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NOTES

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WIRETAPPING—DISCRETIONARY DENIAL OF POLICE APPLICATION BY NEW YORK COURT.—In an opinion which excited considerable editorial comment in the New York City newspapers and various magazines,[1] Justice Samuel Hofstadter of the New York Supreme Court denied an application by the New York City Police Department for an order permitting the interception of telephone communications for the purpose of securing evidence of bookmaking.[2]

The New York Penal Law expressly prohibits wiretapping by private individuals,[3] but the State Constitution[4] and its implementing section in the Code of Criminal Procedure[5] permit certain law enforcement officers to apply to designated courts to procure orders for the interception of telephonic communications upon cause duly shown. Significantly, full discretion in granting or denying these applications is vested in the courts.

In denying the instant application, Justice Hofstadter revealed that he had, for some time past, required that every such wiretapping application be endorsed by a ranking officer in the Police Department, and that written reports of the interceptions

[1] See, *e.g.*, a joint statement approving this decision issued by the American Civil Liberties Union and its New York affiliate, the New York Civil Liberties Union, noted in *Civil Liberties*, Feb. 1955, p. 2.

[2] In the matter of an application for an order permitting the interception of telephone communications of Anonymous, 133 N. Y. L. J. No. 8, p. 1, col. 7 (Jan. 12, 1955).

[3] N. Y. PENAL L. § 552: A person who: 1. Wrongfully obtains or attempts to obtain, any knowledge of a telegraphic or a telephonic message by connivance with a clerk, operator, messenger, or other employee of a telegraph or telephone company; or, 2. Being such clerk, operator, messenger or other employee, wilfully divulges to anyone but the persons for whom it was intended, the contents or the nature thereof of a telegraphic or telephonic message or dispatch intrusted to him for the transmission or delivery . . . is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment.

N. Y. PENAL L. § 1428: A person who wilfully or maliciously displaces, removes, injures, or destroys: . . . 6. a line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; . . . 9 . . . is punishable by imprisonment for not more than two years.

[4] N. Y. CONST. Art I, § 12: The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

[5] N. Y. CODE CRIM. PROC. § 813-a: An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the Supreme Court or judge of a county court or of the court of general sessions of the County of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. . . .

be submitted to the court. The Justice noted that these reports had shown ". . . some arrests and fewer convictions and then rarely, if ever, for a heinous offense."[6]

Although unauthorized telephone interceptions are prohibited in New York, evidence obtained by virtue of such interceptions is admissible in the New York courts.[7] Further, wiretap evidence has been held admissible even where the order authorizing the wiretapping is void or irregular.[8] The United States Supreme Court has held that wiretapping and the use of evidence obtained thereby does not violate either the unreasonable search and seizure proscription[9] of the United States Constitution or the constitutional privilege against self-incriminaton,[10] whether such evidence is introduced in the federal courts,[11] or in the state courts.[12] However, the federal courts have been charged with the interpretation and application of Section 605 of the Federal Communications Act,[13] intended to outlaw wiretapping.

Section 605 was enacted by Congress in 1934 as part of the Enabling Act establishing the Federal Communications Commission as an independent agency, and reflected the widespread feeling against wiretapping which existed at that time.[14] The United States Supreme Court was first called upon to interpret Section 605 in 1937 in the case of *Nardone* v. *United States.*[15] This was an appeal by several defendants who had been convicted of liquor smuggling as the result of evidence which had been obtained through wiretapping procedures engaged in by Federal agents. It was held that the prohibitions of Section 605 applied to Federal officers, and that evidence obtained in violation of Section 605 by such officers was inadmissible in a Federal court. In the second *Nardone* case,[16] the Supreme Court went further, holding that evidence procured by Federal agents through the use of information obtained from tapping telephone wires was likewise inadmissible in a Federal court.

However, in *Goldman* v. *United States,*[17] in 1942, the use of a sensitive listening device hung upon the wall of an adjoining room for the purpose of overhearing a telephone conversation spoken into a receiver was held not to be an interception within the purview of Section 605.

Goldstein v. *United States*[18] was decided in the same year. This was a mail-fraud case in which Federal agents persuaded two men to testify in the prosecution of the defendants by showing them the results of the tapping of their incriminating telephone conversations. Upon defendant's objection to this evidence, it was held that a person not a party to a tapped conversation cannot object to its use in court.

