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Decisions

DECISIONS

CONSTITUTIONAL LAW—NO DENIAL OF DUE PROCESS BY CONSECUTIVE TRIALS WHEN MULTIPLE OFFENSES AROSE OUT OF THE SAME OCCURRENCE.—In affirming a decision of the New Jersey Supreme Court,[1] the United States Supreme Court, in a six to two decision,[2] held that the petitioner was not denied due process of law by consecutive trials even though multiple offenses arose out of the same occurrence. Double jeopardy and the doctrine of collateral estoppel were not applicable to the facts of the case.

The petitioner and two accomplices entered a tavern in Fairview, New Jersey, lined five persons up against the wall, and robbed each of them. Petitioner was tried and acquitted on three separate indictments (joined for trial) for statutory robbery of three persons on the same occasion. Petitioner was the sole witness for the defense in this first trial and testified that he was not at the tavern. Subsequently, he was indicted, tried and convicted for robbing a fourth person during the same occurrence. Petitioner contends that he was deprived of due process of law under the 14th amendment[3] to the U. S. Constitution in that he was put in double jeopardy as he was tried a second time for the same offense. He also contends that under the doctrine of collateral estoppel—res judicata,[4] the second trial was a relitigation of a matter previously decided.

Justice Harlan writing for the majority stated that there was no violation of due process under the 14th amendment of the U. S. Constitution by the petitioner's later prosecution and conviction. The Court rejected the plea of double jeopardy, noting that this was not second jeopardy for the same offense as protected by the double jeopardy clause of the State Constitution. The New Jersey Court has construed the state statute[5] as making each of the four robberies, though taking place on the same occasion, a separate offense. The robbery of one victim was said not to be an essential and integral part of the robbery as to the others, so that the evidence of each victim was separate and distinct.[6] In *State* v. *Di Giosia*[7] the New Jersey court applied the "same evidence test" which states that double jeopardy would not apply unless the same evidence necessary to sustain a second indictment would have been sufficient to secure a conviction in the first. In *State* v. *Harris*[8] it was pointed out that by applying this test, if an essential ingredient of a necessary element or some additional fact be required in order to convict either of the two offenses, which is not required to convict the other, there is no double jeopardy. Therefore, the majority of the Supreme Court stated that nothing in the due process clause of the 14th amendment prevented a state from adopting that construction which enables the state to prosecute the one act as a separate offense.

[1] State v. Hoag, 21 N. J. 496, 122 A. 2d 628 (1956).

[2] Hoag v. New Jersey, 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958); Mr. Justice Brennan took no part in the consideration or decision of this case.

[3] U. S. CONST. AMEND. XIV, § 1, ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

[4] A direct estoppel applies when a judgment has previously been recovered between the same parties on the same cause of action. Collateral estoppel results when the former adjudication is between the same cause of action. In that case the only issues conclusively determined are those which have been actually litigated and judicially determined. RESTATEMENT, JUDGMENTS § 45, subd. b, c (1942). See Scott, *Collateral Estoppel by Judgments,* 56 HARV. L. REV. 1 (1942).

[5] N. J. Rev. Stat. Sec. 2:166-1 (1939).

[6] 21 N. J. 496, 122 A. 2d 628 (1956); People v. Logomarsino, 97 Cal. App. 2d 92, 217 P. 2d 124 (1950).

[7] 3 N. J. 413, 419, 70 A. 2d 756, 759 (1950).

[8] 193 Ga. 109, 17 S. E. 2d 573 (1941).

The case of *Palko* v. *Connecticut*[9] laid down the basic test as to whether there was an attempt to wear the accused out by a multitude of cases with accumulated trials. As was pointed out in the instant case, although it was constitutionally permissible for a state to punish one for each of the crimes as separate offenses it doesn't mean that a state was free to prosecute the individual for each crime at a different trial. The question is one of fundamental unfairness. The 14th amendment goes to those fundamental principles of liberty and justice that lie at the heart of all civil and political institutions.[10] It should be noted that constitutionally it may be permissible to prosecute for each robbery at a different trial but the preferable practice for a state is to try several offenses in a single prosecution.[11]

Two rules of common law origin have evolved from the view "no one ought be twice vexed for one cause."[12] One rule involves primarily civil litigation which is known as res judicata and the other rule involves criminal prosecutions which is known as double jeopardy. One of the earliest cases[13] concerning res judicata was a criminal prosecution in which the doctrine laid down was that once a cause of action between parties has been litigated, then it cannot be relitigated as between those same parties. Not only does res judicata prevent relitigation of the same cause of action but also prevents a second adjudication of such facts and issues as have already been passed on by a court in a different cause of action.[14] This doctrine is termed collateral estoppel. It was argued unsuccessfully in *United States* v. *Oppenheimer*[15] that the failure of the Fifth amendment of the U. S. Constitution to mention res judicata indicated the non-existence of the latter as a doctrine separate from double jeopardy. The basic protection afforded in res judicata and in double jeopardy is similar in that once the courts have decided for a party on a cause of action or ultimate facts and issues, there can be no relitigation of the rulings, for to do so would involve a violation of constitutional safeguards and offend fundamental justice.[16]

It was not necessary for the Court in the instant case to determine whether collateral estoppel is a constitutional requirement in criminal cases since the New Jersey Supreme Court[17] did consider the doctrine and its applicability to the case. The three indictments of the first trial involved several questions and not just the petitioners' identity and therefore there was no way of knowing upon which question the juries' verdict turned. In the case of *McNabb* v. *United States*,[18] the U. S. Supreme Court stated that the proper administration of criminal law of the States rest with the state courts. The same court held in *Watts* v. *Indiana*,[19] that the U. S. Supreme Court does not have the corrective power over the state courts and that all those matters which are usually issues of fact are for the conclusive determination by the state courts and are not open for reconsideration. Under the 14th amendment, in determining whether a State has violated the Federal Constitution, it is not the function of the Supreme Court of the United States to try to outguess the State court.

