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DECISIONS:

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AGENCY—HOSPITAL HELD LIABLE FOR NEGLIGENCE OF NURSE WHO ABANDONED PROFESSIONAL TASK TO CARRY OUT ASSIGNED ADMINISTRATIVE DUTY.—The Court of Appeals, reversing judgments below, has held a hospital liable for the negligence of one of its nurses. This case turned on the question as to whether the causative act was professional or administrative.[1]

Plaintiff's intestate, a baby less than one day old, was burned to death in her bassinet in the nursery ward of the defendant hospital. Evidence indicated that the fire was caused by a naked and unguarded 100-watt bulb and reflector which the student nurse on duty had placed three inches from the baby's blanket, to raise its body temperature. The nurse had left the room for fifteen minutes to carry out an assigned duty of transporting nursery bottles to the basement. Upon her return, she discovered the bassinet in flames two feet high, the baby dead, and its body charred. At trial, the jury found for the plaintiff, but the verdict was vacated on the ground that the nurse's act in fixing and attending the lamp was of a professional nature, which, even though negligently done, as a matter of law would not render defendant hospital liable.[2]

On appeal to the Appellate Division, judgment was affirmed,[3] but the Court of Appeals reversed on the ground that the interference of the nurse's assigned *administrative* duties with her professional decision to apply heat to the infant caused the infant to be exposed to danger.

In New York there are three types of hospitals: public, private non-profit, and private profit-earning. Their tort liability is identical in that none are liable for the negligent performance of professional acts by staff members carefully selected.[4] The basis for this rule is that such staff members, including doctors and nurses, are independent contractors and as such are liable for their own torts. "A hospital undertakes, not to heal or attempt to heal through the agency of others, but merely to supply others who will heal or attempt to heal on their own responsibility."[5]

In this case there is no difficulty in determining the character of the two separate and distinct acts. It is clear that the tending of the baby was professional and the carrying away of the bottles was administrative. The problem was in ascertaining which of said functions was the legal cause of the injury.

The more usual problem which confronts the courts in hospital liability cases is whether the act which caused the injury was professional or administrative. Thus, when a patient was burned by an orderly's negligent application of a hot water bag, the status of the orderly was held to be the same as that of a nurse because the act was professional.[6] And, where a nurse failed to remove a hot water bag which she placed in a patient's bed and which resulted in the patient's being burned, the act

[1] Cadicamo v. Long Island College Hospital, 308 N. Y. 196, 124 N. E. 2d 279 (1954).

[2] 131 N. Y. S. 2d 287 (1954).

[3] 283 App. Div. 953, 130 N. Y. S. 2d 889 (2d Dept. 1954).

[4] Schloendorff v. New York Hospital, 211 N. Y. 125, 105 N. E. 92 (1914); but see, N. Y. GEN. MUN. L. § 50d, which imposes liability upon municipal hospitals for the malpractice of physicians and dentists who render gratuitous services; also see Note, 15 ALBANY L. REV. 190 (1951).

[5] Bernstein v. Beth Israel Hospital, 236 N. Y. 268, 270, 140 N. E. 694, 696 (1922).

[6] Phillips v. Buffalo General Hospital, 239 N. Y. 188, 146 N. E. 197 (1924).

was held professional.[7] But where a nurse placed a hot water bag in a bed which was being made up for an incoming patient, and the heat caused the patient to suffer burns, the act was held administrative and the hospital therefore liable.[8] Where an orderly left the plaintiff's decedent unguarded on a table top from which he fell and died, it was held that had the orderly remained, his duties would have been those of a nurse, and negligence a breach of professional duty. Therefore, the injury was held to have resulted from a professional act.[9] The Court of Appeals has asserted that it is the character of the act rather than the title of the actor that determines the extent of the hospital's duty.[10]

It is noteworthy that in most of these cases, the courts seemed to characterize the nurse's acts as professional as a matter of law. Thus, even where an apparently administrative task caused the injury, the courts seemed inclined to find that an exercise of professional judgment was involved, thereby rendering the hospital immune.

It would appear therefore that the courts have tended to resolve the problem of characterizing the offending act in favor of the hospital's non-liability.

If this solution represented a judicial attitude, we could expect to find the courts leaning toward the professional act as the one causing the harm in a close case like the one at bar. However, the Court of Appeals in the instant case held the authority of *Santos* v. *Unity Hospital*[11] to be controlling. There, a nurse had left a pregnant woman, of apparently sound mind, alone in the labor room while she left to answer a telephone. The woman was actually suffering from a rare psychosis inducing suicidal tendencies, incident to pregnancy, and jumped from a window to her death. The hospital was held liable because the administrative act of answering the telephone was found to be the proximate cause of the occurrence.

It may be inferred from these two decisions that where administrative tasks prevent the proper performance of professional duties, and injury results, the court may consider itself free to find, via the avenue of causation, that the administrative act was the proximate cause of said injury.

