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COPYRIGHTS - UNDER COPYRIGHT ACT SPOUSE AND CHILDREN OF DECEASED AUTHOR RENEWAS CLASS / CRIMINAL LAW-MULTIPLE SENTENCES THOUGH CONCURRENT, HELD VALID

NOTES

COPYRIGHTS—UNDER COPYRIGHT ACT SPOUSE AND CHILDREN OF DECEASED AUTHOR RENEW AS CLASS—"CHILDREN" IN ACT MAY INCLUDE ILLEGITIMATES.—In the recent case of *De Sylva* v. *Ballentine*,[1] the Supreme Court of the United States, Mr. Justice Harlan writing the majority opinion, has decided two questions ". . . of great importance in the administration of the Copyright Act . . . which has never before been determined although the statutory provisions involved have been part of the Act in their present form since 1870."[2]

Under the present Copyright Act, on the death of an author and a year prior to the expiration of an original twenty-eight year copyright term, the author's ". . . widow, widower, or children . . ." are next able to renew the author's copyright for an additional twenty-eight year term.[3] Although a disjunctive "or" has separated "widow, widower" and "children" in various modifications of the Act since 1870,[4] the question of whether a deceased author's spouse and children renew as a class, or whether the spouse has a lifetime priority in renewal, the children being able to renew only after the death of the spouse, has never been decided. Also, although a deceased author's widow and children were first given the right to renew in 1831,[5] the scope of the terms "child" or "children" in various modifications of the Act since 1831 has never been determined. *De Sylva* v. *Ballentine* has answered these two questions.

In 1950, George De Sylva, a noted song writer, died leaving a widow and an illegitimate child. Since many of De Sylva's compositions were copyrighted during the last twenty-eight years of his life, on his death they had not yet become eligible for renewal. Resultantly, as renewal rights accrued under the Act, his widow, petitioner in this case, renewed some solely in her name. Respondent, as mother and guardian of the estate of De Sylva's illegitimate child, brought an action for a declaratory judgment that the illegitimate had an interest in the copyrights renewable during the widow's lifetime, and also requested an accounting of profits from such copyrights as had already been renewed. In her answer petitioner maintained under the present Copyright Act that she, as widow, was the sole owner of all copyright renewals in which De Sylva had an interest and that the child, Stephan William Ballentine, was not a child of De Sylva's within the meaning of the Act.

The District Court found that De Sylva under California law had gone through a process of acknowledging his illegitimate child.[6] However, since the District Court

[1] 351 U. S. 570, 76 S. Ct. 974, 100 L. Ed. 1415 (1956).

[2] *Id.* at 572-73, 76 S. Ct. 976, 100 L. Ed. 1423.

[3] 61 STAT. 652 (1947), 17 U. S. C. § 24 (1952) which provides in part: ". . . the widow, widower or children of the author, if the author be not living . . . shall be entitled to a renewal and extension of the copyright . . . for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright."

[4] Act of July 8, 1870, C. 230 § 88, 16 STAT. 212 first provided that the ". . . widow *or* children . . ." of a deceased author could renew. Prior to this, the Act of February 3, 1831, C. 16 § 2, 4 STAT. 436 provided that renewal rights went to a deceased author's ". . . widow *and* child, or children. . . ." (Emphasis added.)

[5] The Act of 1831, *supra* note 4, first gave renewal rights to a deceased author's widow and children. Prior to this, the Act of May 31, 1790, C. 15 § 1, 1 STAT. 124, the first Copyright Act, restricted renewal rights solely to the author.

[6] Cal. P. Code C. 281 § 255 (1931), as amended, C. 998 §1 (1947): "Every illegitimate child is an heir of his mother, and also of the person who, in writing,

felt that the language of section 24 meant that a spouse had renewal priority over any children of a deceased author, De Sylva's acknowledgment became meaningless. Under the District Court's resasoning, even if De Sylva's son were legitimate, he would be unable to renew during the widow's lifetime since the Court interpreted the Act as giving the widow exclusive priority of renewal.

The Court of Appeals held both points against the widow. Agreeing with the District Court, they found that De Sylva had acknowledged his illegitimate child and that his acknowledgment was sufficient to qualify the child as "children" under section 24. Furthermore, disagreeing with the District Court, they held that the statute did not give the widow renewal priority but that spouse and children renewed as a class under the Act.

