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DECISIONS

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CONSTITUTIONAL LAW—JURISDICTION OF UNITED STATES SUPREME COURT—STATE COURT'S DISCRETIONARY DENIAL OF MOTION MADE ON CONSTITUTIONAL GROUND DOES NOT DEPRIVE SUPREME COURT OF CERTIORARI JURISDICTION OVER CONSTITUTIONAL QUESTION.—Where a Georgia trial court and the Georgia Supreme Court declined to grant a motion, though possessed of the power to do so under State law, and such motion was based upon a valid constitutional objection, the state court's discretionary decision to deny the motion did not deprive the United States Supreme Court of jurisdiction to decide the substantive issue.[1]

The United States Supreme Court had under review the decision of the Georgia Supreme Court which rejected a claim of infirmity in a trial court conviction for murder, based on a constitutional ground raised for the first time in an extraordinary proceeding after the conviction had been affirmed on appeal.

The procedure by which the jury was selected to try Williams, a Negro, must be understood for a clear understanding of the case. The names of prospective white jurors had been placed on white tickets; the names of prospective Negro jurors had been placed on yellow tickets. A Georgia Superior Court judge selected the tickets from a box, and after some were excused, 120 were available as jurors to serve during the week Williams was to be tried. Of the 120, four were Negroes. From a panel of 48 "put upon" Williams at his trial, 13 jurors, including three of the four Negroes, were excused for cause from the trial. The State peremptorily challenged the fourth Negro, so that no Negroes served on the jury of 12 which was finally selected to try Williams.

The trial followed immediately, and lasted one day, resulting in a conviction. Williams' court-appointed attorney filed a motion for new trial. The motion was overruled, and on appeal to the Georgia Supreme Court, judgment was affirmed. Two weeks later, Williams' counsel filed in the trial court an extraordinary motion for new trial under the Georgia Code,[2] alleging for the first time that Williams had been denied equal protection of the laws, under the Fourteenth Amendment to the United States Constitution, by the manner in which the petit jury had been selected, organized, impaneled, and challenged. The dismissal of this motion by the trial court was affirmed by the Georgia Supreme Court, on the ground that Williams, having failed to challenge the array when put upon him, had waived any objections to the jury's selection. Affidavits that the methods used to select a jury could not have been discovered by Williams' counsel "in the exercise of ordinary diligence" were deemed insufficient to excuse his failure to challenge the array at the outset of the trial.

Upon appeal to the Georgia Supreme Court, Williams' attorney relied almost exclusively upon the case of *Avery* v. *Georgia*[3] to support his contention that Williams had been denied equal protection of the laws. In that case, Avery's jury was drawn precisely in the manner used in the present case, except that no Negroes appeared on the list of prospective jurors, and Avery challenged the array when the jury was put upon him. The challenge was overruled, and on appeal, the Georgia Supreme Court affirmed the judgment on the ground that, because there were no Negroes on the panel, the dif-

[1] Williams v. Georgia, 349 U. S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955).

[2] GA. CODE ANN. § 70-303: ". . . in case of a motion for new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. . . . No motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case."

[3] 345 U. S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953).

ferent-colored tickets did no actual harm in that instance.[4] The United States Supreme Court, however, reversed this decision, holding that Avery had made out a prima facie case of an unconstitutional discrimination by showing the use of different-colored tickets which the State had not rebutted.

While the *Avery* case was decided more than a month before the amendment to Williams' formal motion for new trial, his counsel did not rely upon the *Avery* decision until some six months later, in his extraordinary motion for new trial.

Due to the factual similarities of the *Avery* case with the present case, a majority of the United States Supreme Court granted certiorari to Williams.[5] Mr. Justice Minton, dissenting, felt that the *Avery* case had no bearing on the present case because in that proceeding the challenge had been timely made;[6] and also that the present case had been disposed of by the Georgia Supreme Court altogether on State grounds, *i.e.*, "the court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of State law."[7] On oral argument, the State of Georgia agreed that the use of the different-colored tickets was, in fact, a denial of equal protection in the light of *Avery* v. *Georgia;* but, notwithstanding, Williams still was not entitled to a new trial because of his failure seasonably to challenge the array. Moreover, the Attorney General of the State intimated in his brief to the Georgia Supreme Court that another remedy was open to Williams.

The question before the United States Supreme Court, in view of Georgia's concession, was whether the ruling of the Georgia Supreme Court rested upon an adequate nonfederal ground, so that the United States Supreme Court was without jurisdiction to review the Georgia Court.

