Volume 1
Issue 1 *NEW YORK LAW FORUM, vol 1, 1955*

Article 13

January 1955

Decisions

DECISIONS

CRIMINAL LAW—CONSTITUTIONAL LAW—RIGHT OF ACCUSED TO PUBLIC TRIAL.—At the trial of the defendant on charges of compulsory prostitution[1] and related offenses,[2] the trial judge, on his own motion and over defendant's vigorous objection, barred both press and public from the courtroom during the presentation of the People's case. He gave as his reason the fact that the opening statements of both prosecution and defense indicated that "obscene and sordid details" would be adduced during trial and that "the sound administration of justice and . . . the interests of good morals" called for such prohibition. He further directed that no copies of the minutes of the trial were to be made available to anyone other than the parties without his express permission, but permitted the defendant to have his friends and relatives present during the entire trial. Both press and public were permitted to re-enter the courtroom at the conclusion of the People's case. Defendant was convicted on two counts of compulsory prostitution. The conviction was reversed by the Appellate Division on the ground that he had been deprived of a public trial.[3] The People then appealed to the Court of Appeals, which affirmed, with two judges dissenting.[4]

The right to a public trial has long been regarded as a fundamental privilege of a defendant in a criminal prosecution.[5] In this respect, the Sixth Amendment is applicable to the federal courts,[6] while state courts are similarly controlled by constitution, statute or decision.[7] In New York, the appropriate statutes are Section 8 of the Code of Criminal Procedure and Section 12 of the Civil Rights Law, which guarantee every accused the right to "a speedy and *public* trial." (Emphasis supplied). With certain specified exceptions, Section 4 of the Judiciary Law declares that "the sittings of *every* court within this state shall be public." (Emphasis supplied). The revisers responsible for all three statutes specifically noted that the first two stemmed directly from the Sixth Amendment.[8]

However strong this guarantee, the courts of this state have jealously guarded their inherent control over their courtrooms. On numerous occasions, the number of spectators at trials has been severely curtailed in the interest of health or to prevent disorder.[9] In other jurisdictions, courtrooms have been temporarily cleared in order to enable an immature or emotionally disturbed witness to testify.[10] Furthermore, the language of Section 4 of the Judiciary Law provides that the court may, at its discretion, exclude from the courtroom "all persons who are not directly interested" in cer-

[1] Penal Law § 2460.

[2] Penal Law § 1148.

[3] 284 App. Div. 211, 130 N. Y. S. 2d 662 (1st Dept. 1954).

[4] 308 N. Y. 56, 123 N. E. 2d 769 (1954).

[5] Blackstone's Commentaries, c. 25, 1022-1030 (Chase, 4th ed., New York, 1938); 2 Coke's INSTITUTES, 103-104 (London, 1794-1797); Radin, *The Right to a Public Trial*, 6 Temple L. Q. 381 (1932).

[6] See Matter of Sawyer, 124 U. S. 200, 219, 8 S. Ct. 482, 492, 31 L. Ed. 402, 409 (1887).

[7] See Matter of Oliver, 333 U. S. 257, 267-268, 68 S. Ct. 499, 504-505, 92 L. Ed. 682, 695-696 (1947).

[8] Revisers' Notes to N. Y. Rev. Stat. (1829), c. IV, § 14, ¶ I.

[9] See People v. Miller, 257 N. Y. 54, 60, 177 N. E. 306, 308 (1931); Crisfield v. Perine, 15 Hun 200, 201 (N. Y. Sup. Ct., 4th Dept. 1878), aff'd 81 N. Y. 622 (1880).

[10] See Hogan v. State, 191 Ark. 437, 86 S. W. 2d 931 (1935); Moore v. State, 151 Ga. 648, 108 S. E. 47 (1921); State v. Damm, 62 S. D. 123, 252 N. W. 7 (1933).

tain civil and criminal proceedings such as those involving divorce, sodomy, rape and similar sexual crimes and causes of action. The crime of compulsory prostitution is not included in the statutory list.

The People took the position that Section 4 authorized the trial judge's action despite the omission of compulsory prostitution in the statutory enumeration. The District Attorney, in arguing the appeal relied substantially on the old case of *People* v. *Hall*,[11] in which the court excluded both public and press from the trial of a defendant accused of extorting money from a clergyman by threatening to charge him publicly with sodomy. In affirming the order of exclusion in the *Hall* case, the Appellate Division stated that the trial judge was not required to give a literal meaning to the statute[12]—which at that time did not include sodomy as one of the specific legislative exceptions as in the present statute. The Court of Appeals in the present case rejected this argument, maintaining, however, that it had neither approved nor followed that decision—a contention not shared by the dissent. In view of the fundamental importance of the right of public trial, the Court of Appeals felt that it was required to construe statutes of this type strictly "in favor of the general principle of publicity."[13]

The Court then disposed of the contention of the prosecution that the presence of the accused's friends and relatives satisfied the legislative mandate requiring a "public trial." Despite scattered decisions in other states sanctioning this point of view,[14] the Court refused to subscribe to this position, holding that the exclusion of all but a limited few did not meet the statutory requirement. Furthermore, the exclusion of the press deprived the defendant of that public scrutiny which has traditionally been regarded as a safeguard against abuse of judicial authority.[15]

Accordingly, without requiring the defendant to show affirmatively that he had been prejudiced by the trial court's exclusion order, the Court affirmed the Appellate Division. It would seem, in light of this decision, that a trial judge in New York may not clear his courtroom merely because he believes that evidence of a shocking nature may be presented in the proceedings before him, save where the case is one which comes within the purview of Section 4 of the Judiciary Law, or where there is imminent physical danger to the public, or where an exclusion is necessary in order to protect a witness testifying at the trial.

