Fordham Law Review

Volume 22 | Issue 3 Article 5

1953

Recent Decisions

RECENT DECISIONS

CONFLICT OF LAWS—EX PARTE DIVORCE—CUSTODY DECREE NOT ENTITLED TO FULL FAITH AND CREDIT.—The parties were married and domiciled in Wisconsin. In the course of marital difficulties the wife took their children to Ohio, whereupon the husband obtained an *ex parte* divorce decree in Wisconsin awarding him custody of the children. The wife was served in Ohio but not in Wisconsin, and did not appear in the action. Upon the strength of this decree the husband obtained custody of the children who remained with him in Wisconsin, until he permitted them to visit their mother in Ohio. Upon her refusal to surrender them, the husband relying upon the Wisconsin decree, filed a petition for a writ of habeas corpus in an Ohio state court. He was granted relief on the ground that the Wisconsin decree was entitled to full faith and credit. The trial court's decision was affirmed by the Court of Appeals for Columbiana County and an appeal to the Supreme Court of Ohio was dismissed. On appeal to the U.S. Supreme Court, three justices dissenting, *held*, judgment reversed. A mother's right to custody of her children is a personal right which cannot be cut off by an *ex parte* decree, so as to be binding upon a sister state. *May v. Anderson*, 345 U.S. 528 (1953).

The instant case presents the issue of whether the courts of one state must give full faith and credit[1] to the custody provisions of an *ex parte* divorce decree in a sister state. This precise question has never been the subject of a decision by the Supreme Court, for while the Court dealt with the problem of custody and the Full Faith and Credit Clause in *Yarborough v. Yarborough*[2] and *New York* ex rel. *Halvey v. Halvey*,[3] neither case directly involved the point now at issue. In the *Yarborough* case the trial court had acquired personal jurisdiction of both parties while in the *Halvey* case the problem was noted by the Court but it expressly reserved decision on it[4]. It is well settled that the Full Faith and Credit Clause requires only that a state shall give to the decree or judgment of a sister state the force and effect to which it was entitled in the state where rendered.[5] Consequently the problem presented by the case is whether or not the Wisconsin court had sufficient jurisdiction to award custody of the children.

At one time the authorities regarded the jurisdictional requirements for divorce and custody decrees as being closely related.[6] Traditionally, divorce was recognized as an action in rem with the res being the matrimonial domicile, and a divorce decree

1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. Art. IV, § 1. By the Act of May 26, 1790 Congress provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." 1 Stat. 122 (1790), 28 U.S.C. § 1738 (1946).

2. 290 U.S. 202 (1933).

3. 330 U.S. 610 (1947).

4. "The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, e.g., . . . whether in the absence of personal service the Florida decree of custody had any binding effect on the husband; . . . On all these problems we reserve decision." New York ex rel. Halvey v. Halvey, 330 U.S. 610, 615 (1947).

5. New York ex rel. Halvey v. Halvey, 330 U.S. 610, 614 (1947); Sistare v. Sistare, 218 U.S. 1, 17 (1910); Tilt v. Kelsey, 207 U.S. 43, 57 (1907).

6. See Goodrich, Custody of Children in Divorce Suits, 7 Cornell L. Q. 1 (1921).

rendered in a state other than the matrimonial domicile was not entitled to be enforced outside the territorial jurisdiction of the court.[7] This concept was completely altered by the two decisions in *Williams* et al. *v. North Carolina*[8] which held that *ex parte* divorce decrees were entitled to full faith and credit on the theory that the domicile of one of the parties in the decreeing state gave that state a sufficient interest in the matrimonial status. In the absence of desertion, a finding of domicile by one state is not conclusive, however, but may be attacked by the absent spouse[9] provided he or she did not appear to contest the action.[10]

Most jurisdictions went along with the concept of domicile in custody cases by holding that power to award custody of children depends on the domicile of the child.[11] This was the basis of Mr. Justice Jackson's dissenting opinion. The children in the instant case were technically domiciled in Wisconsin, even though residing outside the state, by virtue of the fact that in the absence of a decree awarding custody, a minor's domicile is usually that of its father.[12] From this it was concluded that Wisconsin had acquired jurisdiction sufficient to determine custody of the children.[13] There is a very strong minority view in several jurisdictions holding that jurisdiction to award custody of children belongs to the state where they reside irrespective of their technical domicile,[14] on the theory that the state is acting in the capacity of a *parens patriae*.[15] This position is inconsistent with the decision in *Yarborough v. Yarborough*[16] which upheld the validity of a Georgia custody decree even though the child was temporarily residing in South Carolina.

The majority opinion rejected both theories and laid down the principle that personal jurisdiction of both parties is required for a custody decree[17] on the basis of

7. Haddock v. Haddock, 201 U.S. 562 (1906).

8. 317 U.S. 287 (1942); 325 U.S. 226 (1945).

9. "In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable." Williams et al. v. North Carolina, 325 U.S 226, 232 (1945). See also Rice v. Rice, 336 U.S. 674 (1949).

10. Scherrer v. Scherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948).

11. 2 Beale, The Conflict of Laws 717 (1935); Restatement, Conflict of Laws § 117 (1934); 47 Mich. L. Rev. 703 (1949).

12. Yarborough v. Yarborough, 290 U.S. 202, 211 (1933); Helton v. Crawley, 241 Iowa 296, 41 N.W. 2d 60, 67 (1950).

13. This was also the theory of the Ohio Court of Appeals. Anderson v. May, 91 Ohio App. 557, 107 N.E. 2d 358 (1952), aff'd, 157 Ohio St. 436, 105 N.E. 2d 648 (1952).

14. Helton v. Crawley, 241 Iowa 296, 41 N.W. 2d 60 (1950); DiGiorgi v. DiGiorgi et al., 153 Fla. 24, 13 So. 2d 596 (1943); People ex rel. Noonan v. Wingate et al., 376 Ill. 244, 33 N.E. 2d 467 (1941); Rogers v. Commonwealth, 176 Va. 346, 11 S.E. 2d 584 (1940); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

15. New York Foundling Hospital v. Gatti, 203 U.S. 429 (1906); Boone v. Boone et al., 150 F. 2d 153, 155 (D.C. Cir. 1945); People ex rel. Herzog v. Morgan, 287 N.Y. 317, 320, 39 N.E. 2d 255, 256 (1942); Finlay v. Finlay, 240 N.Y. 429, 435, 148 N.E. 624, 626 (1925).

16. 290 U.S. 202 (1933).

17. Prior to this decision a number of cases took the position that if the child is neither physically present nor domiciled within the state a court has jurisdiction to award custody if both parents are before the court. See Anderson v. Anderson, 74 W. Va. 124, 81 S.E. 706 (1914); Stephens v. Stephens, 53 Idaho 427, 24 P. 2d 52 (1933). In Yarborough v. Yarborough, 290 U.S. 202, 210 (1933) the Supreme Court said by way of dictum ". . . juris-

the decision in *Estin v. Estin*.[18] The *Estin* case upheld the validity of a Nevada divorce obtained *ex parte* by a husband resident in Nevada, insofar as it dissolved the bonds of matrimony, but held Nevada powerless, in the absence of personal jurisdiction,[19] to interfere with the wife's property rights under the alimony provisions of a prior separation decree in another state. Using the *Estin* case as a starting point, the majority of the Court took the position that personal rights,[20] far more valuable than property rights, are entitled to at least as much protection as her right to alimony.

