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Criminal Procedure—Right to Assigned Counsel Now Available to Misdemeanants Tried in Special Sessions Courts

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though Civil Service was a matter of state concern, the administration of civil service was not. The administration of civil service is a matter of local concern and came within the definition of local property, affairs or government.[45] This approach would seem to be consistent with the letter and the spirit of the 1964 Amendment. In analyzing the approach taken by the court in the instant case toward the question of state concern, two flaws appear. First, fire protection has been held to be a matter of local affairs rather than state concern.[46] Although there is no direct holding classifying police protection as a matter of local affair, there are many decisions holding certain aspects of the police department, such as wages, hours of work, pension plans, as being matters related to the property, affairs or government of local municipalities.[47] This prior case law makes the holding of the court in the instant case rather weak when it states that the state law setting the residency requirements of police officers is dealing with a matter of state concern. The second flaw of the court's opinion in the instant case is that even if this area (police protection) could be considered a matter of state concern, the reasoning of the *Caparco* case would justify a holding that the particular area involved (residency requirements) was a matter of local concern. The specific area involved rather than the general subject matter is determinative. These are just a few of the questions which must be answered by the courts when construing the 1964 Amendment. The answers will determine to a great extent the future course of the home rule movement in New York.

DAVID M. BROWN

CRIMINAL PROCEDURE—RIGHT TO ASSIGNED COUNSEL NOW AVAILABLE TO MISDEMEANANTS TRIED IN SPECIAL SESSIONS COURTS

Defendant, a nineteen year old youth, along with two others, was arrested at an apple orchard in the Town of Ramapo, Rockland County, on September 12, 1961, at approximately 10:30 P.M. while helping himself to half a bushel of apples valued at about two dollars. The owner of the orchard, having caught one of the youths in the act, filed an information with the Justice of the Peace charging the defendants with petit larceny. The defendant appeared before the Justice of the Peace at a little past midnight that same evening, whereupon he was informed of the charge against him and instructed in the following manner:[1]

45. *Id.* at 217, 245 N.Y.S.2d at 839.
46. See Holland v. Bankson, 290 N.Y. 267, 49 N.E.2d 16 (1943); Osborn v. Cohen, 272 N.Y. 55, 4 N.E.2d 289 (1936).
47. Allmendinger v. City of New York, 182 Misc. 142, 46 N.Y.S.2d 641 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 691, 54 N.Y.S.2d 392 (1st Dep't 1945), *aff'd*, 295 N.Y. 644, 64 N.E.2d 712 (1945); Gorman v. City of New York, 304 N.Y. 865, 109 N.E.2d 881 (1952).

1. These proceedings were held pursuant to N.Y. Code Crim. Proc. § 699.

> You are entitled to the aid of counsel in every stage of these proceedings, and before any further proceedings are had. You are entitled to an adjournment for that purpose and upon your request I will send a message to any counsel you name within this jurisdiction. Do you desire counsel?[2]

Defendant, having neither a prior police record nor experience with criminal proceedings, answered, "No." The defendant pleaded guilty to the charge and was convicted and sentenced by the Justice of the Peace, sitting as a Court of Special Sessions, to serve thirty days in jail and pay a twenty-five dollar fine. Since he was without funds to pay said amount, the defendant's sentence was increased to fifty-five days. He subsequently appealed to the Rockland County Court which affirmed the conviction but found his sentence to be excessive and reduced it to seven days, the time already served. Leave to appeal having been granted, the Court of Appeals, in a four to three decision, reversed the conviction. The Court held that the defendant was deprived of his constitutional and statutory right to counsel[3] because the lower court had failed to inform him of the availability of court-assigned counsel if he desired an attorney but could not afford one, thereby making the defendant's negative response an ineffective waiver of his right to counsel. *People v. Witenski*, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

The fundamental right of an accused to have the aid and advice of counsel in criminal cases is constitutionally guaranteed[4] and is binding upon the States under the mandate of due process.[5] Two ". . . essential elements inherent in the principle of right to counsel [are] the right to be informed of one's right to counsel and the right in certain circumstances to have counsel appointed by the court."[6] The latter right, in the absence of an effective waiver, was granted in the Federal courts to all indigent criminals by judicial mandate,[7] and was read into the due process clause of the fourteenth amendment requiring the States to provide legal representation to any indigents accused of a capital offense.[8] This movement was climaxed in the recent decision of *Gideon v. Wainwright*[9] which extended the States' duty to provide assigned counsel to a de-