RIGHT OF PRESS AND PUBLIC TO BE PRESENT AT CRIMINAL TRIAL—RIGHT TO BRING SEPARATE ACTION.—Respondent, a Judge of the Court of General Sessions, excluded both press and public from a portion of a criminal trial, as has been noted above. Appellants, various press associations and newspaper publishers, petitioned under Article 78 of the Civil Practice Act for an order restraining respondent from enforcing his exclusion order. The Special Term's dismissal of their petition[1] was approved by the

[11] 51 App. Div. 57, 64 N. Y. Supp. 433 (4th Dept. 1900).

[12] Then Section 5 of the Code of Criminal Procedure.

[13] *Supra* note 4 at 65, 123 N. E. 2d at 773.

[14] 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).

[15] See Matter of United Press Ass'n v. Valente, 308 N. Y. 71, 80, 123 N. E. 2d 777, 779 (1954); Matter of Oliver, *supra* note 7.

---

[1] 203 Misc. 220, 120 N. Y. S. 2d 642 (Sup. Ct., Spec. Term, N. Y. Co., 1953).

Appellate Division,[2] and the Court of Appeals affirmed, with two judges dissenting.[3]

The Court of Appeals was of the opinion that no constitutional questions were present,[4] and limited its consideration to the sole issue as to whether members of the public at large, including the press (which it refused to recognize as *sui generis*), shared with the accused a right to insist upon a public trial. Respondents relied primarily on the language of Section 4 of the Judiciary Law which declared that, subject to certain stated exceptions, "the sittings of every court within this state shall be public, and *every citizen may freely attend the same.*" (Emphasis added).

The Court held that the last phrase of Section 4 (in italics) is merely a guarantee of protection from arrest, historically afforded to those whose presence was necessary to accomplish the judicial function by serving as witnesses. Thus, the italicized phrase is not construed as expanding or explaining the previous phrase.[5] The Court thereupon directed its attention only to the question as to whether the guarantee of a public trial created an enforceable right in a member of the public.

In refuting this proposition, the Court took the position that, like so many other fundamental privileges, the right to a public trial must be asserted by the accused rather than by those who are not directly affected by its denial.[6] Since the former may, under certain circumstances, desire to waive such rights, his decision in this regard should not be subject to interference or frustration by others whose interests are secondary to his own. As one court answered the argument, "To deny the right of waiver in such a situation would be 'to convert a privilege into an imperative requirement' to the disadvantage of the accused."[7]

The Court also observed that, if appellants' contenton were sustained, the accused's rights could be determined in a proceeding to which he was not a party. In this case, appellants were able to reach the Court of Appeals long before the accused's own appeal had been argued before the Appellate Division; and if the Court of Appeals had not reserved decision until the appeal of the accused had come before the Court, the merits of Jelke's case could have been passed upon despite the fact that he would not be heard. "There is something essentially wrong and unreasonable about a procedure that permits such a result,"[8] declared the Court.

The Court further noted that acceptance of appellants' interpretation of Section 4 of the Judiciary Law would deprive the courts of their inherent power to limit public attendance in certain situations.[9] If this construction were adopted, the trial judges would have no right to exclude individual spectators, no matter how necessary such exclusion might be to preserve order or safeguard the public. Such might lead to intolerable interferences with the judicial process.[10]

•

CONFLICTS OF LAWS—CONTRACTS—APPLICATION OF "GROUPING OF CONTRACTS" THEORY.—The New York Court of Appeals, in a contract action involving a conflict of laws, applied the "Grouping of Contacts" theory in arriving at its decision, and held that

2 281 App. Div. 395, 120 N. Y. S. 2d 174 (1st Dept. 1953).
3 308 N. Y. 71, 123 N. E. 2d 777 (1954).
4 See Danziger v. Hearst Corp., 304 N. Y. 244, 107 N. E. 2d 62 (1952).
5 *Supra* note 3, at 78-80, 123 N. E. 2d at 779.
6 See United States v. Sorrentino, 175 F. 2d 721 (3d Cir. 1949).
7 *Id.* at 723.
8 *Supra* note 3, at 83, 123 N. E. 2d at 782.
9 *Ibid.*
10 *Id.* at 84, 123 N. E. 8d at 782.

the law of England would govern,[1] thereby reversing Special Term and the Appellate Division, both of which had concluded that New York law was to be applied.[2]

Plaintiff and defendant were married in England in 1917, and had lived there for about fourteen years. In 1931, defendant deserted his wife and children, came to the United States on a visa, procured a Mexican divorce, and then "married" another woman.

Plaintiff came to New York in 1933 to see defendant and to adjust their differences; the result was the execution of a separation agreement by which it was provided that the wife should live in England, separate and apart from her husband, and the latter agreed to pay fifty pounds a month to a trustee in New York for the support of the wife and children. It was also agreed that neither would sue in an action relating to their separation.

The defendant husband defaulted in his payments, and in 1934, plaintiff, then in England, petitioned the court there for separation. An order requiring payment of alimony *pendente lite* was entered, but the case never came to trial.

Plaintiff, having received nothing under the English order and practically nothing under the separation agreement, brought this action in 1947 to recover $26,564, representing the amount due her under the said agreement from January 1, 1935 to September 1, 1947.

Defendant, in his answer, pleaded that plaintiff's institution of the English separation action constituted a repudiation of the agreement made in New York and effected a forfeiture of her rights to any payments under it.