CONSTITUTIONAL LAW—EFFECT OF EX PARTE FOREIGN DIVORCE ON MAINTENANCE SUIT IN DOMICILE OF ABSENT SPOUSE.—A wife instituted suit for support and maintenance for herself and a child in the District of Columbia, her place of domicile, against the defendant who had at that time obtained a divorce in an *ex parte* Florida proceeding. Wife was not personally served with process in that proceeding nor did she otherwise appear or participate therein. The trial court held that defendant had no *bona fide* residence in Florida, which was without jurisdiction to enter its decree. Therefore, said decree was not entitled to full faith and credit and support and maintenance was awarded to plaintiff wife and child. Defendant appeals on the ground that the *ex parte* foreign divorce operates as a bar, under the full faith and credit clause of the federal constitution, to subsequent suit by the wife, in the District of Columbia, for support and maintenance. Held, reversed and remanded for reconsideration and redecision following the principle that the taking of jurisdiction by a state court in a suit for support

[7] Sutherland v. New York Polyclinic Medical School and Hospital, 298 N. Y. 682, 82 N. E. 2d 583 (1948).

[8] Iacono v. New York Polyclinic Medical School and Hospital, 296 N. Y. 502, 68 N. E. 2d 450 (1946).

[9] Andrews v. Roosevelt Hospital, 259 App. Div. 733, 18 N. Y. S. 2d 447 (2d Dept. 1940).

[10] See note 6, *supra*.

[11] 301 N. Y. 153, 93 N. E. 2d 574 (1950).

and maintenance filed after the defendant in that suit has obtained a valid *ex parte* foreign divorce is consistent with the full faith and credit clause of the federal constitution.[1]

This case focuses attention on another of the many problems which arise out of the *ex parte* foreign divorce. It is now the law, as a result of the first *Williams* case,[2] that full faith and credit must be given a decree of divorce granted by a state which had jurisdiction over the plaintiff and the matrimonial domicile even though based on constructive service on an absent non-resident spouse. The second *Williams* case, however,[3] leaves the situation potentially troublesome by holding that the state court of the domicile of the absent spouse has the power to examine the *bona fides* of the domicile in the foreign state and if it finds that jurisdiction was thereby lacking, it need not recognize said divorce decree.

The appellate court consented to entertain this case because of the confusion existing in the question of whether there is necessity for a frontal attack upon the validity of the foreign *ex parte* divorce in order for the trial court to sustain the maintenance suit.

In *Estin* v. *Estin*[4] the husband obtained an *ex parte* divorce in Nevada after a New York court, where he had appeared generally, had awarded his wife a decree for permanent alimony. Upon obtaining the Nevada decree, he stopped paying the alimony under the New York award. The wife thereupon brought suit in New York for a supplemental judgment on the past due payments. The United States Supreme Court held,[5] sustaining the position of the New York Court of Appeals,[6] that the New York Court may give effect to the Nevada decree insofar as it affects the marital status and still find that the Nevada decree is ineffective on the issue of alimony.

Later, the United States Supreme Court in *May* v. *Anderson*,[7] held that where a wife who was a domiciliary of Ohio brought a *habeas corpus* proceeding in Ohio to determine the right to custody of children, the Ohio court could take jurisdiction therein and was not barred by the full faith and credit clause where this proceeding was subsequent to an *ex parte* Wisconsin matrimonial decree which awarded custody to the husband.

The rationale of making the foreign divorce divisible is that the foreign court had jurisdiction to render the divorce decree because it had jurisdiction *in rem* when the plaintiff brought the marital *res* to that foreign court. Alimony and custody are said to depend on *in personam* jurisdiction.

"A mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony."[8]

The logic moved this court to reverse the trial court, which apparently felt that it was necessary to declare the foreign divorce invalid before it could award the wife maintenance. It told the trial court that if in fact and in law the foreign decree is invalid, it is free to so decide, but it should do so only if it must. The frontal attack is not only unnecessary but also undesirable. First, because of deference due to the

[1] Hopson v. Hopson, 221 F. 2d 839 (D. C. Cir. 1955).

[2] Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

[3] Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1123 (1945), followed in Rice v. Rice, 336 U. S. 674, 69 S. Ct. 751, 93 L. Ed. 959 (1949).

[4] 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. (Adv. Op.) 1078 (1948).

[5] *Id.*

[6] 296 N. Y. 308, 73 N. E. 2d 113 (1947), and see, Lynn v. Lynn, 302 N. Y. 193, 97 N. E. 2d 748 (1951).

[7] 345 U. S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953).

[8] *Id.* at 534, 73 S. Ct. at 843, 97 L. Ed. at 1227.

proceedings of a sister state, and second, because of possible stigmatization to children born of a subsequent marriage.

Judge Stephens, dissenting in part, felt that the *Estin* case[9] could not "properly be treated as authority for applying the so-called 'divisibility' of divorce doctrine to a wife's claim for maintenance *which had not ripened into an adjudication in her favor prior to the entry of the foreign decree of divorce in favor of husband.*"[10]

In the *Estin* case the wife had her alimony decree from the New York court prior to the foreign decree. Whether the United States Supreme Court will, in the future, go so far as to support the decision herein, that an unadjudicated maintenance claim may survive a valid *ex parte* foreign divorce decree, is still an open question.

