestic Relations Law. It is unrealistic to assume in the light of the numerous scientific and sociological changes which have taken place in the last decade, that laws, no matter how general their wording, apply only to subjects and concepts directly contemplated by the members of the legislature when the law was passed. Such a restrictive idea would make the law inflexible and bound by archaic rules, long after the reasons for the rules had passed out of existence.

The final objection to abolition of the common law rule is that the peace and harmony of the home will be disrupted if one spouse be permitted to press criminal charges against the other for larceny. However, it certainly is doubtful that such marital bliss exists in a home where one spouse has resorted to stealing from the other. Rather, this decisison of the Court of Appeals has finally settled the law on this important question, recognizing that the interests and protection of society as a whole are better served by refusing to allow a criminal offender to go unpunished, than by preserving a long outmoded common law fiction.

DAMAGES—PLEADING—AFFIRMATIVE DEFENSE IN MITIGATION OF PUNITIVE DAMAGES.—Plaintiff, a sales employee, brought an action against defendant for false imprisonment alleging that detectives in the employ of the defendant had willfully, wrongfully, maliciously and forcibly imprisoned her over a matter involving an alleged theft of a purse in the store. Defendant's answer consisted solely of a general denial. No affirmative defense of justification was pleaded nor was there any plea in mitigation of damages. As part of its case the defense offered evidence of reports of prior losses by other employees and a plan to trap the thief by leaving a purse with marked bills conspicuously placed. It was this purse that the plaintiff had picked up. Subsequently she was taken into custody by detectives. Plaintiff objected to the introduction of this evidence on the ground that it had not been pleaded as part of the answer. Nevertheless, the court received the evidence on the subject of good faith, lack of malice and probable cause. A verdict of no cause of action was rendered by the jury which verdict was set aside by the trial court on the ground that evidence of prior thefts had been improperly admitted as bearing upon the defendant's liability for exemplary damages, since no plea in mitigation of damages had been interposed by the defendant. Upon appeal, *held,* affirmed. Admission of evidence offered to mitigate damages was prejudicial error since the circumstances relied upon had not been affirmatively pleaded in the answer. *Gill v. Montgomery Ward and Co.,* 284 App. Div. 36, 129 N.Y.S. 2d 288 (3d Dep't 1954).

The defendant's liability herein would not be affected by good faith and probable cause on the defendant's part since such elements do not constitute a complete

defense for an action of false imprisonment.[1] Furthermore, extenuating circumstances, such as good faith and probable cause, would not affect the plaintiff's claim of compensatory damages.[2] In *Sanders v. Rolnick*,[3] an action by the plaintiff for false arrest by a private citizen acting without a warrant, the court held that ". . . good faith, absence of malice and the existence of reasonable and probable cause may be shown by the defendant . . . not to defeat the action . . . not to reduce the actual damage sustained, but only in mitigation with respect to punitive damages."[4] There would seem however, to be an exception to the general rule that extenuating circumstances have no bearing on actual damages in actions for assault. In *Kiff v. Youmans*[5] the court held that extenuating circumstances do serve to disprove actual as well as to mitigate punitive damages in such actions.[6] To better understand the reasoning for this exception, it should be recalled that damages in an action for assault may include not only compensation for the actual physical injury suffered by the plaintiff, but also compensation for the less tangible damages consisting of mental anguish and humiliation.[7]

The question then is whether in order to prove extenuating circumstances in so far as they bear upon plaintiff's claim for actual damages upon the trial specific pleading thereof is necessary as provided by section 262[8] and section 339[9] of the Civil Practice Act. It was pointed out in Judge Cardozo's concurring opinion in *McClelland v. Climax Hosiery Mills*[10] that matter in disproof of actual damages need not be pleaded to be proved upon the trial. In the *McClelland* case the defendant in an action for wrongful discharge sought to prove that the plaintiff had been offered a comparable position at a similar salary, thus seeking to reduce the amount of damages claimed by the plaintiff. Judge Cardozo said that this was not

1. McLoughlin v. New York Edison Co., 252 N.Y. 202, 169 N.E. 277 (1929). See also Prosser, Torts 72, 73, 162 (1941). For statutory proviso see also N.Y. Code Crim. Proc. §§ 177, 183 (1849).

2. Bradner v. Faulkner, 93 N.Y. 515 (1883); Sanders v. Rolnick, 188 Misc. 627, 67 N.Y.S. 2d 652 (App. Term 1947) aff'd without opinion, 272 App. Div. 803, 71 N.Y.S. 2d 896 (1st Dep't 1947); Young v. Fox, 26 App. Div. 261, 49 N.Y. Supp. 634 (1st Dep't 1898).

3. 188 Misc. 627, 67 N.Y.S. 2d 652 (App. Term 1947).

4. Id. at 632, 67 N.Y.S. 2d at 657.

5. 86 N.Y. 324 (1881).

6. Id. at 330: "Although this provocation fails to justify the defendant . . . it may be relied upon by him in mitigation even of compensatory damages." See also Genung v. Baldwin, 77 App. Div. 584, 79 N.Y. Supp. 569 (3d Dep't 1902); Freedman v. Metropolitan St. Railway Co., 89 App. Div. 48, 85 N.Y. Supp. 986 (2d Dep't 1903). This is apparently the minority view. See 14 Fordham L. Rev. 95 (1945); Robison v. Rupert, 23 Pa. St. 523 (1854).

7. McCormick, Damages § 88 at 315-316, 317 (1935).

8. N.Y. Civ. Prac. Act § 262 (1936). This section provides: "A partial defense may be set forth, but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth. . . . Matter tending only to mitigate or reduce damages is a partial defense, within the meaning of this section."

9. N.Y. Civ. Prac. Act § 339 (1939). This section provides: "In an action to recover damages for a personal injury, or an injury to property, the defendant may prove, at the trial, facts not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defenses to the entire cause of action."

