NEW YORK LAW SCHOOL

NYLS Law Review

Volume 2
Issue 1 *New York Law Forum, Volume 2, Issue 1, 1956*

Article 8

January 1956

# CRIMINAL LAW - CONVICTION FOR HOMICIDE ARISING FROM VIOLATION OF MULTIPLE DWELLING LAW UPHELD DESPITE LACK OF NOTICE TO OWNER OF VIOLATION.

# *DECISIONS*

PROCEDURE—MUNICIPAL COURT MAY ALLOW EXAMINATION BEFORE TRIAL AND BILL OF PARTICULARS IN SUMMARY PROCEEDING.—Reversing an order of the Municipal Court, Borough of Manhattan, and overruling its own 1953 decision,[1] which followed a 1922 holding of the Appellate Division, Second Department,[2] a divided Appellate Term, First Department, recently held that the Municipal Court, in its discretion, may allow an examination before trial and a bill of particulars in a summary proceeding to recover real property, ample need otherwise being shown.[3]

Plaintiff landlord corporation became the owner of a building and instituted summary proceedings under the Emergency Commercial Space Rent Control Law[4] to recover possession of realty from defendant statutory tenants, for the immediate and personal use of the landlord's sole stockholder. Accompanying the service of respondent's amended verified answer was a notice of examination before trial and a demand for a bill of particulars. The landlord then moved for an order to vacate the notice and the demand on the ground that neither was allowable in a summary proceeding to recover real property. This motion was granted by the Municipal Court, but the order was reversed by the Appellate Term.

The majority of the Appellate Term did not feel itself bound by past decisions which had barred, as a matter of law, examinations before trial as being hostile to the speed, promptness, and certainty of decision which the summary proceeding seeks to attain.[5] Justice Hofstadter, for the majority, termed such past refusal because of undue delay as "largely illusory at the present time,"[6] because the examintion date and conduct are strictly within the control of the court. In support, *Dorros* v. *Dorros Bros.*[7] was cited to show that the court's attitude towards examinations before trial has changed radically. In that case, the Appellate Division, Second Department, noted that "the purpose of examinations before trial, like the trial itself, is to get out the facts. As the trial should be an open meeting on the merits, both sides should have a fair opportunity, in advance of trial, to garner evidence. Examinations before trial are thus a useful procedure in facilitating preparation and expediting the trial."[8] Moreover, as noted by the decision in the instant case, a summary proceeding to recover real property is, nevertheless, a judicial proceeding where justice is not sacrificed for speed. The Emergency Commercial Space Rent Control Law empowers the court to stay the issuance of a warrant to dispossess after a final order has been entered "for a period which shall not extend beyond six months following the time of commencement of proceedings, or two months from the entry of a final order, whichever is longer."[9] Thus, concludes the majority, any delay, though prior to the entry of a final order, which is within the period of permissible stay causes no prejudice, and should be allowable, assuming ample need, within the discretion of the court. Nor is a bill of

[1] Wiener Realty Co. v. Regent Brand Clothes, 204 Misc. 231, 122 N. Y. S. 2d 231 (App. T., 1st Dept. 1953).

[2] Dubowsky v. Goldsmith, 202 App. Div. 818, 195 N. Y. Supp. 67 (2d Dept. 1922).

[3] 42 West 15th Street Corp. v. Theodore S. Friedman, 208 Misc. 123, 143 N. Y. S. 2d 159 (App. T., 1st Dept. 1955).

[4] N. Y. EMERGENCY COMMERCIAL SPACE RENT CONTROL LAW § 8(d)(1) (1953).

[5] See notes 1 and 2, *supra.*

[6] See note 3, *supra,* at 124, 143 N. Y. S. 2d 159, 160.

[7] Marie Dorros, Inc. v. Dorros Bros., 274 App. Div. 11, 80 N. Y. S. 2d 25 (1st Dept. 1948).

[8] *Id.* at 13, 80 N. Y. S. 25, 27.

[9] N. Y. EMERGENCY COMMERCIAL SPACE RENT CONTROL LAW, § 8(m) (1953).

particulars opposed to the philosophy of a summary proceeding, adds the court. Between 1921 and 1939, the statute provided that where a landlord initiated summary proceedings and the tenant interposed the defense of unreasonable and oppressive rent, the landlord was specifically *required* to give a bill of particulars.[10]

Only the *Wiener*[11] and *Dubowsky*[12] cases, which the court in this case expressly declined to follow, were squarely in point. In each, however, the court was divided and reversed lower court orders granting examinations before trial. The *Wiener* case, decided by the same court two years before, rested on the authority of the *Dubowsky* case, a 1922 Appellate Division, Second Department decision. The former held that under the Civil Practice Act[13] (as under the Emergency Commercial Space Rent Control Law)[14] the court has no jurisdiction to stay a summary proceeding until after a final order has been entered, and this precludes an examination before trial. Justice Hofstadter had concurred in the *Wiener* case, but only on the basis that there had been an unreasonable abuse of the lower court's due discretion, the *Dubowsky* case appearing to him persuasive but not controlling. In the *Dubowsky* case, the expeditious object and nature of a summary proceeding had been the overriding consideration, although the tenant's then-existing right to a bill of particulars when accompanied by the defense of unreasonable and oppressive rent under the Code of Civil Procedure[15] was noted.

