NEW YORK LAW SCHOOL

NYLS Law Review

Volume 3 | Issue 1 Article 7

January 1957

Constitutional Law - STATUTE PROHIBITING SALE OF EVAPORATED SKIMMED MILK IN OTHER THAN TEN POUND CONTAINERS HELD ARBITRARY AND NOT A VAiD EXERCISE OF POLICE POWER / Criminal Law - IMPROPER AND PREJUDICIAL CONDUCT OF THE PROSECUTOR WHICH REMAINED UNADMONISHED BY THE PRESIDING JUSTICE COUPLED WITH AN UNNECESSARY DELAY IN ARRAIGNMENT HELD TO CONSTITUTE REVERSIBLE ERROR DESPITE OVERWHELMING PROOF OF GUILT

DECISIONS

CONSTITUTIONAL LAW—STATUTE PROHIBITING SALE OF EVAPORATED SKIMMED MILK IN OTHER THAN TEN POUND CONTAINERS HELD ARBITRARY AND NOT A VALID EXERCISE OF POLICE POWER.—The New York Court of Appeals, affirming the Appellate Division, Third Department, recently held[1] that a section of the Agriculture and Markets Law[2] which prohibited the sale of evaporated skimmed milk "except that it be in containers or packages of ten pounds avoirdupois or more"[3] was unconstitutional.

The plaintiff, a milk distributor, brought an action in the Supreme Court[4] for a declaratory judgment declaring so much of that section[5] as prohibits the sale of evaporated skimmed milk in less than ten pound containers, as unconstitutional, invalid, and void, on the grounds that it is arbitrary, capricious, and unreasonable.

The plaintiff is a foreign corporation engaged in the manufacture, sale, and distribution of evaporated skimmed milk throughout the United States, both at retail and wholesale and in packages of less than ten pounds net weight and mainly in containers of 14½ ounces.

In 1951 the plaintiff commenced the selling of its product in New York in the 14½ ounce containers, but was thereafter informed that such sale was in violation of the statute. Thereupon, the plaintiff discontinued the sale, and instituted this action.[6]

Plaintiff asserted that the statute was unconstitutional in so far as it arbitrarily limited the size of the containers. The Agriculture and Markets Commissioner defended the constitutionality on the grounds that the statute tended to promote public health, morals, safety, and welfare of the people, to protect the people from fraud and deceit, and was therefore a valid exercise of police power of the state. The official referee of the New York Supreme Court held that where the validity of a legislative act was challenged, it was the duty of the court to determine the constitutionality, and where police powers were attacked as an invasion of rights and liberties guaranteed by fundamental law, it was the duty of the court to determine whether exercise of such power was necessary for the public good. The referee found that since it was undisputed that plaintiff's product was a healthful, wholesome article of food, sale thereof could not be prevented on the ground that it was injurious to public health. The referee also found that there was no proof in the record to sustain a charge of fraud or deception. The markings as to contents on the 14½ ounce containers were precisely the same as on the ten pound package, that no one would be deceived, that therefore plaintiff's product could not be banned on the grounds of protecting the people from fraud and deceit. While the constitutionaliy of police powers was presumed, it was a rebuttable presumption. The court found that the plaintiff had successfully rebutted the presumption, and awarded judgment for the plaintiff. The Appellate Division affirmed by a divided court,[7] and held that the plaintiffs had met the burden of showing that the prohibition against its product was arbitrary.

The Court of Appeals affirmed by a divided court[8] and held in answer to appel-

[1] Defiance Milk Products Co. v. C. Chester Dumond, as Commissioner of Agriculture and Markets, State of New York, 309 N. Y. 537, 132 N. E. 2d 829 (1956).

[2] New York State Agricultural and Markets Law 1922, c. 48.

[3] Section 64, § 2, L. 1922, c. 48.

[4] 205 Misc. 813, 133 N. Y. S. 2d 216 (Sup. Ct. Albany Co. 1954).

[5] See note 3 *supra.*

[6] See note 4 *supra.*

[7] 285 App. Div. 337, 136 N. Y. S. 2d 619 (3d Dep't 1954).

[8] See note 1 *supra.*

lant's assertion, that the plaintiff had failed to carry the burden of proof, that plaintiff showed all that it had to show. There existed no reasonable grounds for an absolute ban on evaporated skimmed milk.