10. 252 N.Y. 347, 354, 169 N.E. 605, 608 (1930).

matter in mitigation within the aforementioned statutes[11] and, therefore, could be proved though not specially pleaded.[12] There is one instance however, where matter tending merely to disprove actual damages must be affirmatively pleaded to be admissible in evidence, that is, in a defamation action, matter such as the bad reputation of the plaintiff certainly disproves his asserted claim that his good reputation has been damaged.[13] And yet the same considerations of administrative convenience which led the courts to require that truth be affirmatively pleaded, namely the prevention of surprise,[14] require that facts merely tending but failing to prove the truth of a libel (such as bad reputation) be also pleaded, even when such facts are sought to be shown merely to disprove damages.[15]

Extenuating circumstances would properly bear upon the plaintiff's right to recover punitive damages in the case under review since punitive damages are assessed for punishment and not to compensate the plaintiff for the alleged wrongful act of the defendant. A positive element of conscious wrongdoing is always required by proof of either ill will, malice, or evil motive.[16] In order to introduce proof of such extenuating circumstances, a partial defense in mitigation of punitive damages must be pleaded.[17] In *McClelland* the court ruled that the mitigating circumstances referred to in section 262 and section 339 ". . . were those that bore upon a defendant's liability for punitive or exemplary damages by reducing or softening the moral or social culpability attaching to his act, or upon his liability for actual damages by showing that, though suffered they had been partially extinguished. . . . Mitigating circumstances are not those that reduce the actual damages by showing that they were not suffered. Mitigating circumstances are those that affect the basis for an award of exemplary damages, or reduce actual damages by showing, not that they were never suffered, but that they have been partially extinguished."[18] In *Bradner v. Faulkner*,[19] an action for false imprisonment and malicious prosecution, the court held, in interpreting section 536 of the Code of Civil Procedure,[20] that its effect

11. N.Y. Civ. Prac. Act §§ 262 (1936), 339 (1939).

12. In McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 356, 169 N.E. 605, 608 (1930), Judge Cardozo in his concurring opinion said: "Matter tending to the disproof of actual damages, or damages claimed to be actual, was not matter in mitigation within the meaning of the statute, and might be proved by a defendant though not mentioned in the answer."

13. Fleckenstein v. Freidman, 266 N.Y. 19, 193 N.E. 537 (1934). See also Seelman, Law of Libel and Slander in the State of New York § 66 (1933).

14. In Bisbey v. Shaw, 12 N.Y. 67 at 71 (1854), the court said: "But evidence so tending to prove the truth of words was excluded by the uniform practice of the courts, although the offer was expressly limited to the purpose of mitigating damages. The courts were driven to the adoption of this practice, by the apprehension that the admission of such evidence, under the pretence of mitigation, would enable a defendant, by accumulating facts and circumstances before the jury, all tending to prove the truth of words, to work into the case a practical justification, without notice to the plaintiff that the defendant intended to justify."

15. Fleckenstein v. Freidman, 266 N.Y. 19, 193 N.E. 537 (1934).

16. Bradner v. Faulkner, 93 N.Y. 515 (1883); O'Connor v. Field, 266 App. Div. 121, 41 N.Y.S. 2d 492 (1st Dep't 1943); McCormick, op. cit. supra note 7.

17. N.Y. Civ. Prac. Act §§ 262 (1936), 339 (1939).

18. 252 N.Y. 347, at 355, 358, 169 N.E. 605, at 608, 609 (1930).

19. 93 N.Y. 515 (1883).

20. N.Y. Code of Civ. Proc. § 536. The forerunner of this section was § 165 of the

would be to preclude the defendant from proving circumstances by way of mitigation that are not set forth in the pleadings.

The fundamental question may be raised why a defendant must warn a plaintiff, by special pleading, that the defendant intends to introduce evidence of extenuating circumstances, since a plaintiff by claiming punitive damages must expect to be met with proof, offered by the defendant, tending to reduce or soften "the moral or social culpability attaching to his act," in an effort to persuade the jury either not to punish at all or at least to reduce the punishment to a minimum. The answer would appear to be that usually a plaintiff has no way of knowing the extenuating circumstances the defendant intends to rely on. Such circumstances may be, and often are, exclusively within the knowledge of the defendant, bearing as they do on his own mental state at the time the act was committed. The facts of the principal case serve to illustrate what might occur. The plaintiff would not become informed of what motivated the defendant to act until well after the trial had begun and the plaintiff had presented his proof.

DOMESTIC RELATIONS—CONSTRUCTION OF STATUTE GIVING ALIMONY AFTER EX PARTE DIVORCE—SEQUESTRATION.—*H* and *W* were married in 1948 and separated in 1952. In 1953, *H* procured a Nevada divorce in an action in which *W* did not appear. *W* subsequently began a separation action in New York in which *H* appeared specially to contest the jurisdiction of the Court. His Nevada decree withstood attack. *W* then moved for a judgment of alimony under section 1170-b of the New York Civil Practice Act. *H*, while claiming to preserve his special appearance, argued the case on the merits. *Held*, that since *W*'s failure in the separation action was due to a divorce decree procured by *H* in an action in which she didn't appear, *W* was entitled to alimony under section 1170-b. The alimony was to be satisfied out of *H*'s property, sequestered pending the separation action. *Vanderbilt v. Vanderbilt*, — Misc. —, 138 N.Y.S. 2d 222 (Sup. Ct. 1955).