The *Dorros* case,[16] cited by the tenant in the instant case, was an action brought to enjoin defendant's use of a trade name in the same business field. There, the Appellate Division, First Department, unanimously affirmed a lower court order granting an examination before trial, as a matter of court discretion, even to a party having the negative of an issue as being "material and necessary in the prosecution or defense of the action" within the meaning of the Civil Practice Act.[17] This rule has since been adopted in New York by a 1952 amendment to the Rules of Civil Practice.[18] Prior to this amendment the First and Second Departments had been split on the question, the First Department consistently holding the examination to be a matter of court discretion,[19] while the Second generally barred it as a matter of law.[20] The Court of Appeals took judicial notice of this split, but declined to resolve it.[21]

In New York City, which comprises the First and Second Departments, there are no Justice Courts, and no County Courts of civil jurisdiction. Only the Municipal Courts possess original jurisdiction over summary proceedings to recover real property.[22] The procedure governing this judicial proceeding is set out in the Civil Prac-

[10] N. Y. CODE CIV. PROC. § 2231(2)(a), adopted as N. Y. CIV. PRAC. ACT § 1410, repealed 1939.

[11] See note 1, *supra.*

[12] See note 2, *supra.*

[13] N. Y. CIV. PRAC. ACT § 1446.

[14] See note 9, *supra.*

[15] See note 10, *supra.*

[16] See note 7, *supra.*

[17] N. Y. CIV. PRAC. ACT §§ 288, 308.

[18] N. Y. RULES CIV. PRAC. Rule 121(a).

[19] Alden v. O'Brien, 138 App. Div. 249, 122 N. Y. Supp. 910 (1st Dept. 1910); Shaw v. Samly Realty Co., Inc., 201 App. Div. 433, 194 N. Y. Supp. 531 (1st Dept. 1922); Mann v. Luke, 272 App. Div. 19, 68 N. Y. S. 2d 313 (1st Dept. 1947), *appeal granted,* 272 App. Div. 803, 71 N. Y. S. 2d 926 (1947).

[20] Oshinsky v. Gumberg, 188 App. Div. 23, 176 N. Y. Supp. 406 (2d Dept. 1919).

[21] Public National Bank of New York v. National City Bank of New York, 261 N. Y. 316, 185 N. E. 395 (1933).

[22] N. Y. CIV. PRAC. ACT § 1413

tice Act[23] and the Municipal Court Code.[24] Neither contains any express reference to examinations before trial or bills of particular. Yet the Civil Practice Act does allow depositions, as a matter of court discretion, in special proceedings,[25] though the dicta in the *Wiener*[26] and *Dubowsky*[27] cases would seem to deny its applicability to this type of summary proceeding.

The instant decision reflects the modern procedural policy trend towards liberal flexibility governed by court discretion as typified by the Federal Rules.[28] It is interesting to note, in anticipating the future of this problem, the *Public National Bank* case,[29] in which a related procedural issue (whether having the affirmative burden of proof is a prerequisite to an examination before trial in any action or special proceeding) was presented. There, the First and Second Departments were similarly split, but the state's highest tribunal would not interfere with basic intra-Departmental procedural autonomy. Only a subsequent legislative edict[30] established a state-wide rule in favor of flexibility.

MALPRACTICE—ACTION FOR BREACH OF CONTRACT NOT BARRED BY TWO-YEAR NEGLIGENCE STATUTE OF LIMITATIONS.—The Court of Appeals has ruled that the complaint in an action against a surgeon for breach of contract sufficiently stated a cause of action in contract and was not barred by the two year Statute of Limitations[1] which governs actions for malpractice.[2]

Plaintiff employed the defendant, a licensed physician and surgeon, to perform an operation which, in the defendant's opinion, was relatively minor. Defendant promised plaintiff that he would be *cured* in one or two days, could leave the hospital in that time, and immediately resume his occupation. The operation involved the removal of a growth from plaintiff's body by the application of electric sparks. During the operation the defendant twice punctured one of plaintiff's organs causing the plaintiff to undergo a major operation including opening the abdominal wall by incision.

Plaintiff was hospitalized for a month and was compelled to pay large sums of money for medical and surgical treatment. Although plaintiff might have brought a suit for malpractice he was precluded by the two-year Statute of Limitations, which begins to run from the time the cause of action accrues and not from the time the act of malpractice is discovered.[3] Therefore plaintiff brought this action to recover expenditures for nurses, medicine, loss of time from his occupation, and other damages that ordinarily flow from a breach of a contract of this nature.

In discussing the relationship of physician and patient, the United States Supreme Court has said: "The duty of a physician or surgeon to bring skill and care to the amelioration of the condition of his patient does not arise from contract, but has its foundation in public considerations which are inseparable from the nature and exercise of his calling; it is predicated by the law on the relation which exists between

[23] *Id.*, Art. 83, §§ 1410-47.
[24] N. Y. MUN. CT. CODE, § 28-a.
[25] N. Y. CIV. PRAC. ACT § 308.
[26] See note 1, *supra.*
[27] See note 2, *supra.*
[28] FED. R. CIV. P. 16.
[29] See note 21, *supra.*
[30] See note 18, *supra.*

[1] N. Y. CIV. PRAC. ACT § 50(1).
[2] Robins v. Finestone, 308 N. Y. 543, 127 N. E. 2d 330 (1955).
[3] Conklin v. Draper, 254 N. Y. 620, 173 N. E. 892 (1930).

physician and patient."[4] The doctrine is well settled in New York that the general practitioner of medicine or of surgery does not, in the absence of special contract, impliedly warrant the success of his treatment or operation, but only that he possesses, and will carefully apply, such professional skill and learning as are ordinarily possessed by general medical practitioners in the locality in which he practices.[5]

Ordinarily a doctor undertakes *only* to give his best judgment and skill.[6] However, a physician may bind himself, by contract, to effect a cure.[7] When such a contract is made (as in the instant case) and the physician fails to effect a cure, he is liable for breach of contract even though he uses the highest possible degree of professional skill.[8]

