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DECISIONS

ATTORNEY'S LIEN—PRIORITIES IN DISTRIBUTION OF AWARD JUDGMENT—U.S. GOVERNMENT TAX LIEN HELD SUBORDINATE TO ATTORNEY'S LIEN FOR SERVICES RENDERED.—In a recent case,[1] the New York Court of Appeals has held that an attorney's lien, secured by virtue of an assignment clause in a retainer contract, was superior to a United States Government lien for unpaid taxes. The court said that the attorney acquired a vested interest from the commencement of the action so that the Government tax lien applied only to the balance of the property remaining to the taxpayer after

transfer to the attorney of his agreed share.

In the case at hand the attorney agreed to represent the client in a condemnation proceeding brought about by the Washington Square Slum Clearance Project. The retainer agreement, dated March 8, 1954, recited that the client assigned 20% of the award that might be paid or awarded for the property to the attorney, plus disbursements. An award in the amount of $6,056.00 was secured, and title to the property became vested in the City of New York on August 5, 1955.[2] New York University, as sponsor of the slum clearance project, obtained a judgment against the taxpayer in the sum of $920.00 which was the reasonable value of the use and occupation of the condemned premises. The damage check was retained by the City Comptroller pending the satisfaction of this judgment, as the award was made subject to this condition. On May 23, 1956, the Bureau of Internal Revenue filed a tax lien against the taxpayer in the amount of $8,436.78.

On January 28, 1957, the attorney moved to have his lien enforced pursuant to Section 475 of the Judiciary Law.[3] The Government appeared as a claimant and cross-moved for an order declaring its tax lien. The Special Term ruled that New York University's judgment should be given first priority since the award was made subject to this condition; that the attorney's lien had next priority since by virtue of the assignment clause in the retainer contract he had a property interest in the award as *purchaser* within the meaning of the federal statute[4] which exempts such a property interest from a Government tax lien, and that the Government's tax lien was subordinate because it could attach only to the property of the taxpayer remaining after the attorney's lien was satisfied. This ruling was unanimously affirmed without opinion by the Appellate Division.[5]

Before the Court of Appeals the Government contended that the attorney was not a *purchaser* of 20% of the award from the *commencement of the action* but had only

[1] In The Matter of Washington Square Slum Clearance (United States of America v. Coblentz) 5 N.Y.2d 300, 157 N.E.2d 587 (1959).

[2] Adm. Code, City of N.Y. Sec. B-1536.0.

[3] "From the commencement of an action, special or other proceeding in any court or before any state, municipal, or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who appears for a

a mere inchoate right; no more than a contingent right to share in the proceeds of the award when made. The attorney claimed that his lien had attached from the *commencement* of the condemnation proceedings pursuant to Section 475 of the Judiciary Law,[6] and that accordingly the only property subject to the Government tax lien was the unassigned balance remaining after the attorney's lien had been satisfied.

In its opinion the court stated that a Government tax lien is not always paramount. A tax lien, it said, is not valid by statutory enactment against mortgagees, pledgees, purchasers, or judgment creditors. Such liens, it held, attach only to property or to the rights of property of the taxpayer. Since a cause of action is property, the question to be decided, therefore, was, did the attorney acquire a property right by virtue of his retainer contract at the *commencement* of the proceeding and became thereby a *purchaser* of the property involved within the meaning of the federal statute?

The Court of Appeals speaking through Mr. Justice Dye said that when the taxpayer signed the retainer contract, it effectively divested itself of a part of its cause of action. The attorney was a *purchaser* of 20% of the award for a good and valuable consideration, namely his professional services in securing the award; and that, therefore, the only property subject to the Government tax lien was the balance remaining after the attorney's lien had been satisfied in full—or the remaining 80% of the award. In effect the court found that the assignment clause in the retainer contract, when read in the light of the federal statute, operated as a transfer of property, so that a portion of the client's cause of action from the *commencement* of the proceeding was effectively transferred to the attorney.

This interesting construction of a retainer agreement creates a vendor-vendee relationship status between client and attorney the moment the agreement is signed by the parties. Not that alone, but in the light of this decision an attorney's lien, in respect to real property, has attained a superior character from the commencement of an action vis à vis other lienors. Although the attorney's lien has been enforced by the courts from quite early times, the original estate of the legal fraternity in England[7] was so elevated that counselors' legal fees were honorary in character and not demandable as a matter of right. Such a concept of the legal profession was never entertained in America. Rather, our courts have held that with our utilitarian policies and practical notions,[8] legal actions for the enforcement of attorney's liens will be entertained.

At common law attorney's liens were of two kinds; retaining liens and charging liens.[9] A retaining lien depended upon the possession of papers and documents that came into the custody of the attorney by virtue of his professional services. The retaining lien was dependent upon possession, and once the papers were surrendered the lien was lost. The client could discharge his attorney and cancel the contract of retainer whenever he was dissatisfied, but he had to pay for the services rendered. In the absence of such payment, the lien remained in force and the attorney could not be compelled to surrender the papers in relation to the action in his possession in the absence of unprofessional conduct on his part.[10] An attorneys' lien today is the same as that just described.

A charging lien is not dependent upon possession, but is a lien for the value of services rendered in a particular action. The limitation of this lien is that it has appli-

[6] See note 4, supra.

[7] Chase's Blackstone, 3 Ed. P. 630.

[8] Adams v. Stevens & Cagger, 26 Wend. 451 (N.Y. 1841).

[9] Matter of Heinsheimer, 214 N.Y. 361, 108 N.E. 636 (1915).

[10] Goldman v. Rafel Estates, 269 App. Div. 647, 58 N.Y.S.2d 168 (1st Dep't 1945); Matter of Weitling, 266 N.Y. 361, 108 N.E. 636 (1915).

cation only to the cause of action then in existence and cannot apply as a general lien for any balance due the attorney. The present status of the law of charging liens is much the same as at common law, except that it has been enlarged by statute to the extent that it attaches to a cause of action even before judgment. Under the common law an attorney by commencing an action acquired no lien on the cause of action.[11]

The measure of an attorney's lien, in the absence of a special agreement, is the reasonable value of the legal services rendered in the action.[12] A charging lien cannot exist unless it is an element, express or implied, of an agreement that the attorney is to be paid out of the fruits of the judgment.[13] An attorney representing a defendant can acquire no charging lien unless the answer contains a counterclaim.[14] The lien can be waived if the contract of retainer is inconsistent therewith, or if the attorney agrees to perform services on the credit of the client, rather than on the credit of the cause of action.[15] The courts have no right to discharge the lien,[16] and since it is created by statute it does not require the giving of notice to bring it into existence.[17] The attorney of record alone is entitled to the lien.[18]

The lien as established is not like any other lien known to the law, because it may exist although the attorney has not and cannot, in a property sense, have possession of the judgment recovered. It is a peculiar lien to be enforced by peculiar methods. Originally it was a devise invented by the courts for the protection of attorneys against the knavery of their clients who disabled them from securing the fruits of recoveries without paying for the valuable services by which the recoveries were obtained.[19]

While there is consistency between the cases decided in the federal courts and the tribunals of the State of New York,—namely, that an attorney's lien attaches from the commencement of the cause of action, there appears to be inconsistencies of decisions as to the character of the lien and its relative superiority over other liens. The federal courts seem to treat the attorney's lien as being inchoate until a judgment or award has been granted, whereas our state courts hold that the attorney has a vested right in the proceeds from the moment the action is begun, a right which cannot be subordinated nor defeated by the rights of other lienors.[20]

In *United States v. Pay-O-Matic Corporation*,[21] the federal court held that the Government tax lien was prior and superior to the lien of an attorney who represented the taxpayer in a condemnation proceeding. *Pay-O-Matic* and the instant case appear to be in conflict. In the former case the Government sued as a claimant and moved

[11] Randall v. Van Wagenen, 115 N.Y. 527, 22 N.E. 361 (1889).

[12] Matter of Weitling, note 10, supra.

[13] Reisman v. Ind. Realty Corp., 195 Misc. 260, 89 N.Y.S.2d 763 (1949); aff'd 277 App. Div. 1020, 100 N.Y.S.2d 407 (1st Dep't 1950).

[14] National Exhibition Co. v. Crane, 167 N.Y. 505, 60 N.E. 768 (1901).

[15] See note 9, supra.

[16] Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647 (1924).

[17] Drake v. Pearce Butler Radiator Corp., 202 Misc. 935, 116 N.Y.S.2d 712 (1952).

[18] Goodwin Film & Film Co., 216 F. 831 (D.C.W.D.N.Y. 1914). Matter of Sebring, 238 App. Div. 281, 264 N.Y. Supp. 379 (4th Dep't 1933); Kennedy v. Carrick, 18 Misc. 38, 40 N.Y. Supp. 1127 (1896).

[19] Goodrich v. McDonald, 112 N.Y. 157, 19 N.E. 649 (1889).

[20] Matter of Herlihy, 274 App. Div. 342, 83 N.Y.S.2d 707 (3d Dep't 1948); Application of Peters, 271 App. Div. 581, 67 N.Y.S.2d 305 (3d Dep't 1946), mod. on other grounds 296 N.Y. 974, 73 N.E.2d 560 (1950); Matter of Meltzer, 9 Misc. 2d 464, 167 N.Y.S.2d 69 (1957).

[21] 162 F. Supp. 154 (D.C.N.Y. 1958) aff'd, 256 F.2d 581 (2d Cir. 1958), cert. den., 358 U.S. 830, 79 S. Ct. 50, 3 L. Ed. 68 (1958).

for summary judgment to satisfy a tax lien. The attorney also moved for summary judgment claiming that his lien was superior to the Government's tax lien in that it attached from the commencement of the condemnation proceeding in accordance with New York Judiciary Law. The federal court held that the attorney's lien was inchoate, since it was contingent on the outcome of the award in the condemnation proceeding, and gave judgment for the Government. Whether the attorney's lien would be held to be choate by state tests was not passed upon, the court deciding only that it was clear that under federal tests the lien was inchoate when in conflict with the Government tax lien, and that state's characterization of its liens, while good for state purposes, did not bind the federal courts. Although the *Pay-O-Matic* case and the instant case appear to be on all fours factually, they were distinguished on the ground of the "first in time, first in right" doctrine, in the determination of priority of payments of conflicting claims. The rationale of the instant case was that the attorney became a *purchaser* of the property, i.e., the cause of action, from the *commencement* thereof and thus the relative priority of the liens was immaterial.