Consequently, on appeal by the widow, the Supreme Court was faced with two concise questions; first, whether the words ". . . widow, widower, or children . . ." in section 24 of the present Copyright Act meant that the widow and children of a deceased author renew as a class or in the order of statutory enumeration and second, whether the word "children" in section 24 included an illegitimate child.

In answering the first question, petitioner had argued generally that the normal meaning of the word "or" where it appears in a statute is disjunctive, indicating priority in order of statutory enumeration. In a general sense the Supreme Court agreed with this argument, but felt that there the better meaning of the statute was that spouse and children should renew as a class.

Statutory history and construction influenced the Court's thinking. For example, the Copyright Act of 1831 bestowed renewal rights on the ". . . widow and child or children . . ." of a deceased author.[7] The Act of 1870 stated that this right went to a deceased author's ". . . widow, or children . . ."[8] Reasoned petitioner, the change from ". . . widow and child . . ." in the Act of 1831 to ". . . widow . . . or children . . ." in 1870, substituting the disjunctive "or" for the conjunctive "and", indicated that in 1831 Congressional intent was to permit the widow and children to renew as a class, but in 1870, as evidenced by the substituted "or" Congressional intent was to change renewal rights to priority in the order of statutory enumeration.

The Supreme Court, however, disagreed with this viewpoint, noting that the scant legislative history available indicated that the change in the 1870 Act was intended to compress the somewhat cumbersome phrasing of the 1831 Act by deleting the words "and child" and obtaining precisely the same result by permitting the remainder of the phrase, "or children", to remain.[9]

Since 1870, the renewal section of the Copyright Act has been changed once again. The present Act, first appearing as section 23 of the Copyright Act of March 4, 1909,[10] extends renewal rights to two other groups in addition to a deceased author's spouse and children; the author's executors or, in the absence of a will, his next of kin.[11]

signed in the presence of a competent witness, acknowledged himself to be the father. . .".

[7] See note, 4 *supra.*

[8] *Ibid.*

[9] See CONG. GLOBE, 41st Cong., 2d Sess. 2680, 2854 (1870).

[10] Act of July 30, 1947, C. 391 § 1, 61 STAT. 652 changed § 23 to § 24 in the present Act.

[11] See note 3, *supra;* this portion of § 24 provides: ". . . if such author, widow, widower, or children be not living, then the author's executors or in the absence of a will, his next of kin shall be entitled to a renewal. . .".

The present Act,[12] however, clearly stipulates by a condition precedent that the author's spouse or children can renew only ". . . if the author be not living . . ." So also, another condition precedent indicates that the author's executors or next of kin can renew only ". . . if such author, widow, widower, or children be not living".[13] No condition precedent, however, separates "widow" or "widower" from "children" in the statute. Since the rest of the statute decisively distinguishes priority between enumerated classes by condition precedents, the Court felt that failure to do so in the case of spouse and children ". . . may nevertheless be taken as some indication that the widow and children are to take the right to renew at the same time."[14]

Considerations outside historical background and construction of the statute also helped the Court to reach their conclusion. Petitioner had maintained that the "universal" interpretation of section 24 was that children were entitled to renew only after the death of the widow or widower. The Copyright Office, on the other hand, had adopted and actually had followed regulations which permitted children of a deceased author to apply for renewals along with the author's widow or widower.[15] In addition, many specialists in the field of copyright law had expressed doubt on the question, and had even concluded, in accord with the practice followed by the Copyright Office, that the spouse and children of a deceased author do renew as a class.[16]

Consequently, due to the combined force of these outside considerations and problems of interpretation in the statute itself, the Court felt that while the matter was ". . . far from clear, we think, in balance, the more likely meaning of the statute is that adopted by the Court of Appeals, and we hold that, on the death of an author, the widow and children of the author succeed to the right of renewal as a class, and are each entitled to share in the renewal term of the copyright."[17]

With this point settled, the Court then faced the question of whether "children" in section 24 included De Sylva's illegitimate son. Prior to *De Sylva,* children under the Copyright Act had been the subject of litigation in the lower federal courts. Thus, *West Publishing Co.* v. *Edward Thompson Co.*[18] held that renewal rights could not be assigned by an author's children, and *Tobani* v. *Carl Fisher Inc.*[19] decided that renewal rights taken out by one of an author's children were held for the benefit of any other children of an author. The scope of the term "children" however, had never before been determined though, as noted before, children under various modifications of the Act had been entitled to renew since 1831.[20]

Since the term appeared in a federal statute, the Court was concerned with the scope of a federal right. Nevertheless, as the Court noted, citing *Jackon County* v. *United States* [21] the scope of a federal right may be determined by state as well as by federal law. Here, the portion of the statute to be construed dealt with the defini-

[12] See note 3, *supra.*

[13] See note 11, *supra.*

[14] 351 U. S. 577, 76 S. Ct. 978, 100 L. Ed. 1425.