It was noted that both parties had based their arguments on conflicting interpretations of the United States Supreme Court opinion in the two *Carolene Products* cases.[9] The Court of Appeals distinguished the *Carolene* cases from the case at bar in that the Carolene product was filled milk and that the shipment of filled milk was forbidden by a federal law.[10] The Congress enacted this legislation because "filled milk" was frequently confused by customers with ordinary condensed milk, and dealers compounded the confusion by representing the product as condensed milk and charged the same price for it as for condensed milk. The constitutionality of the federal statute was upheld on the grounds that widespread confusion, deception and lack of understanding had caused the public to be deceived.[11]

The passage of Section 64, Subdivision 2, a part of the Farms and Markets Law of 1922, indicated that the New York Legislature intended to prevent the sale of evaporated filled milk in containers similar to those used in evaporated condensed milk. Throughout the United States many laws were passed which imposed regulations upon those who dealt with farmers, and the disposal of farm products. As long as the limits of police power or of express constitutional provisions were not exceeded, such regulations were held valid. In *St. Louis* v. *Schneer*[12] the Missouri court sustained a conviction under an ordinance forbidding the sale of milk containing any foreign matter; an Iowa court held adulteration of milk was in violation of its statute,[13] even on the assumption that the adulteration had no deleterious effect;[14] in *Sage Stores* v. *Kansas*,[15] the United States Supreme Court upheld the validity of the Kansas Filled Milk Act[16] forbidding the sale of milk to which fat had been added. There have been many cases decided along the lines of those stated above, a few of which are noted.[17] In general, the legislatures were determined to prevent the sale of food that could be injurious to health. It therefore seems clear that the sale of a wholesome and healthful article of food should not be prohibited.

However, the Court of Appeals found that such grounds did not exist in this case. The Court observed this statute, which was enacted to prevent the sale of injurious foods, and to prevent fraud and deceit, was being used to prohibit the sale of a healthful article of food, in containers which were clearly marked so as to prevent any mistake as to the contents of the can. Such prohibition was therefore unreasonable.

The level of modern advertising, if nothing else, makes it safe to assume that the present-day consumer is quite conscious of brands and labels. This consciousness has greatly reduced the possibility of fraud. When fraud, not even reasonably foreseeable on a large scale, is the only possible disadvantage resulting from the sale of a food, this disadvantage being far outweighed by the advantages to be gained from the sale of

[9] 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); 323 U. S. 18, 65 S. Ct. 1, 89 L. Ed. 15 (1944).

[10] 42 Stat. 1486, 21 U. S. C. § 61 (1923).

[11] See note 4 *supra*.

[12] 190 Mo. 524, 84 N. W. 698 (1905).

[13] Iowa Code c. 97, pp. 4989, 4990 (1897).

[14] 112 Iowa 642, 84 N. W. 698 (1900).

[15] 323 U. S. 32, 65 S. Ct. 9, 89 L. Ed. 25 (1944).

[16] Kansas G. S. 1935, 65-707.

[17] Poole & C. Market Co. v. Breshears, 343 Mo. 1133, 125 S. W. 2d 23 (1938); Hebe & Co. v. Shaw, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255 (1919); State, ex rel. Carnation Milk Products Co. v. Emery, 178 Wis. 147, 189 N. W. 564 (1922).

that food, it certainly seems unreasonable to prohibit its sale. This does not mean that courts should take judicial notice of the level of intelligence of the consumer, but they can take judicial notice that "it is incredible that as of this date shoppers do not know what is meant by condensed skimmed milk."[18]

It would appear that this decision is a step in the direction of curbing the police power in the field of non-adulterated manufactured food products. Speaking for the majority, Justice Desmond said: "the property of a citizen including his right to sell non-deleterious substances may not be taken from him without rhyme or reason."[19]

CRIMINAL LAW—IMPROPER AND PREJUDICIAL CONDUCT OF THE PROSECUTOR WHICH REMAINED UNADMONISHED BY THE PRESIDING JUSTICE COUPLED WITH AN UNNECESSARY DELAY IN ARRAIGNMENT HELD TO CONSTITUTE REVERSIBLE ERROR DESPITE OVERWHELMING PROOF OF GUILT.—In unanimously reversing[1] a majority judgment of the Appellate Division, First Department,[2] which had affirmed a decision of the Court of General Sessions, the New York Court of Appeals held recently, that even though a defendant's guilt had been established through independent proof beyond a reasonable doubt, an unnecessary delay in arraignment coupled with allowing improper and prejudicial conduct of the prosecutor to stand unadmonished, constituted reversible error.

