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DOMESTIC RELATIONS-CUSTODY OF INFANT AWARDED TO FATHER WHERE MOTHER WAS FOUND UNFIT, NOTWITHSTANDING HER DENIAL OF HIS PATERNITY / PROCEDURE-ACCUSED ENTITLED TO DISMISSAL OF SIX-YEAR OLD INDICTMENT DESPITE FAILURE TO OBJECT FOR SIX YEARS / LABOR LAW-EMPLOYEE DISCHARGED FOR FAILURE TO JOIN UNION WITHIN PRESCRIBED TIME HELD TO HAVE QUIT VOLUNTARILY "WITHOUT GOOD CAUSE" WITHIN MEANING OF UNEMPLOYMENT INSURANCE LAW / PERSONAL PROPERTY-PLEDGOR WHO WAIVES RIGHT TO NOTICE AND ADVERTISEMENT OF SALE ON DEFAULT HELD NOT TO RELEASE PLEDGEE FROM REQUIREMENT OF GOOD FAITH / CRIMINAL PROCEDURE-ACCUSED MAY TEST VALIDITY OF CONCURRENT SENTENCING BY HABEAS CORPUS-MULTIPLE SENTENCING, THOUGH CONCURRENT, HELD INVALID / DOMESTIC RELATIONS-HUSBAND'S FALSE REPRFSENTATIONS OF LAW BEFORE MARRIAGE CONCERNING WIFE'S LEGAL DISABILITY HELD NOT TO BE FRAUD / AGENCY-GENERAL CONTRACTOR NOT LIABLE FOR INJURY TO SUBCONTRCOR'S EMPLOYEE WITHOUT ACTUAL NEGLIGENCE-STATUTORY DUTY TO MAITAIN SAFE "PLACE OF

WORK" HELD DECLARATORY OF COMMON LAW RULE / CRIMINAL LAW-CONVICTION FOR VAGRANCY, BASED ON FEMALE'S UNCORROBORATED TESTIMONY THAT DEFENDANT INDUCED HER TO COMMIT SEXUAL ACTS IN HIS HOME, REVERSED.

DECISIONS

DOMESTIC RELATIONS—CUSTODY OF INFANT AWARDED TO FATHER WHERE MOTHER WAS FOUND UNFIT, NOTWITHSTANDING HER DENIAL OF HIS PATERNITY.—The New York Court of Appeals recently affirmed a decision of the Appellate Division, Second Department,[1] and held that the custody of a child of tender years will be awarded to the father, where there is sufficient evidence showing the unfitness of the mother and the fitness of the father, notwithstanding the mother's assertion that, though her husband, he was not the father of the child.[2]

The action was brought by the husband against the wife for separation, on the ground of abandonment. The husband requested the custody of his daughter, who was then about one year old. The wife answered by denying her husband's paternity, and counterclaimed for a declaratory judgment to that effect, stating that a third person was the natural father of the child, and therefore the husband was not entitled to either custody or visitation. The counterclaim was stricken and no appeal was taken therefrom.

The evidence offered by the husband on the trial showed that the wife left the child with someone while she was at work, that she kept the child out late, at one time until 1:00 A.M., and that on one occasion she left the child sick with fever while spending the evening with the man she claimed to be the father of the child. The evidence demonstrated that the husband could provide the child with a good home under the constant care of his sister, that he was a good father and had been a good husband, had supported his wife and child, and that the wife had abandoned the husband. At the trial, the wife's mother and sister testified for the husband.

Upon the facts, the official referee granted a separation to the husband, and awarded the custody of the child to him, with rights of visitation allowed to the wife. The Appellate Division affirmed,[3] three to two, the dissenting judges reasoning that the evidence was insufficient to find the wife unfit for custody. The Court of Appeals, however, affirmed the award of the custody to the husband.

At common law, it was the father who had a superior right to the custody of his children, in the absence of good and sufficient adverse reasons shown to the court, such as grossly immoral principles and habits, or want of ability.[4] In an early common law case,[5] it was held that the courts had no jurisdiction to deprive a father of this common law right, even though he was living in a state of adultery, if no harm could come to the child.

Today, by statute,[6] there is no prima facie right to the custody in either parent. In disposing of the custody of minor children, the primary consideration is the welfare and best interest of the children, in point of moral, physical, social and pecuniary well-being.[7] Generally, the welfare of a child of tender years is today considered best served by awarding custody to the mother, where she meets the moral qualifications, and had substantial grounds for leaving her husband.[8] Even when she lacks sufficient grounds for leaving her husband, it is open to her to convince the court that the welfare of the

[1] Shea v. Shea, 286 App. Div. 1112, 146 N. Y. S. 2d 285 (2d Dep't 1955).
[2] Shea v. Shea, 1 N. Y. 2d 660 (1956).
[3] See note 1, *supra*.
[4] People *ex rel.* Nickerson v. ————, 19 Wend. 16 (N.Y. 1837).
[5] Ball v. Ball, 2 Sim. 35, 57 Eng. Rep. 703 (V. C. Ct. 1827).
[6] N. Y. DOM. REL. L. § 70.
[7] People *ex rel.* Pryune v. Walts, 122 N. Y. 238, 25 N. E. 266 (1890).
[8] People *ex rel.* Sternberger v. Sternberger, 12 App. Div. 398, 42 N. Y. Supp. 423 (1st Dep't 1896).

child will best be promoted by placing the child in her custody.[9] Thus, if a mother shows her fitness, she will be awarded the custody of the children of tender years under the policy adopted by the New York courts, even if the husband is equally fit, and the mother is the guilty party in the matrimonial action.[10] While proof of adultery alone may be some evidence of unfitness, it is not of itself conclusive.[11] So concerned are the courts for the welfare of the children, that the court will give little weight to the child's preference for his father, if the child avows equal love for both, where both parents are equally moral, and it is felt that the mother could better supervise and give personal care to the child.[12]

The custody of a child, however, will not be granted to a mother who is morally degenerate.[13] In one case, custody of the children was taken away from the mother and given to the father when it was proven that she was indiscreet, intemperate of speech, infirm of temper, and neglectful; that she kept bad hours and passed much time in association with men whose influence was bad; while the father was able to offer a home in refined surroundings.[14]

In the present case, the wife argued that the determination of the referee was predicated on a punitive basis, and that the evidence was insufficient to justify awarding custody to the husband. The Court of Appeals, however, following the well-established policy of strict solicitude for the welfare of the child, held that the wife had been shown to be unfit on the facts presented, and thus affirmed the award of custody to the husband.