Section 1170-b of the Civil Practice Act, was enacted in 1953 on the recommendation of the New York State Law Revision Commission.[1] It was adopted in the interest of the New York wife who is divested of her right to support by reason of her husband's *ex parte* divorce decree.[2]

The circumstances involved in the instant decision are akin to those presented

N.Y. Code of Civ. Proc. of 1848 which applied only in actions for libel and slander. Subsequently this section was embodied in § 536 of the Code of Civ. Proc., now § 339 of the Civ. Prac. Act (1939) which expanded the classes of actions to include those wherein suit is brought to recover damages for the breach of a promise to marry, or for personal injury, or an injury to property.

1. See Leg. Doc. No. 65 (k) (1953). The statute reads as follows: CPA 1170-b (1953). *"Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.* In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. . . ."

2. The term "ex parte" as used in this article denotes a divorce granted to one spouse in an action in which personal jurisdiction over the other spouse was not had.

in the case of *Estin v. Estin*.[3] In that case, *H* and *W* were residents of New York. In a separation action brought by *W* in which personal jurisdiction over *H* was had, the New York Supreme Court awarded her a judgment for alimony. Subsequently, *H* procured an *ex parte* divorce in Nevada and discontinued the alimony payments. When *W* sued him for the unpaid installments, *H* appeared in the action and moved to set aside the alimony provisions of the separation decree. The New York courts denied him this relief.[4] This decision was upheld by the United States Supreme Court on the ground that Nevada could not adjudicate the rights of a party under a New York judgment when Nevada had no jurisdiction over her person.

Although the alimony award in the prior separation action in the *Estin* case distinguishes it from the present decision, the theory underlying both cases is essentially the same. The *Estin* decision recognized two things: first, the interest which New York has in the welfare of its domiciliaries[5] and secondly, the all-important but essentially simple fact, that a court lacking in personam jurisdiction cannot adjudicate in personam rights.[6] In granting the husband his divorce the Nevada court had before it, the marital *res*. Having this in rem jurisdiction, it could dissolve the marriage. But in order to adjudicate the wife's right to alimony, personal jurisdiction over both parties was required[7] and this the court lacked. Hence, it could not interfere with the New York alimony award.

Applying the same reasoning to the present facts, there is no basis for denying to a state authority to require an individual to support his former wife when she is his *former* wife by reason of his *ex parte* divorce. Does the state not have as much interest in *her* welfare as it has in the welfare of the wife to whom it has granted support? Can the *ex parte* divorce effect her right to alimony any more than it could effect the rights of the wife who had previously procured a separation decree? Prior to the enactment of 1170-b, the New York courts lacked the necessary statutory authority to award her alimony or support.[8] Section 1170-b now vests this authority exclusively in the Supreme Court.[9]

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3. 334 U.S. 541 (1948).

4. 63 N.Y.S. 2d 476 (Sup. Ct. 1946), aff'd 271 App. Div. 829, 66 N.Y.S. 2d 421 (2d Dep't 1946), aff'd 296 N.Y. 308, 73 N.E. 2d 113 (1947).

5. 334 U.S. at 547. In speaking upon this subject, the court said, "New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest. The New York court, having jurisdiction over both parties, undertook to protect her by granting her a judgment of permanent alimony. . . . "

6. Pennoyer v. Neff, 95 U.S. 714 (1877).

7. Edwards v. Edson, 119 App. Div. 684, 104 N.Y. Supp. 293 (3d Dep't 1907); Rigney v. Rigney, 127 N.Y. 408, 28 N.E. 406 (1891), rev'd on other grounds sub nom. Laing v. Rigney, 160 U.S. 531 (1895).

8. Ramsden v. Ramsden, 91 N.Y. 281 (1883); Erkenbrach v. Erkenbrach, 96 N.Y. 456 (1884). It has long been a well recognized principle in New York that there is no inherent right to alimony. Hence, the power to grant it is entirely regulated by statute.

9. The stated purpose of 1170-b is " . . . to authorize the Supreme Court to provide for the maintenance of a wife where the husband had previously obtained a divorce annulment, or a declaration of nullity of a void marriage from a court which did not have jurisdiction over her person." Leg. Doc. No. 65 (k) (1953) at 3. Furthermore, the New York Children's Courts and Domestic Relations Courts are forums of limited jurisdiction over matrimonial actions and are not empowered to order support for ex-wives. N.Y. Const., art. VI, 18; N.Y. Children's Court Act § 30 (1942); N.Y. Dom. Rel. Ct. Act §§ 91, 137 (1942).

In view of the premises upon which the *Estin* decision rests, should there be any doubt as to the validity of section 1170-b? In the *Estin* case the highest court expressly warned against discrimination with respect to the foreign *ex parte* divorce.[10] In other words, to permit a New York separation decree to survive a foreign *ex parte* divorce would not be violative of any constitutional provision as long as the same rule was applied to *ex parte* divorces secured in a New York court.[11] In recommending the passage of 1170-b, the Law Revision Commission took cognizance of the *Estin* caveat by stating: "In order to avoid discrimination against foreign divorces, against which the *Estin* opinion warned, such legislation should be made applicable whether the husband's *ex parte* adjudication of marital status was obtained in a foreign court or a New York court".[12] If legislative intent be given its proper consideration the statute obviously contemplates both out-of-state and New York *ex parte* decrees and would appear immune to constitutional attack.

Safe as it may be from constitutional attack, the statute will find limited application. Most cases arising under it will undoubtedly involve a valid *ex parte* decree secured in a state other than New York. Such a decree requires that the husband be a bona fide domiciliary of that other state at the commencement of the divorce action.[13] Since personal jurisdiction over him by the New York court is necessary to grant an alimony judgment to the wife,[14] the non-resident husband who is not served with process in New York can thwart the provisions of 1170-b by not appearing in the New York action. In the absence of personal jurisdiction over a defendant in an alimony suit, New York will permit the sequestration of his property within the state.[15] The judgment is then satisfied out of the sequestered property. Since personal jurisdiction over the defendant was lacking in the instant case, the court permitted the alternative remedy. Is there authority to do so?

