DECISIONS

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CONTRACTS—REAL PROPERTY—WHERE CONTRACT REQUIRED VENDEE TO PAY FOR INSURANCE IN VENDOR'S NAME, HELD, VENDEE IS ENTITLED TO REDUCTION IN PURCHASE PRICE COMMENSURATE WITH INSURANCE PREMIUMS RECEIVED BY VENDOR.—In a recent four to three decision the New York Court of Appeals affirmed a judgment of the Appellate Division, Third Judicial Department. The court held that after a fire loss, proceeds paid to a vendor of real estate under a fire insurance policy in his name, should be credited to the balance due under the purchase agreement, where the purchaser has paid the insurance premiums as required by the agreement.[1]

Plaintiff brought this action to compel specific performance of an agreement to sell real property. The case was submitted to the trial judge upon a written stipulation of facts. The plaintiff agreed to purchase and the defendant agreed to sell for $6,000 a farm owned by the defendant. While the plaintiff was in possession as purchaser under the contract, a fire occurred, and as a result defendant vendor received $4,650 as proceeds of a policy of fire insurance issued to her, the premiums for which had been paid by plaintiff as required by the contract. The plaintiff thereupon tendered to the defendant the difference between the amount actually unpaid on the contract and the insurance proceeds. The defendant contended that she was personally entitled to the proceeds and refused plaintiff's demand that $4,650 be credited on the balance of the purchase price.

Thus, the trial judge was requested to determine the case upon the question of law as to whether a purchaser of real property is entitled to have the proceeds of a fire insurance policy, in the vendor's name only, applied in reduction of the purchase price where the contract of sale required the vendee to pay the insurance premium.

The Supreme Court at Trial Term decided that plaintiff, as purchaser, was entitled to credit the proceeds against the purchase price. On appeal, the Appellate Division affirmed the judgment unanimously,[2] and the court of appeals granted permission to appeal.

The law as to the burden of loss under land contracts and as to the practically related problems of fire insurance upon the property contracted to be sold is governed by the Uniform Vendor and Purchaser Risk Act. This Act has been adopted by the majority of the states including New York.[3]

[1] Raplee v. Piper, 3 N. Y. 2d 179, 143 N. E. 2d 919 (1957).

[2] Raplee v. Piper, 2 A. D. 2d 732, 154 N. Y. S. 2d 1017 (3d Dep't 1956).

[3] N. Y. REAL PROP. LAW § 240-A:

"Any contract for the purchase and sale or exchange of realty is to be interpreted, unless the contract expressly provides otherwise, as including an agreement that the parties shall have these rights and duties:

(a) When neither the legal title nor possession of the subject matter has been transferred to the purchaser, if all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the seller cannot enforce the contract, and the buyer is entitled to recover any portion of the price that he has paid; but the vendor shall not be deprived of any right to recover damages against the purchaser for any breach of contract by the buyer prior to the destruction or taking. If an immaterial part is destroyed without fault of the purchaser or is taken by eminent domain, neither the seller nor buyer is thereby deprived of the right to enforce the contract, but there shall be, to the extent of the destruction or taking, an abatement of the price.

(b) When either the legal title or possession of the subject matter of the contract has been transferred to the purchaser, if all or any part thereof is destroyed without fault of the seller or is taken by eminent domain, the purchaser is not thereby relieved from duty to pay the price, nor is he entitled to recover any part that he has paid; but the buyer is not deprived of any right to recover damages against the seller for any breach of contract by the vendor prior to the destruction or taking."

It is well established in New York that the vendor of real property has an insurable interest in the premises regardless of what view is taken as to the burden of loss. If the burden is on him, he has the same insurable interest as any owner.[4] If the burden is on the purchaser, but the vendor has not been paid in full, he has a security interest in the premises which is clearly insurable. Even if the vendor has been paid, there is no reason, so far as the doctrine of insurable interest is concerned, why he cannot procure insurance on the property as trustee for the purchaser.[5] Until the contract is made, the purchaser has, of course, no insurable interest; but once it is made, he can insure his interest regardless of whether the burden of loss is on him or not.[6] His equitable title to the property constitutes a good insurable interest therein.[7]

Where a vendor, who has insured prior to the contract of sale, collects the insurance money for a loss occurring subsequent to the making of the contract, the matter of burden of loss as between the parties to the contract is an important factor in determining how the money so received is to be disposed of. Where the burden of loss is on the vendor, this problem is easily dealt with. The loss is the vendor's and the indemnity for that loss which he receives from the insurer is his. The purchaser, although he is entitled to the return of his deposit, or may, if he so elects, be able to enforce partial specific performance with compensation, has no claim to the insurance money.[8] Where, however, the burden of loss is on the purchaser and where the vendor has paid the premiums, a much more difficult problem is presented. In the leading English case of *Rayner* v. *Preston*,[9] the Court of Appeals held, that the purchaser was not entitled either to claim the insurance money received by the vendor or to have it applied to the repair of the damaged premises. The New York Court of Appeals took advantage of the opportunity afforded by the case of *Brownell* v. *Board of Education*[10] to adopt the doctrine of *Rayner* v. *Preston*.[11] A contract of fire insurance is a contract of personal indemnity. It insures, not the property, but the interest of the insured in the property.[12] In the vendor's case, what is insured is his security interest. If he collects in full from the purchaser, he has suffered no loss and the insurance company should not be required to pay. If he collects from the insurer, rather than proceeding against the purchaser, the insurer is entitled to subrogation to his rights against the purchaser under the contract of sale.[13]

The purchaser, once the contract is made, has an insurable interest in the property, and may and frequently does insure.[14] If a loss occurs, any insurance which the purchaser collects under a policy insuring his interest belongs to him free of any claim of the vendor. Where, however, the purchaser, pursuant to the contract, insures the property with loss payable to vendor and purchaser "as their interests may appear", the vendor is entitled to the insurance money to the extent of payment due on the

[4] Berry v. American Central Insurance Co., 132 N. Y. 49, 39 N. E. 254 (1892); Redfield v. Holland Purchase Insurance Co., 56 N. Y. 354, 34 N. E. 531 (1874).