PROCEDURE—ACCUSED ENTITLED TO DISMISSAL OF SIX-YEAR OLD INDICTMENT DESPITE FAILURE TO OBJECT FOR SIX YEARS.—Where a defendant who had been sentenced as a fourth felony offender, one of the previous convictions actually having been for a misdemeanor only, was rearraigned on one of three indictments to which six years earlier he had pleaded not guilty, the Court of Appeals reversed the Appellate Division, Fourth Department,[1] and dismissed the indictment, holding the defendant had been denied the right to a speedy trial.[2]

In 1946 the Grand Jury of Oswego County returned five indictments against the defendant. One of these charged him with burglary in one count and grand larceny in another count, and another indictment charged him with carrying a concealed weapon. Defendant pleaded guilty to the concealed weapon charge and to the larceny count, and in February, 1946, he was sentenced as a fourth felony offender. In 1952 defendant instituted a habeas corpus proceeding on the ground that he was not a fourth felony offender because a previous conviction had been for a misdemeanor only. The defendant was then rearraigned on one of the three indictments to which six years earlier he had pleaded not guilty, and at trial he was convicted upon two counts of burglary

[9] Ullman v. Ullman, 151 App. Div. 419, 135 N. Y. Supp. 1080 (2d Dep't 1912).
[10] Radeff v. Radeff, 272 App. Div. 582, 74 N. Y. S. 2d 749 (4th Dep't 1947).
[11] Matter of Thorne, 240 N. Y. 444, 148 N. E. 630 (1925).
[12] People *ex rel.* Elder v. Elder, 98 App. Div. 244, 90 N. Y. Supp. 703 (2d Dep't 1904).
[13] People *ex rel.* Wright v. Gerow, 136 App. Div. 824, 121 N. Y. Supp. 625 (2d Dep't 1910).
[14] People *ex rel.* Lawson v. Lawson, 111 App. Div. 473, 98 N. Y. Supp. 130 (2d Dep't 1906).

[1] People v. Prosser, 285 App. Div. 997, 138 N. Y. S. 2d 45 (4th Dep't 1955).
[2] 309 N. Y. 353, 130 N. E. 2d 891 (1955).

and grand larceny and sentenced as a prior felony offender. The Appellate Division affirmed the judgment on the ground that the defendant had waived his right to a speedy trial by failing to invoke the remedy set forth in section 668 of the Code of Criminal Procedure. The Court of Appeals condemned the delay, reversed the conviction, and dismissed the indictment.

Section 8 of the New York Code of Criminal Procedure provides that "in a criminal action the defendant is entitled . . . to a speedy and public trial." Section 668 states: "If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown."

In 1884 a New York court held that it was not wise or just, where there are several indictments, to allow years to elapse between the trials in each. "They should all be tried when the witnesses are alive and accessible and when the testimony for both sides is readily to be had."[3] To similar effect is the language in a well-known Wyoming case, which points out that "a long delay may result in the loss of witnesses for the accused as well as the state, and the importance of this consideration is not lessened by the fact that the defendant is serving a sentence in the penitentiary for another crime."[4] By being in prison, the accused is less able on that account to keep posted as to the movements of his witnesses, and their testimony may be lost through his continued confinement. It would seem to be a harsh construction of that clause in the Bill of Rights which guarantees a speedy trial, that would deny application of the clause to those who stand most in need of it.[5]

In defining "speedy trial", New York has held that where the extraordinary term at which an indictment was returned against the defendants remained in session throughout the summer months, and the defendants were not brought to trial as they requested, their constitutional right to a "speedy trial" was violated, "speedy" meaning to make haste, to hurry, to move with celerity.[6]

Sound public policy requires that criminal cases be promptly disposed of,[7] and generally a defendant is entitled to a speedy trial even though he is confined in an institution.[8] Penitentiary prisoners have been held to be entitled to a discharge of indictments which were not tried within the second term of the court.[9] Speedy justice requires prompt action in administering criminal law, governed not by degree or foulness of the crime, but by the accused's rights.[10] What constitutes a speedy trial is not fixed by a statute in days or months: it depends upon the circumstances of each particular case,[11] and it is left to the court to determine whether that important right has been denied to the defendant.[12]

The Federal courts have held that one complaining of delay must affirmatively demand his right to a speedy trial if he wishes to take advantage of the Sixth Amendment.[13] In the instant case, the defendant never raised the objection until his re-

[3] People v. Smith, 2 N. Y. Crim. Rep. 45, 46 (1884).
[4] State v. Keefe, 17 Wyo. 227, 257-259, 98 Pac. 122 (1908).
[5] People v. Corrado, 178 Ark. 841, 12 S. W. 2d 777 (1929).
[6] People v. Harris, 294 N. Y. 424, 63 N. E. 2d 17 (1944).
[7] People v. Paine, 104 N. Y. S. 2d 529 (Steuben Co. Ct. 1951).
[8] People v. Peters, 101 N. Y. S. 2d 755, 198 Misc. 956 (Columbia Co. Ct. 1951).
[9] Fulton v. State, 178 Ark. 841, 12 S. W. 2d 777 (1929).
[10] People v. Becker, 239 N. Y. S. 61, 135 Misc. 471 (Sup. Ct. Cayuga Co. 1930).
[11] Reed v. State, 94 Fla. 32, 113 So. 630 (1927).
[12] People v. Hall, 51 App. Div. 57, 64 N. Y. S. 433 (4th Dep't 1900).
[13] Phillips v. United States, 201 Fed. 259, 262 (8th Cir. 1912); Worthington v. United States, 1 F. 2d 154 (7th Cir. 1924).

arraignment six years later. However, the Court of Appeals noted that although § 668 permits a defendant to move to dismiss the indictment, the Legislature neither by that statute nor by any other provision empowers him to bring the indictment on for trial.[14]

The protections which our system of criminal law accords the criminal defendant are, in the main, procedural. This case is illustrative of the vigilance with which the courts will maintain those protections.

