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Decisions

DECISIONS

CRIMINAL LAW—GRAND JURY—DENIAL OF MOTION TO DISMISS INDICTMENT FOR INSUFFICIENT EVIDENCE HELD REVIEWABLE ON APPEAL FROM JUDGMENT OF CONVICTION.—No person may be held to answer for a felony unless on an indictment by a grand jury,[1] and no indictment should be found by it unless the evidence presented would "if unexplained or uncontradicted, warrant a conviction by a trial jury."[2]

With these two fundamental statutory provisions before it, New York State's highest judicial tribunal recently held[3] that the denial of a motion to dismiss an indictment on the ground of evidentiary insufficiency before the grand jury is reviewable on appeal from the judgment of conviction;[4] but such a motion will not be granted in the absence of a clear showing to that effect.[5] This is based upon the presumption that an indictment is handed down upon the basis of legal and sufficient evidence.[6] The court also held that a motion to inspect the grand jury minutes rests solely within the discretion of the trial judge and an order denying that motion is not appealable,[7] in the absence of a statute authorizing such an appeal.[8]

The defendant Howell was convicted of murder in the second degree after a jury trial. The evidence submitted was that one Ryan shot and killed another man deliberately and with premeditation. Upon establishing the fact that Howell and Ryan were acquaintances, the prosecution's witnesses gave further testimony which, if believed, would show that Howell was an accomplice of Ryan in the commission of the crime. The most damaging evidence submitted for the people was the testimony given by one Sanders, who swore to admissions made by the defendant subsequent to the latter's surrender to the authorities. This testimony, if believed, provided a complete confession. On cross-examination, however, it was made clear that Sanders, concededly had not testified before the grand jury which returned the indictment. Defense counsel then argued that without Sanders' testimony before the grand jury, the remaining evidence submitted by the prosecution was purely circumstantial and insufficient to warrant the indictment.

Before the trial, defense counsel made a cumulative motion for an inspection of the grand jury minutes and a dismissal of the indictment for insufficiency of evidence before this body. The ground for this motion was that the press reports indicated the prosecution had presented incompetent, irrelevant, and prejudicial evidence to the grand jury. This was denied. When it appeared that Sanders had not given testimony before the grand jury, defense counsel renewed his motion to dismiss the indictment. This too, was denied and upon appeal from a judgment of conviction Howell raised these rulings as grounds for reversal and dismissal of the indictment. The Appellate Division affirmed the conviction by a divided court[9] and defendant appealed to the New York Court of Appeals.

1 N. Y. CONST. art. I, § 6.

2 N. Y. CODE CRIM. PRO. § 251.

3 Pople v. Howell, 3 N. Y. 2d 672, 148 N. E. 2d 867 (1958).

4 People v. Nitzberg, 289 N. Y. 523, 47 N. E. 2d 37 (1943); People v. Sexton, 187 N. Y. 495, 80 N. E. 396 (1907); People v. Glen, 173 N. Y. 395, 66 N. E. 112 (1903) N. Y. CODE CRIM. PRO. § 485, 517.

5 See note 3, *supra.*

6 People v. Sweeney, 213 N. Y. 37, 106 N. E. 913 (1914); see *supra,* note 4, People v. Glen.

7 See *supra,* note 6, People v. Sweeney; Eighmy v. People, 79 N. Y. 546 (1880).

8 People v. Strauss, 165 App. Div. 58, 150 N. Y. Supp. 991 (2d Dep't 1914); Matter of Montgomery, 126 App. Div. 72, 110 N. Y. Supp. 793, *appeal dismissed,* 193 N. Y. 659, 87 N. E. 1123 (1908); N. Y. CODE CRIM. PRO. § 485, 517.

9 People v. Howell, 3 A. D. 2d 153, 158 N. Y. S. 2d 985 (1st Dep't 1957).

It has been said that "the Grand Jury is the great inquest between the government and the citizen."[10] "It is of the highest importance that this institution be preserved in its purity, and that no citizen be tried until he has been regularly accused by the proper tribunal."[11] Therefore, whenever it has clearly been shown that an indictment was founded upon illegal and incompetent testimony, our courts have the power to set it aside.[12] The courts have accordingly recognized the right of the defendant to challenge the sufficiency of evidence before the grand jury by a motion to dismiss the indictment prior to the entry of the judgment of conviction.[13] This is a constitutional right which exists without a specific statutory provision[14] permitting one to make such a motion.[15] At least two bases for challenge relate to such a constitutional right which are: a) a grand jury can receive none but legal evidence[16] and b) it should only find an indictment when all the evidence taken together would, "if unexplained or uncontradicted warrant a conviction by a trial jury."[17] The right to make a motion on these grounds necessarily implies the right to review an order denying such a motion. The New York Code of Criminal Procedure,[18] provides that upon an appeal by a defendant from a judgment of conviction, "any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred eighty-five, may be reviewed." Therefore an order denying such a motion is reviewable as an incident to the appeal from the judgment of conviction.[19]

The New York Court of Appeals in the instant case,[20] acknowledged the fact that it had jurisdiction to review the denial of the motions to dismiss this indictment, but would not grant them because they were not supported by satisfactory and sufficient evidence. With regard to defendant's oral confession that was not before the grand jury, the court said that there is no presumption that the people's evidence at the trial was the same as that evidence considered by the grand jury. This negated the argument presented in the dissenting opinion which said that because the District Attorney found subsequent and additional evidence not before the grand jury at the time it voted the indictment, it did not remedy the defect of an otherwise invalid indictment.[21]

In regard to the motion to inspect the grand jury minutes, decisions of questions of this nature rest solely in the sound discretion of the trial court, and unless it is obvious that there has been an abuse of such discretion, there is no lawful ground for review by a higher court.[22] This was one of the main contentions of the court in dismissing the appeal upon an order denying such a motion. In a leading case[23] on the question of whether this order is appealable, the court discussed the absence of a

[10] United States v. Coolidge, 25 Fed. Cas. 622 (D. Ky. 1815).

[11] *Ibid.*

[12] People v. Restenblatt, 1 Abb. Prac. 268 (N. Y. Court of Gen. Sess. 1855); People v. Briggs, 60 How. Pr. 17 (N. Y. 1880); see *supra,* note 4, People v. Glen, People v. Nitzberg; see *supra,* note 6, People v. Sweeney.

[13] See *supra,* note 4, People v. Sexton at 511-12, 80 N. E. at 402.

[14] N. Y. CODE CRIM. PRO. § 313.

[15] See *supra,* note 4, People v. Glen.

[16] N. Y. CODE CODE CRIM. PRO. § 249.

[17] *Id.* § 251.

[18] *Id.* § 517.

[19] People *ex rel.* Hummel v. Trial Term, 184 N. Y. 30, 76 N. E. 732 (1906); see *supra,* note 4, People v. Glen; see *supra,* note 4, People v. Sexton.

[20] See note 3, *supra.*

[21] See *supra,* note 4, People v. Nitzberg at 530-31, 47 N. E. 2d at 41.

[22] See *supra,* note 7, Eighmy v. People.

[23] See *supra,* note 8, Matter of Montgomery.

statutory provision for an application to procure the inspection of the grand jury minutes. Such an omission is intended to limit the number of appeals from intermediate orders or proceedings which would follow if permission to review every motion followed by an order were granted by statute.[24] The only appeal allowed by statute is from a judgment of conviction on which an intermediate order or proceeding forming part of the judgment-roll may be reviewed.[25]

While agreeing that the order denying the inspection was not reviewable by the Court of Appeals,[26] the dissenting opinions in the case at bar argued that the denial of the pretrial motion to inspect brought it before the court on the motions to dismiss the indictment, the denial of which *was* subject to review.[27] However, the inference that the minutes became part of the judgment upon denial of the motion was improper and not to be drawn.[28] The lower court's discretion in refusing to permit an inspection did not, as the majority opinion contended, bring the minutes before the court on the subsequent motion to dismiss.

The sum total of the dissenting opinion was that the refusal to grant a motion to inspect in this case was a transgression of the defendant's right not to be indicted except on adequate proof which, it contended, the trial record did not show. In not finding this to be the case, the court held to the contrary, asserting the fundamental proposition that its appellate jurisdiction is confined to the correction of errors of law. Therefore, in the absence of statutory authorization it will never review questions of fact or the exercise of a discretion reserved to the inferior courts.[29] R. W. Mck.

CRIMINAL LAW—VAGRANCY—MAGISTRATE'S JURISDICTION OVER OFFENSE.—The Appellate Division of the Supreme Court of the State of New York has recently considered the question of a magistrate's jurisdiction over a person accused of vagrancy.[1]

In this case, a policeman had observed the defendant from time to time and knew she had no visible means of support. He questioned her, and she admitted that she lived without employment and had no visible means of support. The officer after being duly sworn made his complaint to a magistrate stating the requirements of vagrancy set forth in the statute.[2] The magistrate assumed jurisdiction over the charge upon the facts presented, whereupon the defendant was tried and convicted of vagrancy. Defendant then applied to the Supreme Court of New York for a writ of habeas corpus, claiming that the arresting officer's complaint was not sufficient in law to give proper jurisdiction to the magistrate. The writ was granted and the State appealed to the Appellate Division which reversed the Supreme Court's decision and held the complaint to be sufficient in law to give proper jurisdiction to the magistrate.

It must be fully understood that vagrancy is a mere offense and is to be differen-

[24] *Id.* at 75, 110 N. Y. Supp. 795.

[25] N. Y. CODE CRIM. PRO. § 485, 517.

[26] See *supra,* note 7, Eighmy v. People; see *supra,* note 6, People v. Sweeney; see *supra,* note 8, Matter of Montgomery; see *supra,* note 8, People v. Strauss.

[27] See note 3, *supra.*

[28] N. Y. CODE OF CRIM. PROC. § 485, 517.

[29] People v. Boas, 92 N. Y. 560 (1883).

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[1] People v. Fennelly, 5 A. D. 2d 71, 168 N. Y. S. 2d 1018 (3d Dep't 1957); *aff'd without opinion,* 4 N. Y. 2d 966, 152 N. E. 2d 520 (1958).