Plaintiff then made a motion for summary judgment and defendant made a cross motion for like relief. Defendant's cross motion was granted at Special Term and the Appellate Division affirmed the lower court.[3] Both courts came to the conclusion that New York law was to be applied, and held that under such law the commencement by plaintiff of the English action constituted a rescission and repudiation of the separation agreement.

In contract cases, where there is a conflict as to which law to apply, a frequently applied rule is that all matters bearing upon the execution, the interpretation and the validity thereof are determined by the law of the place where the contract was made, and all matters connected with its performance are to be regulated by the law of the place where the contract, by its terms, is to be performed.[4]

Many courts, however, examine all the circumstances which could be supposed to have influenced the actions of the parties, seeking what has been termed the "center of gravity" of the circumstances.[5]

There is some advantage in taking this accumulation of contract points as paramount, since the result harmonizes with a sense of appropriateness, in that a transaction will be governed by the law of the state with which it is most closely in contact. In addition, problems of finally identifying the place of contracting and the place of performance will be avoided.

The rule has been formulated by a court of another jurisdiction as follows: "The court will consider all acts of the parties touching the transaction in relation to the

[1] Auten v. Auten, — N. Y. —, — N. E. 2d — (1955).
[2] 280 App. Div. 912, 115 N. Y. S. 2d 817 (1st Dept. 1952).
[3] *Ibid.*
[4] Union Nat. Bk. v. Chapman, 169 N. Y. 538, 543, 62 N. E. 672, 673 (1902).
[5] Harper, Taintor, Carnahan & Brown, CONFLICTS OF LAWS, CASES AND MATERIALS, 6 (Indianapolis, 1950).

several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact."[6]

In the instant case, the court noted that the merit of this theory 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 context, thus allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation.

The court cited *Jones* v. *Metropolitan Life Ins. Co.*,[7] where the Appellate Term, First Department, grouped the various elements to be considered in determining which law to apply and came to the conclusion that one group was of greater significance than the other and applied New York instead of New Jersey law. However, the court there said that: "If it be assumed that the law of the place of making governs, the contract in suit must be deemed to have been made in New York"[8] and "If the law of the place of performance be considered, New York law must likewise apply"[9] and "If the grouping of the various elements be considered the determinative test, New York law must apply."[10] In the final analysis, therefore, the court did not clearly indicate upon which of the three grounds it was basing its decision.

The court also cited *Rubin* v. *Irving Trust Co.*,[11] where it was found that the contacts with New York were more numerous and more significant than those with Florida. However, this finding was prefaced by language stating that "There is yet another approach to the problem which tends to dictate the same result . . . the 'center of gravity' theory of conflicts of laws."[12]

In the case at bar the court found that the facts spelled out a pattern indicating that England had the most contacts with the parties and observed that England had the greatest concern in prescribing and governing these obligations and in securing to the wife and children essential support and maintenance and held that English law should be applied.

The court did note, however, that the same result would follow by the application of the general rule even if it were not to place emphasis on the law of the place with the most significant contacts.

It would appear that the court, in arriving at its decision in the instant case, relied more on the "Grouping of Contacts" theory than courts of this state have in the past. This may indicate that the "Grouping of Contacts" theory will ultimately prevail as the settled rule in this State.

TAX LAW—ORCHESTRA CONDUCTOR HELD NOT ENGAGED IN AN "UNINCORPORATED BUSINESS" WITHIN THE PURVIEW OF THE NEW YORK TAX LAW.—In a significant opinion which reversed affirmation by the Appellate Division,[1] the Court of Appeals held that an orchestra conductor who claimed the salaries of musicians and arrangers as deduc-

[6] W. H. Barbour Co. v. Hughes, 223 Ind. 570, 586, 63 N. E. 2d 417, 423 (1945).
[7] 158 Misc. 466, 286 N. Y. Supp. 4 (App. T., 1st Dept. 1936).
[8] *Id.* at 468, 286 N. Y. Supp. at 7.
[9] *Id.* at 469, 286 N. Y. Supp. at 8.
[10] *Id.* at 469, 286 N. Y. Supp. at 9.
[11] 305 N. Y. 288, 113 N. E. 2d 424 (1953).
[12] *Id.* at 305, 113 N. E. 2d at 431.

[1] In the Matter of the Application of Donald D. Voorhees v. Spencer E. Bates, *et al.*, (State Tax Commission), 282 App. Div. 988, 125 N. Y. S. 2d 632 (3d Dept. 1953).

tions for expenses on his 1941 state tax return, was not carrying on an unincorporated business within the meaning of the New York Tax Law.[2]

Appellant Voorhees, an orchestral conductor of note, conducted the orchestras for two weekly radio programs during the year in question. With reference to the "Cavalcade of America" radio program, sponsored by E. I. DuPont, Voorhees reported receipt of $101,142.60. Under "Expenses" he listed $54,741.00 for musicians' payroll, $11,035.00 for arrangers and $2,907.24 for payroll taxes. It appeared at the hearing before the Tax Commission, however, that Voorhees was only the nominal employer of the musicians and arrangers for the convenience of the sponsor, DuPont. Union regulations prevented Voorhees from being an actual employer, and a union contractor in fact engaged the musicians. Voorhees received money from DuPont for musicians and arrangers and immediately paid it out for the necessary expenses.

Article 16-A of the New York Tax Law provided for the tax on net incomes of unincorporated business.[3] Section 386 thereof defines the term "unincorporated business."[4] It excludes from the definition the activities of persons who practice professions, derive more than 80% of gross income from services rendered personally, and do not have capital as a material income-producing factor.[5] Specifically excluded are the professions of law, medicine, dentistry and architecture.