The causes of action in malpractice and breach of contract are dissimilar as to theory, proof and damages recoverable. The action for malpractice is tortious in nature and is based upon a failure to use the required medical skill, while the action for breach of contract is predicated upon a failure to perform a special agreement. Negligence is the basic element in a malpractice action and the damages recoverable are for personal injuries including the pain and suffering which naturally flow from the tortious act. In the contract action the damages are limited to the expenditures for nurses, medicines, and of time.[9]

A cause of action for both malpractice and breach of contract may arise out of the same transaction.[10] In *Conklin* v. *Draper*,[11] the defendant, a licensed surgeon, failed to remove arterial forceps from within the plaintiff's abdominal cavity after removing plaintiff's appendix. A second operation, performed by another surgeon more than four years after the appendectomy, removed the forceps and cured the plaintiff. The plaintiff's complaint contained causes of action for both malpractice and breach of contract. After deciding that the cause of action for malpractice was barred by the two year Statute of Limitations, it being decided that the Statute of Limitations began to run from the time the appendectomy was performed, the Court ruled that the second cause of action for breach of contract was not barred by the statute. The Court relied upon a Massachusetts decision[12] which held that a surgeon *impliedly* undertakes to use care in performing an operation and any act of misconduct or negligence on his part in the service undertaken is a breach of his contract which gives rise to a right of action in contract or tort. An early New York case[13] had held that while a contract to cure a patient does involve the elimination of the patient's condition, the physician cannot be held responsible for sickness which he agrees to end but does not end, unless he is guilty of malpractice.

It appears from the decision in the instant case that a cause of action for breach of contract against a physician or surgeon exists when the physician expressly contracts to cure the patient and fails to effect that cure regardless of the amount of professional skill involved. It is significant that the court in this case points out that nowhere in his complaint does the plaintiff seek to recover damages for pain and suffering. Those damages would be recoverable in an action which sounds in negli-

[4] National Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621 (1879).
[5] Pike v. Honsinger, 155 N. Y. 201, 49 N. E. 760 (1898).
[6] See note 3, *supra*.
[7] *Id.*
[8] Safian v. Aetna Life Insurance Co., 286 N. Y. 649, 36 N. E. 2d 692 (1940).
[9] See note 2, *supra*.
[10] See note 3, *supra*.
[11] See note 5, *supra*.
[12] Cappuci v. Baron, 266 Mass. 578, 165 N. E. 653 (1919).
[13] Leighton v. Sargent, 27 N. Y. 460 (1853).

gence. It is reasonable to infer from the decision that if the plaintiff had sought such damages the court would have considered the case to sound in negligence. "The damages sought are those suited to an action on contract, and help characterize the complaint as one based upon a contract and not one based upon malpractice and negligence."[14]

DEPORTATION—HEARING PROVISIONS OF ADMINISTRATIVE PROCEDURE ACT HELD TO SUPERSEDE PROVISIONS OF IMMIGRATION AND NATIONALITY ACT—DEPORTATION FOR FELONY COMMITTED BEFORE ACT'S PASSAGE UPHELD.—The Supreme Court has held[1] that the hearing provisions of the Administrative Procedure Act have been expressly superseded by the Immigration and Nationality Act of 1952[2] in hearings for the deportation of aliens previously convicted of one of the crimes specified in the Immigration and Nationality Act. This decision affirmed lower holdings[3] that the deportation order was valid, and reaffirmed the Court's own previous decisions in recent deportation cases[4] prohibiting the application of the ex post facto clause[5] to deportation proceedings.

The petitioner, Marcello, was convicted of a violation of the Marihuana Tax Act in 1938,[6] and sentenced to imprisonment for one year. In 1952 the Immigration and Nationality Act was passed, providing that an alien who has been convicted, at any time, of a violation of any law or regulation which relates to the Government's control over narcotics may, upon the recommendation or "order of the Attorney General, be deported."[7] The government thereafter instituted a proceeding under this provision to deport Marcello.

At the hearing before the special inquiry officer, Marcello did not dispute the fact of his prior conviction, but did object to the proceedings on the ground that they violated due process[8] and the Administrative Procedure Act, and that the ex post facto clause precluded the retroactive application of the 1952 law to his case. These objections were overruled by the hearing officer, and Marcello was, accordingly, ordered deported. Marcello and his attorney were advised of their right to apply to the Attorney General for the discretionary relief of suspension of deportation provided for by the Immigration Act.[9] At first, Marcello refused to do so, but later, he moved to reopen the hearing on this ground, although he made no formal application for suspension of deportation as set out in the act. This motion was denied, and on appeal, the Board of Immigration Appeals affirmed the order of deportation.

The primary issue presented to the Supreme Court was whether the hearing provisions of the Immigration Act of 1952 supersede those of the Administrative Procedure Act. The Immigration Act provides that in a hearing for the deportation of an alien for the conviction of a crime made deportable by the Act, the special inquiry officer may take the dual role of prosecutor or hearing officer as long as he does

[14] See note 2, *supra,* at 547, 127 N. E. 2d 330, 334.

[1] Marcello v. Bonds, 349 U. S. 302, 99 L. Ed. 658, 75 S. Ct. 757 (1955).

[2] 66 STAT. 209 (1952), 8 U. S. C. § 1252 (b) (1952).

[3] 113 F. Supp. 22 (E. D. La. 1953), *aff'd* 212 F. 2d 830 (5th Cir. 1954).

