NEW YORK LAW SCHOOL

NYLS Law Review

Volume 6 | Issue 1 Article 8

January 1960

Decisions

DECISIONS

CONSTITUTIONAL LAW—RACIAL DISCRIMINATION IN PUBLIC HOUSING—STANDING TO SUE—PROOF OF DENIAL OF ADMISSION TO A PUBLIC HOUSING PROJECT ON ACCOUNT OF RACE OR COLOR NECCESSARY TO MAINTAIN ACTION TO ENJOIN SUCH DISCRIMINATION.—In the case of *Cohen v. Public Housing Administration*,[1] the United States Court of Appeals for the Fifth Circuit refused to enjoin the continuance of an alleged policy of racial segregation in public housing where the plaintiff failed to prove that she had made application and had been denied admission to a particular housing development.

The United States Supreme Court saw fit to deny certiorari.[2]

The action was originally instituted in the federal district court[3] by eighteen Negro residents of Savannah, Georgia, in their own behalf and in behalf of other Negroes similarly situated, against the Public Housing Administration and the Savannah Housing Authority and its officers. The plaintiffs sought a declaratory judgment and to enjoin the defendants from enforcing a policy of racial segregation in public housing developments. The complaint alleged that the two housing agencies (the PHA and the SHA) administered the entire program of public housing in Savannah and pursued an administrative policy under which certain developments were designated for occupancy by qualified white families and others by qualified Negro families. The plaintiffs claimed that they met all of the requirements for admission to the projects limited, by the defendants, to the occupancy by white families and that each of them had been denied admission to the Fred Wessels Homes, a development limited to white occupancy, solely because of race or color.

The district court granted summary judgment to PHA, and dismissed the action as to the SHA holding that since separate though equal housing facilities were provided the plaintiffs, their constitutional rights were not violated. The United States Court of Appeals for the Fifth Circuit,[4] on appeal, reversed the decision in part and remanded the case to the district court for trial on the merits. The court held that, as to the SHA, if the allegations made in the complaint were proven, a claim under the federal Civil Rights Statutes was stated and the complaint should not have been dismissed without a hearing on the merits. As to the PHA, the court held that the plaintiffs were entitled to a trial on the question whether the governmental agency could give federal assistance to the construction of segregated housing projects.

At the opening of the trial in the district court,[5] after remand, the action was voluntarily dismissed as to all but one of the plaintiffs. The court found that the remaining plaintiff, Queen Cohen, had never applied for admission to the Fred Wessels Homes or to any other public housing development and that there was no proof that the defendants had refused her any preferential right of occupancy. The action was dismissed and the plaintiff appealed to the United States Court of Appeals for the Fifth Circuit.[6]

On appeal, the plaintiff contended that she was not required to prove that she had applied for or was denied admission to the Fred Wessels Homes. She argued that such an act was futile, in view of the policy pursued by the defendants and that equity does not require, as a prerequisite for injunctive relief, the performance of a vain act.

1 257 F.2d 73 (5th Cir. 1958).
2 358 U.S. 928, 79 S. Ct. 315, 3 L. Ed. 2d 302 (1959).
3 Heyward v. Public Housing Authority, 135 F. Supp. 217 (S.D. Ga. 1955).
4 238 F.2d 689 (5th Cir. 1956).
5 154 F. Supp. 589 (S.D. Ga. 1957).
6 See note 1, supra.

School Board v. Allen,[7] which was relied upon by the plaintiff in support of her contention, involved an action to restrain governmentally enforced racial segregation in public schools. There, as in the instant case, it was contended on the part of the defendants, that to be entitled to equitable intervention, it was necessary to apply individually and be denied admission to a particular school. The Fourth Circuit Court of Appeals held that, in view of the announced policy of the school boards, an application for admission to a school maintained for white children would have been futile and not requisite as a condition of relief. The Court of Appeals for the Fifth Circuit reaffirmed this decision in *Gibson v. Board of Public Instruction*,[8] which involved an almost identical set of circumstances. Citing the *Allen* case, the court held that the futility of the act absolved its performance as a condition of seeking equitable relief.

The court distinguished the instant case, on its facts, from the *Allen* and *Gibson* cases on two grounds. In the first place the court reasoned that in the latter cases the petitioners had, prior to the institution of their actions, placed themselves on record as being desirous of the relief which they sought to accomplish by the commencement of the action, while in the present case there was no proof that the plaintiff desired to become a tenant in the Fred Wessels Homes prior to the action. The court felt that "testimony, years after the critical event, as to what one's intentions were cannot take the place of acts done at that time."[9] The second ground of distinction was that in the present case the defendants denied that they were enforcing a policy of racial segregation while in the *Allen* and *Gibson* cases, the school boards admitted that racial segregation was enforced.