LABOR LAW—EMPLOYEE DISCHARGED FOR FAILURE TO JOIN UNION WITHIN PRESCRIBED TIME HELD TO HAVE QUIT VOLUNTARILY "WITHOUT GOOD CAUSE" WITHIN MEANING OF UNEMPLOYMENT INSURANCE LAW.—The New York Court of Appeals has held that an employee discharged for failure to join a union within the time specified in the employer's collective bargaining agreement with the union, had voluntarily left his employment "without good cause" within the meaning of the New York Unemployment Insurance Law,[1] thereby disqualifying himself from receiving unemployment compensation until the expiration of the prescribed waiting period.[2]

Malaspina worked as an assembly hand from April 30 to June 13, 1953, for the Union Standard Equipment Company, and from October 7 to November 4, 1953, for the National Equipment Corporation, both of which were under common control and were designated as "the Employer" under the collective bargaining agreement with the union. That agreement expressly provided that employees were to join the union within 60 days after they were hired, and that "If any employee . . . fails to become a member of the union . . . or . . . to pay his periodic dues or the initiation fees . . . the Union will give written notice thereof to the Employer; and if within ten days after the receipt of such notice by the Employer, such employee has not joined the Union or paid such dues or initiation fees, he shall be summarily discharged by the Employer." When Malaspina was first employed in April of 1953 he was told of the foregoing requirement, but the actual necessity of union membership did not arise because he quit his job on June 13. Rehired for substantially the same job in the following October, he was told that his earlier 45-day period of employment would count as part of the 60 day period within which he was required to join the union. The union shop steward offered to let him pay the $25 initiation fee in three installments, beginning on the first pay day after termination of the 60 day period, but Malaspina failed to do so, alleging financial inability. The employer, after notification, discharged him at the union's request on November 4, 1953.

Malaspina then filed a claim for unemployment benefits as of November 4, 1953, under the Unemployment Insurance Law,[3] but the Industrial Commissioner made an initial determination that Malaspina had voluntarily left his employment "without good cause" within the meaning of § 593,[4] and that he was, therefore, ineligible for benefits for a 42-day period following his discharge. At a subsequent hearing, requested by the claimant, a referee overruled the Commissioner's determination, holding that

[14] *Cf.* CIV. PRAC. ACT §§ 181, 433.

[1] Article 18 of the N. Y. LABOR LAW (§ 500 to § 640) is officially known as the Unemployment Insurance Law. § 593 provides: *"Disqualification for benefits.* 1. Voluntary separation. In the case of any claimant who leaves his employment voluntarily,... (c) if such separation was without good cause, no benefits shall be payable to such claimant . . . until forty-two consecutive days shall have elapsed after his registration for benefits subsequent to such voluntary leaving . . . ."

[2] Matter of Malaspina, 309 N. Y. 413, 131 N. E. 2d 709 (1956).

[3] See note 1, *supra.*

[4] *Id.*

there was no voluntary leaving of employment under those conditions. This decision by the referee was affirmed by the Appeal Board, which relied on *Matter of Baida* [*Corsi*].[5] In that case, an immediate discharge, caused by the employee's advance notice of quitting, had been held an involuntary separation.

The Industrial Commissioner brought the Appeal Board's ruling before the Appellate Division, Third Department, for review. That Court unanimously reversed the Board,[6] distinguishing the *Baida* ruling as applicable only to its special circumstances and stating that "under the realities of the present day industrial scene", Malaspina's failure to comply with the union requirement was quite as " 'voluntary' an act as most choices and amounted to an election by the employee not to meet a condition of the work," language which the Court of Appeals quoted with approval.

The Court of Appeals in a unanimous opinion agreed that Malaspina's action was voluntary, holding that the condition was not "beyond the reasonable reach of the employee". The court did not distinguish willful refusal from failure because of financial inability, as urged by the claimant, but cited with approval similar reasoning by New Jersey's Supreme Court in *Campbell Soup Co. v. Board of Review*.[7] In the *Campbell Soup* case the New Jersey Court, while holding that resignations forced at age 65 under union contract provisions were involuntary, based the test on whether the decision to go or to stay at the time lay with the worker alone. The Court of Appeals pointed out that if a contrary result had been reached in Malaspina's case, "the collective bargaining provision insisting upon union membership as a prerequisite to employment would be considerably diluted, if not destroyed." The British rule that "in refusing to pay dues the employee 'loses his employment by his own choice' ",[8] therefore appears to have been expessly adopted in New York.

Whether Malaspina's two separate periods of work constituted one employment for purposes of computing the 60-day period within which he was required to join the union, was deemed by the Court of Appeals to be a point which "warrants mention". The Court reviewed both the evidence and the legislative history of the statute, and concluded that the similar character of the two employment periods satisfied the legislative intention to give an employee sufficient opportunity to determine whether he liked the work well enough to go to the expense of joining the union. The Commissioner, the referee, the Appeal Board and the Appellate Division had previously reached the same conclusion.