[4] Harisiades v. Shaughnessy, 342 U. S. 580, 96 L. Ed. 586, 72 S. Ct. 512 (1948); Galvan v. Press, 347 U. S. 522, 74 S. Ct. 737, 99 L. Ed. 911 (1953).

[5] U. S. CONST. art. I § 9.

[6] Marihuana Tax Act, 53 STAT. 280 (1938), 26 U. S. C. § 2591 (1952).

[7] 66 STAT. 204, § 241 (a) (11) (1952), 8 U. S. C. § 1251 (a) (11) (1952).

[8] U. S. CONST. art. V.

[9] 66 STAT. 214, § 244 (a) (5) (1952), 8 U. S. C. § 1254 (2) (5) (1952).

not hear cases in which he has previously functioned as an investigator or prosecutor.[10] The Administrative Procedure Act provided that the hearing officer in a deportation proceeding could neither be responsible to nor under the supervision of those engaged in investigative or prosecuting functions.[11]

The Administrative Procedure Act was passed in 1946, and in the *Wong Yang Sung*[12] case, the Court held that it was applicable to deportation hearings. However, six months later, Congress passed the Supplemental Appropriations Act of 1951,[13] which provided that the Administrative Procedure Act should not govern the procedure to be used in deportation hearings. However, in 1952 the Immigration Act was passed, which apparently reapplied the Administrative Procedure Act to deportation hearings, through its repetition of the same pertinent provisions, and by operation of the specific provision of the Administrative Procedure Act that any supersession of its provisions must be express.[14] The Court held that although there was no magical password in the Immigration Act, still there was such express supersession by virtue of "legislative history . . . and the direction in the statute that the method therein prescribed shall be the sole and exclusive procedure for deportation proceedings."[15]

From the detailed coverage of the same subject matter dealt with in the hearing provisions of the Administrative Procedure Act, it was made quite clear that Congress, in the Immigration Act, was setting up a specialized administrative procedure applicable to deportation hearings, drawing freely on the similar provisions and adapting them to the peculiar needs of the deportation process.[16] By looking to the framework of the Immigration Act, the Court determined that Congress intended to use the Administrative Procedure Act only as a "model", and that where a deviation appeared, Congress intended that the deviation and not the general model should apply.[17]

Because Marcello had been convicted under the Marihuana Tax Act before that conviction became a ground for deportation, a question arose as to whether the proceeding was a violation of the ex post facto provision of the Constitution, in that the punishment for the crime was being increased after its commission by him. The ex post facto clause of the Constitution has been interpreted as prohibiting penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment.[18] However, deportation has been consistently classified through judicial decisions as a civil rather than a criminal procedure,[19] and in a recent case, the Supreme Court held that "whatever might have been said at an earlier date for applying the ex post facto clause, it has been the unbroken rule of this court that it has no application to deportation."[20] The Court found no special reason in the case

[10] 66 STAT. 209, § 242 (b) (1952), 8 U. S. C. § 1252 (b) (1952).

[11] 60 STAT. 237, § 5 (c) (1946), 5 U. S. C. § 1001 (1952).

[12] Wong Yang Sung v. McGrath, 339 U. S. 33, 94 L. Ed. 616, 70 S. Ct. 445 (1949).

[13] 64 STAT. 1048 (1950), 5 U. S. C. § 1001 (1952).

[14] 60 STAT. 244, § 12 (1946), 5 U. S. C. § 1001 (1952).

[15] 349 U. S. 302, 309, 99 L. Ed. 658, 665, 75 S. Ct. 757, 762 (1955).

[16] 349 U. S. 302, 308, 99 L. Ed. 658, 666, 75 S. Ct. 757, 761 (1955).

[17] See note 15, *supra.*

[18] Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648 (U. S. 1798).

[19] Johannessen v. United States, 225 U. S. 227, 32 S. Ct. 613, 56 L. Ed. 1066 (1911); Fung Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1892); Bugajewitz v. Adams, 228 U. S. 585, 33 S. Ct. 607, 57 L. Ed. 978 (1914); Bilokumsky v. Tod, 263 U. S. 149, 448 S. Ct. 54, 68 L. Ed. 221 (1923); Mahler v. Eby, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549 (1923).

[20] Galvan v. Press, 347 U. S. 522, 531, 99 L. Ed. 911, 920, 74 S. Ct. 737, 746 (1953).

at bar to overturn its precedents[21] pertaining to this long-settled question, and therefore merely reiterated this rule.

While our immigration laws have followed a logical pattern in their development, they have been restricted mainly to the exclusion rather than the expulsion of aliens. Actually, it was not until the passage of the Immigration Act of 1917,[22] and three subsequent acts,[23] that Congress established a definite legislative trend for the expulsion of undesirable aliens from the United States. The Alien Registration Act of 1924 was limited in application to specific classes of undesirable aliens, and the Subversive Control Act of 1925, was designed to strengthen security screening of aliens. It was not until the passage of the 1952 Immigration Act that the number of grounds for which undesirable aliens could be deported was increased. Furthermore, it greatly strengthened the power of the administrative agencies whose duty it is to administer our immigration laws and to deport undesirable aliens. It also increased the power of the federal courts to aid the administrative agencies in the exercise of their functions.

This decision confirms the results of earlier cases by denying the protection of the ex post facto clause to aliens whom the government seeks to deport. Further, the court, in interpreting a statute which gives the agencies concerned a greater latitude in their choice of grounds for deportation, appears to have given judicial sanction to a greater latitude, as well, in their methods of conducting hearings.