The plaintiff also relied upon the case of *Staub v. City of Baxley*,[10] in support of her contention that it was not necessary to prove that she had applied and was denied admission to a particular project. The *Staub* case concerned a municipal ordinance which violated the Constitution on its face. The ordinance made it an offense to solicit members for a dues-paying organization without obtaining a permit which, in the discretion of the licensing authority, could be refused. It was contended that the appellant, who was convicted under the ordinance, could not attack its constitutionality because she had not attempted to secure a permit under it. The United States Supreme Court held that one does not lack standing to attack the constitutionality of an ordinance because he has not submitted to its demands.

The so-called "standing to sue" doctrine is that "in a suit in a federal court by a citizen against a government officer, complaining of alleged . . . unlawful conduct . . . , there is no justiciable 'controversy,' without which, . . . the court has no jurisdiction, unless the citizen shows that such conduct . . . invades or will invade a private substantive legally protected interest of the plaintiff citizen . . . ."[11]

The court, in the instant case, distinguished the *Staub* case on the ground that in that case the appellant had a legal right to solicit membership to a labor union notwithstanding the ordinance, while, in the present case, the plaintiff did not have a legal right to be admitted to a housing project without having applied for admission. The court concluded that in the absence of proof that the plaintiff had been denied admission to a public housing project on account of her race or color she lacked "standing to sue."

By way of dicta the court noted that the federal constitution does not require

[7] 240 F.2d 59 (4th Cir. 1956), cert. denied, 353 U.S. 910, 77 S. Ct. 667, 1 L. Ed. 664 (1957).

[8] 246 F.2d 913 (5th Cir. 1957).

[9] See note 1, supra, at 77.

[10] 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).

[11] Associated Industries v. Ickes, 134 F.2d 694, 700 (2nd Cir. 1943).

actual integration of the races but merely prohibits the use of governmental power to enforce racial segregation. Consequently where segregation of the races is voluntary rather than enforced, it cannot constitutionally be objected to.[12]

In conclusion, it would seem that while it is well-settled that governmentally enforced racial segregation in public housing is unconstitutional,[13] a plaintiff has no standing to maintain an action to enjoin such segregation in the absence of any attempt to apply for admission to the public housing project.—A. K.

CONSTITUTIONAL LAW—CONTEMPT CONVICTION FOR REFUSAL TO ANSWER BECAUSE COUNSEL NOT ALLOWED IN HEARING ROOM NOT A VIOLATION OF DUE PROCESS.—In a recent 5-4 decision,[1] the United States Supreme Court ruled that petitioners' convictions for contempt for refusing to answer questions at a judicial inquiry was not a violation of the due process clause of the 14th amendment of the United States Constitution,[2] even though their counsel was excluded from the room during the interrogation.

These proceedings arose out of a state judicial inquiry into allegedly improper practices of attorneys of the Kings County Bar, who were charged with "ambulance chasing" and various other unethical activities. Acting according to the New York Judiciary Law,[3] the Appellate Division of the Supreme Court of New York, Second Department, ordered an investigation into these activities appointing Mr. Justice Arkwright, later replaced by Justice Baker, to preside at an Additional Special Term of the Supreme Court.

Appellants, who are licensed detectives, appeared as subpoena witnesses to this judicial inquiry, and were accompanied by counsel. Presiding Justice Arkwright, acting pursuant to a recently adjudicated case[4] during the course of this investigation, told the appellants that their lawyers would be excluded from the hearing room while they were being interrogated, but gave them the opportunity to suspend the questioning at any time in order to consult counsel. Thereafter, the appellants refused to answer relevant questions put to them, on the ground that their counsel was not allowed in the hearing room during the questioning. Because of this refusal they were held in contempt, and this was affirmed in the lower court.[5] The New York Court of Appeals[6] then denied petitioners' ensuing appeals.

[12] Accord, Shelly v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); Barnes v. City of Gadsden, 268 F.2d 594 (5th Cir. 1959); Rippy v. Border, 250 F.2d 690 (5th Cir. 1957); Avery v. Wichita Falls, 241 F.2d 230 (5th Cir. 1957).

[13] Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); City of Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950); Tate v. City of Eufaula, 165 F. Supp. 303 (M.D. Ala. 1958); Jones v. City of Hamtramck, 121 F. Supp. 123 (E.D. Mich. 1954); Vann v. Toledo Metropolitan Housing Authority, 113 F. Supp. 210 (N.D. Ohio 1953); Banks v. Housing Authority, 120 Cal. App. 2d 1, 260 P.2d 668 (1953); Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (1954).

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[1] Anonymous Nos. 6 and 7 v. Hon. Edward G. Baker, 360 U.S. 287, 79 S. Ct. 1157, 3 L. Ed. 2d 1234 (1959).

[2] U.S. Const. Amend. XIV, § 1, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

[3] New York Judiciary Law, § 90.

[4] Matter of M. Anonymous v. Arkwright, 5 A.D.2d 790, 170 N.Y.S.2d 535 (2d Dep't 1958); leave to appeal denied, 4 N.Y.2d 676, 149 N.E.2d 538 (1958).