2. People v. Witenski, 15 N.Y.2d 392, 394, 207 N.E.2d 358, 359, 259 N.Y.S.2d 413-14 (1965).

3. U.S. Const. amends. VI, XIV; N.Y. Const. art. I, § 6; N.Y. Code Crim. Proc. §§ 8, 188, 308, 699; People v. Waterman, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 447, 216 N.Y.S.2d 70, 74 (1961); People v. Tomaselli, 7 N.Y.2d 350, 353-354, 165 N.E.2d 551, 553, 197 N.Y.S.2d 697, 700-01 (1960).

4. U.S. Const. amend. VI; N.Y. Const. art. I, § 6.

5. U.S. Const. amend. XIV; Gideon v. Wainwright, 372 U.S. 335 (1963).

6. Birzon, Kasanof & Forma, *The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State*, 14 Buffalo L. Rev. 428, 430 (1965).

7. Glasser v. United States, 315 U.S. 60 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938); codified into Fed. R. Crim. P. 44. See generally Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U.L.Q. Rev. 1 (1944).

8. Powell v. Alabama, 287 U.S. 45 (1932).

9. 372 U.S. 335 (1963) overruling *Betts v. Brady*, 316 U.S. 455 (1942); Krash, *The Right to a Lawyer: The Implications of Gideon v. Wainwright*, 39 Notre Dame Law. 150 (1964). The reversal of the "special circumstances" test in *Betts* was urged by several critics,

fendant in any non-capital felony trial desiring the assistance of counsel but lacking sufficient funds to secure his own. This right has long existed in New York at common law[10] and was later expressed in statutory form in 1881[11] along with provisions creating the procedural machinery through which a person accused of crime was to be advised by the magistrate at the initial confrontation between the defendant and the State of his right to have counsel at every stage of the proceedings.[12]

The statutory obligations of an arraigning magistrate in New York with respect to a defendant appearing before him is to clearly and unequivocally[13] inform[14] him of his right to have counsel for his defense and to provide the defendant ample opportunity to secure counsel if he desires.[15] In Special Sessions courts, where a Justice of the Peace sits with dispositive jurisdiction over misdemeanors,[16] the New York Code of Criminal Procedure section 699 provides that ". . . the magistrate must immediately inform [the defendant] . . . of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had, . . . must allow the defendant a reasonable time to send for counsel, and adjourn the proceedings for that purpose."[17] The rights conferred by this section may be waived by the defendant[18] "if the waiver be a knowing, deliberate and informed relinquishment of that right."[19] In order to further effectuate the purpose of insuring the constitutional guarantee of civil rights in this area, the New York legislature enacted section 308 to the Code which compels the arraigning magistrate to assign counsel to any exiguous defendant demanding legal representation during the prosecution of an indictable crime.

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e.g., Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 De Paul L. Rev. 213, 230-33 (1959); Beaney, *The Right to Counsel: Past, Present, and Future*, 49 Va. L. Rev. 1150-9 (1963); Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. Chi. L. Rev. 1 (1962). See Annot., 71 A.L.R.2d 1160 (1957).

10. *E.g.*, People v. Molineux, 168 N.Y. 264, 331, 61 N.E. 286, 308 (1901); People *ex rel.* Saunders v. Board of Supervisors, 1 Sheld. (N.Y.) 517 (Buffalo Superior Ct. 1875); People *ex rel.* Brown v. Board of Supervisors, 4 N.Y. Crim. 102 (Sup. Ct.), *aff'd mem.*, 102 N.Y. 691 (1886).

11. N.Y. Code Crim. Proc. § 308. Compare *People v. Price*, 262 N.Y. 410, 412, 187 N.E. 288, 299 (1933) which stated that, "even prior to section 308 . . . there was inherent power in the courts to assign counsel to defend a prisoner who was without an attorney and unable to employ one." See People *ex rel.* Acritelli v. Grout, 87 App. Div. 193, 84 N.Y.S. 97, 18 N.Y. Crim. 1 (1st Dep't 1903), *aff'd*, 177 N.Y. 587, 70 N.E. 1105 (1904).