In a companion case, *Kreiger v. Kreiger*,[21] the Supreme Court expressly refused to indicate whether the reasoning in the *Estin* case was applicable to custody decrees. Therefore, the decision under review must be regarded as an extension of the holding in the *Estin* case. This extension might be objected to on the ground that it conflicts with *Williams* et al. *v. North Carolina*.[22] A spouse must be regarded as having a personal interest in his own marital status which is entitled to protection, yet under the *Williams* decision this interest can be cut off without the personal jurisdiction of both parties. The answer to this seeming difficulty would appear to be that in a divorce action the absent spouse's personal interest is in the matrimonial res of which a court can acquire jurisdiction simply through the domicile of one of the parties within its borders. With regard to custody, however, the absent spouse's personal interest is independent of the matrimonial res. Custody is not a matter of status for in such cases a court is not creating or dissolving a legal relationship but is making a determination as to which of two or more contesting parties has the best claim to the child.[23]

It is submitted that in extending the holding in the *Estin* case to custody disputes the Supreme Court provided the best possible solution to a problem that has plagued the courts and called forth Law Review Notes[24] for some time. The other two possible solutions, domicile and *parens patriae*, are subject to the objection that under them an unscrupulous spouse may withdraw with the children to a distant

---

diction over parents confers eo ipso jurisdiction over the minor's custody and support." See also 20 Ford. L. Rev. 328 (1951).

18. 334 U.S. 541 (1948).

19. In the leading case of Pennoyer v. Neff, 95 U.S. 714 (1877), it was held that a defendant may not be deprived of property rights without personal service.

20. "It is elementary that parents are the legal and natural custodians of their minor children and each parent has an equal right to their custody in the absence of an order, judgment, or decree of a court of competent jurisdiction fixing their custody. Section 8032 General Code." In re Corey, 145 Ohio St. 413, 61 N.E. 2d 892, 894 (1945). Section 8032 of the Ohio General Code was repealed in 1951 and replaced by Section 8005-3 which is substantially identical.

Mr. Justice Jackson dissenting in the case under review, distinguished a proceeding involving the status, custody & support of children, from one involving adjudication of property rights. Custody is to be viewed not with the idea of adjudicating rights in the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children.

21. "No issue as to the custody of the child was raised either in the court below or in this court." Kreiger v. Kreiger, 334 U.S. 555, 557 (1948).

22. 317 U.S. 287 (1942); 325 U.S. 226 (1945).

23. Stumberg, The Status of Children in The Conflict of Laws, 8 Univ. Chi. L. Rev. 42, 55 (1940).

24. See: 37 Va. L. Rev. 134 (1951); 20 Ford. L. Rev. 326, 328 (1950); 24 N.Y.U. L.Q. 615 (1949); 22 So. Calif. L. Rev. 293 (1949); 47 Mich. L. Rev. 703 (1949).

jurisdiction and thereby prevent adequate consideration and disposition of the issues in the case. The dominant consideration in custody cases should always be the welfare of the children. Their interest is best served by actually having both parties before the court so that it may more adequately judge which parent is better able to discharge the solemn obligations of parenthood. In addition personal jurisdiction of all the parties whose rights are affected by a proceeding is highly desirable to make certain that they had valid notice and an opportunity to be heard.

CONFLICT OF LAWS—MARRIAGE OF UNCLE AND NIECE—MARRIAGE VALID IF VALID IN THE STATE WHERE PERFORMED.—Respondent and the decedent, uncle and niece and members of the Jewish faith, were residents of New York. In 1913, they were married in Rhode Island according to the rites of the Jewish religion. The marriage was valid in Rhode Island. On the death of the wife, the petitioner, a daughter, sought letters of administration. The respondent husband objected to the granting of such petition on the ground that he was the surviving spouse. This was disputed by the petitioner who argued that the marriage was void under the law of New York. The Appellate Division reversed the Surrogate who had granted letters to the petitioner, and granted letters to the decedent's husband. On appeal, *held,* one judge dissenting, judgment affirmed. The marriage in Rhode Island was valid in New York since it was valid in the state of celebration. *Matter of May,* 305 N.Y. 486, 114 N.E. 2d 4 (1953).

In Rhode Island, a marriage between uncle and niece is prohibited. An exception to the rule is made, however, in the case of a marriage which is solemnized according to the rites of the Jewish religion.[1] In New York, all such marriages are declared as incestuous and void without exception, and the parties thereto are subject to fine and imprisonment.[2]

While it is fundamental that every state has the right to determine the marital status of its citizens,[3] it has also long been held in New York, as in all other states, that the validity of nuptial contracts is to be determined by the law of the place where the marriage is performed.[4] This course has not been shaken despite the fact that in a majority of cases the parties concerned were married in other states to avoid the laws of New York.[5] There have apparently been only two variances from this rule.

1. Rhode Island General Laws tit. xxxvi, c. 415 §§ 1, 4, 9 (1913).

2. New York Domestic Relations Law § 5, sub. 3 (1909).

3. Maynard v. Hill, 125 U.S. 190 (1888).

4. Van Voorhis et al. v. Brintnall et al., 86 N.Y. 18 (1881).

5. Moore v. Hegeman, 92 N.Y. 521 (1883); Thorp v. Thorp, 90 N.Y. 602 (1882); Van Voorhis et al. v. Brintnall et al., 86 N.Y. 18 (1881). In Fisher v. Fisher, 250 N.Y. 313, 318, 165 N.E. 460, 462 (1929), the Court of Appeals used the following language: "It is well settled that the provisions of our statutes forbidding the remarriage of a party who has been divorced for adultery have no extra-territorial effect; that a subsequent marriage of the guilty party, during the life of the innocent party in a sister State, if valid in that State, will be recognized here as a lawful marriage." Some cases have arisen in the same manner under the restrictions imposed by Sec. 7 Sub. 1 of the Domestic Relations Law which concerns itself with the age of legal consent. Reid v. Reid, 72 Misc. 214, 129 N.Y. Supp. 529 (Sup. Ct. 1911); Donohue v. Donohue, 63 Misc. 111, 116 N.Y. Supp. 241 (Sup. Ct. 1909).

In *Cunningham v. Cunningham*[6] and *Mitchell v. Mitchell*,[7] where there was no cohabitation after a marriage of minors in a state where the marriage was valid, the courts felt free to declare the marriage void.

To combat the uncertainty caused by such situations and to declare a public policy with statutory force, many states have legislated against the violation of their laws by their domiciliaries. The majority of states have enacted general evasion laws,[8] which, in effect, provide that if any persons leave the state in order to evade the laws or regulations thereof, their marriage shall be void. These statutes are illustrative of the general principle previously mentioned that each state has the right to determine the marital status of its citizens.[9]

In the instant case, the majority of the court held the case of *Van Voorhis* et al. *v. Brintnall* et al.[10] to be controlling. In that case, one who had been divorced in New York for his misconduct was remarried in Connecticut within the lifetime of his former spouse. Holding the marriage valid, despite the prohibition of Section 8 of the Domestic Relations Law as to such remarriages, the Court of Appeals noted two exceptions to the general rule which recognizes as valid a marriage considered valid in the place where celebrated.[11] These are cases within the prohibition of positive law and cases involving polygamy or incest in a degree regarded generally within the prohibition of the natural law.[12] Applying the instant case to those exceptions, the court stated that it fell into neither. It held that Section 5 of the Domestic Relations Law does not by express terms regulate a marriage solemnized in another state and that the statute's scope should not be extended by judicial construction.[13] As to the second exception, the court reasoned that since the marriage was in accord with the ritual and practice of the Jewish faith, "it was not offensive to the public sense of morality to a degree generally regarded with abhorrence and thus was not within the inhibition of the natural law."[14]

In prior cases in lower courts, New York has had similar problems. In *Incuria v. Incuria*[15] a woman married her nephew in Italy where the marriage was void. The marriage was held void here. But, in *Campione v. Campione*[16] the court stated that Sec. 5, Sub. 3 of the Domestic Relations Law applied only to marriages within this state. It held that a marriage of uncle and niece, valid in Italy (where the parties obtained a civil exemption), was valid in New York.