PERSONAL PROPERTY—PLEDGOR WHO WAIVES RIGHT TO NOTICE AND ADVERTISEMENT OF SALE ON DEFAULT HELD NOT TO RELEASE PLEDGEE FROM REQUIREMENT OF GOOD FAITH.—In a decision reversing judgments below, the New York Court of Appeals has held that a pledgee's published notice of the sale of pledged stocks at public auction must set forth an *adequate* description of the stocks to be sold, in order that the sale be in good faith. Such a description was held necessary notwithstanding a covenant by which the pledgor authorized the pledgee to sell and to repurchase all or part of the stocks upon default, at public or private sale, without demand, notice or advertisement. This covenant was held to waive only the statutory requirement of advertisement, but did not dispense with the equity requirement of "good faith".[1]

[5] 282 App. Div. 975, 125 N. Y. S. 2d 514 (3rd Dep't 1953).
[6] 285 App. Div. 564, 139 N. Y. S. 2d 521 (3rd Dep't 1955).
[7] Campbell Soup Co. v. Board of Review, 13 N. J. 431, 100 A. 2d. 287 (1953).
[8] See note 6, *supra*.

[1] Matter of Kiamie, 309 N. Y. 325, 130 N. E. 2d 745 (1955).

Najeeb Kiamie had negotiated with the Colonial Trust Company a renewal note for $26,000. This sum represented the unpaid balance of much larger previous loans. The security for the renewal note was the same as was already held by the Trust Company for the previous notes. Part of this security were the stocks which were the subject of this discovery proceeding.

The stocks represented the entire capital stock of four corporations owned by Kiamie and his family. A covenant[2] in the renewal note gave the Trust Company the right to sell and repurchase, upon default, at public or private sale without any notice, demand, or advertisement.

After the execution of the note, the financial condition of Kiamie and his family grew steadily worse. There was a default on the note, and shortly thereafter Kiamie died. The Trust Company notified his family and his attorney that the stocks were to be sold at public auction. Notice of sale was published in the New York morning papers for two consecutive days prior to the auction, and the collateral stocks were listed in the auctioneer's printed catalog as follows:

"5 shs. Sherman Investing Corp. (N. Y.)
3 shs. Kiamie Holding Corp. (N. Y.)
3 shs. Haviland Holding Corp. (N. Y.)
100 shs. La Dana Holding Corp. (N. Y.)"

At the auction the stocks were struck down in one lot to the Trust Company for $5,000. No one representing the Kiamie family was present at the auction. Subsequently, the estate brought a discovery proceeding.

It is a well-settled rule in New York[3] that a pledgee may sell pledged property and repurchase the same[4] at public or private sale, without any demand, notice or, advertisement as required by statute,[5] provided the parties have entered into a covenant waiving these rights of the pledgor. The appellate courts have held that, notwithstanding any waiver of the statutory obligations of the pledgee, equity assigns to the pledgor and pledgee a trust relationship with resulting obligations on the pledgee to act in good faith and to do nothing to impair the value of the pledge.[6] One of these requirements is "to use every effort to sell the estate under every possible advantage of time, place and publicity."[7] In defining the requirements of a pledgee's advertisement of the sale of stock, the courts have held that the advertisement must be such as to "alert investors and invite competition."[8]

In *Toplitz v. Bauer*[9] it was held that "the contract of bailment, whereby personal

[2] *Id.* at 329, 130 N. E. 2d 745, 747: "Upon non-payment of this note . . . the Trust Company shall have the right to sell, assign and deliver the whole or any part of the property hereinabove specifically described . . . at any time or times either at the New York Stock Exchange or at any other Exchange or at any broker's board, or at public or private sale, either for cash or on credit or future delivery, without demand, advertisement or notice, which are hereby waived. . . . Upon any sale as aforesaid, the Trust Company may purchase and hold the whole or any part of the property sold, free from any claim or right of redemption of the undersigned, which is hereby waived and released."

[3] Fullerton v. Northern Bank of New York, 184 App. Div. 37, 171 N. Y. Supp. 574 (1st Dep't 1918).

[4] General Phoenix Corp. v. Cabot, 300 N. Y. 87, 89 N. E. 2d 238 (1949).

[5] N. Y. LIEN L. §§ 200-202.

[6] Toplitz v. Bauer, 161 N. Y. 325, 55 N. E. 1059 (1900).

[7] Cole v. Manufacturers Trust Co., 164 Misc. 741, 747, 299 N. Y. S. 418 (Sup. Ct. Kings Co. 1937).

[8] Dyker v. Allen, 7 Hill 499 (N. Y. 1844).

[9] See note 6, *supra*.

property is deposited or pledged as security for a debt, creates duties and relations peculiar to itself. These duties and relations are governed more by the general maxims of equity than by the strict rules of the common law." Advertisement of sale must be included among the duties, and thus its adequacy governed by the general maxims of equity.

The Court of Appeals in the instant case[10] took the position that due to the large number of business corporations chartered in New York today, and the fact that the stocks sold were of unlisted and relatively unknown corporations, the listing of these names was meaningless, and therefore the published notice of sale "was so defective in its description of the property that the sale itself was entirely void. . . . No information whatever was given the reading public as to what, if anything, those shares represented. . . . If these had been listed or otherwise well-known stocks, the description might have furnished a sufficient clue."

The Court of Appeals in this decision has upheld the pledgor's right not only to waive by contract the statutory requirements of notice, but also to give the pledgee the right to purchase the security after default. It reiterated, however, that this waiver left intact the law's own requirements that every such sale be conducted in "good faith."[11] The Court of Appeals has taken the position that in a published notice of sale a description of stocks, unlisted and not well-known, which consists only of the number of shares, names of corporations and the fact that they are New York corporations, was not sufficient to prove this "good faith", rendering the sale void.

Other jurisdictions, when faced with the problem of the adequacy of published notices of sale under like circumstances, have taken a similar view.[12] This decision appears to put New York in line with the majority of jurisdictions on this matter.