EVIDENCE—"DEAD MAN'S ACT"—TESTIMONY OF ILLEGITIMATE CHILD'S GRANDMOTHER HELD INCOMPETENT TO ESTABLISH ORAL CONTRACT OF SUPPORT AGAINST DECEASED PUTATIVE FATHER'S ESTATE.—In a recent action brought by an illegitimate minor child against the estate of her putative father, the Court of Appeals held that the child's maternal grandmother was incompetent to testify to an oral agreement made between the grandmother and the deceased father for the support of the child during her minority.[1]

The facts alleged by the plaintiff were as follows: At the time of the child's birth, her mother and grandmother were desirous of putting her up for adoption. However, the putative father did not wish the child to be adopted, and in consideration for the grandmother's promise to raise the child, he promised to pay $60 per month, plus other necessary expenses for her support, until the child became 21 years of age. The father made these monthly payments until his death four years later. The infant, by her guardian ad litem, brought this action against his estate for the balance of the money owed. The trial court allowed both the mother and the grandmother to testify to the making of the alleged oral agreement, over the objection of the defendants, administrators de bonis non of the estate of the putative father. The jury found for the plaintiff, and judgment was entered for $18,000,[2] which judgment the Appellate Division affirmed by a divided court.[3]

Defendants appealed to the Court of Appeals, attacking the judgment below on three grounds: (1) the alleged oral contract was void under the Statute of Frauds as a "contract not to be performed within one year";[4] (2) the testimony of the mother should not have been admitted as she was "a party or person interested in the event" within the meaning of the New York Civil Practice Act, § 347; and (3) the grandmother was the "party or person from, through, or under whom such an interested party [the infant] derives his interest or title by assignment or otherwise" and therefore her testimony should have been excluded by operation of § 347 of the Civil Practice Act.[5]

[9] See note 4, *supra.*

[10] 221 F. 2d at 852. Italics those of Judge Stephens. Peff v. Peff, 2 N. J. 513, 67 A. 2d 161 (1949) is authority for the proposition that an unadjudicated claim for maintenance does not survive.

[1] Duncan v. Clarke, 308 N. Y. 282, 125 N. E. 2d 569 (1955).

[2] Duncan v. Duncan, 123 N. Y. S. 2d 54 (Sup. Ct. N. Y. Co. 1953).

[3] Duncan v. Duncan, 283 App. Div. 859, 129 N. Y. S. 2d 897 (1st Dept. 1954).

[4] N. Y. PERS. PROP. L. § 31, subd. 1.

[5] N. Y. CIV. PRAC. ACT § 347: "Personal transaction or communication between witness and decedent or lunatic. Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person

The Court of Appeals upheld the lower court's ruling that the oral contract did not violate the Statute of Frauds, which provides that any contract which "by its terms is not to be performed within one year from the making thereof, or the performance of which is not to be completed before the end of a lifetime" must be in writing.[6] The object of the contract in the instant case was the support of the child during minority, and inasmuch as the child could die within a year from the time of the making of the contract, the agreement was not one which could not be performed within a year. The court again distinguished, as it had in *Burger* v. *Neumann*,[7] a contract for support of an infant during infancy from a contract of employment for a term of years, which contract was held in *Cohen* v. *Bartgis Bros. Co.*[8] to come within the terms of the Statute of Frauds. The basis for this distinction is found in the object of the contract. Where the object is to supply necessaries for a child during infancy, the promisor is discharged from liability upon the child's death. On the other hand, a contract to purchase services or accomplish some other purpose through a term of years would not be fully performed if death occurred within a year.

As to the second point raised by defendants, the Court of Appeals held that the testimony of the mother had been properly admitted. An interested party within the meaning of the statute[9] is one who "will either gain or lose by the direct legal operation and effect of judgment, or one for or against whom the record will be legal evidence in some other action." The interest must be "present, certain and vested and not remote, uncertain or contingent."[10] Even though the mother would be partially relieved of the burden of supporting the infant, if the agreement were to be established, such a gain has been held to be too remote to constitute an "interest" within the meaning of the statute.[11] Although the jury in this case was correctly instructed to weigh the effect of the outcome upon the mother in relation to her credibility, the interest was not such as would make her incompetent to testify.

The admission below of the grandmother's testimony, however, raised the question as to whether she was a "person from, through, or under whom" the child derived her interest. The Court of Appeals held in *Todd* v. *Weber*[12] that in an action against the estate of a deceased putative father, brought by the infant for whose support the father had orally contracted, the promisee was competent to testify to the making of the contract. The consideration provided by the promisee did not make her the one "from, through or under whom" the beneficiary had derived her interest within the meaning of § 347. The beneficiary was held to have derived her interest under those circumstances from the father. Other cases have also held that when an action is brought by a third party beneficiary on a contract for support

from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic. . . ."

[6] See note 4, *supra*.

[7] Burger v. Neumann, 300 N. Y. 495, 83 N. E. 2d 724 (1949).

[8] Cohen v. Bartgis Bros. Co., 289 N. Y. 846, 47 N. E. 2d 443 (1943).

[9] See note 5, *supra*.

[10] Hobart v. Hobart, 62 N. Y. 80, 83 (1875).

[11] Connolly v. O'Connor, 117 N. Y. 91, 22 N. E. 753 (1889).

[12] 95 N. Y. 181 (1884).

during infancy, made for his benefit, the child does not derive his interest from the person providing the consideration, but that his interest was direct within the meaning of the statute.[13]

The majority opinion in the instant case, however, ruled that the grandmother was an incompetent witness under the statute and that therefore the admission of her testimony was error. As authority, the court cited *Rosseau* v. *Rouss*,[14] in which a mother was ruled an incompetent witness. There, the action was on an alleged oral promise to the mother by the putative father to settle a fortune of $100,000 upon the child on his tenth birthday, in consideration of the mother's not taking the child to another locality as she had planned. The court in the *Rosseau* case reasoned that unless there was an interest on the part of the mother, there would not be sufficient consideration to support the contract, and if she did not have an interest, her testimony would be inadmissible and the action would fail. However, in that case the court did distinguish an agreement to settle a fortune on a child, from an agreement for the support of the child, which, the court said, would require nothing more than a moral obligation to sustain it.