[15] 37 C. F. R. § 201.24 (a) (1938); see also § 48 Copyright Office Bulletin No. 15 (1913), § 46 Copyright Office Bulletin No. 15 (1910).

[16] See, for example, Chafee, *Reflections on the Law of Copyright,* 45 COL. L. REV. 503, 527 (1945); Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909,* 44 COL. L. REV. 712, 717 (1944).

[17] 351 U. S. 580, 76 S. Ct. 979, 100 L. Ed 1427.

[18] 169 Fed. 833 (2d Cir. 1909).

[19] 36 U. S. P. Q. 77, 98 F. 2d 57 (1938), cert. den. 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420.

[20] See note 5, *supra.*

[21] 308 U. S. 343, 60 S. Ct. 285, 84 L. Ed. 313 (1939).

tion of a family relationship. However, since there is no "federal law of domestic relations", the Court came to the conclusion that the most satisfactory procedure in this instance was to define the term according to the law of California instead of attempting to relate it to its use in other federal statutes. Petitioner had not questioned the District Court's finding that De Sylva had acknowledged his illegitimate son. Due to this, and to the Court's determination that renewal rights under the Act were a question of descent of property, the Court concluded that section 255 of the California Probate Code was applicable.[22] As a result, since California by the process of acknowledgment permits illegitimates to inherit property from their natural father, in this instance "children" Section 24 included De Sylva's illegitimate son.

In a concurring opinion, Mr. Justice Douglas joined by Mr. Justice Black recommended that "children" under the Act include illegitimates whether or not state laws permitted illegitimates dependency benefits. To a certain extent disagreeing with the majority, they maintained that this was not a question of descent of property and therefore the common law rule that a bastard is *nullius filius,* applicable in most states, was not here in point. Justice Douglas reasoned that renewal rights under this statute were not given for the benefit of an estate but rather, as in the Federal Death Act, given under statute ". . . for those who by our standards are legally and morally entitled to support." Consequently, ". . . the policy reason of protecting dependents would be better served by uniformity rather than by diversity which would flow from incorporating into the Act the laws of forty-eight states."[23]

The question as to the respective size of the shares that spouse and children take when they renew as a class under section 24 has been left open for future determination. When this is answered the perplexing problem will be completely solved.

CRIMINAL LAW—MULTIPLE SENTENCES THOUGH CONCURRENT, HELD VALID.—The New York Court of Appeals, in reversing the Appellate Division, Third Department, has unanimously held that the imposition of concurrent sentences for assault and attempted robbery does not violate the prohibition against double or multiple punishment.[1] More particularly, the Court ruled that section 1938 of the New York Penal Law[2] does not apply to the case of a prisoner separately sentenced for assault and attempted robbery where such assault was committed apart from the attempted robbery but arising out of the same transaction.

Maurer, after entering a plea of guilty to several offenses, was sentenced in 1951 to concurrent terms for: (a) attempted robbery, first degree (fifteen to thirty years) in that, on a certain night, while "armed with a dangerous weapon," he attempted to take certain property from a person by force and violence; (b) assault, first degree (ten to twenty years) in that, on the same date, he aimed and discharged a loaded pistol at the same person "with intent to kill"; (c) carrying a loaded pistol concealed on the person while the foregoing crimes were committed (seven to fourteen years).

[22] See note 6, *supra.*

[23] 351 U. S. at 583, 76 S. Ct. at 981, 100 L. Ed. at 1429.

[1] People ex rel. Maurer v. Jackson, 2 N. Y. 2d 259, — N. E. 2d — (1957).

[2] "An act or omission 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; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

The Supreme Court, at Special Term, dismissed a writ of habeas corpus, in which Maurer contended he was doubly punished.

The Appellate Division agreed with the Supreme Court on the appropriateness of all the sentences except for the assault, and accordingly reversed the order and remanded Maurer for resentencing.[3] The Court 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 section 1938 of the Penal Law. The single issue thus presented to the Court of Appeals in Maurer's appeal from the modification was whether the imposition of concurrent sentences for assault in the first degree and attempted robbery in the first degree under the stated facts violated the prohibition against double punishment.