[6] *Supra,* note 2.

[7] People v. McDonald, 177 App. Div. 806, 165 N. Y. Supp. 41 (2d Dep't 1917); Matter of Davis, 252 App. Div. 591, 299 N. Y. Supp. 632 (1st Dep't 1937).

[8] People v. Katz, 201 Misc. 414, 114 N. Y. S. 2d 360 (Co. Ct. Westchester, 1952).

[9] U. S. CONST. amend. IV.

[10] U. S. CONST. amend. V.

[11] Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).

[12] Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908).

[13] 47 U. S. C. § 605: No person not being authorized by the sender shall intercept any commmunication and divulge or publish the . . . contents . . . to any person . . . and no person having received such intercepted communication . . . shall . . . use the same or any information therein contained for his own benefit or for the benefit of another.

[14] 74 CONG. REC. 2687, 2901 (1931); 75 CONG. REC. 4546, 4733 (1932).

[15] 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937).

[16] 308 U. S. 338, 69 S. Ct. 266, 84 L. Ed. 307 (1939).

[17] 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942).

[18] 316 U. S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312 (1942).

In 1939, the Supreme Court in *Weiss* v. *United States*,[19] was called upon to decide whether the prohibitions of Section 605 apply to *intra* as well as *inter*-state communications. The *Weiss* decision held in the affirmative. However, the significance of that decision was qualified in *Schwartz* v. *United States*,[20] where it was held that evidence obtained through violation of Section 605 might still be received in state courts. The Supreme Court took the position that Section 605 was not intended to impose a rule of evidence upon the state courts.

Justice Hofstadter's opinion expresses the view that wiretapping in any form is the greatest possible invasion of the right of privacy—a right which is "part of the expanding concept of the individual's right to be free from unwarranted intrusion,"[21] and which is recognized by the New York Civil Rights Law.[22] The dissenting opinions of Justices Holmes and Brandeis in the *Olmstead* case[23] pointed out the dangers inherent in wiretapping and its encroachment upon American ideals. In the words of Justice Holmes, "as a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared to wiretapping."[24]

Wiretapping by Federal agencies is thought, in some quarters, to be widespread[25] despite the federal prohibitions against such practice. Illegal wiretapping by individuals and private detective agencies has been dramatically revealed in recent days during the course of legislative investigations in New York City. Also in New York, the counsel to a private anti-crime organization was held in contempt for failure to disclose to a grand jury the identity of persons who gave him information concerning illegal wiretapping.[26]

While arguments for and against official wiretapping continue to be raised,[27] its present legality in New York necessitates the exercise of judicial discretion as each application is made to the courts by the police department. The New York judges are required to weigh conflicting values.[28] The search for a standard in the exercise of discetion conferred by statute continues. It should be noted that this discretion is a procedural safeguard, a device much favored in American law.[29] The Justice in the instant case warns that future wiretap applications in connection with so minor a crime as bookmaking will be denied because "the sacrifice is disproportionate to the possible gain."

RES JUDICATA—ACTION BY EMPLOYER AGAINST INSURER ON FIDELITY POLICY HELD BARRED BY PREVIOUS RECOVERY AGAINST EMPLOYEE FOR ONE DOLLAR.—In *Virginia Metal Products Corporation* v. *Hartford Accident and Indemnity Company*,[1] the United States Court of Appeals for the Second Circuit sustained the dismissal by the District

[19] 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298 (1939).
[20] 344 U. S. 199, 73 S. Ct. 232, 97 L. Ed. 231 (1952).
[21] *Supra*, note 2.
[22] N. Y. CIVIL RIGHTS L. §§ 50-51.
[23] *Supra*, note 9.
[24] *Supra*, note 9, at 476, 48 S. Ct. 564, 571, 72 L. Ed. 944, 955.
[25] THE WIRETAPPERS (New York, 1955). This is a series of articles published in The Reporter magazine by the Fortnightly Publishing Co., Inc.
[26] People v. Keating, 133 N. Y. L. J. No. 121, p. 1, col. 1 (June 22, 1955).
[27] *E.g., Wiretapping: An Unnecessary Evil* and *Wiretapping: A Realistic Appraisal*, both in 18 THE SHINGLE 1, (The Philadelphia Bar Association, February, 1955).
[28] Westin, *The Wiretapping Problem*, 52 COL. L. REV. 165 (1952).
[29] McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).