[2] N. Y. CODE CRIM. PROC. § 887(1): "A person who, not having visible means to support himself, lives without employment."

tiated from a crime.[3] The Statute provides that the magistrate obtains jurisdiction by a complaint.[4] The precise proposition before the Court involves the procedure to be followed in the case of an offense. While the procedural law regarding the proper content of an information or indictment has often been decided, the same is not true in offense cases. It does not specify the requirements of the complaint either as to form or substance. It has been only by analogy with the criminal law that the courts have decided the problem of what formalities of form and substance are required. Need the formal requirements be commensurate with those necessary to an indictment or information, or will a lesser degree of rigidity suffice? Apparently New York Courts are of the opinion that less formal standards are required.[5] The nature of an indictment or information is merely to state the offense and the act constituting the offense,[6] and therefore the court has here reasoned that a complaint which does these things is certainly sufficient.

In situations where a complaint is made to a magistrate, there is some question whether the arresting officer's allegations of the offense may be based solely upon information and belief or whether the allegations must be based upon the actual knowledge and experience of that officer. In the instant case the Appellate Division relied upon a Court of Appeals case which decided that a charge upon information and belief was technically sufficient.[7] Again the decision involved not an offense but a crime, but by implication the Appellate Division has applied the same reasoning to offenses. The question then arises of what limitations or qualifications are to be imposed upon the information and belief. Here, the Appellate Division has again followed the Court of Appeals which decided in a misdemeanor case that an admission made to a police officer of an act a part of a misdemeanor justifies the conclusory statement of the fact in the information charging the misdemeanor.[8]

Thus the decision of the Appellate Division which recognized as sufficient the complaint of the arresting officer in a vagrancy charge was based not upon the explicit terms of the procedural statute regarding the offense of vagrancy, but upon procedural decisions in criminal cases.[9] The Court of Appeals has set out the substantive difference between offenses and crimes, and perhaps upon appeal of this decision it will decide whether or not there shall be procedural distinctions as well. A possible argument in favor of procedural requirements for complaints different from those for indictments and informations is that offenses are essentially patent public wrongs, which by their very nature are punishable because they create a public harm. Therefore if an officer cannot readily detect for himself that such a wrong is being perpetrated (without benefit of information and belief) there is little reason to permit him to burden the magistrate with an essentially trifling situation. J. S. N.

DECEDENT'S ESTATE—ABANDONED PROPERTY—ESCHEAT—DECEDENT'S UNCLAIMED ESTATE CONSISTING SOLELY OF WAR VETERANS' PENSION PAYMENTS RECEIVED FROM UNITED STATES MUST BE TURNED OVER TO UNITED STATES.—In The Surrogate's Court, Orange County, New York State, it was held that the estate of a decedent, an incompetent

[3] Cooley v. Wilder, 234 App. Div. 256, 259, 255 N. Y. Supp. 218, 221 (4th Dep't 1932).

[4] N. Y. CODE CRIM. PROC. § 889.

[5] People v. Hipple, 263 N. Y. 242, 244, 188 N. E. 725 (1934).

[6] People v. Love, 306 N. Y. 18, 23, 114 N. E. 2d 186, 189 (1953).

[7] People *ex rel.* Livingston v. Wyatt, 186 N. Y. 383, 79 N. E. 330 (1906).

[8] People v. Belcher, 302 N. Y. 529, 535, 99 N. E. 2d 874, 877 (1951).

[9] See note 4, *supra*.

veteran, who died intestate, without known distributees, and whose estate consisted only of unexpended war veterans' payments received from the United States should be paid to the Comptroller of the State, thus, complying with a New York statute which claims such funds.[1] Said funds were also claimed by the United States under a statute which provided that they should revert to the Veterans Administration.[2] The State statute provided for payment to the Comptroller of legacies or distributive shares, the owners of which were unknown, and claimed their use for public benefit, but also required payment to the rightful owner upon proof of claim. The Federal statute stated that such funds that were given as war benefits should revert to the Veterans Administration. In addition, the Federal statute's language included the phrase "that any funds . . . that would escheat to the state shall escheat to the United States." The Surrogates Court based its decision in favor of the State upon the fact that title to the funds did not pass to the State under its statute since the State is obligated to return the funds at any time upon the establishment of a claim.[3] Thus, the State established for the first time the theory that, under the New York statutory scheme, since no title passed, there was therefore no escheat.

Upon appeal, the Supreme Court, Appellate Division, Second Department, reversed the above decision.[4] Thus, the problem of the ultimate distribution of personalty, in regard to the facts of this case was appealed to the Court of Appeals.

The Court of Appeals held that the Appellate Division properly directed that the fund be turned over to the United States.[5] The appellant asserted that the language of section 272 of the Surrogates Court Act did not concern escheat. The appellant felt it was a statute that dealt with the descent of property—an area in which the states have exclusive power. The State also claimed that its statute did not concern absolute forfeiture but concerned custodial care only. Thus, since the Federal statute provided for escheat to the United States only when it was established that the funds would escheat to the state, since under the State statute there was no escheat to the State, the claim of the United States fails under the provisions of statute. The appellee contends that Federal policy, as enacted into law declares that unexpended veterans benefit payments, in the estates of deceased veterans shall on the failure of heirs or distributees to appear, revert to the United States. Thus, the United States Code provides that if such funds would otherwise escheat to the state they are to escheat to the Federal Government. The dispute, therefore, is whether or not there is present the condition prescribed by Federal law for reverter. Both sides agreed as to the intent of Congress. However, does the language in the United States Code include such transfers of unclaimed estate funds as is required by New York State? The Court of Appeals held that the Federal statute included such funds and stated that the word

[1] N. Y. SURR. CT. ACT § 272 (1921). "Where the person entitled to a legacy or distributee share is unknown, the decree must direct . . . administrator . . . to pay the amount thereof to the comptroller . . . for the benefit of the person or persons who may thereafter be entitled thereto."

[2] 2 Stat. of Aug. 12, 1935, ch. 510, sec. 1, 49 Stat. 607 (1935), 38 U. S. C. § 450(3) (1952). ". . . that any funds in the hands of a guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, derived from compensation, automatic or term insurance, emergency retirement pay or pension, payable under said Acts which under the laws of the State wherein the beneficiary had his last legal residence would escheat to the State shall escheat to the United States . . . to the Veterans Administration. . . ."

[3] Matter of Hammond, 205 Misc. 309, 127 N. Y. S. 2d 702 (Surr. Ct. Orange Co. 1954).

[4] Matter of Hammond, 2 App. Div. 2d 160, 154 N. Y. S. 2d 820 (2nd Dep't 1956).

[5] Matter of Hammond, 3 N. Y. 2d 567, 147 N. E. 2d 777 (1958).

"escheat" need not be restricted to absolute and immediate transfers of title at the moment of death. Eventually in New York State the surplus property will be applied for the State's use. The construing of the Federal Statute, therefore, includes such transfers as occur under the New York State statutory scheme. The purpose of the Federal law is to prevent profit to a state out of funds originally provided by the United States Veterans Administration. This was the intent of Congress and the New York method of transfer comes within such intent and obvious purpose of Federal law.

"Escheat" signifies a flowing of decedent's estate into the general property of the state on decedent's death intestate and without lawful heirs.[6] In general, the state takes the title which the former owner had and in the same condition.[7] The time when title vests in the state by reason of escheat depends to some extent on the necessity for a judicial declaration of escheat. The authorities differ as to the necessity for a judicial proceeding to establish an escheat. In many jurisdictions, and at least in those jurisdictions where property escheats without any judicial declaration, if the owner dies intestate, without heirs, the title vests in the state immediately on his death.[8] In New York State, property of a person who dies intestate without heirs escheats to the State by operation of law.[9] In regard to realty, such title vests in New York State at once.[10]

The title and modes of the disposition of real property within the state are not matters placed under the control of Federal authority. It is claimed that such control would be foreign to the purposes for which the Federal government was created and would seriously affect the land interests of the states.[11] The states, by the Federal Constitution, are not forbidden to limit, condition, or even abolish the power of testamentary disposition over property within their jurisdiction.[12] Thus, the state has jurisdiction over property under circumstances indicating abandonment thereof by owners.[13]

In New York State the exercise of the power of the State over unclaimed funds is justified as an exercise of custodial care in order to secure their safety and protection.[14] This custodial statute (the Abandoned Property Law) was enacted to take over and use for the benefit of all the people, property, the ownership of which is unknown and at the same time protect the rights of the owners of such property.[15]

Under the common law of escheat, we find that in England escheat was an incident of tenure and this provided for a revision of escheated property to the lord of the manor. In this country, where there is no recognition of feudal tenure, it is generally held to be an incident of sovereignty. However, while personal property does not escheat in the original sense of the word, the doctrine of escheat has been applied to personal property in New York as well. This has been the uniform practice of the State since its organization.[16]

The law enacted by Congress, however, is the supreme law of the land and prevails over state law. The rights of the United States are paramount. Thus, an act of

[6] *Re* Clark's Estate, 271 App. Div. 691, 68 N. Y. S. 2d 487 (4th Dep't 1947).
[7] 30 C. J. S. *Escheat* § 19.
[8] *Ibid.*
[9] Matter of Bonner, 192 Misc. 753, 80 N. Y. S. 2d 122 (Surr. Ct. Queens Co. 1948).
[10] Note 6, *supra.*
[11] United States v. Fox, 94 U. S. 315, — S. Ct. —, 24 L. Ed. 192 (1876).
[12] Irving Trust Co. v. Day, 314 U. S. 556, 62 S. Ct. 398, 86 L. Ed. 452 (1942).
[13] Brooklyn Borough Gas Co. v. Bennett, 154 Misc. 106, 277 N. Y. Supp. 203 (Sup. Ct. Albany Co. 1935).
[14] Moufang v. State of New York, 295 N. Y. 121, 65 N. E. 2d 321 (1946).
[15] Gordon v. McGovern, 284 App. Div. 25, 130 N. Y. S. 2d 168 (4th Dep't 1954).
[16] Matter of Menschefrend, 283 App. Div. 463, 128 N. Y. S. 2d 738 (1st Dep't 1954).

Congress prevails over section 272 of the Surrogate's Court Act.[17] Furthermore, if the Constitution gives the United States the right to give pensions, then, even where the pension is in the possession of the pensioner the United States has the right and power to control the funds by using any means calculated to produce the results desired in regard to the establishment of such pension.[18] The right of the United States in regard to these funds was challenged in *matter of Cambell.*[19] In this case New York State did not oppose the right of the Federal government under the statute, but New York contended that a person does not die without next of kin, and section 450 is inapplicable until the United States establishes the right of escheat because of the lack of next of kin. However, the court held that a pensioner has no vested legal right to his pension for pensions are the bounties of the government which Congress has the right to give, withhold, distribute or recall, at its discretion. Hence the law with respect thereto is binding upon the states.