Section 1170-b imposes two prerequisites to an award of alimony *viz.*, prior dissolution of the marital status and the wife's failure to obtain in her New York matrimonial action, a decree of divorce, separation, annulment, or judgment declaring the marriage a nullity. In previous cases involving sequestration, neither element was present. The marriage was always in existence when the sequestration was ordered and plaintiff-wife was successful in obtaining a decree or judgment in her matrimonial suit. The question therefore arises: is sequestration proper in the absence of an existing marriage, and if so, is the sequestration automatically vacated upon the failure by the wife to procure a decree or judgment in her action? Under the present law the answer is uncertain. While there is no law expressly prohibiting the use of sequestration under these circumstances, by the same token, there is no law expressly permitting it.

Section 1171-a of the Civil Practice Act permits sequestration only if personal jurisdiction over defendant-husband is impossible because of his absence from or concealment within the state. Can the term "husband," as used here, be construed

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For cases construing these statutes see, Morton v. Morton, 99 N.Y.S. 2d 155 (N.Y. Dom. Rel. Ct. 1950); Adler v. Adler, 192 Misc. 953, 81 N.Y.S. 2d 797 (N.Y. Dom. Rel. Ct. 1948).

10. 334 U.S. at 549, 552.

11. Compare Hughes v. Fetter, 341 U.S. 609 (1951), with Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

12. Leg. Doc. No. 65 (k) (1953) at 6.

13. Williams v. North Carolina, (I) and (II), 317 U.S. 287 (1942) and 325 U.S. 226 (1945).

14. See note 7 supra.

15. Civ. Prac. Act 1171-a (1940).

to include an ex-husband domiciled in another state in which he secured an *ex parte* divorce? Section 1171-a further states that the alimony is to be paid out of the sequestered property, "during . . . or at the termination. . . ."[16] of the action. Can this phrase be construed to include actions which terminate in such a fashion that the plaintiff fails to win a matrimonial decree?

Earlier decisions indicate that an existing marriage *is* a prerequisite to the sequestration of the husband's property.[17] There is legal opinion which concurs in this proposition.[18] However, at the time these cases were decided, the *ex parte* divorce had not commanded the attention it has been given in the past decade. These courts never discussed and apparently never considered the effect of an *ex parte* divorce upon the issuance of a sequestration order. Later courts have never faced the problem.[19] This aspect of the instant case will require further judicial clarification.

Although it would appear that the reasoning of *Estin v. Estin* predetermined the constitutionality of section 1170-b, the statute itself presents a new situation in the law. The facts of the *Estin* case revealed the following chronological sequence: separation, alimony, *ex parte* divorce, and survival of the alimony decree. In the instant case, the alimony award came after the marriage had been dissolved. Whether it is proper to equate the *Estin* rationale with the new statute is a question upon which final determination will rest with the Supreme Court of the United States.

DOMESTIC RELATIONS—LEGITIMACY OF CHILD WHERE PARENTS DIVORCED FROM FORMER SPOUSES UNDER MEXICAN MAIL ORDER DIVORCES.—On July 7, 1934, plaintiff-mother and decedent participated in a marriage ceremony in Connecticut. Previously both parties were validly married, but had obtained mail order divorces from a Mexican court. The parties never appeared in this court or established a residence in Mexico. No other judicial proceeding ever terminated their marriages. After the Connecticut ceremony, both parties lived in New York as man and wife until the death of the wage-earner on April 28, 1950. Plaintiff-child, born on November 26, 1936, is the only issue. This was an action by the mother and daughter against the Secretary of Health, Education and Welfare for social security benefits. The court determined the mother was not the decedent's widow under New York law and

16. Ibid.

17. Matthews v. Matthews, 240 N.Y. 28, 147 N.E. 237 (1925); Geary v. Geary, 272 N.Y. 390, 6 N.E. 2d 67 (1936).

18. "In Geary v. Geary, the court was able to award support to the wife of an absent defendant in her separation action by the use of the property sequestered prior to judgment, pursuant to Section 1171-a of the Civil Practice Act. The question arises as to whether or not this same procedure may be followed where there is no husband-wife relationship to support the original marital action. Although the language of the sequestration statute doesn't preclude an affirmative answer, a close reading of the pertinent sections of the Civil Practice Act would indicate that this section wouldn't suffice as a basis for granting the wife relief." Legislative Recognition of the Divisible Divorce—New Protection for the Stay-at-Home Spouse, 28 St. John's Law Rev. 164, 170 (1954). See also, 5 Bender's Forms for the Civ. Prac. Act, Form No. 5646, at 766; op. cit. supra at 768, n.56.

19. Frank v. Frank, 43 N.Y.S.2d 460 (Sup. Ct. 1943); Rubinstein v. Rubinstein, 191 Misc. 325, 79 N.Y.S. 2d 289 (Sup. Ct. 1948); Mazer v. Mazer, 276 App. Div. 733, 97 N.Y.S. 2d 59 (1st Dep't 1950). But see Forster v. Forster, 182 Misc. 382, 46 N.Y.S. 2d 320 (Sup. Ct. 1944).

denied her a recovery under the Social Security Act. As to the child's claim under the Social Security Act, the court ordered a remand to the administrator for a determination of the child's rights to benefit payments. *Magner v. Hobby*, 215 F. 2d 190 (2d Cir. 1954).