[1] 219 F. 2d 931 (2d Cir. 1955).

Court for the Southern District of New York of an action on a fidelity policy brought by an employer against its insurer for losses resulting from an alleged misappropriation by an employee. In an opinion by Judge Learned Hand, the court held that the plaintiff employer was barred by a previous judgment for one dollar recovered against the employee for the same conduct.

Virginia Metal, in a proof of claim filed with Hartford in April, 1949, charged its treasurer, Taylor, with misappropriation, including the conversion of checks and the submission of fraudulent travel vouchers. Thereafter, in November, 1949, Virginia Metal brought an action in the New York Federal District Court against Hartford upon the fidelity policy insuring Virginia Metal against losses through fraudulent or dishonest acts of its employees. In November, 1953, the complaint was summarily dismissed,[2] and an appeal was taken.

In August, 1950, after the New York action was begun and before the appeal was taken, Taylor sued Virginia Metal for libel and slander in the United States District Court for the Eastern District of Virginia.[3] In that proceeding, Virginia Metal pleaded five counterclaims based upon the misconduct alleged in the New York action, praying damages in the amounts of the funds allegedly misappropriated. The verdict was in favor of the defendant, Virginia Metal, on both the complaint and counterclaim. However, the jury only awarded nominal damages in the sum of one dollar. Both parties made motions to set aside the verdict, and both motions were overruled.

Virginia Metal objected on the ground that the damages were inadequate. The Virginia court ruled, however, that the jury had acted within its scope as trier of the facts in awarding nominal damages. Testimony as to the amount, as well as to the existence, of Taylor's indebtedness had been highly conflicting, and the court, in its discretion, saw fit to leave undisturbed the jury's finding, which the court labeled as a verdict for Taylor "perversely . . . expressed."[4]

The appeal was decided in May, 1953, in the United States Court of Appeals for the Fourth Circuit.[5] On the basis of the holding below that the finding was, in effect, for Taylor, the employee contended that he had been exonerated of the alleged misappropriation. He thus argued that he was entitled to judgment and further hearings as to damages. On this point the court held that the finding of nominal damages only for Virginia Metal did not amount to a finding that the charges against Taylor were false. The jury may have thought the company had not established the amount of damages it had sustained with sufficient certainty to justify the awarding of any more than nominal damages. Judgment was affirmed for Virginia Metal, the defendant, both as to the complaint and counterclaim. The effect of this holding was to limit the liability of Taylor to Virginia Metal for the alleged misconduct to nominal damages, and to allow the lower finding, "perversely . . . expressed" for Taylor, to stand.

In February, 1955, after the proceedings in Virginia were completed, the appeal of Virginia Metal in the New York action against the defendant bonding company on the fidelity policy was decided.[6] In that appeal, the issue was whether the previous

[2] Virginia Metal Products Corp. v. Hartford Accident & Indemnity Co., Civil No. 53-186, S. D. N. Y., Nov. 2, 1953. Not reported.

[3] Taylor v. Virginia Metal Products Corp., 111 F. Supp. 321 (E. D. Va. 1952).

[4] Rawle v. McIlhenny, 163 Va. 735, 750, 177 S. E. 214, 221 (1934).

[5] Taylor v. Virginia Metal Products Corp., 204 F. 2d 457 (4th Cir. 1953), *cert. denied,* 346 U. S. 865, 98 L. Ed. 375, 74 S. Ct. 104 (1953).

[6] Virginia Metal Products Corp. v. Hartford Accident & Indemnity Co., 219 F. 2d 931 (2d Cir. 1955).

judgment for one dollar which Virginia Metal had recovered against its employee, would operate as a bar in an action on the policy to recover for losses allegedly suffered as a result of the same misconduct.