The majority noted that "a state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power."[8] "Thus," says the majority, "we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort . . . to be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the State court action in the particular circumstances is, in effect, an avoidance of the federal right."[9]

The majority established three premises upon which it rested its conclusion that the Supreme Court *did* have jurisdiction: *First,* a State court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. *Second,* although the Georgia courts do not favor extraordinary motions for new trial after judgment,[10] the Georgia statute does empower

[4] 209 Ga. 116, 124, 70 S. E. 2d 716, 722 (1952).

[5] See note 1, *supra.*

[6] See note 1, *supra.*

[7] Edelman v. California, 344 U. S. 357, 358-359, 73 S. Ct. 293, 295; 97 L. Ed. 387, 391 (1953).

[8] See note 1, *supra* at 382-83, 75 S. Ct. 814 821, 99 L. Ed. 1161, 1170.

[9] *Cf.* Rogers v. Alabama, 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417 (1904); Abie State Bank v. Bryan, 282 U. S. 765, 772-773, 51 S. Ct. 252, 255, 75 L. Ed. 690, 701 (1931); Pierre v. Louisiana, 306 U. S. 354, 358, 59 S. Ct. 536, 538, 83 L. Ed. 757, 760 (1939); Urie v. Thompson, 337 U. S. 163, 172-173, 69 S. Ct. 1018, 1026, 93 L. Ed. 1282, 1294 (1949); Vandalia R. Co. v. Indiana *ex rel.* South Bend, 207 U. S. 359, 367, 28 S. Ct. 130, 132, 52 L. Ed. 246, 248 (1907).

[10] Parks v. Georgia, 204 Ga. 41, 48 S. E. 2d 837 (1948); Brown v. Georgia, 141 Ga. 783, 82 S. E. 238 (1914); Tyre v. Georgia, 38 Ga. App. 206, 143 S. E. 778 (1928).

them to entertain such motions.[11] (Justice Clark, however, agreed with Justice Minton that the majority had misconstrued Georgia's law. As they read the State law, the decisions indicate that the Georgia courts had no power to hear and determine this particular petitioner's extraordinary motion on the merits.[12]) *Third*, although generally, the granting or denying of such motion rests primarily in the discretion of the trial court, and the appellate court will reverse only if such discretion is abused, there are several cases where the appellate courts have not hesitated to reverse and grant a new trial in exceptional cases.[13]

The majority conceded that these latter cases involved objections made only to the selection of individual jurors, as contrasted with the whole panel in the present case, but they felt that the two situations cannot be distinguished on this ground. As to the state's rule that an objection to the whole panel must be made by way of a challenge to the array at the time the panel is put upon the defendant, the majority found in the decided State cases no declaration that an extraordinary motion is not available *in a proper case* for granting a new trial when the objection is to the panel, from which the inference can be drawn that the Georgia courts have the same degree of discretion in the "array" cases as in cases involving individual jurors.

Mr. Justice Clark, dissenting from this conclusion, points out that the majority cites no case where such discretion was exercised on a challenge to the array, and that not one of the "individual juror" cases, relied on by the majority, is mentioned, much less distinguished, in the Georgia court's opinion in this case. He considered it fair to assume that the Georgia court itself considered the two types of challenge to be governed by entirely different rules, and that, excuse or no excuse, the petitioner had waived his claim "once and for all."

The majority concluded that since the motion was based upon a valid constitutional objection, the Supreme Court had jurisdiction. However, the Court declined to exercise this jurisdiction; in reliance on *Patterson* v. *Alabama*,[14] the case was remanded for the Georgia Supreme Court's further consideration. The extraordinary facts of the case, *e.g.*, the use of the colored tickets a year after the Georgia Supreme Court condemned the practice; the fact that a life was at stake; the acknowledgment by the State that Williams had been deprived of his constitutional right; and the opportunity which it was claimed the Georgia Supreme Court had to designate the appropriate remedy, if any (as intimated by the Attorney General in his brief to the Georgia Supreme Court), all were felt to compel a remand.

PROCEDURE—WHERE COURT DENIES MOTION TO DISMISS ASSAULT ACTION, IT IS ERROR TO DISMISS NEGLIGENCE ACTION BASED ON SAME FACTS.—In *Flamer* v. *City of Yonkers*, the New York Court of Appeals has held that where a complaint embraces causes of action in negligence and in assault based on the same facts, it is error for the trial court to dismiss the negligence action for insufficiency, and at the same time submit the same

[11] See note 2, *supra*.

[12] Jordan v. State, 22 Ga. 545 (1857); Moon v. State, 68 Ga. 687 (1882); Cumming v. State, 155 Ga. 346, 117 S. E. 2d 378 (1923); Wilcoxon v. Aldredge, 192 Ga. 634, 637, 15 S. E. 2d 873, 876 (1941).