The decision of the Court of Appeals in this case established that "escheat" need not be restricted to absolute and immediate transfer of title at the moment of death and thus construed the Federal statute to include such transfers of unclaimed funds as occur in New York. This decision would appear to be justified. It is equitable that the funds should return to the donor. The State should not profit with respect to Veterans Administration funds, for it is the intention of the Federal statute to recapture such funds for future use. The New York method of transfer comes within the intent and obvious purpose of the Federal law. A strict interpretation of the word "escheat" in the United States statute would be entirely irrational. The intent of Congress is clear, and it would be unjustified to avoid such intent due to the loose wording of the Federal statute. The interpretation of a statute should be based upon the intent and purpose of the statute and such intent should not be distorted by niceties of semantics.

The State asserts the fact that title to such estate never passes to the State. Eventually, however, the surplus property will revert to the State. Notice, however, that in both the State and Federal statutes the unclaimed property will forever be available to heirs who come forward. This is obviously an analogous situation but the United States refers to the situation as escheat and the state as custodial care. The law in New York provides that title to realty in similar circumstances passes to the State.[20] However, in regard to personalty title does not pass. The Appellate Division, in regard to the *Hammond* case, after setting out the details of the statutory system for the disposition of unclaimed property in New York, concluded that since no other State process existed whereby such unclaimed estates would revert to the State that to award the funds to the State would be the antithesis of that provided by the Federal Statute.[21]

Prior to the Court of Appeals decision in the *matter of Hammond,* but with notice that the lower court's decision was being appealed from, another Surrogates court reached the same conclusion as was reached in the Court of Appeals. In the *matter of Milnowski,*[22] the court held that similar funds were payable to the United States. The court stated that it had given consideration to the opinion in the *matter of Hammond* wherein the funds were awarded to the State. However, the Court held that the funds should revert to the United States. It was stated that veterans benefits

17 Note 9, *supra.*
18 United States v. Fairchilds, 25 Fed. Cas. 1035 (1867).
19 195 Misc. 520, 89 N. Y. S. 2d 310 (Surr. Ct. Kings Co. 1949).
20 Note 6, *supra.*
21 Note 4, *supra.*
22 3 Misc. 2d 730, 155 N. Y. S. 2d 71 (Surr. Ct. Kings Co. 1956).

are bounties of the government and as such should be refunded and returned to their donor since the grant of such funds ended with the death of the beneficiary.[23]

A similar case was decided in the District of Columbia. The estate of a decedent was derived from payments made by the Veterans Administration. The decedent was not survived by next of kin. Also said decedent's last legal residence was in the District of Columbia. The Court held that the estate of the decedent should escheat to the Federal Government and not to the District of Columbia.[24] The contention of the District of Columbia was that Congress did not mean to include the District within the meaning of the word "state" as used in the Federal Statute. This is an application of deductive reasoning clearly contrary to the expressed intent of Congress. The funds are meant to be returned to the Treasury and used only by the Veterans Administration for the payment of compensation, insurance, or pensions. The intent of Congress as to the disposition of such funds can only be carried out by including the District of Columbia within the meaning of the term "state." Thus, an attempt can be seen again to avoid the obvious intent of the statute by introducing questions of semantics. Yet the courts held that the funds should revert to the United States.

Another case with similar facts was decided within the jurisdiction of Massachusetts.[25] In the Massachusetts court it was held that there can be no doubt that Congress intended that the net assets in question should revert to the United States. The gift to the pensioner was subject to a condition subsequent. It is of no importance that, as is contended by the State, the reverter is not properly called an escheat. The will of Congress rises superior to the common law classifications and qualities of estates. In this case the contention of the State was that escheat is an exercise of sovereign power by the state and the limited powers of the United States do not permit an escheat to it of personal property owned by a decedent domiciled within a state. Thus, we again find support for the Court of Appeals decision regarding the construction of the Federal statute.

The effect of the decision in *matter of Hammond*[26] for some purposes finally resolves the ultimate distribution of personalty in the State of New York.[27] In *matter of Hammond*[28] the State presented and established the theory that under New York statutes regarding abandoned property, since the State did not claim title, there consequently was no escheat in New York. In regard to real property the states usually acquire title if such property is abandoned. The modern view is that such title passes automatically by operation of law. In an opinion by Judge Cardozo,[29] it was stated that while in its feudal origin escheat was an incident of tenure it is now an incident of sovereignty. It is unnecessary to perfect the title of the state. Ancient restraints are not contrived by our laws as restraints upon conveyances by the state. Escheat as it survives in the Constitution of New York preserves the name but ignores the origin of its feudal prototype. It has also been stated in New York that title to personal property passed to the State in the same manner as realty.[30] Thus, where a person dies without heirs or next of kin his property escheats to the state by operation of law, and statutes providing therefor, make no distinction between personalty and

[23] Matter of Price's Estate, 199 Misc. 833, 104 N. Y. S. 2d 518 (Surr. Ct. Kings Co. 1951).

[24] *Re* Germanovich's Estate, 122 F. Supp. 169 (D. D. C. 1954).

[25] Coakly v. Attorney General, 318 Mass. 508, 62 N. E. 2d 659 (1949).

[26] See note 4, *supra.*

[27] Huston, *Succession,* 32 N. Y. U. L. Q. REV. 1452 (1957).

[28] See note 3, *supra.*

[29] Matter of People (Melrose Ave.), 234 N. Y. 48, 136 N. E. 235 (1922).

[30] *Re* Martin's Will, 95 N. Y. S. 2d 260 (Surr. Ct. Westchester Co. 1949).

realty. While it has been stated at common law that the doctrine of escheat relates exclusively to real property it has been determined that the pertinent statutory enactments of New York make no distinction between real and personal property. The *Hammond* case[31] decided in the Surrogate Court stated that the assumption that the state acquired title to personalty was an erroneous interpretation of the New York State statutes. Thus, New York's position repealed the operation of law theory since the State never acquired title to real property. However, if we view the situation with a realistic approach, since the State's custody to the property is perpetual, we must conclude that title passes.

In conclusion, the decision in the Court of Appeals regarding *matter of Hammond* decides that regardless of the wording of New York statutes, for some purposes, at least, New York is an escheat theory state. L. S.

DOMESTIC RELATIONS—DIVORCE—ALIMONY—FOREIGN JUDGMENT ENTITLED TO FULL FAITH AND CREDIT WHERE PARTY WITHDRAWS FROM ACTION.—New York's Appellate Division, Third Department, has held that a personal judgment for lump sum alimony is entitled to full faith and credit in this State, and that the requirements of due process are not violated where a husband's attorney withdraws from the case after the wife's petition for a separation was amended and a cause of action for absolute divorce was substituted therefor.[1]

The wife, in this case, sued her husband in New York to enforce a lump sum alimony provision of a Vermont judgment of divorce. The Supreme Court, Special Term, Warren County, entered judgment in favor of the wife.[2] The husband then brought this appeal.

The facts showed that Mrs. Chapman commenced an action[3] for a divorce from bed and board for the period of four years against her husband, in the County Court of Rutland County, Vermont. A Vermont attorney entered a general appearance, on behalf of Mr. Chapman, in this action, and interposed an answer on the merits. Mr. Chapman appeared personally at a hearing for alimony pendite lite. He was ordered to pay $100 a month. He failed to pay this sum and a summary judgment for arrears was entered against him. The husband thereupon left the State of Vermont. He disregarded all communications from his Vermont attorney, and consulted with a New York attorney who communicated with his wife's Vermont attorney in an attempt to adjust the marital difficulties of the parties. These negotiations were without result.

Mr. Chapman became a domiciliary of the State of Florida and on September 14, 1951 he commenced an action against his wife by constructive service for absolute divorce. Mrs. Chapman did not appear in this action and the husband was granted a judgment of absolute divorce on November 23, 1951 by the Florida Court.

[31] See note 3, *supra.*

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[1] Chapman v. Chapman, 5 App. Div. 2d 257, 168 N. Y. S. 2d 872 (3rd Dep't 1957).

[2] Chapman v. Chapman, 6 Misc. 2d 45, 165 N. Y. S. 2d 984 (Sup. Ct. Warren Co. 1957).

[3] For prior litigation between the principles relative to the issues herein see: Chapman v. Chapman, 118 Vt. 120, 100 A. 2d 584 (1953); Chapman v. Chapman, 118 Ct. 166, 102 A. 2d 849 (1954); Chapman v. Chapman, 284 App. Div. 504, 134 N. Y. S. 2d 707 (3rd Dep't 1954); Chapman v. Chapman, 284 App. Div. 854, 134 N. Y. S. 2d 173 (3rd Dep't 1954); Chapman v. Chapman, 285 App. Div. 991, 138 N. Y. S. 2d 709 (3rd Dep't 1955); Chapman v. Chapman, 4 Misc. 2d 64, 158 N. Y. S. 2d 674 (Sup. Ct. Warren Co. 1956); and note 2, *supra.*

Mrs. Chapman's attorney in Vermont moved for a trial of the separation on November 20, 1951. On November 17, 1951 Mr. Chapman was notified of this by his Vermont attorney. He did not communicate with his attorney and trial was set for December 17, 1951.

The wife, before the trial, moved to amend her complaint to substitute a cause of action for absolute divorce.[4] The motion was returnable on December 17, 1951. Mr. Chapman's Vermont attorney then moved to withdraw from the case on December 15, 1951. This motion, too, was returnable on December 17, 1951. The Judge conferred with both attorneys in chambers before deciding the motions in open court, explaining the order in which the motions would be ruled on. In court, the motion to amend was granted and *then* the motion to withdraw was granted.[5] The adoption of this procedure meant that Mr. Chapman was represented at the time the motion to amend was made, and due process was technically satisfied. The cause was heard, on the same day the motions were granted, and Mrs. Chapman was granted an absolute divorce, and $25,000 in lieu of alimony was awarded to her. The husband did not bring the Florida divorce to the attention of the Vermont Court. Mrs. Chapman did not either, she informed the court that she had heard that her husband had commenced a divorce action in Florida. Thus, the Vermont Court did not know that it lacked jurisdiction and on this basis determined that it had jurisdiction and proceeded to grant the divorce and money judgment to the wife.[6]

Mr. Chapman petitioned the Supreme Court of Vermont for a new trial, mainly on the ground that the Vermont judgment was barred by the Florida judgment in November 1953. The petition was dismissed without prejudice for lack of proper service on Mrs. Chapman.[7] Mr. Chapman again petitioned the Supreme Court of Vermont for a new trial in February, 1954.[8] This petition was identical with the petition of November, 1953. This petition was denied on the ground that the husband had not proceeded with due diligence.[9] Mrs. Chapman then brought this action in New York, on the Vermont judgment, for the lump sum alimony.