[5] Anonymous Nos. 6 and 7 v. Arkwright, 6 A.D.2d 719, 176 N.Y.S.2d 227 (2d Dep't 1958).

[6] Anonymous Nos. 6 and 7 v. Arkwright, 4 N.Y.2d 1034, 152 N.E.2d 651 (1958).

The case first reached the United States Supreme Court where further consideration was postponed to a hearing on the merits involving jurisdiction.[7] Incidental to this issue, it was noted that the basis for appeal to this court[8] was incorrect, and the appeal was dismissed because the constitutionality of the New York statute[9] was never questioned or passed upon in the state courts and, therefore, the United States Supreme Court had no jurisdiction. However, the appeal was treated as a petition for writ of certiorari, which was granted.[10]

Before discussing the opinion of the court as delivered by Justice Harlan, an analysis of the legal history and effect of the judicial inquiry here in question would be proper.

Legal proceedings before the Special Term involving disbarment and disciplining of lawyers have always had a special and distinct set of standards and rules as opposed to general trial court procedures. The reason for this is found in the inherent character of the proceedings. The power to remove members of the bar rests with the Appellate Division of the Supreme Court,[11] which has the authority to commence a general inquiry when informed of any unethical practices among the bar members, and can place this inquiry in the hands of a Supreme Court Justice sitting in Special Term. The nature of this inquiry is that of a preliminary investigation resulting in the promulgation of various reports and recommendations upon which future actions may rest.

In the landmark case dealing with disbarment proceedings, *People ex rel. Karlin v. Culkin*,[12] Mr. Justice Cardozo said that the proceedings at Special Term constitute a "preliminary inquisition, without adversary parties, neither ending in any decree, nor establishing any right . . . a quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter . . . ."[13] Due to the delicacy of the situation involved in such a proceeding "whereby the fair fame of a lawyer however innocent or wrong, is at the mercy of the tongue of ignorance or malice,"[14] the essential element of the preliminary investigation is that of privacy and secrecy, and does not come within the scope of Section 4 of the Judiciary Law which requires sessions of a court to be public.[15]

Though, "the two fields of action are diverse and independent,"[16] there is an analogy in these cases to Grand Jury proceedings where counsel is not allowed to be present at the interrogation of witnesses in such an inquisition.[17] However, it has been recently held in New York that the Judge at Special Term has the discretion to permit counsel to attend where the witness himself is the target of the hearing.[18]

The source of power of the judge in these judicial inquiries is derived from the State Judiciary Law which spells out the broad power of the presiding justice when saying, "In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem

[7] Anonymous Nos. 6 and 7 v. Arkwright, 358 U.S. 891, 79 S. Ct. 151, 3 L. Ed. 2d 119 (1958).
[8] 62 Stat. 929 (1948), 28 U.S.C., § 1257(2) (1952).
[9] See note 3, supra § 90 (10).
[10] 62 Stat. 962 (1948), 28 U.S.C., § 2103 (1952).
[11] See note 3, supra.
[12] 248 N.Y. 465, 162 N.E. 487 (1928).
[13] Id. at 478, 479, 162 N.E. at 492.
[14] Ibid.
[15] Ibid.
[16] Id. at 470, 162 N.E. at 489.
[17] Cf. People ex rel. McDonald v. Keeler, 99 N.Y. 463, 2 N.E. 615 (1885).
[18] See note 4, supra at 791, 170 N.Y.S.2d at 536.

necessary."[19] This view was reaffirmed in 1958 when the New York State Legislature refused to amend the Civil Rights Law,[20] so as to require counsel to be permitted to be present at the examination of witnesses in proceedings of this nature.

With the background and history of these judicial inquiries as a perspective, Justice Harlan, in writing for the majority of the court, said that the exclusion of counsel from the hearing room was not the institution of a novel procedure by a specific court or judge in a particular case, but was in keeping with established state policy of keeping these hearings private, and leaving such discretion up to the presiding judge in order to achieve this aim.

The United States Supreme Court in *Chandler v. Fretag*[21] held that a defendant has a right to be represented by counsel in a state criminal proceeding, but the courts have not extended this right to the preliminary examination and investigation levels of such proceedings.[22] In criminal contempt proceedings arising out of state investigations presided at by a judge sitting as a "One Man Grand Jury,"[23] there is a constitutional right to counsel. But the *Groban* case[24] laid down the rule that witnesses who are examined in a state investigation which is privately conducted, have no constitutional right to the aid and presence of counsel while being questioned. In that case,[25] an Ohio statute,[26] authorizing a fire marshal investigating into causes of a fire, to exclude counsel representing witnesses from the hearing room, was held constitutional. The court in *Groban*,[27] said that in some situations in a preliminary hearing the testimony of a witness might lay him open to criminal charges, but until these criminal proceedings are commenced, no constitutional right to counsel exists nor can be insisted upon, for up to then the witness is protected by the privilege against self-incrimination.[28]

The same principle applies here, for New York, as Ohio, has a privilege against self-incrimination,[29] which the appellants were free to exercise at any time during the hearing. The case here is even stronger than *In Re Groban*,[30] for the inquiry was conducted by an experienced judge who gave the appellants an opportunity to suspend the questioning and consult counsel, even though they were outside of the hearing room. Thus in adhering to the *Groban*[31] decision the court rejected appellants' constitutional claims, and held that no additional constitutional rights accrue to them, by the fact that they may later be faced with criminal charges.[32]

Justice Black writing for the dissent declared as he did in the *Groban* case,[33] that these secret inquisitions where defense counsel has been excluded, are violations of the

[19] See note 3, supra § 90(10).