9 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).
10 *Id.* at 328, 58 S. Ct. at 153, 82 L. Ed. at 293.
11 A. L. I. Model Penal Code § 1.08 (2), (Tentative Draft No. 5, 1956).
12 Gershenson, *Res Judicata in Successive Criminal Prosecutions*, 24 BROOKLYN L. REV. 12 (1957).
13 Rex v. Duchess of Kinston, 20 How. St. Tr. 355 (1776).
14 Comment, 14 WASH. & LEE L. REV. 80, 81 (1957).
15 242 U. S. 85, 37 S. Ct. 68, 61 L. Ed. 161 (1916).
16 See *supra* note 14, 14 WASH. & LEE L. REV. at 81.
17 21 N. J. 496, 122 A. 2d 628 (1956).
18 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).
19 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949).

Opposed to the majority decision are two very vigorous dissents, written by Chief Justice Warren and by Mr. Justice Douglas in which each declared that the petitioner was denied due process of law under the 14th amendment. Chief Justice Warren stated that the only issue raised at the first trial was the identity of the petitioner and that the same issue was raised again at the second trial which was contrary to the requirements of fair procedure as guaranteed by the due process clause of the 14th amendment. In support of the Chief Justice's view the court held in *Niemotko* v. *Maryland*[20] that in cases in which there is a denial of rights under the Federal Constitution, the Supreme Court is not bound by the conclusions of the lower courts but may examine the evidentiary basis on which those conclusions are founded. Where the sole contested issue was identity of the criminal, as is contended here, the courts have evaluated the trial record in a number of cases.[21]

Justice Douglas in his dissenting opinion stated that the petitioner had been placed in double jeopardy since the prosecution of the second trial was for a crime growing out of the identical facts occurring at the same time.[22] In citing *People* v. *Grazesczak*,[23] Mr. Justice Douglas pointed out that the doctrine of collateral estoppel should apply since the only litigated question of fact on both the indictments was the presence of the accused when the crimes were committed.

Both dissenting opinions conclude that the failure to apply the doctrine of collateral estoppel to the facts here was to employ a procedure that failed to meet the standard required by the due process clause of the 14th amendment.

Thus, we see that the Supreme Court of the United States has once again refused to substitute its view as to the basis of a jury's verdict and has left the administration of criminal law of the states with the state courts. E. B. B.

EVIDENCE—WAIVER OF FIFTH AMENDMENT ON CROSS-EXAMINATION PERMITTED IN CIVIL TRIAL AS TO TESTIMONY OFFERED ON PETITIONER'S DIRECT CASE.—In a recent decision by the Supreme Court of the United States,[1] it was held that by taking the stand and testifying in her own behalf in a civil case, the petitioner waived the right to be free from cross-examination on matters raised by her own testimony on direct examination. Upon petitioner's refusal to answer questions on cross-examination which were pertinent to matters raised on her direct testimony, the petitioner, Mrs. Brown, was adjudged guilty of criminal contempt[2] and imprisoned.[3]

The matter presently a hand originated at a hearing for denaturalization[4] brought against Mrs. Brown. It was alleged by the Government that she had secured citizenship by fraudulent means in 1946. Such fraud consisted in the petitioner falsely swearing that she was attached to the principles of the Constitution, and that she was not now nor had she been for ten years prior, a member of any organization whose purpose

[20] 340 U. S. 268, 71 S. Ct. 328, 95 L. Ed. 267 (1951).

[21] Sealfon v. United States, 332 U. S. 575, 68 S. Ct. 237, 92 L. Ed. 180 (1948); Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951).

[22] Green v. United States, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

[23] 77 Misc. 202, 137 N. Y. Supp. 538 (1912).

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[1] Brown v. United States, 356 U. S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958).

[2] Fed. R. Crim. P. 42 (a).

[3] 18 U. S. C. § 401 (1948).

[4] Immigration and Nationality Act § 340 (a), 66 STAT. 260 (1952), 8 U. S. C. § 1451 (1952).

was the destruction of the Government by violent means. The complaint further charged her with being a member of the Communist Party and the Young Communist League from 1933 to 1937.

Thereupon, Mrs. Brown was called to testify as an adverse witness[5] by the Government, but she invoked the self-incrimination privilege provided by the Fifth Amendment,[6] concerning any questions whose subject matter dealt with her alleged activities and membership in the Communist Party. Subsequently, Mrs. Brown once more took the stand, and on her direct case, emphatically stated that her statements at the time of her naturalization were true, that she had quit the Communist Party in 1935, and that she never advocated the overthrow of the Government by forcible means. On cross-examination she refused again to answer questions pertaining to her alleged Communist activities, cloaking herself within the privilege against self-incrimination. The trial court ruled that by taking the stand as a witness in her own behalf, the petitioner had waived any privilege under the Fifth Amendment[7] as to testimony offered on her direct case. When Mrs. Brown repeatedly refused to answer, the District Court[8] found her in criminal contempt, and sentenced her to six months' imprisonment. The Court of Appeals affirmed this conviction.[9]

In deciding the constitutional issue and in upholding the ruling of the lower court,[10] the Supreme Court compared the matter with the situation of a defendant in a criminal action.[11] In so doing, the Court, through its opinion by Mr. Justice Frankfurter, depicted Mrs. Brown to be a voluntary witness. As such, she had the opportunity of judging the advantages and disadvantages in offering herself as a witness in her own behalf. The petitioner had the right not to have testified at all. The Fifth Amendment[12] does not go so far as to give Mrs. Brown the choice as to testifying, and having testified, to grant her immunity from cross-examination on the very testimony she has put in dispute.

This opinion was the subject of a vigorous dissent labeling the trial court's action as an abuse of discretion. It was another decision in a line of recent decisions[13] which seems to limit the privilege against self-incrimination. The dissenters urged that the ruling places the witness in a precarious position. If, on the one hand, she offers herself as a witness in her own behalf, she can be forced to give such evidence as would tend to incriminate her. On the other hand, if she chooses not to testify, a disfavorable inference may be drawn since a denaturalization proceeding is a civil suit.

The vote of the Supreme Court was 5 to 4 sustaining the conviction of the lower court.[14]

It is necessary that we also consider, not only the constitutional issue with regard to the Fifth Amendment,[15] but the discretionary power of the Court to punish for contempt. As the interpretation of the Fifth Amendment[16] has been narrowed, the aforesaid power has been widened.