[13] *Cf.* Wright v. Davis, 184 Ga. 846, 193 S. E. 757 (1937); Smith v. Georgia, 2 Ga. App. 574, 59 S. E. 311 (1907); Crawley v. Georgia, 151 Ga. 818, 108 S. E. 238 (1921); Doyal v. Georgia, 73 Ga. 72 (1884).

[14] 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1097 (1935).

facts to the jury in the assault action, because both require proof of essentially the same facts except that assault requires the additional element of intent.[1]

The facts alleged by plaintiff, and which plaintiff's witnesses testified to, were that plaintiff's intestate, who had been drinking, became involved in an argument in a tavern. The barkeeper put in a call to the police, but everything was quiet when the police arrived. However, the officers approached the plaintiff's intestate, and began beating him with their nightsticks and fists. He struggled to defend himself. One of the police officers backed away and reached for his gun. A nephew of the decedent, who was with him, called to the police officer, saying, "Don't shoot, he's drunk." The officer nodded as if he understood and while the decedent stood in the middle of the room in a dazed manner, the officer drew his gun and without any warning took aim and fatally shot him.

The plaintiff, administratix of the deceased, brought an action for wrongful death against the City of Yonkers, naming the two police officers involved in the shooting as party defendants. She claimed damages on three causes of action. The first cause of action was for negligence in making the arrest, the second was for assault, and the third was against the City alone for having knowingly and negligently employed unreliable police officers. This third cause of action was dismissed for failure of proof, and no appeal was taken from the dismissal.

The police officers contended that the plaintiff's intestate was conducting himself in such a belligerent and threatening manner as to require prompt and drastic action to subdue him; that in shooting the decedent they used no more force than the circumstances warranted. The defendants pleaded a general denial as to all three causes of action, and interposed the defense of the decedent's alleged contributory negligence to the first cause based on negligence.

At the conclusion of the plaintiff's case, the defendant City moved to dismiss the first cause on the grounds that the plaintiff had failed to state a cause of action, there being no evidence in support of the allegations of negligence, and no proof that the police officers were engaged in making an arrest. The court reversed decision on the defendant's motion. At the close of the case, the court granted the city's motion to dismiss the cause in negligence, on the ground that the plaintiff had not made out a case, but denied a similar motion addressed to the cause in assault and submitted it to the jury which returned a verdict for the defendant. The appeal to the Appellate Division, Second Department, dealt only with the judge's dismissal of the first cause of action based on negligence. The Appellate Division affirmed,[2] and plaintiff appealed to the Court of Appeals.

The general rule is that no private action, unless expressly authorized by statute, can be maintained against a state or municipality for the negligent performance of public duties imposed on it by law, even if the negligence is gross.[3] New York State, by statute, has waived its sovereign immunity.[4] In carrying out governmental functions, as in this case, the city is acting under powers delegated from the state,[5] and therefore its derivative immunity ceased to exist with the passage of the immunity statute.[6] Today in New York, a municipal corporation, like a private corporation or individual, may be

[1] Flamer v. City of Yonkers, 309 N. Y. 114, 127 N. E. 2d 838 (1955).
[2] 283 App. Div. 790, 130 N. Y. S. 2d 895 (2d Dep't 1954).
[3] Young v. Worcester, 253 Mass. 481, 149 N. E. 204 (1925).
[4] N. Y. Ct. Cl. Act § 8.
[5] Bloom v. Jewish Board of Guardians, 286 N. Y. 349, 36 N. E. 2d 617 (1941).
[6] McCarthy v. City of Saratoga Springs, 269 App. Div. 469, 56 N. E. 2d 600 (3d Dep't 1945).

held liable for damages resulting from its tortious acts,[7] and its liability is determined by the same rules of law.[8] There is no immunity to protect any civil division of the state performing a governmental function, even if the civil division has passed no statute sanctioning that enlarged liability.[9] A municipality may be held liable for a tort committed by a police officer in its employ, on the theory of *respondeat superior;*[10] however, as is the case with any defendant, no cause of action can accrue if the municipality has exercised ordinary and reasonable care.[11]

In negligence actions, the only proof ordinarily required to establish a prima facie case is defendant's failure to exercise ordinary and reasonable care commensurate with the circumstances.[12] The plaintiff must show that the defendant was negligent, by breaching some legal duty owed to the plaintiff, that the plaintiff was damaged thereby, and that he (the plaintiff) was free from contributory negligence.[13] If he fails to do so, the defendant may make a motion to dismiss, or ask for a directed verdict or a nonsuit.[14] The plaintiff is entitled to the most favorable inference to be drawn from the testimony when such a motion is made.[15] However, this inference must establish some specific act of negligence or offer evidence from which a specific act of negligence by the defendant may be inferred.[16] This inference must not be predicated merely upon a bare possibility.[17]