12. N.Y. Code Crim. Proc. §§ 8, 188, 699.

13. People v. Brantle, 13 A.D.2d 839, 216 N.Y.S.2d 329 (2d Dep't 1961); People v. Hinsch, 3 A.D.2d 915, 162 N.Y.S.2d 602 (2d Dep't 1957).

14. People v. Mulhearn, 22 Misc. 2d 689, 199 N.Y.S.2d 83 (Ct. of Spec. Sess., 1960).

15. People v. Marincic, 2 N.Y.2d 181, 139 N.E.2d 529, 158 N.Y.S.2d 569 (1957); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944).

16. N.Y. Const. art. 6, §§ 15(c), 17(a); N.Y. Code Crim. Proc. §§ 56, 60; N.Y.C. Crim. Ct. Act §§ 30, 31; N.Y. Justice Ct. Act § 2.

17. N.Y. Code Crim. Proc. § 699(1),(2).

18. N.Y. Code Crim. Proc. § 699(4).

19. People v. Palmer, 296 N.Y. 324, 328, 73 N.E.2d 533, 535 (1947). See *e.g.*, Matter of Bojinoff v. People, 299 N.Y. 145, 151-2, 85 N.E.2d 909, 912 (1949). *Cf.* United States v. Fay, 242 F. Supp. 273 (S.D.N.Y. 1965); United States *ex rel.* Maldonado v. Denno, 239 F. Supp. 851 (D.C.N.Y. 1965).

In the principal case, the majority of the court, led by Chief Judge Desmond, engage in a significant piece of progressive judicial legislation. In arriving at the conclusion that the defendant could not have effectively and intelligently waived his right to counsel, the Chief Judge points to the facts[20] in the case and argues that they "create an inference of fact" precluding a valid waiver. He then addresses himself to the major issue of whether there was any deprivation of the defendant's "fundamental right to counsel."[21] The holding of the Court is developed through two distinct, yet inseparable steps. In the first place, since the right to counsel in New York is well established and has always included the right to have counsel assigned by the court in cases of indigency, the Court is now extending the right to assigned counsel to indigent misdemeanants. Spurred perhaps by the principle expressed in the *Gideon* case which held that constitutional due process requires the assignment of counsel to indigent felons in state courts, the majority now acknowledges that this "basic minimal right" to counsel will not be "restricted to prosecutions for major crimes" in this jurisdiction.[22] The breadth of this formulation, however, opens the door to many serious issues which would be pressed upon the Court in subsequent cases, viz., the retroactivity[23] of the *Witenski* decision and whether the right to assigned counsel extends to such minor criminal offenses as traffic infractions.[24] It is in the area of the probable effect of *Witenski* that the dissenting opinion by Judge Bergan criticizes the majority for lightly dismissing the many serious and complex problems involved in the administration of the assigned counsel program. Judge Bergan points out as follows:

> In many rural towns in the Third and Fourth Departments there are no resident lawyers and in many there are no lawyers who practice in the local courts of the town.
>
> If a Justice of the Peace in one of the remote towns of Clinton County, for example, undertook to assign a lawyer in Plattsburgh to defend in his court a misdemeanor case, a number of practical obstacles to any effective result come readily to mind. Of all the lawyers in Clinton only two are listed as having offices outside of Plattsburgh in the current Legal Directory.[25]

The minority recommends that, "A change of this kind in the processes of criminal law would be unworkable without extensive implementation which, in turn,

20. In determination by a court of whether or not a proper waiver of counsel was effected, such factors as the defendant's youth, background, experience and conduct enter into consideration, bearing in mind that courts do not presume acquiescence in loss of fundamental rights, or that the accused knew of the right to counsel. People v. Richetti, 109 N.Y.S.2d 29, 43-44 (County Ct., 1951).

21. People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944).

22. *Cf.* Harvey v. Mississippi, 340 F.2d 263, 271 (5th Cir. 1965) citing the famous case of Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

23. *Cf.* Doughty v. Maxwell, 376 U.S. 202 (1964); Pickelsimer v. Wainwright, 375 U.S. 2 (1963) applying *Gideon* retroactively. See generally Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. Rev. 606-09 (1965).