[5] Fed. R. Civ. P. 43 (b).
[6] U. S. CONST. amend. V.
[7] See note 6, *supra.*
[8] (No official citation.)
[9] 234 F. 2d 140 (6th Cir. 1956).
[10] See note 8, *supra.*
[11] Fitzpatrick v. United States, 178 U. S. 304, 20 S. Ct. 944, 44 L. Ed. 1078 (1900).
[12] See note 6, *supra.*
[13] Feldman v. United States, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408 (1944); Rogers v. United States, 340 U. S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1950).
[14] See note 8, *supra.*
[15] See note 6, *supra.*
[16] *Ibid.*

In March 1947, the plaintiff and one Savani had a rendezvous at night at which time the plaintiff gave Savani $3,500 and cancelled a $500 debt, in return for a Cadillac car. At the time, Savani had jumped bail for a felony in New York and was therefore a fugitive.[2]

The police subsequently seized the vehicle from the plaintiff, giving various reasons for their action, among them that the car was stolen, and that the car belonged to a fugitive and not to the plaintiff. At the time of seizure, the police did not bring the car before a magistrate for disposition as required by law.[3]

The plaintiff thereafter produced a bill of sale from a Florida dealer to Savani, and a "certificate of title" transferring title from Savani to the plaintiff. The certificate was dated and notarized one day after the alleged sale took place. The police property clerk refused to surrender the vehicle after being shown these documents.

In an action against the property clerk in 1948, for recovery of the vehicle or $4000 plus $1000 damages, the trial court awarded the plaintiff $100 plus $151 costs. Later, an application to the Supreme Court to review the clerk's refusal to return the vehicle, was denied.[4]

The plaintiff was thereafter incarcerated for from three to five years for attempted rape. Upon release, the Appellate Division affirmed the trial court[5] and subsequently denied a motion for re-argument but gave leave to appeal.[6]

At this time the plaintiff was again incarcerated for parole violation.

Upon release, action was again brought in the trial court which found that although no sale had been effected, the plaintiff had been given a right to possession by Savani. Relying on *Marigliano* v. *O'Connor*,[7] which held that an assignment by a felon would give sufficient possession to the assignee to maintain replevin, the court awarded the plaintiff possession without damages.

In a further proceeding, the Appellate Division reversed.[8] The court pointed out that according to the findings of the trial court there had been no sale. The opinion also stated that the evidence would have warranted a finding that the plaintiff was planning to return the car to Savani, or sell it and give Savani the money. The court implied, without elaborating, that this would be violative of the Penal Law provision against harboring a fugitive.[9] It was reasoned that even if there was a sale by the fugitive to the plaintiff, such a sale was void as against public policy. The *O'Connor* case was distinguished on other grounds. The court held that in either event the plaintiff had no property rights in the vehicle at the commencement of the action and therefore could not maintain replevin.

[2] N. Y. Penal Law § 1694a: "A person who has been admitted to bail in connection with a charge of felony and who fails to appear as required . . . is guilty of a felony."

[3] N. Y. Vehicle and Traffic Law § 60(3). ". . . in every case of seizure (of a car believed to be stolen) the officer making seizure shall forthwith proceed to the most accessible magistrate or judge who shall direct either that the motor vehicle . . . be forthwith released or that it be retained. . . ."

[4] Michalowski v. Beckman, 274 App. Div. 946, 84 N. Y. S. 2d 925 (2d Dep't 1948).

[5] Michalowski v. Ey, 282 App. Div. 965, 126 N. Y. S. 2d 204 (2d Dep't 1953).

[6] Michalowski v. Ey, 283 App. Div. 725, 128 N. Y. S. 2d 572 (2d Dep't 1954).

[7] Marigliano v. O'Connor, 113 App. Div. 848, 99 N. Y. Supp. 544 (App. Term 1906).

[8] Michalowski v. Ey, 4 App. Div. 2d 694, 164 N. Y. S. 2d 192 (2d Dep't 1957).

[9] See note 2, *supra*.

N. Y. Penal Law § 1698: "A person who knowingly or wilfully conceals or harbors for the purpose of concealment a person who has escaped or is escaping from custody is guilty of a felony if the prisoner is held upon a charge or conviction of a felony. . . ."

The Court of Appeals reversed,[10] holding that the plaintiff had a right to possession and damages for unlawful detention. The court found that ownership was proved when the plaintiff showed the bill of sale and "certificate of title." The court observed that although the police stated the vehicle was stolen they never instituted an investigation to determine its true ownership. The opinion also referred pointedly to the police violation of sec. 60 of the Vehicle and Traffic Law.[11] The court reasoned, even if it were assumed that there was no sale between the plaintiff and Savani, police seizure and detention of the property was wrongful. Section 512[12] of the Penal Code was interpreted as denying the police the authority to seize personalty on the grounds that it is the property of a fugitive. The court found, however, that the true reason for seizure was the fact that the police believed Savani to be the true owner.

The court continued by stating that at the time of the sale the plaintiff did not realize Savani was a fugitive. Further, the transaction between the two was valid, and sufficient proof of ownership was shown to the defendant to warrant release of the vehicle. The opinion further stated that even if the plaintiff knew Savani was a fugitive, the sale would be valid in the absence of facts rendering the purchaser an accessory or indicating an intent to defeat justice. The purchase of an article lawfully owned by a fugitive is not invalid per se.

As a rule, "replevin lies only on behalf of one entitled to possession of property against the defendant at the time of commencement of the action or of issuance of writ, and such right of possession must be immediate, exclusive and unqualified."[13] In replevin actions, "the plaintiff can recover only on the strength of his own title or right to possession and not on the weakness of the defendant's title or right."[14] These maxims generally reflect New York law today.

By 1862, a New York case held that the plaintiff might not recover in replevin unless he was entitled to possession of the goods in question at the commencement of the action.[15] The court in that case denied replevin to the owner of goods bailed with a third person at the commencement of the action.

Some twenty years later, a further limitation was placed upon the action of replevin. In the case of *Simpson* v. *St. John*[16] the Court of Appeals held that temporary detention of articles allegedly stolen, was within the police power of the state. If upon review of the circumstances by a magistrate (as then required by law) no order to return the property was given, detention must be deemed necessary for public justice. Therefore, no action for replevin by the owner would lie until a conviction or acquittal was achieved.