The delay in arraignment[3] and improper remarks[4] violated statutes which protect all accused persons against such specific injustices. The lower court, by allowing such conduct to remain without proper judicial criticism, raised the possibility of condonement in the minds of the jury.

Lovello was convicted on four counts of criminally buying and receiving stolen property. Upon arrest, and after making an admission to the arresting officers, he was taken into custody and held from late Saturday night, until Monday morning, at which time he was arraigned. A court of competent jurisdiction was open and available for arraignment on Sunday. While being held in custody before arraignment Lovello made a statement, witnessed by a detective Omark and a stenographer. The stenographic notes were never offered in evidence. The state relied on the testimony of Omark, which was denied by Lovello at the trial. It was Lovello's contention that the statement was taken during a period of "unnecessary delay in arraignment"; because of the serious effect of these admissions, to the defendant's case, the fact of this illegally imposed relationship should have been presented to the jury, in the court's instructions. The Court of Appeals agreed with the defendant's contention and held it to be erroneous for the court not to have charged the jury that the "police officers were guilty of unnecessary delay as a matter of law."

However, the Court of Appeals felt that the most condemning aspect of the case arose upon the prosecution's summation. The incriminating statement, made by Lovello while in custody, had been introduced without benefit of stenographic record but merely on the testimony of Detective Omark. The Prosecutor referred to this criticism and said to the jury, ". . . if that conversation did not take place, then I am an aider and abetter to Omark's perjury." The Court of Appeals opposed such action

[18] 309 N. Y. 537, 542, 543, 132 N. E. 2d 829, 831 (1956).
[19] *Id.* at 541, 132 N. E. 2d 829, 839 (1956).

[1] People v. Lovello, 1 N. Y. 2d 436, 136 N. E. 2d 483 (1956).
[2] 1 App. Div. 2d 162, 150 N. Y. S. 2d 615 (1st Dep't 1956).
[3] N. Y. Code of Criminal Procedure, § 165.
[4] *Id.*, § 542.

by a state prosecutor. Their opposition was voiced by reiterating the words of Justice Peck in his dissent of the Appellate Division decision.[5] The Court felt that the district attorney had thrown his own person and position into the summation. He pitted against the defendant, not only the creditability of Detective Omark, but also the veracity of his own character; this action, in effect, made him an unsworn witness for his own purpose. Such a circumstance has always been condemned by the Court of Appeals[6] and could not, the court felt, be allowed to stand in the instant case.

In *People* v. *Berger*,[7] involving improper actions by an overzealous prosecutor, the United States Supreme Court held, "It is as much the duty of a United States Attorney to refrain from improper methods calculated to produce a wrongful conviction, as it is to use every legitimate means to bring about a just one."[8]

The proven guilt of the defendant seemed to carry great weight with the Appellate Division[9] in their decision to overlook what they considered to be a slight infringement of the defendant's rights, in the light of such guilt. The Court of Appeals disagreed most emphatically on the ground that, by his actions, the prosecutor had seriously jeopardized the right of Lovello to receive a fair trial and, in the light of justice, such results have never before, and could not in the instant case, be allowed to stand as law. In granting Lovello a new trial, the Court of Appeals held, "It is more important to the administration of justice that the conduct of trials be free from prejudicial impropriety and that the District Attorney remain within the bounds of legitimate advocacy than it is to hold the conviction of a guilty defendant and avoid the burden of a new trial." No matter how guilty a defendant may appear to both judge and jury, if his rights are violated, and a fair trial does not result, the court will reverse such decision and give to the defendant the fair trial to which he is entitled.

ETHICS—ATTORNEY-CLIENT—DOMICILED ATTORNEY EMPLOYED BY AN OUT-OF-STATE LAW FIRM AT A WEEKLY SALARY ORDERED TO DISASSOCIATE BY THE ETHICS AND GRIEVANCE COMMITTEE OF THE NEW JERSEY BAR.—In a recent decision[1] the Supreme Court of New Jersey, one judge dissenting, ruled that it could not approve an arrangement whereby a member of the New Jersey bar works on a salary basis for an out-of-state lawyer. More particularly, the Court held that its approval could not be given in a situation whereby a New Jersey lawyer has been engaged by an out-of-state law firm at a weekly salary to supervise an office and to undertake all legal work necessary in passing upon and certifying titles, preparation and execution of papers involved with sales and mortgages, and attendance at title closings in connection with residential real estate project of a client of the out-of-state law firm.