CRIMINAL PROCEDURE—ACCUSED MAY TEST VALIDITY OF CONCURRENT SENTENCING BY HABEAS CORPUS—MULTIPLE SENTENCING, THOUGH CONCURRENT, HELD INVALID.—The Appellate Division, Third Department, recently determined that § 1938 of the New York Penal Law, which provides that "an act . . . which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one . . . ", applies to the case of a prisoner concurrently sentenced for separate crimes arising out of the same act.[1]

The relator was sentenced in 1951 in Nassau County Court for several offenses: attempted robbery, first degree (fifteen to thirty years); assault, first degree (ten to twenty years); carrying a loaded pistol concealed on the person (seven to fourteen years); and an additional sentence of ten to fifteen years was imposed for being armed while the foregoing crimes were committed.[2] The first three sentences were directed to

[10] See note 1, *supra.*

[11] General Phoenix Corp. v. Cabot, 300 N. Y. 87, 94, 89 N. E. 2d 238 (1949); Industrial & General Trust, Ltd. v. Tod, 180 N. Y. 215, 225, 226, 73 N. E. 7, 9 (1904).

[12] Eppert v. Lowish, 91 Ind. App. 231, 168 N. E. 616 (1929); Newman v. Jackson, 25 U. S. 570, 6 L. Ed. 732 (1827); Union and Mercantile Trust Co. v. Harnell, 158 Ark. 295, 250 S. W. 321 (1923).

[1] People *ex rel.* Maurer v. Jackson, 1 App. Div. 2d 140, 149 N. Y. S. 2d 246 (3d Dep't 1956).

[2] N. Y. PENAL L. § 1944: ". . . [I]f any person while in the commission or attempted commission of either of such acts (committing or attempting to commit a felony or crime) or in leaving the scene of the crime, shall be armed with a pistol . . . the punishment elsewhere prescribed in this law for the felony of which he is convicted may be increased by imprisonment in state's prison for not less than five nor for more than ten years."

run concurrently; the last at the conclusion of the others. The Supreme Court at Special Term dismissed a writ of habeas corpus.

The Appellate Division, in reversing the order and remanding the relator for resentence, held that the prisoner had sufficient interest in the duplicated charges to test their validity by habeas corpus proceedings, and that such a concurrent sentence was not in accordance with the provisions of § 1938.

It appears that only New York[3] and California[4] have statutory provisions which specifically provide that a criminal act "punishable in different ways" may not be punished "under more than one."

Most other states have only constitutional and/or statutory provisions against double jeopardy but not expressly against double punishment. However, these jurisdictions treat double punishment as a violation of the prohibition against double jeopardy. "The constitutional principle that no one shall be put in jeopardy twice for the same offence . . . , is broad enough to mean that no one can lawfully be punished twice for the same offense; the one follows from the other, and the constitutional provisions are designed to protect accused from a double punishment as much as to protect him from two trials."[5]

When, then, are consecutive or concurrent sentences permissible? An answer to this question involves some consideration of "included" and "separate" crimes. It would seem that under any statutory regime or under the common law, cumulative sentences could be imposed for convictions of separate crimes. However, the term "separate" when considered under the common law, meant entirely separate actions under separate indictments since, under common law rules of pleading, several crimes, even though arising out of the same act, could not be included in one indictment. However, New York provides a means[6] for inclusion in one indictment of separate counts for "two or more acts or transactions constituting crimes of the same or similar character" and separate crimes "constituting parts of a common scheme or plan."

The test for determining whether crimes are separate or included is a factual one. An included crime may be said to be one which must necessarily be accomplished in the commission of another; thus, there can be no crime of robbery without the "included" crimes of assault and larceny. Similarly, in murder, there must first be an assault; add to the assault the element of battery and it becomes an assault and battery; add the element of the death of the victim and it becomes manslaughter; add the element of intent to kill and it becomes murder. A separate crime, on the other hand, is one which need not necessarily be accomplished in the commission of another. Thus, there may be a robbery without a kidnapping or a kidnapping without a robbery.[7]

These considerations would seem most pressing where a conviction for included crimes results in two or more consecutive sentences. So, in *People* ex rel. *Thornwell* v. *Heacox*,[8] where the defendant was convicted of attempted robbery, attempted grand

[3] N. Y. PENAL L. § 1938.

[4] CALIF. PENAL CODE § 654: "An act . . . which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act . . . under any other. . . ."

[5] 24 C. J. S. § 1990.

[6] N. Y. CODE CRIM. PROC. § 279.

[7] See the exhaustive discussion by Sobel, J., in People v. Savarese, 1 Misc. 2d 305 (Kings Co. Ct. 1956).

[8] 231 App. Div. 617, 247 N. Y. Supp. 464 (4th Dep't 1931). *Accord:* Matter of Zovick v. Eaton, 259 App. Div. 585, 20 N. Y. S. 2d 447 (3d Dep't 1940); People v. Edwards, 173 App. Div. 375, 159 N. Y. Supp. 410 (2d Dep't 1916).

larceny, and assault (included crimes) and given consecutive sentences on each, the court said, "The court exceeded its powers in sentencing relator as it did. It could only pass judgment on the count in the indictment which charged the highest grade of offense."

It is apparent that in the case of consecutive sentences which are statutorily invalid, an immediate and vital interest of the prisoner is at stake, namely, whether his sentence may be arbitrarily increased by the addition of crimes each carrying a penalty of imprisonment. Where concurrent sentences are ordered for included crimes, the interests of the prisoner are more indirect, since affirmation or reversal of the subordinate sentence cannot affect his over-all term in jail. However, as the court here pointed out, such distinctions may well become relevant in computation of felonies leading to more severe punishment.

California's Code provision[9] is, except for minor dissimilarities of language, the same as that of New York. Under it, concurrent sentencing for robbery and kidnapping was held to be invalid and, on appeal, a judgment for robbery was reversed while the conviction for kidnapping was affirmed.[10]

On the other hand, the federal courts have adopted a line of reasoning stemming directly from the common law. This view found expression in a case[11] involving an action of slander, where the plaintiff in error (the defendant below) attacked two counts of a declaration as insufficient in law, and prayed for a reversal of a judgment on that ground. Lord Mansfield, in affirming the judgment, stated that, while in civil cases where a verdict is taken generally and any one count is bad it vitiates the whole, he preferred the criminal concept "that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad."[12]

In New York, however, the rule has been established that, where concurrent sentences have resulted from "included" crimes, a remedy lies. The instant case would seem to follow *People* v. *Daghita,*[13] where the defendant was convicted of grand larceny and the crime of criminally concealing and withholding stolen property, both counts being predicated upon the same act. The Court of Appeals reversed the conviction on the latter count, holding that while a defendant may be indicted on both counts, the jury must determine whether he is guilty, as a thief, of the larceny or, as a non-thief, of the concealing and withholding, and sentence must be given accordingly. Also in point is *People* v. *Riforgiato,*[14] where the prisoner was convicted on two counts of robbery, and sentence was imposed on the first count and "a like sentence" on the second count. The judgment was amended by striking out the second sentence, the court noting that "separate sentences should not have been imposed."