It is important to note that all three requirements must be met in order to avoid the extra tax upon unincorporated business. The requirement of not having capital as a material income-producing factor, not being in issue, was disregarded. The Court did, however, examine the questions of whether Voorhees was engaged in the practice of a profession and whether he derived more than 80% of his gross income from services rendered personally.

As the Court noted, this is the first case to consider the "arts" under Section 386 of the Tax Law. It observed that the term "profession," within the meaning of Section 386, has been applied to a landscape architect[6] and an industrial designer,[7] but not to a customhouse broker,[8] an economist,[9] a life insurance agent,[10] a specialist in corporate reorganization[11] or a furniture designer.[12] The majority held, however, that

[2] *Id.* 308 N. Y. 184, — N. E. 2d —. (Decided Dec. 1, 1954).

[3] This article, as originally enacted in 1935, bore the title, "Temporary Emergency Tax on Net Incomes of Unincorporated Businesses." The title was amended in 1947.

[4] ". . . the words 'unincorporated business' mean any trade, business or occupation conducted, engaged in or being liquidated by an individual, statutory or common law trust, estate, partnership or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, referee, assignee, or by any other entity or fiduciary, other than a trade or business conducted, or engaged in by, or the liquidation of a trade or business of, any corporation, or any other entity subject to the tax imposed by articles nine, nine-a, nine-b, or nine-c of this chapter, and include any trade or business which if conducted or engaged in by a corporation would be taxable under any of said articles. . . ."

[5] New York Tax Law, Art. 16-A, § 386.

[6] Matter of Geiffert v. Mealey, 293 N. Y. 583, 59 N. E. 2d 414 (1944).

[7] Matter of Teague v. Graves, 261 App. Div. 652, 27 N. Y. S. 2d 762 (3d Dept. 1941), aff'd, 287 N. Y. 549, 38 N. E. 2d 222 (1941).

[8] People *ex rel.* Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. 2d 955 (1940).

[9] Matter of Backman v. Bates, 279 App. Div. 1115, 112 N. Y. S. 2d 926 (3d Dept. 1952), aff'd, 305 N. Y. 839, 114 N. E. 2d 39 (1953).

[10] Matter of Recht v. Graves, 257 App. Div. 889, 12 N. Y. S. 2d 158 (3d Dept. 1939), lv. denied, 281 N. Y. 885 (1939).

[11] People *ex rel.* Moffett v. Bates, 276 App. Div. 38, 93 N. Y. S. 2d 313 (3d Dept. 1949), aff'd, 301 N. Y. 597, 93 N. E. 2d 494 (1950), cert. denied, 340 U. S. 865, 71 S. Ct. 88, 95 L. ed. 631 (1950).

Voorhees' occupation qualifies as a profession within the meaning of Section 386, and with this point the dissenting opinion agreed. The Court relied upon its statement in *People* v. *Kelly*,[13] a zoning law case, to the effect that no distinction could be drawn, for the purposes of that case, between the professions of law, medicine and dentistry, and that of music. The Court further relied upon its earlier definition of a profession as embracing "knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study."[14]

Voorhees' tax return on its face disclosed that he could not claim exemption from taxation as an unincorporated business because less than 80% of his gross income was derived from personal services, his payments to musicians and arrangers constituting over one-half of his reported gross receipts. Nevertheless, on the basis of hearing testimony the Court found that the return did not accurately reflect the true transaction. The record demonstrated that Voorhees was engaged in a "wash" transaction as to the money received for the musicians and arrangers, and consequently this money was not actually a part of his gross income. The Court emphasized that Voorhees ran no risk, made no profit and suffered no loss in this transaction. This may well be used as a test in future situations wherein exemption from taxation as an unincorporated business is claimed.

DOMESTIC RELATIONS—ARTIFICIAL INSEMINATION—AS CONSTITUTING ADULTERY—QUESTION OF LEGITIMACY.—In a recent divorce proceeding[1] in the Superior Court of Cook County, Illinois, the presiding judge ruled that artificial insemination of the wife by any man other than her husband, whether or not it was done with his consent, constituted adultery. The court further held that the resulting child was illegitimate.

Artificial insemination has been accepted by a large segment of the population in recent years, notwithstanding certain religious objections.[2] There are two classifications

[12] Matter of DeVries v. Graves, 266 App. Div. 1030, 44 N. Y. S. 2d 535 (3d Dept. 1943), aff'd, 292 N. Y. 529, 54 N. E. 2d 379 (1944).

[13] 255 N. Y. 396, 175 N. E. 108 (1931).

[14] Note 8, *supra*, at 412, 26 N. E. 2d at 957 (1940).

---

[1] Doornboos v. Doornboos, Ill. Super Ct., (unreported) New York Herald Tribune, Dec. 14, 1954, p. 15, col. 3.

[2] AID has been condemned as adulterous by several major religious groups. The Archbishop of Canterbury pronounced the attitude of the Church of England as follows:

"Adultery is the surrender outside the bonds of wedlock, and in violation of it, either of the sexual organs alone, by the use of contraceptives, of the reproductive organs alone by the AID—or, of course, of both, as in normal intercourse." 161 Off. Rep. Parl. Debates (Lords) 404 (1948-1949); New York Times, March 17, 1949, p. 13, col. 2; Chicago Daily Tribune, March 18, 1949, p. 6.