In the *Pay-O-Matic* case the court found *United States v. Ball*[22] to be controlling. In that case an assignment was made to a surety which in effect created a valid mortgage according to Texas law. The Supreme Court held the assignment to be a mere inchoate right and not within the provision of the federal statute exempting mortgagees. Although the federal courts have held that state law will be considered where relevant, the priority of liens relative to a tax lien of the Government, involves a federal question which is to be determined by the federal courts.[23] Federal law, for example, governs the question whether a creditor of a taxpayer can qualify as a mortgagee, pledgee, or purchaser, within the meaning of the federal statute.[24] In this connection, even though the state characterizes a lien as being perfected, while good for state purposes, it does not bind the federal courts.[25] Irrespective of the effect attributed to the state statute by the state courts,[26] they determine for themselves whether a lien created by state statutes is sufficiently specific to raise a question as to the applicability of the priority of a tax lien.

The federal cases mentioned above were determined on the relative priorities of competing liens, or the "inchoate" character of the lien with that of the Government tax lien. In the instant case the attorney was held to have been a purchaser of property, and since what constitutes property of a taxpayer on the date of a claim by the Government is a matter of state law,[27] alleged property rights which do not exist at the time of the demand upon the taxpayer are not subject to a Government tax lien.[28] The specific section of the federal statute which imposes a tax lien on all property and rights to property of a defaulting taxpayer has been construed by a famous jurist in the following terms: . . . . "In adopting this legislation the Congress did not create property interests on which a lien might be imposed and there is no suggestion that it authorized the federal courts to do so. On the contrary it took for granted here, as it normally does in the tax law, the vital existence of state laws creating and maintaining various interests. The statute was fashioned to require the courts to determine

[22] 355 U.S. 587, 78 S. Ct. 442, 2 L. Ed. 510 (1958).

[23] United States v. Acri, 348 U.S. 211, 75 S. Ct. 239, 99 L. Ed. 264 (1954).

[24] United States v. Kings County Iron Works, 224 F.2d 232 (2d Cir. 1955).

[25] See note 23, supra.

[26] United States v. Waddill, 323 U.S. 353, 65 S. Ct. 304, 89 L. Ed. 294 (1945).

[27] Aetna Casualty Insurance Co. v. United States, 4 N.Y.2d 639, 115 N.E.2d 225 (1958).

[28] United States v. L.I. Drug Co., 115 F.2d 983 (2d Cir. 1940).

for federal purposes whether those state-created interests are "property" or "rights to property." *That classification of interests is a federal question; the existence of the interests to be federally classified, however, is solely a question of state law.*"[29] [emphasis supplied]

If the interest or right created by local laws was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by the state law;[30] and when a Government lien is properly filed, no subsequently recorded lien or claim may prevail against it.[31]

The sole dissenting opinion in the instant case was written by Mr. Justice Fuld. He argued that the retainer contract did not have the effect of creating a vendor-vendee relationship between client and attorney but that the latter had a mere potential inchoate interest which was subordinate to the Government's tax lien. The *Pay-O-Matic* case, he contended, was controlling and should be followed.

A *purchaser* within the meaning of the federal statute has been construed by the court to be one who acquired title for a valuable consideration in the manner of vendor and vendee.[32] A state statute making an attachment-creditor a *purchaser* has been held not to be controlling on the federal courts since there was no vendor-vendee relationship as the terms are commonly understood. Therefore the tax lien was superior and the attaching creditor's lien was inchoate in character.[33]

It is interesting to contemplate what reception the instant case might receive in a federal court. In the past such liens have not fared too well.[34] However, here the question is not based upon a choate or inchoate right, nor priority of assignments, but upon the transfer of property for a valuable consideration. The attorney has acquired by virtue of the assignment clause in his retainer contract the relationship of vendee with his client, and that from the *commencement* of the action. But just how the federal courts will view the relationship is at the present time purely speculative.

B.K.

CONTRACTS—FRAUD—SPECIFIC DISCLAIMER—BUYER OF LEASEHOLD ESTOPPED FROM ASSERTING RELIANCE ON PRIOR CONTRADICTORY ORAL STATEMENTS.—The Court of Appeals of New York,[1] with one judge dissenting, has held that where a contract provides that the buyer does not rely upon *specific* oral representations made prior to the signing thereof, he is estopped from alleging reliance upon any such prior oral representations.

[29] Judge Medina in N.Y.C. Housing Authority v. United States, 241 F.2d 142 (2d Cir. 1957).

[30] Morgan v. Commissioner, 309 U.S. 78, 60 S. Ct. 424, 84 L. Ed. 585 (1940).

[31] Aquilano v. United States, 3 N.Y.2d 511, 146 N.E.2d 774 (1957).

[32] United States v. Scovil, 348 U.S. 218, 75 S. Ct. 244, 99 L. Ed. 271 (1955).

[33] United States v. Hawkins, 228 F.2d 517 (9th Cir. 1955).

[34] On the inchoate character of the lien, see United States v. Bear Brewing Co., 350 U.S. 1010, 76 S. Ct. 646, 100 L. Ed. 871 (1956)—mechanics lien. United States v. Colotta, 350 U.S. 808, 76 S. Ct. 82, 100 L. Ed. 725 (1955)—mechanics lien. United States v. Liverpool & London & Globe Insurance Co., 348 U.S. 215, 75 S. Ct. 247, 99 L. Ed. 268 (1954)—garnishment. United States v. New Britain, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954)—(city tax lien). United States v. Gilbert Associates, 345 U.S. 361, 73 S. Ct. 701, 97 L. Ed. 1071 (1953)—(ad valorem tax held "judgment" under state law, but not for federal purposes). B.K.

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[1] Dannan Realty Co. v. Harris, 5 N.Y.2d 317, 157 N.E.2d 597, 184 N.Y.S.2d 599 (1959).

The plaintiff, therein, a realty corporation, alleged that it was induced to enter into a contract for the sale of a leasehold owned by the defendant because of defendant's oral representations made prior to the execution of the written contract. These representations, fraudulently made by the defendant and allegedly relied upon by the plaintiff, concerned the operation expenses of the building and the profit to be realized from the investment.

The contract contains the following provisions: "The purchaser has examined the premises agreed to be sold and is familiar with the physical conditions thereof. The seller has not made and does not make any representations as to the physical conditions, rents, leases, expenses, operations or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the purchaser hereby expressly acknowledges that no such representations have been made and the purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is.'"[2]

"It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representations not embodied in this contract made by the other. The Purchaser has inspected the buildings on said premises and is thoroughly acquainted with their condition."[3]

Judge Burke, speaking for the majority, maintained that where a cause of action is predicated upon fraud, the plaintiff's alleged reliance must be justifiable under all circumstances. Hence, when the plaintiff *specifically* repudiates any prior oral representation, reliance in no way can be found or justified.

The majority noted that the buyer had signed the contract and asserted that to allow him to later deny his intention to be bound thereby would afford him an unconscionable advantage. Moreover, if this contract was not sufficient to estop him from claiming that he was fraudulently induced to enter an agreement, no writing whatsoever could accomplish that purpose. The court concluded that to hold otherwise would place the seller in an unfair position and would greatly burden men who depend upon the solidarity of the written contract.

In a dissenting opinion, Judge Fuld reasoned that where a party through fraudulent statements induced another party to enter a contract, no language may be devised to shield him from the consequences of such fraud. The judge noted that public policy and morality would be forsaken by giving effect to such a contract.

In 1892, a New York court[4] considered the question of admissibility of oral testimony to expose fraud, despite an all inclusive statement that the written agreement embodied the entire agreement. The majority in that case held that irrespective of a general disclaimer, a contract could always be avoided when a party was fraudulently induced into entering such contract and allowed testimony to show a prior fraudulent inducement. The dissenting opinion, however, supported the view that where you have a written contract and the parties to the contract stipulate that the writing embodies the entire agreement, it is impossible to find a reason for allowing the testimony of prior oral agreements to vary the written contract.

In *Bridger v. Goldsmith*[5] the Court of Appeals vigorously restated the proposition that no authority or justification could be found to allow a person by means of a con-

[2] Id. at 320, 157 N.E.2d at 598, 184 N.Y.S.2d at 601.
[3] Ibid.
[4] Universal Fashion Co. v. Skinner, 64 Hun. 293, 19 N.Y.S. 62 (1892).
[5] Bridger v. Goldsmith, 143 N.Y. 424, 38 N.E. 458 (1894).

tract to perpetuate a fraud and then be immune from liability by the very means which had perpetuated that fraud. To hold otherwise, the court stated that "The maxim that fraud vitiates every transaction would no longer be the rule but the exception."[6] The court further explained that the protection against fraudulent dealings would soon disappear and only where the guilty party neglected to protect himself, by the insertion of a general disclaimer, would the defrauded party be given relief. In deciding precisely the same issue in a later case,[7] the court reiterated its views upon the subject stating that "fraud vitiates all contracts,"[8] and that no writing is cloaked with enough importance to shroud the presence of fraud and eliminate the liability of one who has effectuated such fraud.

The minority in the instant case contend that the courts of New York have shown great reluctance in allowing a person, merely by the insertion of a general disclaimer, to avoid liability for a fraud which preceded the contract, and which, in fact, did induce the other party to enter a contractual relationship.[9] The New York courts, they argue, although in agreement with the principle that the business community is dependent upon the strength and unwavering quality of the written contract, hold that the admissibility of parol evidence does not in any way weaken the written contract but rather serves in a larger capacity to expose fraud.[10] They assert further that since the written paper was not devised to shield fraud[11] by allowing one to hide behind its solidarity after misrepresenting a material fact,[12] the seemingly indelible imprint of the contract is open to scrutiny in the area of fraud.[13] The minority, therefore, found it impossible to distinguish the instant case, either on principle or reasoning, from the prevailing view in New York. The majority, on the other hand, distinguished the present case from the prevailing view in New York. Alluding to *Freemand v. Hewitt*[14] Judge Burke maintained that each case must be read in light of the existing facts, and that these facts must be sufficient to sustain the alleged fraud, not a group of phrases picked from various decisions. Speaking for the majority, he contended that in cases dealing with general disclaimers,[15] the prevailing view of allowing parol evidence to expose fraud should be strictly adhered to.

The present case, however, is concerned with a specific disclaimer. Although an earlier case[16] held that a general disclaimer was ineffective to preclude proof of fraud, the court therein nevertheless took notice of a specific disclaimer. As a matter of fact, Judge Burke pointed out that the larger implication of that case was to give binding effect to a specific disclaimer.

[6] Id. at 428, 38 N.E. at 459.

[7] Smith v. Hildenbrand, 15 Misc. 129, 36 N.Y.S. 485 (New York C.P. additional General Term 1895).