As stated earlier, the Supreme Court of New York in *Marigliano* v. *O'Connor*,[17] held that an assignment by a felon in prison gave the plaintiff assignee sufficient right to possession, so that an action for replevin would be sustained.

In 1917,[18] the requirement for the right to possession at the commencement of the action was more clearly defined in a case where the Supreme Court sustained a replevin

[10] See note 1, *supra*.

[11] See note 3, *supra*.

[12] N. Y. Penal Law § 512: "A conviction of a person for any crime does not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeitures to the people of the state in the nature of deodands, or in the case of suicide or where a person flees from justice, are abolished."

[13] 77 C. J. S., REPLEVIN § 42 (1952).

[14] 77 C. J. S., REPLEVIN § 45 (1952).

[15] Wood v. Orser, 25 N. Y. 348 (1862).

[16] 93 N. Y. 363 (1883).

[17] See note 7, *supra*.

[18] Herman v. Rubin, — Misc. —, 167 N. Y. Supp. 1038 (App. Term 1st Dep't 1917).

action by a plaintiff who had title to the goods in question at the commencement of the action, but sold them prior to the termination of the trial.

In 1928,[19] a lower court spelled out the law, denying recovery of gambling devices in a replevin action. No action to recover a chattel may be maintained when the property right asserted is not recognized by law. (The law at the time forbade possession of gambling devices.)

The right to maintain replevin was further limited in the case of *Flegenheimer* v. *Brogan*,[20] in 1940. In that case the plaintiff's testator, in order to defeat the purpose of federal and state alcoholic beverage licensing laws, transferred his stocks and bonds in a brewery, to a third person. The third person, without consideration, transferred it to another party who refused to disgorge upon the demand of the true owner's executrix. In a 4-3 decision, the court refused to aid the plaintiff executrix in her effort to recover the stocks and bonds, stating that the underlying transaction was so adverse to public interest as to prevent the plaintiff from invoking the aid of the courts to replevy the stocks.

The Court of Appeals in the 1943 decision of *Hofferman* v. *Simmons*[21] denied replevin in a case where police raided a bookmaking and policy establishment and seized funds therein. The court held that even though seizure of gambling proceeds was not specifically authorized by statute, whereas seizure of gambling instruments was, the rights of gamblers were not thereby enlarged. The gamblers could not maintain replevin since their possessive right was not recognized by law.

The case of *Stone* v. *Freeman*,[22] further expanded the *Flegenheimer* doctrine by denying recovery of moneys placed in the hands of another for an unlawful purpose. The action was instituted before the moneys in question were used in conjunction with the unlawful purpose. Recovery was denied, the contract being unlawful.

The court moved still further in the 1957 case of *Carr* v. *Hoy*.[23] The plaintiff pleaded guilty to outraging public decency by permitting the photography of nude models on a farm outing. In making the arrest, the defendant sheriff seized the proceeds of the outing. The plaintiff brought an action for the return of the proceeds. Citing the *Hofferman* case,[24] the court held that the money was the proceeds of a criminal act and although the defendant had no title, the complaint was properly dismissed. The court pointed out that the defense by the sheriff of the illegality of the plaintiff's acquisition was not a protection to the defendant but a disability to the plaintiff.

In order to maintain a replevin action against police after the series of decisions, culminating in the *Hoy* case, it appeared necessary that the plaintiff prove "a property interest recognized by law." Just what property right the courts would recognize was not completely defined. However, the courts would strain to avoid having the subject matter or proceeds of an illegal contract fall within this definition.[25] This was the situation at the commencement of the *Michalowski* case.[26]

It is apparent that the Appellate Division, in its reversal of the lower court in the

[19] Triangle Mint v. Horgan, 133 Misc. 802, 233 N. Y. S. 570 (Munic. Ct. Brooklyn 1929).

[20] 284 N. Y. 268, 30 N. E. 2d 591 (1940).

[21] 290 N. Y. 449, 49 N. E. 2d 523 (1943).

[22] 298 N. Y. 268, 82 N. E. 2d 578 (1948).

[23] 2 N. Y. 2d 185, 139 N. E. 2d 531 (1957).

[24] See note 21, *supra*.

[25] Sanders v. Lowenstein, 264 App. Div. 367, 35 N. Y. S. 2d 591 (1st Dep't 1942); Axelrath v. Spencer Kellogg and Sons, 290 N. Y. 767, 50 N. E. 2d 103 (1943); see note 19, *supra*.

[26] See note 1, *supra*.

Michalowski case, followed the conservative trend in the case law of replevin in instances of police detention.

Regarding, as they did, the transfer of the vehicle as an attempt to circumvent the administration of justice, it was reasonable for the court to determine that the transaction was void as against public policy. Certainly there are earlier cases supporting such a rule.[27] It follows, that if the transaction was void, the plaintiff had no right to possession, and with no right to possession there could be no replevin, as in *Wood* v. *Orser*.[28] Therefore, the Appellate Division's holding was somewhat in line with the *Simmons, Flegenheimer* and *Hoy* decisions.

In the rare fact pattern of the *Michalowski* case, the Court of Appeals found a dramatic opportunity to draw a liberal line in the yet unfinished portrait of replevin. To be sure, one of the underlying reasons for this decision was probably the high handed manner in which the police seized the car, without adhering to section 60 of the Vehicle and Traffic Law. The court also appeared annoyed at the transparent pretext for seizure i.e., that the vehicle was stolen. But, it is believed that the main reason for reversal of the Appellate Division was a fear that affirmance would expand the police power of seizure on suspicion of theft to power to seize all property of a fugitive. The letter and spirit of the law is averse to such seizures.[29]

It appears that the court must have then reasoned that having a right to possess, a fugitive has also the right to divest himself of possession. Hence, the conclusion that a sale by a fugitive could be lawful. Indeed, it seems that the sale would be lawful, giving the purchaser a "right to possession recognized by law," unless the purchaser is an accessory, or the intent of the sale is to defeat justice.