The matter came before the New Jersey Supreme Court as the result of a presentment by an Ethics and Grievance Committee charging a member of the New Jersey bar with a violation of the canons in permitting an out-of-state law firm to practice in New Jersey in the respondent's name.

Out-of-state developers engaged in major residential real estate projects in various states engaged an out-of-state law firm, none of whose members are permitted to

[5] See note 2 *supra* at 168, 150 N. Y. S. 2d 615.
[6] People v. Tassiello, 300 N. Y. 425, 91 N. E. 2d 872 (1950).
[7] Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).
[8] *Id.* at 89.
[9] See note 2 *supra* at 170, 150 N. Y. S. 2d 615.

[1] In the matter of "X," an attorney at law, 21 N. J. 281, 121 A. 2d 489 (1956).

practice in New Jersey, to undertake all legal work in connection with their developments in New Jersey. The out-of-state firm established an office in New Jersey and engaged "X," the respondent, to carry out all the work set forth above. In connection with such work a sign was placed upon the outside of the office bearing the name of the out-of-state law firm, accounts were opened in the firm name in a New Jersey bank, the local telephone directory listed the out-of-state law firm, and the firm name was further communicated upon stationery used in the office, in closing statements, and in papers filed with the county clerk. It was also established that the fees for the closings were deposited in the above bank accounts, from which either a member of the out-of-state firm or the respondent had the right of withdrawal. After about one and a half months of operation in this manner, all designations identifying the operation as those of the out-of-state firm were removed and eliminated and further operations were carried out apparently by the respondent alone. It appears, however, that the basic arrangement between the out-of-state firm and the respondent continued and remained the same until the handing down of the presentment. This continued basic arrangement consisted mainly in employment of the office personnel by the out-of-state firm and receipt of weekly salary by the respondent from such out-of-state firm.

The Supreme Court considered the arrangement as not within the spirit of the canons of professional ethics. However, instead of disciplining "X" as petitioned in the presentment, it held that since the problem presented was a novel one, and since there had been complete absence of any wrongful intent or of any wilful attempt at violation of rules and canons on the part of respondent, no action would be taken against "X" upon proof that he has disassociated himself from the above specifically defined arrangement.

This holding, taken in itself, is an extremely far-reaching one if not limited to the particular circumstances of the case in question. If literally interpreted, it might prevent any attorney from acting as an associate on a salary basis for an out-of-state lawyer. Actually, the court in this connection held that the objectives sought—namely, of giving the client of the out-of-state lawyer the benefit of the experience and services of the domiciled attorney—can readily be obtained within the ethical confines of the canons of ethics by the client directly retaining or employing the domiciled attorney to do their legal work in New Jersey. This statement may be interpreted as generally disapproving any arrangement where a domiciled attorney carries out work for an out-of-state attorney on a salary basis instead of being directly employed by the client.

Whether the above broad interpretation is to be given to this decision, or whether this decision is to be limited to the particular circumstances of the case, is yet to be determined.

LABOR RELATIONS—A STRIKE CALLED DURING THE "SIXTY DAY COOLING-OFF" PERIOD TO COMBAT UNFAIR LABOR PRACTICES OF THE EMPLOYER HELD NOT TO DEPRIVE STRIKERS OF THEIR STATUS AS EMPLOYEES UNDER NATIONAL LABOR RELATIONS ACT.—In affirming a split decision of the United States Court of Appeals for the second circuit,[1] the Supreme Court of the United States[2] by a divided court held that a provision in a collective bargaining agreement prohibiting strikes did not apply to strikes called for the purpose of redressing or preventing the unfair labor practices of an employer. It was further decided that the strikers did not lose their status as employees for having

[1] Mastro Plastic Products Corp. v. N. L. R. B., 214 F. 2d 462 (2d Cir. 1954).

[2] Mastro Plastic Products Corp. v. N. L. R. B., 350 U. S. 270, 76 S. Ct. 349, 100 L. Ed. 255 (1955).

engaged in such a strike less than sixty days after their collective representative served notice on the employer of a proposed modification in the then existing agreement.

The Carpenters Union, the collective bargaining agent of the employees, caused a complaint to be filed with the National Labor Management Relations Board, in which the employer was charged with the commission of unfair labor practices in violation of the National Labor Relations Act,[3] by having given its support to another union and by discriminatorily discharging certain employees after they went out on strike in protest.