[8] Id. at 139, 36 N.Y.S. at 487.

[9] Angerosa v. White Co., 248 App. Div. 425, 290 N.Y.S. 204 (4th Dep't 1936), aff'd, 275 N.Y. 524, 11 N.E.2d 325 (1937); Crowell-Collier Pub. Co. v. Josefowitz, 5 N.Y.2d 998, 157 N.E.2d 730, 184 N.Y.S.2d 859 (1959).

[10] See note 4, supra.

[11] Ernst Iron Works v. Duralith Corp., 270 N.Y. 165, 200 N.E. 683 (1936).

[12] Jackson v. State of New York, 210 App. Div. 115, 205 N.Y.S. 658 (4th Dep't 1924), aff'd, 241 N.Y. 563, 150 N.E. 556 (1925).

[13] See note 11, supra.

[14] Freeman v. Hewitt, 329 U.S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946).

[15] Sabo v. Delman, 3 N.Y.2d 155, 143 N.E.2d 906, 164 N.Y.S.2d 714 (1957); see note 4, supra; see note 5, supra; see note 7, supra; see note 9, supra; see note 11, supra; see note 12, supra.

[16] See note 11, supra.

The majority further noted that in *Jackson v. State of New York*[17] and *Sabo v. Delman*[18] the defendants were in *exclusive* possession of the facts misrepresented, a situation not apparent on the record in the instant case. The court could not conclude that the information allegedly relied upon by the plaintiff was particularly within the defendant's knowledge and therefore applied the general rule,[19] as laid down in *Schumaker v. Mather*,[20] and approved as law in *Sylvester v. Bernstein*,[21] and held that the plaintiff will not be heard to complain that he was induced to enter the contract by the fraudulent misrepresentations of the defendant.

Other jurisdictions, consistent with the prevailing view in New York, have handled the repugnant nature of fraud with equal animosity and distaste. In a leading case,[22] a Massachusetts court has held that no one could escape the equitable consequences of his prior fraudulent statement by the insertion of a general disclaimer into the contract. Otherwise contractual devices would afford too easy a method of circumventing public policy and would thereby subvert the condemnation of fraud.[23] Thus, the original Massachusetts theory of excluding parol evidence to alter the terms of a written contract to show fraud was repudiated in favor of public policy.

Connecticut takes an equally dim view of the general disclaimer and through its Supreme Court has held that liability for fraud cannot be protected by contract.[24] Missouri's Appellate Court maintains that it would be as inequitable to allow a party by means of a contract to shield his fraud as it would be to allow him to hide his crime by the terms of a written paper.[25] The Federal Courts, alluding to the predominant view,[26] take the position that if general disclaimers were allowed to bar prior oral misrepresentations, a simple method of obtaining immunity would be furnished.[27]

Therefore, where a party has been induced to enter into a contract through fraud or misrepresentation, the proposition seems to be that the parol evidence rule is no bar to the admissibility of evidence of oral statements at variance with those in the contract.[28] This proposition is consistent with the holdings in most jurisdictions, and applies with equal force where the contract contains a provision stating that the writing

[17] See note 12, supra.

[18] Sabo v. Delman, supra, note 15.

[19] See, infra, note 19 at 596, 30 N.E. at 757. "If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation."

[20] Schumaker v. Mather, 133 N.Y. 590, 30 N.E. 755 (1892).

[21] Sylvester v. Bernstein, 283 App. Div. 333, 127 N.Y.S.2d 746 (1st Dep't 1954), aff'd, 307 N.Y. 778, 121 N.E.2d 616 (1954).

[22] Florimand Realty Co. v. Waye, 268 Mass. 475, 167 N.E. 635 (1929).

[23] Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551 (1941).

[24] Callahan v. Jursek, 100 Conn. 490, 124 Atl. 31 (1924).

[25] Tiffany v. Times Square Auto Co., 168 Mo. App. 729, 154 S.W. 865 (1913).

[26] Hubert v. Apostoloof, 278 Fed. 673 (D.C.E.D.N.Y. 1921), aff'd, 285 Fed. 161 (2d Cir. 1922); Arnold v. National Aniline Co., 20 F.2d 364 (2d Cir. 1927); Robinson Co. v. Buzzard, 65 F.2d 950 (8th Cir. 1933); Smith v. O'Connor, 88 F.2d 749 (D.C. Cir. 1936).

[27] Crowell v. Baker Oil Co., 99 F.2d 574 (9th Cir. 1938).

[28] 4 Wigmore, Evidence § 2439 (3d ed. Supp. 1957).

includes all matters agreed on by the parties as well as where there is a statement that neither party is relying upon stipulations not included in the contract.[29]

Recently, however, a limited number of courts have deviated from the above stated proposition. In deciding whether or not parol evidence had been justly excluded by the trial court, Missouri's Court of Appeals has held that even if the evidence was admissible, it did not make out a case of fraud.[30] In other words, it is not sufficient merely to allege fraud; the facts constituting fraud must be clearly and explicitly set out.[31] In the New York case of *Cohen v. Cohen*,[32] the Court of Appeals concerned themselves primarily with the sufficiency of the alleged reliance upon prior oral misrepresentation to spell out fraud and ruled that where a party manifested his intentions to be bound by a contract and where the parties specifically covenanted that neither had made any representations other than those expressed in the contract, reliance was insufficient to constitute fraud.

The majority in the instant case, following the above reasoning, maintained that a cause of action in fraud is predicated upon an asserted reliance which must be justifiable. The buyer signed a contract for the purchase of a leasehold and acknowledged therein that no representation had been made as to operation expenses, that purchaser had inspected premises and that neither party was relying upon any statement or representation not embodied in the contract. In the light of the signing of the contract, and in the absence of an allegation by the plaintiff that the contract was not read, the court concluded that the contract was read and understood. It would be unrealistic to assume that the plaintiff did not understand what he had read and signed. The court, therefore, maintained that reliance upon prior representation was absent, and dismissed the complaint for inadequacy.

In essence, the court in the instant case approves and sanctions as law the New

[29] Standard Tilton Milling Co. v. Mixon, 243 Ala. 309, 9 So. 2d 911 (1942); Lufty v. Roper and Sons Motor Co., 57 Ariz. 495, 115 P.2d 161 (1941); Hunt v. L. M. Field, 202 Cal. 701, 262 Pac. 730 (1927); Webster v. Palm Beach Ocean Realty Co., 16 Del. Ch. 15, 139 Atl. 457 (1927); Oceanic Villas Inc. v. Gordon, 148 Fla. 454, 4 So. 2d 689 (1941); Connell v. Newkirk-George Motor Co., 28 Ga. App. 382, 111 S.E. 749 (1922); Advance-Rumely Threshing Co. Inc. v. Jacobs, 51 Ida. 160, 4 P.2d 657 (1931); Michuda v. Sanitary Dist. of Chicago, 305 Ill. App. 314, 27 N.E.2d 582 (1940); Benewell v. Jacobson, 130 Iowa 170, 106 N.W. 614 (1906); Senters v. Elkhorn and Jellico Coal Co., 248 Ky. 667, 145 S.W.2d 848 (1941); Unity Industrial Light Ins. Co. v. Dejoie, 202 La. 249, 11 So. 2d 546 (1943); Gross v. Stone, 173 Md. 653, 197 Atl. 137 (1938); Robinson v. Great Lakes College, 294 Mich. 192, 292 N.W. 701 (1940); Edward Thompson Co. v. Shroeder, 131 Minn. 125, 154 N.W. 792 (1915); Nash Miss. Valley Motor Co. v. Childress, 156 Miss. 157, 125 So. 708 (1930); Wissman v. Pearline, 235 Mo. App. 314, 135 S.W.2d 1 (1940); Zweig v. Zweig, 116 N.J. Eq. 589, 174 Atl. 485 (1934); Berrendo Irrigated Farms Co. v. Jacobs, 23 N.M. 290, 168 Pac. 483 (1917); John N. Benedict Co. v. McKeage, 201 App. Div. 161, 195 N.Y.S. 228 (3d Dep't 1922); Blacknoll v. Rowland, 108 N.C. 554, 13 S.E. 191 (1891); Advertisers Exchange v. Morelock, 192 Okl. 7, 133 P.2d 204 (1943); Carty v. McMenamin, 108 Or. 489, 216 Pac. 228 (1923); Pennsylvania Turnpike Comm. v. Smith, 350 Pa. 355, 39 A.2d 139 (1944); J. I. Case Threshing Mach. Co. v. Webb, 181 S.W. 853 (Tex. Civ. App. 1916); Dieterich v. Rice, 115 Wash. 365, 197 Pac. 1 (1921); Pratt v. Darling, 125 Wis. 93, 103 N.W. 229 (1905). But see Krummenacher v. Easton-Taylor Trust Co., 306 S.W.2d 593 (Mo. App. 1958); see Palone v. Moschetta, 387 Pa. 386, 128 A.2d 37 (1956).

[30] Krummanacher v. Easton-Taylor Trust Co., supra, note 29.

[31] Palone v. Moschetta, supra, note 28.

[32] Cohen v. Cohen, 1 App. Div. 2d 586, 151 N.Y.S.2d 949 (1st Dep't 1956), aff'd, 3 N.Y.2d 813, 144 N.E.2d 649, 166 N.Y.S.2d 10 (1957).

York and majority proposition that parol evidence is admissible to expose fraud despite a general disclaimer in the written contract; that is, where the written contract contains an *all inclusive* statement which stipulates that the written contract embodies the entire agreement, the parol evidence rule is not a bar to expose fraud. A specific disclaimer, however, distinguishes the case at hand from cases involving general disclaimers and removes it from the scope of the aforementioned proposition. The court concludes that, as a matter of law, a *specific* disclaimer vitiates a party's alleged reliance upon fraudulent representations. F. M.

CRIMINAL LAW—INTERPRETATION OF FOREIGN PENAL STATUTES.—The New York Court of Appeals in a recent decision held[1] that where a foreign statute defined burglary in two ways, only one of which would be a felony in New York no surplusage existed as to the operative facts in the information which would constitute a felony in New York as well as in Florida. Accordingly, the imposition of an additional sentence under New York multiple offender statutes based on the Florida information was proper.

The case, *People ex rel. Gold v. Jackson*,[2] dealt with one of the most troublesome areas of the New York Penal Law, namely, interpretation of Sections 1941[3] and 1942.[4] In substance, these sections provide, upon conviction of a felony in New York, for enhanced penalties for offenders who previously have committed one or more felonies

[1] People ex rel. Gold v. Jackson, 5 N.Y.2d 243, 157 N.E.2d 169 (1959).