EVIDENCE—NEW EVIDENCE OFFERED AS BASIS FOR NEW TRIAL HELD TO BE MERELY CUMULATIVE, AND NOT LIKELY TO CHANGE VERDICT.—In denying defendant's motion for a new trial after a conviction for murder in the first degree, the Court of Appeals of the State of New York recently held that newly discovered evidence must be of such a character that it would probably result in a change in the verdict. The court further held that the evidence must not be cumulative and that failure to produce such evidence at the original trial must not have resulted from want of due diligence.[1]

In the instant case the defendant was convicted primarily on the basis of testimony of two witnesses placing the defendant at the scene both before and after the crime was committed and on a dying declaration of the victim. At the trial the defendant introduced evidence tending to show that he was elsewhere when the crime was committed and that the substance of the dying declaration was untrue, but he did not testify in his own behalf. An initial appeal[2] was unsuccessful. Subsequently, the defendant moved for a new trial on the basis of newly discovered evidence. This motion was denied and it was from this denial that the present appeal was taken. The newly discovered evidence offered for this appeal was made up chiefly of evidence tending to discredit the dying declaration. This evidence took two forms, one tending to show that the victim was unable to talk, the other tending to show that the witness who reported the dying declaration did not speak with the victim.

In the State of New York the power to grant an order for a new trial on the grounds of newly discovered evidence is statutory, expressed in the Code of Criminal Procedure.[3] A motion for a new trial on such grounds, after the conviction has been

[21] Harisiades v. Shaughnessy, note 4, *supra;* Galvan v. Press, note 4, *supra.*

[22] 39 STAT. 874 (1917), 5 U. S. C. § 342 (1952).

[23] 40 STAT. 559 (1918), 22 U. S. C. § 226 (1952); 40 STAT. 1012 (1918), 8 U. S. C. § 137 (1952); 41 STAT. 395 (1920), 43 U. S. C. § 1173 (1952).

[1] People v. Salemi, 309 N. Y. 208 (1955).

[2] People v. Salemi, 306 N. Y. 863, 118 N. E. 2d 917 (1954).

[3] N. Y. CODE CRIM. PROC. § 465.

affirmed by the Court of Appeals, is addressed to the discretion of the court and may only be granted where the requirements of the statute have been observed.[4] The court in the instant case found no such abuse of discretion which would warrant a reversal.

The statute[5] requires that the evidence be of such nature that, if it had been received before, the verdict would probably have been different. This is a matter within the discretion of the court, a principle early recognized in the courts of New York.[6] At the same time it was recognized that new cumulative evidence made ineffective by the present statute, was improper as a basis for granting a new trial.

Want of diligence is also a statutory bar to the granting of a new trial which has its roots in the common law.[7] In *People* v. *Hovey*,[8] the court refused to grant a new trial noting that the lack of diligence was not on the part of counsel but on the part of the defendant. In the case of *People* v. *O'Brien*[9] lack of diligence on the part of defendant's counsel did not bar a new trial. Rather, it was deemed a valid cause for granting a new trial.

A further condition is that the evidence must not be cumulative. It is a general rule that even in an original trial, cumulative witnesses may be excluded at the discretion of the court.[10] For example, the *Draft Uniform Evidence Act*[11] limits expert witnesses to three in number unless permission of the court is granted to introduce more. Of course, corroborating evidence is very important. It has been held in New York that where corroborating evidence was improperly refused admission it was improper for the trial court to allow the jury to question the accused's credibility. The law on the subject of interpretation of the applicable statute is summarized in *People* v. *Priori*,[12] where it was emphasized that the newly discovered evidence must not merely impeach or contradict the evidence originally submitted.

In the instant case the new evidence which was offered tended to impeach or contradict the existence of a dying declaration, but was not of the character that would tend to impeach or discredit the declarant. Such evidence showing the bad character,[13] improper state of mind,[14] conviction for a crime,[15] or prior inconsistent statements[16] of the declarant has been held to be admissible. Impeachment of a person claiming to be a witness to the dying declaration by testimony showing that he was not present at the time alleged has been allowed.[17] The court in this case was presented with the question of whether evidence of this character is cumulative, and answered this question affirmatively. Under the existing statute the court felt compelled to deny the defendant's motion on the ground that this evidence would not have affected the results of the trial.

[4] People v. Farini, 125 Misc. 300, 209 N. Y. Supp. 532 (Sup. Ct. Kings Co. 1925).

[5] See note 3, *supra*.

[6] People v. Giordano, 144 Misc. 108, 259 N. Y. S. 178 (Bronx Co. Ct. 1932); People v. Luciano, 164 Misc. 167, 299 N. Y. Supp. 132 (Sup. Ct. Bronx Co. 1937); Guyot v. Butts, 4 Wend. 579 (N. Y. Sup. Ct. 1830).

[7] People v. Verinilyea, 7 Cow. 369 (N. Y. Ct. Errors 1827).

[8] People v. Hovey, 30 Hun 354 (1st Dep't 1883).

[9] People v. O'Brien, 110 App. Div. 26, 96 N. Y. S. 1045 (2d Dep't 1905).

[10] See 7 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 531 (New York, 1827).

[11] DRAFT EVIDENCE ACT 1938, § 8.

[12] People v. Barberi, 149 N. Y. 256, 43 N. E. 635 (1896).

[13] People v. Priori, 164 N. Y. 459, 58 N. E. 635 (1900).

[14] Carver v. United States, 164 U. S. 694, 17 S. Ct. 228, 41 L. Ed. 602 (1897).

[15] Nordgren v. People, 211 Ill. 425, 71 N. E. 1042 (1904).

[16] People v. Ricken, 242 App. Div. 106, 273 N. Y. S. 470 (3d Dep't 1934).