The Carpenters Union was the collective bargaining representative at a time when the Warehouse Workers Union began a campaign among the employees to become their representative. Because the employer feared that the Warehouse Workers was a Communist Union and thought that the Carpenters Union was not strong enough to combat the Warehouse Workers Union, it invited the Paper Mill Workers Union to solicit the support of the employees, in order for them to become the collective bargaining representative.

Frank Ciccone, one of the members of the Carpenters Union who opposed these activities on the part of the employer, was discharged. The other seventy-six employees named in the complaint went out on strike to protest his discharge. Consequently, these strikers were also discharged. Upon demand, the employer refused to reinstate them.

The collective bargaining agreement provided: "5. . . . The Union . . . agrees to refrain from engaging in any strike or work stoppage during the term of this agreement."[4]

At the time of the commencement of the strike, the Carpenters Union was in the process of negotiating with the employer for modifications in the collective bargaining agreement, which was nearing its expiration date thus starting the statutory negotiating period.

The employer asserted that the discharge of Ciccone was not discriminatory in that he was discharged for having disobeyed a supervisor. As to the seventy-six strikers, the employer contended that it was not required to reinstate them because of their breach of the collective bargaining agreement which prohibited strikes during the term of that agreement. It was also contended that the strikers lost their status as employees because they engaged in a strike during the "60 day cooling off period" as prescribed by the Act.[5]

The National Labor Relations Board found that the employer was engaged in unfair labor practices and that the strike was caused, and prolonged, by these practices. The Board reasoned that the situation which confronted the employees was one which was not contemplated by the parties at the time the agreement was made; that it would be inequitable to permit the "no-strike" provision to apply in this case as it would deny the strikers the protection to which the Act would otherwise entitle them. It was also the opinion of the Board that the employer should not be permitted to invoke the agreement after it had committed the unfair labor practices to which the employees were protesting.[6]

The Supreme Court gave its approval to this doctrine by pointing out that there had been no court decision called to its attention which had held that the employees' right to strike against unfair labor practices has been waived by language such as that which was before them. On the other hand, prior to such contract, such language

[3] 29 U. S. C. §§ 152 (6) and (7) and 158 (a) (1), (2) and (3) [1952].
[4] 350 U. S. 270, 274, 76 S. Ct. 349, 353, 100 L. Ed. 255 (1955).
[5] 29 U. S. C. § 158 (d) (4) (1952).
[6] Mastro Plastic Products Corp., 103 N. L. R. B. 511 (1952).

had been held by the Board to apply to economic strikes with consequent loss of employee status.[7] It was held by the Court that contracts concerned, solely, with the economic relationship in dealing with agreements not to strike or to interrupt production, are intended to apply only to strikes or interruptions for the purpose of gaining economic advantage. However, such agreements were not to be interpreted so as to deprive the strikers of their status as employees when they strike as the result of the employer's unfair labor practices.

As for the defense that the strikers violated the prohibitions under the Act[8] by striking during the "60 day cooling off period", the Supreme Court held that at the time of the passage of the Act, Congress did not intend the proscription against strikes to apply to cases such as the one here decided.

It appears that the instant case was the first to decide the question of whether proscription found in the National Labor Management Relations Act is to be applied when the cause of the strike during the "60 day cooling off period" was the unfair labor practices of the employer. However, a subsequent case, which was similar to the one here decided, follows this decision and clearly indicates that the Act is inapplicable in those cases where the strike is precipitated by the unfair labor practices of the employer.[9]

It appears, therefore, that before the strikers can be found to have lost their status as employees for having engaged in a strike during the "60 day cooling off period", it is necessary to determine the underlying reasons for which the strike was called. From these decisions, it appears that so long as the strikers attempt to remedy or to prevent unfair labor practices, their status as employees remains unendangered. On the other hand, if their purpose is to attempt to gain an economic advantage by means of the strike, their status as employees would be terminated by operation of the Act.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—WORK-INDUCED AGGRAVATION OF EMPLOYEE'S PRE-EXISTING PHYSICAL DEFECT HELD NOT OCCUPATIONAL DISEASE SO AS TO PERMIT RECOVERY UNDER WORKMEN'S COMPENSATION LAW.—Reversing a decision of the Appellate Division, Third Department, the Court of Appeals, by a four-to-two decision, recently held that a disability suffered on the job by a workman with a congenital spinal defect was not an "occupational disease" warranting recovery under § 3(2)(29) of the Workmen's Compensation Law, where the nature of the employment did not tend to induce a similar disability in the average workman of normal health.[1]