It is an ancient principle of the common law that one may not be twice lawfully punished for the same offense. Although there have been questions in the application of this rule, there has never been any doubt of its entire and complete protection of the party when double or multiple punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in the maxim *"Nemo debet bis puniri pro uno delicito"*.[4]

It appears that only New York[5] and California[6] have statutory provisions which specifically provide that a criminal act "punishable in different ways" . . . may not be punished . . . "under more than one".

The application of these statutory provisions to cases in which the act charged was such as to come within the definition of an "included" crime has met with a great deal of confusion. An "included" crime is one that must necessarily be committed in the commission of another. Thus 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. All of these lesser crimes are "included" in the crime of murder. The same is true of robbery. There can be no crime of robbery without committing the "included" crimes of assault and larceny. A "separate" crime on the other hand is one which need not necessarily be committed in the commission of the other. Thus, there may be a larceny without a burglary and a burglary without a larceny.[7]

The difference between an "included" crime and a "separate" crime is entirely a matter of legislative definition. It is well settled that a statute may define the separate steps in a single transaction as distinct offenses so that the same conduct may furnish the basis for separate charges for which separate punishment may be imposed.[8]

These considerations would seem most pressing where a conviction for "included" crimes results in two or more consecutive sentences. Thus, two recent cases in California, which has a statute almost identical with section 1938,[9] are illustrative of the treatment and consequences of separate sentences for assault and robbery. In *In re*

[3] People ex rel. Maurer v. Jackson, 1 App. Div. 2d 140, 148 N. Y. S. 2d 136 (3d Dep't 1956); see 2 N. Y. Law Forum 336 (1956).

[4] 4 Coke, 43a; 11 Coke, 59b: "No man ought to be punished twice for one offense."

[5] N. Y. Penal L. § 1938.

[6] 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. . . ."

[7] People v. Savarese, 1 Misc. 2d 305 (Kings Co. Ct. 1956).

[8] Morgan v. Devine, 237 U. S. 632, 35 S. Ct. 712, 59 L. Ed. 1153 (1915).

[9] See note 6, *supra*.

Chapman,[10] the victim was struck by defendant *after* he had surrendered his money to the defendant, and consecutive sentences were sustained. While in *People* v. *Logan*,[11] defendant struck his victim with a baseball bat and *then* took her purse. It was held that there could not be punishment for both assault and robbery. The court said "If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act has been so committed that more than one statute has been violated." Also in point is *People ex rel. Poster* v. *Jackson*,[12] where the defendant pleaded guilty to six counts of an indictment charging him with six offenses against his daughter all committed in a single transaction. He pleaded to incest (first count), rape (second count), abduction (third count), assault with intent to commit incest and rape (fourth count), sodomy (fifth count), and assault with intent to commit sodomy (sixth count). The defendant was sentenced to five to ten years for incest. This sentence included the lesser crimes of rape, abduction and assault with intent to commit incest and rape. He was also sentenced to ten to twenty years for sodomy which covered the included crimes of assault with intent to commit sodomy. Both sentences were to run consecutively. The trial court sustained a writ of habeas corpus. On appeal this holding was reversed, the court said:

"Relator contends that this was in violation of Penal Law section 1938, in that his plea of guilty rendered his conviction for a single criminal act made differently punishable by different provision of law. We do not agree. The offenses constituted different crimes the commission of which require separate and different criminal acts. Their gravamen is different in law and in fact. Their nature and definition is such that they cannot merge in a single offense. The sentences were lawfully imposed."

The Court of Appeals in the instant case[13] took a similar position. By the plea of guilty to the attempted robbery in the first degree, and assault in the first degree, the defendant admitted not only the act of attempting to rob and the assault incidental thereto, i.e., with intent to commit that felony, but also a separate act of "aiming and discharging a loaded revolver with intent to kill".

Robbery is defined as an "unlawful taking or compulsion, if accomplished by force or fear . . . when committed by a person, 1. Being armed with a dangerous weapon."[14] A material element of assault in the first degree is either of two basic conditions in addition to the assault itself, namely: the act must be done by a person "with an intent, 1. to kill a human being or 2. to commit a felony upon the person or property of the one assaulted, or of another."[15]

Therefore it is seen that discharging a revolver with intent to kill a victim is not an essential element of the crime of robbery; and that an assault "with an intent to kill a human being" is quite different from one with an intent "to commit a felony". The latter is an element of robbery, the former is not; it is only the former that is alleged in the indictment. However, it would seem apparent had Maurer been indicted for assault with intent "to commit a felony", the situation would have been different.