The main question the court had to decide was whether the Vermont judgment was entitled to full faith and credit[10] in the courts of New York or, whether the Vermont judgment was obtained in violation of the requirements of due process.[11]

In an opinion by Foster, P. J., the court quickly disposed of the matter of the Vermont Court's right to grant the divorce alone. This is based on the facts that the husband made a general appearance in the original separation action, and was represented by counsel at the time the cause of action was amended, and that the parties were domiciled in Vermont at the time the action was instituted. This is in accord with the principle set forth in the famous case of *Williams* v. *State of North Carolina*.[12]

The court next turned to the heart of the case and with some difficulty managed

[4] In Vermont absolute divorce and separation constitute different statutory causes of action, but the grounds for both are the same. VT. STAT. REV. of 1947, §§ 3205, 3218.

[5] The order in which the motions were granted is of prime importance. This point was in issue and the facts as set forth were found by the trial court.

[6] In Vermont, in divorce cases, any fact which may defeat the action, such as former adjudication, may be shown at the trial. Hemenway v. Hemenway, 65 Vt. 623, 27 A. 609 (1893); Burton v. Burton, 58 Vt. 414, 5 A. 281 (1886); Schackett v. Schackett, 49 Vt. 195 (1876); Bain v. Bain, 45 Vt. 538 (1873).

[7] Chapman v. Chapman, 118 Vt. 120, 100 A. 2d 584 (1953).

[8] Chapman v. Chapman, 118 Vt. 166, 102 A. 2d 849 (1954).

[9] Note 8, *supra*.

[10] U. S. CONST. art. IV, sec. 1.

[11] U. S. CONST. art. XIV, sec 1.

[12] 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

to accord full faith and credit to the personal judgment against the husband for lump sum alimony.

First, the court stated the familiar principles that a divorce action is *in rem* and that a judgment for alimony is *in personam* and that to render an *in personam* judgment valid personal service must be made.

The matter of due process having been considered by the Courts of the State of Vermont appears to have troubled the court. The court, however, concluded the Supreme Court of Vermont tacitly found the requirements of due process satisfied in the procedures of the Vermont trial court by not considering the question of due process. The court said: "While it is true that the Supreme Court of Vermont neither mentioned nor expressly passed on any issue of due process nevertheless we must assume that since it in effect affirmed the judgment by refusing to grant a new trial it found the procedures followed by the court below to be in accord with due process. Certainly there was implicit in its decision tacit recognition that the amendment to the prayer for relief in the separation action was duly and regularly made, and in full conformity with the statutory laws and practice in Vermont, and that the judgment for divorce and for lump sum alimony was in accordance therewith."[13] With this reasoning as a foundation the court applied the principle of *res judicata* which encompasses all litigated matters and all matters which could have been litigated including jurisdiction.[14] Therefore, the proper procedure to be followed by the husband was appeal to the Supreme Court of the United States and not collateral attack on the Vermont judgment in New York.

The court next considered this same problem upon the theory of waiver. The court said: "When the defendant thereafter moved in the Courts of Vermont to have the judgment of divorce set aside, and for permission to set up as a defense his judgment of divorce obtained in the State of Florida as a bar to plaintiff's cause of action, he waived any issue of personal jurisdiction. His appearance therein was not a special appearance, designed only to contest the jurisdiction of the Court of Vermont by reason of a change in the original cause of action pleaded against him, but quite to the contrary was for affirmative relief to further contest the action on another ground."[15]

Finally, the court held that both the principles of *res judicata* and waiver are founded in the principle of estoppel, and the husband is therefore estopped from denying the validity of the Vermont judgment for lump alimony so far as full faith and credit in New York is concerned.[16]

Halpern, J., concurred in the result solely on the theory that inasmuch as the husband's attorney was present in the Vermont Court when the motion to amend was granted and offered no opposition, he must be deemed to have appeared with respect to the action for absolute divorce.[17]

The Judge rejected, however, the conclusions of the majority relative to the principles of *res judicata* and waiver.[18] Citing the case of *Bioni* v. *Haselton*[19] he con-

[13] Note 1, *supra* at 877.

[14] Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); Heiser v. Woodruff, 327 U. S. 726, 66 S. Ct. 853, 90 L. Ed. 970 (1946); Sherrer v. Sherrer, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429 (1948); Connolly v. Bell, 286 App. Div. 220, 141 N. Y. S. 2d 753 (1st Dep't 1955), *modified* 309 N. Y. 581, 132 N. E. 2d 852 (1956); Pray v. Hegeman, 98 N. Y. 351, 105 N. Y. S. 27 (1885).

[15] Note 13, *supra.*

[16] Note 1, *supra.*

[17] Note 1, *supra.*

[18] Note 1, *supra.*

[19] 99 Vt. 453, 134 A. 606 (1926).

tended that a general appearance after judgment does not waive jurisdictional defects or validate a void judgment, but may be only as a prospective basis of jurisdiction for a new judgment if there is an opening of default. This he maintained should be determined under Vermont law.

He further contended that all that was decided on the motion to reopen[20] was that as a matter of discretion the husband was not entitled to the relief sought. The rule of *res judicata,* therefore, should apply only to final orders and final judgments and not to intermediate orders or to orders upon a motion to open a default.[21]

The differences between the majority and concurring opinions seem traceable to the different interpretations of the facts involved. It appears also that the court encountered some differences as to the application of Vermont law on certain points. Both opinions, however, were in substantial accord on the chief principles of law influencing the decision. G. G. B.

DOMESTIC RELATIONS—FOREIGN DIVORCE—HUSBAND ENJOINED FROM CONTINUING INDIANA DIVORCE ACTION IN WHICH WIFE HAD APPEARED WHERE ADJUDICATION IN NEW YORK OF WIFE'S SEPARATION ACTION AND HUSBAND'S COUNTERCLAIMS WAS HELD TO BAR RELITIGATION OF ISSUES DETERMINED BY NEW YORK COURT.—The Appellate Division of the Supreme Court of New York, on October 29, 1957 affirmed[1] a judgment of the Trial Term enjoining the defendant husband from further prosecuting divorce proceedings instituted by him in the wife's home state of Indiana where the parties had been married in July, 1952, only five months prior to the commencement of the husband's action. After a honeymoon trip to Europe the parties had taken residence in New York. Shortly thereafter they separated. On October 4, 1952 the wife left New York with all her baggage. Except for one brief journey to New York for an unsuccessful attempt at reconciliation she stayed in her parents' home in Indiana, voted in that state's November, 1952 elections, and did not return to New York until January, 1953.

In December, 1952 the husband brought his action in Indiana for divorce and subsequently amended the complaint to include a count for annulment for fraud. Process was left for the wife at her parents' home. Two days later the wife commenced separation proceedings in New York.

The wife appeared specially in the Indiana proceedings to contest jurisdiction. The parties are agreed that under Indiana law that state's jurisdiction is predicated on the wife's residence in Indiana for one year prior to the institution of the action. The court denied her plea in abatement holding that the issue of Indiana's jurisdiction would depend on the result of the trial of the issue of fraud since fraud, if sustained, would nullify the residence effect of the marriage. The wife, thereupon, entered a general appearance, and beyond that point the Indiana proceedings have not progressed.

In the New York proceedings the husband pleaded cruelty, abandonment and fraud and counterclaimed for separation and annulment. The lower court sustained the complaint and awarded the husband a separation. The Appellate Division dismissed the counterclaims affirming dismissal of the complaint.[2] The Court of Appeals affirmed

[20] Note 8, *supra.*

[21] Sand v. Sand, 116 Vt. 70, 69 A. 2d 7 (1949).

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[1] Aghnides v. Aghnides, 4 App. Div. 2d 498, 167 N. Y. Supp. 2d 201 (1957) *lv. to appeal denied,* 5 App. Div. 2d 767, 170 N. Y. Supp. 2d 993 (1st Dep't 1958).

[2] Aghnides v. Aghnides, 283 App. Div. 1054, 131 N. Y. Supp. 2d 886 (1st Dep't 1954).

dismissal of the counterclaims but directed entry of judgment for separation in favor of the wife.[3]

The court held that the finding by the Court of Appeals in the preceding suit that fraud was absent conclusively established the lack of Indiana jurisdiction, thus bringing the instant case squarely within the doctrine of *Garvin* v. *Garvin*[4] and *Hammer* v. *Hammer*.[5] These cases illustrate situations where relief was granted to wives who continued to live in the state of the forum while their husbands established colorable residence in the divorce state with no intention of remaining there. They are in point in so far as they stand for the general principle that relief should be granted to a spouse ". . . confronted with the prospect of a presumptively valid decree of a sister State, entitled to full faith and credit . . ." but the language just quoted is immediately followed by the qualification ". . . where the residence of the suing spouse in the sister State is, in fact, but a sham."[6]

This highlights an important distinction between the instant case and those cited as authorities. Indiana jurisdiction is claimed by the defendant husband to rest not on his own residence in Indiana which is not even alleged but on the wife's domicile in that state up to the time of the parties' marriage followed by her return there within three months of departure, as well as service of process in Indiana as distinct from constructive service. To these significant features is added the prior adjudication in New York of separation suit and counterclaims setting this case apart from those cited.