The dissenting opinion forcefully argues that the marriage should be void in New

6. 206 N.Y. 341, 99 N.E. 845 (1912).

7. 63 Misc. 580, 117 N.Y. Supp. 671 (Sup. Ct. 1909).

8. e.g. Del. Rev. Code c. 3485 (1935); Code of Ga. Ann. c. 53, § 214 (1933); Ill. Rev. Stat. c. 89, § 20 (Cahill, 1933); Burn's Ind. Stat. Ann. c. 44, § 209 (1931); Me. Gen. Laws c. 72, § 9 (1930); Mass. Gen. Laws c. 207, §§ 10, 11 (1933); Vt. Pub. Laws § 3066 (1933); Code of Va. c. 204, § 5089 (1942); Michie's W. Va. Code c. 48, Art. 1, § 18 (1949).

9. Maynard v. Hill, 125 U.S. 190 (1888).

10. 86 N.Y. 18 (1881).

11. Id. at 25.

12. Ibid. Note that Restatement of the Conflict of Laws, Sec. 132 (b), states the second exception as follows: "incestuous marriages between persons so closely related that their marriage is contrary to a strong public policy of the domicile."

13. 305 N.Y. 486, 492, 114 N.E. 2d 4, 7 (1953).

14. Id. at 493, 114 N.E. 2d at 7.

15. 155 Misc. 755, 280 N.Y. Supp. 716 (Dom. Rel. Ct. 1935).

16. 201 Misc. 590, 107 N.Y. Supp. 2d 170 (Sup. Ct. 1951).

York, urging that such marriages have been condemned for centuries[17] and that the Penal Law declares a strong public policy in this matter.[18] The dissent further notes that some forty-seven states forbid marriage between uncle and niece (except Georgia) and one state, Rhode Island, permits it if solemnized among people professing the Jewish faith.[19] *Van Voorhis* et al. *v. Brintnall* et al. was also distinguished from the present case. The dissent stated that Section 8 of the Domestic Relations Law was only an *in personam* prohibition against the remarriage of an adjudicated adulterer. Section 5 lists those marriages which are incestuous and void and reasons that since all such misalliances are incestuous, all are equally void.[20]

The extra-territorial effect of the Rhode Island statute had been litigated once before. In the Maryland case of *Fensterwald v. Burk*[21] the facts were substantially the same as in the case under discussion, and the court reached the same conclusion that the marriage was valid. The court held that the case fell within neither of the aforementioned exceptions. The marriage was held not incestuous according to the generally accepted opinion of Christendom, nor did the Maryland statute[22] have extraterritorial effect.[23]

---

17. 1 Bishop on Marriage, Divorce and Separation § 738 (1st ed. 1891) is cited as authority for this statement. The text writers do not seem to be in harmony on this point. Professor Beale in 2 Conflict of Laws § 132.2 (1st ed. 1935) says that it remains uncertain as to whether or not a marriage between uncle and niece can universally be condemned as incestuous. See also Goodrich, Conflict of Laws § 117 (3d ed. 1949) and Stumberg, Conflict of Laws 285 (2d ed. 1951). For a discussion by leading ecclesiastical authorities, see Bouscaren and Ellis, Canon Law, a Text and Commentaries §§ 82, 83 and Jone, Moral Theology § 710.

18. New York Penal Law § 1110. "When persons, within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by not more than ten years." In Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938), a nephew married the widow of his deceased uncle in Georgia. Both were residents of Alabama. The Alabama Court held that the marriage was void as contrary to positive law and they cited a statute similar to Sec. 1110 of the Penal Law as authority for doing so.

19. 305 N.Y. 486, 493, 494, 114 N.E. 2d 4, 8 (1953). Many courts, however, hold that this union is not contrary to the natural law or to the principles of Christianity. 2 Beale, Conflict of Laws § 132.2 (1st ed. 1935).

20. Id. at 495.

21. 129 Md. 131, 98 Atl. 358 (1916), cert. denied, 248 U.S. 592 (1918).

22. Ann. Code Md. §§ 1, 2 (1904).

23. One of the main points in the argument of counsel in the Maryland case was that the Rhode Island Statute was unconstitutional as the civil capacity of a member of the Jewish faith is enlarged by this statute. The court found that this question had never been decided in Rhode Island and was, therefore, hesitant in deciding it unconstitutional. The court also noted that a legislative act should not be pronounced unconstitutional in a doubtful case. The constitutionality of the Rhode Island statute seems very doubtful indeed. In the language of the Supreme Court, "The First Amendment to the Constitution . . . was intended . . . to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." (Davis v. Beacon, 133 U.S. 333, 342 (1890)) and in a more recent case, "The First Amendment does not select any one type of religion for preferred treatment." (U.S. v. Ballard, 322 U.S. 78, 87 (1944)). Whether or not the exception in the Rhode Island statute would be controlled by these principles is still an undecided question. It is

Since the courts manifest their intent not to extend the effect of our marriage statutes beyond the boundaries of the state, the task now lies in the hands of the legislature to declare, if it so wishes, a public policy so strong that there would be no doubt as to cases such as the one under discussion. This policy could be effected by the enactment of an evasion statute similar to those previously mentioned,[24] which would give extra-territorial effect to our marriage statutes.

CONSTITUTIONAL LAW—TRIAL BY JURY—RIGHT TO WAIVE A UNANIMOUS VERDICT IN A CRIMINAL ACTION FOR FELONY.—Defendant was tried by a jury in a United States District Court for the commission of a felony. After the jury had deliberated for twenty-seven minutes, it returned and announced that it was unable to agree upon a verdict on either count of the indictment, whereupon the court asked both counsel if the parties would accept a majority verdict. The defendant, after consulting with his attorney, agreed to abide by such a verdict, as did counsel for the Government. A judgment of conviction entered upon a majority verdict of the jury, was appealed by defendant on the ground that he had no power to waive a unanimous verdict. On appeal, *held,* conviction reversed. The unanimous verdict of the jury in a criminal action may not be waived. *Hibdon v. United States,* 204 F. 2d 834 (6th Cir. 1953).

While the Constitution clearly declares that "The trial of all crimes . . . shall be by jury"[1] and that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,"[2] it nowhere defines the elements of a jury trial. Trial by jury has three indispensable elements; namely, a panel of twelve men, a judge before whom the evidence is presented to the jury and who instructs them as to the law which applies in the case, and a unanimous verdict of the jury as the basis for any judgment entered.[3] These elements are found in the common law of England from which they were adopted by the American colonies as a part of the legal system of the new nation,[4] and no trial from which one or more of them are excluded can be considered a valid and constitutional trial by jury.[5] The importance of each of these elements has been stated on many occasions by the Supreme Court[6]

important to note, however, that certiorari was denied by the Supreme Court in the Fensterwald case.