The Appellate Division thus has reiterated the rule that the controlling statute[15] enables an accused who is improperly given concurrent sentences arising out of "included" crimes to obtain resentencing so as to punish only the highest crime for which the indictment was returned.

[9] CALIF. PENAL CODE § 654.

[10] People v. Knowles, 35 Cal. 2d 175, 217 P. 2d 1 (1950).

[11] Peake v. Oldham, 1 Cowp. 275; cited in Claasen v. United States, 142 U. S. 140, 12 S. Ct. 169, 35 L. Ed. 966 (1891).

[12] *Accord:* Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699 (1924).

[13] 301 N. Y. 223, 93 N. E. 2d 649 (1950).

[14] 281 App. Div. 1067, 122 N. Y. S. 2d 197 (4th Dep't 1953).

[15] See note 3, *supra.*

DOMESTIC RELATIONS—HUSBAND'S FALSE REPRESENTATIONS OF LAW BEFORE MARRIAGE CONCERNING WIFE'S LEGAL DISABILITY HELD NOT TO BE FRAUD.—The Appellate Division, Second Department, recently held that a husband's false pre-marital representations of law to his wife, to the effect that her legal disability as a divorcee would not bar their marriage, did not warrant an award of damages to her for fraud, in the absence of a strict fiduciary relationship or a prior formal engagement, and in view of the fact that she was charged with knowledge of her own status.[1]

The wife's former husband had obtained a decree of divorce in New York, for her adultery. By statutory prohibition, the wife could not contract a valid marriage in New York, without prior modification by the court of the decree of divorce.[2] Before her marriage with Pluchino, in New York, she disclosed the facts and circumstances of the divorce to him, then believing herself to be under a legal disability to contract a valid marriage with Pluchino in New York, without a modification of the decree. Pluchino told her that it was not necessary to obtain such a modification. He advised her that she was legally capable of contracting a valid marriage with him, and that he had submitted the facts with reference to the divorce to his lawyer, and had been so advised.

Subsequently, the husband sued to annul the marriage, and the wife counterclaimed for damages for fraud. The trial court dismissed the counter-claim, and the Appellate Division affirmed the dismissal, on the ground that there had been no strict fiduciary relationship between Pluchino and the wife, prior to the marriage, and that she had at the time been charged with knowledge of the terms of her decree.[3]

The court likened the right to bring the present action to the right to bring an action for breach of promise to marry. Although the action for breach of contract to marry was outlawed in New York in 1935 by § 61 of the Civil Practice Act, it had been held even before that an action for breach of promise to marry would not lie, where the parties, knowing of the disability, contracted to marry in another judisdiction.[4] A person under a disability to marry, because of an adultery decree, cannot enter into a valid contract to marry, without first obtaining reformation of that decree,[5] and if such person nevertheless proceeds to enter into such a contract, the contract is void in all respects.[6]

The court said that if the evidence showed that there was some fiduciary relationship present before the marriage, or that the parties were formally engaged, the alleged misrepresentations might have made Pluchino liable for the fraud. Due to the closeness of the engagement relationship, it would have been incumbent upon him to reveal the truth in reference to their ability to marry.[7] Absent this confidential relationship, a fraud action cannot be founded upon a misrepresentation of law or legal effect, in a personal transaction.[8]

Moreover, the court completely discounted the wife's reliance on Pluchino's rep-

[1] Pluchino v. Pluchino, 1 App. Div. 2d 831, 148 N. Y. S. 2d 508 (2d Dep't 1956).

[2] N. Y. DOM. REL. L., § 8: "But a defendant for whose adultery the judgment of divorce has been granted in this state may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered, shall in that respect modify such judgment. . . ."

[3] See note 1, *supra*.

[4] Kastner v. Stein, 130 Misc. 840, 225 N. Y. Supp. 442 (Sup. Ct. N. Y. Co. 1927).

[5] Haviland v. Halstead, 34 N. Y. 643 (1866).

[6] Price v. Price, 75 N. Y. 244 (1878).

[7] Benintendi v. Benintendi, 298 N. Y. 848, 48 N. E. 2d 60 (1948).

[8] Lefferts v. Lefferts, 243 App. Div. 278, 276 N. Y. Supp. 809 (1st Dep't 1935).

resentations. One to whom false representations are made may not rely thereon, if such person has means available to him of knowing, by the exercise of ordinary intelligence, the truth or real quality of the representations.[9] In the present case, the wife was notified by her decree that she was under a disability, and therefore as a matter of law could not rely on Pluchino's statements. Although the court talked of a possible fraud action if there were a confidential relationship or prior formal engagement, charging her with notice of this disability would seem to cancel any reliance, which would be a requisite to the fraud action.

AGENCY—GENERAL CONTRACTOR NOT LIABLE FOR INJURY TO SUBCONTRACTOR'S EMPLOYEE WITHOUT ACTUAL NEGLIGENCE—STATUTORY DUTY TO MAINTAIN SAFE "PLACE OF WORK" HELD DECLARATORY OF COMMON-LAW RULE.—The Court of Appeals of New York, affirming[1] a judgment of the Appellate Division, First Department,[2] which had reversed the trial court, recently held that in the absence of evidence that a general contractor itself placed a faulty plank upon a scaffold built by its subcontractor, the general contractor could not be held liable for injuries sustained by the subcontractor's employee, because the scaffold did not constitute a "place of work" within the meaning of the Labor Law.[3]

Butler was employed by the Aetna Fireproofing Company Inc., a subcontractor for defendant D. M. W. Contracting Company Inc., a general contractor engaged in the erection of a building. The subcontractor, Aetna, had erected a hanging scaffold which had a frame for working planks. A plank which Butler used, while engaged in his work as a concrete stripper, broke because it was defective, and the plaintiff fell and suffered serious injury. There was no evidence that the general contractor constructed or supplied the plank or assumed control over the scaffold, or that its employees were present at the scene.