The instant case seems to overrule *Todd* v. *Weber*,[15] insofar as its holding on almost identical facts that the third party beneficiary plaintiff had not derived her "interest" from the promisee who gave the consideration, so as to bar the promisee's testimony, after the promisee's death. As such, it may illustrate a judicial trend toward a stricter construction of the "Dead Man's Act" in New York.

EVIDENCE—FEDERAL COMMUNICATIONS ACT—INTERCEPTED NON-PUBLIC RADIO MESSAGES HELD INADMISSIBLE IN CRIMINAL PROSECUTION OF SENDER FOR CONSPIRACY.—The United States Court of Appeals for the Ninth Circuit has unanimously held that the contents of messages broadcast by a licensed radio transmitter, and intercepted by an F. C. C. monitor, cannot be used as evidence to support a criminal prosecution of the broadcaster for violation of the immigration laws.[1]

Robert Sugden operated a cotton farm in Arizona, and used a short-wave radio transmitter to broadcast instructions to his overseers in the field. He obtained an F. C. C. license for this transmitter, effective on September 17, 1953, and his wife Jean assisted him in its operation.

In accord with standard procedure, a Federal Communications Commission engineer monitored messages radioed by the Sugden station; the transmissions so monitored were made before and after the effective license date. Some of these messages contained instructions to the field overseers to secrete from detection Mexican nationals (commonly called "wetbacks") who had illegally entered the United States. Contents of these broadcasts were made available to the Immigration Service and the United States attorney, and as a result the Sugdens were thereafter indicted for conspiracy to violate the immigration laws.

At the trial, a motion to suppress all the evidence obtained through said monitoring was granted, and the indictment was quashed, the trial court holding that the evidence had been obtained in violation of section 605 of the Federal Communications Act of 1934.[2]

[13] Healy v. Healy, 166 N. Y. 624, 59 N. E. 1119 (1901); Bouton v. Welch, 170 N. Y. 554, 63 N. E. 539 (1902).

[14] Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916 (1904).

[15] See note 12, *supra*.

[1] United States v. Sugden, 24 L. Wk. 2 (9th Cir. 1955).

[2] 48 Stat. 1064 (1934), 47 U. S. C. § 605 (1952): "No person not being author-

Before the passage of this statute, evidence obtained by wiretapping was not inadmissible in the federal courts.[3] By operation of the act of 1934, however, evidence obtained by the interception of telecommunications was held to be inadmissible in federal courts even when obtained by government agents,[4] and this prohibition has been interpreted to apply to intrastate as well as to interstate messages.[5]

The problem of what constitutes an "intercepted communication" within the meaning of section 605 has often been before the courts in connection with intercepted telephone communications.[6] Where a telephone conversation was listened to by a third person with the consent of one of the parties, the majority of the federal decisions have held that there was no interception within the meaning of the statute,[7] although some decisions have held to the contrary that such interceptions do fall within the prohibition of the statute.[8]

However, the question of whether intercepted *radio* messages are within the purviews of section 605 appears never to have been litigated in the federal courts, and therefore the offer of the intercepted radio messages as evidence in the instant case presented to the court what appears to have been a novel problem. While the Government urged that listening on the air is different from wiretapping, the trial court took the view that anyone who listens to *non-public* radio broadcasts, does "intercept", unless he is a party to the communications or is with a party. The Court of Appeals agreed with the trial court's reasoning, that although the Federal Communications Commission had the right to tune in for detecting possible violations of the Communications Act, the information obtained by the interception of such licensed broadcasts could be used only in proceedings to enforce the Communications Act itself, and for no other purpose.

Although the district court refused to receive any of the evidence so obtained, the Court of Appeals did draw a line between the messages intercepted before the effective date of the license, and those monitored thereafter. It decided that, while the evidence obtained after the license date could not be used, free use could be made of any radio communication that preceded the date of the license. To this extent, the judgment of the district court was modified. As to the messages intercepted after the effective license date, the higher court affirmed the exclusion by the trial court of the intercepted messages, asserting that "if Congress wanted the Federal Communications Commission to go into the general crime detection business it should say so."

ized by the sender shall intercept any communication 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."

[3] Kerns v. United States, 50 F. 2d 602 (2d Cir. 1931); Morton v. United States, 60 F. 2d 696 (7th Cir. 1932), *cert. den.* 288 U. S. 607, 53 S. Ct. 401, 77 L. Ed. 982 (1933); Bushouse v. United States, 67 F. 2d 843 (6th Cir. 1933).

[4] Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937).

[5] Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298 (1939). For a discussion of these and related cases, see Note, 1 N. Y. L. F. 235 (1955).

[6] 20 Am. Jur., Evidence, § 399 (1955).

[7] United States v. Lewis, 87 F. Supp. 970 (D. D. C. 1950) *rev'd on other grounds,* 184 F. 2d 394 (D. C. Cir. 1950); United States v. Sullivan, 116 F. Supp. 480 (D. D. C. 1953); United States v. Pierce, 124 F. Supp. 264 (N. D. Ohio 1954); United States v. Flanders, 22 F. 2d 163 (6th Cir. 1955).