24. See note 8 supra.

1. U.S. Const. Art. III, § 2.

2. U.S. Const. Amend. VI.

3. Capital Traction Co. v. Hof, 174 U.S. 1, 14 (1898); see also 3 BL. Comm.* 379.

4. "When our more immediate ancestors removed to America they brought this great privilege with them as their birthright and inheritance as a part of that admirable common law which had fenced round and imposed barriers on every side against the approaches of arbitrary power. It is now incorporated in all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." 2 Story on the Constitution 541 (Cooley's ed. 1873).

5. Patton v. United States, 281 U.S. 276 (1930).

6. See e.g. Thompson v. Utah, 170 U.S. 343 (1897) (twelve jurors, no more no less); Capital Traction v. Hof, supra note 2 (a judge to instruct jurors on law); American Publishing Company v. Fisher, 166 U.S. 464 (1897) (unanimity of verdict).

and it has been held that any attempt by legislative authority to impair them by statute is unconstitutional.[7]

The question as to whether a jury trial or any of its elements may be waived in a criminal[8] proceeding has been the topic of some judicial concern in recent times. In *Low v. United States*,[9] the defendant and the United States attorney waived trial by jury and proceeded before the court alone. On appeal from his conviction the defendant challenged the power of the trial court either to try or sentence him without the verdict of a jury. In reversing the conviction, the Court of Appeals held that Article III of the Constitution defined the elements of the tribunal required for criminal trials in federal courts and did not merely confer a right upon the defendant which he might forego at his election. Therefore, a federal court was without jurisdiction to try and sentence a person accused of crime unless the trial was held before a jury.[10] In *Dickinson v. United States*,[11] this same principle was relied upon to reverse a conviction when counsel had stipulated to continue a trial with only ten jurors when two of the panel had been excused after the trial had begun.[12] In *Freeman v. United States*,[13] a stipulation permitting a judge who had not heard the evidence to charge the jury and pass sentence because the first judge had died, was held to be invalid and unconstitutional.[14] In all of these cases the court based its holding on the theory that the presence of a jury was essential to give a federal court jurisdiction to hear criminal cases, and that the court was unable to enter any judgment which was not based upon the verdict of a jury.

Subsequently, in *Patton v. United States*,[15] the defendants agreed to continue the trial of a conspiracy indictment with eleven jurors after one of the panel had become ill. In affirming a conviction based upon the unanimous verdict of the eleven jurors,

7. American Publishing Company v. Fisher, supra note 6.

8. Nothing contained in this discussion has any reference whatever to civil actions. The principles which govern trial by jury in civil cases rest upon the Seventh amendment (U.S. Const. Amend. VII) and upon a burden of proof which is met by a mere preponderance of evidence.

9. 169 Fed. 86 (6th Cir. 1909)

10. "This provision (U.S. Const. Art. III) is not one merely extending a privilege or guaranteeing a right. . . . It goes to the constitution of the tribunal, and a 'trial' for a 'crime' which is not by 'jury' is not a trial by any tribunal known to the Constitution." Low v. United States, 169 Fed. 86, 90 (6th Cir. 1909). Under the law of New York, waiver of the entire jury in criminal cases is permitted by N.Y. Const. Art. I § 2 (1938). Waiver of any of the other elements of trial by jury, however, in felony actions is prohibited on the grounds that it is too dangerous an innovation upon the common law right of trial by jury. See Cancemi v. People, 18 N.Y. 128, 138 (1858).

11. 159 Fed. 801 (1st Cir. 1908).

12. "On the other hand, the provisions of section 2 of article 3 are peremptory in form, and point out absolutely the tribunal which must dispose of the crimes to which they refer. They cover nothing except what concerns the public interests, as well as personal liberty." Dickinson v. United States, 159 Fed. 801, 806 (1st Cir. 1908).

13. 227 Fed. 732, 742 (2d Cir. 1915).

14. ". . . twelve men 'can never be properly regarded as a jury' unless presided over by a court . . . a presiding law tribunal is implied and the conjunction of the two is the peculiar and valuable feature of the jury trial." Freeman v. United States, 227 Fed. 732, 743 (2d Cir. 1915) (citing Lamb v. Lane, 4 Ohio St. 167, 179 (1854)).

15. 281 U.S. 276 (1930).

the Supreme Court rejected the rule that a jury was necessary to give a federal court jurisdiction over criminal cases, and held that trial by jury was a procedural right established for the benefit of those accused of crime which might be waived by one for whose benefit it was established.[16] The Court noted, however, that there was an "unassailable integrity of the establishment of trial by jury in all its parts . . ."[17] It held that "a destruction of one of the essential elements has the effect of abridging the right in contravention of the Constitution."[18] No attempt, however, was made by the Court in the *Patton* case to determine what distinction, if any, was to be made among the essentials of trial by jury as to their nature or importance. The Court in effect, held that there is no difference in principle between the absence of a jury in its entirety and the absence of one of the three main elements. In either case, there can be no constitutional trial by jury. Nevertheless, the Court permitted waiver respecting the number to comprise the panel and held that a jury trial in its entirety might also be waived.

In the instant case the Government relied on the fact that, in the *Patton* case, no distinction had been made among the elements of a jury trial; if one of the essentials could be waived any other might also be waived. The court in the present case, however, holds that a unanimous verdict is so essential a part of our criminal procedure that any departure from it, even by stipulation of the parties is repugnant to due process under the Constitution.[19] The distinction relied upon by the court to support this holding is that although the requirement that there be twelve men on the jury is an arbitrary one, the origins of which "may be shrouded in the mists of antiquity,"[20] a unanimous verdict is the proven safeguard of the defendant to have his guilt proved beyond a reasonable doubt. This marks the first attempt by a federal appellate court to distinguish the elements of a jury trial and to determine their relative importance in the pattern of due process. There can be no question that the waiver of a unanimous verdict, however voluntarily it is made, materially lessens the obligations of the Government to rebut the presumption of innocence beyond any reasonable doubt. However, in resting its decision upon the evidentiary problem of the duty of persuasion, this court assumed the position of the *Patton* case that trial by jury and all its elements were procedural as opposed to jurisdictional. It may be that parties to a criminal action are free to choose whether they will be tried with or without a jury, and that taken in its entirety, trial by jury is a procedural right.[21] Actually, it would seem that in every criminal action, the parties have a choice of a tribunal consisting either of judge and jury or of judge alone. The choice between them is purely procedural, subject to the rule that any waiver of a jury trial must have the court's consent. However, once the choice has been made, the parties must abide by the election. No element of the tribunal which prescribes its judicial duties or the manner of discharging them may be dispensed with by stipulation or otherwise. Waiver, after the jury has been selected as the fact finding unit of the

16. "Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into any imperative requirement." Id. at 298.

17. Id. at 290.

18. Ibid.

19. Hibdon v. United States, 204 F. 2d 834, 838 (6th Cir. 1953).

20. Ibid.

21. Patton v. United States, 281 U.S. 276 (1930).

tribunal, should be confined to those factors which have reference to technical aspects such as the number of jurors and the method of their selection.