Estoppel by judgment requires that the issues in the second action be the same as those in the first, and that the parties in the second action be the same or the privies of the parties to the first action.[7] The misconduct of Taylor was the issue at bar in both the Virginia and New York actions, and thus the first requirement of estoppel was satisfied. The fact that the counterclaim of Virginia Metal against Taylor in the Virginia action was $90,000 (the amount of the alleged misappropriation), whereas the New York action against the insurer was for $50,000, the amount stipulated in the fidelity bond, is immaterial insofar as estoppel is concerned.[8]

The question then arose as to whether the second requirement of estoppel was satisfied, since the defendants in the successive actions were not identical. However, parties in such successive actions need not be identical, provided there is privity or identity of interest.[9]

"What is privity? As used when dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property."[10] Even that was lacking in the actions in question. "Plaintiff contends that res judicata does not apply because there is no privity between defendant and Taylor. Defendant concedes privity is lacking."[11] Thus the court could not find an estoppel based upon a privity or mutuality concept.

It is a general principle that an estoppel based upon a prior judgment must be mutual; that is, available to both parties.[12] There is an apparent exception to the rule of mutuality where liability is altogether dependent upon the culpability of one of the parties exonerated in a prior suit, based upon the same facts and involving the same parties.[13] In such cases, this exception to the mutuality rule avoids the injustice which might otherwise result if recovery against one party were allowed based upon the conduct of another, when that other had been exonerated in a previous action.[14]

The requirements of unilateral estoppel had to be met if there was to be any estoppel at all, for the insurer was neither a party to the action in Virginia, nor was he in privity with Taylor. "Its position was that recovery was dependent upon Taylor's culpability, and Taylor, having been exonerated by the judgment on the counterclaim, that judgment inured to defendant's benefit and was a bar to this action even though defendant was not a party to the counterclaim and there was no privity be-

[7] 50 C. J. S., Judgment § 686 (1947).

[8] 50 C. J. S., Judgment § 712 (1947).

[9] Eissing Chemical Co. v. People's National Bank of Brooklyn, 205 App. Div. 89, 92, 199 N. Y. Supp. 342, 345 (2d Dept. 1923), *aff'd,* 237 N. Y. 532, 143 N. E. 731 (1924).

[10] Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U. S. 111, 128, 129, 56 L. Ed. 1009, 1024, 32 S. Ct. 641, 660 (1912).

[11] Brief for Appellee, p. 7, Virginia Metal Products Corp. v. Hartford Accident & Indemnity Co., 219 F. 2d 931 (2d Cir. 1955).

[12] Atlantic Dry Dock Co. v. New York, 53 N. Y. 64 (1873); 50 C. J. S., Judgment § 765 (1947).

[13] Adriaanse v. United States, 184 F. 2d 968 (2d Cir. 1950); Lafoon v. Waterman Steamship Corp., 111 F. Supp. 923, 928, 929 (S. D. N. Y. 1953); RESTATEMENT, JUDGMENT § 99 (1942).

[14] Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U. S. 111, 127, 128, 56 L. Ed. 1009, 1024, 32 S. Ct. 641, 659 (1912). 50 C. J. S., Judgment § 765 (1947).

tween it and Taylor."[15] Since it fell within the exception to the rule of mutuality, the estoppel, though unilateral, was held valid. The court pointed out the particular nature of the exception: "Fidelity insurance is only one form of secondary liability, the primary liability being that of the employee to the insured."[16] Judge Hand further disclosed the rationale of the exception: "It is the well-settled doctrine in New York, as well as elsewhere, that a party secondarily liable for the culpable conduct of a third person, after paying the loss, may sue that person as surrogate of the obligee; and that any act of the obligee that impairs this right discharges the party secondarily liable, at least to the extent of the impairment."[17]

In so explaining the estoppel rule invoked in the instant case, the court disposed of difficulties in the underlying fact pattern. A unilateral estoppel requires that the person primarily liable must have been exonerated in a prior action. In the Virginia courts, nominal damages for the employer was held to be, in effect, a finding for Taylor.[18] Even if this might not be considered strict exoneration (since judgment was for the employer) the reasoning of the court is sure: "It is true that the judgment was not against the [employer], but in his favor. However, that is immaterial, because it fixed beyond dispute the amount that the [employer] could recover from Taylor and as effectively barred any further recovery from him by the [insurer] as surrogate of the [employer], as though it had dismissed the claim altogether."[19]

The judgment for nominal damages, rendered against Taylor in the Virginia action, limited Taylor's liability for the misconduct in question, thereby limiting the secondary liability of the insurer and discharging him to that extent at least.[20] The employer was barred or estopped from an action against the insurer based upon the policy-covered misconduct of an employee who had been made impervious, through judgment, to all but nominal liability.