The criminal courts in New York have recognized that section 1938 is not by its terms limited to included crimes, although it is clear that the statute will there apply; however, if the acts are separable, it will not apply. In the instant case, one single act

[10] 43 Cal. 2d 385, 273 P. 2d 817 (1954).
[11] 41 Cal. 2d 279, 260 P. 2d 20 (1953).
[12] 303 N. Y. 680, 102 N. E. 2d 837 (1951).
[13] See note 1, *supra*.
[14] N. Y. Penal L. § 2124.
[15] N. Y. Penal L. § 240.

is not the basis of the two charges. The charges were separable and distinct and involved two different types of conduct, even though arising out of the same transaction.

In New York the imposition of consecutive or concurrent sentences for two or more offenses constituting separate crimes set forth in diverse counts of the same indictment is authorized by section 2190, (4) of the Penal Law. On the other hand, the rule has been established that consecutive sentences for "included" crimes may not be properly imposed without violating the prohibition of double punishment.[16]

It appears that although the practice of imposing concurrent sentences for included crimes is not uncommon in the courts, the Court of Appeals has never specifically passed on the question.[17] The California Courts, under the statute previously referred to, take the position that the imposition of concurrent sentences where cumulative sentences could not be imposed still amounts to multiple punishment. The only reason given for categorizing the concurrent sentence as punishment is that it might adversely affect the prisoner's potential parole.[18] As opposed to this view, the federal cases have long recognized that the imposition of concurrent sentences does not add to the defendant's punishment.[19] So, in *Nishimoto v. Nagle*,[20] where a person was convicted upon five counts, the court said:

"The fact the sentences run concurrently merely means that the convict is given the privilege of serving each day a portion of each sentence, so that in practical effect as far as he is concerned, there is no punishment for the shorter and therefore does not inflict upon him any additional restraint or detention . . . Another important factor should not be overlooked . . . the imposition of concurrent sentences for lesser included offenses insures that the defendant will not go unpunished if there is an error in his conviction for the highest degree of offense resulting in an acquittal as to that count."

In New York, in *People* v. *Florio*[21] defendant was convicted of the crimes of kidnapping, rape and assault (included crimes) and given concurrent sentences. In discussing the effect of section 1938 and the practice that sentence should be imposed on the count charging the highest grade of offense, it was said that the proper result was reached by the imposition of concurrent sentences.

However, there are cases[22] in this jurisdiction which are in seeming support of the proposition that the imposition of concurrent sentences constitutes multiple punishment in violation of section 1938. This view found expression in *Conkey & Harrington* v. *People*.[23] A statement was made in connection with a multiple count indictment, that when a jury brings in a general verdict of guilty, the practice is to sentence the defendant on the highest grade of offense charged, since, if the jury wanted to avoid the imposition of the most severe sentence on the defendant, they would have so indicated. The Court of Appeals in the *Maurer* case said: "Our recent references to this

[16] See note 12, *supra*.

[17] See note 1, *supra*.

[18] People v. Craig, 17 Cal. 2d 453, 110 P. 2d 403 (1942); People v. Kehoe, 33 Cal. 2d 711, 204 P. 2d 321 (1949).

[19] Hirabayashi v. United States, 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943); Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699 (1925).

[20] 44 F. 2d 304 (3d Cir. 1930).

[21] 301 N. Y. 46, 92 N. E. 2d 881 (1950).

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

[23] 5 Parker Cr. Rep. 31; Cited in People v. Florio, 301 N. Y. 46, 92 N. E. 2d 881 (1950).

rule indicate that we use it to refer to the discretion of the sentencing court to impose up to the maximum penalty for the highest grade of offense . . . at no time was the question of concurrent sentences for lesser included offenses before us, nor did we pass on it."[24]

In reversing the Appellate Division, the Court of Appeals[25] in a unanimous opinion agreed, in collateral support of its holding, that section 1938 forbids multiple punishment, not multiple convictions. When concurrent sentences are imposed, there is no double punishment, there is a single punishment measured by the sentences for the highest grade of offense into which all concurrent sentences merge. In other words, in the language of section 1938, defendant is punished under "one of those provisions, but not under more than one."

The court was fully cognizant of the statutory intent, and to infer a holding which defeats this purpose would do a grave injustice to a court of the highest reputation. The principal decision accomplishes substantial justice, and at the same time does not expose the statute to the danger of serious inroads.

[24] See note 1, *supra.*
[25] *Ibid.*