[8] United States v. Polakoff, 112 F. 2d 888 (2d Cir. 1940), *cert. den.,* 311 U. S. 653, 61 S. Ct. 41, 85 L. Ed. 418 (1940); Reitmeister v. Reitmeister, 162 F. 2d 691 (2d Cir. 1947).

REAL PROPERTY—WHERE CITY OBTAINS DEFAULT JUDGMENT IN FORECLOSURE ACTION, HELD, THAT COURT HAS NO DISCRETIONARY POWER TO OPEN UP DEFAULT AFTER ONE YEAR DESPITE LACK OF ACTUAL NOTICE TO OWNER.—The City of New York, in *in rem* proceedings, acquired, for unpaid water charges of $887, two parcels of realty assessed at $52,000. The foreclosed owners of these two parcels moved under section 108 of the New York Civil Practice Act for relief from the default judgments entered against them. The Court of Appeals acknowledged the hardship, but nevertheless felt bound by the statute to affirm denial of the motion.[1]

Defendants were trustees under a testamentary trust, and the realty involved in this case was part of the trust corpus. The trustees maintained an office in New York City, where records of the trust were kept, and from which the various mortgages and real properties belonging to the trust were managed. Employed in this office was a trusted bookkeeper, whose duty it was to keep the records and accounts of the trust.

In 1951, pursuant to Chapter 17, Title D, of the Administrative Code of the City of New York, the City commenced *in rem* actions to foreclose all tax liens which were then four years old or more, in designated sections of Brooklyn, where one parcel of the trust realty was located. At that time, three water charges on this parcel were four years old or more, in the total amount of $814.50. The property was assessed for $46,000. Judgment of foreclosure was entered[2] and pursuant to said judgment, a deed of even date vested title in the City.

On May 22, 1950, under the same statute, the City had commenced a similar action against defendants' property in Queens. When that action was instituted only two annual water charges were four or more years old, and these totaled only $72.50. This property was at that time assessed at $6,000. By a similar judgment[3] title to the Queens property had vested in the City and the property had been subsequently sold to a third party for $7,000, the City retaining the entire proceeds. Nevertheless, the City continued to bill defendants for real estate taxes for two years after it had taken title and sold the property.

In 1952, the trustees discovered as a consequence of the trusted bookkeeper's attempted suicide, that he had concealed from them the unpaid water bills, representing that all such charges were being currently paid, and had also concealed the notices of the *in rem* actions. One discovery led to another, and twelve days after defendants learned of the default judgments and foreclosure sales, they offered to pay all of the charges on their properties. This offer was refused by the Bureau of City Collections.

Defendants, pursuant to Article 15 of the New York Real Property Law, moved for relief from the judgments entered in the two tax foreclosure *in rem* actions. They asked the court to cancel the deed conveying title to the parcel still held by the City of New York, and sought a judgment against the City for the difference between the liens for water charges and the sale price of the parcel sold to the innocent third party. A motion by the City for a summary judgment was granted, and the complaint was dismissed.[4] On appeal, the Appellate Division unanimously affirmed.[5]

In the Court of Appeals, defendants contended that, despite the apparent limitation contained in section 108 of the Civil Practice Act (that "the Court . . . at any

[1] Nelson v. City of New York, 309 N. Y. 94, 127 N. E. 2d 827 (1955).
[2] Sup. Ct. Kings Co., No. 8700-1951 (May 19, 1952).
[3] Sup. Ct. Queens Co., No. 3000-1950 (August 22, 1950).
[4] 131 N. Y. L. J., p. 12, col. 1, May 14, 1954 (Sup. Ct. Kings Co.).
[5] City of New York v. Nelson, 283 App. Div. 722, 127 N. Y. S. 2d 854 (2d Dept. 1954).

time within one year after notice thereof, may relieve a party from a judgment. . . ."), the court has the *inherent* power to grant relief from defaults beyond the one year period where, as here, the defaulting party had no actual notice of the judgment. The City maintained, however, that the right of redemption exists only as permitted by statute, and that therefore, the court has no equitable powers to relieve appellants from their failure to redeem or plead within the statutory period.

Defendants also urged that tax statutes should not be construed so as to abrogate acknowledged equitable principles where there exist special and extraordinary circumstances, in accord with the well-established principle that tax statutes are strictly construed against the taxing authority.[6] In a recent case[7] the Court of Appeals set aside a tax deed recorded for more than six years, and in so doing nullified the effect of a provision contained in the Suffolk County Tax Act establishing a conclusive presumption of regularity after that time. To this contention, however, the City cited *Keely* v. *Sanders*,[8] in which the United States Supreme Court stated that "courts cannot extend the time or make any exceptions not made in the statute. Redemption cannot be had in equity except as it may be permitted by statute, and then only under such conditions as it may attach." To like effect is *People ex rel. Quaranto* v. *Moynahan*,[9] in which it was held that "the right of redemption exists only as permitted by statute, and it can be exercised only as the statute may prescribe."

However, defendants continued, even if the code could properly be interpreted as containing a Statute of Limitations, the City should be estopped to assert it or to assert defendants' default, on the theory that the City wrongfully contributed to the default by continuing to bill the trustees for real estate taxes for two years after it took title. Moreover, it was urged, the false tax bills and the acceptance by the City of defendants' checks in payment therefor played an important part in furthering the fraudulent scheme of defendants' bookkeeper. The trustees contended that this should be a bar in equity to the City's deriving any benefit by way of unjust enrichment.