By way of dicta, the court stated that the sale might be valid, even though the vendee knew that the vendor was a fugitive from justice. It is submitted that this dicta is far too liberal. It is hard to conceive of any transaction with a fugitive which does not aid him and thereby tends to defeat justice. Furthermore, once given the right to buy a car from a known fugitive, the right to sell a car to a person fleeing justice could follow. Finally, the right to sell a fugitive a rifle might be permitted. There is no doubt that the courts should stand guard over a fugitive's constitutional and legislative safeguards, but removing roadblocks to his escape is another matter. A. K. S.

TORTS—LIABILITY OF MUNICIPAL CORPORATION EXTENDS TO PARTICULAR CLASS—POLICE LIABLE AFTER NOTICE FOR DUE PROTECTION OF INFORMANTS.—In *Schuster* v. *City of New York*,[1] the New York Court of Appeals held that police owe a duty of protection to an informant whose life has been anonymously threatened. With three dissenting opinions filed, the Court, reversing a four to one Appellate Division ruling,[2] sustained plaintiff's complaint as setting forth a cause of action.

Plaintiff's intestate had given New York City Police information which led to the arrest of a very notorious criminal, one Willie Sutton. Plaintiff alleged that the police were instrumental in publicizing the decedent's part in this arrest, and in consequence thereof, numerous written and verbal threats on his life resulted. The police established a personal guard over the person of the decedent, but despite decedent's pleas and

[27] See note 25, *supra*.
[28] See note 15, *supra*.
[29] See note 12, *supra*.

[1] Schuster v. City of New York, — N. Y. 2d —, — N. E. 2d — (1958).
[2] *Id.*, 286 App. Div. 389 (1st Dept. 1955).

objections, the guard was soon discontinued, decedent being advised to ignore the recurrent threats. In reliance on this advice, the decedent appeared freely upon the streets, where nineteen days after he had given information relative to Sutton to the police, he was murdered. The lower court dismissed the complaint on, essentially, three grounds: that plaintiff failed to show a duty owing to the decedent; that he failed, assuming a duty and breach thereof, to allege the direct causal relationship to the murder of the decedent by an unknown assailant; and finally, that plaintiff failed to allege facts that would sustain a finding that the police, in dismissing the reported threats as the work of harmless cranks, did more than express a mere opinion.

New York Municipal Corporations, under their sovereign powers, enjoyed immunity from the consequences of the doctrine of respondeat superior until enactment of permissive legislation waived this sovereign right. Under the Court of Claims Act, Section 8, it was set forth that liability shall be determined in like manner that private individuals and corporations shall be deemed responsible.

It is pointed out that the instant case involves only the sufficiency at law of the complaint; matters of proof supporting the allegations and establishing justiciable damages await trial on the merits.

"A complaint may be dismissed without a plenary trial only if by no rational process could the jury make a finding in plaintiff's favor."[3] "At this time (on motion to dismiss, instant case) every favorable inference is required to be indulged to sustain the complaint."[4]

Granting the permissive statute waiving sovereign immunity, a long line of cases may be cited[5] showing that a municipal corporation, through its police and fire protection powers and duties, cannot be cast in damages for negligence in the discharge of its responsibilities to the public at large. In *Moch Co.* v. *Rensselaer Water Co.*,[6] the municipal corporation was held not liable for plaintiff's fire loss resulting from their failure to properly maintain water lines.

Municipalities have been held liable, however, to a bystander negligently shot by a policeman engaged in an altercation with another;[7] to a taxicab driver shot by a passenger negligently placed in his cab by policemen;[8] to the estate of an arrested man who died from pneumonia caused by exposure in jail, and failure to secure medical aid for a fractured hip and elbow;[9] to the estate of a man negligently shot by a policeman for making a disturbance while intoxicated;[10] to a wife shot by her husband to whom the police had negligently returned a pistol;[11] and to a bystander injured while directing traffic at the direction of a police officer.[12] In *McCrink* v. *City of New York*,[13]

[3] Stein v. Palisi, 308 N. Y. 293, 296, 125 N. E. 2d 575, 576 (1955).

[4] Levine v. City of New York, 309 N. Y. 88, 92, 127 N. E. 2d 825, 828 (1955).

[5] C. J. Murrain v. Wilson Line, Inc., 270 App. Div. 372, 59 N. Y. S. 2d 750 (2d Dept. 1946), *aff'd without opinion*, 296 N. Y. 845, 72 N. E. 2d 29 (1947); Steitz v. City of Beacon, 295 N. Y. 51, 64 N. E. 2d 704 (1945); Rocco v. City of New York, 282 App. Div. 1012, 126 N. Y. S. 2d 198 (1st Dept. 1953).

[6] 247 N. Y. 160, 159 N. E. 896 (1928).

[7] Wilkes v. City of New York, 308 N. Y. 726, 124 N. E. 2d 338 (1954).

[8] Lubelfeld v. City of New York, 4 N. Y. 2d 455, 151 N. E. 2d 862 (1958).

[9] Dunham v. Village of Canisteo, 303 N. Y. 498, 104 N. E. 2d 872 (1952).

[10] Flamer v. City of Yonkers, 309 N. Y. 114, 127 N. E. 2d 838 (1955).

[11] Benway v. City of Watertown, 1 App. Div. 2d 465, 151 N. Y. S. 2d 993 (2d Dept. 1957).

[12] Adamo v. P. G. Motor Freight, Inc., 4 App. Div. 2d 758, 168 N. Y. S. 2d 993 (2d Dept. 1957).

[13] McCrink v. City of New York, 296 N. Y. 99, 71 N. E. 2d 419 (1947).

a city was held liable for negligently having omitted to discharge a police officer by whom plaintiff's intestate was shot. In *Meistinsky* v. *City of New York*,[14] the estate of a hold-up victim who had been killed by an untrained officer's bullets, was permitted to recover.

In all of these cases the plaintiff suffered damage as a direct result of police negligence, whether passive or active and with or without the agency of a third party. In every case, the injured party had ceased to become subject to classification as "general public"; i.e., the responsible officials had actual or constructive notice of plaintiff's impending peril. "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of apprehension."[15]

Although much might and has been said[16] of Schuster's duty or freedom from duty to assume the status of informant, this consideration is wide of materiality. Although Schuster's public-spirited co-operation in bringing a vicious criminal to bar may be worthy of note to emphasize his right to consideration and dramatize his damages, the essential question is—was a duty owed to the decedent by the police?