24. *Compare* People v. Kohler, 45 Misc. 2d 692, 258 N.Y.S.2d 279 (Sup. Ct. 1965) *with* People v. Stein, 391 Misc. 2d 47, 262 N.Y.S.2d 697 (Dist. Ct., Nassau County 1965).

25. Instant case at 399, 207 N.E.2d at 362, 259 N.Y.S.2d at 418.

ought to be in the form of statutory enactment, and perhaps also be accompanied by an appropriation of public money."[26] The statistics[27] quoted by the majority in attempted rebuttal, do not effectively answer the argument of the dissent. It is submitted that an inherent fallacy in the reasoning of the majority is that in actual distribution, especially in rural counties which lack a concentrated urban area of any appreciable size, the ratio of lawyers to population is vastly disproportionate to the one per three hundred average distribution relied upon by the majority.[28] In the second line of reasoning, the majority restricts the holding of the case to the mere extension of the "procedural requirements" of section 699 of the Code of Criminal Procedure to include the provisions of section 308. The effect of this interpretation is aptly formulated by the minority: "The court now for the first time is imposing on Special Sessions the duty of informing persons charged with misdemeanors not only that they have a right to aid of counsel but also 'as to the availability of assigned counsel.' "[29] This will compel the arraigning magistrate or Justice of the Peace at Special Sessions to assign counsel to any indigent defendant who requests the aid of an attorney. The majority concedes that there is no direct authority interpreting section 699 for holding that a defendant must be informed of the availability of assigned counsel upon arraignment,[30] but based on consideration of the common law of New York which was later expressed in statutory form,[31] and dicta in *People v. Marincic*,[32] the Court decides to "now hold that such information must be provided," thus giving sections 308 and 699 a conjoint effect and interpreting section 699 as being supplemented in purpose by its extension in scope. The justification of the majority for the principle announced in *Witenski* was to correct ". . . so gross a violation of [the defendant's] fun-

26. Instant case at 398, 207 N.E.2d at 362, 259 N.Y.S.2d at 418. An excellent survey and evaluation of the existing systems for providing counsel for criminal indigents in New York State can be found in Birzon, Kasanof & Forma, *supra* note 6; Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association, Equal Justice for the Accused (1959) [hereinafter cited as N.Y.C. Special Committee]; but for an extensively comprehensive study in this area on a national level, see Silverstein, Defense of the Poor in Criminal Cases in American State Courts—A Field Study and Report (1965).

27. The Chief Judge states: "There are about 54,000 registered lawyers in this State, or one lawyer to every 300 inhabitants." Instant case at 398, 207 N.E.2d at 362, 259 N.Y.S.2d at 417.

28. According to the 1965 New York Lawyers Diary and Manual (Legal Diary Pub. Co.), there are 53 registered attorneys in Clinton County, only five of which are listed outside of Plattsburgh, which serve a county population of approximately 73,000 (1960 Census): a ratio of 1:1377.

29. Instant case at 398, 207 N.E.2d at 362, 259 N.Y.S.2d at 417-8.

30. However there is direct authority to the contrary in *People v. Meers*, 28 Misc. 2d 60, 211 N.Y.S.2d 648 (Sup. Ct. 1960); and also in *People v. Sprung*, 13 A.D.2d 877, 215 N.Y.S.2d 517 (3d Dep't 1961) and *People v. Crimi*, 303 N.Y. 749, 103 N.E.2d 538 (1952) by implication.

31. See text accompanying notes 9-12, *supra*.

32. 2 N.Y.2d 181, 139 N.E.2d 529, 158 N.Y.S.2d 569 (1957); see also People v. Banner, 5 N.Y.2d 109, 154 N.E.2d 553, 180 N.Y.S.2d 292 (1958); People v. Brantle, 13 A.D.2d 839, 216 N.Y.S.2d 329 (2d Dep't 1961).

damental rights"[33] which would be evinced by restricting the right to be informed and availed of assigned counsel only to "prosecutions for major crimes."