The inherent power of a court of equity to restrain a person within its jurisdiction from the prosecution of a foreign action is indisputable,[7] and courts have liberally exercised their authority to enjoin, in proper cases, actions for divorce or separation instituted in other states where the divorce court was held to have no jurisdiction.[8] The need for injunctive relief is said to be linked with the presumptive legality and validity of the foreign divorce sought by the defendant in the injunction proceeding. Thus a distinction is made between instances involving courts in foreign countries and those in sister states, judgments of the former being entirely void if rendered in circumstances of lack of jurisdiction, decrees of the latter, however, commanding "full faith and credit" under the Constitution of the United States.[9] On the ground that a Mexican divorce decree obtained without bona fide residence in that country of either of the parties would be a nullity injunctive relief is considered unnecessary,[10] and until recently the New York courts denied relief even in cases where a divorce was sought in a sister state against a non-appearing spouse who, it was thought, could not be bound by the decree anyhow.[11] Since the Supreme Court of the United States, reversing its position,[12] has ruled that divorce decrees of a sister state are entitled to full faith and credit where the court found one spouse to be resident in the divorce state even though the other was served only by publication,[13] the courts of New York

3 Aghnides v. Aghnides, 308 N. Y. 530, 127 N. E. 2d 323 (1955).
4 Garvin v. Garvin, 302 N. Y. 96, 96 N. E. 2d 721 (1951).
5 Hammer v. Hammer, 303 N. Y. 481, 104 N. E. 2d 864 (1951).
6 Note 1, *supra* at 500, 167 N. Y. Supp. 2d at 202.
7 "There is no doubt as to the power of Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign courts, where the circumstances make such an interposition necessary or expedient." Dismore v. Neresheimer, 32 Hun (N. Y. 204, 207) (N. Y. 1884) quoting Cranworth, L. Ch.
8 Annot., 128 A. L. R. 1467 1468/9 (1940).
9 U. S. CONST., art. IV, § 1; 1 STAT. 122 (1790), 28 U. S. C. § 1738 (1948).
10 Rosenbaum v. Rosenbaum, 309 N. Y. 371, 130 N. E. 2d 902 (1955).
11 Goldstein v. Goldstein, 283 N. Y. 146, 27 N. E. 2d 969 (1940).
12 Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867 (1906).
13 Williams v. North Carolina, 317 U. S. 287, 293, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

have changed their position. "Back in the days when *Haddock* v. *Haddock* . . . made foreign judgments of the kind being attempted here, our court held in *Goldstein* v. *Goldstein* . . . , relying on the *Haddock* rule, that such injunctive relief was unnecessary for the protection of the spouse who, staying at home and refusing to appear in the foreign suit, could not be bound thereby anyhow, under the *Haddock* rule. But all this has gone by the board since *Williams* v. *North Carolina*. . . ."[14]

The development just outlined shows clearly that the necessity of equitable relief depends on the extent of the dilemma in which one spouse is placed when the other seeks a foreign divorce, the graver the predicament the greater the need for protection. In both the *Garvin*[15] and the *Hammer*[16] cases the husband claimed his residence in the sister state to confer jurisdiction on the divorce court although his residence was in fact but a sham. In both instances the wife was served by publication, and in neither case did the wife appear. A divorce decree rendered under these circumstances, as we have seen, is entitled to full faith and credit, and injunctive relief was held to be justified in order to protect the wife from the effect of a decree of prima facie validity. However, the findings by the divorce court are not conclusive of the jurisdictional fact but open to challenge in another state.[17] In the instant case the wife did not appear. That in itself is insufficient to render a decree binding beyond the possibility of collateral attack. "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile."[18] In the words of a New York case, "jurisdiction of a court to entertain a divorce action and render a binding decree therein must rest on a broader base than jurisdiction over the person of the parties. A requisite is jurisdiction over the marital res."[19]

Where the defendant has appeared and contested the jurisdictional issue, the determination by the court is final and becomes *res judicata* even though the court may have erred in its decision.[20] Notwithstanding the denial by the Indiana court of the wife's plea in abatement, the court is free to decide the jurisdictional issue against the wife and render judgment on the merits in favor of the husband. Such judgment would not be open to collateral attack. By the same token, the New York adjudication constitutes a final determination of the issues here before the court. However, the Indiana court cannot take cognizance of the prior adjudication unless it is brought to the court's attention. The necessity to defend the suit thus becomes all the more imperative.

Where the defendant in a foreign divorce suit has entered an appearance, either special or general, the threat of finality of adjudication clearly enhances rather than diminishes the justification of injunctive relief.[21] L. J. H.

[14] See note 4, *supra*.

[15] *Ibid.*

[16] See note 5, *supra*.

[17] "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897 (1873).

[18] Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945).

[19] Senor v. Senor, 272 App. Div. 306, 70 N. Y. Supp. 2nd 909 (1st Dep't 1947), *aff'd without opinion*, 297 N. Y. 800, 78 N. E. 2d 20 (1948).

[20] Scherrer v. Scherrer, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429 (1947); Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26 (1938); Lynn v. Lynn, 302 N. Y. 193, 97 N. E. 2d 748 (1951).

[21] The lower court's decision in the instant case is noted in 17A AM. JUR., *Divorce and Separation* § 999 (1957).

INSURANCE—RESCISSION OF POLICY—WHERE INSURER BILLED INSURED FOR PREMIUM AND ACCEPTED PAYMENT AFTER HAVING KNOWLEDGE OF GROUNDS TO CANCEL POLICY, HELD—INSURER WAIVED RIGHT TO RESCIND.—In a recent decision[1] the Appellate Division of the Supreme Court of New York held that where an insurer had billed an insured for and accepted a premium after acquiring knowledge of grounds sufficient to warrant cancellation of the policy, the insurer had waived its right to rescind.

Plaintiff, the insured, had applied in 1951 for a policy providing for coverage for total disability, being informed by the defendant company's agent that the fact that he had only one eye would not affect the policy. Plaintiff's main contention was that the insurer's agent had orally represented to him that the policy would provide for payments of $100 monthly in the event of total disability and that the company was thus bound by that term.

Defendant's representative filled out the application himself, answering in the negative the questions: "Have you any impairment of sight or hearing?" and "Have you ever been operated on by a physician or surgeon?" Plaintiff signed the application without reading it.

When the policy was issued, this application was attached thereto, containing a notation above the insured's signature to the effect that the insured understood and agreed that the only contract existing between the parties was contained in the written policy. The policy provided for the payment of $100 monthly in the event of total disability except in the case of the loss of an eye; in that instance the payment of $625 outright with no further liability was provided.

In July 1954, the policy still being in force, plaintiff suffered the loss of his other eye. This suit was brought to reform the policy in accordance with the oral representation made by defendant's agent, namely, the payment of $100 monthly. But after paying certain benefit checks until October of 1954, defendant's claim manager informed plaintiff that they were cancelling the policy because of the misrepresentations contained in the application. A notice to this effect was sent to the plaintiff on the 13th of October. On the 15th defendant's office in Omaha sent a bill for the premium due for the next quarter. The premium was paid, accepted, and deposited in defendant's bank account in Syracuse. Thereafter, the insurer filed a countersuit for rescission of the policy on the grounds of misrepresentation.

The court ruled that since the application was attached to the policy and contained a notation providing that the only terms of the contract were those contained in the written instrument, the insured was put on notice that the agent had no authority to make oral representations; and that the company was thus bound only by the terms as written. It was further held that when insurer billed the insured for the premium on the 15th it did so with full knowledge of the misrepresentations which constituted grounds for rescission and had thus waived that right by accepting the payment thereof. It was maintained that this was not a mere inadvertent acceptance after a decision to cancel.

The rule of law apparently applied here would be that, faced with an election of remedies, a party to a contract is deemed to have waived a certain remedy—in this case, rescission of the contract—by acts inconsistent with that election.

In a dissenting opinion it was held that the necessary element in waiver is intent. The minority ruled that the defendant's Omaha office, using automatic machinery, had sent the premium notice before the claim manager in the Syracuse office had had an opportunity to inform them of the intention to rescind. It was pointed out that the insurer had tendered return of the premiums paid theretofore and had been refused

[1] Johnson v. Mutual of Omaha, 5 App. Div. 2d 103, 168 N. Y. S. 2d 879 (3rd Dept. 1957).

by plaintiff on the advice of attorney. There was further evidence that plaintiff continued to insist the policy was valid in all respects, despite defendant's continued efforts to return the premiums and cancel the policy. The dissenting view maintained that these facts clearly demonstrated that the insurer had no intention of abandoning its right to rescind and that the necessary element in waiver, intention, was obviously missing.

The dissent went further, contending that some element of estoppel was necessary in order to render final such a waiver of right; and that since plaintiff could have had no doubt of insurer's determination to pursue that right, he could not have thus been misled into relying on such belief to his detriment.

There is no little confusion as to the law on this subject, not only in other jurisdictions, but in New York, as well. The difficulty arises over the inability to distinguish between waiver and estoppel in some instances—a distinction tenuous at best—and the uncertainty as to what elements are necessary to constitute a waiver.

The rule in New York has been to some extent more nearly that expressed by the minority in the instant case rather than that of the majority. A leading New York case, *Kiernan* v. *Dutchess County Mutual Insurance Co.*[2] drew an even finer distinction with regard to the application of the rule than appears in later decisions. It was held that waiver might exist under three circumstances: 1) if the intention to waive was clearly expressed; 2) if the intention to waive was not clearly expressed; 3) where there was in fact no intention to waive. In the first instance, where the intention was clearly expressed, there could be no problem. But where the intention to waive was not clearly expressed, then such intention might be inferred from the circumstances surrounding the case, this being called implied waiver. But in the third instance, where there was in fact no intention to waive, then the rule to be applied was estoppel. This would require some act on the part of the party against whom rescission is sought, indicating some detriment suffered in reliance on the conduct of the other party.

It can be seen that the necessary element in waiver, intention, becomes a question of fact rather than of law. There is authority to support this contention.[3]

The question of intent in waiver as a question of fact appears also in some of the later cases. So that where an insurance company retained a premium for two months after notice of grounds for rescission, it was held that such fact by itself would not constitute a waiver; but that recourse must be had to other circumstances, such as the insurer's attempt to return paid premiums and the insured's refusal to accept them.[4]

Also, in *Alsen's American Portland Cement Works* v. *Degnon,* it was held that waiver of a right under a contract was a question for the jury, since it depends upon intention, not negligence, oversight, or thoughtlessness.[5]

It would seem at first blush, then, that the salient point of difference between the majority opinion and the minority view in the instant case was one merely of interpretation of facts. However, this is not really the case. For if the majority opinion be allowed to stand, then the result is a radical enunciation of new law: hereafter waiver might be based on any act, only seemingly inconsistent with an intention to

[2] Kiernan v. Dutchess County Mutual Ins. Co., 150 N. Y. 190, 44 N. E. 698 (1896).