Section 435 of the New York City Charter (1938) enumerates, among others, mandatory duties to "protect the rights of persons and property" to "preserve the public peace," to "prevent crime." The City owed the decedent a duty to exercise care "in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect."[17] Here Schuster's peril was clearly foreseeable, and expressly forewarned. With these elements of Sutton's notoriety, vast news coverage of Schuster's role, and the resultant threats, Schuster indeed became separated from the ranks of general public and became due the usual (not "special") care and protection reasonably commensurate with his apparent peril.

The case should go to the jury if the causation of the injury by the defendant's negligence may be reasonably inferred, even though the evidence fails to eliminate the remote possibility that the injury was not caused by the negligence of the defendant.[18]

One further question of law remains: did plaintiff's intestate suffer actionable damage by relying on police assurances that the threats he had received were harmless?

District Judge Learned Hand has said: "An opinion is a fact and it may be a very relevant fact."[19] Judge Andrews in a leading case, *International Products Company* v. *Erie Railroad Company*,[20] said: "Liability arises only where there is a duty, if one speaks at all, to give correct information. . . . There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties . . . must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."

Although the instant decision may have further defined concepts of duty and enlarged the understanding of municipal liability, there is anything but a clear mandate to provide any "special" round-the-clock police protection for informers, or informants. The duty to Schuster arose not from his status as an informant but from the threats

14 Meistinsky v. City of New York, 309 N. Y. 998, 132 N. E. 2d 900 (1956).

15 Palsgraf v. Long Island R. R. Co., 248 N. Y. 339, 162 N. E. 99 (1928).

16 See note 1, *supra*.

17 Caldwell v. Village of Island Park, 304 N. Y. 268, at 274, 107 N. E. 2d 441, at 445 (1952). Flamer v. City of Yonkers, note 10, *supra*.

18 Betzag v. Gulf Oil Corp., 298 N. Y. 358, 362, 83 N. E. 2d 833, 837 (1949).

19 Vulcan Metals Co. v. Simons Mfg. Co., 248 Fed. 853 (2d Cir. 1918).

20 244 N. Y. 331, 155 N. E. 662 (1927).

to his life among surrounding circumstances that would reasonably indicate serious peril. A foreseeable peril to a specific person or class of persons gives rise to a commensurate duty of protection in those charged by statute with such duty, and a liability for failure to discharge that particular duty. This is not an entirely new concept in the law of torts, nor in the field of municipal corporate liability. W. C. H. Jr.

TORTS—MALPRACTICE—DAMAGES PROPERLY AWARDED FOR MENTAL ANGUISH FLOWING FROM FEAR OF CANCER, SOLELY ON STATEMENT OF PHYSICIAN CONSULTED AFTER ORIGINAL INJURY OCCURRED.—In an action for malpractice, the New York Court of Appeals, in a four to three decision ruled that a patient was entitled to recover damages for mental anguish against the original wrongdoers arising from information received from the physician whom she consulted for treatment of the original injury.[1]

The plaintiff wife in the instant case had been suffering from a bursitis of the right shoulder and received a series of treatments from the defendants, doctors specializing in x-ray therapy. After her third treatment she experienced a feeling of nausea about which she informed one of the defendants. He prescribed certain pills which she purchased and utilized. At the conclusion of the sixth treatment she continued to experience pain in her shoulder and at the suggestion of one of the defendants, she returned for a seventh treatment as the pain had not diminished three days later. Subsequently, physical changes of the skin occurred leaving a residual area of raw flesh exposed. While these changes were occurring, the plaintiff returned to the defendants and exhibited the condition of her shoulder. The defendants gave her a prescription for some salve which she procured and applied.

Approximately two years after the treatments, degenerative changes in the skin having manifested themselves, the plaintiff was referred by her attorney to a dermatologist for examination. The condition was diagnosed as chronic radiodermatitis. After examination and prescribing treatment for the malady, the dermatologist advised the plaintiff to have her shoulder checked every six months as the area might become cancerous.

Thereafter, the plaintiff began an action for malpractice, stressing in her testimony the fear of cancer and mental anguish she suffered which had been induced by the dermatologist's statement as to the possibility of such a disease developing. The plaintiff's testimony was substantiated by the introduction of a neuropsychiatrist who testified, on the question of mental anguish that she was suffering from a severe cancerophobia, i.e., the phobic apprehension that she would ultimately develop cancer in the area of the radiation burn.

Upon a verdict in her favor, the plaintiff was awarded $25,000 damages of which $15,000 was specifically allocated as damages for mental suffering induced by the cancerophobia.

The defendants appealed the judgment and the issue before the Court of Appeals was, whether the plaintiff could recover in an action for malpractice, damages for mental anguish induced solely by the statement of the physician whom she consulted for treatment of the original injury inflicted by the defendants. The Court re-affirmed the propriety of the award for the mental anguish flowing from the cancerophobia.

This ruling might appear to be an extension of the doctrine regarding psychic injury and liability in New York as decided in 1896 in *Mitchell* v. *Rochester Railway*,[2] the leading case on emotional disturbance. The position that the Court of Appeals took

[1] Ferrara v. Galluchio, 5 N. Y. 2d 16, 152 N. E. 2d 249 (1958).
[2] Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896).

therein was that there could be no recovery for injuries sustained by fright occasioned by negligence where there was no immediate personal injury or physical contact. A case ensuing some thirty-five years later[3] reaffirmed the *Mitchell* rule.

Under this rule therefore, if there was some personal injury, however slight, the courts would allow damages for accompanying mental anguish. If there was no physical injury or physical contact, then even if there had been a psychic injury which resulted in bodily harm there could be no recovery either for the bodily harm or the mental anguish which ensued.