The workman brought an action for negligence, contending that section 200 of the Labor Law[4] had broadened the scope of liability of the general contractor. (He avoided basing his cause of action on section 240, because in a prior case of *Iacono v. Frank and Frank Contracting Co. Inc.*[5] brought under section 240 upon facts similar to the present case, the Court of Appeals had held that the general contractor and owner were not liable to the subcontractor's employees.[6])

Under common law rules the general contractor owes to employees of the subcontractor a duty to exercise reasonable care to make safe the places he provides for them.[7] A general contractor, however, is not liable for a place of work furnished by the subcontractor, unless the general contractor assumes control of the operation

[9] Sylvester v. Bernstein, 283 App. Div. 333, 127 N. Y. S. 2d 746 (1st Dep't 1954).

[1] Butler v. D. M. W. Contracting Co., Inc., 309 N. Y. 990 (1956).

[2] 286 App. Div. 826, 143 N. Y. S. 2d 24 (1st Dep't 1955).

[3] N. Y. LABOR L. § 200: "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The Board shall make rules to carry into effect the provisions of this Section."

[4] *Ibid.*

[5] 259 N. Y. 377, 182 N. E. 23 (1932).

[6] Transcript of Record p. 137, Butler v. D. M. W. Contracting Co., Inc., 309 N. Y. 990 (1956).

[7] Coughty v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387 (1874); Mautsewich v. United States Gypsum Co., 217 N. Y. 593, 112 N. E. 471 (1916).

or provides the place of work.[8] While an employer is under the duty at common law of exercising due care in respect to his plant or the appliance he furnishes, he is under no duty with respect to appliances supplied by a contractor improving the plant.[9]

The cases decided since enactment of the Labor Law indicate a consistent application of the statute as declaratory of the common law,[10] although it is well established that violation of the statute is at least some evidence of negligence.[11] Thus it has been held that Section 200 of the Labor Law is merely declaratory of the common law and does not impose absolute liability on an employer, and is ineffective to impose on the employer any liability for injuries resulting from dangers which he could not discover with the exercise of due diligence.[12]

Regarding the liability of a general contractor or owner to the employee of a subcontractor, general common law rules are still valid under the statutory causes of action.[13] The instant case[14] indicates that the courts apparently regard the statute as merely declaratory of the common law,[15] and will not impose liability on the general contractor for personal injuries to an employee of a subcontractor in the absence of evidence that the general contractor supplied, constructed, or assumed control of, the defective appliance.

CRIMINAL LAW—CONVICTION FOR VAGRANCY, BASED ON FEMALE'S UNCORROBORATED TESTIMONY THAT DEFENDANT INDUCED HER TO COMMIT SEXUAL ACTS IN HIS HOME, REVERSED.—The Court of Appeals of New York has recently held that subdivision 4 of the vagrancy statute[1] was not directed against a man who induced a woman to have sexual relations with him, but rather against general prostitution and pandering, and par-

[8] Hess v. Bernheimer and Schwartz Brewing Co., 219 N. Y. 415, 418, 114 N. E. 808, 809 (1916); Iacono v. Frank and Frank Contracting Co. Inc., 259 N. Y. 377, 182 N. E. 23 (1932); De Lee v. T. J. Pardy Construction Co., 249 N. Y. 103, 162 N. E. 599 (1928); Quigley v. Thatcher, 207 N. Y. 66, 100 N. E. 596 (1912).

[9] Hess v. Bernheimer and Schwartz Brewing Co., 219 N .Y. 415, 419, 114 N. E. at 809 (1916); Semanchuch v. Fifth Avenue and Thirty-seventh Street Corp., 264 App. Div. 329, 333, 35 N. Y. S. 2d 305, 309 (1st Dep't 1942); *appeal denied,* 289 N. Y. 635, 44 N. E. 2d 507 (1943); Casperson v. La Sala Bros., 253 N. Y. 491, 494, 171 N. E. 754, 755 (1930); Hutson v. Dobson, 138 App. Div. 810, 123 N. Y. Supp. 892 (1st Dep't 1910); Fuller v. Mulcahy and Gibson, 164 App. Div. 829, 150 N. Y. S. 164 (1st Dep't 1914).

[10] Ross v. Delaware R. R. Co., 231 N. Y. 335, 132 N. E. 108 (1921); Jeffrey v. Miller, 222 N. Y. 135, 118 N. E. 522 (1917); Anderson v. Milliken, 194 N. Y. 521, 87 N. E. 1114 (1908); M. H. Treadwell Co. Inc. v. United States Fidelity & Guaranty Co., 249 App. Div. 809, 293 N. Y. Supp. 928 (1st Dep't 1937), *rev'd on other grounds,* 275 N. Y. 158, 9 N. E. 2d 818 (1937).

[11] Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572 (1903); Schumer v. Caplin, 241 N. Y. 346, 150 N. E. 139 (1925); Weisthal v. Arena Building Corp., 232 App. Div. 694, 247 N. Y. Supp. 576 (2d Dep't 1931).

[12] Dittiger v. Isal Realty Corp., 246 App. Div. 279, 281, 35 N. Y. S. 2d 311, 312 (1st Dep't 1942); *rev'd on other grounds,* 290 N. Y. Supp. 492, 49 N. E. 2d 980 (1943).

[13] See note 5, *supra;* Risso v. Murry, 256 App. Div. 956, 10 N. Y. S. 2d 92 (2d Dep't 1939); Wholfron v. Brooklyn Edison Co. Inc., 238 App. Div. 463, 265 N. Y. Supp. 18 (2d Dep't 1933), *aff'd* 263 N. Y. 547, 189 N. E. 691 (1933).