[5] RICHARDS, INSURANCE § 76 (5th ed. New York 1952).

[6] *Ibid.*

[7] *Ibid.*

[8] Rayner v. Preston, 18 Ch. D. 1 (1881); Brownell v. Board of Education, 239 N. Y. 369, 146 N. E. 630 (1925); Polisivk v. Mayers, 205 App. Div. 573, 200 N. Y. Supp. 97 (2d Dep't 1923).

[9] 18 Ch. D. 1 (1881).

[10] 239 N. Y. 369, 146 N. E. 630 (1925).

[11] See note 9, *supra*.

[12] Brownell v. Board of Education, 239 N. Y. 369, 146 N. E. 630 (1925); see note 5, *supra*.

[13] See note 10, *supra*.

[14] See note 6, *supra*.

purchase price.[15] This method of insuring, which is that ordinarily employed where the relation of the parties is that of mortgagor and mortgagee, is the most satisfactory way of arranging insurance between vendor and purchaser.[16]

The court of appeals[17] in the instant case distinguished on the facts the case of *Brownell* v. *Board of Education*,[18] where it was held that a vendor of real property, after a fire loss, was entitled to the proceeds of a fire insurance policy in his name alone, and was not compelled to credit such proceeds against the purchase price. There, the vendor at his own cost, for his own protection, and not because of any agreement, took out his *own* insurance. The insurance company was not "a part of the res bargained for and no trust relation exists in regard to it."[19] While in the instant case the insurance was taken out at the cost of the vendee in the name of the vendor for the protection of the contract and of both parties to the contract.

The court thought it most unjust that a purchaser, although complying with the contract by keeping the property insured in the name of the vendor, should get no benefit from the insurance. The majority was fearful of a situation where the vendor would be entitled to the full purchase price even though the building was destroyed, plus the insurance proceeds, while the purchaser, although deprived of the destroyed building, would nonetheless pay the full price.

Since *Brownell* v. *Board of Education*[20] the precise point decided in the instant case had not been considered by the New York Court of Appeals. There have been only two reported decisions in this state which deal with the issue presented by the principal case. One, *Persico* v. *Guernsey*,[21] reached the same result that the majority reached in the instant case, and the other, *Cowan* v. *Sutherland*,[22] held directly opposite. In both cases the circumstances were similar to the principal case.

CONTRACTS—UNCOPYRIGHTED IDEA AFFORDED LEGAL PROTECTION WHERE FACTS GIVE RISE TO QUASI-CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES.—The United States District Court for the Southern District of New York has recently considered the common law doctrine that an idea, not reduced to tangible form, will not be afforded the protection of the law.[1]

Plaintiff, an Ohio housewife, wrote an unsolicited letter to the defendant, Procter and Gamble, in which she expressed her idea for a useful new product which combined soap and bluing. The defendant answered the letter expressing a cordial disinterest with an explanation that the idea had been considered in the past without much success, and that a slightly different approach was then being used in their research. Shortly thereafter defendant put on the market a product called "Blue Cheer" which was similar to that suggested by the plaintiff. Plaintiff brought this action in quasi-contract, alleging that defendant had unjustly enriched itself by the appropriation of an uncopyrighted idea in which the plaintiff had a property right. Defendant then moved for a summary judgment.

[15] Cromwell v. Brooklyn Fire Insurance Co., 44 N. Y. 42, 32 N. E. 41 (1870); Turner v. Bryant, 215 N. Y. 669, 109 N. E. 1094 (1915); Persico v. Guernsey, 222 App. Div. 719, 225 N. Y. Supp. 890 (3d Dep't 1927).

[16] See note 5, *supra;* Tiemann v. Citizen Insurance Co., 76 App. Div. 5, 78 N. Y. Supp. 620 (3d Dep't 1902).

[17] See note 1, *supra.*

[18] See note 10, *supra.*

[19] *Id.* at 373; 146 N. E. at 635.

[20] See note 10, *supra.*

[21] 222 App. Div. 719, 225 N. Y. Supp. 890 (3d Dep't 1927).

[22] 117 N. Y. S. 2d 365 (Sup. Ct. Herkimer Co. 1952).

[1] Galanis v. Procter and Gamble Corp., 153 F. Supp. 34 (S. D. N. Y. 1957).

A summary judgment may be rendered if the pleadings, admissions and affidavits show that there is no genuine issue as to a material fact and that the party making the motion is entitled to a judgment as a matter of law.[2] At common law, if the plaintiff failed to establish a valid contract, the action would be dismissed and a summary judgment awarded to the defendant because there was no recognition at common law of the concept that an author could have a property right in an idea[3] which was not reduced to some tangible form.[4]

However, today the problem is approached not solely from the standpoint of whether an uncopyrighted idea should be protected as a matter of law, but rather whether failure to protect the idea would be inequitable. The nature of the action is that an implied-in-fact or quasi-contract resting upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another.[5] In the absence of any agreement equity creates an obligation when the acts of the parties have placed money or its equivalent in the hands of one party when in good conscience it belongs to another.[6]

In a leading New York case[7] this concept was recognized and applied in a situation similar to the instant case. The court denied recovery by distinguishing original and marketable ideas from those which were commonly known and used. A mere suggestion by the plaintiff of this latter type of idea was insufficient to sustain a cause of action. In 1946 the United States Court of Appeals,[8] for the Second Circuit, affirmed a district court decision granting a plaintiff recovery because of the unjust enrichment of a defendant who used the plaintiff's idea without compensation. The plaintiff, an employee of a steamship line, conceived an idea for loading cargo which would effectuate tremendous savings for the company. After a company agent saw a demonstration of the idea, he promised to compensate the employee. However, the compensation was never paid. The company was held liable on the theory of unjust enrichment. The court held that the theory applied in situations where the product of an inventor's brain is knowingly received and used by another.

In the instant case, the district court cited this decision in the same judicial circuit, and also cited a District of Columbia decision[9] which was in point. In considering the issue of when there is such property right in an uncopyrighted idea as will enable the plaintiff to recover, the District of Columbia Court stated that the idea must be ". . . original, concrete, useful and disclosed in circumstances which, reasonably construed, clearly indicate that compensation is contemplated if it is accepted and used."[10] In following the holding of the District of Columbia Court, the New York District Court declared that if the plaintiff's idea could fulfill these requisites she was entitled to judgment as a matter of law.