[7] 350 U. S. 270, 283, 76 S. Ct. 349, 358, 100 L. Ed. 255 (1955). See Scullin Steel Co., 65 N. L. R. B. 1294 (1946) enforced as modified, 161 F. 2d 143 (8th Cir. 1947); Dyson and Sons, 72 N. L. R. B. 445 (1947), Rutland Court Owners, 44 N. L. R. B. 587 (1942), overruled by Colgate Palmolive Peet Co. v. N. L. R. B., 338 U. S. 355, 70 S. Ct. 166, 94 L. Ed. 161 (1949) on the ground that the alleged unfair labor practices which led to the strike were not the voluntary acts of the employer, but were its acts in conforming with the requirements of the collective bargaining agreement. The union requested the employer to discharge the employees in order to maintain its effect as the collective bargaining representative. Similar distinctions were made by the Board in deciding that National Electric Products Corp., 80 N. L. R. B. 995 (1948) is to be clearly distinguished from this case. See also N. L. R. B. v. Wagner Iron Works, 220 F. 2d 126 (7th Cir. 1955) which holds that the no strike provision in the contract does not apply to unfair labor practice strikes.

[8] 29 U. S. C. § 158 (d) (4).

[9] N. L. R. B. v. Wagner Iron Works, 220 F. 2d 126 (7th Cir. 1955).

[1] Matter of Detenbeck v. General Motors Corp., 309 N. Y. 558, 132 N. E. 2d 840 (1956).

The claimant, Louis C. Detenbeck, was a salvage inspector at the General Motors plant in Buffalo, New York. His main function was to pick up scrap metal from the floor of the plant. This act entailed lifting, pushing, and moving, usually by himself, engine cases weighing 176 lbs., and barrels of defective motor parts, weighing over 100 lbs. each. After a year of the foregoing he was compelled to stop working because of constant backaches. There was medical evidence that prior to claimant's disability, Detenbeck had suffered from a congenital malformation or weakness in his back, which condition was aggravated by his work. Thereupon, claimant instituted an action under § 3(2)(29) of the Workmen's Compensation Law.[2] There was no claim of an industrial accident. The Workmen's Compensation Board found that there existed a causal connection between claimant's back condition and occupation; that there existed a causally related "occupational disease" for which compensation was awarded. This was affirmed by the Appellate Division, Third Department,[3] on the theory that since all employees in a comparable job with the same weakness, would in all probability, be similarly affected, claimant's disease was "occupational."

The majority of the Court of Appeals, however, disagreed with this theory and held the correct test of an "occupational disease" under the Workmen's Compensation Law to be whether the nature of the employment would tend to induce a similar malady in the average workman of normal health, rather than whether one with a pre-existing susceptible condition would be so affected.[4] The Court declared that the test of an occupational disease must be the same whether the employee was decrepit or in normal health. Recognizing that a physically handicapped employee may contract an occupational disease more easily, the court re-affirmed that "There must be some recognizable link between the disease and some distinctive feature of the claimant's job, common to all jobs of that sort,"[5] this feature amounting to more than the ordinary wear and tear of life, and not merely aggravating an innate previous infirmity.

The dissent regarded the instant decision as overruling prior recent Court of Appeals decisions which tended to broaden recovery of Workmen's Compensation claims for "occupational diseases."[6] Distinguishing cases cited by the majority as not involving "conditions that inhered in the nature of the particular employment,"[7] the dissent enumerated in detail, a number of recent decisions[8] allowing recovery where a pre-

[2] L. 1947, c. 431, § 2 (formerly para. 28 under L. 1935, c. 254).

[3] 285 App. Div. 1099, 139 N. Y. S. 2d 439 (3rd Dep't 1956).

[4] The Court relied upon the following cases: Matter of Goldberg v. 954 Marcy Corp., 276 N. Y. 313, 12 N. E. 2d 311 (1938); Matter of Harman v. Republic Aviation Corp., 298 N. Y. 285, 82 N. E. 2d 785 (1948); Matter of Champion v. W. & L. E. Gurley, 299 N. Y. 406, 87 N. E. 2d 430 (1949).