The Vatican has condemned artificial insemination in almost all forms. *Doctor's Dilemma.* Time, (Oct. 10, 1949). It is also anticipated that Orthodox Jewry will disapprove, inasmuch as an Orthodox Jewish marriage is only consummated by sexual intercourse. See Abel, GYNECOLOGY AND OBSTETRICS 521 (International Abstract of Surgery, 1947). Testimony before a committee hearing of the New York Legislature in 1951 indicated that there were then about 20,000 children in this country who were the products of artificial insemination. Ploscowe, SEX AND THE LAW, 113 (New York, 1951).

of artificial insemination.[3] When use is made of the husband's semen to impregnate the wife, it is termed artificial insemination homogenous—or AIH; when a donor's semen must be used, it is called artificial insemination donor—commonly referred to as AID.

AIH raises few legal problems. Since both the husband and wife are the biological parents of the child there are no questions as to adultery or illegitimacy. Serious problems are raised, however, when AID is resorted to.[4]

Before AID may be characterized as adultery, the question of what constitutes adultery must be answered. If the principal basis for condemning adultery as a crime is society's need to preserve the family entity[5] and to assure the husband's right to heirs of his own blood, then impregnation outside the marital relationship logically would constitute adultery. This conclusion would seem to be required even in an instance where actual penetration by a third party had not occurred.[6] But the point is not conclusively settled since some jurisdictions have required proof of sexual intercourse in order to prove adultery.[7]

One of the earliest cases in which AID was involved was a Canadian case[8] in which the court held that adultery consisted of the voluntary surrender to another person of the reproductive powers or faculties of the guilty spouse. However, this statement with regard to AID was purely dictum, the court having already found on the facts that the defendant had had carnal relations with a person other than her husband.[9] In 1945, an American court[10] took the opposite view, also by way of dicta, contending that AID was not included in a literal sense within any extant definition of adultery, and could never support a judgment that adultery had been committed.

The first case to render a direct holding on this general problem arose in New York in 1948.[11] This was a custody proceeding in which visitation rights were allowed to the husband, notwithstanding the fact that the child was not of his blood. The wife had been artificially inseminated by donor, with the husband's consent. The court held that the child had been inferentially adopted or semi-adopted by the husband, and that thus the husband was at least entitled to the rights of a foster parent. It further stated that since the husband had consented to clinical impregnation, that the child was legitimate. However, the court specifically refrained from passing on the legal consequences of AID in so far as property rights were concerned.

Some six weeks before the instant case, the Superior Court of Cook County held in the *Ohlson* case[12] that where a child is born during the continuance of a marriage

[3] For descriptions of the medical techniques of artificial insemination, see Farris, HUMAN FERTILITY AND PROBLEMS OF THE MALE, c. 14 (White Plains, N. Y., 1950); Barton, Walker and Wiesner, *Artificial Insemination,* [1945] Brit. Med. J. 40 (June 13, 1945); *The Rôle of Artificial Insemination in the Treatment of Sterility,* 120 J. A. M. A. 442 (1942).

[4] Schwartz, *Some Legal Aspects of Artificial Insemination,* 18 Queens Bar Bull. 87 (1955).

[5] May, SOCIAL CONTROL OF SEX EXPRESSION, ix (New York, 1931).

[6] Russell v. Russell, [1924] A. C. 687, 721, 13 Brit. Rul. Cas. 246.

[7] Warner v. State, 202 Ind. 479, 484, 175 N. E. 661, 663 (1930); Commonwealth v. Moon, 151 Pa. Super. 555, 30 A. 2d 704 (1943). Note: (1950) Wis. L. Rev. 136, 144.

[8] Orford v. Orford, 49 Ont. L. R. 15, 58 D. L. R. 251, 258 (1921).

[9] 58 Yale L. J. 458 (1948-49).

[10] Hoch v. Hoch (not reported), Chicago Sun, Feb. 10, 1945.

[11] Strnad v. Strnad, 190 Misc. 786, 78 N. Y. S. 2d 390 (1948).

[12] Ohlson v. Ohlson, United Press Service, Sept. 20, 1954.

the presumption arises that both marital partners are its parents. It was said that only "conclusive proof" could upset that presumption. But unlike the instant case, the very fact of artificial insemination was in question in the *Ohlson* case, and the court avoided a ruling on the AID problem by its holding that artificial insemination had not been proved.

A number of unanswered questions remain. If resort to AID is adulterous, is the wife liable to criminal prosecution? If the husband has consented to the procedure, will he be estopped from offering adultery as a ground for divorce? Is the wife's adulterer the donor of the semen or the doctor who performed the impregnation? If the children of AID are illegitimate, do they have any inheritance rights in the donor's estate? May custody of such a child be given to an adjudicated adulterous woman? Assuming that the husband has consented to the use of AID and does not sue for divorce, does he formally have to adopt the child? What different consequences will follow if the husband consents or if he does not consent to adoption? To what extent should the state regulate the processes of artificial insemination, the doctors who practice it, and the choice of donors?

Both in 1949 and in 1951 the New York State Senate considered legislation in this field, but on both occasions it was rejected.[13] The *Doornboos* case reflects the growing need for declarative and remedial legislation.

TORTS—NEGLIGENCE—NON-LIABILITY OF STATE FOR FATAL STABBING COMMITTED AFTER RELEASE BY PATIENT FROM STATE HOSPITAL BECAUSE OF ERRONEOUS DIAGNOSIS.—Reversing a judgment of the Court of Claims, the Appellate Division, Third Department, recently held that the State of New York was not liable for a fatal stabbing by a patient released from a state mental hospital whose diagnosis was admittedly erroneous.[1] To the question "are the doctors, or is the state which employs them, legally responsible in damages for an honest error of professional judgment made by qualified and competent persons?" the court responded in the negative.