[17] State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312 (1892); State v. Kacar, 74 Mont. 269, 240 Pac. 365 (1925).

The dissents rely, in part, upon the premise that the jury might have been persuaded by the new evidence. The defense did not put the existence of a dying declaration into issue at the trial; only after the new evidence was discovered did this question arise. Should it not then be sufficient ground for a new determination of fact? Even if the evidence should be technically classified as cumulative, should not the holding of *Page* v. *Krekey*[18] be given weight, that so long as facts testified to are not conclusively established or admitted, they are still open to further proof?

The statute construed in this case[19] states that cumulative evidence is not "new evidence" of the kind required as a ground for a motion for a new trial, and the trial court determines whether the evidence is or is not cumulative. Undoubtedly the restrictions in the statute are necessary in order that the judicial process may not be extended indefinitely. However, in its present form, the statute says, in effect, that evidence which is cumulative can never persuade a jury. The strong dissents in the instant case contain cogent arguments for the enactment of a statute more liberal in its language than the present provision.[20]

FEDERAL PROCEDURE—SECTION 1404(a) OF JUDICIARY CODE HELD TO BROADEN DISCRETION OF DISTRICT COURTS IN ORDERING TRANSFER OF CIVIL ACTIONS RATHER THAN MERELY CODIFYING DOCTRINE OF FORUM NON CONVENIENS.—In *Norwood* v. *Kirkpatrick*,[1] the Supreme Court has held that Section 1404(a) of Title 28, United States Code, broadens the discretion of the federal district courts in the transfer of civil actions, and is not merely a codification of the doctrine of forum non conveniens.

Three dining car employees who had been injured in the derailment of defendant's interstate train in South Carolina, sued under the Federal Employers Liability Act[2] in the United States District Court for the Eastern District of Pennsylvania. Defendant railroad filed motions to dismiss or in the alternative to transfer the cases to the Eastern District of South Carolina. The District Court denied the motions to dismiss, but granted the motion to transfer the case to the South Carolina Federal Court. The plaintiffs filed applications for mandamus to have set aside the District Court's order of transfer. They conceded that such orders are not appealable, as had been held in *All States Freight* v. *Modarelli*[3] and more recently in *Riverbank* v. *Hardwood*[4] (regarding an order denying a motion to dismiss the action for improper venue). But they cited in support of their position, the dictum of the *All States Freight* case, which although denying the instant application, alluded to a policy[5] set forth in *Gulf Research and Development Co.* v. *Leahy*,[6] to the effect that where "extraordinary circumstances" exist,[7] interlocutory review by mandamus lies. However, the Court of Appeals for the Third Circuit denied the applications and the Supreme Court granted certiorari.[8]

In its opinion the Supreme Court approved the District Court's following of the

[18] Page v. Krekey, 137 N. Y. 307, 33 N. E. 311 (1893).
[19] See note 1, *supra*.
[20] See note 3, *supra*.

[1] 349 U. S. 29, 75 S. Ct. 544, 99 L. Ed. 461 (1955).
[2] 45 U. S. C. § 56 (1952).
[3] 196 F. 2d 1010 (3d Cir. 1952).
[4] 220 F. 2d 465 (7th Cir. 1955).
[5] See note 3, *supra* at 1012.
[6] 193 F. 2d 302 (3d Cir. 1951), *aff'd*, 344 U. S. 861, 73 S. Ct. 102, 97 L. Ed. 668 (1952).
[7] *Id.* at 304.
[8] 348 U. S. 870, 75 S. Ct. 106, 99 L. Ed. 49 (1954).

*All States Freight* case[9] holding that the statute does broaden the discretion of the District Court as exercised under the doctrine of forum non conveniens. This doctrine permits dismissal of a case because the forum chosen by the plaintiff is inappropriate and inconvenient.[10] Once dismissed, the action must be renewed in another jurisdiction, where, of course, the statute of limtations has been running since the cause arose. As a consequence, the application of the doctrine has been strictly limited.[11]

In 1948, Congress enacted Section 1404(a) of title 28, United States Code, which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might be brought." The statute, according to Mr. Justice Minton, limits the privilege of the plaintiff to sue in the forum of his choosing, and its purpose is to grant a broad power of transfer to District Courts, for the convenience of parties and for other reasons, regardless of the appropriateness of the dismissal or transfer under the doctrine of forum non conveniens.[12] Under the statute, the order transferring the action from one District Court to another does not end the action, but preserves it against the running of the statute of limitations and for all purposes.

In a recent decision[13] interpreting the statute, it was held that the federal District Court abused its discretion in denying a motion of the defendant railroad to transfer a death action from Illinois to Iowa, where the fatal accident occurred, for convenience of parties and witnesses and in the interest of justice. In determining whether the case should be transferred to another district, held the Court, the interests of the parties to the law suit, as well as the interests of society in general, should be considered.[14]

However, the decision upon which the Supreme Court relied most extensively to show that Congress intended to do more than just codify the existing law on forum non conveniens was its own ruling in *Ex parte Collett*.[15] There, the Court had held that in enacting Section 1404(a) Congress was revising as well as codifying the common-law rule of forum non conveniens, and substituting the remedy of transfer for the previously existing remedy of dismissal, where the action was not brought in the appropriate forum.

In the dissent, Mr. Justice Clark foresaw a possibility of conflict, confusion and injustice if plaintiffs were allowed to "shop" for a forum under Section 1404(a), a result which, he felt, would follow if the majority opinion's construction of the statute were followed. However, it is to be noted that Section 6 of the FELA extended plaintiff's choice of forum to the extreme limits of the defendant's business operations. It would, therefore, seem that the majority holding should, if anything, cut down the amount of "shopping" once the trial court exercises a broader discretion in granting a change of venue.