In New York, mutuality of estoppel is an accepted doctrine. It has been held that a judgment in favor of one co-trespasser may not be used by another co-trespasser, not a party to that judgment, by way of estoppel. "The estoppel must be mutual, which it is not in this case."[21] Unilateral exceptions to the rule, however, have been allowed in New York. It has been held that section 59 of the Vehicle and Traffic Law imposes a relationship akin to that of master and servant, and that this relationship falls within the scope of unilateral estoppel.[22] The connection between indemnitor and indemnitee has also been held to come within the exception to the mutuality rule.[23] There has been unwillingness to extend the area of the exception to cases where the plea of res judicata has been used other than as a defense, or in support of a counterclaim or to establish liability affirmatively.[24] In a case involving an indemnitor-indemnitee relationship, the court held: "One derivatively liable may plead in defense a judgment for the one

[15] Brief for Appellee, p. 7, Virginia Metal Products Corp. v. Hartford Accident & Indemnity Co., 219 F. 2d 931 (2d Cir. 1955).

[16] 219 F. 2d 931, 933.

[17] 219 F. 2d 931, 933.

[18] Rawle v. McIlhenny, 163 Va. 735, 750, 177 S. E. 214, 221 (1934).

[19] 219 F. 2d 931, 933.

[20] RESTATEMENT, SECURITY § 139, subd. 1 (1941).

[21] Atlantic Dry Dock Co. v. New York, 53 N. Y. 64, 68 (1873).

[22] Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 9 N. E. 2d 758 (1937).

[23] American Surety Co. v. Singer Sewing Machine Co., 18 F. Supp. 750 (S. D. N. Y. 1937).

[24] Elder v. New York & Penn. Motor Express Inc., 284 N. Y. 350, 353, 31 N. E. 2d 188, 189 (1940).

primarily liable in a previous action by the same plaintiff, to which one was not a party, but may not make a judgment the basis of a claim or counterclaim."[25]

In the case under consideration, there was an effective unilateral estoppel by judgment, and after that judgment, neither the fact of, nor the extent of liability of the person primarily liable (Taylor) can be relitigated by Virginia Metal or its insurer.

WORKMEN'S COMPENSATION—APPEAL BY CLAIMANT TO VACATE AWARD TO ENABLE HIM TO PROCEED AGAINST EMPLOYER IN COMMON LAW NEGLIGENCE.—"This is an unusual workmen's compensation case, since here it is the permanently disabled workman who appeals from an order affirming an award to himself."[1] An injured workman, in *Matter of Doca* v. *Federal Stevedoring Co., Inc., and Workmen's Compensation Board*,[2] brought this appeal seeking to have vacated a compensation award, in order that he might bring a common law negligence action against his employer. The theory underlying this latter action is that Doca was injured by one of his fellow-employees at Federal Stevedoring while he (Doca) was outside his employment, having finished his work for the day.[3] The employer's compensation carrier maintained that the injury was compensable under the workmen's compensation laws, it being presumed that the reason behind this assertion was that the same company was the carrier on the employer's general liability policy.[4]

The facts in the case were never in dispute. Doca, a longshoreman, had checked out and departed from work at a Brooklyn pier. He was passing another pier on his way home, when he was run down and severely injured by an auto crane belonging to his employer, Federal. The next day, Federal filed the first of several reports of injury with the Board. No claim or report was ever submitted by Doca. The Board, after giving notice to all parties, held a hearing, at which none of the parties appeared, and on the basis of the employer's reports and several physicians' reports, found the accident and injury to be compensable.