When, as in this case, a motion to dismiss is made after the presentation of the plaintiff's case, an issue of law only is presented: where all the facts presented stand admitted and the plaintiff is given the advantage of every inference that can be fairly drawn from the facts presented, is an issue of fact presented for the determination of the jury?[18]

In the instant case, the trial court dismissed the first cause of action in negligence because of the plaintiff's failure to show that the police officers were acting within the scope of their employment when they came into the tavern and shot plaintiff's intestate. The Appellate Division upheld the decision of the trial court.[19]

The Court of Appeals, in its reversal, held that the plaintiff's failure to show proof of an arrest was not fatal, since such fact could, by favorable inference, be implied from the testimony of the plaintiff's witnesses. Whether the officers were or were not making an arrest was, as are all other questions of fact, an issue for the jury.[20] The jury also has to determine, under the particular circumstances of the case, if ordinary care was exercised by the defendant police officers in proportion to the danger to be

7 Lindlots Realty Corp v. County of Suffolk, 278 N. Y. 45, 15 N. E. 2d 393 (1938).

8 Schuster v. City of New York, 207 Misc. 1102, 121 N. Y. S. 2d 735, *aff'd* 286 App. Div. 389 (1st Dep't 1955).

9 McCrink v. City of New York, 265 N. Y. 99, 71 N. E. 2d 419 (1917).

10 See note 6, *supra.*

11 Klein v. Town of Pittstown, 241 App. Div. 202, 272 N. Y. Supp. 324 (3d Dep't 1934).

12 Mescher v. Brogan, 223 Iowa 573, 272 N. W. 645 (1937).

13 Shuttleworth v. Crown Can Co., 165 F. 2d 974 (7th Cir. 1948).

14 Sadowski v. Long Island R. R. Co., 292 N. Y. 448, 55 N. E. 2d 497 (1944).

15 Cohen v. Consolidated Gas Co., 137 App. Div. 213, 121 N. Y. Supp. 956 (1st Dep't 1910).

16 Morris v. Railway Co., 148 N. Y. 182, 42 N. E. 579 (1896).

17 Egan v. Dry Dock, E. B. & B. R. R. Co., 12 App. Div. 556, 42 N. Y. Supp. 188 (1st Dep't 1896).

18 Kraus v. Birnbaum, 200 N. Y. 130, 93 N. E. 474 (1910).

19 See note 2, *supra.*

20 See note 14, *supra.*

avoided and in view of the consequences that might have reasonably flowed from the neglect.[21] The jury was justified, perhaps, in finding for the defendant in the assault action, since the plaintiff had not proved an intention on the part of the police officers to do a wrongful act. However, the elements of negligence were inferable, and it was therefore reversible error not to submit that cause of action to the jury also.

CRIMINAL LAW—AGENCY—PHOTOGRAPHER WHO PAID SHIP PURSER FOR LIST OF INCOMING PASSENGERS HELD NOT GUILTY OF CRIME OF BRIBING EMPLOYEE OF ANOTHER.—The Court of Appeals has held, in construing Section 439 of the Penal Law,[1] that one who pays a ship's purser to do an act not concerning a matter affecting the ship company's interest, and not involving discretion in the conduct of the ship company's business, is not guilty of the crime, defined in the statute, of corruptly influencing the employee of another.[2]

Jacobs, a professional photographer, conceived it to be to his advantage to learn the names and addresses of passengers debarking from ocean liners at New York City, in order that he might take and more easily market their photographs in pursuit of his profession. Lists of inbound passengers containing street addresses of returning residents of this country, known as passenger manifests, are required by federal statute to be delivered by incoming vessels to the customs, immigration and public health authorities. A United States Line purser testified that he accepted from Jacobs ten dollars apiece for copies of said manifests. In consequence, the photographer had been convicted of violating Section 439 of the Penal Law, making it a misdemeanor to corruptly influence agents, employees, or servants of another.

The material portion of Section 439 provides that: "A person who gives, offers, or promises to an agent, employee or servant of another, any gift or gratuity whatever, without knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence such agent's, employee's or servant's action in relation to his principal's employer's or master's business, or an agent, employee or servant who without the knowledge and consent of his principal, employer or master requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself or to another, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business, or receive a reward for having so acted . . . is guilty of a misdemeanor."[3] The crucial question was whether the payment here made to the agent had influenced him to do an act "in any particular manner in relation to his principal's . . . business," as laid out in the statute.

The operation of this section had been partially clarified when the Appellate Division, First Department, in *People v. Graf*,[4] interpreted the words, "particular manner." In that case, defendant was an agent of a union whose members were employed by a manufacturer who desired to use members of this union in connection with work in cities outside of New York City. Jurisdictional disputes arose with the out-of-city unions. The company paid defendant to travel to these cities and prevent outside unions from getting recognition as bargaining agents. Although the company benefited from

[21] Mink v. Keim, 291 N. Y. 300, 52 N. E. 2d 444 (1943).