Further, defendants asserted, the use of the *in rem* statute in this particular case was unconstitutional. They contended that the assessed value of the properties and the relative insignificance of the liens would have guaranteed a successful collection by the City of its charges by the sale of a Transfer of Tax Lien, an optional means of collecting tax liens under Title A of the City Code which preserves the taxpayer's equity.

However, the Court of Appeals, agreeing with the lower court, sustained the City's position that it is mandatory upon the Treasurer to employ the *in rem* foreclosure procedure on both improved and unimproved properties without discrimination.[10] In affirming the decision of the lower courts, the Court observed that "this is indeed a hard case. . . . Unfortunately, the power to afford relief here is not confided to the courts. The result suggests the need of legislation liberalizing the right of redemption, or giving to city officials the power to ameliorate such extreme hardships in appropriate cases."[11]

[6] People *ex rel.* Mutual Trust Co. v. Miller, 177 N. Y. 51, 69 N. E. 124 (1903); Matter of Harbeck, 161 N. Y. 211, 55 N. E. 850 (1900).

[7] Cameron Estates, Inc. v. Deering, 308 N. Y. 24, 123 N. E. 2d 621 (1954).

[8] 99 U. S. 441, 25 L. Ed. 327 (1878).

[9] 148 App. Div. 744, 746, 133 N. Y. S. 361, 362 (2d Dept. 1912), *aff'd* 205 N. Y. 590, 98 N. E. 1113 (1912).

[10] 309 N. Y. 94, 96, 127 N. E. 2d 827, 830.

[11] *Id.* at 97, 127 N. E. 2d 827, 831.

TAXATION—POWER OF STATE TO TAX MUTUAL SAVINGS BANK WITHOUT EXCLUDING FROM TAX UNITED STATES SECURITIES.—In reversing a decision of the Supreme Court of Ohio,[1] the United States Supreme Court has decided that a property tax assessed by a State against a mutual savings bank is void as a tax upon obligations of the Federal Government, where such tax is measured by the amount of the bank's capital, surplus, and undivided profits without deducting federal securities held by the bank.[2]

It was early decided by the United States Supreme Court that obligations of the Federal Government are immune from State taxation.[3] This rule, aimed at the protection of the borrowing power of the United States from State encroachment, was derived from the "Borrowing" and "Supremacy" clauses of the United States Constitution,[4] and the constitutional doctrines announced in *McCulloch* v. *Maryland*.[5] In that case, Mr. Chief Justice Marshall held that the State could not constitutionally impose taxation upon such operations as the issuance of notes by a local branch of the United States Bank, because the bank was an agency of the Federal Government, and the States had no power by taxation or otherwise, to hamper the execution by that Government of the powers conferred upon it by the people. Such sovereign power was held to imply the establishment and operation of a bank, as a necessary and proper means of borrowing money. The Chief Justice went on, however, to note that his opinion did not extend to a tax paid upon the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of a State may hold in a federal bank, in common with other property of the same description throughout the State.

Today, this rule has been expressed by statute,[6] and has been extended to include the "indirect taxation of such [federal] obligations through their inclusion in a tax imposed on all the property of a taxpayer,"[7] even if the State tax does not discriminate against the Federal obligations.[8]

There is a well-established exception, however, to this general rule of immunity. The United States Supreme Court has held that a State may impose a tax on the stockholder's interests in national banks, measured by corporate asset values, without making any deduction on account of United States securities held by such banks.[9] This exception has been extended to a tax on the stock of state-created banks, which tax is measured by corporate assets including such federal obligations.[10] The theory underlying this exception to the general rule of immunity is that a stockholder's interest in a corporation represents a property interest separate from the corporation's

[1] Society for Savings v. Bowers, 161 Ohio St. 122, 118 N. E. 2d 651 (1954).

[2] Society for Savings v. Bowers, 349 U. S. 143, 75 S. Ct. 607, 99 L. Ed. 557 (1955).

[3] Weston v. City Council of Charlestown, 2 Pet. (U. S.) 449 (1829).

[4] U. S. CONST. art. I, § 8, cl. 2; U. S. CONST. art. IV, cl. 2.

[5] 4 Wheat. (U. S.) 316 (1819).

[6] 31 U. S. C. § 742 (1952): "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

[7] Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516, 34 S. Ct. 354, 58 L. Ed. 706 (1914).

[8] N. J. Realty Title Ins. Co. v. Division of Tax Appeals of N. J., 338 U. S. 665, 70 S. Ct. 413, 94 L. Ed. 439 (1950).

[9] Van Allen v. Assessors, 3 Wall. (U. S.) 573 (1866); National Bank v. Commonwealth, 9 Wall. (U. S.) 353 (1870); Des Moines National Bank v. Fairweather, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191 (1923).

[10] Cleveland Trust Co. v. Lander, 184 U. S. 111, 22 S. Ct. 394, 46 L. Ed. 456 (1902).

ownership of its assets, so that a tax on the stockholder's interest is not a tax on the federal obligations included in the corporate property.