Despite the fact that he received and accepted substantial payments for medical expenses, Doca sought to recover in a common law negligence action. The trial court denied a motion to dismiss the complaint, and the order was affirmed by the Appellate Division.[5] The Court of Appeals reversed, on the ground that Doca could not attack the Board's finding in this collateral manner.[6] Doca then brought an appeal from the findings of the Board itself. The Appellate Division, from whose decision the instant appeal was taken, sustained the Board's finding.[7]

In his appeal to the Court of Appeals, Doca's contentions were: (1) that the Board lacked jurisdiction over the matter because Doca had never filed a claim; and

[25] Kearns Coal Co. v. U. S. Fed. Guaranty Co., 118 F. 2d 33, 37 (2d Cir. 1941), *cert. denied*, 313 U. S. 579, 85 L. Ed. 1536, 61 S. Ct. 1099 (1941).

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[1] Judge Desmond's opening remark in Matter of Doca v. Federal Stevedoring Co., Inc., and Workmen's Compensation Board, 308 N. Y. 44, 47, 123 N. E. 2d 632, 633 (1954).

[2] 308 N. Y. 44, 123 N. E. 2d 632 (1954).

[3] Id. at 48, 123 N. E. 2d at 633.

[4] *Ibid.*

[5] Doca v. Federal Stevedoring Co., 280 App. Div. 940, 116 N. Y. S. 2d 25 (2d Dept. 1953).

[6] 305 N. Y. 648, 112 N. E. 2d 424 (1953).

[7] 284 App. Div. 46, 130 N. Y. S. 2d 172 (3d Dept. 1954).

(2) that even if the Board had had jurisdiction, there was no residuum of legal evidence supporting the finding.

The Court disposed of Doca's claim that the Board lacked jurisdiction by reference to the case of *Meaney* v. *Keating*,[8] which interpreted the language of Section 20 of the Workmen's Compensation Law. This section provides in part that "a claim for compensation may be presented to the employer or to the chairman" of the Board, and that the Board shall have jurisdiction over claims "presented to it." In the *Meaney* case, the Court held that a notice of injury filed by the employer constituted a "claim" within the meaning of Section 20, and that therefore the Board had acquired jurisdiction, despite the fact that the injured worker had never filed a claim himself. Applying this authority to the Doca case, the Court held that the Board had, as a matter of law, acquired jurisdiction.

Addressing itself to the major issue, the Court held, five to two, that sufficient evidence had been presented. However, the court glossed over the questions as to the existence of a "residuum of legal evidence."[9]

New York entered the field of workmen's compensation legislation 45 years, ago, with the enactment of a Workmen's Compensation Act,[10] which was invalidated by the Court of Appeals a year later.[11] The present Workmen's Compensation law, enacted in 1913[12], secured to those workmen covered by its provisions an insurance system of compensation for industrial accidents, thus freeing them from the necessity of relying on the chance remedy of protracted and oftentimes speculative litigation; and depriving the employer of certain defenses that were available to him at common law.[13] In the following year, the Legislature added Article I, Section 19 to the New York State Constitution to remove any doubt as to the constitutionality of the 1913 enactment. After the constitutional amendment, the Workmen's Compensation Law was reenacted by L. 1914, c. 41.

The liberal social policy of the statute is well illustrated by the presumptions it creates in favor of the injured workman. Section 21 provides in part that, "In any proceedings for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary (1) that the claim comes within the provisions of this chapter."

Nor need the Board observe the strict courtroom rules of procedure: it "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. . . ."[14]

The problem which arose in the *Doca* case is one which inevitably arises when a finding by an administrative or quasi-judicial Board is brought to a court of law for review: what "support" must the Board's finding have in the record in order that these findings be upheld by the court? Chief Justice Hughes said that a court should insist upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[15] Judge Learned Hand said that such a finding must be "supported

[8] 305 N. Y. 660, 112 N. E. 2d 763 (1953).

[9] *Supra,* note 2 at 49, 123 N. E. 2d 632, 636.

[10] L. 1910, c. 674.

[11] Ives v. South Buffalo R. R., 201 N. Y. 271, 94 N. E. 431 (1911).

[12] L. 1913, c. 816.

[13] Contributory Negligence, Assumption of Risk and the Fellow Servant Rule were the important common law defenses abolished. See Prosser, LAW OF TORTS, c. 2, 520 (St. Paul, 1941).

[14] N. Y. Workmen's Compensation Law, § 118.