[20] Civil Rights Law, §§ 1-242.

[21] 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954).

[22] See Cicenia v. LaGay, 357 U.S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1957); see Crooker v. California, 357 U.S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1957).

[23] In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1947).

[24] In re Groban, 352 U.S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376 (1956).

[25] Ibid.

[26] Page's Ohio Rev. Code, 1954, § 3737.13.

[27] See note 24, supra at 332, 333, 77 S. Ct. at 513, 1 L. Ed. 2d at 380, 381.

[28] U.S. Const. Amend. V; Adamson v. California, 332 U.S. 46, 52, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947); Ullman v. United States, 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956).

[29] N.Y. Const. Art. 1, § 6.

[30] See note 24, supra.

[31] Ibid.

[32] See note 27, supra.

[33] See note 24, supra.

due process clause of the 14th amendment[34] resulting in the infringement on the rights and liberties of the individual, through the extending of too broad and dangerous a power to the presiding judge or public official. Justice Black further questions the constitutionality of these hearings where counsel for the state can remain at the inquiry while opposing counsel cannot, even when possible future criminal action might be brought against his clients as a result of their testimony.

Despite this vigorous dissent, the United States Supreme Court has now solidified its position in upholding as constitutional the state policy of excluding counsel during preliminary private investigations.—A. H. M.

NEW YORK STATE CIVIL SERVICE—DETERMINATION OF ELIGIBILITY FOR ACCIDENTAL DEATH BENEFITS BY COMPTROLLER—MAY NOT BE ARBITRARY AND CAPRICIOUS—FINAL WHEN REASONABLE AND BASED ON EVIDENCE.—The New York Court of Appeals has recently held[1] that where the Comptroller of the State of New York made a determination[2] regarding the eligibility of the widow of a civil service employee for accidental death benefits, the Comptroller's determination was final when his decision was reasonable and supported by evidence.

In the instant case,[3] the deceased had been a Forest Ranger for the State Conservation Department for many years. His duties included the fighting and suppression of fires and frequently required extended periods of work in thickly wooded, rough and hilly terrain. In October of 1953, he had a mild cardiac insuffiency, at the age of 57. Several months later, he sufferered a myocardial infarction which hospitalized him for several weeks. He returned to duty in March of 1954. At this time he was advised by his doctor to restrict his activities to supervisory work only. However, Croshier continued to perform the usual strenuous activities expected of Forest Rangers. A year later, on April 11, 1954, shortly after having participated in extinguishing an "average, nasty . . . little"[4] forest fire on a steep hill, he collapsed and died of a heart attack.

The deceased had been a member of the New York State Employees' Retirement System. His widow applied for the payment of accidental death benefits.[5] She claimed that her husband's death was the result of an accident sustained in the performance of his duties. The Comptroller rejected the claim, finding that Croshier died of a coronary occlusion due to a pre-existing heart condition,[6] and that his voluntarily undertaken fire fighting duties precipitated the coronary attack. The Comptroller concluded that there was no accident sustained in the performance of duties, and that consequently the death of Croshier was not the result of an accident.

[34] See note 2, supra.

[1] Matter of Croshier v. Levitt, 5 N.Y.2d 259, 157 N.E.2d 486 (1959).

[2] N.Y. Retirement and Social Security Law § 74(b): "The comptroller shall have exclusive authority to determine all applications for any form of retirement or benefit provided for in this article."

[3] See note 1, supra.

[4] Id. at 261, 157 N.E.2d at 487.

[5] N.Y. Retirement and Social Security Law § 61(a)(1): "An accidental death benefit shall be payable upon the death of a member if, upon application . . . the comptroller shall determine, on the basis of the evidence, that such member: died . . . as the natural and proximate result of an accident sustained in the performance of duty. . . ."

[6] See note 1, supra, at 262, 157 N.E.2d at 487, "Croshier died of an attack of coronary occlusion secondary to a pre-existing pathological condition of coronary arteriosclerosis and anteroseptal myocardial infarction."

An appeal from this decision of the Comptroller was brought pursuant to Article 78[7] of the Civil Practice Act. The Appellate Division annulled the determination of the Comptroller, holding that, as a matter of law, the facts of the case can lead only to "the legal conclusion . . . that there was an accident".[8] The Appellate Division based its decision on the *Owens* case[9] which it cited as controlling.