Prior to the *Witenski* decision,[34] legislation was drafted by the office of the New York Attorney General designed to provide assigned representation to indigent criminals. This proposal was originally intended to be submitted to a legislative committee for study purposes only. However, subsequent to the adjudication in *Witenski*, a public hearing was held[35] by the Senate and Assembly Codes Committees upon request of Attorney General Lefkowitz wherein he announced the submission of the bill to the legislature for consideration and urged its passage. The hearing was called to alert all the bar associations and other interested persons of the recent recommendation to submit the bill for legislative action in the light of the new policy set down in *Witenski*.[36] Approximately a month later, the Anderson-Bartlett Bill,[37] as it was denominated, was passed by the legislature and signed by the Governor[38] on July 16, 1965 becoming Chapter 878 of the Laws of New York, 1965 Regular Session, effective December 1, 1965.[39] The bill, modelled somewhat after the Federal Criminal Justice Act of 1964,[40] amended sections 188, 190, 308 and 699 and repealed section 189 of the Code of Criminal Procedure[41] and codifies the mandate in *Witenski* requiring an arraigning magistrate to inform the defendant that "if he desires the aid of counsel and is financially unable to obtain counsel, then counsel shall be assigned." In addition, it amended the County Law inserting a new article, Article 18-B: providing for the assignment of counsel for indigents on arraignment charged with any crime, specifically denoting the types of crimes intended to be included within the article;[42] providing for the mandatory establishment by all the coun-

33. Instant case at 397, 207 N.E.2d at 361, 259 N.Y.S.2d at 417. Compare People v. Shenandoah, 9 N.Y.2d 75, 172 N.E.2d 548, 211 N.Y.S.2d 165 (1961).

34. The principal case was decided on April 22, 1965.

35. The hearing was held in Albany on May 25, 1965.

36. The telegrams sent out by the Attorney General announcing the public hearing and setting forth the purpose of the bill, contained the following statements: "This bill to require assignment of counsel upon arraignment on any charge would codify recent decision Court of Appeals in Witenski. The bill would provide practical means to meet this obligation. . . ."

37. Senate Int. 2755, Pr. 2911, 5844—Warren M. Anderson; Assembly Int. 4786, Pr. 4909—Richard J. Bartlett.

38. In a memorandum approving this and another bill, Governor Rockefeller stated:

> In our society, the right to counsel is as indispensible as the right to a fair trial, and both must be protected if our system of justice under law is to continue and flourish. New York has always been a leader in the protection of the rights of its citizens and the approval of [this] . . . bill especially marks another great step forward in that tradition. In recent weeks, the highest court in this State has made it unmistakably clear that every defendant charged with crime must be afforded a meaningful opportunity to obtain the services of counsel. This bill provides the machinery for guaranteeing the true exercise of that right.

39. N.Y. Sess. Laws 1965, ch. 878, § 8.

40. 18 U.S.C. 3006A (1964).

41. N.Y. Sess. Laws 1965, ch. 878, §§ 2-6.

42. The new addition to the County Law, § 722-a sets forth this definition of crime:

> For the purposes of this article [18-B of the County Law], the term "crime" shall mean a felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon conviction thereof.

ties in the State of a systematic program for furnishing counsel to any persons unable to obtain counsel; and requiring the compensation and reimbursement of counsel furnishing such services necessary for an adequate defense. This is a vast improvement over the former statutory and local policies of providing free criminal representation to indigents, who comprise a large segment, if not a majority of the criminal offenders in New York[43] and other jurisdictions.[44]

The problem of the indigent accused and the handicaps he suffers in his ability to enjoy his constitutional rights and privileges, at least in the realm of effective criminal representation, has been somewhat rectified in New York in the past year by both the judiciary and the legislature. The *Witenski* decision, which was very instrumental[45] in promoting the passage of the Anderson-Bartlett Bill, provided the stimulus necessary to adjust the law to respond to the social problem of the inequity of the poor man caught in the law enforcement machinery of society. The question which immediately comes to mind, however, is whether this will suffice to insure adequate legal representation for the indigent defendant. Since the flexibility of the new bill permits a county to establish any one of the four plans for representation[46] it may desire, there is nothing to support the tacit implication that a particular county will necessarily set up a program most advantageous to the indigent accused.[47] Moreover, it is not inconceivable that a given county might choose to establish for example, the public defender program in compliance with the statute and thereby merely create another political plum with which to reward some loyal party supporter as opposed to someone perhaps more dedicated or competent in the field of criminal law. Certainly, this does not implement the intended advantage or benefit to the indigent criminal comtemplated by the new statute. Likewise, there are intrinsic weaknesses in the traditional coordinated assigned counsel program and the privately operated legal aid plan.[48] There seems to be no provision in either

43. Birzon, Kasanof & Forma, *supra* note 6, at 433, 436.

44. Silverstein, *supra* note 26; Attorney General's Report on Poverty and the Administration of Criminal Justice (1963).