[3] Walker v. Phoenix Ins. Co., 156 N. Y. 628, 51 N. E. 392 (1898); see also S. & E. Motor Hire Corp. v. N. Y. Indemnity, 255 N. Y. 69, 174 N. E. 65 (1930).

[4] Traveler's Ins. Co. v. Pomerantz, 246 N. Y. 63, 158 N. E. 21 (1927).

[5] Alsen's American Portland Cement Works v. Degnon, 222 N. Y. 34, 118 N. E. 210 (1917).

pursue a right; for in essence what the majority would do is to eliminate the requirement of intention, even in an implied sense, from the doctrine.

That this is the natural consequence of the majority view is manifest, if one will only look at the facts. The situation is almost exactly parallel with the case of *Traveler's Insurance Co.* v. *Pomerantz*,[6] where a premium was held for two months, with an offer thereafter to return them, followed by a refusal to accept by the insured. In that case, and in this, there can be little doubt that the insurer had no intention of waiving the right of rescission. In fact, in the instant case, refusal of tender was made by plaintiff on the advice of counsel, with a view in mind of pursuing his rights in court on the grounds that the insurer was bound by the oral representations of its agent. This is a collateral issue, it is true; but it indicates that plaintiff could not have been mistaken as to the defendant's purpose.

Returning, then, to the matter of the majority view: if the court's view of the facts is upheld, then they will fly in the face of a clear intention on the part of the insurer not to waive the right of rescission.

However, this leaves yet unresolved a problem of law even more complex and confusing—namely, the doctrine of estoppel and to what extent elements of it are to be applied in determining waiver. It is here that the most confusion results, even within the state of New York. There are cases which would appear to be inconsistent with the rule so succinctly established in the *Kiernan* case.[7]

For if the rule in the *Kiernan* case were to be followed, then, as we have seen, estoppel would be applied only in those instances where there was in fact no intention to waive a right and where there was a change in position by the other party in reliance upon a belief that there was such intention. But there is authority to support the view of the dissent to the effect that estoppel is a more prevalent doctrine.

Williston has said that ". . . some element of estoppel (is) the decisive factor."[8] And no less eminent a jurist than Justice Cardozo has maintained that: "Indeed it is probable that some element either of ratification or of estoppel is at the root of most cases, if not all, in which an election of remedies, once made, is viewed as a finality."[9]

In support of this contention, it has been held that the basis of waiver is estoppel in the earlier case of *Gibson Elelctric Co.* v. *Liverpool & London Insurance Co.*[10]

The contention of the minority in the instant case was that some element of estoppel would be necessary to render waiver final. We have already cited the authority for this immediately above. But, if only to confound the issue still further, there are two cases inconsistent with this point of view. Both the Court of Appeals and the Appellate Division in the Second Department have held that in the absence of anything to indicate intent, the lack of reliance to his detriment on the part of the insured would create no estoppel and no waiver of the right involved.[11]

Thus, we have apparently made a full circle. For the rule as enunciated by the above cases would reaffirm the decision in the *Kiernan* case, where estoppel would be used only when intent to waive was not apparent, either from clear expression thereof or from the conduct of the parties.

Authorities in other jurisdictions seem to be hopelessly divided on the subject of

[6] See note 4, *supra.*

[7] See note 2, *supra.*

[8] 3 WILLISTON ON CONTRACTS, § 686 (Rev. Ed.).

[9] Schenck v. State Line Tel. Co., 238 N. Y. 308, 312, 144 N. E. 592, 593 (1924).

[10] Gibson Electric Co. v. Liverpool & London & Globe Ins. Co., 159 N. Y. 418, 54 N. E. 23 (1899).

[11] Weatherwax v. Royal Indemnity Co., 250 N. Y. 281, 165 N. E. 293 (1929); Gutman v. U. S. Casualty, 241 App. Div. 752, 270 N. Y. S. 160 (2d Dept. 1934).

estoppel. In the Federal Courts estoppel is the doctrine to be applied in all cases.[12] And the few cases from other states in recent years are only apparently in point, failing to touch upon the question of estoppel.

In Nebraska, where an application for insurance was prepared by the insurer's agent, who filled in false answers to interrogatories which were truthfully answered by the applicant, the insurer could not rely upon such answers for rescission of the policy.[13]

And in a recent California decision it was held that where an insurer had actual notice of material misrepresentations on an application for life insurance, the insurer could not rescind on that ground.[14]

The United States Court of Appeals for the Fourth Circuit rendered a decision in which it was held that a life insurer was deemed to have waived its right to rescind on the grounds of false statements in the application where it was apprised of sufficient facts to put it upon inquiry.[15]

And the United States Court of Appeals for the Fifth Circuit ruled that where an insurer acquires full knowledge of facts sufficient to work a forfeiture, and does not cancel, but retains a premium, it waives the right to rescind.[16]

But all these cases, which would appear to support the contention of the majority to the effect that the insurer had performed acts inconsistent with the election of the right to rescind, are not really in point. For neither the majority view in the instant case, nor the courts in the cases just cited, have dealt either with the matter of intent as a necessary element of waiver, nor the application of estoppel, elements of which are clearly involved in the applicable law of New York.

If any conclusion is to be drawn from the instant case it is this: that allowing for the uncertainty of the courts as to the matter of the application of estoppel, the view expressed by the dissenting opinion is more nearly the law as it has been in New York than the stand taken by the majority of the court. For if the law in New York is that waiver is a question of fact as to the matter of intent, then the interpretation of the facts most logical would be that most favorable to the defendant; and if the law of New York is that some element of estoppel is necessary to render the waiver final, then we can see that there was no change of position on the part of the plaintiff. In either case the defendant must prevail.

But if the majority are upheld, then neither waiver in the implied sense nor estoppel will be applied in the same manner as heretofore. S. K.

TRAFFIC LAW—SPEEDING VIOLATION—USE OF RADAR EVIDENCE TO ESTABLISH VIOLATION. —In a recent decision, the Court of Appeals of New York has ruled unanimously that the use of radar in detecting the speed of a moving vehicle is scientifically reliable and that its results may be used in evidence without having an expert testify as to its operation and its underlying scientific principles.[1]

[12] Globe Mutual Life Ins. Co. v. Wolff, 95 U. S. 326, — S. Ct. —, 24 L. Ed. 387 (1877).

[13] Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780 (1956).

[14] San Francisco Lathing Co. v. Penn Mutual Life Ins. Co., — Cal. App. —, 300 P. 2d 715 (1956).

[15] Pilot Life Ins. Co. v. Pulliam, 229 F. 2d 912 (4th Cir. 1956).

[16] American Fire & Cas. Co. v. Eastham, 185 F. 2d 729 (5th Cir. 1950).

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[1] People v. Gene J. Magri, 3 N. Y. 2d 562, 147 N. E. 2d 728 (1957).

The effect of this decision is that the highest court of New York has taken judicial notice of the radar speedometer. Judicial notice is the acceptance of a fact although there is no evidence offered to prove that fact.[2] The court may take judicial notice both of matters of fact and matters of law.[3] It is a discretionary power of the court to take such notice; however, there are certain areas where notice must be taken.[4] In a trial, the court may take such action on its own initiative or at the request of one of the litigants.[5] The court may also take judicial notice of scientific evidence, as it did in this case.[6]

In the instant case, the defendant, Gene J. Magri, was operating his car eastbound on the Southern State Parkway on August 1, 1956. He drove his car through a radar beam, which recorded his speed at 53 m.p.h. The speed limit on this parkway was 40 m.p.h.[7] He was tried and found guilty and fined $10.00, by the District Court of Nassau County. This conviction was affirmed by the Nassau County Court.

At the trial, the defendant offered no testimony in his own behalf. The prosecution's witnesses were Officers Judge and Mulvey, who operated the radar unit and issued the summons. Their testimony as to the defendant's speed and the results of the radar reading constituted all the evidence in the trial. On appeal, the defendant sought a reversal on two grounds; that an expert witness did not testify as to the operating principle of the radar speedometer; and that it was not established at the trial that the radar had been tested or that it was operating properly at the time of the arrest.

As regards the defendant's second contention, the Court of Appeals ruled that the results of the untested radar unit could be used in evidence, in as much as a witness, the patrolman, was able to corroborate these results. On this point, the court cited the *Heyser Case*.[8] The observations of the witness can be used without violating the Vehicle & Traffic Law, section 56(3), which requires that the defendant be clocked for a ¼ mile, because that statute is not involved. The defendant violated a Long Island State Parkway Ordinance,[9] which has been ruled on previously and does not require that the defendant be clocked by the police car.[10]

As to the defendant's contention regarding the omission of the testimony of an expert in electronics, the court had to pass on the scientific reliability of the radar unit. Further, they had to determine whether or not it was prejudicial to the defendant to omit expert testimony.

Judicial notice of scientific principles are now an important function of the courts. X-rays, electro-encephalograms, electro-cardiograms, speedometer readings, time by clocks, fingerprinting, ballistic evidence, blood grouping tests, and photographs, once questioned, are now admitted in evidence.[11] Those above no longer require expert testimony to explain the scientific principles that are involved.

Dr. Kopper, who is a recognized expert in electronics, has written an article for the North Carolina Law Review,[12] which is cited by the Court of Appeals in the

2 RICHARDSON, EVIDENCE, § 8 (8th Edition Brooklyn 1955).
3 See note 2, *supra* at § 16.
4 See note 2, *supra* at § 17.
5 UNIFORM RULES OF EVIDENCE, Rule 9, A. L. I. 1954.
6 See note 1, *supra*.
7 Long Island State Parkway Ordinance, No. 6, § 6.
8 161 N. Y. S. 2d 36, 2 N. Y. 2d 390 (1957)
9 See note 7, *supra*.
10 People v. Mangini, 194 Misc. 615, 87 N. Y. S. 2d 34 (1948); People v. Love, 306 N. Y. 18, 114 N. E. 2d 186 (1953).
11 Cowley v. People, 83 N. Y 464 (1880).
12 Kopper, *The Scientific Reliability of Radar Speedmeters*, 33 N. C. L. REV. 355 (1955).