Plaintiff's intestate was fatally stabbed by one, William Jones, in Brooklyn, New York, on March 5, 1950. Several years earlier Jones had been sentenced as a wayward minor. Thereafter, upon suspicion of a mental disturbance, he was examined by two physicians who diagnosed his case as being one of psychosis with psychopathic personality.[2] He was thereupon committed to Mattewan State Hospital for the Criminal Insane where he remained until the expiration of his original sentence.

A voluminous report on Jones was compiled during his stay at Mattewan, and his condition was repeatedly diagnosed as psychosis with psychopathic personality, although the proper diagnosis should have been schizophrenia, paranoid type.[3] Shortly after his release from Mattewan, Jones stabbed seven persons without provocation. Four, including plaintiff's intestate, were fatally injured.

[13] S. 801, 172d Sess. (1949); S. 745, 174th Sess. (1951).

---

[1] Yula St. George, adm'x of Frank St. George v. The State of New York, 283 App. Div. 245, 127 N. Y. S. 2d 147 (3d Dept. 1954), aff'd 307 N. Y. 689, — N. E. 2d — (1954).

[2] This is a general description which indicates the existence of a severe form of mental disease. Webster's NEW INTERNATIONAL DICTIONARY, 2002 (2d ed., Springfield, Mass., 1948).

[3] The disintegration of personality, inconsistent tendencies and what is commonly known as "split personality," together with delusions of persecution and of one's own greatness. *Id.*, at 1733, 2433, 2235.

Plaintiff's theory of liability rested upon the erroneous diagnosis of Jones' mental condition by the doctors and psychiatrists at Mattewan, alleging that the hospital was understaffed and overcrowded and that the diagnosis arose from inadequate observation and information. There was no claim, however, that the staff doctors who had Jones in charge were unqualified or incompetent, or that they were unconscientious or insincere in making such diagnosis and the Court found that their judgment was based on adequate observations and compilations of case history.

Among the standards considered by the Court were those set out in *Pike* v. *Honsinger*,[4] a leading medical malpractice case in this jurisdiction. It was there held that a doctor "is under the obligation to use his best judgment in exercising his skill and applying his knowledge" and "the rule requiring him to use his best judgment does not hold him liable for a mere error of judgment provided he does what he thinks is best after careful examination."[5] To the same effect is *Kingsley* v. *Carravetta*.[6]

The Court distinguishes the instant case from the so-called "escape" cases, where liability for harm done by escapees from mental hospitals is imposed upon the state.[7] In these cases, the fact that the patient's mental condition was such as to require confinement was known. Typical of these cases is *Weihs* v. *State of New York*,[8] where it was held: "Bearing in mind the knowledge which they possessed as to his mental condition they should reasonably have anticipated that he would attempt to escape and hence were bound adequately to guard him, and safeguard him against harm to himself or to others."[9] These cases differ from the instant one where, after competent and seemingly exhaustive diagnosis by qualified and experienced doctors, the actual mental condition of the patient was not known.

Statini v. *State of New York*,[10] decided by the Court of Claims in April of 1952 appears to be the only case in point in this jurisdiction. Plaintiff's intestate there was killed by her husband, one Schioppa, after he was released from Central Islip State Hospital where his condition was tentatively diagnosed as dementia praecox, paranoid type.[11] It does not appear that this was an incorrect diagnosis, as was the fact in the instant case. After having been released on a convalescent status, Schioppa killed his wife. Plaintiff claimed that the Hospital was negligent in not using certain types of psychiatric devices of examination to determine if patient was ready for release. The Court rejected this proposition, holding that the psychiatrists exercised the skill of reasonably proficient practitioners in dealing with the patient. Thus, the standard of care as set up for doctors in the cases on medical malpractice was applied in determining liability of the state in the instant type of case.

Cases in other jurisdictions dealing with the same problem cited by the Court in the instant case appear to reject liability on different grounds. Two of such cases indicate that performance by hospital superintendents and their staffs, of governmental

[4] 155 N. Y. 201, 49 N. E. 760 (1898).

[5] *Id.* at 210, 49 N. E. at 762.

[6] 244 App. Div. 213, 279 N. Y. Supp. 29 (4th Dept. 1935), aff'd 273 N. Y. 559, 7 N. E. 2d 691 (1937).

[7] Weihs v. State of New York, 267 App. Div. 233, 45 N. Y. S. 2d 542 (3d Dept. 1943) and Jones v. State of New York, 267 App. Div. 254, 45 N. Y. S. 2d 404 (3d Dept. 1943).

[8] See note 7, *supra*.

[9] *Id.* at 235, 45 N. Y. S. 2d at 544.

[10] 202 Misc. 689, 112 N. Y. S. 2d 20 (1952).

[11] This involves delusions, blunting of emotions, loss of interest in and loss of participation in social life. Webster's NEW INTERNATIONAL DICTIONARY, 695 (2d ed., Springfield, Mass., 1948).

duties entrusted by statute are not subject to judicial review,[12] since such persons are given official *discretion* to release the patients. The others arrive at the conclusion that the act of discharging an insane person is not the proximate cause of the harm done by such persons, apparently even though the release was done without the proper exercise of professional judgment.

As of now, the New York rule appears to be non-liability for honest errors of professional judgment by qualified and competent physicians.

MARRIAGE—ANNULMENT—ALIMONY—SLEICHER V. SLEICHER, OVERRULED.—The parties were married in 1927. They separated and entered into a separation agreement in Connecticut in 1944. The agreement provided, *inter alia,* that the defendant husband was to pay the wife $1,668 a year for her support and maintenance during her life, "or until she shall remarry." It also required defendant to maintain a $10,000 life insurance policy on his life for the benefit of the plaintiff, "unless and until" she should remarry.