A stronger argument made by the dissent is that the majority position might work to cut down plaintiff's rights under Section 6 of the FELA. There is no ques-

[9] See note 3, *supra*.

[10] Hayes v. Chicago, R. I. & P. R., 79 F. Supp. 821, 824 (D. Minn. 1948).

[11] See note 3 *supra*, at 1011.

[12] *Ibid.*; Jiffy Lubricator Co. v. Steward Warner Corp., 177 F. 2d 360 (4th Cir. 1948).

[13] Chicago, R. I. & P. R. v. Igoe, 220 F. 2d 299 (7th Cir. 1955).

[14] Jiffy Lubricator Co. v. Stewart Warner Corp., note 12 *supra*, at 363.

[15] 337 U. S. 55, 69 S. Ct. 944, 93 L. Ed. 1207 (1949); see also, Schoen v. Mountain Producers Corp., 170 F. 2d 707 (3d Cir. 1948); Berger v. Proctor and Gamble Defense Corp., 172 F. 2d 541 (5th Cir. 1949); United States v. National City Lines, 80 F. Supp. 734 (S. D. Cal. 1948), *aff'd*, 337 U. S. 78, 69 S. Ct. 955, 93 L. Ed. 1226 (1949).

tion that the choice of forum has been limited by this ruling, but on the other hand, a defendant now has the opportunity of a transfer where a need presents itself. Formerly, the District Court could only *dismiss* an action on the ground of inconvenience. This was a right which trial courts exercised with restraint because of the running of the statute of limitations.

Two Supreme Court cases, decided before the statute was enacted by Congress, were discussed in the dissent to support the position that the statute is merely a restatement of the doctrine of forum non conveniens. In *Gulf Oil Corp.* v. *Gilbert*,[16] the court held that the plaintiff's choice of forum should not be disturbed unless the balance is *strongly* in favor of the defendant. In *Koster* v. *Lumberman's Mutual Casualty Co.*,[17] it was decided that in any balancing of conveniences, a showing of convenience by a plaintiff suing in his home forum will normally outweigh the inconvenience the defendant may have shown. These decisions were regarded in the dissent as having influenced Congress only to codify the old doctrine which was to continue as the prevailing rule.

Three recent Supreme Court cases were cited by the dissent as interpreting the statute as a codification of the doctrine, although none was referred to in the majority opinion. These omissions may have been made because the language relied on in the first appears to have been dictum,[18] the action in the second was not brought under Section 6 of the FELA,[19] and the language relied on in the instant case was cited only in the dissent in the third.[20]

Under this opinion, the District Court now has a broader discretion than formerly under the doctrine of forum non conveniens. Should Congress disagree with this judicial construction of the statute, it must express its disagreement by future legislative revision.

CRIMINAL LAW—CONVICTION FOR HOMICIDE ARISING FROM VIOLATION OF MULTIPLE DWELLING LAW UPHELD DESPITE LACK OF NOTICE TO OWNER OF VIOLATION.—The attention of the popular press has several times in recent years been focused on the problem of the tenement owner who maintains his property in violation of the Multiple Dwelling Law and thereby occasions the death of residents.[1] In a recent New York case,[2] decedents were trapped in defendant's burning building which lacked the fire protection required by statute.[3] Defendant was convicted of the crime of manslaughter in the first degree: "homicide . . . committed without a design to effect

[16] 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1946).

[17] 330 U. S. 518, 67 S. Ct. 888, 91 L. Ed. 1067 (1946).

[18] Pope v. Atlantic Coast Line R. R., 345 U. S. 379, 383, 73 S. Ct. 749, 754, 97 L. Ed. 1094, 1098 (1952); "Section 1404(a) makes the doctrine applicable to FELA cases brought in federal courts and provides for the transfer of such actions to a more convenient forum."

[19] Korotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U. S. 180, 186, 72 S. Ct. 219, 225, 96 L. Ed. 200, 203 (1952): "If the manufacturer is joined as an unwilling defendant in a forum non conveniens, he has available upon an appropriate showing the relief provided by Section 1404(a) of the Judiciary Code."

[20] Wells v. Simonds Abrasive Co., 345 U. S. 514, 522, 73 S. Ct. 856, 860, 97 L. Ed. 1211, 1218 (1952) (dissent): "The purpose was to adopt for federal courts the principles of forum non conveniens."

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[1] See generally, Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*, 87 U. PA. L. REV. 811 (1939), and cases cited therein.

[2] People v. Nelson, 309 N. Y. 231, 128 N. E. 2d 391 (1955).

[3] N. Y. MULT. DWELLING L. §§ 187, 188, 189; violation as misdemeanor, § 304.

death by a person engaged in committing or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed or of another,"[4] and of manslaughter in the second degree: "homicide . . . committed without a design to effect death . . . by . . . culpable negligence."[5] The Appellate Division struck out the conviction of manslaughter in the second degree, and the Court of Appeals affirmed the conviction as modified.

Defendant, a former tenant seventy-one years of age, took title to the premises under threat of eviction a year and a half before the fire. He had not been personally notified that the defective conditions constituted violations, but testimony tended to prove that he was aware of the physical conditions. The trial court withheld from the jury the defense of complete ignorance of the underlying misdemeanors on the ground that specific criminal intent was not prerequisite to defendant's guilt. The owner contended that this was error; that the jury should have been allowed to consider the issue of culpable negligence in the absence of actual notice. The Court of Appeals rejected this contention.