In the *Owens* case, decedent had been employed by New York State as a junior civil engineer. While climbing a hill with a survey party he suffered a pain in his chest, complained of shortness of breath, and was relieved of his duties. The next morning he died of an acute coronary thrombosis. The Comptroller rejected the claim of his widow for accidental death benefits holding that the decedent's death was not due to an accident within the meaning of the Retirement and Social Security Law.[10] The Court of Appeals reversed[11] the Appellate Division's affirmance[12] of the decision of the Comptroller. The issue was phrased as whether the Comptroller of the State has the authority to deny an application for accidental death benefits without permitting the applicant to introduce medical evidence of causation? The Court held[13] that he may not do so. This decision, however, was not applicable to the *Croshier* case since it was established that the Comptroller had relied on medical evidence in making his determination.

In upholding the determination of the Comptroller, the Court of Appeals stated that under Section 74 of the Retirement and Social Security Law,[14] the exclusive authority to determine an application for such a benefit rests with the Comptroller. The crucial question then becomes one of whether, despite the broad grant of power which the legislature has given to the Comptroller, can the courts annul a determination by him that a heart attack brought on while in the performance of normal and customary work, voluntarily undertaken, was not an accident?

The Court cited a former decision[15] it had rendered in 1937, wherein it was held that a decision of the Industrial Board (under the Workmen's Compensation Law) that an injury was accidental was binding upon the medical board of the Retirement System. However, the legal effectiveness of this decision was nullified in 1938. At this time the Legislature amended the law to provide that a decision under the Workmen's Compensation Law is not to be binding upon the Comptroller, and that the final determination as to eligibility for accidental disability or death benefits shall be made by the Comptroller.[16]

[7] N.Y. Civil Practice Act. Article 78, § 1283 et seq.

[8] Matter of Croshier v. Levitt, 5 App. Div. 2d 941, 172 N.Y.S.2d 344, 345 (3rd Dep't 1958).

[9] Matter of Owens v. McGovern, 309 N.Y. 449, 131 N.E.2d 729 (1956).

[10] See note 5, supra.

[11] See note 9, supra.

[12] Matter of Owens v. McGovern, 283 App. Div. 898, 129 N.Y.S.2d 118 (3rd Dep't 1954).

[13] See note 8, supra.

[14] N.Y. Retirement and Social Security Law § 74(b): "The comptroller shall have exclusive authority to determine all applications for any form of retirement or benefit provided for in this article. He shall examine into the facts of each such application. . . ."

[15] Matter of Nash v. Brooks, 276 N.Y. 75, 11 N.E.2d 545 (1937).

[16] N.Y. Retirement and Social Security Law § 64(b): "A final determination of the state workmen's compensation board that benefits are payable . . . shall not in any respect be, or constitute, a determination that an accidental disability retirement allowance or an accidental death benefit is payable on account thereof pursuant to the provisions of this article."

It is to be noted, that under the Retirement and Social Security Law, when an employee dies, his beneficiary will receive benefits whether his death was caused by an accident or not. The determination that death resulted from an accident bears only on the amount of benefits to be paid. However, under the Workmen's Compensation Law, there is no coverage for the beneficiary unless the death was caused by an accident or was the result of an occupational disease. As it was put by the Court of Appeals, *"a different social philosophy was envisaged by the Legislature for benefits under the Civil Service Law than it had in mind for benefits under the Workmen's Compensation Law."*[17] [Emphasis supplied.]

In the case of *Matter of McCadden v. Moore,*[18] a police officer became disabled after shoveling snow while in the performance of his duties. He suffered a heart attack the next day while driving a patrol car. The Comptroller denied the application for disability payments in spite of the fact that there was evidence to show that the condition was precipitated by the efforts of the previous day. It was also shown that this work was sufficient to precipitate the coronary condition. In addition, the policeman had been awarded workmen's compensation payments. The Court of Appeals, without opinion,[19] affirmed the decision of the Appellate Division, which had held, in substance, that the question of whether or not the appellant's disability was caused by an accident was a question of fact to be determined by the Comptroller, and because the decision was determined on substantial evidence, should be affirmed. As it was stated in another case,[20] *"if reasonable minds might fairly differ, the Comptroller's independent judgement must be accepted."* [Emphasis supplied.]

The *Croshier* case[21] makes no final determination as to what constitutes an accident. It indicates that it is now established that in cases involving Civil Service Disability Benefits, the Comptroller has the final authority to determine whether or not a specific disability was suffered as the result of an accident. However, this does not give the Comptroller *carte blanche.* He shall have such exclusive authority *"when his conclusion is not unreasonable."*[22] [Emphasis supplied.]

In a sharply critical dissenting opinion,[23] Judge Dye stated that the only conclusion of law reasonably to be drawn from the facts of this case was that the death resulted from an accident. He cited a previous case[24] wherein the Court of Appeals held that an accident "is to be determined not by any legal definition, but by the common-sense viewpoint of the average man." He stated that the Comptroller may not ignore commonly accepted criteria and substitute a rule of his own. Indeed, where a causal relationship has been shown, the Comptroller is bound by law to declare that death resulted from an accident.