The justification of this rule in criminal actions is founded on the principle expressed by Judge Cooley who said that: "Many of the incidents of a common-law trial by jury are essential elements of the right. . . . The jury must unanimously concur in the verdict."[22] Moreover, each member of society[23] has an interest in the preservation and proper functioning of the judicial process established by the Constitution. Trial by jury is an essential part of that process. If, as suggested, judge and jury together constitute the forum defined by law, no individual may under the guise of waiving a personal right impair the substantial elements of a constitutionally established tribunal.

CONSTITUTIONAL LAW—WRONGFUL DEATH ACTION—APPLICATION OF THE STATUTE OF LIMITATIONS OF THE FORUM.—Plaintiff, administratrix of the estate of the decedent, brought suit in the United States District Court of Pennsylvania, by reason of diversity of citizenship, charging defendant corporation with the wrongful death of the intestate who was fatally injured in Alabama. Plaintiff based her action on that state's wrongful death statute which contained a two-year limitation. The action was brought after one year but within two years of the death. The defendant pleaded the analogous Pennsylvania wrongful death statute, which required that the action be brought within one year of the death, and moved for summary judgment. The motion was granted and plaintiff appealed. The Court of Appeals for the Third Circuit affirmed the judgment. The Supreme Court granted certiorari. On appeal, three justices dissenting, *held,* affirmed. *Wells v. Simonds Abrasive Co.,* 345 U.S. 514 (1953).

In the District Court it was determined that the Pennsylvania conflict of law rule called for the application of its own period of limitation rather than that of the place of the tort. The Supreme Court granted certiorari limited to the question of whether the Pennsylvania rule violated the Full Faith and Credit Clause of the Federal Constitution.[1] The determination of this question rests upon whether or not the provision of the Alabama statute be deemed substantive or procedural. If the court of the forum erroneously decides that the provision is procedural rather than substantive and applies the law of the forum rather than that of the foreign state, it has denied full faith and credit to the foreign statute.[2]

The fundamental rule in conflict cases, when the plaintiff comes into a jurisdiction with a cause of action which has arisen in another, is that the procedural law of the forum will be applied, along with the substantive law of the locus.[3] The general rule regarding limitation statutes is that they are procedural, and therefore the applicable limitation is that of the forum[4] since the limitation pertains to the remedy and not

22. 1 Cooley, Constitutional Limitations 676, 677 (8th ed. 1927).

23. It has been suggested in State v. Kaufman, 51 Iowa 578, 2 N. W. 275 (1879), that by accepting a plea of guilty, the courts permit waiver of trial by jury in contravention to the supposed right of the public to the preservation of trial by jury. It is submitted that this is not a waiver of trial by jury in any respect since the function of the jury is to decide issues of fact and a plea of guilty implies that there is no issue of fact to be tried.

1. U.S. Const. Art. IV, § 1.

2. John Hancock Mutual Life Insurance Co. v. Yates, 299 U.S. 178 (1936).

3. Goodrich, Conflict of Laws 226-27 (3d ed. 1949).

4. McElmoyle v. Cohen, 13 Pet. 311 (U.S. 1839).

to the right.[5] This view has been criticized[6] but is too well established to admit of any doubt.

A distinction is drawn, however, between general and specific statutes of limitations where the specific limitation is directed at a right created by statute and unknown to the common law.[7] In the instant case, the Court was faced with the application of a specific, "built in", statute of limitation, one prescribing the period within which an action for wrongful death must be brought.[8] The majority of the Court refused to consider this distinction substantial and held that the Full Faith and Credit Clause did not compel the forum state to apply the limitation of the foreign state.

The problem of whether a foreign statute of limitation is applicable may arise in either one of two situations: the foreign statute specifying either a *shorter* period than that of the forum, or conversely, the foreign statute specifying a *longer* period than that of the forum. Where the foreign statute creating the cause of action provides for a *shorter* period of limitation than that of the forum state, a suit instituted after the expiration of that period has consistently been barred[9] for the reason that in such a case the limitation is so closely allied to the right that it is substantive in nature.[10] The foreign limitation is considered to be a condition annexed to the cause of action, and therefore operative in the court of the forum.[11]

In the instant case the situation which we have labelled as "converse" is presented, in that it is the limitation of the *lex fori* which is the *shorter*. Prior to the decision of the closely divided Court in the instant case, the law in such a situation was un-

5. Id. at 326, ". . . the point under consideration will be determined, by settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? . . . it is well settled, to be a plea to the remedy; and consequently the lex fori must prevail."

6. See Leroy et al. v. Crowninshield, 15 Fed. Cas. No. 8, 269 at 371 (1820), wherein Justice Story expressed doubt that a right could be said to exist when the remedy upon it was legally extinguished, but noted that "The error, if any has been committed, is too strongly engrafted into the law, to be removed without the interposition of some superior authority."

7. Davis v. Mills, 194 U.S. 451, 454 (1904) ". . . ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced . . ."

8. Ala. Code Tit. 7 § 123 (1940). "Such action must be brought within two years from and after the death of the testator or intestate."

9. The Harrisburg, 119 U.S. 199 (1886).

10. Id. at 214, "Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." It is to be noted that the Court here, was also considering the application of a wrongful death statute.

11. Boyd v. Clark, 8 Fed. 849, 852 (C.C. E.D. Mich. 1881) ". . . where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in separate section, limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

settled.[12] The cases[13] holding that the *longer* foreign limitation controlled reason that the period prescribed by the foreign statute was not like an ordinary statute of limitation merely effecting the remedy, but that it was a constituent part of the very right itself.[14] Accordingly, if the forum state did not allow suit to be brought within the period prescribed by the foreign statute, it failed to give effect to the right intended to be created.[15] The decisions in these cases[16] holding that the *longer* limitation of the locus controls would seem to rest mainly on a conviction that, since the limitation of the foreign state had been held to apply in cases where the foreign limitation was *shorter,* the converse must necessarily follow. This is the position taken by the minority of the Court in the instant case.[17] *Dictum* in *The Harrisburg,*[18] the leading case indicating that where the foreign limitation is *shorter* the plaintiff cannot succeed in any jurisdiction, would seem to support this conclusion.

Contrary decisions hold that where the limitation imposed by the statute of the foreign state is *longer* than that of the forum, the limitation of the forum will be applied.[19] The decisions reason that in the converse situation, where the foreign period is *shorter,* the limitation precludes the enforcement of the cause of action because it has extinguished the right and the plaintiff cannot support an action in any jurisdiction. In effect these cases are holding that the limitation directed at an action for wrongful death has a dual aspect. It is substantive in that it may cut off the right completely, as in cases where it is *shorter* than that of the forum, but that it must be regarded as procedural when the time limitation imposed by the foreign statute is *longer* than that dictated by the forum's analogous statute. This would seem to be the better view, for if the forum state applies its own limitation, where it is *shorter,* the court of the forum is no more denying the foreign law full faith and credit than it does where it applies the general limitation of the forum to a right

12. Goodrich, Conflict of Laws 244 (3d ed. 1949)

13. Maki v. Cooke Co., 124 F. 2d 663 (6th Cir. 1942); Keep v. National Tube Co., 154 Fed. 121 (C.C.D. N.J. 1907); Brunswick Terminal Co. et al. v. National Bank, 99 Fed. 635 (4th Cir. 1900); Theroux v. Northern Pacific R.R. et al., 64 Fed. 84 (8th Cir. 1894); Negaubauer v. Great Northern R.R., 92 Minn. 184, 99 N.W. 620 (1904).