In spite of the strict rule in the *Mitchell* case, New York has, in the cases which have arisen since, allowed recovery for mental anguish in a variety of actions under the general classification of mutilation of dead body cases, interference with contractual relationship cases, immediate physical injury cases, slight impact cases, Workmen's Compensation cases, food cases, wilful or wanton injury cases, and invasion of right of privacy cases.[4] The underlying breach of duty to the plaintiff has sustained the liability for the psychic stimuli and subsequent emotional distress.

One of the arguments advanced by the courts in New York for the adherence to the *Mitchell* doctrine and limitation of liability has been the public policy concept, Justice Martin in his opinion stated:

"If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection and where the damages must rest upon mere conjecture or speculation. . . . To establish such a doctrine would be contrary to principles of public policy."[5]

In affirming the award to the plaintiff in *Ferrara* v. *Galluchio*,[6] the majority took into consideration this concept of public policy but declared nevertheless, that neither public policy or common sense was offended by the verdict, which was supported by the facts. They did not announce a principle concerning the extent to which an original wrongdoer would be held liable under similar circumstances[7] nor did they prescribe a principle regarding damages for mental suffering, either as a substantive cause of action or as incidental to the recovery of damages for the infliction of other injuries. Rather, the decision was based on the established rule in New York whereby the wrongdoer is liable for the ultimate result even though the original injury and subsequent damages are increased through the mistake or negligence of the physician who treats the injury.[8] The distinction made was that although only the plaintiff's mental anguish was aggravated by the treating physician's statement, she was nevertheless entitled to damages for the additional anguish from the defendant, the original wrongdoers. They were the ones who started the chain of circumstances without which the cancerophobia would not have developed.[9]

In their dissent, the minority adopted the view that as a matter of public policy, the plaintiff should not have been entitled to recover for the mere "possibility" of another ailment developing. They averred that allowing damages based on the plaintiff's subjective mind and speculation by the physician as to what might occur would be

[3] Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931).

[4] McNiece: *Psychic Injury and Tort Liability in N. Y.*, 24 ST. JOHN'S L. REV. 1, 33 (1949).

[5] See note 2, *supra* at 110, 45 N. E. at 355.

[6] 5 N. Y. 2d 16, 152 N. E. 2d 249 (1958).

[7] *Id.*, at 22, 152 N. E. 2d at 254.

[8] Milks v. McIver, 264 N. Y. 267, 190 N. E. 487 (1933).

[9] See note 1, *supra* at 21, 152 N. E. 2d at 252.

introducing into the law a new field of damages affording opportunity for unverified claims.[10] The rationale is analogous to the reasoning in the *Mitchell* case.[11]

Though the courts in other jurisdictions have allowed recovery for mental anguish where there has been a physical injury and a causal connection,[12] the cases where allowances of such damages based primarily on the testimony of the injured party himself have been few.

A 1940 Texas case allowed the plaintiff, who had suffered partial loss of use of one arm and one leg, to testify to his fear of paralysis.[13] The court held that this fear was a part of the mental anguish occasioned by the injury for which the plaintiff was entitled to recover. In the holding there was a statement to the effect that the court realized they were pioneering in their conclusion.[14]

In a recent Missouri case,[15] even though there had been error in admitting expert medical testimony on the issue of mental anguish, the plaintiff was still allowed to recover solely on the basis of her own testimony regarding subjective symptoms experienced by her while pregnant.

Our instant case then, has not changed the *Mitchell* rule in New York. The damages for mental anguish allowed the plaintiff herein, though perhaps speculative in nature, were founded primarily on the original harm, the radiodermatitis attributed to the defendant's negligence. This radiodermatitis appears to be the peg on which the damages were hung.

The *Mitchell* rule's principle of no liability for psychic trauma and resulting injuries has been riddled with exceptions[16] and therefore been subject to condemnation by many legal scholars.[17] The position taken by the American Law Institute in the Restatement of the Law of Torts[18] is also somewhat at variance with the rule.

The answer to the conflict appears to be some type of statutory enactment which would attempt to cover some of the myriad problems presented under the heading of emotional disturbance and tort liability or abolishing the *Mitchell* rule and leaving to judicial determination the limits to be placed on the right of recovery in this type of case. This was in effect the recommendation of the Law Revision Committee in a report concerning liability in New York under the *Mitchell* doctrine.[19] M. E. C.

WILLS—ELECTION TO TAKE AGAINST SPOUSE'S WILL, HELD, RECOVERABLE EVEN AFTER EXPIRATION OF STATUTORY TIME LIMIT FOR FILING NOTICE OF ELECTION.—Affirming an order by the Surrogate's Court in an accounting proceeding[1] the Appellate Division has unanimously held a widow's executor bound by the widow's revocation of a valid notice of election to take against her predeceased husband's will even though at the time of her revocation the statutory six-month period for the exercise of the right of election had expired.[2]

[10] *Id.*, at 23, 152 N. E. 2d at 254.

[11] See note 5, *supra*.

[12] S. C. Padgett v. Colonial Wholesale Dist. Co., — S. Car. —, 103 S. E. 2d 265 (1958); Greenberg v. Stanley, 51 N. J. Super. 90, 143 A. 2d 588 (1958); Lessard v. Tarca, 20 Conn. Super. 295, 133 A. 2d 625 (1957).

[13] Dulaney Inv. Co. v. Wood, — Tex. —, 142 S. W. 2d 379 (1940).

[14] *Id.*, at 384.

[15] Caspermeyer v. Florsheim Shoes Store Co., — Mo. —, 313 S. W. 2d 198 (1958).

[16] See note 4, *supra*.

[17] See generally, 30 VA. L. REV. 193 (1944), 49 HARV. L. REV. 1033 (1936).

[18] RESTATEMENT, TORTS § 463 (1934).

[19] 1936 REPORTS, N. Y. LAW REVISION COMMITTEE, ALBANY.

[1] Matter of Allan, 5 Misc. 2d 92, 160 N. Y. S. 2d 587 (Surrogate's Court, New York County, 1957).

[2] Matter of Allan, 5 App. Div. 2d 453, 172 N. Y. S. 2d 447 (1st Dep't, 1958).