The parties were subsequently divorced in Nevada and the husband remarried. In 1949, the plaintiff wife married one Harragan and advised her former spouse that he could cease making payments. Subsequently, Harragan's divorce from his first wife was declared invalid and plaintiff wife in the instant case obtained an annulment of her second marriage. In 1953, plaintiff instituted an action to recover support and maintenance under the separation agreement and for restoration of the insurance policy on the defendant's life. The trial court, concluding that the separation agreement "contemplated a valid remarriage," held that the defendant's obligation was revived as of the date the second "marriage" was annulled on the authority of *Sleicher* v. *Sleicher.*[1] On appeal, the Appellate Division reversed, one justice dissenting, concluding that plaintiff did remarry within the terms of the agreement and that defendant's obligations were permanently extinguished. The Court of Appeals affirmed.[2]

In the *Sleicher* case, a separation agreement incorporated into a Nevada divorce decree provided for payments to the wife "so long as she remains unmarried." When the wife's subsequent remarriage was annulled on the ground of her second husband's insanity, Judge Cardozo held that the first husband's obligation to make payments was not terminated by the invalid remarriage. He rested his decision on the doctrine of "relation back." The husband was required to pay all support payments from the date of the annulment.

At the time of the *Sleicher* case in 1929, alimony could not be granted to a wife who received an annulment decree. This was based on the theory that the decree of nullity necessarily "related back" to the time of the contract of marriage and "he who elects to rescind a contract can claim nothing under it."[3] Since, on general principles

[12] Emery v. Littlejohn, 83 Wash. 334, 145 P. 423 (1915) and Kendrick v. United States, 82 F. Supp. 430 (D. C., N. D. Ala., 1949).

---

[1] 251 N. Y. 366, 167 N. E. 501 (1929).

[2] Gaines v. Jacobson, 283 App. Div. 325, 127 N. Y. S. 2d 909 (1st Dept., 1954), aff'd 308 N. Y. 218, — N. E. — (Dec. 31, 1954) (unreported).

In the absence of proof to the contrary, both the Appellate Division and the Court of Appeals assumed that the law of Connecticut, under which the agreement was made, was the same as the law of New York. See, International Textbook Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (1912).

[3] Sleicher v. Sleicher, *supra,* note 1.

of equity, a plaintiff wife in an annulment action could not be granted alimony,[4] Judge Cardozo avoided this harsh result by upholding the wife's contention that her right to support, under a separation agreement with her first husband, was revived upon the annulment of her second marriage. He duly recognized that "the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice."[5]

However, in 1940, the legislature enacted Sec. 1140a[6] of the Civil Practice Act which provided:

"When an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires. . . ."

Since that date, the courts have discretionary power to grant or deny alimony in all annulment actions, and may determine the amount and length of time during which payments shall be made.[7] Under the broad language of the statute, it has been held that a wife, instituting an action to have an alleged marriage declared a nullity, could also apply for support.[8] It has been held that the statute embraces all situations in which the Domestic Relations Law declares a marriage void or voidable,[9] and the discretionary power which it confers does not depend for its exercise upon the fault of either party;[10] it will even sustain an award of alimony *pendente lite*.[11]

While the trial court felt itself bound by the *Sleicher* case, the Appellate Division and the Court of Appeals took the position that the case was inconsistent with the provisions of Sec. 1140a, and that the foundation of the *Sleicher* decision had been destroyed. Since the statute permitted a wife to obtain support from a husband following an annulment, the wife in this case could receive such support from her second husband, following the determination that their marriage was void. There was no need to revive the obligation of the first husband whose duty to furnish support ended at the time of the second marriage, especially since the first husband was a "stranger" to the annulment. It was the court's attitude that, "as between successive husbands, the wife look to the last one for support and, certainly, that she be given neither two sources of support nor the ability to choose between her first and second husbands for the most profitable source."[12]

The decision appears sound. It gives full effect to the legislative intent to attach a degree of validity to annulled marriages sufficient to support an award of alimony. As the court pointed out, the decision eliminated the unjust situation wherein "a plaintiff (wife) shall have support or an equivalent from each of two men during the same period of time and this by force of a fiction subservient to justice."[13]

[4] Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22 (1905).

[5] Sleicher v. Sleicher, *supra*, note 1.

[6] L. 1940, c. 226.

[7] Johnson v. Johnson, 295 N. Y. 477, 68 N. E. 2d 499 (1946).

[8] Adams v. Adams, 188 Misc. 381, 67 N. Y. S. 2d 752 (Spec. Term, Queens Co., 1947); Anonymous v. Anonymous, 174 Misc. 496, 21 N. Y. S. 2d 71 (Dom. Rel. Ct., Bronx Co., 1940); Landsman v. Landsman, 278 App. Div. 214, 104 N. Y. S. 2d 301 (1st Dept., 1951); Shaw v. Shaw, 81 N. Y. S. 2d 684 (Spec. Term, Pt. 1, N. Y. Co., 1948).

[9] Sleicher v. Sleicher, *supra*, note 1.

[10] Johnson v. Johnson, *supra*, note 7.

[11] Weis v. Weis, 108 N. Y. S. 2d 396 (Sup. Ct., Monroe Co., 1951).

[12] Gaines v. Jacobson, *supra*, note 2.

[13] Sleicher v. Sleicher, *supra*, note 1.