While at first blush there seemed to be no factual issues relative to the motion; the court by invoking the rule, allowing recovery in the theory of unjust enrichment; made it clear that contentious issues of fact were involved and that such issues must be properly decided by a jury.

2 FED. R. CIV. P. 56 (c).

3 Carter v. Bailey, 64 Me. 458, 461 (1874).

4 *Ibid;* Ryan and Associates v. Century Brewing Assoc., 185 Wash. 600, 55 P. 2d 1053 (1936).

5 Miller v. Schloss, 218 N. Y. 400, 401, 113 N. E. 337, 339 (1916).

6 *Ibid.*

7 Bristol v. Equitable Life Assurance Soc. of New York, 132 N. Y. 264, 30 N. E. 506 (1892).

8 Matarese v. Moore-McCormack Lines, Inc., 158 F. 2d 631, 634 (2d Cir. 1946).

9 Hamilton National Bank v. Belt, 210 F. 2d 706 (D. C. Cir. 1951).

10 *Id.* at 708.

CRIMINAL LAW—EXTRADITION—EFFECT OF EXTRADITION AGREEMENT BETWEEN STATES IN REGARD TO CONDITIONAL COMMUTATION OF LIFE SENTENCE.—The relator was convicted in New York of murder in the second degree and sentenced to a term of twenty years to life imprisonment. Pursuant to an agreement of extradition between the Governors of the States of New York and Pennsylvania, he was surrendered to Pennsylvania to stand trial on the charge of murder in the first degree. In Pennsylvania he was convicted and sentenced to life imprisonment. After a period of fifteen years the Governor of Pennsylvania commuted his sentence to a minimum term of fifteen years one month and ordered his return to New York. Upon his return, he was reincarcerated in a New York State Prison.

The agreement of extradition[1] between the Governors, stipulated that the relator was to be surrendered to Pennsylvania on condition ". . . that if he were acquitted, or if he were convicted and given a lesser sentence by the Pennsylvania Court than that which he was serving in New York, he was to be returned to finish his sentence in New York; but that if he were convicted and sentenced to either life imprisonment or execution, he was to be left in the custody of the State of Pennsylvania."[2]

On the basis of the commutation, relator moved for a writ of habeas corpus which was dismissed.[3] Relator appealed.

The basis of the relator's appeal was that the Governor of New York, in surrendering him to Pennsylvania under this agreement of extradition,[4] had forever waived any jurisdiction this state had over him, or more particularly, had in effect commuted his New York sentence to the time he was surrendered to Pennsylvania. The relator further contended that in any event, releasing him to Pennsylvania did not stop the running of his New York sentence, thus entitling him to receive credit toward his New York sentence for the time spent in the Pennsylvania prison.

The New York Court of Appeals, however, reached a conclusion contrary to the relator's contention, and held that the agreement was in the nature of a conditional extradition, ". . . it was clearly not an absolute commutation, but rather, was conditioned upon the relator's receiving a more severe sentence in Pennsylvania than had been imposed upon him in New York."[5] The court thought it inconceivable that the Governor of New York might overlook the fact that the accused could possibly receive a commutation of sentence and that if this condition was not capable of operation, a result would have been reached that never was intended. The relator would have been able to return to society after a short period of imprisonment for the crimes of murder in the first and second degree.

The court in considering whether the prison sentence ran in favor of the relator, pointed out that the running of a prison sentence may only be interpreted in one of three ways: (1) Sentence or the execution of it may be suspended before imprisonment has begun, but not thereafter; (2) the prisoner may escape from prison or violate parole or (3) the governor may modify the length of the sentence by commutation or parole.[6] Since the reason for relator's extradition did not fit within one of the categories, the court held that his sentence had been running without interruption since he was first imprisoned in a New York State Prison.

[1] People *ex rel.* Reynolds v. Martin, 3 N. Y. 2d 217, 144 N. E. 2d 22 (1957).

[2] *Id.* at 220, 144 N. E. 2d at 22.

[3] People *ex rel.* Reynolds v. Martin, 2 A. D. 2d 646, 157 N. Y. S. 2d 981 (4th Dep't 1956).

[4] See note 1, *supra* at 220, 144 N. E. 2d at 23.

[5] *Id.* at 222, 144 N. E. 2d at 25.

[6] People *ex rel.* Rainone v. Murphy, 1 N. Y. 2d 367, 135 N. E. 2d 567 (1956).

The decisions in New York are strongly in accord with the holding of this case. In *People* v. *Martin*[7] the Court of Appeals adopted the view of *People ex rel. Gariti* v. *Brophy*[8] in which it was held that where a relator, who was serving a prison sentence was surrendered to another state, the State of New York did not thereby waive its rights thereafter to incarcerate the relator for the balance of his sentence. Stressing this point, the Appellate Division in *People ex rel. Hutchings* v. *Mallon*[9] was of the opinion that a person who had departed from the state, leaving its demands unsatisfied, is still a fugitive from justice.

In *Appleyard* v. *Mass.*[10] the United States Supreme Court held: ". . . that a person charged by indictment or by affidavit before a magistrate with the commission of a crime within that state and who after the date of the commission of such crime leaves the state, no matter for what purpose or with what motive, nor under what belief becomes from the time of such leaving and within the meaning of the Constitution and the laws of the United States, a fugitive from justice who must be delivered up to the Governor of such state whose laws have been violated." In other cases before the Federal Courts,[11] it has been held that there is a well established rule of comity, which is reciprocal, whereby one sovereign, having exclusive jurisdiction of a prisoner, may temporarily waive its right to such person for the purposes of trial in the courts of another sovereignty. This infers that the asylum state can still regain custody of that person for the purpose of punishment for any crime committed within that state.

It is to be noted that the New York Courts, in prior decisions concerning the issue in the instant case, have never cited the Uniform Extradition Act which was incorporated in the New York Code of Criminal Procedure in 1936.[12] The act also has been adopted in thirty-nine other states. Section 857 of the New York Code of Criminal Procedure is applicable where a prisoner has been extradited to another state before completing his sentence. It states in substance that such an act shall not be deemed to constitute a waiver by this state of its right, power or privilege to regain custody of such persons for the purpose of trial, sentence or punishment for any crime committed within this state.