The benefits sought by the child are awarded under section 216(h)(1) of the Social Security Act, as amended.[1] This section, as well as the New York cases,[2] indicate that the legitimacy of this child must be resolved by the law of New York, the state of domicile. In New York the children of parents whose marriage is void and who never marry validly are illegitimate from birth.[3] In *Matter of Moncrief*[4] the court said: ". . . at common law where a marriage was annulled, the parties were in the same position as though a marriage had never been entered into and the children born of it were all illegitimate unless legitimated by statute. This rule remains unimpaired."[5] The harsh results which obviously flow from this common law rule have been eased in many states by statute.[6] New York has not been generous in such legislation.[7]

The court in disposition of the child's claim referred the administrator to section 1135(6) of the New York Civil Practice Act[8] for determination as to the child's

1. 68 Stat. 1080, 42 U.S.C.A. § 416 (h) (1) (1954). ". . . the Administrator shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death . . . ."

2. Olmsted v. Olmsted, 190 N.Y. 458, 83 N.E. 569 (1908); Hubbard v. Hubbard, 228 N.Y. 81, 85, 126 N.E. 508, 509 (1920), wherein the court said: "Whether or not the operation of a foreign decree of divorce in a given case will contravene the policy or wrong or injure citizens of the state is exclusively for its courts to determine. They are the final judges of the occasions on which the exercise of comity will or will not make for justice or morality."

3. In Baylis v. Baylis, 207 N.Y. 446, 101 N.E. 176 (1913), the issue of a marriage, void because of the existence of a former spouse, was held to remain illegitimate because of lack of good faith on the part of the parties to the second marriage.

4. 235 N.Y. 390, 139 N.E. 550 (1923).

5. Id. at 396, 139 N.E. at 552.

6. The most advanced legislation is found in Arizona and North Dakota where all children are declared to be the legitimate issue of their natural parents. Ariz. Civ. Code §§ 1-3 (1913). North Dakota Sess. Laws c. 70 (1917).

7. N.Y. Dom. Rel. Law § 24 (1896), makes a child born out of lawful wedlock legitimate upon the marriage of its parents. N.Y. Civ. Prac. Act § 1135 provides for legitimacy of children in an action to annul a marriage. These sections are illustrative of New York legislation in this direction.

8. N.Y. Civ. Prac. Act § 1135 (6) "legitimacy of children . . . (6) If a marriage be declared a nullity or annulled upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, if it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead or that the former marriage had been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, a child of such subsequent marriage is deemed the legitimate child of the parent who at the time of the marriage was competent to contract. If either party or both parties to such subsequent marriage were incompetent to contract, the court by the judgment may decide that a child of the marriage is the legitimate child of such an incompetent."

right to payment. This section evidences one of the few New York efforts to alleviate the strict common law rule, by providing for legitimization in an annulment proceeding. However, the fact that no such proceeding was brought in this particular case, coupled with the lack of good faith of the parties, denies to the child the benefit of this section. In view of these circumstances, payment to her could not be made. Therefore, the prudence of the court's disposal of this phase of the case is questionable. But beyond this, the decision serves to illustrate the hardship and injustice resulting from inadequate legislation for children of void marriages.

Although section 1135(6) was passed with a view of helping the plight of such illegitimate children, an examination thereof reveals it is limited in application. Of the two elements necessary for a finding of legitimacy, both are apparently lacking in this case. A finding of legitimacy must be made in an annulment proceeding[9] and at least one of the parties must have entered the marriage in good faith.[10] The wording of the section itself indicates an appropriate judicial proceeding is contemplated: "The following provisions govern the effect of declaring a marriage void or annulling a voidable marriage upon the legitimacy of children of the marriage. . . ."[11] Since no such action was brought in the instant case, the child would not be entitled to receive a payment from the administrator.

Furthermore, the harshness of the New York law is emphasized by the fact that the child has no avenue to establish legitimacy left open to her. Children of marriages which are annulled or declared void by a New York court can be legitimatized by providing for them in the judgment of annulment or the judgment declaring the nullity of a void marriage. There is a limitation on the persons who are eligible to bring an action to annul a marriage when the former husband or wife is living.[12] Section 1134 of the New York Civil Practice Act provides for this particular action but stipulates that it ". . . may be maintained by either of the parties during the lifetime of the other, or by the former husband or wife."[13] Since one of the parties in the instant case had died, the other party to the void marriage could not bring an action to annul under section 1134.[14] The wording of this section manifests this conclusion and supports a reasonable inference that the parties to the former valid marriages are precluded from such action as well. It is evident, therefore, that the child involved in the case under review would not receive the benefits sought since the administrator was by court direction to be guided by section 1135(6) which is so limited in application.

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9. Anonymous v. Anonymous, 174 Misc. 906, 22 N.Y.S. 2d 598 (N.Y. Dom. Rel. Ct. 1940); Matter of Crook, 140 Misc. 721, 252 N.Y. Supp. 373 (Surr. Ct. 1931).

10. Hiser v. Davis, 234 N.Y. 300, 307, 137 N.E. 596, 598 (1922) wherein the court said: " . . . the child if illegitimate will be illegitimate unless this condition can be cured under the specified provision of the Code and that provision of the Code expressly requires that the question of good faith of the parents must be settled and the decree of legitimacy made in the annulment action."

11. N.Y. Civ. Prac. Act § 1135.

12. Matter of Avras, 142 Misc. 358, 254 N.Y. Supp. 611 (Surr. Ct. 1931): " . . . either of the parties to the later marriage and the party to the former marriage who was not a party to the later . . . ." may bring an action to annul a marriage where the former husband or wife was living. Stokes v. Stokes, 198 N.Y. 301, 305, 91 N.E. 793, 794 (1910).

13. N.Y. Civ. Prac. Act § 1134.

14. In Matter of Crook, 140 Misc. 721, 252 N.Y. Supp. 373 (Surr. Ct. 1931), the death of one of the parties to a second void marriage was held as a bar to the power of the court to declare the issue of this marriage legitimate.