TORTS—NEGLIGENCE—LAST CLEAR CHANCE THEORY—ACTUAL KNOWLEDGE BY DEFENDANT OF NEGLIGENT PLAINTIFF'S PERIL NOT ALWAYS NEEDED.—The Court of Appeals, in an action for wrongful death, ruled that the element of knowledge by defendant of negligent plaintiff's peril, which is necessary to the last clear chance doctrine, is satisfied if there is shown conduct constituting negligence so reckless as to show indifference to knowledge, and held that plaintiff had made out a prima facie case, thus reversing the Appellate Division.[1]

Decedent Kumkumian was killed by a local subway train of the B. M. T. line in Brooklyn, New York, in the tunnel between Prospect Avenue and 25th Street. The tunnel between the two stations is about 2,000 feet long. As the motorman was coasting down a slight grade at the rate of 15 m.p.h. toward the 25th Street Station, the train came to an automatic stop about 600 feet from the 25th Street Station. There are several causes which can activate the automatic emergency stopping equipment, but the motorman knew that one such cause is by the working of a tripping device under each car, which, upon contact with an object under the car, automatically applies the brakes. However, the motorman failed to make any investigation, reset the brakes in his cab, and proceeded on until the emergency equipment again brought the train to a stop. Again the brakes were reset and the train again proceeded. It was only when the train was automatically stopped for a third time that an investigation was made and the remains of decedent Kumkumian found.

The Court classified decedent's presence in the tunnel as negligence on his part. The last clear chance doctrine has been held to apply only where there is contributory negligence.[2] Where defendant has the last clear chance to avoid the accident, plaintiff's negligence is not the proximate cause of the injury, and, therefore, recovery is allowed.[3] Recovery has been allowed where defendant had actual knowledge of the peril of the negligent plaintiff but failed to use reasonable care to avoid the accident, but recovery has been denied where plaintiff's act of negligence was continuing and defendant did not have actual knowledge of the peril.[4]

Both the *Bragg* and *Panarese* cases[5] set forth the rule requiring the defendant to have actual knowledge of the plaintiff's peril. The former case dealt with the death of a railroad worker who fell asleep on the tracks after long hours of labor, and was hit by a train. The trial court charged that decedent was negligent and that there could be recovery only if the jury was satisfied that after the engineer had actually discovered Bragg's position of peril, he should have, in the exercise of ordinary care, stopped the train. The Court of Appeals held that this was a correct statement of the rule, and plaintiff recovered. It is important to note that the Court of Appeals said of the engineer, "He was not bound to see Bragg before he actually did see him."[6]

The *Panarese* case[7] presented a situation wherein plaintiff's intestate, a helper on a truck moving north alongside one of defendant's street railway tracks, jumped off the truck for the purpose of watching its operation, and while running alongside the truck, ran into an approaching trolley car of defendant and was killed. The doctrine of last clear chance was held inapplicable here because the negligence of both parties was contemporaneous, and the plaintiff was thus barred by the rule of contributory

1 Kumkumian v. City of New York, 305 N. Y. 167, 111 N. E. 2d 865 (1953).
2 Lee v. Penn. R. R., 269 N. Y. 53, 198 N. E. 629 (1935).
3 Bragg v. C. N. E. Ry., 228 N. Y. 54, 126 N. E. 253 (1920).
4 Panarese v. Union Ry., 261 N. Y. 233, 185 N. E. 84 (1933).
5 Notes 3 and 4 *supra*.
6 Panarese v. Union Ry., *supra* note 4, at 57.
7 Note 3 *supra*.

negligence. However, in stating the last clear chance rule, the Court said: "The doctrine of the 'last clear chance' is predicated upon the knowledge of the peril being brought home as an actual fact to the person charged with subsequent negligence."[8]

Although the Court in the *Kumkumian* case quotes to some extent from the *Bragg* and *Panarese* cases, it is obvious that a strict observance of the requirements for the application of the last clear chance doctrine, as laid down in those cases, would bar recovery by *Kumkumian*. The reason is that the motorman here did not have actual knowledge of decedent's peril.

However, the requirement that defendant have knowledge of the plaintiff's peril has been considered satisfied if plaintiff can show "negligence so reckless as to betoken indifference to knowledge."[9] It must be noted that this was presented by way of dictum, since it was found that defendant had actual knowledge and did act upon it, although not in time.

The requirement of knowledge has also been considered satisfied if there is proof to support an inference that someone is in peril; defendant need not have exact knowledge of the peril and the individual threatened, but must have "the requisite knowledge upon which a reasonably prudent man would act."[10] This rule resulted from a situation wherein two boys rode on a fender of defendant's truck, in a place where driver was unable to see them. As one of the boys began to slip off, the other knocked at the cab window, urging the driver to stop. The driver, however, continued onward for several blocks before he stopped, during which time the boy slipped under the wheel of the truck, and was killed. Although this rule derives from a markedly different factual situation, the Court applies it to the *Kumkumian* case. An important difference, however, is that the truck driver in the *Chadwick* case actually knew that someone was in peril.

The importance of this case is that the lack of *actual* knowledge by the defendant of the negligent plaintiff's peril does not necessarily bar the application of the last clear chance doctrine. To find liability in the instant case, the Court was required to invoke the dictum of the *Woloszynowski* case, thus making it a Rule of Law in this jurisdiction that the element of knowledge by defendant of negligent plaintiff's peril, necessary to the last clear chance doctrine, is satisfied if there is shown conduct constituting "negligence so reckless as to betoken indifference to knowledge."[11]

[8] *Id.* at 236.

[9] Woloszynowski v. New York Cent. R. R., 254 N. Y. 206, 172 N. E. 471 (1930).

[10] Chadwick v. City of New York, 301 N. Y. 176, 181, 93 N. E. 2d 625, 628 (1950).

[11] Woloszynowski v. New York Cent. R. R., *supra* note 9, at 209, quoted in Kumkumian v. City of New York, *supra* note 1, at 175.