There are cases[13] in other jurisdictions which are in seeming support of the proposition that when a state honors the requisition of another state by surrendering a fugitive against whom a charge is pending in the asylum state, the latter waives its right to punish the accused.

In an Illinois case,[14] although the precise question which appears in the instant case was not decided, the court said, by way of dicta, that when the requisition of a fugitive has been honored and the fugitive surrendered thereunder, such surrender will operate as a waiver of jurisdiction of the asylum state. In a more recent case,[15]

[7] People v. Martin, 261 App. Div. 1034, 26 N. Y. S. 2d 5 (3d Dep't 1941).

[8] People *ex rel.* Gariti v. Brophy, 255 App. Div. 823, 7 N. Y. S. 2d 19 (1938), *aff'd*, 279 N. Y. 778, 18 N. E. 2d 863 (1939).

[9] People *ex rel.* Hutchings v. Mallon, 218 App. Div. 461, 218 N. Y. Supp. 432 (1st Dep't 1926).

[10] Appleyard v. Mass, 203 U. S. 222, 27 S. Ct. 122, 51 L. Ed. 223 (1906).

[11] Werntz v. Looney, 208 F. 2d 102 (10th Cir. 1953); Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 66 L. Ed. 607 (1922); *Ex parte* Aubert, 51 F. 2d 136 (N. D. Cal. 1931).

[12] N. Y. CODE CRIM. PROC. §§ 827-59.

[13] *Ex parte* Guy, 41 Okla. Crim. Rep. 12, 269 P. 783 (1928); *In re* Jones, 154 Kan. 589, 121 P. 2d 219 (1942).

[14] People *ex rel.* Klinger, 319 Ill. 275, 149 N. E. 799 (1925).

[15] People *ex rel.* Barrett v. Bartley, 383 Ill. 437, 50 N. E. 2d 517 (1943).

the Supreme Court of Illinois in affirming a writ of habeas corpus, limited its position on the question to those extradition proceedings where there is no agreement for return between the governors, thus inferring that if there is an agreement for the return of the fugitive to the asylum state, jurisdiction is only temporarily waived. It is to be noted that Illinois has not adopted the Uniform Extradition Act.

It would seem while the instant case presents a novel question, the decision rendered is in accord with the few reported cases in New York that have passed upon waiver of jurisdiction. The court could have based its decision on the Uniform Extradition Act, as it has been adopted in New York. However, it chose to look to the intention of the agreement made between the Governors of New York and Pennsylvania as the foundation for its decision.

The court's decision, in the instant case, is in accord with the view set forth in *Commonwealth ex rel. Kamons* v. *Ashe*,[16] a Pennsylvania case. In that case the court was of the opinion that when a fugitive is under custody of the asylum state at the time of extradition, delivery to the other state is a matter of comity, and what is to be done afterwards with the prisoner becomes a matter of agreement between the Governors of the states.

CRIMINAL LAW—UNIFORM TRAFFIC TICKET, HELD, INSUFFICIENT AS AN INFORMATION UPON WHICH A MISDEMEANOR CONVICTION MAY BE BASED.—In reversing a decision of the St. Lawrence County Court, the New York Court of Appeals,[1] in a 4 to 1 decision, has held that a "uniform traffic ticket" is not sufficient as an information upon which a misdemeanor conviction may be based. The court also concluded that the absence of a verified information was a jurisdictional defect which was not cured by defendant's plea of guilty.

The defendant was issued a "uniform traffic ticket,"[2] notifying him to appear before a Police Justice, sitting as a Court of Special Sessions, in order to answer a charge of driving while intoxicated.[3] After arraignment, he was fully informed of his rights, whereupon he pleaded guilty and was fined $25.00. The conviction was upheld by the St. Lawrence County Court.

The New York Code of Criminal Procedure[4] defines an information as an "allegation made to a magistrate that a person has been guilty of some designated crime." The "ticket," however, is merely a notice ordering the defendant to appear in a given court on a certain day, at which time and place, he will be charged with a specific crime. It is not similar to a summons in a civil action, which serves to bring defendant under the jurisdiction of the court.[5] The "ticket" would be akin to a summons for a parking violation which is not sufficient to give the court jurisdiction over the person of the defendant.[6] Such a summons is notice that an information has been presented charging the commission of an offense.

[16] 114 Pa. Super. Ct. 119, 173 A. 715 (1934).

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[1] People v. Scott, 3 N. Y. 148, 143 N. E. 2d 901 (1957).

[2] Prescribed by the Bureau of Motor Vehicles (N. Y. OFF. COMP. OF CODES, RULES & REGULATIONS, 10TH OFF. SUPP., 1955, pp. 734-43).

[3] N. Y. VEHICLE & TRAFFIC LAW § 70 (5).

[4] N. Y. CODE CRIM. PRO. § 145.

[5] N. Y. CIV. PRAC. ACT § 218.

[6] People v. Levins, 152 Misc. 650, 273 N. Y. Supp. 941. (N. Y. C. Ct. Spec. Sess. 1934).

All prosecutions commenced in courts of special sessions in the City of New York must be initiated by an information drawn by the District Attorney,[7] but such is not the case outside the city. The New York Code of Criminal Procedure does not specify what is required there, but it is apparent that it is something less than within the city. In other jurisdictions in the United States, the general rule is that the information be drawn by a qualified public official.[8] It is not necessary that the information be written where an offense is charged. However, where the case involves the commission of a misdemeanor, it appears clear that a written information is needed.[9] Such a document was required in similar prosecutions by the early Common Law of England.[10] Section 699 of the New York Code of Criminal Procedure,[11] applicable to misdemeanor prosecutions in courts of special sessions outside the City of New York, provides that the charge must be distinctly read to the defendant, thereby implying that the allegation be in writing.