Magri Case.[13] In this article, Dr. Kopper explains in detail the working of the radar unit and points out that its margin for error is no more than two miles per hour. Further, he points out that any defect in the operation of the unit will benefit the motorist. In effect, Dr. Kopper has, in his article, reduced to writing the testimony that he has been called on to give in previous proceedings in which the radar speedometer has been involved.

In *State* v. *Dantonio,*[14] the New Jersey Court determined without dissent that radar has reached the stage in its development where it could be judicially noticed. In this case, the defendant contested on the ground that a tachometer, which he had in his vehicle, did not indicate that he was speeding; however, the court found for the radar. Dr. Kopper testified in this New Jersey case in 1955. Dr. Kopper has also testified in the New York Courts on several occasions, as will be brought out later.

In *People* v. *Katz*[15] and *People* v. *Sarver,*[16] Dr. Kopper testified for the prosecution. These cases decided in 1954 did not point out the need for taking judicial notice of radar. These decisions relied on two earlier New York cases, *City of Rochester* v. *Torpey*[17] and *People* v. *Offerman.*[18] In these last two cases, the lower courts accepted the radar evidence, but they were reversed on appeal, because an expert had not testified in regard to the radar.

Recently, however, two lower court cases in New York have pointed out the necessity of taking judicial notice of the radar speedometer. In *People* v. *Nasella,*[19] the court stated that it was foolish and an abuse to require expert testimony in radar cases. In *People* v. *Sachs,*[20] Magistrate DelGiorno set forth in his opinion a nine point plan to be followed in the prosecution of these cases. In his plan, he omits the testimony of the expert witness. In substance, his plan is as follows:

"1. The radar car was properly set up in its detecting location.
2. The radar instruments used were working.
3. The apprehending car was set in its own location.
4. That both cars were visible to each other at a reasonable distance.
5. That a motorcycle or other vehicle equipped with a calibrated speedometer had been used at the beginning of the tour and the end of tour to test the accuracy of the radar set and the manner in which they were made.
6. The graph sheets show the results of these tests.
7. That the speedometer of the motorcycle or other vehicle had been tested in the manner herein described and found to be accurate.
8. The radar car officer observed the speeding vehicle as well as any other vehicle and his description of the speeding vehicle.
9. The defendant was apprehended and what the apprehending officer did to insure that the proper defendant was served with the summons."[21]

This is what the Magistrate feels should be needed as evidence in a radar case. Dr. Kopper testified in both of these cases.

The suggestions of the lower courts have recently found support in the law reviews.[22] Professor Baer in his article, *Radar Goes to Court,*[23] discusses the develop-

[13] See note 1, *supra.*
[14] 18 N. J. 570, 105 A. 2d 918 (1954).
[15] 205 Misc. 522, 129 N. Y. S. 2d 8 (1954).
[16] 205 Misc. 523, 129 N. Y. S. 2d 9 (1954).
[17] 204 Misc. 1023, 128 N. Y. S. 2d 864 (1953).
[18] 204 Misc. 769, 128 N. Y. S. 2d 179 (1953).
[19] 3 Misc. 2d 418, 155 N. Y. S. 2d 463 (1956).
[20] 1 Misc. 2d 148, 147 N. Y. S. 2d 801 (1956).
[21] See note 20, *supra* at 156, 157.
[22] Kopper, *The Scientific Reliability of Radar Speedmeters,* note 12, *supra*; Baer, *Radar Goes to Court,* 33 N. C. L. REV. 355 (1955); Woodbridge, *Radar in the Courts,* 40 V. L. REV. 809 (1954).
[23] See note 22, *supra.*

ment of judicial notice in the scientific field, with emphasis on the problem of radar. Working with the development of the New York lower court cases and the *Dantonio Case*,[24] he points out that the radar speedometer is such an instrument as can be determined reliable enough to be recognized by the courts.

Woodbridge, in his article, concerns himself with some of the possible objections against the use of radar.[25] He poses the issue of entrapment and of the admissibility of possible hearsay evidence. Entrapment is the plea of the motorist, who is the victim of radar. To cure this problem, many states have enacted statutes that signs must be posted warning the driver of the presence of the radar unit.[26] In these states, warning signs must be displayed in order to have a radar supported conviction. The testing of the radar unit by the police before and after each tour poses the hearsay problem. When radar is used, it must be tested in the manner above described. In testing, a vehicle with a calibrated speedometer is run through the beam. Since at least two men are necessarily involved, it would be hearsay for either one of them to testify as to the test results. This problem is removed by the fact that the officers have first hand knowledge that his speedometer recorded the same result as called out by the other over the car radio. Further, the officers can be brought in to testify.

It should be noted that several other states have passed on radar and have accorded it judicial notice in intermediate appellate courts.[27]

At the writing of Professor Baer's article,[28] radar had not been given judicial notice in the United States in any appellate court. Today, however, *People* v. *Magri*[29] represents the most advanced position of any of the several jurisdictions.

In as much as the radar speedometer is now used by the law enforcement agencies in 43 states, the District of Columbia, and Hawaii, it appears inevitable that the other jurisdictions will soon have to take the step taken by New York.

The reasoning behind this development is sound and not without some precedent as herein mentioned above. Clearly, the radar speedometer has been shown to be reliable and where error is possible, the motorist will benefit, as is shown in Dr. Kopper's article. This article will be of great value to the courts in cases involving the use of radar and has been proven such in New York. In the past, the courts have made reliability the test in accepting scientific evidence by judicial notice; radar has passed that test.

Further, the requirement of having an expert testify in every case would make the prosecution of these matters prohibitive, through high cost.

The prima facie case, now that radar has been determined to be scientifically reliable, appears to be embodied in the nine point outline of Magistrate DelGiorno in *People* v. *Sachs*.[30] If this does not suffice alone, it should be adequate when taken in conjunction with Dr. Kopper's article.[31] J. A. E.

[24] See note 14, *supra*.

[25] 40 V. L. REV. 809 (1954).

[26] VA. CODE § 46-215.2 (Supp. 1954); MD. ANN. CODE GEN. LAWS, Art. 35, § 99 (Supp. 1954); CAL. VEHICLE CODE § 752 (Supp. 1953); ORE. REV. STAT. § 483.112 (1953).

[27] Peterson v. State, 163 Neb. 669, 80 N. W. 2d 688 (1956); Dietze v. State, 162 Neb. 80, 75 N. W. 2d 95 (1956); State v. Ryan, 48 Wash. 2d 304, 293 P. 2d 304 (1956).

[28] See note 23, *supra*.

[29] See note 1, *supra*.

[30] See note 20, *supra*.

[31] See note 12, *supra*.

TORTS—EMERGENCY DOCTRINE—DRIVER OF AN AUTOMOBILE WHEN CONFRONTED WITH THE SUDDEN APPEARANCE OF AN OBSTACLE, IN HIS PATH AND NOT REASONABLY FORESEEABLE HELD TO BE WITHIN THE PROTECTIVE PROVISIONS OF THE "EMERGENCY DOCTRINE".—Reversing a decision of the Appellate Division, Third Department, the Court of Appeals has recently held[1] the "emergency" doctrine applicable to the driver of a moving automobile suddenly confronted with a falling tree directly in his path. This softened a previous tendency to find the appearance of sudden obstacles in the street a type of emergency that an automobile driver must anticipate and be prepared to meet under present traffic conditions, and therefore not within the scope of the "emergency" doctrine.[2]

Plaintiff was a passenger in the car (a Chevrolet Sport Sedan in good condition), driven by the defendant at the time of the accident. Just prior to the accident the defendant was driving in a safe manner at about 15 to 20 miles per hour. There was a group of trees set back on the sidewalk on a lawn between two large white houses, about thirty feet west of the curb. Between the sidewalk and curb in front of one of the houses and across the street there was also a line of large trees. According to the plaintiff, she saw a tree, described by another witness as about 60 feet high, start to fall. She yelled "Jack, that tree!" and immediately moved closer to the defendant on the seat, but did not feel any brakes applied, any change in the direction of the car or any increase in speed. Plaintiff testified that she first saw the tree start to fall approximately 90 feet from where it struck the car and straddled the street. In all, about three seconds elapsed between the time she first noticed the tree and the moment it struck the car and injured the plaintiff.

Plaintiff thereupon commenced an action to recover damages for personal injuries resulting from defendant's negligence. On the above evidence, the jury returned a verdict for the plaintiff. However, the trial court set aside this verdict, granting defendant's motion for a directed verdict and dismissed the complaint because plaintiff had failed to establish a prima facie case. Upon appeal, the Appellate Division, Third Department, reversed the judgment of the trial court, and reinstated the jury's verdict, holding there was adequate evidence to support a finding by the jury that the defendant was negligent.[3] Defendant appealed.

The Court of Appeals unanimously found that as a matter of law plaintiff's evidence was insufficient to permit a jury to reasonably infer that the injuries were proximately caused by the defendant's negligent conduct. The quality of the evidence was poor and there were no facts to support such an inference.

On the issue of negligent conduct, the Court applied the "emergency" doctrine in determining the defendant's requisite standard of care. This required the existence of a sudden and unexpected emergency, not created by defendant's own negligence, depriving defendant of an opportunity for reflection, deliberation, thought or consideration.[4] According to this doctrine defendant is not obliged to exercise the best judgment; his choice may be prudent and yet mistaken.[5] Furthermore, conditions and knowledge ascertained after the event are not proof of lack of care.[6] The Court felt that the instant facts warranted the application of the "emergency" doctrine because of the time limitation, and defendant was only notified of the fact but not the exact

[1] Rowlands v. Parks, 2 N. Y. 2d 64, 138 N. E. 2d 256 (1956).

[2] PROSSER, LAW OF TORTS, § 32, 137-138 (2d ed., St. Paul 1955).

[3] Rowlands v. Parks, 1 App. Div. 2d 925, 149 N. Y. S. 2d 690 (3d Dep't 1956).

[4] Meyer v. Whisnant, 307 N. Y. 369, 121 N. E. 2d 372 (1954).

[5] Ward v. F. R. A. Operating Corp., 265 N. Y. 303, 192 N. E. 585 (1934); Woloszynowski v. N. Y. Central R. R. Co., 254 N. Y. 206, 172 N. E. 471 (1930).