[5] Matter of Harman v. Republic Aviation Corp., 298 N. Y. 285, 287, 82 N. E. 2d 785, 786 (1948).

[6] Matter of Moore v. Colonial Sand & Stone Co., 261 App. Div. 857, 24 N. Y. S. 2d 751 (3rd Dep't 1941), *motion for leave to appeal denied,* 285 N. Y. 860, 33 N. E. 2d 568 (1941); Matter of Pinto v. Competent Fur Dressers, 297 N. Y. 846, 78 N. E. 2d 864 (1948); Matter of Peloso v. D'Allessio Bros., 298 N. Y. 582, 81 N. E. 2d 111 (1948); Matter of O'Neil v. American Locomotive Co., 276 App. Div. 1043, 95 N. Y. S. 2d 678 (3rd Dep't 1950), *motion for leave to appeal denied,* 301 N. Y. 815, 95 N. E. 2d 59 (1950); Matter of Buchanan v. Bethlehem Steel Co., 302 N. Y. 848, 100 N. E. 2d 45 (1951); Matter of Griffin v. Griffin & Webster Inc., 283 App. Div. 145, 126 N. Y. S. 2d 672 (3rd Dep't 1953), *motion for leave to appeal denied,* 306 N. Y. 984, 118 N. E. 2d 606 (1954); Matter of Townsend v. Union Bag & Paper Corp., 307 N. Y. 710, 121 N. E. 2d 537 (1954).

[7] See note 1, *supra,* at 565, 132 N. E. 2d 846 (1956).

[8] See note 6, *supra.*

existing dormant condition had been activated or aggravated by the nature of the employment.

The definition of "occupational disease" has long troubled the courts. The common law and early Workmen's Compensation Statutes did not recognize recovery for occupational disease. Formerly, the word "occupational," as describing a disease, was only a label for a legal conclusion denying recovery for an "industrial accident" as distinct from a disease where recovery is allowed.[9] Now the scope of recovery has been extended to include both. The present distinction lies between occupational diseases and diseases which are neither occupational nor accidental, but common to all mankind and not directly connected with the employment. Thus, the task of definition has assumed new complexity.[10]

The N. Y. State Legislature has declined to define specifically the term "occupational disease" in the statute, leaving its ultimate interpretation to the courts. In 1920, progress towards clarification was made when New York became the first state to enact a "schedule" type Workmen's Compensation Act.[11] This paralleled the English practice of codifying both particular diseases and the processes by which they were contracted. As the courts began to broaden recovery to more types of "occupational diseases," the legislature took statutory recognition by a 1935 amendment which added the phrase "all other occupational diseases."[12]

The most commonly accepted definition of the term was set down in the celebrated *Goldberg* case.[13] It described an "occupational disease" as one "which results from the nature of the employment, and by nature is meant . . . conditions to which all employees of a class are subject, and which produce a disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general."

It is submitted that this decision is in line with the current attitude against expanding recovery for "occupational disease." There is an apprehension that such recovery would transform workmen's compensation into "health and life insurance."[14]

WORKMEN'S COMPENSATION—HUSBAND INJURED WHILE RESIDING AT PLACE OF EMPLOYMENT BUT NOT RENDERING ANY SERVICE FOR EMPLOYER HELD NOT TO HAVE OCCURRED IN THE COURSE OF EMPLOYMENT—WIDOW NOT ENTITLED TO DEATH BENEFITS.—Reversing the Workmen's Compensation Board, the Appellate Division, Third Department, by a three-to-two decision, recently held that where an employee, who was permitted, though not required to reside on the premises of his employment, was injured on the premises during free time, a claim for death benefits under § 16 of the Workmen's Compensation Law did not lie.[1]

[9] See Hiers v. Hull & Co., 178 App. Div. 350, 164 N. Y. S. 767 (3rd Dep't 1917), where the court labels the contraction of anthrax from a scratch an "accidental" injury, as opposed to "occupational disease," enabling recovery.

[10] LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41 (1st ed. New York 1952).

[11] L. 1920, c. 538.

[12] See note 2, *supra*.

[13] Matter of Goldberg v. 954 Marcy Corp., 276 N. Y. 313, 12 N. E. 2d 311 (1938).

[14] Matter of Harman v. Republic Aviation Corp., 298 N. Y. 285, 82 N. E. 2d 785 (1948); see, note 1, *supra* at 561, 132 N. E. 2d 842 (1956).