The use of the "traffic ticket" as an information was further objected to because it was not verified. Although the dissent pointed out that there is no statutory requirement that such a paper be sworn and that there is no basis for it in the common law,[12] the majority held that it was necessary. Earlier cases have distinguished between an information when used as a basis for an arrest and when used as a pleading after defendant has come under the court's jurisdiction. In *People ex rel. Livingston* v. *Wyatt*,[13] the court of appeals held that verification was required in order to obtain a warrant of arrest, for otherwise, unfounded accusations could be offered and an investigation instituted upon them. However, in *People* v. *Belcher*,[14] the information was used as a pleading in the trial of a misdemeanor and not as the basis for a warrant of arrest. The court held that such an information was not defective although not sworn to because it served only the purpose of a pleading. It was this factor and the prior lawful arrest that distinguishes the two cases.

In *People* v. *Jacoby*,[15] defendant was charged with a violation of the Penal Law.[16] He appeared voluntarily before the judge with a sworn affidavit of facts. Having been informed of his rights, he thereupon pleaded guilty without the issuance of a sworn information. On appeal, the issue was whether the court had jurisdiction although no information had been filed. The court of appeals, in a 4 to 1 decision held that the court had jurisdiction, agreeing that the prosecution of a misdemeanor can proceed only on a written information. The court treated defendant's sworn affidavit as the equivalent of a sworn information. In the instant case, it was concluded that the policy in the *Wyatt* case, requiring verification of the information in order to obtain a warrant of arrest, also required that it be verified when used as a pleading.[17]

Having accepted the proposition that the "ticket" was defective as an information, the second problem considered was whether the defect was waived by defend-

[7] See note 4, *supra*.

[8] People v. Grogan, 260 N. Y. 138, 183 N. E. 273 (1932); People v. McGahan, 249 App. Div. 691, 291 N. Y. Supp. 673 (3d Dep't 1936); People v. Tompkins, 202 Misc. 147, 114 N. Y. S. 2d 297 (West. Co. Ct. 1952).

[9] 27 Am. Jur., *Indictments and Informations* § 58 (1940).

[10] *Ibid.*

[11] N. Y. CODE CRIM. PRO. § 699.

[12] See note 9, *supra*, § 44; 42 C. J. S., *Indictments and Informations* § 86 (1944).

[13] 186 N. Y. 383, 79 N. E. 330 (1906).

[14] 302 N. Y. 529, 99 N. E. 2d 874 (1951).

[15] People v. Jacoby, 304 N. Y. 33, 105 N. E. 2d 613 (1952).

[16] N. Y. PEN. LAW § 43.

[17] See note 1, *supra* at 152, 143 N. E. 2d at 903.

ant's plea of guilty. The majority held that the absence of a verified information was a jurisdictional defect which was not so waived.

Lower New York court cases[18] prior to the United States Supreme Court's decision in *Albrecht* v. *U. S.*[19] held that the defect was a formal one which was waived by a guilty plea. Since that decision, the lower courts have held that the requirements of a written information cannot be waived. In the *Albrecht* case, the Court held that: "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court."

In the *Jacoby* case which was decided after the *Albrecht* case, the court held that where a *lawful arrest* is made and no objection is offered to the form of the information on arraignment or before trial, the defendant has waived any objection to it and the court has acquired jurisdiction of both the defendant and the subject matter.[20] Fuld J., in a vigorous dissent,[21] urged that compliance with the basic elements of an information was a jurisdictional requirement that could not be cured or dispensed with by a plea of guilty.

It appears that the present court agreed with the dissent in the *Jacoby* case for they also considered the defect to be a jurisdictional one. The cases are reconcilable, however, for three of the majority judges in the latter case agreed with Fuld J., that the defect could not be waived. However, they decided that defendant's own verified affidavit was the equivalent of a sworn information.

In the instant case, Desmond J., dissenting,[22] distinguished between the kind of information involved here and the kind that serves as a basis for the issuance of a warrant. The latter, since it results in a deprivation of liberty, must be supported by a verified statement. He contended that the information here served only the function of a pleading because the trial court had already acquired jurisdiction over the defendant by a valid arrest. He also contended that the absence of a verified information was at most a defect in form and that defendant could not be deprived of any rights because the paper was not sworn to. If a defendant might waive other important rights at a trial, it would not be prejudicial to allow him to waive this mere formality; the presentation to him of a formal written accusation.

It would appear that the rationale behind the present decision is that courts will go far in protecting the rights of an individual in a criminal case, insofar as they require that the court establish proper jurisdiction over the defendant and apprise him fully as to his rights.

EVIDENCE—ATTORNEY-CLIENT PRIVILEGE NOT VITIATED BY PUBLICATION OF ILLEGALLY OBTAINED TRANSCRIPT CONTAINING THEIR CONFERENCE.—The Appellate Division of the Supreme Court of New York recently commented[1] on the nature and extent of the attorney-client privilege.[2] This privilege is an evidentiary rule which bars compulsory

[18] See *supra,* note 8, People v. Tompkins; People v. Halling, 203 Misc. 428, 122 N. Y. S. 2d 543 (Monroe Co. Ct., 1953).

[19] 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505 (1926).

[20] See note 15, *supra* at 41, 105 N. E. 2d at 617 (1952).

[21] *Id.* at 43, 105 N. E. 2d at 618 (1952).

[22] See note 1, *supra* at 154, 143 N. E. 2d at 905.

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[1] Reuter v. Cosentino, 4 A. D. 2d 252, 164 N. Y. S. 2d 534, *lv. to appeal denied,* 4 A. D. 2d 831, 166 N. Y. S. 2d 302 (1st Dep't 1957).

[2] For a discussion of the question of communication by the client's agent to the attorney see, 43 WIS. L. REV. 424-30 (1943); on the question of competency of the attorney to testify see, 2 OKLA. L. REV. 94-96 (1949); on the question of attorney-

disclosure by the attorney of confidential communications between himself and his client. The instant decision[3] prohibits asking the attorney questions which are constructed from an illegally obtained[4] transcript of a conference between the attorney and his client.