14. Negaubauer v. Great Northern R.R., 92 Minn. 184, 99 N.W. 620, 621 (1904). Plaintiff instituted suit for wrongful death basing the cause of action on Montana's wrongful death statute which provided for a three year limitation period. Minnesota's statute provided a two year limitation. "Now, it is well settled that where by statute a right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right, and will control, no matter in what forum the action is brought."

15. Theroux v. Northern Pacific R.R., 64 Fed. 84, 87 (8th Cir. 1894). "To refuse to entertain such a suit within three years would be to subtract from the liability, and to impair the right intended to be conferred by the laws of Montana; for the period allowed in which to enforce the liability, . . . is a substantial part of the liability imposed and of the right intended to be created."

16. See note 13 supra.

17. 345 U.S. 514, 525. "In all three of these cases the benefit of this doctrine that the remedy is inseparable from the right accrued to defendants. But the validity of a doctrine does not depend on whose ox it gores."

18. 119 U.S. 199 (1886).

19. Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931), noted in 79 U. of Pa. L. Rev. 1112, 1113 (1931); Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930), noted in 68 A.L.R. 210, 217 (1930).

accruing under the common law of the foreign state. This latter view seems to have found favor with most of the text writers.[20]

The instant decision, by the highest Court of the land has determined a point long in conflict. It is to be regretted, however, that the opinion of the majority chose to decide the question with a cursory dismissal of the distinctions above outlined, stating that they were "too unsubstantial to form a basis for constitutional distinctions under the Full Faith and Credit Clause."[21]

CORPORATIONS—CONSIDERATION FOR THE ISSUANCE OF STOCK—N. Y. STOCK CORPORATION LAW § 69.—Plaintiff, trustee in bankruptcy of a New York corporation, brought an action to recover for the par value of stock issued to the defendants alleging no legal consideration was received therefor by the corporation. The corporation was organized by an engineer who requested the defendants to join him in forming the organization to do business as consultant in the fields of management, engineering, finance, pension plans, public relations and labor relations. Defendants left lucrative and promising positions in order to go with the organization. After defendants joined the corporation its board of directors passed a resolution issuing a number of shares of its five dollar par value stock to them "in order to compensate for the risk undertaken in accepting this employment. . . ." The stock had no market value at the date of issuance. The court gave judgment to the defendants. In the light of the corporation's nature as a service corporation, defendants' skill and ability are property within the meaning of Sec. 69 of the New York Stock Corporation Law. *Brown v. Watson* et al., 124 N.Y.S.2d 504 (Sup. Ct. 1953).

Section 69 of the New York Stock Corporation Law restricts the issuance of authorized stock "except for money, labor done or property actually received for the use and lawful purpose of such corporation." The statute provides that the stock issued in accordance with its requirements shall be fully paid and relieves the holders thereof of further liability. It further provides that in the absence of fraud the judgment of the directors as to the value of the property purchased shall be conclusive. The requirements of the statute were designed for the benefit and protection of creditors.[1]

The past participle of the verb in the expression "labor done" as used in the statute has been given a literal interpretation so that stock may not validly be issued in consideration of services to be performed in the future.[2] In *B & C Electrical*

20. Goodrich, Conflict of Laws, 243-44 (3d ed. 1949); Stumberg, Conflict of Laws, 51-52 (2d ed. 1951).

21. 345 U.S. 514, 518.

1. Winston v. Saugerties Farms, Inc., 262 App. Div. 435, 21 N.Y.S. 2d 841 (3d Dep't 1940), aff'd, 287 N.Y. 718 (1942). In this case it was held that creditors could not complain, so long as the corporation received full value, because only one of the two stockholders, to whom the stock was issued equally, put in the entire consideration.

2. The phrase "for the use . . . of such corporation" has received an equally literal interpretation so as to exclude services performed in the promotion of the corporation prior to its incorporation. Herbert v. Duryea, 34 App. Div. 478, 54 N.Y. Supp. 311 (1st Dep't 1898), aff'd, 164 N.Y. 596 (1900); Berger v. National Architects' Bronze Co., 173 App. Div. 680, 160 N.Y. Supp. 331 (1st Dep't 1916); Osaan v. Jones, 209 App. Div. 9, 204 N.Y. Supp. 242 (2d Dep't 1924).

Construction Co. v. Owen[3] the issuance of stock to a person upon the sole consideration that he become president for a one year period so that the corporation might have the benefit of his business and financial standing was held to be illegal as a contract for services to be performed in the future.[4] An assignment of an executory contract for services to be performed as an aid in the publication of the historical work the corporation was organized to publish was also held to be insufficient as property within the contemplation of the statute in *Stevens v. Episcopal Church History Co.*[5] Nevertheless it would seem that the word property was intended to embrace intangibles as well as tangibles.[6] Accordingly, goodwill has been treated as sufficient consideration for the issuance of bonds by a purchasing corporation[7] and it is likely that it would also support the issuance of stock.[8]

The court in the case under consideration termed the defendants' undertaking to enter the corporation's employ as sufficient consideration for the issuance of stock, in effect construing the defendants' skill and ability as property, the obtaining of which was analogous to the purchase of goodwill. The court took the position that the statute did not require as consideration for the issuance of stock property subject to levy or sale on execution or capable of application to the corporation's debts as similar statutes in other states have specified.[9]

It cannot be denied that the corporation relied for its success on the defendants' skill and ability, but it is submitted that their undertaking to perform services in the future is not property in the sense required by Section 69 and the case seems to fall within the rule of the *B & C Electrical Construction Co.* and *Stevens* cases, *supra.* Corporations owning tangible assets totaling millions of dollars may depend on the skill and ability of their officers and employees to the same extent as a service corporation. Where stock is issued as in the instant case, for an agreement to enter into future employment, the parties have in mind the services as the predominant thing of value, not the obligation to serve, which, if breached, could not be specifically enforced[10] but might only result in a recovery of damages. Certainly this right to recover a problematical amount of damages cannot be construed as property under Section 69. The corporation's position under this contract must be distinguished

3. 176 App. Div. 399, 163 N.Y. Supp. 31 (4th Dep't 1917). But cf. Morgan v. Bon Bon Co., 222 N.Y. 22, 118 N.E. 205 (1917) where, the agreement having called for the issuance of stock subsequent to the performance of services to the satisfaction of the corporation, the consideration was held valid.

4. Accord: Shaw v. Ansaldi Co., 178 App. Div. 589, 165 N.Y. Supp. 872 (1st Dep't 1917).

5. 140 App. Div. 570, 125 N.Y. Supp. 573 (1st Dep't 1910).

6. See Estate Planning Corporation v. Commissioner of Internal Revenue, 101 F. 2d 15 (2d Cir. 1939).

7. Ibid.

8. 1895, Opinion N.Y. Atty. Gen. 447; but cf. 11 Fletcher, Cyclopedia Corporations § 5187 (1932): "But an agreement to secure customers . . . for the corporation cannot be regarded as property or its equivalent, where successful termination of the projected enterprise is problematical, and it cannot be said with reasonable certainty that any substantial advantage or benefit will inure to the corporation," citing Holman v. Thomas, 171 Fed. 219 (C.C.W.D. N.Y. 1909).

9. Texas, Vernon's Annotated Civ. St. of Texas Art. 1353 (1933); Michigan, Mich. Comp. Laws, Ann. Sup. c. 175, § 9053 (53) (Cahill, 1922), Comp. Laws, 1929 § 10001 (Repealed), Michigan General Corporation Act § 21.21 Comp. Laws 1948, § 450.21 now similar to New York statute.