In 1951, the New York Law Revision Commission considered the problem of legitimacy of children of void or annulled marriages, with particular emphasis on section 1135.[15] The commission was justly disturbed by the fact that the statute failed to benefit children of marriages which, although void under New York law, are never judicially declared void in a proceeding pursuant to article 67 of the Civil Practice Act entitled "Action to Annul a Marriage." Furthermore, even if this proceeding were brought, the stigma of illegitimacy would remain if the parties were not in good faith.[16] The collusive and frivolous nature of the Mexican divorces obtained by both parties in the instant case exemplifies bad faith and further illustrates the frustration of the child's position.

The very fact that there is a section 1135 is proof of the fact that New York sympathizes with children of void marriages, and that they should not be punished for the wrongdoing of their parents. However, this remedial legislation is stripped of effectiveness because of the limitation contained therein. The commission suggested: ". . . that legitimacy of children should be declared by statute in all cases where the parents of such children have entered into a ceremonial marriage."[17] Although the commission's recommendations on this matter were not adopted, it is a consolation to know that there is some legal consciousness of this problem which may ultimately be resolved by proper legislation.

EVIDENCE—ATTORNEY-CLIENT PRIVILEGE—COMMUNICATIONS RELATING TO FUTURE CRIME.—In the course of a grand jury investigation of gambling and the corruption of public officials, defendant refused to answer four questions on the ground that they referred to past acts related to him as counsel by his deceased client in connection with a lawyer-client purpose, and were privileged. The questions substantially were: 1) to whom did the defendant's client pay protection money; 2) to whom did the client give political contributions; 3) did the client tell the defendant he had been to the home of the state Republican Chairman; 4) did the client tell his attorney he talked to the state Republican Chairman? The Supreme Court, three justices dissenting, reversed the two lower courts, which had refused to direct the defendant to answer the questions in a criminal contempt proceeding, holding that sufficient evidence had been adduced to show that the client was in a continuing conspiracy to obstruct the due administration of the laws of the state, and that such conduct would deny the privilege. The only specific proof of the continuing conspiracy was: 1) the testimony of the state Republican Chairman that he had been visited shortly after defendant had been retained, and had been asked by the client to intercede to prevent a grand jury investigation of gambling; 2) the client's statement that public officials were constantly demanding more bribe money; 3) the fact that the client had had more than two hundred conferences with defendant in less than a year's time, when the client was neither under arrest nor indictment. *In re Selser*, 15 N.J. 393, 105 A. 2d 395 (1954).

Where legal advice of any kind is sought from an attorney, the communications relating to that purpose made in confidence by the client are, as a general rule, per-

15. Report, Recommendations and Studies of the Law Revision Commission 137 (Leg. Doc. No. 65 (E) (1951)).

16. N.Y. Civ. Prac. Act § 1135 (6).

17. Report, Recommendations and Studies of the Law Revision Commission 138 (Leg. Doc. No. 65 (E) (1951)).

manently protected from disclosure by the attorney.[1] It has long been recognized that the dividing line between the application or denial of the attorney-client privilege in cases of fraudulent employment of counsel is drawn at the point where the advice sought refers to future wrongdoing and not to prior wrongdoing, even though the attorney be ignorant of the client's purpose.[2] The proof required to deny the privilege is a prima facie case that the wrongful future purpose exists, and that the communications sought to be discovered can be reasonably connected with that purpose.[3]

Whether under the test so outlined the communications in issue should be denied the privilege is doubtful, for the defendant testified that they were made to him *after* the events to which they refer and for the legitimate purpose of gaining advice prior to appearing before the Kefauver Investigating Committee.[4]

The majority of the court did not consider whether the communications in issue referred to some future criminal purpose, but held that because a continuing criminal purpose permeated the client's activities before and after his retention of counsel, the client would not be allowed to avail himself of the privilege.[5] The decisions cited and relied upon by the majority would seem to require evidence not only of a wrongful purpose in the employment, but also the seeking of advice for the achievement of that purpose before the privilege would be denied.[6] In the instant case it does

1. 8 Wigmore, Evidence § 2292 (3d. ed. 1940). The privilege exists to secure the subjective freedom of the client in giving information to his attorney. It could not be attained if the client understood that when the relation ended, or when he died, the attorney could be compelled to disclose the confidences. In this sense the privilege is permanent. See 8 Wigmore, op. cit. supra, § 2323. Of course, the privilege can be waived by the deceased client's personal representatives, but they did not choose to do so in this case. See 8 Wigmore, op. cit. supra, § 2329.

2. S.E.C. v. Harrison, 80 F. Supp. 226 (D.D.C. 1948); Matthews v. Hoagland, 48 N.J. Eq. 455 (Ch.), 21 Atl. 1054 (1891); O'Rourke v. Darbishire [1920] A.C. 581; Regina v. Cox, L.R. 14 Q.B. Div. 153 (1884); Greenough v. Gaskell, 1 My. & K. 98 (1833); 8 Wigmore, op. cit. supra note 1, § 2292.

3. Alexander v. United States, 138 U.S. 353 (1891); Pollock v. United States, 202 F. 2d 281 (5th Cir. 1953); S.E.C. v. Harrison, 80 F. Supp. 226 (D.D.C. 1948); Matthews v. Hoagland, 48 N.J. Eq. 455 (Ch.), 21 Atl. 1054 (1891); Graham v. People, 63 Barb. 468 (N.Y. 1872). See also 28 R.C.L. 558; 125 A.L.R. 508.

4. App. pp. 45a, 46a, 47a, 49a, 50a of Record on Appeal, In re Selser, 15 N.J. 393, 105 A. 2d 395 (1954). It is interesting to note that the state contended the communications concerning contributions were made prior to the visit to the state Republican Chairman, which occurred on November 12, 1950, whereas the testimony of the defendant was that they were made immediately prior to the Kefauver investigation which took place in Washington on the 13th and 14th of December, 1950.