The client had been paroled[5] for good behavior[6] from his imprisonment[7] following a conviction for extortion.[8] The parole was subject to a series of revocations[9] and reinstatements which were brought to the attention of the Joint State Legislative Committee investigating the procedures of the New York State Parole Board and the supervision of parolees by various agencies. Previously, the police authorities had effected an electronic penetration of a conference between the client and his attorney. A transcript of the conference was made available to the legislative committee which then published its contents. The attorney was summoned by the State Commissioner of Investigation to testify at a hearing. The commissioner with the aid of the transcript in questioning the attorney was able to pose collateral questions not going directly to the attorney-client conversations; questions which would inferentially confirm the transcript and disclose other activities of the attorney on behalf of the client. The lawyer raised the bar of the attorney-client privilege and upon his continued refusal to answer, contempt proceedings were instituted against him.[10]

The Appellate Division in affirming the judgment of the supreme court which dismissed the contempt proceedings held, that the attorney-client privilege was a bar to collateral questions derived from a transcript of the conference between an

client privilege as to advice given by the attorney to the client reflecting on judicial integrity see, 34 NEB. L. REV. 538-46 (1955); as to the extent of the attorney's duty to advise the client see, 28 L. INST. J. 80-82 (1954), 103 L. J. 807-08 (1953).

[3] For an indication of the interest generated in this case see Editorial, NEW YORK HERALD TRIBUNE, Late City Edition, May 3, 1957, § 1, p. 16, col. 1.

[4] While in federal judicial proceedings illegally obtained evidence is inadmissible, Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914); this rule does not apply in New York where illegally obtained evidence is admissible in criminal proceedings, if such evidence is competent, People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).

[5] N. Y. CORREC. LAW § 212: "Every person sentenced to an indeterminant sentence . . . shall be subject to the jurisdiction of the Board of Parole."

[6] *Id.* § 213: "No prisoner shall be released on parole . . . (unless) the Board of Parole is of the opinion that, if such prisoner is released, he will . . . remain at liberty without violating the law."

[7] *Id.* § 215: "The Board of Parole . . . shall specify . . . the conditions . . . of parole. A violation of such conditions may render . . . prisoner liable to . . . reimprisonment. The board shall adopt rules with regard to conditions of parole and their violation. . . . Such rules . . . may include . . . that parolee . . . shall abandon evil associates. . . ."

[8] The indictment was filed against the client on Jan. 17, 1941 in the Court of General Sessions, New York County, Docket No. 226467. It consisted of one count of conspiracy and six counts of extortion. On Jan. 12, 1943 the client pleaded guilty to the count of conspiracy and the fifth count of extortion. Wallace J., sentenced the client on Jan. 29, 1943 to not less than 7½ nor more than 15 years imprisonment.

[9] See note 5, *supra* § 216 ". . . (if a) prisoner has lapsed into criminal company . . . (his parole officer) shall report to the Board of Parole which . . . shall issue a warrant for . . . (parolee's) return to prison."

[10] "While the attorney-client privilege is a right vested in the client, and can not be claimed by the attorney on his own behalf, it is proper for the attorney to raise the issue whether the privilege has attached to a communication between the attorney and the client; such issue is raised by the attorney on behalf or in the name of the right of the client." RICHARDSON, EVIDENCE § 433 (8th ed. Brooklyn 1955).

attorney and his client notwithstanding the legitimate legislative purpose for which the inquiry was made. It is now settled[11] that the courts will not restrain publication of the intercepted confidential communications by members of a legislative committee, nevertheless, the right of a governmental unit to publish the product of penetration is different from attempting to compel a lawyer to testify as to a privileged communication.[12] The right of an individual to be advised by a lawyer and the protection afforded such a consultation should be preserved even though modern electronics has provided a facile way of ascertaining what is said between them.[13] "The law does not lie helpless because there may arise ingenious facilities to circumvent its safeguards; and if the constitutional guarantee of aid of counsel is to be of value the court must afford to every man the right to talk to his lawyer with the assurance that the lawyer will not be required to disclose what is said."[14] "Where illegally obtained information of the professional consultation becomes a guide and beacon to examination, the lawyer ought not be compelled to disclose activities resulting from the consultation. When such acts mirror the privileged communication and tend to uncover it they should be within the area which will not be disclosed."[15] It was stated that it is not feasible to lay down set patterns of questions which will be permissible in such interrogations.

The privilege against compulsory testimonial disclosure attaching to the attorney-client relationship is the oldest privilege[16] known to Anglo-American jurisprudence. Originally, it provided for the protection of the oath of the attorney (pledging to his client secrecy of the client's affairs) and the lawyer's honor (securing such pledge), rather than to allay the client's fears of disclosure of his affairs. This concept was so eroded that by the late 1700's it was recognized that there was no moral delinquency in breaking one's pledge under force of legal process.[17] The theory of the sanctity of the legal practitioner's honor was repudiated. This concept of honor was supplanted by the necessity of eliminating the client's fears of disclosure of his secrets in order to encourage prospective litigants to seek legal advice from attorneys and to fully confide therein.[18] The primary object of the privilege is ". . . to secure the orderly administration of justice by insuring frank revelation by the client to the attorney without fear of a forced disclosure; in other words to promote freedom of consultation."[19] In an early New York case the court stated: "In ancient times parties litigant were in the habit of coming into court and prosecuting or defending their suits in person."[20] As law suits multiplied and judicial proceedings became more complex, it became necessary to find persons skilled in the laws and the practice of the courts in order that they might conduct the proceedings. This evolution resulted

[11] Lanza v. N. Y. State Joint Legislative Committee, 3 N. Y. 2d 92, 143 N. E. 2d 772 (1957).

[12] *Id.* at 98, 143 N. E. 2d at 775.

[13] See note 1, *supra* at 254, 164 N. Y. S. 2d at 536.

[14] See note 1, *supra* at 255, 164 N. Y. S. 2d at 536.

[15] *Ibid.*

[16] The history of this privilege dates back to the reign of Eliz. I of England when it was recognized in Bird v. Lovelace, Cary 88 (1577); Denis v. Codrington, Cary 143 (1580); in Orbie's case, March pl. 136 (1642), Roll. C. J., said "he is not bound to make answer for things which may disclose the secrets of his client's cause."

[17] 8 WIGMORE, EVIDENCE § 2290 (3d ed. Boston 1940).