[2] Ibid.

[3] N.Y. Penal Law § 1941:

"A person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of such second or third offense, as follows:

"If the second or third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term . . ."

[4] N.Y. Penal Law § 1942:

"A person, who, after having been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state, government or country, of crimes which if committed within this state would be felonious, commits a felony, other than murder, first or second degree, or treason, within this state, shall be sentenced upon conviction of such fourth, or subsequent, offense to imprisonment in a state prison for an indeterminate term the minimum of which shall be not less than the maximum term provided for first offenders for the crime for which the individual has been convicted, but, in any event, the minimum term upon conviction for a felony as the fourth or subsequent, offense, shall be not less than fifteen years, and the maximum thereof shall be his natural life. A person so sentenced may be released on parole in the same manner and upon the same conditions as prisoners serving an indeterminate sentence in state prisons are released. A person to be punishable under this and the preceding section need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section. For purposes of this section, conviction of two or more crimes charges in separate counts of one indictment or information, or in two or more indictments or informations consolidated for trial, shall be deemed to be only one conviction . . ."

either in New York or in any other state or country. In their enforcement, however, litigation has frequently arisen particularly where one or more of the prior felonies charged were committed in other jurisdictions. The interpretive problem is made especially difficult where the foreign statute upon which the information or indictment is based differs from New York Penal statutes, but not nearly so where the acts complained of in the foreign indictment clearly constitute a felony in New York. The question is what to look for to determine whether the conviction for the foreign felony would also be a felony in New York.

In the *Jackson Case*[5] relator Jackson, having been sentenced as a fourth felony offender in New York, was serving a 15 year to life sentence. He sued out a writ of habeas corpus to establish that the second of three previous felonies charged against him, a conviction in Florida, was not a felony in New York.

Specifically, the information to which the relator had pleaded guilty in Florida alleged that he unlawfully and feloniously entered a dwelling in Miami with the intent to commit a felony therein. The Florida statute[6] under which he was convicted made it felonious to break and enter with the intent to commit a felony, or to break out of a building having entered with the intent to commit a crime therein. It is clear that the former consists of elements of the felony of burglary in the third degree[7] in New York, while the latter in New York would be the misdemeanor of unlawful entry.[8]

The relator contended that the rule in *People v. Olah*[9] required the court to look to the Florida statute, and maintained that since the statute upon which the indictment was founded was not in its entirety a felony in New York, he had been improperly sentenced. His contention was sustained by the County Court of Clinton County, and the Appellate Division[10] affirmed granting, however, *sua sponte,* permission for the People to appeal.

The New York Court of Appeals reversed stating that the rationale of *Olah*[11] does not license the courts to disregard the indictment or information upon which a conviction in a sister state is based in deciding whether the crime charged therein constitutes a felony in New York.

Briefly, the Olah Rule established the proposition that in order to satisfy itself whether a foreign indictment or information would also be a felony in New York, the court must look first to the statute which creates and defines the crime to determine the material and operative facts constituting the crime. Then the indictment is to be examined to determine what facts presented in it, or in the information, are operative and material. All facts which are not operative and material are considered surplusage and are to be disregarded. In this connection the court stated:

"The intent and spirit of the *Olah Rule* requires that the courts of New York abstain from considering the surplusage contained in the indictment or information which would spell out a felony under our penal statutes."[12]

The Court of Appeals in the *Jackson Case*[13] said that the operative and material facts in the indictment were that relator broke and entered with the intent to commit

[5] See note 1, supra.
[6] Florida Statute Anno. § 810.01.
[7] N.Y. Penal Law § 404.
[8] N.Y. Penal Law § 405.
[9] People v. Olah, 300 N.Y. 96, 89 N.E.2d 329 (1949).
[10] People ex rel. Gold v. Jackson, 4 App. Div. 2d 456, 172 N.Y.S.2d 399 (3d Dep't 1958).
[11] See note 9, supra.
[12] See supra note 1, 5 N.Y.2d at 245, 157 N.E.2d at 170.
[13] Ibid.

a felony therein. There was no allegation that relator broke out of a building entered with the intent to commit a felony therein. Therefore, it would be improper to assume that the relator was convicted of a crime in Florida which would be a misdemeanor in New York.

People v. Olah[14] decided in 1949 by the Court of Appeals is the leading case on this subject in New York. In this case the defendant having been previously convicted of larceny in New Jersey was upon the commission of a subsequent felony in New York treated as a second felony offender under the penal law.[15]

The distinction in New York between the felony of grand larceny and the misdemeanor of petit larceny is $100.[16] In New Jersey the distinction is $20.[17] The indictment to which defendant had pleaded guilty in New Jersey alleged that the defendant had stolen property in the value of $200.

The problem presented was whether the nature of the crime as a felony within the meaning of the New York second felony offender statute was controlled by the statutory definition of the crime in New Jersey, the theft of property in the value of above $20, which in New York would be a misdemeanor; or, by the specifications in the indictment which alleged the theft of property in the value of $200, which is a felony in New York. The Court of Appeals held that the question was controlled by the statutory definition of the crime in New Jersey and not the specifications in the indictment which were proved at the trial. Thus the court held that in order to determine whether the crime of which an offender has been convicted would be a felony in New York, the statute which created and defined the crime on which the indictment was founded must be considered as prevailing. It ruled that under the statute upon which the indictment was founded, the value of the property taken was of no consequence whatsoever, once the defendant admitted it was $20 or more. On these points the court said:

"It is the statute upon which the indictment was drawn that necessarily measures and defines the crime . . . The operative facts which constitute the criminal offense as defined by the statute cannot be extended or enlarged by allegations in the indictment . . . Facts not specified in the statute upon which the indictment was founded may not be rendered material and operative by merely stating them in the indictment."[18]

Judges Conway, Lewis and Dye vigorously dissented to the 4-3 majority decision. They asserted that such a construction thwarted the purpose and intent of the habitual offender statutes as set forth by the legislature, and ran counter to a long line of cases[19] which held that in determining whether a defendant was guilty in another State of acts which would be a felony in New York, the court must look only to the foreign judgment of conviction or indictment upon which it was predicated.

[14] See note 9, supra.

[15] See note 3, supra.

[16] N.Y. Penal Law §§ 1296, 1298, 1299.

[17] N.J.S.A. 2: 145-2 provides:

"Any person who shall steal any of the following enumerated articles, property or things, the same belonging to or being the property of another . . . if the value . . . be of or above $20, shall be guilty of a high misdemeanor."

[18] See note 9, supra at 97, 89 N.E.2d at 330.

[19] People ex rel. Newman v. Foster, 297 N.Y. 27, 74 N.E.2d 224 (1947); People v. Voelker, 222 App. Div. 717, 225 N.Y.S. 883 (4th Dep't 1927); People v. Wicklem, 183 Misc. 639, 53 N.Y.S.2d 88 (Onondaga County Court 1944); People v. Dacey, 166 Misc. 827, 3 N.Y.S.2d 156 (Court of General Sessions New York County 1938); People v. Cohen, 270 N.Y. 528, 200 N.E. 302 (1936); People v. Daiblach, 265 N.Y. 125, 191 N.E. 859 (1934); People ex rel. Cox v. Wilson, 281 N.Y. 712, 23 N.E.2d 542 (1939).

In spite of the trenchant criticism, the New York courts have followed the *Olah Rule* in a long line of cases.[20] Analysis of some of the lower court decisions, however, tend to indicate that the principle of the *Olah Rule* has been enlarged beyond the point originally intended.

For example, in *People v. Murray,* the Court of General Sessions, New York County, held that the defendant was improperly sentenced as a fourth felony offender under New York law where one of the prior felonies included housebreaking under a South Carolina statute. In spite of the allegations in the indictment that the defendant had feloniously broken and entered with the intent to steal, take, and carry away goods, the court pointed out that the South Carolina statute[21] included in the alternate, breaking with intent to enter, which is not a felony in New York.

In *People ex rel. Marsh v. Martin,*[22] the Appellate Division held that the defendant had been improperly sentenced as a multiple offender where the defendant had been guilty of a prior felony in Utah. The indictment there, upon which the defendant had been found guilty, alleged that the defendant was charged with "breaking and entering" a dwelling house, under circumstances sufficient to constitute the felony of burglary in New York. The court held, however, that the *Olah Rule* required them to look to the Utah Statute.[23] Aside from making it felonious to break and enter in the nighttime any house or apartment with the intent to commit a felony therein, the statute provided in the alternate that it was also a felony where one entered without force ". . . an open door, window, or other aperture of any house with the intent to commit a felony." Since the latter provision, "or one who without force", is a misdemeanor in New York,[24] the court reasoned that the Utah Statute did not spell out a felony in New York since the charge of breaking could include the lesser crime of "entering without force". The decision was affirmed by the Court of Appeals without opinion.

In *People v. Deveaux,*[25] however, the Appellate Division appeared to liberalize the rule where foreign disjunctive statutes are in issue. In this case the court held that it was reversible error for the lower court to look solely to the judgment of conviction in determining whether an act committed in Florida would be a felony in New York. The Florida statute in question provided for two fact situations, only one of which would be a felony in New York. The court indicated in this case that it could look

[20] People ex rel. Marsh v. Martin, 284 App. Div. 287, 130 N.Y.S.2d 718 (4th Dep't 1954); People v. Adams, 124 N.Y.S.2d 742 (Suffolk County Court 1953); People v. Swinson, 284 App. Div. 284 (1st Dep't 1954); People v. Burgess, 144 N.Y.S.2d 538 (Jefferson County Court 1955); People v. McDowell, 105 N.Y.S.2d 971 (Court of General Sessions N.Y. County 1951); People v. Murray, 10 Misc. 2d 690, 172 N.Y.S.2d 841 (Court of General Sessions N.Y. County 1958).

[21] Code of S.C. 16-332 (formerly 1139):

"Every person who shall break and enter or one who shall break with intent to enter, in the daytime any dwelling house or other house or who shall break and enter or who shall break with intent to enter, in the nighttime any house which would not constitute burglary, with the intent to commit a felony or other crime of lesser grade shall be held guilty of a felony and punishable . . . for a term not exceeding five years".

[22] People ex rel. Marsh v. Martin, 284 App. Div. 156, 130 N.Y.S.2d 718 (4th Dep't 1959); aff'd, 308 N.Y. 823, 125 N.E.2d 873 (1955).

[23] Utah Code Anno. 76-9-3:

"Every person who in the night time forcibly breaks and enters, or without force enters an open door window or other aperture of any house, room, apartment, car, vessel, etc. with the intent to commit larceny or any felony is guilty of burglary in the second degree."