45. See notes 36 and 38 *supra*. In the Attorney General's memorandum (#39) supporting his recommendation of the Anderson-Bartlett bill, the pertinent remarks are:

> It was believed at the time of the introduction of the proposed bill that present New York statutory law requires assignment of counsel . . . only for an indictable crime and only following indictment (CCP § 308). However, subsequent to the introduction of the proposed bill, the Court of Appeals in *People v. Witenski* interpreted the New York statutes to require that even in courts governed by § 699 of the Code . . . , an accused person must be instructed that if he cannot afford counsel, the court will assign one to represent him, before any further court proceedings take place. . . . New York standards on the right to counsel now make it incumbent on counties to provide lawyers to defendants upon their first arraignment in court in every type of criminal case. . . . The urgency of becoming organized to handle the volume of assignments bound to follow the clear pronouncement in the *Witenski* case caused the sponsors of the proposed bill to move ahead from September 1, 1966 to December 1, 1965 the date when a county plan must be put into operation.

46. The new § 722 of the County Law lists the private voluntary defender system, the public defender system, the assigned counsel system or a combination of any of the foregoing as alternative programs a county may select to comply with this section.

47. Birzon, Kasanof & Forma, *supra* note 6, at 453, n.138.

48. *Id.* at 433-34; N.Y.C. Special Committee, *supra* note 26, at 62-76, 86-94; Silverstein, *supra* note 26, at 15-74.

Witenski or its legislative counterpart aimed toward reducing the chances of an indigent becoming the unfortunate victim of malfeasance resulting from inept representation or a sham defense by assigned counsel. The serious problem of adequacy or quality of assigned representation is yet to be acted upon by the legislature or remedied by the courts[49] of this State. This writer recommends that the qualifications of all attorneys participating in any of the assigned counsel programs be approved by the Appellate Division of their respective Departments, using whatever standards or criteria the judiciary deem necessary. Also in this area, there is a lack of a standard workable test of indigency. Since indigency is a very relative concept and not readily definable, perhaps some more attention might be devoted to defining the maximum limits between the deserving indigent and persons who might try to avail themselves of the opportunity to gain free counsel while being reasonably able to retain their own counsel.[50] Only the future will bear out the success or failure of this governmental attempt to overcome one of the many inequalities in a social structure which purports to guarantee equal civil rights and liberties to all of its members. The ultimate democratic goal of the elimination of wealth as a factor affecting the quality and quantity of justice doled out to an individual may perhaps never be completely achieved, but a more substantial equality can now at least be realized by persons in this jurisdiction encumbered by the burden of poverty.

DAVID A. GRZYWNA

DECEDENTS ESTATES—TESTAMENTARY TRUSTS—ADOPTED CHILDREN NOW PRESUMED INCLUDED WITHIN CLASS TERM "ISSUE" AS USED IN WILLS AND TESTAMENTARY TRUSTS

William G. Parks, the testator, died in 1909 creating testamentary trusts for each of his surviving children. The income payable to each child for life and " 'as each of said children . . . dies, the principal of the trust fund of such child . . . shall be distributed among his issue . . . in equal shares.' "[1] *A*, one of the testator's children, an income beneficiary for life, died in 1961. *B*, *A*'s son predeceased her. *B*'s sole survivors were a natural daughter, *C*, and an adopted son, *D*. The issue in this case concerns the rights of the two children, *C* and *D*, to take the portion of the principal of the trust fund which would have gone to their parent *B* had he survived his mother *A*. In determining the respective rights of the two children according to the provisions of the will the surrogate decreed that the adopted child, *D* must be excluded from

49. But see People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960). See generally Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289 (1964).

50. Silverstein, *supra* note 26, at 105-22.

1. In the Matter of the Estate of Park, 15 N.Y.2d 413, 416, 207 N.E.2d 859, 859, 260 N.Y.S.2d 169, 170 (1965).