The term "accident" is defined by Webster[25] as an "event that takes place without one's foresight or expectation, and undesigned, sudden and unexpected event." Black

17 See note 1, supra at 264, 157 N.E.2d at 488.

18 276 App. Div. 490, 95 N.Y.S.2d 740 (4th Dep't 1950).

19 Matter of McCadden v. Moore, 301 N.Y. 760, 95 N.E.2d 819 (1950).

20 Matter of Odell v. McGovern, 308 N.Y. 678, 680, 124 N.E.2d 319 (1954). Matter of Trowbridge, 266 N.Y. 283, 289, 194 N.E.2d 756, 758 (1935).

21 See note 1, supra.

22 See note 1, supra, at 266, 157 N.E.2d at 489.

23 Dissenting opinion by Dye, J., Conway and Desmond, JJ, dissent in separate opinions in which each concurs.

24 Matter of Masse v. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950).

25 Webster, New International Dictionary of the English Language, Unabridged (2nd ed. 1934).

defines it as an ". . . unusual, fortuitous, unexpected unforeseen or unlooked for event, happening or occurrence; . . . ."[26]

In the case of *The United States Mutual Accident Association v. Barry*,[27] the deceased had suffered fatal internal injuries, sustained while he was in good health, as the result of a jump from a four or five foot high platform. In affirming the award of private insurance benefits to the beneficiary of the deceased, the Supreme Court upheld the charge to the jury which outlined the criteria to be applied in determining whether an accident had occurred. "Was there anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground? . . . If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."[28]

In a 1918 case,[29] the plaintiff's testator had died as a result of an infection which spread after a physician had treated what had all the appearances of an ordinry pimple. Judge Cardozo stated that the point of view of the Court must not be that of a scientist. "It must be that of the average man. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident."[30]

In workmen's compensation cases, the history of previous disease has always presented a difficult problem where the payment of benefits has depended upon an industrial accident. In the early days of litigation in workmen's compensation cases, the courts very often would rule out a claim on the basis that the injury was the result of disease, not accident. "Some courts apparently thought of 'accident' and 'disease' as mutually exclusive."[31] The courts have long abandoned this concept.

In analyzing the *Croshier* case,[32] it would not be proper to state that there has been a return to the philosophy which previously prevailed in workmen's compensation cases, namely, that accident and disease are mutually exclusive. It certainly appears, however, that in view of the different social philosophy envisaged by the legislature,[33] the courts probably will uphold stricter criteria when applied by the Comptroller in determining whether an application for accidental death benefits is to be granted, as contrasted to the requirements necessary for workmen's compensation accidental death benefits. Such a determination by the Comptroller, however, must be reasonable and based on evidence. As an example, in the case of *Miller v. McGovern*,[34] a determination of the Comptroller was annulled when the Comptroller had not included medical reports in evidence to substantiate a determination made to a substantial degree, if not entirely, upon a report and opinion of the medical board.

In effect, the *Croshier* case[35] clearly indicates that the Comptroller's decision regard-

[26] Black, Law Dictionary (4th ed. 1951).

[27] 131 U.S. 100, 9 S. Ct. 755, 33 L.Ed. 60 (1889).

[28] Id. at 121, 9 S. Ct. at 762, 33 L.Ed. at 67.

[29] Lewis v. Ocean Accident and Guarantee Corporation, 224 N.Y. 18, 120 N.E. 56 (1918).

[30] Id. at 21,120 N.E. at 57.

[31] 1 Larson, The Law of Workmen's Compensation § 37.30 (1952).

[32] See note 1, supra.

[33] See note 17, supra.

[34] 283 App. Div. 575, 129 N.Y.S.2d 313 (3rd Dep't 1954), aff'd on rehearing, 285 App. Div. 989, 138 N.Y. S.2d 383 (3rd Dep't 1955).

[35] See note 1, supra.

ing eligibility for accidental death benefits is to be final when reasonable and based on evidence. Actually, the case does no more than restate the maxim that an administrative decision can not be contrary to the evidence, and may not be arbitrary and capricious, and above all must be reasonable. H. T.

TAX LAW—INTERNAL REVENUE SERVICE—INDIVIDUAL TAXPAYER NOT SUBJECT TO CUMULATIVE PENALTIES.—The Supreme Court of the United States, in a six to three decision, finally resolved a question, which for many years gave rise to much friction, between numerous individual taxpayers and the Internal Revenue Service. The Supreme Court, in *Commissioner of Internal Revenue v. Fred N. Acker,*[1] held that an individual taxpayer's failure to file a declaration of estimated income tax does not subject him to *both* the substantial underestimation penalty of 6% under Section 294(d)(2),[2] and the failure to file penalty of 10% under Section 294(d)(1)(a),[3] of the 1939 Internal Revenue Code;[4] but only penalizes him subject to the 10% penalty of Section 294(d)(1)(a), for his failure to file such an estimated return.