In the instant case, two mutual savings banks, having no capital stock or shareholders, and located in Ohio, attacked the validity of an Ohio property tax as assessed against them, on the ground that they were required to include in the property values upon which the tax was computed, United States bonds held in their security portfolios. Had these bonds been excluded, the entire tax would have been wiped out in both instances. Nevertheless, the Supreme Court of Ohio sustained the Ohio Tax Commissioner who thought these Government bonds were not excludable. The tax was assessed in the names of these banks, under the Ohio General Code,[11] upon the book value of their "capital employed," or the property representing it"[12] "at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits."[13] Thus, in relying on the exception to the general rule, the Supreme Court of Ohio held that the bank's capital, surplus fund and undivided profits were not themselves the subject matter of the tax, but simply the measure of the tax imposed upon the "intangible property interests" of the depositors as the owners of each bank, the latter being regarded as a mere tax-collecting agent.

The issue which the United States Supreme Court was thus called upon to decide was whether the tax was to be regarded as imposed on the banks, thus making the general rule of immunity operative, or (as the Ohio Court held the state legislature to have intended) on their depositors, thus making the exception to the rule operative. The Ohio Court, recognizing that the tax would fail if directed against the banks, held that the tax was imposed on the depositors, relying on the exception to the rule of immunity. However, the Supreme Court stated that although it would be bound by the Ohio Court's decision as to the rights and liabilities which the Ohio tax statute created and imposed under State law, the Court was not bound by the construction placed on the statute by the Ohio Court in assessing the validity of the tax under federal law. What had to be examined was the real nature of the tax and its effect upon the federal right asserted,[14] not the Ohio Court's "mere conclusion that the tax is imposed on the depositor"; which the Supreme Court considered as no more than a characterization of the tax. In the light of three factors not considered by the state court, the Court concluded that this tax was on the depositors in name only, and that for federal purposes it was on the banks themselves.

First, they noted that should the bank be unable to pay the tax, after it had been assessed, there was no provision entitling the State of Ohio to collect it from the depositors. Therefore, a tax against the depositors which is recoverable only from the bank is, in effect, a tax against the bank only. And if the tax is in fact against the bank, it does not matter whether the ultimate economic impact is passed on to the depositors.[15] In the *Home Savings Bank* v. *Des Moines* case,[16] the state court rested its opinion on the proposition that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. But the United States Supreme Court, in reversing this state court decision,

[11] OHIO GEN. CODE ANN. §§ 5408, 5412.

[12] *Id.*, § 5408.

[13] *Id.*, § 5412.

[14] Carpenter v. Shaw, 280 U. S. 363, 50 S. Ct. 121, 74 L. Ed. 478 (1930).

[15] Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571, 51 L. Ed. 901 (1907).

[16] See note 15 *supra*.

held that the two kinds of taxes are *not* equivalent in law, because the State has the power to levy one and has not the power to levy the other: "the question here is one of power and not of economics."[17]

Secondly, the Supreme Court pointed out that the statute does not relieve the bank from having to pay the tax on the "intangible interest" of a depositor who had an account with the bank on the assessment date of the tax, but had withdrawn his account before the collection date. In such a case, there is no provision entitling the bank to reimbursement from the former depositor, while if there were a tax on the deposit itself, the statute does contain provisions protecting the bank in such a situation.[18]

Finally, and perhaps most important, the Court declared that in all cases upholding State taxes against shareholders, without the exclusion of federal obligations owned by the corporation, an express or implied right of reimbursement was presupposed. The Ohio Court reasoned that "The financial institution, which pays the tax on the [depositor's] property interests in the corporation, will always be able to reimburse itself by reducing the ultimate value of the property interests of those who are the only ones who can have any claim to benefit from the ownership interests taxed."[19] However, the Supreme Court did not consider this as reimbursement in any proper sense of the term; in fact, it could find no such right in the present case at all.

WILLS—INSTRUMENT PROPERLY EXECUTED ADMITTED TO PROBATE DESPITE OBJECTION THAT IT CONTAINED AN UNSATISFIED CONDITION PRECEDENT.—The New York Court of Appeals recently ruled that an instrument offered for probate is not void as a will solely because it contains a condition which had not been fulfilled prior to the death of the maker of the instrument.[1]

A holographic instrument, which had been witnessed and subscribed, was offered for probate. The dispositive provision of the instrument, addressed to the sole legatee, read in its entirety as follows: "This is my will if I should die on this my trip to india you are my sol heiress." The maker of this instrument, a famous motion picture producer, died in New York soon after, without ever having made the trip to India, where he had planned to film the life of Gandhi. Upon Pascal's death said sole legatee, a female friend of decedent, became the petitioner in a proceeding for the probate of said instrument as a will.

It was alleged in the petition for probate that Gabriel Pascal had died less than four and one half months after the making of this instrument, leaving personal property worth over twenty thousand dollars. It was further alleged that Pascal's only next of kin were a widow and a brother. The petitioner prayed for letters of administration c. t. a.

The decedent's brother and widow filed formal answers and objections to probate. The widow had obtained an interlocutory judgment of divorce against the decedent, in California, less than three weeks prior to his death. Both contestants asserted that the paper offered for probate by petitioner was not a will and had never become effective as such. The widow's answer also prayed for letters of administration on the theory that her husband had died intestate.

[17] See note 18 *supra*.
[18] OHIO GEN. CODE ANN. §§ 5412, 5673(1), 5673(2).
[19] 161 Ohio St. 122, 137, 118 N. E. 2d 651, 659-660 (1954).

[1] Matter of Pascal, 309 N. Y. 108 (1955).

After serving her answer, the widow moved for summary relief under Rule 113 of the Rules of Civil Practice. The widow contended that the paper offered by petitioner was subject to a condition precedent which had never occurred and so was not the will of her husband. An affidavit was presented by the contestants which stated that "Gabriel Pascal did not make the trip to India, did not die on any such trip, but died in Roosevelt Hospital in New York City after a prolonged illness." A death certificate was annexed to the affidavit certifying that death was due to "natural causes" and occurred in New York City.