5. In re Selser, 15 N.J. 393, 105 A. 2d 395 (1954).

6. Clark v. United States, 289 U.S. 1 (1933); U.S. v. Bob, 106 F. 2d 37 (2d Cir.), cert. denied, 308 U.S. 589 (1939); S.E.C. v. Harrison, 80 F. Supp. 226 (D.D.C. 1948); Matthews v. Hoagland, 48 N.J. Eq. 455 (Ch.), 21 Atl. 1054 (1891); Model Code of Evidence, Rule 212 (comment) (1942). These cases require that there be sufficient evidence to sustain a finding that the communications were for a forbidden purpose. Much of the difficulty in determining the necessary proof to deny the privilege comes from construction of the word "fraud" in the Clark v. United States dictum, some courts taking it to mean the future purpose alone, while a reading of the whole case indicates that the dictum rested on the word meaning a seeking of advice toward a fraudulent purpose.

not appear that the attorney's advice was sought for any criminal purpose. It may well be that the client was still pursuing the same type of criminal activities and intended to continue the same. But it is quite plausible and equally realistic to infer that he sought advice to guide him through the Kefauver hearings and subsequent criminal proceedings which might be commenced against him rather than advice to aid him in the future perpetration of crime.

It is submitted that even though a criminal purpose might have been proved to have existed, that does not necessarily prove that communications made to the attorney were made in connection with that purpose. The test suggested by the decision of the majority has been put before the American Bar Association but has not been adopted.[7]

The attorney-client privilege is not denied because the client is a criminal, but because he seeks advice from an attorney for a criminal end. Unless that advice can be connected with a criminal end, rather than a legitimate end, no good reason is shown why the advice and the communications should not continue to be privileged and confidential.

LABOR RELATIONS—PEACEFUL, ORGANIZATIONAL PICKETING HELD NOT SUBJECT TO INJUNCTIVE ORDER.—Appellant union, in an attempt to organize three clerks employed in respondent's retail liquor store, sent representatives to him, requesting permission to discuss union membership with the employees. The employer refused to permit this solicitation and stated that should the employees unionize he would cease to employ them. The union thereupon commenced picketing in front of the store. The picketing was peaceful and without violence. Employer's petition to the State Labor Relations Board for an election was rejected since the union neither claimed to represent employees nor had it submitted a contract. The Board characterized the picketing as "organizational". The employer, prior to the Board's action, had filed a petition for injunctive relief, pendente lite. This was denied by the Supreme Court, Special Term. The Appellate Division unanimously reversed and granted an injunction for a six month period. On appeal, *held,* three judges dissenting, reversed. Organizational picketing, peacefully conducted, is lawful regardless of the length of time it is continued, and may not be enjoined. *Wood v. O'Grady,* 307 N.Y. 532, 122 N.E. 2d 386 (1954).

The first question raised in this case was whether a labor dispute existed. Under section 876a of the Civil Practice Act, an injunction cannot be issued "in any case involving or growing out of a labor dispute" except under certain rigidly defined conditions.[1] The majority relied on the definition of a labor dispute contained

7. 8 Wigmore, op. cit. supra note 1, § 2299. Wigmore cites Judge Seabury's suggestion that in cases involving public officials the privilege be dropped entirely, and also mentions a proposal by the Committee on Rules of Evidence of the American Bar Association, denying application of the privilege in cases involving criminal syndicates. The proposal has not been adopted. Wigmore suggests that where some evidence of crime has been introduced the burden should shift to the attorney to show that the communications were for a legitimate purpose.

1. N.Y. Civ. Prac. Act. § 876-a (1939). These conditions include threat or commission of unlawful acts, substantial and irreparable injury to complainant's property, greater damage to complainant by denial of injunction than to defendant if injunction is granted, inadequacy of legal remedy, and failure or inability of police to protect complainant. Even

in section 876a[2] in deciding that a labor dispute did exist, even though the relationship of employer-employee did not exist between the disputants. This was a valid interpretation of the statute in question and there is merit in the majority holding that the situation in this case was exactly the type that the legislature wished to have considered a labor dispute under the definition. Case law also favors the majority viewpoint.[3] It appears, however, that not just anyone can picket a place of business and be protected against injunction. There must exist, at least, a similarity of industry between the employees in the picketed establishment and the picketers themselves to entitle the latter to the protection of the statute.[4]

The most noteworthy aspect of the decision, is its affirmation of the possibility of a picket line being directed at the *employee* rather than at the employer. Having decided that a labor dispute did exist, the court could still have upheld the injunction if an "unlawful objective" could be imputed to the picketing.[5] Under the New York State Labor Law,[6] and the Taft-Hartley Law,[7] it is unlawful for an employer to compel, coerce, or influence his employees either to join or not to join a labor union. It follows that, should a picket line be directed at the employer of non-union employees, it would constitute an attempt to coerce him to an unlawful act and would not be protected by Civil Practice Act section 876a.[8] Such picketing has been termed "recognition" picketing by those who hold that it is possible to categorize picketing by examining its aims. Recognition picketing has been enjoined by New York courts on many occasions.[9] The majority of the court found the picket-

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if these elements are present, the injunction will be denied if it bars publication of facts in a dispute by any method not involving fraud, violence or breach of the peace.

2. N.Y. Civ. Prac. Act § 876-a (1939), subd. 10, par. (c). "The term 'labor dispute' includes any controversy concerning terms and conditions of employment . . . or representations . . . or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."

3. May's Furs and Ready to Wear, Inc. v. Bauer, 282 N.Y. 331, 26 N.E. 2d 279 (1940); Larson Buick Co. v. United Automobile Workers, Local 995, — Misc. —, 113 N.Y.S. 2d 905 (Sup. Ct. 1952).