[18] People *ex rel.* Vogelstein v. Warden of the County Jail of N. Y. County, 150 Misc. 714, 270 N. Y. Supp. 362, *aff'd,* 242 App. Div. 611, 271 N. Y. Supp. 1059 (1st Dep't 1934).

[19] See note 17, *supra* § 2291.

[20] Whiting v. Barney, 30 N. Y. 330 (1864).

in the class of attorneys. But as parties were not obliged to testify in their own cases they would hesitate to employ lawyers and make necessary disclosures to them. To encourage the utilization of attorneys it became necessary to extend to them the immunity enjoyed by the party himself.[21]

In order to ascertain whether the privilege has attached, Professor Wigmore[22] has set forth these requirements: (1) when the prospective client seeks legal advice, (2) from a lawyer in his capacity as such, (3) the communication relating to that purpose, (4) made in confidence by the client (5) becomes privileged, (6) at the client's insistence and is permanently protected (7) from disclosure by the client or his legal adviser, (8) except that the privilege may be waived. That the lawyer will not be compelled to testify to the actual communication between the parties has been settled in New York by statute[23] and judicial policy. The privilege was expressly affirmed in another case[24] arising from this inquiry which dealt with the right of the legislative committee to publish the product of its investigation. Removal of the privilege would hamper the administration of justice[25] and the statute concerning it should receive a "broad and liberal construction."[26]

The attorney-client privilege is based on public policy[27] subject to legislative regulation and limitation.[28] Its purpose being to secure the client's confidence in the secrecy which is to be accorded his communications and to promote greater freedom of communication between client and attorney.[29] The privilege extends only to those communications between attorney and client which they intend to be confidential.[30] Such privilege would not be extended to include third parties overhearing the conversation without the knowledge of attorney or client.[31] Nor would the privilege be extended to protect communications made in furtherance of the commission of a crime.[32] Not every conversation would bear the privilege because one of the parties was a lawyer. A confidential communication is privileged only to the extent that the client is conferring with the attorney in his professional capacity,[33] *i.e.*, that the relationship of attorney-client does exist at the time[34] of the communication and the subject matter[35] is related to the reason for the conversation. As decided by the Appellate Division in the instant case, when the privileged conversation is a guide and beacon to inquiry, activities by the attorney in connection with the conversation

[21] *Ibid.*

[22] See note 17, *supra* § 2292.

[23] N. Y. Civ. Prac. Act § 353-54.

[24] See note 11, *supra.*

[25] People v. Shapiro, 308 N. Y. 453, 126 N. E. 2d 559 (1955).

[26] See note 1, *supra.*

[27] The spirit in which the attorney-client privilege is to be protected is illustrated in People v. Cooper, 307 N. Y. 253, 120 N. E. 2d 813 (1954).

[28] See note 18, *supra.*

[29] *Ibid.*

[30] United States v. Pape, 144 F. 2d 778 (2d Cir. 1944); Flaherty v. Wunsch, 28 N. Y. S. 2d 178 (Sup. Ct. Monroe Co. 1941).

[31] See note 18, *supra* § 2326.

[32] People v. Farmer, 194 N. Y. 251, 87 N. E. 457 (1909).

[33] Kent Jewelry Co. v. Kiefer, 202 Misc. 778, 113 N. Y. S. 2d 12 (Sup. Ct. N. Y. Co. 1952); Modern Woodman of America v. Watkins, 132 F. 2d 352 (5th Cir. 1942); Myles E. Reiser Co. v. Loew's Inc., 194 Misc. 119, 81 N. Y. S. 2d 861 (Sup. Ct. N. Y. Co. 1948).

[34] Application of Ryan, 281 App. Div. 953, 120 N. Y. Supp. 110 (1st Dep't 1953).

[35] *In re* Morrell's Estate, 154 Misc. 356, 277 N. Y. Supp. 262 (Surr. Ct. Kings Co. 1935).

are likewise privileged. When the privilege has attached it is a right vested in the client alone[36] and may be waived only by the client[37] in his life.[38]

WORKMEN'S COMPENSATION—JOINT EMPLOYERS' LIABILITY AWARDED IN PROPORTION TO REMUNERATION PAID EMPLOYEE.—An important Workman's Compensation decision was recently made by the New York Court of Appeals,[1] which held that a workman injured in the joint and concurrent employment of two employers (where the wages paid by the two employers are not equal), shall be compensated by his employers in proportion to their respective wage scales. The Court of Appeals, in a five to two decision, overruled both the Appellate Division,[2] and the Workman's Compensation Board, who had previously held that the compensation award should be equally divided between the two employers.

The undisputed facts revealed that Warren Hunt worked as a night watchman for defendant Regent Corporation and for defendant Butterly & Green. As the defendants' places of business were located one block apart, Hunt was able to perform the night watchman's duties for both, although he spent most of his time in a night watchman's shack on Butterly & Green's property. For this work, Hunt was paid $50.00 a week by Butterly & Green, and $30.00 a week by Regent Corporation. It was conceded that Hunt was injured accidentally, while in the course of his dual employment. The right of Hunt to compensation was not contested on appeal, the only issue being the contention of defendant Regent Corporation that the Workman's Compensation Board and Appellate Division have ordered them to pay more than their rightful share of compensation. Defendant Regent Corporation claimed that the Workman's Compensation Board erred when it declared, "Liability for payment rests equally with both employers."[3]

The Court of Appeals relied predominantly on an earlier New York case[4] in reaching its decision. This case held that "both employers are liable for compensation to the claimant in proportion to the remuneration paid by each," and also that unless an employee's duties to two employers are so separate and distinct in time or place that the employment is capable of identification as that of only one employer, both employers are to be held liable.[5] Judge Fuld, in writing the majority opinion, noted that New York has only treated this subject in the *Stevens* case,[6] and in a memoranda decision, made by the court in 1935,[7] which provided some basis for the court's holding in the *Stevens* case. However, Judge Fuld placed emphasis on similar holdings in other states,[8] and the fact that in some states, apportionment is provided for by statute.[9]

[36] Pearsall v. Elmer, 5 Redf. 181 (Surr. Ct. N. Y. Co. 1881).
[37] People v. Patrick, 182 N. Y. 131, 74 N. E. 648 (1905).
[38] Matter of Cunnion, 210 N. Y. 123, 94 N. E. 648 (1911).