10. Lumley v. Wagner, 1 De G.M. & G. 604 (1852).

from an obligation to pay money, received as consideration for the issuance of stock, as the obligation to pay money admits of a definite value and on that basis has been upheld as sufficient consideration under the statute.[11]

It must be noted, however, that a somewhat liberal view has recently prevailed in regard to the issuance of stock options to key employees of corporations. Such options are usually issued during the holder's period of employment enabling the purchase of the corporation's stock at a purchase price lower than the market price at the date of issue or sale. While to some extent these options depend for their value upon the vagaries of the stock market they nonetheless act as an incentive to the employee to work toward the continued success of the corporation. Far more important, however, are the income tax advantages to both the employee and the corporation derived from the use of the "restricted" stock option. Where the requirements of the Internal Revenue Code[12] are met the employee will receive no income when the stock is transferred to him and no other amount than the option price is considered received by the employer for the stock transferred.[13]

The distinction between the outright issuance of stock for services to be performed and the grant of an option to an employee to acquire stock in the future is that in the former case the *entire* consideration for the issuance of the stock is the executory contract for services, whereas in the case of an option the contract is merely the consideration for the excess of the market price of the stock at the time it is granted over the purchase price at the time the stock may be acquired, if it ever is. Statutes like Section 69 require, for the protection of creditors, full value in the form of money, property or services *already performed* for the issuance of stock. The stock option which is an opportunity to acquire the corporation's stock at a bargain, merely requires *adequate* consideration to the corporation. This consideration may be the mere entering into the employment[14] or an obligation to remain an employee.[15] The decisions regarding options seem to require merely consideration sufficient to support a valid contract, subject always, however, to review by the courts as to whether the consideration is real.[16]

In the light of modern day business practice which requires a high degree of specialization, placing key men at a premium, the inducing of highly skilled individuals to accept employment with a corporation is an essential element in the corporation's success. The issuance of stock is often such an inducement. It is doubtful if Section 69 as it now stands admits of an extension to cover the situation as presented by the facts of this case. The legislature should restudy this section against the background of modern day business trends and may be advised to revise its terminology to allow a corporation to purchase the skill and ability of key employees by the issuance of stock with such safeguards as to the value and designation of the stock as are necessary to afford sufficient protection to creditors.

---

11. Backers v. Hutson, 136 Misc. 290, 240 N.Y. Supp. 610 (Sup. Ct. 1930).

12. Internal Revenue Code § 130A.

13. 3 CCH 1953 Fed. Tax Rep. § 990.

14. McQuillen et al. v. National Cash Register Co. et al., 112 F. 2d 877 (4th Cir.), cert. denied, 311 U.S. 695 (1940); Sandler v. Schenley Industries, Inc. et al., 79 A. 2d 606 (Del. Ch. 1951).

15. Gottlieb v. Heyden Chemical Corp., 90 A.2d 660 (Del. 1952), granting reargument, 91 A. 2d 57 (Del. 1952); Kerbs et al. v. California Eastern Airways, Inc., 90 A. 2d 652 (Del. 1952), denying reargument, 91 A. 2d 62 (Del. 1952).

16. 53 Col. L. Rev. 283 (1953).

CRIMINAL LAW—JURY CHARGE—THE MERGER OF LARCENY AND ASSAULT IN ROBBERY.—Defendant was convicted of the crimes of robbery in the second degree, assault in the second degree and petit larceny all stemming from the same transaction. Upon the trial, the court charged the jury at length, concluding with the ruling that if they find defendant guilty of robbery, they must find him guilty of larceny and assault. The jury was unaware of the elements of the crimes in issue since they returned to the courtroom several times with repeated requests for instructions. The court merely adverted to the fact that a finding of guilt on the robbery count called for a finding of guilt on all three counts and failed to review the constituent elements of these counts or to give the alternate verdicts possible. Upon further questioning, the court explained the robbery count, only. In answer to the judge's question, "Have I made that clear?", one juror replied "No." No further elaboration of the point was made and accordingly a conviction on all three counts was returned. The Appellate Division affirmed without opinion. Upon appeal, *held,* judgments of conviction reversed and a new trial ordered. The charge of the trial court in failing to define adequately the elements of the crimes in issue, deprived defendant of a fair trial. *People v. Lupo,* 305 N.Y. 448, 113 N.E. 2d 793 (1953).

It is well settled that a charge which tends to confuse and mislead[1] and neglects to describe the crimes for which defendant is indicted[2] constitutes reversible error. In the instant case there is no doubt but that the jury was confused as is indicated by their questioning of the court and the frank admission of one juror that he did not understand the problem. The court, in reversing the conviction, placed special emphasis on the fact that repeated requests for instructions by the jury indicated that they were ignorant as to the elements of the crimes.[3] The charge is a guide for the layman, unlettered in the law, which must be a clear and practical explanation of the law.[4] It is incumbent upon the trial judge to state all matters of law to the jury whereby they become triers of the facts.[5] The charge failed to meet this requirement and accordingly defendant merits a new trial. Further, an over-emphasis by the trial court of one count above the others was prejudicial to defendant.[6] However, it is submitted that the charge was not only confusing and misleading but actually

1. A leading case in New York in reversing a judgment of conviction of first degree murder on the ground that the charge confused the distinction between premeditation and deliberation said: "The charge is, therefore, incorrect which confuses these things. . . . If these matters have been perplexing to the courts, how much more important is it to see that they are not perplexing to juries which have to apply the law to the facts." People v. Guadagnino, 233 N.Y. 344, 354, 135 N.E. 594, 603 (1922).

2. Williams v. United States, 131 F. 2d 21 (D.C. Cir. 1942).

3. The trial justice neglected to charge as to the various degrees of robbery but merely defined the offense generally as given in N.Y. Penal Law § 2120. He did not instruct the jury as to what constituted the crime of robbery in the first degree, nor second, nor third. In spite of this lack of information, defendant was found guilty of robbery in the third degree, although the jury did not know what it was. Held, judgment of conviction reversed. People v. Kiernan, 202 App. Div. 542, 195 N.Y. Supp. 207 (2d Dep't 1922).

4. Commonwealth v. Tracey, 137 Pa. Super. 221, 8 A. 2d 622 (1939).

5. N.Y. Code of Cr. Pro. §§ 419, 420.

6. A charge that emphasized felony murder to the exclusion of the other degrees of murder was prejudicial to defendant. People v. Woodley, 273 App. Div. 421, 78 N.Y.S. 2d 284 (3d Dep't 1948).

erroneous in failing to advert to the merger of the larceny and assault into the robbery.[7]

The doctrine that ". . . No person shall be subject to be twice put in jeopardy for the same offense; . . ."[8] is further extended to include an act or omission made punishable in different ways which may not be punished under more than one,[9] and to bar several convictions and consecutive sentences arising out of the same transaction.[10] Even though actual punishment is not involved, a defendant is justified in protesting his conviction.[11] The test in all instances is the same. Is defendant charged with several crimes which are identical as to time, place and circumstance? If so, a conviction or acquittal of the one will bar subsequent prosecution of the other.[12] If the crimes are separate, arising from the same transaction, defendant may be sen-

---

7. Note the distinction between the problem presented in this case—whether a crime which is an essential constituent of a greater crime merges into that greater—and the early common law theory of merger: when a defendant committed both a misdemeanor and a felony, it was held that the misdemeanor merged into the felony and he could never be found guilty of the misdemeanor. At common law, one charged with a misdemeanor had more rights and privileges at his trial than one charged with a felony, such as full defense with counsel and a right to a special jury. Therefore, if a defendant was indicted for a misdemeanor and the offense turned out to be a felony, he would have to be acquitted. And conversely, if he was indicted for a felony, he could not be convicted for any lesser misdemeanor therein. This doctrine has been expressly repudiated in New York today. People v. Tavormina, 257 N.Y. 84, 177 N.E. 317 (1931). A defendant today on an indictment may properly be found guilty of the greater, or any one of the lesser included crimes. Miller, Handbook of Criminal Law 50 (1934); 1 Wharton, Criminal Law § 39 (11th ed. 1935).