4. N.Y. Civ. Prac. Act § 876-a, subd. 10, par. (a) "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation. . . ." See La Rose v. Possehl, 156 Misc. 392, 282 N.Y. Supp. 332 (Sup. Ct. 1935).

5. N.Y. Civ. Prac. Act § 876-a (1939). See note 1, supra.

6. N.Y. Labor Law §§ 703 (1940), 704 (1937).

7. 29 U.S.C.A. § 157 (1947), 29 U.S.C.A. § 158 (1951), correspond to N.Y. Labor Law §§ 703 (1940), 704 (1937).

8. Picketing involving commission of unlawful acts will be enjoined. The New York State Labor Law in forbidding an employer to coerce his employees to join a labor union renders any picketing of an employer to compel him to such action unlawful and enjoinable.

9. Plastic Calendering Corp. v. Spilberg, — Misc. —, 121 N.Y.S. 2d 297 (Sup. Ct. 1953) wherein defendant verbally requested recognition of his union, and pickets carried signs reading: "Strike—Local 815, I.B.T., American Federation of Labor"; Metropolis Country Club v. Lewis, 202 Misc. 624, 114 N.Y.S. 2d 620 (1952), aff'd without opinion, 280 App. Div. 816, 113 N.Y.S. 2d 923 (2d Dep't 1952). Here, picketers used truthful signs, but made verbal misrepresentations to deliverers that a "strike" was in progress. In Bickford's Inc. v. Mesevich — Misc. —, 107 N.Y.S. 2d 369 (Sup. Ct. 1951), picketers urged pros-

ing in the instant case to have been directed at the *employees* of the store and not, therefore unlawful in its objective. Picketing, as in this case, for the purpose of influencing the employees to join a labor union is termed "organizational" picketing.[10] This case marks the first time that organizational picketing has been considered by the Court of Appeals since enactment of the Taft-Hartley Law.[11] The dissent raised objection to the premise that anybody but the employer is influenced or affected by a picket line.

Conceding the possibility and legality of organizational picketing, the question remains as to whether it can be continued indefinitely in the face of manifest unwillingness of the employees to unionize, and still retain its protected status. The majority apparently held that if an act be valid one day, it remains so the next. Prior to this the time element had not been considered a vital factor.[12] However, there have always been additional facts which changed the character of the picketing to recognition picketing. This decision apparently establishes that if a picket line can retain its organizational character over an extended period, it will not become unlawful by mere passage of time.

From the time that the United States Supreme Court declared picketing within an industry to be a form of free speech[13] it has been inevitable that picketing of an organizational character would be sanctioned. As a form of free speech, picketing has the protection of the United States Constitution and is protected as an inalienable right.[14] As indicated above, it is not totally without restriction. In addition to the ban on recognition picketing and picketing where no similarity of industry exists, picketing will be enjoined unless it is truthful,[15] conducted peacefully,[16] or is unaccompanied by a secondary boycott.[17] Neither can picketing be conducted while

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pective customers to "pass them by." This was held to constitute evidence of pressure on employer.

10. This designation is made to distinguish the picketing from recognition picketing, strikes and educational picketing. The latter type consists of picketing of a place of business by a rival union of the union already representing the employees. Its objective is to influence the employees to transfer their allegiance to the picketing union. This has recently been declared legal. Douds v. Local 50, Bakery & Confectionary Workers International Union, A.F.L., 127 F. Supp. 534 (S.D. N.Y. 1955).

11. It was conceded in the principal case that the industry involved was one in intrastate commerce. Therefore, no question was raised as to the propriety of a state court issuing an injunction rather than having a determination on the merits by the N.L.R.B. For a discussion of the jurisdictional conflict between state court and federal board, see Garner v. Teamsters, Local 776, 346 U.S. 485 (1953).

12. Ahlers, Inc. v. Papa, 272 App. Div. 905, 71 N.Y.S. 2d 423 (1st Dep't 1947). In this case, picketing was not enjoined, although it had continued in excess of one year.

13. Thornhill v. Alabama, 310 U.S. 88 (1940). For a complete discussion of the ramifications of the equation of picketing with free speech, see: Teller, Picketing and Free Speech; Dodd, Picketing and Free Speech: A Dissent; and Teller, Picketing and Free Speech: A Reply, 56 Harv. L. Rev. 180, 513, 532 (1942-1943).

14. U.S. Const. Amend. I declares freedom of speech a fundamental personal right. U.S. Const. Amend. XIV insures such rights against abridgement by a state.

15. Metropolis Country Club v. Lewis, 202 Misc. 624, 114 N.Y.S. 2d 620 (1953), aff'd without opinion, 280 App. Div. 816, 113 N.Y.S. 2d 923 (2d Dep't 1952).

16. Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

17. National Labor Relations Act, 65 Stat. 601, 29 U.S.C.A. § 158(b)(4)(A) (1951).

the dispute is being adjudicated before a Labor Board.[18] These restrictions afford the employer protection against irresponsible exercise of the right of free speech by labor unions.

A major objection to the sanctions of organizational picketing stems from public reaction to a picket line. The Supreme Court has recognized that ". . . the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[19] The instant case constitutes a vote of confidence in the responsible segments of both labor and management. It places on them the duty of informing the public of the possibility of picket lines having different motives. A public made aware through education that various types of picketing are possible and legal may well be moved to investigate the aims of each picket line with which it is confronted and base its actions upon a rational evaluation of the merits of the particular picket line. This education is more to be desired than judicial bars to the exercise of a form of free speech, on the sole grounds that the public does not, at present, understand what is being done.

18. Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E. 2d 697 (1951). This case at one time was felt to be a bar to organizational picketing. It is distinguishable on the ground that the dispute in that case was under adjudication before the Labor Board at the time of the picketing. That distinction made the decisions in the instant case possible.

19. Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl, 315 U.S. 769, 776 (1942).