[1] Hunt v. Regent Development Corp., 3 N. Y. 2d 133, 143 N. E. 2d 892 (1957).
[2] 1 A. D. 2d 862, 148 N. Y. S. 2d 794 (3d Dep't 1956).
[3] See note 2, *supra*.
[4] Stevens v. Hull-Grummund & Co., 274 N. Y. 227, 8 N. E. 2d 498 (1937).
[5] *Ibid.*
[6] *Ibid.*
[7] Jacobi v. Supreme Junior Coat Co., 268 N. Y. 654, 198 N. E. 541 (1935).
[8] Arizona: Butler v. Commission, 50 Ariz. 516, 73 P. 2d 703 (1937); California: Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820 (1922); Michigan: Wing v. Clark Equipment Co., 286 Mich. 343, 282 N. W. 170 (1938); Wisconsin: Shaefer & Co. v. Industrial Comm., 185 Wis. 317, 201 N. W. 396 (1924).
[9] TENN. CODE ANN. § 6882 (1932); Riverside Mill Co. et al. v. Parsons, et al., 176 Tenn. 381, 141 S. W. 2d 895 (1940).

Workman's Compensation originated in New York in 1909, when Governor Hughes appointed the Wainwright Commission,[10] to investigate the field and recommend legislation. The commission found that the tort system of employer's liability, which required proof of the employer's negligence, and under which the employer could interpose the employee's contributory negligence, negligence of a fellow servant, or assumption of risk by the employee as a successful defense, was unsatisfactory. The results of this "old" system were that, only a small proportion of injured workmen received substantial compensation, the system was costly and slow in operation, and it bred antagonism between employers and employees. The essence of the new system as recommended by the Wainwright Commission, and based on the principle of the English System, in operation since 1897, is one of employer's liability for work-connected injuries to be imposed without regard to negligence or wrong-doing. The remedy was to be a partial but prompt restoration of income lost to the employee, or of the earning capacity impaired as a result of such injury. In return for assuming the liability in these cases, even though he may not have been at fault, the employer was to be permitted to add the cost of his liability to the selling price of his product, and in this manner, it would eventually be paid by the consumer. Thus, from its origin, it is developed today that the basis of liability under the Workman's Compensation law,[11] is "imposed by this chapter is neither ex contractu nor ex delicto, but the obligation is purely statutory."[12] Or, as stated in another New York case, "an employer's liability to pay compensation is a quasi-contractual obligation imposed by reading this chapter (Workman's Compensation Law) into an employment contract."[13] These cases,[14] plus the applicable statute,[15] show the legislature's intent in fixing the basis of liability and the costs of compensation. Today for practical purposes, most employers contract for workman's compensation insurance to safeguard against individual loss. The provisions of such contracts are limited and restricted by the Workman's Compensation law.[16] The compensation insurance can be obtained from a private carrier, or the state will cover the employer's needs when the employer contributes to a general fund, maintained by the state for this purpose. Therefore, from the economic standpoint, the probable outcome would be that when proportionate compensation is awarded, the company paying the greater share of compensation will usually have to pay increased costs of premiums for their compensation insurance.

In considering the importance of the decision at hand, it is significant that the issue before the court has not been previously stated as a rule of law. The two leading cases on this subject are not New York cases and hold conversely to each other. The case of *Sargent* v. *Knowlson*,[17] held that it is proper in making an award against several employers who are jointly liable, to direct the payment thereof by the several employers in equal amounts. Contrary to this and affirming the present holding is a California case, decided in 1927,[18] which held that awards against joint employees

[10] N. Y. SENATE DOCUMENTS—133rd session (1910), Vol. 25, 38 N. Y. State Library.

[11] N. Y. WORKMEN'S COMP. LAW § 10.

[12] Schmidt v. Wolf Contracting Co., 269 App. Div. 201, 55 N. Y. S. 2d 162 (3d Dep't 1945).

[13] Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 175, 15 N. E. 2d 567 (1938).

[14] See notes 12 and 13, *supra*.

[15] See note 11, *supra*.

[16] N. Y. WORKMEN'S COMP. LAW § 54.

[17] Sargent v. A. B. Knowlson Co., 224 Mich. 686, 195 N. W. 810 (1923).

[18] Hartford Acci. & Indem. Co. v. Industrial Acci. Comm., 202 Cal. 688, 262 P. 309 (1927).

have been computed and made on the basis of the ratio of liability of the respective employers. It is relevant that both of these cases were affirmances of the Compensation Board's findings and were not stated as positive rules of law. The instant case on hand reverses the finding of the Compensation Board and does set up a positive rule of law.

Opposed to the majority decision is a very vigorous dissent, written by Judge Desmond, whose argument supports the finding of the Appellate Division and the Workman's Compensation Board. The position taken by the dissent is that although defendants paid unequal wages, the injury to claimant did not occur three-eighths in one employment and five-eighths in the other, but jointly, concurrently and equally in the two employments carried on inseparably and simultaneously. It is further contended that the New York case, predominantly relied upon by the majority,[19] announced no particular universal law requiring apportionment according to respective wage scales in cases of joint employment. A situation existed in that case, not present here, when the Workman's Compensation Board ordered one defendant to pay compensation in excess of the wages he had paid claimant. This was an express violation of the applicable law,[20] which states that compensation must not exceed two-thirds of the wages. The dissent believes this was the basis of the holding, and not the rule of law as interpreted by the majority. The dissent concludes that in this case, equal division is manifestly fair and just, and since it violates no rule of law, the order appealed from should be affirmed.

Taking cognizance of so vigorous a dissent, the court still held for apportionment. One must conclude then, that in the present case, the New York Court of Appeals has set up a rule of law to serve as a governing precedent in future situations with a similar fact pattern. Where a person is jointly employed, this rule provides that there must be an apportionment of the compensation award in accordance with the wages paid by each employer.

[19] See note 4, *supra*.
[20] N. Y. WORKMEN'S COMP. LAW § 15.