8. N.Y. State Constitution Art. 1, § 6.

9. N.Y. Penal Law § 1938: "An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of these provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

10. People ex rel. Thornewell v. Heacox, 231 App. Div. 617, 247 N.Y. Supp. 464 (4th Dep't 1931): "The constitutional prohibition of double jeopardy not only in the letter but in the full spirit is embodied in, if not extended by this section." (Referring to N.Y. Penal Law § 1938). The court here exceeded its powers in separately sentencing accused for attempted robbery, attempted larceny and assault. The Appellate Division did not expressly allude to the problem of multiple convictions.

11. N.Y. Code of Cr. Pro. § 517 ". . . For every purpose of an appeal herein, a conviction shall be deemed a final judgment although sentence has been or may hereafter be suspended by the court in which the trial was had, or otherwise suspended or stayed"; as exemplified by People v. Daghita, 276 App. Div. 20, 92 N.Y.S. 2d 799, 801 (3d Dep't 1949) ". . . there can no longer be any doubt that appellant is 'aggrieved', in the sense that he has the right of appeal, if one of the counts of the indictment is not sustained by the record . . . appellant may review the judgment based on that count of the indictment, although if the other count be sustained, his actual punishment would not be affected."

12. 1 Bishop, Criminal Law § 1054 (9th ed. 1923) "Where crimes are so included within one another that a higher comprehends whatever a lower one does and more, . . . a conviction for any higher crime bars a prosecution for any lower; since if defendant is guilty of all, he is necessarily so of each particular part."

tenced only for one and practice dictates that it be for the higher.[13] But it is submitted that in the case of "included" crimes, that is, a crime which is necessarily committed in the commission of another, the lesser being an essential element or ingredient and constituting an important and material part of the greater, defendant may be convicted only on that greater crime.[14]

The answer to this problem of merger can best be determined by examining the specific nature of a particular crime and its component parts. Thus it is clear both by statutory definition and judicial interpretation that an assault merges with the homicide when the person killed is the one assaulted.[15] The assault which is the necessary part of every rape merges with the rape.[16] The courts and text book authorities are quick to pronounce robbery as a crime in which larceny and assault are merged.[17] Robbery by its definition includes both the unlawful taking—a larceny, and the means are by force or threat of bodily violence—an assault.[18] It is submitted, therefore, that upon the trial of a defendant indicted for robbery, assault, and larceny as the result of a single transaction, a conviction of all three crimes is improper.

In *People v. Hutchinson*,[19] defendant was convicted of assault in the second degree and carnal abuse of a child. The court in annulling the conviction of assault and dismissing the count said: "Defendant may not be twice punished for the same criminal act. Even though the trial court suspended sentence as to the assault count a judgment thereof upon which no punishment may be lawfully imposed should not stand upon the record." Where on the facts defendant was correctly convicted of the crimes of kidnapping, rape, and assault as separate transactions nevertheless the court went on to say: "It is true that the detention inevitably occurring during the immediate act of commission of such a crime as rape or robbery would not form a basis for a separate crime of kidnapping."[20] In *People v. Daghita*,[21] the court of appeals of

13. People v. Savarese, — Misc. — 114 N.Y.S. 2d 816 (Kings County Ct. 1952); People v. Wells and Papineau, 246 App. Div. 853, 284 N.Y. Supp. 953 (3d Dep't 1936). But note the exception both at common law and given by statute in New York to the crime of burglary whereby defendant may be convicted and sentenced both for the burglary and the crime committed within the building or dwelling house. N.Y. Penal Law § 406.

14. People v. Hutchinson, 276 App. Div. 1040, 95 N.Y.S. 2d 499 (3d Dep't 1950). Similarly, a defendant may not be indicted or convicted for the crime of conspiring when the substantive crime to which it is directed necessarily presupposes an unlawful combination for its commission. United States v. Zeuli, 137 F. 2d 845 (2d Cir. 1943), 13 Ford. L. Rev. 98 (1944).

15. People v. Huter, 184 N.Y. 237, 77 N.E. 6 (1906).

16. People v. Goggin, 256 App. Div. 995, 10 N.Y.S. 2d 586 (2d Dep't 1939).

17. 1 Bishop, Criminal Law § 794 (9th ed. 1923); People ex rel. Thornewell v. Heacox, see note 10 supra; Zovick v. Eaton, 259 App. Div. 585, 20 N.Y.S. 2d 447 (3d Dep't 1940); People ex rel. Richardson v. Morhous, 182 Misc. 299, 43 N.Y.S. 2d 221, 223 (Sup. Ct. 1943). In this latter case, defendant was convicted and sentenced for robbery in the first degree and assault in the second. Sentence for assault was set aside. ". . . thus the statute includes as an element of robbery, an act which unaccompanied by the taking of property would have been an assault."

18. N.Y. Penal Law § 2120.

19. See note 14 supra.

20. People v. Florio, 301 N.Y. 46, 49, 92 N.E. 2d 881 (1950).

21. 301 N.Y. 223, 93 N.E. 2d 649 (1950). Also, see People v. Kadio, 280 App. Div. 854, 113 N.Y.S. 2d 371 (3d Dep't 1952); People v. Nazar, 281 App. Div. 748, 118 N.Y.S. 2d

this state held it was error to convict defendant of both grand larceny and witholding stolen property because it is of the essence of every larceny that a permanent withholding is contemplated. Although decided on a different issue, the court in *Zovich v. Eaton*,[22] in speaking of the trial court's judgment said: "The court held that two separate crimes were committed, one of robbery committed while armed with a dangerous weapon and one of assault with a loaded firearm. We are unable to agree with this conclusion . . . petitioner committed no assault except that which was involved as an element of robbery. . . . The acts of robbery and of assault were all part of a single transaction."

Thus despite the court of appeals statement in the case at bar ". . . every sentence that the judge uttered taken by itself was an accurate statement of law . . .,"[23] it is submitted that it was error to charge the jury that a finding of guilt of robbery established defendant's guilt on all three counts. Although correct in ordering a reversal of the conviction because the charge was prejudicial to the defendant, the basis of the prejudice was not merely an inadequacy of language, as reasoned by this court, but substantive error in defining the crimes and the alternative verdicts permissible.

744 (1st Dep't 1953). In these cases note that the conviction was set aside and annulled and the count of the indictment dismissed.

22. 259 App. Div. 585, 586, 20 N.Y.S. 2d 447, 448 (3d Dep't 1940).

23. People v. Lupo, 305 N.Y. 448, 452, 113 N.E. 2d 795 (1953).