[6] Naffky v. Yosovitz, 268 N. Y. 118, 196 N. E. 764 (1935).

nature of the emergency. In all, defendant had three seconds to act. Also, when plaintiff shouted "that tree" defendant was not thereby advised of the particular tree meant as there were trees on both sides of the street along the curb besides those set back on the lawn from which the tree fell. The collapse of the tree was due to an unexpected operation of a natural force. Confronted by such an unusual occurrence, a driver of a car concentrating on the roadway in front of his car could not reasonably be expected to anticipate a risk from a tree located at least thirty feet off the roadway. Under these circumstances, the Court found the defendant's conduct, and his failure to avoid the accident, to be without fault.

On the issue of causation, the Court added, that it would have been pure speculation to assume that had the defendant jammed on his brakes or swerved, he would have avoided the accident. It concluded that the mere omission to apply the brakes or swerve will not predicate liability where no causal connection is proved or can reasonably be inferred between the occurrence of the accident and the failure to act.

This decision certainly permits the conclusion that, today, the driver may be confronted with traffic situations which are unforeseeable and even though he failed to avoid the accident he may have acted reasonably and prudent under the circumstances. From the decision of the past, one could assume that the driver was required to anticipate almost any unexpected occurrence.

WORKMAN'S COMPENSATION—DEATH OF EMPLOYEE WHILE RETURNING FROM BUSINESS APPOINTMENT HELD "IN THE COURSE OF EMPLOY."—The New York Court of Appeals was called upon in a recent case[1] to determine whether an employee's accident arose "out of and in" the course of his employment within the meaning of the Workmen's Compensation Law. The employee's usual duties were performed in one office of his company, but occasionally he was required to visit branch offices in other cities. On his return from one of his business trips, his car crashed into a tree and he was killed. He had completed his work at the branch office at 5:00 P. M. and then visited relatives and friends until 3:30 A. M., when he left for home. The accident occurred at 5:30 A. M. Although there was evidence that he had been drinking, he was not intoxicated at the time of the accident.

The Workman's Compensation Board found as a matter of fact that, although the decedent had deviated from his employment, at the time of the accident he was on the direct route home, and that his death, therefore, arose "out of and in" the course of his employment. Because his work created the need for travel, the Board considered him an "outside" employee and thus entitled to compensation from the time he left his home until his return.

The finding of the Board was reviewed by a Referee, who held that the employer's business created the necessity for travel and the employee's return trip was a necessary part of his work.

The Appellate Division[2] affirmed the award on the grounds that the decedent's deviation was temporary and the return trip was an integral part of his work. The court held that at the time of the accident he had made a successful re-entry into the scope of employment.

The Court of Appeals, however, in the instant case, reversed the decision of the Appellate Division, not because the trip combined business with pleasure, but because the deviation from the normal procedure created an *unnecessary risk*. The court reasoned that it was weariness from lack of sleep that was responsible for the accident,

[1] Pasquel v. Coverly, 4 N. Y. 2d 28, 148 N. E. 2d 899 (1957).
[2] Pasquel v. Coverly, 3 App. Div. 2d 346, 160 N. Y. S. 2d 688 (3d Dep't 1957).

and ruled as a matter of law that, because the decedent's personal activities had created the risk, his employer was not liable under the Workman's Compensation Act. The court referred to a case[3] in which a policeman was injured on his way home from his regular tour of duty. His claim was dismissed by the Appellate Division on the grounds that, although he was subject to call twenty-four hours a day and was therefore considered an "outside" employee by the Workman's Compensation Board, he had nevertheless already completed his work at the time of the accident and thus his injuries did not arise *both* "out of and in" the course of his employment. But it should be noted that the policeman's work did not create the need for travel, while in the present case it was part of the decedent's assignment.[4]

In another case[5] the Court of Appeals did grant compensation for an injury suffered by an employee during a scuffle with a fellow worker because the dispute occurred while he was on duty and was related to his work. Although fighting with a fellow employee might be regarded as engaging in an *unreasonable* risk it was held not to be a bar to recovery under the Act. But in the present case, the court reasoned that the decedent, by driving home after a sleepless night, exposed himself to unnecessary dangers, and the risk thereby created relieved his employer of liability.

The Workman's Compensation Law[6] provides that "every employer subject to the law shall secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, except that there shall be no liability for compensation . . . when the injury has been solely occasioned by intoxication of the injured employee while on duty or by willful intention of the injured employee to bring about the injury or death of himself or another."

The courts have consistently granted compensation for injuries suffered by an employee returning from a business trip, regardless of earlier deviations for personal reasons.[7] Accordingly, in the current case, the court has indicated that "the circumstances that he combined business with pleasure would not defeat the claim unless the accident resulted from risks produced by personal activities." It may be argued, however, that when an employee reports for work, rarely will his employer question the manner in which he has spent the preceding hours. If the employee should negligently become involved in an accident during the working day, after a sleepless night spent in social activities, and even where it may be reasonably inferred that the employee's negligence is directly related to his weariness, neither his negligence nor his personal activities are a bar to recovery under the Workman's Compensation Law. The Statute expressly provides for compensation without regard to fault, holding *only* the employee's intoxication or his willful intent to bring about the injury a bar to recovery.

The Law was passed to protect the employee and has consistently been construed in his favor.[8] In most cases compensation is given without reservation and regardless

[3] Blackley v. Niagara Falls, 284 App. Div. 51, 130 N. Y. S. 2d 77 (3d Dep't 1954).

[4] See Larson, WORKMAN'S COMPENSATION LAW § 16.00 (New York 1957).

[5] Matter of Hertz v. Ruppert, 218 N. Y. 148, 112 N. E. 750 (1916).

[6] N. Y. WORKMAN'S COMP. LAW § 10.

[7] Larson, WORKMAN'S COMPENSATION LAW § 19.61 (New York 1957); Neville v. Anderson Co., 284 App. Div. 994, 135 N. Y. S. 2d 349 (3d Dep't 1954); Lepow v. Lepow Knitting Mills, 288 N. Y. 377, 43 N. E. 2d 450 (1942); Marks v. Gray, 251 N. Y. 90, 167 N. E. 181 (1929).

[8] Matter of Faulkner v. Stratton Amsterdam Co., 245 N. Y. 542, 157 N. E. 850 (1927); Aetna Life Ins. Co. v. Schmudeke, 192 Wisc. 574, 213 N. W. 292 (1927); Sockolowitz v. Chas. Hamberg & Co., 295 N. Y. 264, 67 N. E. 2d 152 (1946); William v. Gallow Inc., 261 App. Div. 765, 27 N. Y. S. 2d 599 (3d Dep't 1941); see note 5, *supra*.

of any question of wrongdoing.[9] It has even been awarded when the death of the employee was caused by an accident which occurred while she was driving home from a business trip, having previously, deliberately abandoned her employer's instructions to return home by train.[10] Only when the accident occurs *during* the deviation for personal activities,[11] or when the business portion of the trip is secondary and had no part in creating the need for travel, is the employer relieved of liability.[12]

In accordance with the rule laid down by Judge Cardozo,[13] that "if the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own," most jurisdictions grant compensation for accidents that occur after the deviation for personal activities,[14] provided the employee has regained the regular business route. Some will even compensate if, at the time of the accident, the employee was proceeding in the general direction thereof,[15] and neither length of time[16] nor geometric deviation[17] have been held a bar to recovery.

The New York rule, as expressed in *Riley* v. *Standard Oil Co.*[18] is that re-entry is a question of fact, not of law, measured by three necessary elements; "mental attitude of the employee," coupled "with a reasonable connection in time and space within the work in which he should be engaged."[19] If the employee in the present case had stopped at a hotel and returned home the following morning, refreshed and rested after a night's sleep, the court might well have found that, despite his deviation, at the time of the accident he had made a successful re-entry within the scope of his employment, in accordance with the rule in the *Riley*[20] case.

Once an employee has returned to the course of employment, his employer is charged with strict liability for the employee's injuries and "the three wicked sisters of the common law—contributory negligence, assumption of risk, and fellow servant rule,"[21] are invalid defenses. Although *re-entry* was the controversial issue from the inception of the litigation, the court did not expressly determine the question in the instant case, but dismissed the claim on the grounds that the employee's personal activities had created an *unreasonable risk*. Thus, while the Statute has excluded contributory negligence, assumption of risk, and the fellow servant rule as bars to recovery, the current decision has opened the door to a fourth wicked sister, *unreasonable risk*, and by implication, adds it as a fourth element to the rule for measuring *re-entry* into the scope of employment as set forth in the *Riley* case.[22] S. D. G.

9 Graham v. Nossey & Suffolk Lighting Co., 308 N. Y. 140, 123 N. E. 2d 813 (1955); Boyle v. A. C. Cheney Piano Auction Co., 193 App. Div. 408, 184 N. Y. Supp. 374 (3d Dep't 1920); also, see *supra*, note 8, Sockolowitz v. Chas. Hamberg & Co.

10 Matter of France v. Prosperity Co., 255 N. Y. 613, 175 N. E. 336 (1931).

11 Larson, WORKMAN'S COMPENSATION LAW § 19.61 (New York 1957).

12 Mark's v. Gray, 251 N. Y. 90, 167 N. E. 181 (1929).

13 See note 12, *supra*; Matter of Theykin v. Diplomat Products Inc., 268 N. Y. 658, 198 N. E. 543 (1935); Tushinsky v. National Broadcasting Co., 292 N. Y. 595, 55 N. E. 2d 369 (1944).

14 White v. Frank Z. Sindlinger Inc., 30 N. J. 525, 105 A. 2d 437 (1954); Allison v. Brown & Horsch Installation Co., 98 N. H. 434, 102 A. 2d 493 (1953).

15 Larson, WORKMAN'S COMPENSATION LAW § 19.00 (New York 1957).

16 Neville v. Anderson Co., 284 App. Div. 994, 135 N. Y. S. 2d 349 (3d Dep't 1954); also see note 14, *supra*.

17 Webb v. North Side Amusement Co., 298 Pa. 58, 147 A. 846 (1929).

18 Riley v. Standard Oil Co. of New York, 231 N. Y. 301, 132 N. E. 97 (1921).

19 See note 18, *supra* at 305, 132 N. E. at 98.

20 See note 18, *supra*.

21 PROSSER, TORTS, § 69 (Minn. 1955).

22 See note 18, *supra*.