[24] N.Y. Penal Law § 405.

[25] People v. Deveaux, 7 App. Div. 2d 622, 179 N.Y.S.2d 325 (4th Dep't 1958).

to the foreign information or indictment under which defendant was convicted in order to determine the material and operative facts of the foreign statute and relate it to the pertinent New York statutes.

The *People ex rel. Gold v. Jackson* decision liberalizes the interpretation of the *Olah Rule* as it applies to indictments or informations of prior convictions founded on foreign disjunctive statutes. Felons who have been convicted under one portion of a foreign disjunctive statute which also constitutes a felony in New York, will no longer be able to escape the enhanced penalties embodied in the New York multiple offender statutes on a technicality.

It should be noted, however, that loopholes and uncertainties still exist in this area of the law and remedial legislation may be necessary. It is generally agreed that recidivist statutes are predicated on the simple proposition that habitual felons deserve enhanced punishment for the protection of the community. It is clear that this simple purpose is frustrated when habitual felons manage to escape the enhanced statutory penalties on a technicality. The *Olah Case* itself provides the most graphic example. A New Jersey felon could be twice convicted in New Jersey for the theft of $1,000,000, yet this same felon, if subsequently convicted of a felony in New York, could not be treated as a multiple offender in New York, because the statutory limit of value for larceny in New Jersey is lower than the limit in New York. Approximately 45 states have a lower statutory limit of value for larceny than New York. Some remedial measure may be necessary to close this gap in the law. C. R. Y.

EVIDENCE—ADMISSIBILITY IN CIVIL ACTION OF PARTY'S PLEA OF GUILTY TO A TRAFFIC VIOLATION.—On the basis of dicta enunciated by the First Department some ten years ago in the case of *Walther v. News Syndicate Co.*,[1] it appeared until very recently that a conviction for a traffic infraction based on a plea of guilty would be allowed into evidence as an admission against a defendant in a subsequent civil action based on the same facts involved in the conviction.[2] No uncertainty regarding this point any longer exists, however, because of the recent decision of the First Department in *Ando v. Woodberry*,[3] holding that the same reasons which exclude a conviction for a traffic offense should extend to the plea of guilty.

Before these highly significant and controversial decisions may be explained, it is necessary to examine briefly the rather unstable history relating to the admission of convictions into evidence in civil actions as proof of the facts involved in the conviction. Until a relatively recent time courts were almost unanimous in excluding prior convictions or acquittals from subsequent civil actions as evidence of the truth of the facts therein.[4] The reasoning that has been traditionally relied upon for this exclusionary rule

[1] 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949).

[2] The court in Walther based this proposition on Stanton v. Major, 274 App. Div. 864, 28 N.Y.S.2d 134 (3rd Dep't 1948), which involved a misdemeanor rather than a traffic infraction, and Same v. Davison, 253 App. Div. 123, 1 N.Y.S.2d 374 (4th Dep't 1937), which cited Schindler v. Royal Insurance Co., 258 N.Y. 310, 179 N.E. 711 (1932) as authority.

[3] 9 A.D.2d 125, 192 N.Y.S.2d 414 (1st Dep't 1959). Plaintiff, a police officer, had been injured when defendant struck him in making a turn. Defendant pleaded guilty and was convicted of a traffic infraction. The court held that exclusion of the plea by the Supreme Court, Bronx County, was not error.

[4] New York Life Insurance Co. v. Murdaugh, 94 F.2d 104 (4th Cir. 1938); Washington National Insurance Co. v. Clement, 192 Ark. 371, 91 S.W.2d 265 (1936); General

is based on the "dissimilarity of object, issues, procedure, degree and elements of proof, parties to the action, etc.;"[5] reasons which can no longer be a logical basis for exclusion. A further ground sometimes advanced in favor of exclusion of convictions is the lack of mutuality of estoppel, inasmuch as a prior acquittal, which evidences merely a failure to prove guilt beyond a reasonable doubt, has been excluded from evidence in a subsequent civil case,[6] where only a fair preponderance of evidence is required.

New York was among the first jurisdictions to espouse the minority view of admitting convictions, in a limited way, as evidence of the truth of the facts on which the conviction was based.[7] The reasoning relied upon by the New York Court of Appeals in *Maybee v. Avery,* where the plaintiff's prior conviction for stealing hens was used as evidence against him, and reaffirmed by the same court slightly over one hundred years later,[8] was that as a matter of public policy one should not be permitted to benefit by his own wrong. In *Schindler v. Royal Insurance Co.*[9] the court pointed out that "a valid judgment of conviction in a court of competent jurisdiction with all the safeguards thrown about a person accused of crime which enable him to make his defense, to examine witnesses and to testify in his own behalf, might be held free from collateral attack"[10] and thus admissible as prima facie evidence of the facts, subject, of course, to rebuttal.[11] Few jurisdictions have held a prior conviction to be conclusive evidence of the facts on which the conviction was based.[12] This seems proper particularly in view of the fact that the necessary difference in parties and issues makes the doctrine of *res judicata* inapplicable.

Unfortunately, the cases decided after *Schindler* are not entirely reconcilable. Two

Exchange Insurance Co. v. Sherby, 165 Md. 1, 165 A. 809 (1933); Silva v. Silva, 297 Mass. 217, 7 N.E.2d 601 (1937); Young v. Davis, 174 Miss. 435, 164 So. 586 (1935).

[5] Hampton v. Westover, 137 Neb. 695, 291 N.W. 93 (1940).

[6] In Wolff v. Employers Fire Insurance Co., 282 Ky. 824, 140 S.W.2d 640 (1940), the Kentucky court declared that an acquittal would be admissible evidence. This was subsequently overruled. Shatz v. American Surety Co. of New York, 295 S.W.2d 809 (Ky. 1955). Accord: Tennessee Odin Insurance Co. v. Dickey, 190 Tenn. 96, 228 S.W.2d 73 (1950). See Horan v. Wallander, 186 Misc. 920, at 921, 58 N.Y.S.2d 471, 473 (S. Ct. Queens Co. 1948).

[7] Maybee v. Avery, 18 Johns 352 (N.Y. 1820), where plaintiff, having been accused of stealing defendant's hens, brought an action of slander. Defendant introduced into evidence plaintiff's conviction for stealing the hens, and the evidence was admitted as prima facie proof of the truth of defendant's accusation.

[8] Schindler v. Royal Insurance Co., 258 N.Y. 310, 179 N.E. 711 (1932).

[9] Id.

[10] Id., at 313.

[11] Accord: N.Y. and Cuba Mail S.S. Co. v. Continental Insurance Co., 32 F. Supp. 251 (D.C.N.Y. 1940), stating that "many of the early substantial distinctions between civil and criminal trials have been swept away." On appeal, the case was reversed on other grounds, but the court nevertheless disagreed as to the admissibility of the conviction, 117 F.2d 404 (2d Cir. 1941), cert. den. 313 U.S. 580, 61 S. Ct. 1103, 85 L. Ed. 1537 (1941); Austin v. U.S., 125 F.2d 816 (7th Cir. 1942); Twentieth Century Fox Films Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954); North River Insurance Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939), followed in Stuyvesant Ins. Co. v. Militello, 104 Colo. 32, 88 P.2d 569 (1939); Everdyke v. Esley, 258 App. Div. 843, 15 N.Y.S.2d 666 (4th Dep't 1939).

[12] Eagle, Star and British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927) is one of the few cases where a plaintiff's conviction was held to be conclusive of the facts and a bar to his subsequent civil action; Poston v. Home Ins. Co. of N.Y., 191 S.C. 314, 4 S.E.2d 261 (1939); Contra, Clark v. Nannery, 292 N.Y. 105, 54 N.E.2d 31 (1944).

years after the *Schindler* case, the Second Department refused to admit into evidence a prior conviction of a defendant in a subsequent civil action to prove the facts on which the conviction was based, holding in *Roach v. Yonkers Railroad Co.*[13] that the *Schindler* rule only deemed admissible the conviction of a plaintiff who was suing to take advantage of his own wrong. The same court, however, under the impression that the Court of Appeals, in *Matter of Rechtschaffen,*[14] had broadened the *Schindler* doctrine so as to admit into evidence the prior conviction of a defendant, later expressly overruled the *Roach* case.[15] In so relying on *Matter of Rechtschaffen* as authority for admitting into evidence a prior conviction of a defendant, the Second Department ignored the fact that the conviction was of a husband, previously convicted of being a "disorderly person," who was cross-petitioning for letters of administration for his wife's estate and who was therefore in the position of a plaintiff. Although the rule has not been clearly enunciated by the Second Department, there are lower court decisions in New York holding that a conviction of a defendant in a civil action arising from the same facts is admissible as proof of the truth of those facts.[16]

The state of uncertainty has by no means been limited to the Second Department. In the *Walther* case,[17] an action for wrongful death, plaintiff was permitted over objection, to elicit from the defendant-operator of the truck which struck the deceased, that he had been convicted of "dangerous driving," a traffic infraction,[18] as a result of the accident in which plaintiff's intestate had lost his life. Such questioning was clearly error under section 355 of the Civil Practice Act which states that a witness shall not "be required to disclose a conviction for a traffic infraction, as defined by the vehicle and traffic law, nor shall conviction therefor affect the credibility of such witness in an action or proceeding."[19] Plaintiff maintained, however, that if a record of conviction was admissible under the rule in *Schindler,* the question regarding the conviction was harmless error. The court, though recognizing that the Second Department had construed the rule as applicable to a defendant's prior conviction and thus had considered it admissible,[20] stated that both *Schindler* and *Rechtschaffen* had intended a prior conviction to be admissible in evidence only as against a plaintiff attempting to benefit by his own wrong. In the absence of precedent and in the fact of clear public policy against the use of convictions for traffic infractions to impeach witnesses, as

[13] 242 App. Div. 195, 271 N.Y. Supp. 289 (2d Dep't 1934). Accord: Max v. Brookhaven Development Corp., 262 App. Div. 907, 28 N.Y.S.2d 845 (2d Dep't 1941).

[14] 278 N.Y. 336, 16 N.E.2d 357 (1938); see New York Decedent Estate Law, section 87, providing that a husband who has neglected or refused to provide for his wife is not entitled to share in her estate, hence is not a party to interest, and thus is not entitled to letters of administration.

[15] Geissler v. Accurate Brass Co., 271 App. Div. 195, 68 N.Y.S.2d 1 (2d Dep't 1947).