The respondent, Fred N. Acker, without reasonable cause, failed to file a declaration of his estimated income tax for any of the years 1947 through 1950. The Internal Revenue Service levied a 10% penalty on him for failure to file the declaration under Section 294(d)(1)(a) and also imposed the 6% addition for substantially underestimating his tax under Section 294(d)(2). The tax court[5] sustained both of these additions. The Court of Appeals[6] affirmed the penalty for failure to file, but reversed with respect to the addition for substantial underestimation of the tax. Because of conflict among the circuits,[7] the Supreme Court granted certiorari[8] upon the Commissioner's petition.

To see the problem at hand in proper perspective, one must bear in mind that with the enactment of the Current Tax Payment Act of 1943,[9] a new policy of collecting income taxes was put into effect, namely withholding of the tax at its source.[10]

It was assumed that the government, in this manner, would be assured of collecting taxes from persons who might either escape taxation altogether or, through improvidence, might not be in a financial position to pay the tax when finally due. By the method outlined above, the government was assured that persons deriving income from wages or salaries or stated remuneration would have the taxes deducted periodically by the employer, and thus pay income taxes *as they go,* in a more or less

1 Commissioner v. Fred N. Acker, — U.S. —, 80 S. Ct. 144, — L. Ed. — (1959).

2 Int. Rev. Code of 1939, Section 294(d)(2).

3 Int. Rev. Code of 1939, Section 294(d)(1)(a).

4 The Int. Rev. Code of 1939 is no longer in force. At the time of this writing, all federal income taxation is governed by the Int. Rev. Code of 1958.

5 Commissioner v. Fred N. Acker, 26 T.C. 107 (1959).

6 Commissioner v. Fred N. Acker, 258 F.2d 568 (6th Cir. 1959).

7 After the sixth circuit held against the imposition of both penalties, but before rehearing was granted, the third circuit in Abbott v. Commissioner, 258 F.2d 537 (3rd Cir. 1958), and the fifth circuit, in Patchen v. Commissioner, 258 F.2d 544 (5th Cir. 1958), held in favor of the double imposition. Less than two months earlier, the ninth circuit, too, had so held in Hansen v. Commissioner, 258 F.2d 585 (9th Cir. 1958).

8 Commissioner v. Fred N. Acker, 358 U.S. 940, 79 S. Ct. 346, 3 L. Ed. 2d 348 (1959).

9 Int. Rev. Code of 1939, Ch. 20, Section 5(b), 57 Stat. 126 (1943).

10 Withholding at the source refers to the employer deducting taxes from gross salaries earned by the employees.

painless manner. However, there are many taxpayers with taxable incomes derived from sources other than wages or salaries. To put this latter class of taxpayer on a basis of equality with others, Section 58[11] of the Internal Revenue Code of 1939 was enacted, providing for the filing of declarations of estimated tax by individuals and also, prescribing the contents and regulations pertaining to such declarations. In theory, the preparation of a declaration is very simple. At the commencement of the taxable year, the taxpayer estimates his income for the next twelve months. The rate is applied to this estimated income and the resultant estimated tax is paid in quarterly installments throughout the year.

To insure the timely payment of estimated taxes, Congress established a system of penalties to facilitate tax collection. Both of the aforementioned penalties are aimed at the three classes of delinquent taxpayers listed below.

1—Individuals who, without reasonable cause, fail to make and file a declaration of estimated tax
2—Individuals who, without reasonable excuse, fail to pay installments on the basis of such estimate, and
3—Individuals who fail to make an accurate estimate of the tax.

Since the first and second defaults mentioned are of a more severe nature, Congress set the maximum penalty at 10% of the amount which should have been remitted. The section applicable to such classes of default provides, in substance, that if a taxpayer fails to make and file a declaration of estimated tax, within the time prescribed, there shall be added to the tax an amount equal to 5% of each installment due and unpaid, plus 1% of such unpaid installments for each month except the first, not exceeding an aggregate of 10% of such unpaid installments.[12]

The third type of default, as mentioned above, is penalized at a maximum of 6%, since Congress felt that an error in arithmetic or prognostication should not be penalized as severely as a willful, non-excusable omission. Thus Section 294(d)(2) in pertinent part, provides:

"If 80 per centum of the tax . . . exceeds the estimated tax, there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser . . . ."[13]

The Internal Revenue Service had established the procedure of imposing both additions when estimated returns were not filed within the prescribed time limitation. This practice was justified by construing the failure to file, as making the taxpayer also guilty of filing a substantially underestimated return. The issue presented for determination was whether or not the Commissioner had any basis for his statutory interpretation, either in language expressed or implied or in legislative intent.