[1] N. Y. PEN. L. § 439(1).

[2] People v. Jacobs, 309 N. Y. 315, 130 N. E. 2d 636 (1955).

[3] See note 1, *supra*.

[4] People v. Graf, 261 App. Div. 188, 24 N. Y. S. 2d 683 (1st Dep't 1941).

this, defendant did it at the union's behest, and acted favorably to the interest of the union.

The court in the *Graf* case said: "We think that 'particular manner' as used in the statute was intended to mean a particular manner which would serve the purpose of the donor of the money rather than that of the employer, and that the money was given and accepted with the intention to affect some decision by the employee involving exercise of discretion on his part with respect to his employer's interest."[5]

In the *Graf* case, it was clear that the employer's interest was not affected in the sense that the agent was not influenced to do an "act in any way inconsistent with his duties toward the employer,"[6] because "defendant acted favorably to the interests of the union."[7] In addition, no decision by the employee involving exercise of his discretion with respect to his employer's interest was influenced, since the employee acted "at the behest of the union,"[8] as well as on the inducement of the company.

The facts of the present case are not as clearly outside the scope of the statute as were those of the *Graf* case. Here, the employer did not benefit from the payment to the agent, nor did the agent act at the behest of the employer.

However, the court laid emphasis on the fact that the purser's act was not a breach of his duty toward the ship company. "The testimony of the purser, on which defendant's conviction hinges, is that the purser had notified his superior of the fact that his practice was carried on, but that 'the superior gave me no answer, and he didn't say yes or no.' The reason on account of which no reply was given is evidently that the interest of the United States Lines was not regarded as being involved."[9]

In addition, the court held: "Since money was not paid to influence the purser to perform an act involving discretion in the conduct of his employer's business, defendant has not been proved to be guilty of the crime which is defined by section 439 of the Penal Law."[10] The conclusion that the employee's act did not involve the exercise of discretion in the conduct of his employer's business is based on the evidence disclosed in the record. It was indicated there that the United States Lines did not confine the delivery of its passenger manifests to the federal customs, immigration, and public health authorities, but also caused them to be sent to certain newspapers, hereby publicizing the manifests. The fact that they were given publicity in such a manner emphasizes that the purser's act in making them available to the defendant involved no exercise of discretion in the conduct of the business of the company. Jacob's conviction, affirmed by the Appellate Division,[11] was therefore reversed.

PROCEDURE—IN ACTION BROUGHT AGAINST THE STATE OF NEW YORK, COURT OF CLAIMS ACT HELD TO PROHIBIT STATE FROM IMPLEADING THIRD PARTY DEFENDANT.—The Appellate Division, Third Department, has ruled that the limited jurisdiction of the Court of Claims precludes the State of New York from impleading a third-party defendant against whom the State could assert a claim for indemnification at common law or under the terms of its contract.[1]

[5] *Id.* at 191, 192, 24 N. Y. S. 2d 683, 687.
[6] *Id.* at 192, 24 N. Y. S. 2d 683, 687.
[7] *Id.* at 191, 24 N. Y. S. 2d 683, 687.
[8] *Ibid.*
[9] See note 1, *supra,* at 318, 130 N. E. 2d 636, 637.
[10] *Ibid.*
[11] 285 App. Div. 938, 139 N. Y. S. 2d 28 (1st Dep't 1955).

[1] Horoch v. State of New York, 286 App. Div. 303, 143 N. Y. S. 2d 327 (3d Dep't 1955).

The State of New York entered into a contract with the Lachow Demolition Corporation to demolish certain buildings in Bronx County. The claimant was employed by the corporation to assist in the work, and while so employed was injured by an explosion. Subsequently, the worker brought an action against the State of New York in the Court of Claims, alleging that the State had failed to provide adequate supervision over the project, and had thereby permitted a dangerous condition to exist. The State moved to implead the employer as a third-party defendant, on the theory of indemnification. The motion was denied and the State appealed.

At the common law, the State, as sovereign, was immune from tort and contract liability, and no suit could be maintained against the State unless it granted consent to be sued. In most American jurisdictions, such consent has been granted, in a more or less limited form, by statutes which provide for special procedures or create special courts for particular causes of action.[2] In New York State a special tribunal, the Court of Claims, was created to determine the liability of the State.[3]

The Court of Claims Act provides that the liability of the State shall be determined "in accordance with the same rules of law as are applied to actions in the Supreme Court. . . ."[4] Claimants appearing before the Court of Claims are guaranteed substantially the same rights granted to parties appearing before the Supreme Court of the State of New York, with the important exception that the liability of the State is determined solely by the court sitting without a jury.[5] A litigant, however, is not deprived of any of his constitutional rights, for the State, by permitting itself to be sued, extends a privilege which it may qualify as it sees fit.