[16] Alders v. Grow, 75 N.Y.S.2d 647 (S. Ct. Queens Co. 1947); see People v. Minuse, 190 Misc. 57, 70 N.Y.S.2d 426 (S. Ct. N.Y. Co. 1945); People v. Wachtell, 181 Misc. 1010, 47 N.Y.S.2d 945 (S. Ct. N.Y. Co. 1943).

[17] See note 1, supra.

[18] New York City Traffic Regulations, art. 3, section 20; see Vehicle and Traffic Law, section 2, subd. 29, stating that "a traffic infraction is not a crime," that the penalty resulting is not a "penal or criminal penalty, and shall not affect or impair the credibility as a witness, or otherwise, of any person convicted thereof. . . ."

[19] The same Legislature (1934) that enacted this section also amended the New York Penal Law, section 2444, which allows an attack on a witness's credibility by means of a prior conviction, so as to make it conform with C.P.A. 355.

[20] See note 15, supra.

expressed by the 1934 Legislature,[21] the court concluded that convictions for traffic infractions based on a plea of not guilty are inadmissible as evidence of the truth of the facts involved against a defendant in a subsequent civil action. It was pointed out that a conviction of this kind is unreliable because of the informality of procedure followed in traffic court, as well as the tendency of parties to fail to vigorously defend themselves in such actions.[22] The court expressly refused to decide here the admissibility of such a conviction where: (1) the defendant has been convicted of a crime, or (2) the plaintiff has been convicted of a traffic infraction. A distinction was made where a defendant has been convicted of a traffic infraction on a plea of guilty, which the court felt would be an admission against interest.[23] The two New York cases relied upon by the court for this proposition arose in the Third[24] and Fourth[25] Departments, and add little to clarify the state of the law on this issue. In *Same v. Davison* it had been held that a conviction for violation of a traffic ordinance, after a plea of guilty, is admissible, under the *Schindler* rule, against a defendant in a civil action arising out of the same facts involved in the conviction.[26] The *Schindler* case, however, was clearly inapplicable, for it involved a crime, whereas *Same v. Davison* dealt with a traffic infraction. The two cases were further distinguishable in that the court in the *Schindler* case had admitting into evidence the conviction of a plaintiff, whereas *Same v. Davison* had ruled admissible the conviction of a defendant. Nevertheless, *Same v. Davison,* while of dubious value,[27] is still law in the Fourth Department. The other case relied upon in *Walther* as authority for the rule of admissibility of a plea of guilty to a traffic infraction actually dealt with a misdemeanor rather than with a traffic infraction.[28] This is an important distinction which *Walther* had made regarding convictions, and which the same court, in *Ando v. Woodberry,*[29] has now made regarding a plea of guilty, thereby rejecting the dicta in *Walther* and cases repeating that dicta.[30]

The plea of guilty to a crime, and in a relatively recent case to a traffic ordinance,[31] has been given varying degrees of evidentiary weight as an admission against interest in a subsequent civil action based on the same facts.[32] In a recent decision by the

[21] Civil Practice Act, section 355; see notes 18 and 19, supra.

[22] The court noted a similar informality of procedure in inferior criminal courts, and suggested a possible application of the rule of exclusion to such cases. See Zenuk v. Johnson, 114 Conn. 383, 158 A. 910 (1932).

[23] Cf. In re Johnston's Estate, 220 Iowa 328, 261 N.W. 908 (1932); Morrisey v. Powell, 304 Mass. 268, 23 N.E.2d 411 (1939). In a recent case defendant's plea of guilty to a municipal ordinance was admitted into evidence as an admission, Frost v. Hays, 146 A.2d 907 (Mun. Ct. Apps., D.C. 1958). Contra: Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943), where a statute similar to that in New York excluded from evidence convictions for traffic infractions. A plea of guilty to an infraction was there excluded.

[24] Stanton v. Major, 274 App. Div. 864 (memo, 3rd Dep't 1948).

[25] Same v. Davison, 253 App. Div. 123, 1 N.Y.S.2d 374 (4th Dep't 1937).

[26] Id.

[27] See Ando v. Woodberry, 9 A.D.2d at 128, 192 N.Y.S.2d at 419 (1st Dep't 1959). It should also be noted that the opinion in Same v. Davison merely states that a conviction is admissible in the civil action as prima facie evidence of the facts. It clearly does not hold that it is the plea of guilty which is admissible as an admission.

[28] See note 24, supra.

[29] See note 3, supra.

[30] See People v. Fomato, 276 App. Div. 357, 143 N.Y.S.2d 205 (3d Dep't 1955), aff'd, 309 N.Y. 979, 132 N.E.2d 894 (1956).

[31] Frost v. Hays, 146 A.2d 907 (Mun. Ct. Apps., D.C. 1958).

[32] Greenfield v. Tucillo, 129 F.2d 854 (2d Cir. 1942); Morrisey v. Powell, 304 Mass.

United States Court of Appeals, it was held that a plea of guilty in a Federal criminal prosecution was conclusive evidence against a defendant in a subsequent civil action by the Federal Government to recover damages flowing from the crime.[33] Whether this case will be applied narrowly, or will change the effect of convictions and pleas of guilty from prima facie evidence to conclusive evidence in Federal courts remains to be seen.

In view of the vigorous dissent by Judge McNally in *Ando v. Woodberry,* concurred in by Judge Frank, it is not unlikely that the New York Court of Appeals will eventually have to decide whether a plea of guilty to a traffic infraction should be admissible in a civil action.[34] The basis of the dissent was two-fold: first, that the question of the reliability of the plea of guilty is one to be answered by the jury; and secondly, that section 355 of the Civil Practice Act makes specific reference to *impeachment* by use of a *conviction,* while the *Ando* case involved a plea of guilty, used not for impeachment, but to prove the fact admitted. The problem is further complicated by the fact that one who violates a traffic ordinance out of which a civil suit arises for personal injury or property damage, is usually aware that such damage has been wrought and does not cavalierly plead guilty to save time or for other reasons of convenience; if he does so, it is only because he is acting in reliance on the fact that his insurance company has the ultimate financial liability.[35] This fact, however, should not affect the weight of an admission. A. G. W.

TORTS—NEGLIGENCE—RAILROAD'S DUTY TOWARD DISCOVERED INFANT TRESPASSER.—In a recent New York case,[1] the Court of Appeals ruled that a landowner owes no duty toward a mere trespasser except to refrain from inflicting intentional, wanton or wilful injuries upon him. The trespasser, a six year old boy, entered the Long Island Railroad yard and climbed halfway up the ladder on one of the cars of an eight car freight train. As the train started to move, the infant heard a railroad employee yell, "get off, get off the train." The employee, a flagman who was three or four cars away from the plaintiff, began to run toward plaintiff for the apparent purpose of removing him from the train. The boy fell off the ladder, and his foot went under a car wheel causing severe injuries.

At the trial the boy testified that when he saw the employee running toward him shouting, "get off," he "got scared" and fell or slipped from the ladder. Plaintiff received a jury verdict and judgment thereon. The Appellate Division[2] unanimously reversed on the law, although affirming the facts, and held that the railroad had com-

268, 23 N.E.2d 411 (1939), where a prior plea of guilty to drunken driving was admitted into evidence although it had been changed to not guilty and the criminal trial then dropped; Cf. Secor v. Brown, — Md. —, 156 A.2d 225 (1959).

[33] United States v. Doman, 255 F.2d 865 (3rd Cir. 1959), aff'd on other grounds, sub. nom. Koller v. United States, 359 U.S. 309, 79 S. Ct. 755, 3 L. Ed. 2d 828 (1959). In Marcazzolo v. Lawrence, — Misc. —, 191 N.Y.S.2d 872 (S. Ct. Kings Co. 1959) a plea of guilty to reckless driving was held to be conclusive of the facts admitted, in a subsequent civil action.

[34] The only criticism of the value of such a plea by the Court of Appeals involved an administrative hearing, where exclusionary rules do not apply. The court considered such a plea of little probative value. Hart v. Mealey, 287 N.Y. 39, 38 N.E.2d 121 (1941).

[35] See also Vehicle and Traffic Law, section 59, which makes an owner prima facie liable for the driver's negligence.

[1] Lo Castro v. Long Island R.R., 6 N.Y.2d 470, 190 N.Y.S.2d 366 (1959).

[2] Lo Castro v. Long Island R.R., 7 A.D.2d 758, 181 N.Y.S.2d 121 (2d Dep't 1958).

mitted no "affirmative act of negligence" which caused the injury. The Court of Appeals[3] affirmed the Appellate Division stating that the railroad's employees ". . . did what was reasonably necessary to avoid injury to plaintiff," and " 'Toward mere trespassers or bare licensees the rule is well settled that the only duty owing to them by the owner or occupier of land is to abstain from inflicting intentional, wanton or wilful injuries unless he maintains some hidden engine of destruction.' "[4]

The above rule has been the traditional statement by the American courts in defining the legal relationship between landowner and trespasser. Under ordinary circumstances there is no liability for injuries to unknown and unsuspected trespassers caused by the landowner's failure to use reasonable care to put his land in a safe condition for them, or to carry on his activities so as not to injure them.[5] Various reasons have been given for this rule of non-liability. It has been pointed out that the landowner is not obliged to anticipate the presence of the trespasser and, therefore, owes no duty to take precautions for his safety.[6] This anticipation theory, however, has been criticized,[7] and it is suggested that the true basis for the landowner's immunity rests on the ". . . socially desirable policy to allow a man to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right."[8]

An excellent historical analysis of the traditional statement[9] concerning the landowner's duty toward trespassers has been presented by a prominent legal scholar[10] and deserves to be considered here at length. This scholar pointed out that within their sovereign territory the English landowners were not subjected to the King's law, except for felonies and trespass actions, which were originally punitive and extensions of the appeals for felonies to violent wrongs, and wrote:

"When the comparatively modern law of negligence reached the relations of landowners to persons entering his property it found the field occupied by this concept of the owner's right as sovereign to do what he pleased on or with his own property. The history of this subject is one of conflict between the general principles of the law of negligence and the traditional immunity of the landowners. . . . So when the writ of trespass lost its early punitive and criminal character, and became a writ by which an individual aggrieved by unlawful force could recover damages by way of compensation for the injury done him, a right of action in trespass was consistently sustained where the landowner's action was intended to inflict injury or had that quality which in criminal law is regarded as a legal equivalent, wanton or wilful disregard of the injured person's safety. Thus from the fact that the writ of trespass, while it was in its essence criminal, included in its scope offences committed by a landowner upon his

[3] See note 1, supra.

[4] See note 1, supra at 474, 190 N.Y.S.2d at 369.