[15] In Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229, 59 Sup. Ct. 206, 217, 83 L. Ed. 126, 140 (1938).

by the kind of evidence on which responsible persons are accustomed to rely in serious affairs."[16]

The basic rule in New York was announced in *Matter of Carroll* v. *Knickerbocker,*[17] a compensation case decided three years after the enactment of the statute. In the *Carroll* case, the Court reversed a death award on the ground that the finding of the Board was based wholly on hearsay reports of statements made by the deceased worker. The rule as announced in the *Carroll* case was that the Commission "may in its discretion accept any evidence that is offered, [but] in the end there must be *a residuum of legal evidence* to support the claim before an award can be made."[18] (Emphasis supplied). But did the Court of Appeals apply this rule in the *Doca* case? Judge Desmond wrote that the "[residuum] rule has no place here. It governs when the party against whom the award is made questions the sufficiency of the proof but that is not our question."[19]

In *Matter of Ahern* v. *South Buffalo Ry. Co.,*[20] the Court of Appeals held that the acquiescence of an employer in an award, even when the jurisdictional facts were not present, bound the employer. Further, in *Matter of Bollard* v. *Engel,*[21] the Court found that appropriate statements in an employer's reports of injury are probative evidence against an employer that the accident arose out of and in the course of employment. Taking cognizance of these decisions, Judge Desmond held there was "no controlling reason why such statements are not equally probative as against the claimant when his attention is called to them and when he is given notice that findings and an award are to be based on them, and he still makes no protest but accepts the compensation."[22] Dwelling on the "acquiescence" theme, Judge Desmond pointed out that the employee had had ample notice of all the facts and proceedings involved in the administrative determination of the matter. The employee knew that the Compensation Board had had before it a "showing" in the form of employer's notices and physician's reports. The Board had informed him that this was a compensable accident, and that it intended to make a finding that his accident arose out of and in the course of his employment. The employee had made no protest until long after several awards had been made and after he had received compensation payments totaling $2,400, and had had his medical and hospital bills paid by the carrier to the extent of $14,000. In view of this "he [Doca] cannot now be heard to question the fact."[23] The court, speaking through Judge Desmond, made no mention of accord and satisfaction, estoppel, waiver or public policy as being the possible basis or bases for this conclusion. "Acquiescence" was the closest approach.

On the other hand, the minority, speaking through Judge Froessel, contended that there was nothing in the record to support the Board's jurisdictional finding.[24] Taking direct issue with the majority, Judge Froessel agreed that such matters as claimant's failure to appear at the hearings, his acceptance of the compensation awards, the presumption allowed by Section 21 of the Workmen's Compensation Law, and uncorrobo-

[16] In N. L. R. B. v. Remington Rand, 94 F. 2d 862, 873 (2d Cir. 1938).
[17] 218 N. Y. 435, 113 N. E. 507 (1916).
[18] *Id.* at 440, 113 N. E. at 509 (1916).
[19] *Supra,* note 2 at 52, 123 N. E. 2d 632, 636.
[19] Supra, note 2 at 52, 123 N. E. 2d 632, 636.
[20] 303 N. Y. 545, 104 N. E. 2d 898 (1952), *aff'd,* 344 U. S. 367, 73 Sup. Ct. 340, 97 L. Ed. 395 (1953).
[21] 278 N. Y. 463, 17 N. E. 2d 130 (1938).
[22] *Supra,* note 2 at 53, 123 N. E. 2d 632, 636.
[23] *Ibid.*
[24] *Id.* at 55, 123 N. E. 2d at 637.

rated hearsay reports are not *evidence* (emphasis supplied by Judge Froessel). Therefore, they have no probative effect.[25] The employer's report of injury, which is probative evidence against the employer on the jurisdictional issue, was, according to the majority, equally probative against the employee.[26] Judge Froessel, however, pointed out that such a report binds an employer because it is his admission, and is, therefore, within a well-recognized exception to the hearsay rule. When this same report is offered against the employee, no such exception should obtain.[27] He was also careful to note that the majority cited no authority for the proposition that the accident report of the employer was probative evidence against the employee.[28]

[25] *Ibid.*
[26] *Supra,* note 22.
[27] *Supra,* note 24.
[28] *Ibid.*