An analysis of the cases seems to indicate a hesitancy on the part of the New York courts to impose liability for homicide flowing from purely statutory crimes. In *People* v. *Grieco*,[6] defendant, while intoxicated, recklessly drove his auto so as to cause the death of a human being. A conviction of first degree manslaughter under subdivision 2 was set aside since defendant neither intentionally hit the deceased nor saw her before the instant of contact. The Court thus held that prior knowledge was essential, and distinguished the misdemeanors involved,[7] as affecting society in general, from those affecting a particular person or property. Explicitly disapproved was an earlier case[8] wherein a conviction was had under similar circumstances.

The Court of Appeals in the instant case relied heavily on *People* v. *Alexander*,[9] in which defendant was convicted of manslaughter in the first and second degrees for the death of seven persons in a tenement which he maintained without the prescribed safety equipment. Defendant argued that his building was not of the type falling within the purview of the law but the jury was charged that as far as the misdemeanor was concerned, ignorance and mistake of law did not excuse. The highest court unanimously affirmed the conviction, reasoning that although defendant did not intend the violation, he clearly intended the act which constituted it. Similar is the case[10] of a factory owner who was convicted under subdivision 1 when his employees died in a fire after his failure to maintain unlocked doors and doors which opened outward, resulting in a misdemeanor[11] in violation of the Labor Law.[12]

"Felonious intention, as an element of the homicide, is supplied by the intention to do the unlawful act of which the homicide is a consequence. The intent is transferred by implication of the law. It is not necessary that the slayer shall have intended to violate the law in order that he may be found guilty; but he must have intended to commit an act which is a violation of the law."[13] The owner admitted

[4] N. Y. PENAL L. § 1050, subd. 1.

[5] *Id.*, § 1052, subd. 3.

[6] 266 N. Y. 48, 193 N. E. 634 (1934), *rev'g*, 241 App. Div. 790, 270 N. Y. S. 1020 (1st Dep't 1934); *motion to dismiss denied*, 265 N. Y. 504, 193 N. E. 292 (1934).

[7] N. Y. VEH. & TR. L. §§ 58; 70, subd. 5.

[8] People v. Darragh, 141 App. Div. 408, 126 N. Y. Supp. 522 (2d Dep't 1910), *aff'd*, 203 N. Y. 527, 96 N. E. 1124 (1911).

[9] 293 N. Y. 870, 59 N. E. 2d 451 (1944).

[10] People v. Diamond, 95 Misc. 114, 160 N. Y. Supp. 603 (Kings Co. Ct. 1916).

[11] N. Y. PENAL L. § 1275.

[12] N. Y. LABOR L. § 271, subd. 3; § 272, subd. 3.

[13] 26 AM. JUR. Homicide § 188, pp. 281, 282; 40 C. J. S. Homicide, § 57, pp. 920,

the possibility of his culpable negligence in having allowed the "act", but denied an intention to have committed it.

A distinction is made by some courts between acts merely *mala prohibita* and those *mala in se*. Thus, where defendant drove his wagon through a toll gate in an alleged effort to escape payment of the toll, and so caused the death of the keeper, "the act of the defendant in making this attempt in the exercise of due care, was, at its worst, merely *malum prohibitum*, and was in itself devoid of dangerous tendency, and therefore was not criminal. The mere unlawfulness of the act does not, in this class of cases, *per se*, render the doer of it liable, in criminal law, for all the undesigned and improbable consequences of it."[14] Accordingly, under this view, a question of fact remains for the jury. Of like import is *Thiede* v. *State*,[15] where defendant sold intoxicating liquor to the deceased in violation of statute. The Supreme Court of Nebraska held that an act merely *malum prohibitum*, unaccompanied by negligence, is insufficient to supply the wrongful intent essential to criminal homicide.[16]

In regard to the statutes which most states, including New York, have enacted, providing that homicide committed in the course of a misdemeanor, or other "unlawul act" less than a felony, is manslaughter, the New York Law Revision Commission commented that "courts, called upon to construe these, have evinced a uniform reluctance to interpret the provision literally, and manage to read into it limitations which materially modify its rigor. . . . By far the greatest number assert . . . [that the misdemeanor involved] . . . must be *malum in se*, and that an act only *malum prohibitum* resulting in homicide is insufficent to subject the wrongdoer to liability for manslaughter."[17]

In view of the authorities considered, the instant decision seems to define somewhat literally the legislative intent regarding violations of the Multiple Dwelling Law.

921; People v. Hubbard, 64 Cal. App. 27, 220 Pac. 315 (1923); Pumphrey v. State, 84 Neb. 636, 122 N. W. 19 (1909); State v. Welch, 37 N. M. 549, 25 P. 2d 211 (1933); People v. Barnes, 182 Mich. 179, 148 N. W. 400 (1914).

[14] Estelle v. State, 51 N. J. L. 182, 17 Atl. 118 (1889).

[15] 106 Neb. 48, 182 N. W. 570 (1921), 15 A. L. R. 244 (1922).

[16] People v. Pavlic, 227 Mich. 562, 199 N. W. 373 (1924); Potter v. State, 162 Ind. 213, 70 N. E. 129 (1904); State v. Horton, 139 N. C. 588, 51 S. E. 945 (1905); Commonwealth v. Adams, 114 Mass. 323, 19 Am. Rep. 362 (1873); People v. Pearne, 118 Cal. 154, 50 Pac. 376 (1897); State v. Trollinger, 162 N. C. 618, 77 S. E. 957 (1913).

[17] REPORT OF THE NEW YORK LAW REVISION COMMISSION, 663-664 (1937).