The causes of action over which the Court of Claims may exercise jurisdiction are set forth in Section 9 of the Court of Claims Act. This section authorizes claims against the State, counterclaims by the State against the claimant, and the interpleader of parties necessary for the complete determination of a claim or counterclaim.[6] No mention is made in the section of impleader jurisdiction.

Although interpleader and impleader are both methods of bringing new parties into the action, there is a distinction between the two remedies. Interpleader is the procedure by which one who may be exposed to multiple liability may require adverse claimants to litigate their claims in one action.[7] The procedure of impleader does not seek to resolve adverse claims, but is merely the means by which the ultimate primary liability of a third party may be settled.[8] Under the clear language of the Court of Claims Act the remedy of interpleader alone is permitted.

The State urged in this case that it should be allowed to implead the employer in the same manner as the United States may implead third parties in the federal District Courts. The court, however, held that the limitation of the statutory language did not allow this procedure, further pointing out that an impleaded party is guaranteed the right under both the federal and state constitutions to have claims against him determined by a jury.[9] By virtue of the Federal Tort Claims Act the National Government has waived immunity from suit, and now permits the federal District Courts to determine claims against the United States for personal injuries.[10] Through this procedure the Federal

2 PROSSER, HANDBOOK OF THE LAW OF TORTS, 770-780 (2d ed. St. Paul 1955).
3 N. Y. CT. CL. ACT § 8.
4 N. Y. CT. CL. ACT §§ 8. 9(9).
5 *Id.*, § 12(3).
6 *Id.*, § 9(2), 9(3), 9(6).
7 N. Y. CIV. PRAC. ACT § 285.
8 *Id.*, § 193a.
9 U. S. CONST. art. VII; N. Y. CONST. art. XII.
10 62 STAT. 983 (1948), 28 U. S. C. §§ 1346(b), 1402(b), 2402, 2674 (1952).

Government subjects itself to suit in a court of general jurisdiction, where a third party defendant may demand and obtain a trial by jury.[11] On the other hand, the Court of Claims Act created a special tribunal of limited jurisdiction where the rights of the litigant are determined by the court sitting without a jury.[12] Therefore, any attempt by the State to implead a third party in the Court of Claims would work a deprivation of that party's constitutional right to a jury trial in common-law money actions.

This decision appears to interpret the Court of Claims Act as prohibiting the State of New York from impleading third parties in the Court of Claims, and limiting the State to its right to bring a separate action for indemnification, against the person sought to be impleaded, in a court of general jurisdiction.

EVIDENCE—TAX LAW—PRIOR FALSE STATEMENT AS TO ASSETS MADE TO REVENUE AGENTS HELD INADMISSIBLE TO PROVE INTENT IN TAX FRAUD PROSECUTION.—Defendant was convicted in a United States District Court in Alabama of wilfully attempting to evade and defeat federal income taxes for the years 1945, 1946 and 1947 by filing fraudulent returns. On appeal, the United States Court of Appeals for the Fifth Circuit held that while there was sufficient evidence to submit the case to the jury, certain evidence that defendant offered to compromise a tax liability for the years 1924 through 1934, as well as an untrue sworn statement which accompanied the compromise offer, were inadmissible, and the admission of this evidence constituted prejudicial error, calling for reversal and a new trial.[1]

The evidence tended to show that defendant, in his bakery books, overstated the amount expended for merchandise by approximately $17,300.00. No invoices or other records of such purchases could be produced. Testimony of a revenue agent revealed that various deposits in appellant's personal account and in bank accounts to the credit of his wife and daughter, plus the purchase of United States Savings Bonds, corresponded perfectly by dates in each case to the "purchases" as noted in the bakery books.

The government also produced circumstantial evidence to support charges that appellant had made substantial understatements of cash receipts and overstatements of delivery expenses for the years involved. These claims were in part supported by the direct testimony of appellant's bookkeeper.

In order to show defendant's criminal intent to evade payment of taxes for 1945, 1946 and 1947, the government was permitted to prove, over defendant's objection, that he had submitted an offer of $750.00 to compromise a tax liability amounting to $3,100.68 which he had incurred for the years 1924 through 1932, and that at the same time he had made a sworn statement that he borrowed $750.00 from relatives, which statement he later admitted to be untrue; and that other facts relating to his assets and liabilities contained in the compromise offer were likewise untrue. The Court of Appeals held the admission of this evidence to be reversable error.