[5] Walsh v. Fitchburg R.R., 145 N.Y. 301, 39 N.E. 1068 (1895); Capitula v. New York Central R.R., 213 App. Div. 526, 210 N.Y.S. 651 (3d Dep't 1925); Rasmussen v. Palmer, 134 F.2d 780 (2d Cir. 1943); Carbone v. Mackchil Realty Corp., 296 N.Y. 154, 71 N.E.2d 447 (1947); Westmoreland v. Mississippi Power & Light Co., 172 F.2d 643 (5th Cir. 1949); Prosser, Torts pp. 432, 433 (2d ed. 1955); 65 C.J.S. Negligence Sec. 24a.

[6] Capitula v. New York Central R.R., 213 App. Div. 526, 210 N.Y.S. 651 (3d Dep't 1925); Nilsen v. Long Island R.R., 268 App. Div. 782, 48 N.Y.S.2d 817 (2d Dep't 1944); aff'd, 295 N.Y. 721, 65 N.E. 428 (1945); Carbone v. Mackchil Realty Corp., 296 N.Y. 154, 71 N.E.2d 447 (1947); 156 A.L.R. 1234.

[7] Prosser, Torts p. 433 (2d ed. 1955).

[8] Id. at p. 434.

[9] See note 4, supra.

[10] Francis H. Bohlen, "The Duty of a Landowner Toward Those Entering His Premises on Their Own Right," 69 U. Pa. L. Rev. 142, 237, 340 (1920, 1921).

own premises, appears to have come the usual form of statement of a landowner's liability for injuries inflicted upon trespassers by his own acts . . . liability is stated in terms which require the existence of a substantially criminal state of mind. The phraseology differs, but in all [jurisdictions] require only that the landowner shall not inflict intentional, wanton or wilful injury upon a trespasser."[11]

Thus the rule emerges that a trespasser, although he is a wrongdoer, must at least be recognized as a human being, and the owner is under a duty to refrain from wantonly or wilfully injuring him.[12] Of course the natural inquiry is whether or not this rule attempts to resolve the above mentioned conflict between the principles of the law of negligence and the traditional concept of the landowner's immunity. A "duty" not intentionally or wantonly to injure another would seem but a slight reconciliation with the concept of "duty" embodied in negligence law, and which is usually expressed in terms of "reasonable conduct" and "ordinary care." Applying this principle to the undiscovered trespasser presents no conflict because "how could one use care towards a person or an object whose existence was unknown. . . . ?"[13] In most of these cases, however, there is no difficulty since in the absence of a finding of wilful or wanton conduct, the landowner is simply not guilty of a breach of duty,[14] and the trespasser is denied recovery.

Is the same rule applicable in the case of the discovered trespasser? The great majority of the courts answer this question in the negative.[15] They have "discarded 'wilful or wanton' entirely as a limitation, and have said outright that once the presence of the trespasser is discovered, or the owner is otherwise notified of his danger, there is a duty to use ordinary care to avoid injuring him, as in the case of any other human being."[16] It is reasoned that the owner of premises "may presume that he is alone in their enjoyment . . . and is entitled to the freedom of action which his exclusive possession warrants. But when that presumption is overcome by knowledge of another's presence, the duty of using ordinary care to avoid injury to such person immediately arises."[17]

The instant case[18] is in line with a minority of jurisdictions, which refuse to state the landowner's duty in terms of ordinary care and profess to find no liability, at least so far as their express language goes, unless the possessor intentionally, wilfully or wantonly injured the discovered trespasser.[19]

It has been suggested that the term "wilful negligence" is an anomalous piece of

[11] See note 9, supra, at pp. 237-239.

[12] Nicholson v. Erie R.R., 41 N.Y. 525 (1870); Rounds v. Delaware L & W R.R., 64 N.Y. 129, 21 Am. Rep. 597 (1876); Ansteth v. Buffalo Ry., 145 N.Y. 210, 39 N.E. 708 (1895).

[13] 27 Harv. L. Rev. 403, 404 (1914).

[14] Capitula v. N.Y. Central R.R., 213 App. Div. 526, 210 N.Y.S. 651 (3d Dep't 1925); Carbone v. Mackchil Realty Corp., 296 N.Y. 154, 71 N.E.2d 447 (1947); Scholl v. N.Y. Central R.R., 2 A.D.2d 989, 157 N.Y.S.2d 867 (2d Dep't 1956); aff'd, 3 N.Y.2d 989, 147 N.E.2d 475 (1957).

[15] See note 16, infra.

[16] Prosser, Torts p. 436 (2d ed. 1955); see, Herrick v. Wixom, 121 Mich. 384, 81 N.W. 333 (1899); Bremer v. Lake Erie & W. R.R., 318 Ill. 11, 148 N.E. 862 (1925); Cleveland-Cliffs Iron Co. v. Metzner, 150 F.2d 206 (6th Cir. 1945); Atlantic Coast Line R.R. v. Gates, 186 Va. 195, 42 S.E.2d 283 (1947); Duff v. United States, 171 F.2d 846 (4th Cir. 1949).

[17] 69 L.R.A. 513, 515.

[18] See note 1, supra; see note 4, supra.

[19] Griswold v. Boston & M. R.R., 183 Mass. 434, 67 N.E. 354 (1903); New England Pretzel Co. v. Palmer, 75 R.I. 387, 67 A.2d 39 (1949).

legal jargon "inasmuch as the two words are mutually exclusive, because negligence carries with it the meaning of an absence of the will."[20] No further comment on this contention is necessary it being sufficient to know that the term "means something."[21] The subsequent inquiry will be concerned with determining just what this "something" means to the courts who have defined the landowner's duty toward the discovered trespasser in terms of refraining from inflicting wilful or wanton injury upon him. Particular attention will be paid to New York decisions dealing with infant trespassers discovered on moving trains. However, in examining the railroads' duty no direct attempt to deal with the more numerous decisions involving trespassers injured on railroad tracks or at public crossings will be made.

It is possible to indulge in nice legal reasoning as to the exact distinction between wilful conduct and wanton conduct. However, for the purposes of this note it is sufficient to consider both words in connection with a type of aggravated negligence consisting of "intentional conduct of an unreasonable character in disregard of a known risk involving great probability of harm." Such conduct "partakes of the nature of intentional wrong, and is treated in some respects upon the same basis."[22] Wilful or wanton negligence is also described as conduct that amounts to a "reckless disregard for the safety of others to which the law imputes an intention to do harm."[23] The New York decisions emphasize that wilful or wanton negligence is more than just a failure to use ordinary care. Rather it amounts to an "utter heedlessness of care commensurate with the risk involved, the consequences of which may well have been anticipated."[24] Therefore, as Justice Cardozo has written, it is a "question of degree"[25] whether the actor has been negligent, and the final solution to the issue is always dependent upon the particular circumstances of each case.

Thus in the Lo Castro decision[26] it was held that a railroad employee, observing a six year old boy clinging to the side of a moving train, did not commit a wilful or wanton act by first ordering the child to "get off" and then starting to run toward him. The court reasoned that the man who shouted at the boy was "several cars" away from him and that consequently the infant trespasser was not justified in " 'believing that he was about to receive punishment or bodily injury.' "[27] An earlier case[28] involving the same railroad found the infant trespasser playing on top of a freight car, and upon hearing the flagman yell, "get off," the child became frightened and fell off the car when it started to move. The infant was denied recovery on the ground that "The mere calling to a boy to 'get off' unaccompanied by violence or any overt act showing an intention to use force, does not constitute affirmative or willful negligence."[29]

Another case[30] involved an infant trespasser clinging to the rear of a crowded

[20] 8 Minn. L. Rev. 329, 333 (1924); see note 13, supra at p. 418.

[21] Holmes, "The Common Law," p. 121 (1938 ed.) ("gross" negligence).

[22] Prosser, Torts p. 147 (2d ed. 1955); also see, Restatement of Torts Sec. 336.

[23] 69 L.R.A. 513, 517.

[24] Mayer v. Temple Properties, 307 N.Y. 559, 565, 122 N.E.2d 909, 913 (1954); see, Sheridan v. Fletcher, 270 App. Div. 29, 58 N.Y.S.2d 466 (3d Dep't 1945); Goepp v. American Overseas Airlines, 281 App. Div. 105, 111, 117 N.Y.S.2d 276, 281 (1st Dep't 1952); aff'd, 305 N.Y. 830, 114 N.E.2d 37 (1953).

[25] Cardozo, "The Nature of The Judicial Process," p. 161 (1921).

[26] See note 1, supra.

[27] Ibid.

[28] Ralff v. Long Island R.R., 266 App. Div. 794, 41 N.Y.S.2d 620 (2d Dep't 1943); aff'd, 292 N.Y. 656, 55 N.E.2d 518 (1944).

[29] Id. at 794, 41 N.Y.S.2d at 621.

[30] Luther v. Union Ry., 84 Misc. 46, 48, 49, 145 N.Y.S. 893, 894 (App. T. 1st Dep't 1914).

trolley car. The conductor came rapidly toward him from the front, ordered him to get off, and made threatening gestures. Becoming frightened the boy jumped off the moving car. The railroad was not held liable the court stating that merely frightening the child did not constitute grounds for liability. It was felt that the crowded condition of the car and the conductor's distance from the trespasser, "must have made apparent —even to a boy's mind—that no immediate assault or the use of any force was possible."[31] It was also stated that the conductor's acts were not the "proximate cause" of the boy's injury. Previously on a similar set of facts,[32] the court had denied recovery stating that there was no "assault," and that the trespasser could not recover unless he proved that the conductor's acts were "unnecessarily dangerous," and the "proximate cause," of the injury. Another decision[33] held the railroad not liable on the grounds that there was no evidence that the railroad's servants "assaulted" the trespasser.

In each of the above cases[34] it was expressly or impliedly held as the controlling rule of law that toward a mere trespasser the railroad owed no duty except to abstain from wilfully or wantonly injuring him, and, since no recoveries were allowed, it is possible to recognize certain conduct that the court will consider as *not* amounting to wilfullness or wantonness. It is not culpable negligence to yell at a child to "get off" a moving train, or to make "threatening gestures" to remove him when "far back" or a considerable distance away.[35] These acts, it is reasoned, do not constitute wilful or wanton negligence because they are not the "proximate cause"[36] of the trespasser's injury and do not amount to an "assault".[37] As to what conduct *does* constitute wilful or wanton negligence, it may be concluded that it is such conduct as "partakes of the nature of intentional wrong and is treated . . . upon the same basis."[38]

Thus the railroad is liable if one of its employees "kicks"[39] a trespasser from a moving train, or "shoots"[40] him, or runs a train over him after discovering him asleep on the railroad tracks.[41] An early New York case[42] concerned an infant trespasser standing on the side of the platform of a moving street car. The conductor came out on the platform and seeing the child, reached out for him, exclaiming, "Hey!" The proximity of the conductor and his sudden gesture, frightened the boy who fell off the car sustaining injuries. Here the conductor was just inches away from the trespasser, and the court held the railroad liable stating that the conductor's acts exposed the plaintiff to an "unnecessary hazard" and were the "proximate cause" of his injury. It was emphasized that the conductor's conduct was of such a nature as to "justify the Plaintiff in believing that he was about to receive punishment or bodily injury."[43]

[31] Ibid.