The Commissioner's approach was based on a treasury regulation promulgated under the Internal Revenue Code of 1939, which contains the following statement: "In the event of the failure to file the required declaration, the amount of the estimated tax for the purposes of (294(d)(2)) is zero."[14]

The Commissioner cites the conference report[15] accompanying the Current Payment Act of 1943, wherein the above statement was first pronounced, and later embodied into the treasury regulation in question; and, maintains a conference report to

[11] Int. Rev. Code of 1939, Section 58.
[12] See note 3, supra.
[13] See note 2, supra.
[14] Treas. Reg. III, Section 29.294-1(b)(3)(a) (1943).
[15] H.R. Conf. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943); 1943 Cum. Bull. 1372.

be the most authoritative explanation accompanying a statute, since it represents the intent of both Houses as the joint legislative body.

Decisions up to the present time have been almost equally divided, with the tax court taking a firm stand in accordance with the position taken by the Internal Revenue Service. In *Farrow v. United States*,[16] the district court logically recognized that you cannot underestimate that which has not been estimated, but maintained that logic should not prevail in favor of sound fiscal measures. *Palmisano v. United States*,[17] fully agreed with the *Farrow* case[18] but also noted that Congress intended this to be a three-forked civil penalty to place the taxpayer who remits his own taxes on an equal standing with a salaried taxpayer. The double penalty was also upheld since a treasury regulation should be sustained unless "unreasonable and plainly inconsistent with the Revenue statutes".[19] It has also been argued that Congress was aware of the tax court's interpretation of Sections 294(d)(1)(a) and 294(d)(2), and that more authority was given to the tax court's interpretation when Congress did not see fit to show disapproval in a subsequent act, but instead re-enacted the same sections in subsequent revenue acts.

Cases holding contrary to the imposition of both penalties, have stated as a general proposition the very logical approach that a failure to file, cannot in the same breath, be construed a substantial underestimate.[20] In *Powell v. Granquist*,[21] the court reasoned that Congress intended the 10% penalty to cover both the failure to file and the underestimation, whereas the 6% penalty was enacted solely to cover a failure to properly estimate. Other decisions have maintained that penal sections are not to be imposed vindictively but liberally.[22] Therefore if Congress had intended the double penalty, such would have been clearly indicated since it is common knowledge that tax statutes are drawn very carefully.[23]

Mr. Justice Whittaker, speaking for the majority of the court, reasoned in the case at bar, that since "Penal statutes are to be strictly construed"[24] a taxpayer "is not to be subjected to a penalty unless the words of the statute plainly impose it."[25] Accordingly, since 294(d)(2) contains no basis or means of computing additions to the tax, in an instance where no declaration has been filed, to uphold such additional penalty, would be imposing a hardship based on an opinion of the Commissioner, which of course, our law does not permit.

The dissenters led by Mr. Justice Frankfurter, refer to the conference report of the Current Tax Payment Act of 1943, maintaining that such conference report gives the Commissioner power to compute a penalty, based on a zero return, when no return has in fact been filed. The majority could not accept the dissenting contention, since such evidence of legislative intent was associated with the Current Tax Payment Act of 1943, and when this act was revised eight months later by the Revenue Act of 1943,[26]

[16] Farrow v. United States, 150 F. Supp. 581 (S.D. Calif. 1957).
[17] Palmisano v. United States, 159 F. Supp. 98 (E.D. La. 1958).
[18] See note 16, supra.
[19] Abbott v. Commissioner, 258 F.2d 537 (3rd Cir. 1958).
[20] Owen v. United States, 134 F. Supp. 31 (D. Neb. 1955).
[21] Powell v. Granquist, 146 F. Supp. 308, 312 (D. Ore. 1956).
[22] Stephen v. Commissioner, 197 F.2d 712 (5th Cir. 1952).
[23] Barnwell v. United States, 164 F. Supp. 430 (E.D. S.C. 1958).
[24] Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284, 296, 74 S. Ct. 593, 601, 98 L. Ed. 699 (1955).
[25] Keppel v. Tiffin Savings Bank, 197 U.S. 356, 362, 25 S. Ct. 443, 445, 49 L. Ed. 790 (1921).
[26] Internal Revenue Code of 1939, Ch. 63, 58 Stat. 21 (1943).

under which the case at hand was brought, no mention was made of an intent to construe a failure to file, as filing a zero return.

Although the issue decided does not have any effect on individual taxpayers filing declarations after January 1, 1954,[27] the decision is very meaningful to thousands of taxpayers who for various reasons, failed to file an estimated return for any of the eleven years 1944 through the end of 1954. In the case at hand, the Supreme Court clearly indicated that the Commissioner does not have the power to add penalties based on his own regulations in the absence of proper congressional language or intent. B.A.R

[27] The 1954 Internal Revenue Code has eliminated the question here presented for the taxable years after January 1, 1955, by providing for a single penalty of 6% of the amount of the underpayment, whether for failure to file a declaration, or tardy payment of substantial underestimation of the tax. Internal Revenue Code of 1954 Section 6654 (1954).