The petitioner presented an affidavit in opposition, stating that she was prepared to establish that decedent's reference to the trip was included only because he was to fly to Bombay for an extended business trip on February 23d, the day after he executed the instrument, and his thoughts were occupied with the prospects of the trip; that the decedent was informed by cable on February 22d or 23d, that the person he was to visit in India would not be available until May of that year; that the trip was not cancelled but postponed; that the instrument offered by the petitioner was never cancelled; that the decedent was not living with his wife when he executed the instrument inasmuch as she had obtained an interlocutory decree of divorce some seven months prior to the execution of the instrument; and, that she could show that the conditional language in the instrument was not in fact intended to be a condition precedent to its probate, but that it was only included in his will as a statement of inducement of the reasons why he was drawing the will at that time.

The New York County Surrogate denied the motion for summary relief, holding that there was a triable issue of fact present and that the determination of the question of law presented must be based upon the resolution of these triable issues of fact. Rule 113 of the Rules of Civil Practice says in essence that where there is presented no triable issue of fact, the court may grant a motion for summary relief, and dismiss the action.

It has been established in New York that Rule 113, providing for summary relief, can, in proper cases, be invoked in the Surrogate's Court.[2]

However, Section 144 of the Surrogate's Court Act provides that the Surrogate may properly admit an instrument to probate only when he is "satisfied with the genuineness of the will and the validity of its execution".[3] The Surrogate must "look only to the formal validity of the will's execution and it is immaterial . . . that the will, if probated, may be wholly inoperative by reason of the invalidity of its provisions or of subsequent events making it ineffective."[4] In *Matter of Higgins*[5] the Court of Appeals held that said section "requires the Surrogate, when satisfied of the genuineness of a will and the validity of its execution, to admit it to probate. The provisions of this section look only to the formal validity of the will's execution. . . ."[6]

The act does provide, though, that the Surrogate may in his discretion consider the effectiveness of the will or motion. If a party puts into issue at a probate proceeding "the validity, construction, or effect of any disposition of property contained in . . . (the) will, the Surrogate may determine the question upon rendering a decree,

[2] N. Y. SURR. CT. ACT § 316; Matter of Fishkind, 271 App. Div. 1013, 68 N. Y. S. 2d (2d Dept. 1947); Lederer v. Wise Shoe Co., 276 N. Y. 459, 12 N. E. 2d 544 (1938); People ex rel. Lewis v. Fowler, 229 N. Y. 84, 127 N. E. 2d 793 (1920).

[3] N. Y. SURR. CT. ACT § 144.

[4] *Ibid.*, subd. 1, 2.

[5] 264 N. Y. 226, 190 N. E. 417 (1934).

[6] *Id.* at 209, 190 N. E. 417, 418.

after notice . . . or . . . may admit the will to probate and reserve the questions so raised for future consideration and decree. . . ."[7]

However, in the instant proceeding the contestants did not attack the genuineness and validity of the execution of the will. Instead, the Surrogate was asked to determine that the instrument which the petitioner offered for probate was "not a will and never became effective as such." The Court of Appeals upheld the ruling of the Surrogate that the will was genuine and validly executed, and that the effect of the condition (". . . if I should die on this my trip to india") upon the validity of the will should be determined on the trial of the probate or at a later time.

The function of the probate hearing in determining the intention of the testator in regard to such conditions was dealt with in *Matter of Smith*.[8] There, the question was "whether certain facts, extrinsic to the writing, indicate that the literal meaning of the language employed is not in accord with the meaning which the testatrix intended to give it, and whether, when the real intent is shown, the words are adequate to express such intent."[9] "The truth had . . . to be recognized that words always need interpretation; that the process of interpretation inherently and invariably means ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document."[10]

In *Matter of Poonarian*[11] the decedent, while contemplating an ocean voyage to Constantinople, and sixteen years before his death, made a will disposing of specified merchandise used in his business "if anything happens to me in Constantinople or in ocean." The decedent made the trip, returned safely, and continued in the same business until his death. It did not appear what happened to the merchandise alluded to in the will. The Court of Appeals held that the will was to take effect only in case something happened to the decedent on his trip, and since he returned to his home safely and the condition was never met or fulfilled the instrument executed by him, although valid and genuine, had ceased to be a will. An important distinction to be noted between the instant proceeding and *Matter of Poonarian* is that in the *Poonarian* case the testator died sixteen years after he had returned from his trip, while Pascal died before the trip was scheduled to begin.

The instant proceeding was remanded to the Surrogate's Court for probate in accord with the Surrogate's ruling. While it might develop that the instrument in question will be held inoperative as a will for decedent's failure to make his trip to India, the Court of Appeals agreed with the Surrogate's ruling that the instrument could not as a matter of law be held void as a will, upon motion to dismiss the probate petition.

[7] N. Y. SURR. CT. ACT § 145.
[8] 254 N. Y. 283, 172 N. E. 499 (1930).
[9] *Id.* at 290, 172 N. E. 499, 501, 502.
[10] 9 WIGMORE, EVIDENCE, § 2970, subd. 3 (3d ed. Boston, 1942).
[11] 234 N. Y. 329, 137 N. E. 606 (1922).