The rules governing the admission of evidence of prior acts to show a present intent have evolved in the law, both civil and criminal, from a very strict rule at common law which had as its maxim: "Let no similar facts be admitted."[2] As a general proposi-

[11] United States v. Yellow Cab Co., 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951).

[12] See note 5, *supra.*

[1] Lloyd v. United States, 226 F. 2d 9 (5th Cir. 1955).

[2] Stone, *The Rule of Exclusion of Similar Fact Evidence: America,* 51 HARV. L. REV. 988 (1938).

tion, this common-law concept is still the law. As one New York court has put it, "One may not be convicted of one crime on proof that he probably is guilty because he committed another crime."[3] This rule, however, has various exceptions which have been found necessary, in order to show scienter in certain crimes. The strict rule was relaxed in about 1840[4] because of the special difficulty of proving guilty knowledge in cases of uttering counterfeit and forged currency and documents, and in cases of receiving stolen property. For these two particular criminal acts, it became important to prove guilty knowledge in connection with the doing of the act, in order to negative the possibility of good faith in the transaction in question, and it was held proper to show that the accused had been guilty of similar offenses on prior occasions.[5] Today, evidence of prior criminal acts may also be admitted to prove intent in the crimes of forgery and obtaining money or goods by false pretenses.[6]

Many jurisdictions today have announced that they will not restrict evidence of prior acts to cases of the four crimes listed above, but will rather be guided by general principles of competence, materiality, and logical connection. A Washington court has laid down the rule that "in prosecution for any crime, whether felony or misdemeanor, in which the gravamen of the offense is not in the doing of the deed, but in the faith of which it was done, evidence of other *similar contemporaneous offenses* is admissible on the issue of intent."[7] A Minnesota court has announced that it will, in its discretion, look at prior acts in relation to their remoteness both in deed and/or in point of time.[8]

In the instant case, the federal Court of Appeals, after considering this persuasive authority, felt that the admission in evidence of appellant's prior acts was error, because those acts were not similar enough to the acts charged, but were so remote as to be lacking in evidentiary value.[9] The admission of evidence of these prior acts in the lower court was held to be highly prejudicial, for it indicated to the jury that the defendant had cheated on his income taxes over a period of years, and furthermore, was unworthy of belief because he had made misstatements in his offer to compromise. The court was unwilling to say that without such inadmissible evidence the jury might not have reached a different verdict,[10] and, therefore, reversed the judgment of conviction.

PROCEDURE—IN ACTION AGAINST CITY, INJURED WIFE NOT BARRED FROM DISCRETIONARY EXTENSION OF FILING TIME BECAUSE HUSBAND COULD HAVE FILED ON HER BEHALF WITHIN NINETY DAYS.—The Court of Appeals, in reversing orders below[1] which denied an application for extension of the statutory 90-day period for filing a notice of claim, (which is a condition precedent to the commencement of a negligence action against the City of New York)[2] where the injured party is physically incapable of filing said

[3] People v. Goldstein, 295 N. Y. 21, 65 N. E. 2d 169 (1946).

[4] See note 2, *supra*; Lockwood v. Doane, 107 Ill. 235 (1883); Davis v. State, 54 Neb. 177, 74 N. W. 599 (1898); State v. Lyle, 125 S. C. 406, 118 S. E. 803 (1923); State v. Baugh, 200 Iowa 1225, 206 N. W. 250 (1925).

[5] McKusick, *Techniques in Proof of Other Crime to Show Guilty Knowledge and Intent*, 24 IOWA L. REV. 471 (1938).

[6] RICHARDSON, EVIDENCE, § 148 (7th ed. by Prince, Brooklyn 1948).

[7] State v. Raub, 103 Wash. 214, 173 Pac. 1094 (1918).

[8] Hale v. Life Indemnity & Investment Co., 65 Minn. 548, 68 N. W. 182 (1896).

[9] 2 WIGMORE, EVIDENCE, § 302 (3d ed. Boston 1942); Wolcher v. United States, 200 F. 2d 493 (1952).

[10] Kotteakos v. United States, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

[1] 285 App. Div. 1085, 140 N. Y. S. 2d 140 (1st Dep't 1955).

[2] N. Y. GEN. MUN. L. § 50-e(1).

notice, because of hospitalization, the fact that a spouse could have filed the notice during the 90-day period does not bar the injured party from a discretionary extension of the filing period.[3]

Mrs. Rosenberg and her two infant children were injured on July 3, 1954, in an automobile accident on the lower level of the Manhattan Bridge. The negligence alleged against the City of New York was that it permitted the traveled surface to become disintegrated so as to allow the smooth, slippery metal portions beneath the covering of the roadway to be exposed, causing the driving surface to become dangerous. The 90-day period[4] for filing the notice of claim expired on October 1, 1954. Notices of claim for the three parties were filed on November 16, 1954. The Supreme Court, at Special Term, denied all three applications to extend the time for filing, stating that the husband and father was capable of presenting the claims in behalf of the claimants within the permissible period. The Appellate Division reversed in regard to the infant claimants, but affirmed in regard to the mother, agreeing that her husband could have filed the notice in her behalf within the statutory period.