Fifteen months after filing her concededly valid notice of election to take against her husband's will filed in accordance with New York Decedent Estate Law section 18, the widow by notice served upon the executors of her husband's estate, revoked her election but within a short time thereafter and subsequent to the commencement of the accounting proceeding instituted by the executors, the widow died. While no objections to the widow's change of position had been raised by any of the beneficiaries under the husband's will, the widow's executor, substituted for her as a respondent, now interposed an objection to the accounts grounded on his contention that the widow's revocation of her previously filed election was wholly void.

The statute granting the right of election contains no provision as to whether and when an election once made may be revoked.[3] The question seems to be one of first impression in this jurisdiction except for a few scattered dicta by lower courts.[4] These dicta are as irreconcilable[5] as are the cases in other states. The general rule is said to be that ". . . an unconditional voluntary election to take under or contrary to a valid will, made with knowledge of the facts and of the rights of the person making the election, and not induced by fraud or undue influence, may not be revoked or set aside."[6] There is, however, authority for the proposition that election may be revoked within the statutory period for making the original election[7] but no court seems to have gone so far as to recognize the validity of a revocation exercised after expiration of the statutory period.

The court in the instant case rejects Surrogate Wingate's dictum in *Matter of Zweig* that "no change of position will be permitted in the absence of active fraud after the expiration of the (statutory) period. . . ."[8] *Matter of Zweig* is extensively quoted and relied on as the leading case on the subject in the recent Wyoming case *In re Harrt's Estate*.[9] Involved in both these well documented New York and Wyoming cases are situations where widows who had a right of election to take against the will but omitted to exercise their rights within the statutory time limit prayed for relief from the results of their failure to act. In both instances the courts held the statutory time limits to be mandatory so as to deprive the courts of the power to grant relief but probing farther afield the courts went out of their way to consider the petitions in their aspect of applications to reverse an intentional and valid election in favor of the will and again found themselves constricted by the weight of authorities which would have permitted a change of position only prior to the expiration of the period within which election was originally possible.

The case of *Craven* v. *Craven*,[10] by contrast, involves the revocation of an election to take against the will. Here, where expiration of time was not in issue, the court said: "But can a widow, who has elected to renounce the will, as in this case, withdraw her election and have a second election? The general rule is, when a widow deliberately elects to renounce the will, that she cannot thereafter recall it. But there are some

3 N. Y. DECEDENT ESTATE LAW § 18.

4 Matter of Zweig, 145 Misc. 839, 857, 261 N. Y. S. 400, 419 (Surrogate's Court, King's County, 1932); *In re* Hearn's Will, 158 Misc. 370, 374, 285 N. Y. S. 935, 940 (Surrogate's Court, King's County, 1936); Matter of Tourneau, 4 Misc. 2d 941, 942, 156 N. Y. S. 2d 793, 794 (Surrogate's Court, New York County, 1956).

5 Compare Matter of Zweig, *supra*, with Matter of Tourneau, *supra*.

6 Annot., 81 A. L. R. 740, 741 (1932); *In re* Johnson's Estate, 244 Pa. 600, 90 A. 203 (1914); Caravatta v. O'Brien, 98 N. J. EQ. 199, 129 A. 752 (1925).

7 Ward v. Ward, 134 Ill. 417, 25 N. E. 1012 (1890); Williams v. Williams, 161 Ky. 55, 170 S. W. 490 (1914).

8 145 Misc. at 857, 261 N. Y. S. at 419.

9 75 Wyo. 305, 295 P. 2d 985 (1956).

10 181 Ky. 428, 205 S. W. 406 (1918).

exceptions to this rule, as where she is not in the possession of all the facts, is deceived, misled, or overreached, or where the devise fails, or the election is conditional. . . . But the rule generally recognized is that the widow can have but one election, if deliberately made, and is free from fraud, undue influence, and to her advantage."[11] In direct opposition to this view stands the dictum in *Matter of Tourneau*[12] that in the absence of a showing of prejudice to any of the interested parties a widow should be free to withdraw her notice of election.

Comparing the New York statute with those of sister states the court in the instant case felt compelled to reject as authorities the decisions in other jurisdictions as based on statutes entirely dissimilar to Decedent Estate Law section 18. This view is as striking as it is forceful. The New York statute is said to be patterned after the Pennsylvania statute[13] which on that account may serve as the best example to illustrate the dissimilarity. There it is provided: "(a) Right of election. When a married person dies testate as to any part of his estate, the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated . . . . (b) Share of estate. The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real and personal estate of the testator, if the testator is survived by more than one child, or by one or more children and the issues of a deceased child or children, or by the issue of more than one deceased child, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator."[14] As against this, the rights of the surviving spouse under section 18 are essentially predicated on insufficiency of the testamentary provision as compared with the intestate share whereby trusts set up for the benefit of the surviving spouse are to remain undisturbed if they constitute an equivalent of the intestate share, qualified by provisions for an absolute right to a sum of $2,500 subject to the intestate share being not less than that amount. As the court points out, section 18 merely entitles the surviving spouse generally to take the difference between the testamentary disposition and the intestate share while the statutes of other states grant the right of election to take against the will entirely. Thus the New York statute is indeed *sui generis*.

It follows that as the result of a valid election the surviving spouse acquires what the court terms the "elective increment," a right he may waive, or an interest he can dispose of by assignment or by gift. "As a general rule a party may waive a statutory or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and cannot afterward invoke its protection."[15]

The court's holding, it is submitted, gains additional force in the light of the characterization of the statutory period for the exercise of the right of election as a statute of limitation.[16] The penalty for failure to act within the statutory period may be loss of the right, but the right once acquired cannot be lost by the running of the statute.

As a corrective, estoppel may on a proper showing be raised against the spouse revoking his election to the prejudice of other beneficiaries under the will. Nothing is detracted from the significance of this decision by the court's rider that the better and safer practice would seem to be to apply to the court for leave to revoke the election. L. J. H.

[11] 205 S. W. at 407.
[12] 4 Misc. 2d at 942, 156 N. Y. S. 2d at 794.
[13] 145 Misc. at 841, 261 N. Y. S. at 403.
[14] PA. WILLS ACT OF 1947 as amended 1956, 20 P. S. § 180.8.
[15] Selzer v. Baker, 295 N. Y. 145, 65 N. E. 2d 752 (1946).
[16] See note 4, *supra*.