[14] See note 1, *supra.*

[15] See note 12, *supra.*

[1] N. Y. CODE CRIM. PROC. § 887.

ticularly that paragraph (d) of subdivision 4 was directed at the organizer or instigator who enlists pimps and prostitutes.[2]

The information was laid under the vagrancy statute and included the charge that the defendant had induced the complainant to commit sexual acts with him in his home. The City Court of Buffalo found the defendant guilty as charged upon the uncorroborated testimony of the complainant. She testified that she was over twenty years of age, that she had been defendant's housekeeper for about a month, and that she was a willing participant in the acts, at least for the first few times. She further testified that she became "afraid of him" but did not leave because he had not told her she "could quit the job any time."

The Supreme Court, Erie County, assumed the complainant was "apparently a willing participant" in the acts and "an accomplice." Nevertheless, the court affirmed the conviction.

The Court of Appeals, reversing the judgment and dismissing the information,[3] held that subdivision 4 of the vagrancy statute was aimed at general prostitution and pandering but not at the acts which the defendant may have committed. The court also held that the uncorroborated testimony of the female complainant could not sustain the conviction.

At common law, a person was deemed a "vagrant" who went about from place to place without visible means of support, was idle, and, although able to work for his maintenance, refused to do so, and lived without labor or on the charity of others.[4] Subdivision 4(d) of the vagrancy statute,[5] however, defines a vagrant as "a person who in any manner induces, entices or procures a person who is in any thoroughfare or public or private place to commit such acts."

To determine the meaning of this paragraph and more particularly of "such acts," the court looked to the whole of subdivision 4 and noted that the other paragraphs were aimed at persons who offer to commit prostitution, persons who offer to secure others for prostitution, loitering pimps and prostitutes, keepers of houses of prostitution, common prostitutes without lawful employment, and persons who aid or abet any of these.[6]

The court said here, as it had in *People* v. *Gould*,[7] that subdivision 4 condemns various aspects and incidents of pandering and prostitution, but that the section could not sustain the conviction of the participants in *all* private acts of lewdness. In the *Gould* case, the defendant was tried under 4(f) for suggesting to a woman of good character that she become a prostitute under his management. The woman did not accept nor did he have any women working for him at the time. The Court of Appeals, in reversing the conviction, had held that while subdivision 4 condemned various aspects and incidents of pandering and prostitution, it did not apply to the defendant who had not as yet committed any act of pandering.

In *People* v. *Anonymous*,[8] the Court of Appeals held that subdivision 4 did not apply to a male customer of a prostitute. "It has been held in a long line of cases that those who violate clause (f) of the subdivision are those who assist or take part in the act of offering to procure persons for prostitution or lewd and indecent

[2] People v. Moss, 309 N. Y. 429, 131 N. E. 2d 717 (1956).
[3] *Id.* at 433, 131 N. E. 2d 717, 719.
[4] People v. Banwer, 22 N. Y. S. 2d 566, 569 (Mag. Ct. N. Y. 1940).
[5] See note 1, *supra*.
[6] N. Y. CODE CRIM. PROC. § 887, subd. 4, para. (a)-(g).
[7] 306 N. Y. 352, 118 N. E. 2d 553 (1954).
[8] 202 Misc. 569, 114 N. Y. S. 2d 248 (Spec. Sess. App. Pt. 2d Dep't 1952), *aff'd*, 304 N. Y. 927, 110 N. E. 2d 742 (1953).

acts. Not the male customer."[9] The court further noted that another section of the code of criminal procedure[10] permitted testimony concerning reputation of places and persons in support of a charge under subdivision 4 of the vagrancy statute, giving rise to an inference that the legislature regarded subdivision 4 as a general prostitution statute.

In *People* ex rel. *Stolofsky* v. *Superintendent*,[11] the court was faced with the problem of deciding whether subdivision 4 of the vagrancy statute was criminal in nature. The relator had been convicted of violating this statute, and as a result had been placed in a state institution. The statute pursuant to which he was placed in the institution[12] required a conviction for a criminal offense. The court held that a violation of the vagrancy statute was criminal in nature, notwithstanding the fact that the code of criminal procedure made a violation of this statute a public offense rather than a crime under the Penal Law:[13] a conviction results in a penal judgment and the execution proceedings are essentially as punitive as any sentence imposed for crime.

In considering the quality of the testimony in the instant case, which was given solely by the complainant, the court noted that a conviction for most sexual crimes set forth in the Penal Law may not be had upon the uncorroborated testimony of the party defiled.[14] In view of the conclusion that the vagrancy statute was not aimed at the acts charged, and that it was criminal in nature, the court refused to uphold the conviction based on the uncorroborated testimony of the accomplice. In dismissing the charge, the court concluded that "if the legislature chooses to make the misconduct complained of here—where the sole evidence of privately committed acts is the testimony of an accomplice—a public offense or a crime, under whatever name, it should do so expressly."[15]

[9] *Id.* at 570, 114 N. Y. S. 2d 248, 249.

[10] N. Y. CODE CRIM. PROC. § 889 (a).

[11] 259 N. Y. 115, 118, 119, 181 N. E. 68, 69 (1932).

[12] N. Y. CORRECTION L. § 438.

[13] N. Y. PEN. L. § 2. See also CODE CRIM. PROC. § 2.

[14] Rape (N. Y. PEN. L. § 2013), Seduction (PEN. L. §§ 2175, 2177), Adultery (PEN. L. §§ 100, 103), Sodomy (PEN. L. §§ 690, 691). See also PEN. L. § 2460, subd. 9, which requires corroboration of the female's testimony to support a conviction for compulsory prostitution, and CODE CRIM. PROC. § 399 which precludes a conviction on the uncorroborated testimony of an accomplice.

[15] See note 2, *supra* at 433, 131 N. E. 2d 717, 719.