[32] Prenderville v. Coney Island & Brooklyn R.R., 131 App. Div. 303, 115 N.Y.S. 633 (2d Dep't 1909); also see, Van Houten v. N.Y.N.H.&H.R.R., 286 App. Div. 875, 142 N.Y.S.2d 178 (2d Dep't 1955); aff'd, 2 N.Y.2d 739, 157 N.Y.S.2d 376 (1956).

[33] Johnson v. N.Y. Central & H. R.R., 173 N.Y. 79, 65 N.E. 946 (1903).

[34] See note 1, supra; see note 28, supra; see note 30, supra; see note 32, supra; see note 33, supra.

[35] Ibid.

[36] Ibid.

[37] Ibid.; see also, Gonzalez v. Van Nostrand, 7 A.D.2d 868, 182 N.Y.S.2d 144 (2d Dep't 1959).

[38] See note 22, supra.

[39] Rounds v. Delaware L & W R.R., 64 N.Y. 129, 21 Am. Rep. 597 (1876).

[40] Cf., Mager v. Hammond, 83 N.Y. 387, 76 N.E. 474 (1906).

[41] Cf., Bragg v. Central New England R.R., 228 N.Y. 54, 126 N.E. 253 (1920).

[42] Ansteth v. Buffalo Ry., 145 N.Y. 210, 214, 39 N.E. 708, 709 (1895).

[43] Ibid.

Again it is appropriate to refer to a comment by Justice Cardozo: "We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees. It is a question of degree whether I have been negligent."[44] Threatening to remove a child from a moving train does not amount to wilful or wanton negligence if the infant is at the rear of a "crowded" car,[45] or in the instant case if he is "several cars away,"[46] but it is culpable negligence if the conductor is on the same platform with the trespasser[47] and thereby near him.

The Lo Castro case,[48] and another one previously considered,[49] exonerated railroads from liability on the ground that they were not guilty of active or affirmative negligence. It thus becomes important to emphasize the distinction made by the courts between "affirmative negligence" and so called "passive negligence." A leading New York case[50] explained the distinction as follows: "Negligence consists in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty, to the injury of another. It is essential to a recovery in the latter case, to establish that the defendant owed at that time some specific, clear, legal duty to the plaintiff or the party injured."[51]

Referring specifically to trespassers' actions for injuries, the distinction to be made is between those injuries which are caused by the landowner's acts, and those caused by the condition of the premises. The intruder, who climbs upon a decayed wall and is injured when it collapses, cannot recover from the owner for the latter's mere failure to repair the defective wall.[52] The failure to repair may be considered as passive negligence, but it imposes no liability because, as previously stated,[53] there is no duty to protect the trespasser, and he enters the premises at his peril. However, a different situation arises when the landowner, aware that children trespass on his land, covers a pit fifty-five feet in depth when a flimsy board that crumbles under the weight of an infant trespasser. In such a case[54] the landowner is liable for injuries suffered, because he maintained a deceptive trap which amounted to an act of affirmative negligence and was "tantamount to a reckless disregard of the safety of human life equivalent to willfulness. . . ."[55]

It has been pointed out that once the trespasser is discovered in a position of peril, the majority of courts require the landowner to use ordinary care to avoid injuring him.[56] Sometimes this rule is expressed in terms of the owner's duty to exercise ordinary care not to injure the trespasser by some affirmative act or "affirmative negligence."[57] However, when the New York courts use the term affirmative negligence, it

[44] See note 25, supra.
[45] See note 31, supra.
[46] See note 1, supra, at 473; 190 N.Y.S.2d at 368.
[47] See note 42, supra.
[48] See note 1, supra.
[49] See note 28, supra; see note 29, supra.
[50] Nicholson v. Erie R.R., 41 N.Y. 525 (1870).
[51] Id. at 529.
[52] Carbone v. Mackchil Realty Corp., 296 N.Y. 154, 71 N.E.2d 447 (1947).
[53] See note 5, supra.
[54] Mayer v. Temple Properties, 307 N.Y. 559, 565, 122 N.E.2d 909, 913 (1954).
[55] Ibid.; putting flimsy boards over the pit was said to be an "affirmative creation" of a dangerous trap; also see, Byrne v. N.Y.C.&H.R.R., 104 N.Y. 362, 10 N.E. 539 (1877) (negligently backing train over public crossing); Nicholson v. Erie R.R., see note 50, supra (a mere failure to secure brakes).
[56] See note 16, supra.
[57] Hill v. Baltimore & O.R.R., 153 F.2d 91 (7th Cir. 1946); certiorari denied 66

cannot be properly equated with such negligence as arises from a failure to use ordinary care. At least, in so far as the legal relationship between the landowner and the trespasser is concerned, it appears that the terms, wilful or wanton negligence, and active or affirmative negligence, are used synonymously. This reasoning is based on the fact that the terms are used interchangeably and without distinction by the courts.[58]

The rationale of the majority rule[59] has been explained as follows: "The standard of care required of an owner observing the helpless peril of a trespasser is indistinguishable from that required of any person carrying on the same activities at a point where both he and the person in peril have an equal right to be. . . ."[60] It has been suggested[61] that there is no conflict between the rule of ordinary care, and the New York rule that once a trespasser is observed in a position of peril the landowner must refrain from wantonly or wilfully injuring him. "The difficulty arises in failing to distinguish between passive and active negligence. One having a superior right of way on a railroad track . . . need not be actively vigilant in discovering a trespasser, but when he has discovered him, then he must be active in not injuring him. Lack of activity, under such circumstances, becomes reckless conduct."[62]

Such language,[63] however, should not be construed to mean that once a trespasser has been discovered a failure to use ordinary care amounts to reckless or wanton conduct. Some courts have reasoned in such a manner and have held, that "It is wanton negligence, within the meaning of the law, to fail to use ordinary and reasonable care to avoid injury to a trespasser after his presence has been ascertained."[64] However, when the instant case[65] states that the railroad's employees did what was "reasonably necessary"[66] to avoid injuring the infant trespasser, the Court of Appeals means simply that the landowner refrained from assaulting or wilfully and wantonly injuring him. This conclusion seems to be a fair interpretation in view of the preceding discussion.[67] Of course it could be inferred, that since the trespasser was an infant, greater precaution need be taken to avoid injuring him than in the case of an adult. Such an inference is not justified, however, since none of the cases mentioned herein specifically refers to any greater duty owed to an infant. The express language of the courts seems to indicate that the adult and the infant are to be treated on the same basis.[68] "The

S. Ct. 1123, 328 U.S. 849 (1946). It is not settled whether or not the duty of ordinary care extends to protecting the trespasser against purely passive conditions. See Prosser, Torts p. 436 (1955 ed.); see also, 49 L.R.A. 778; 156 A.L.R. 1226.

[58] See note 1, supra; see note 29, supra; see note 55, supra; see also, Morse v. Buffalo Tank Corp., 280 N.Y. 110, 19 N.E.2d 981 (1939).

[59] See note 16, supra.

[60] 69 U. Pa. L. Rev. 237, 241 (1920, 1921); see Restatement of Torts Vol. II, p. 1291 Scope Note, Sec. 336; see note 16, supra; see note 17, supra.

[61] Rosenthal v. N.Y. Susquehanna & W.R.R., 112 App. Div. 431, 98 N.Y.S. 476 (1st Dep't 1906); aff'd, 188 N.Y. 639, 81 N.E. 1175 (1907).

[62] Id. at 435, 98 N.Y.S. at 478; see, Weiler v. Manhattan Ry., 53 Hun. 373, 6 N.Y.S. 320 (1889); aff'd, 127 N.Y. 669, 28 N.E. 255 (1891).

[63] Ibid.

[64] Frederick v. Philadelphia Rapid Transit Co., 337 Pa. 136, 10 A.2d 576 (1940); see, Sloniker v. Great Northern R.R., 76 Minn. 306, 79 N.W. 168 (1899); Duff v. United States, 171 F.2d 846 (4th Cir. 1949).

[65] See note 1, supra.

[66] Ibid.

[67] See note 1, supra; see note 4, supra; see note 28, supra; see note 30, supra; see note 32, supra; see note 33, supra.

[68] Ibid.

infant was a trespasser to whom the defendant owed no duty other than to refrain from affirmative acts of negligence, or from willfully and intentionally injuring him."[69]

The dissenting opinion of the two dissenters in the instant case[70] held that the flagman's acts of yelling, "get off," and of running toward the trespasser, were such as to "affirmatively frighten" the infant and "cause" him to fall from the moving train. This dissenting opinion, nonetheless, should not be viewed as indicating a tendency to relax or deviate from the rule that the railroad's only duty toward a trespasser is to refrain from wilfully or wantonly injuring him. The dissent claimed that the evidence made out a case of "willful negligence" against the railroad indicating that liability was being sought within the framework of the wilful, wanton rule.

It must be concluded that the New York courts, so far as their express language goes, have failed both to distinguish between an undiscovered trespasser and one observed in a position of peril,[71] and have refused to find liability, under any circumstances, unless there is a showing of wilful or wanton conduct. New York has stood firm in protecting the landowner's rights against the personal interests of the trespasser and, so far as the railroads are concerned, has consistently denied recovery in actions for injuries against the landowner. The great number of such actions brought against railroads have undoubtedly influenced judicial thought which leans toward a public policy that will permit the railroads to carry on their important functions without undue harassment. In the final analysis, the instant case[72] must stand as a further solidification of the already well settled rule of law that toward a trespasser the landowner is under no duty except to refrain from wilfully or wantonly injuring him. E. S. M.

[69] Ralff v. Long Island R.R., 266 App. Div. 794, 41 N.Y.S.2d 620, 621 (2d Dep't 1943); see note 28, supra.

[70] See note 1, supra.

[71] "A 'position of peril' means only that the trespasser may be injured if the defendant is negligent." Prosser, Torts p. 436 n.92 (2d ed. 1955).

[72] See note 1, supra.