[1] Matter of Groff v. Uzzilia, 1 App. Div. 2d 273, 149 N. Y. S. 2d 651 (3rd Dep't 1956).

The decedent, Leo Groff, had been employed for approximately two hours each morning to clean up the Blue Danube Restaurant. His wages were fifteen dollars per week, in addition to a daily meal. His employer, Arthur Uzzilia, also owned bowling alleys in an adjacent building connected to the restaurant by an alleyway. There, each evening till midnight, the decedent worked as a pinboy for extra compensation. When he was not on the above jobs, his time was his own.

Originally, Groff's home was a short walk from his place of employment. Due to some domestic difficulties he became estranged from his family. His employer permitted him to reside in an attic above the restaurant which could be reached from the alleyway by an outside stairway. Groff's residence on the premises was not a mandatory condition of his employment nor was it unreasonably difficult to obtain accommodations nearby.

On December 24th, 1951 Christmas Eve, the restaurant and bowling alleys closed at 10:30 p.m. to re-open at 8:30 a.m. on December 26th. Before closing time, the decedent left the premises, and was free until the morning of the 26th. He was last seen by the owners of a nearby coffee shop about midnight. They reported that the deceased, somewhat intoxicated, entered their establishment to wish them a "Happy New Year". To discourage any further premature celebration, they confiscated from him a number of bottles of beer and advised him to "try to get home safely".

Groff left the coffee shop apparently to return to his room. It was snowing that night, and the outside stairway leading to his attic room was covered with snow and ice. The evidence indicated that the deceased ascended half way up the stairs, then slipped, fell, and fractured his skull. His body was found the next morning.

Thereafter, Groff's widow filed a claim for death benefits under § 16 of the Workmen's Compensation Law. It was disallowed by the referee. Upon review, the Workmen's Compensation Board reversed the referee's report, and found that the decedent had been killed, "in the course of his employment", and made an award to the widow.

The employer appealed on the grounds that such finding was contrary to the facts, since the evidence substantially indicated that the deceased was not "in the course of his employment" at the time of the accident; and that the occurrence of the accident on the premises did not, per se, constitute a sufficient basis for an award, as it must be shown that the employee was performing the duty for which he was hired.[2]

The Appellate Division reversed the Board and held that the claim could not be allowed. The majority of the court distinguished between cases where residence on the premises is mandatory, or necessitated by the circumstances, and where the residence is permissive, that is, not serving the employer's convenience but solely for the benefit of the employee. In the latter situation injuries resulting from such residence are not compensable.

The decision is consistent with previous New York case law. *In Matter of Van Riper,* an employee, who as part of his compensation was allowed to reside on the premises, was injured while walking up the stairs to his room. The court concluded that since at the time of the injury the employee was engaged in a personal transaction on his own free time, the injury was not received in, or arising out of the "course of his employment".[3]

The dissent in the instant case reasoned that the Workmen's Compensation Board reasonably could find that the lodgings were part of the consideration and thus an in-

[2] Congdon v. Klett Co., 307 N. Y. 218, 120 N. E. 2d 796 (1954); Kane v. Barbe, 210 App. Div. 558, 206 N. Y. Supp. 444 (3rd Dep't 1924); Van Riper v. Al Newman's Tavern, 250 App. Div. 801, 294 N. Y. Supp. 130 (3rd Dep't 1937).

[3] See note 2, *supra.*

tegral part of the decedent's employment. Therefore, as the death was occasioned by a risk inherent in the use of these premises the claim should be upheld. The minority opinion cited no supporting cases.

Where claims have been allowed under the Workmen's Compensation Law for injuries occurring on the premises while the employee was engaged in his own affairs, the employee's residence on the premises was required by the contract for the benefit of the employer.[4]

However, where such residence was not for the benefit of the employer, though included in the contract as part of the consideration (either as a method of payment or for the employee's convenience) and the injury arose while the employee was engaged in his own affairs, the courts have consistently held that an award under the Workmen's Compensation Law will not be granted.[5]

[4] Culver v. Sevilla Home for Children, 262 App. Div. 620, 30 N. Y. S. 2d 917 (3rd Dep't 1941).

[5] Matter of Van Riper, 250 App. Div. 801, 294 N. Y. Supp. 130 (3rd Dep't 1937); Kane v. Barbe, 210 App. Div. 558, 206 N. Y. Supp. 444 (3rd Dep't 1924).