Section 50-e(1) of the General Municipal Law provides in part that "in any case . . . where a notice of claim is required . . . as a condition precedent to the commencement of an action . . . in tort . . . it shall be given within 90 days after the claim arises." In this connection, section 50-e(5) of the General Municipal Law provides that the 90-day notice may be extended for not more than a year "where the claimant is an infant, or is mentally or physically incapacitated and by reason of such disability fails to serve a notice of claim . . . within the time limited therefor."[5]

The issue presented by the appeal was whether the 90-day period permitted by section 50-e(1) of the General Municipal Law[6] should have been extended for the filing of a claim by the mother, as a result of her incapacity caused by the injuries she sustained in the accident.

The Appellate Division had found that appellant's husband should have filed for her since she was incapable of doing so herself.[7] The Court of Appeals, in reversing the Appellate Division, held that the statute does not *require* that someone else act for a person physically incapacitated, within the 90-day period, and said that "whether the 90-day period is to be extended does not, at least in the case of an adult not adjudged to be mentally incompetent, depend upon whether there is someone other than the claimant who can act in the matter prior to the expiration of a year."[8]

The law of New York, on the question of an extension of the statutory period for filing a notice of claim, appears to be well settled as to what extent of injury will bring the claimant within the statutory exception. The injuries alleged by the claimant must be *proved* to be such as to prevent him from filing. Thus, notices of claim filed against the City after the expiration of the 90-day period have been sustained where the injured party was either mentally or physically disabled from the time of the accident to a time beyond the 90-day period.[9] On the other hand, such claims have been denied when

[3] Application of Rosenberg, 309 N. Y. 304 (1955).

[4] See note 2 *supra*.

[5] *Ibid.*

[6] *Ibid.*

[7] See note 1, *supra*.

[8] See note 3, *supra*, at 306.

[9] Application of Colehammer, 276 App. Div. 809, 93 N. Y. S. 2d 499 (1st Dep't 1949); Application of Huntley, 201 Misc. 426, 106 N. Y. S. 2d 195 (Sup. Ct. N. Y. Co. 1951); Application of Sullivan, 282 App. Div. 1097, 126 N. Y. S. 2d 438 (1st Dep't 1953); Moore v. City of New York, 276 App. Div. 585, 96 N. Y. S. 2d 324 (1st Dep't 1950); Kraus v. Board of Education of the City of New York, 199 Misc. 505, 103 N. Y. S. 2d 939 (Sup. Ct. N. Y. Co. 1951).

filed after the expiration of the 90-day period, when the physical or mental incapacity of the claimant was not substantiated by sufficient evidence,[10] where the injury was such that the claimant had been back at her employment for at least eight months prior to filing her claim;[11] where the claimant's arm was in a cast for a portion of the statutory period;[12] where the claimant made seven trips to the hospital as an out-patient three months after his discharge.[13]

However, unlike the above cases, there was in the instant case no question of the claimant's incapacity to file. The question was whether claimant's husband, who concededly could have filed, should have done so, and whether claimant was precluded because he had not. The Court of Appeals saw no justification in the statutory language for such an interpretation. Further, the court pointed out that section 50-e(5) is drafted in the alternative, so that either infancy or physical or mental incapacity provides a foundation upon which the courts, with their discretionary power, may act. Therefore, reasoned the Court of Appeals, the Appellate Division, having extended the time of the infants, was in error in refusing to extend the appellant's time likewise.

The injured party will not be deprived of his day in court merely because another could have filed the notice of claim on his behalf within the statutory period, while he was in fact physically incapacitated from doing so.

[10] Sullivan v. Town of Babylon, 277 App. Div. 791, 97 N. Y. S. 2d 240 (2d Dep't 1950), *aff'd* 302 N. Y. 609, 96 N. E. 2d 898 (1951); Freimer v. City of New York, 279 App. Div. 1084, 112 N. Y. S. 2d 660 (1st Dep't 1952).

[11] McGuire v. City of New York, 116 N. Y. S. 2d 163 (1st Dep't 1952).

[12] Franco v. City of New York, 270 App. Div. 1050, 63 N. Y. S. 2d 291 (1st Dep't 1946).

[13] Application of Babinski, 279 App. Div. 871, 110 N. Y. S. 2d 225 (1st Dep't 1952).