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Criminal Law And Procedure—Arranging For Adoption And Placement Of Foreign Orphans Not Violative Of The Law Prohibiting The Placing Out Of Children For Compensation

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ARRANGING FOR ADOPTION AND PLACEMENT OF FOREIGN ORPHANS NOT VIOLATIVE OF THE LAW PROHIBITING THE PLACING OUT OF CHILDREN FOR COMPENSATION

Two attorneys in New York accepted fees for placing orphaned Greek children with local families. Their clients would select the children from among photographs kept on file at the offices of the attorneys, who thereafter arranged for the proxy adoption of the children in Greece. The children were then transported to New York, where they were given over to the adoptive parents. Both men were indicted for violations of the Penal Law prohibiting the "placing out" of children for compensation. Under the statute "placing out" is defined as: "arrang[ing] for the free care of a child in a family other than that of the child's parent . . . for the purpose of adoption or for the purpose of providing care."[1] The adoption and entry of such children were permitted under the applicable federal law,[2] and the adoption was in accordance with the requirements of Greek law. Defendants moved to set aside the indictments on the grounds that their acts did not amount to a violation of the prohibition of the Penal Law against the placing out of children and that even if state law had been violated, the federal law permitting such adoptions was superior. The motion was granted and on appeal, *held*, affirmed, three judges dissenting. Where a child is *adopted* prior to his entry into the home, he is by definition not being placed in a home other than his parents'. Neither is the child, to whom his adoptive parents owe the duty of care, being placed for purposes of adoption or free care. *People v. Scopas*, 11 N.Y.2d 120, 181 N.E.2d 754, 227 N.Y.S.2d 5 (1962).[3]

In a vigorous dissent in the Court of Appeals Judge Burke declared that the purpose of the statute is to prevent the arranging of free care for a child. He pointed out that section 371 (12) of the Social Welfare Law was amended in 1949 to alter the wording from "to provide for the care of a child in a free home . . ." to its present form "to arrange for." He stressed that the Special Committee on Social Welfare and Relief of the Joint Legislative Committee on Interstate Co-operation discussed the need to discover ways to control the process by which children get into foster and adoptive homes and to prevent payments by foster parents as a way to adopt a child.[4]

According to Judge Burke's argument, any arrangement for the free care for a child, whether or not that care is actually received before the adoption takes place, violates the purpose of this act. Time is the essence of his argument, and his main point is that the time at which the prohibitive language

1. N.Y. Social Welfare Law § 371(12); N.Y. Penal Law § 487(a).
2. Refugee Relief Act of 1953, 67 Stat. 402 (1953), as amended, 68 Stat. 1044 (1954), as amended, 71 Stat. 639 (1957).
3. 13 A.D.2d 638, 215 N.Y.S.2d 1002 (1st Dep't 1961); 13 A.D.2d 638, 215 N.Y.S.2d 1001 (1st Dep't 1961), affirming 24 Misc. 2d 832, 208 N.Y.S.2d 137 (Ct. Gen. Sess. 1960).
4. N.Y. Legis. Doc. No. 62, pp. 48, 49, 55 (1949); N.Y. Legis. Doc. No. 51, p. 93 (1948); N.Y. Legis. Doc. No. 60, p. 88 (1947).

of the act takes effect is when the initial arrangement is made by anyone to bring about the placing of a child in a home that is not, at that time of initial arrangement, the home of his parent or near relative.

Several factors bearing upon the interpretation of the statute lend support to the position taken by the dissent. In the language of the statute the act made criminal is the "arranging for compensation" the placing out of children. This change was recommended by the advisory committee to cure the evils of trafficking in the lives of infant human beings. These evils are not prevented, nor is the act accomplishing these evils curtailed, simply because the wrongdoer technically falls outside part of the definition of the crime, that is, that the arrangements and compensation are directed at placing a child in a home which, by virtue of the decree of a foreign jurisdiction, is the home of his adoptive parents. The underlying social harm borne by the child is still present, where the regulated selection process provided for placing children is not followed. Examination of that part of the definition of the crime which allows the defendants to circumvent the statute need not be given the interpretation placed upon it by the majority opinion. The home in which a child may be placed is that of his parents, but as the dissent suggests it is not at all clear that the time the placing occurs is the time of the child's physical entry into the home. Moreover, the purpose of his placement, either for free care or adoption, is sufficiently inclusive to bring the present case within it. In short the substance and credibly the terms of the statute had been violated by the conduct of the defendants. The dissent is vigorous and effective but is weakened upon further inquiry into the statutory scheme into which the relevant sections of the Social Welfare and Penal Laws fall. New York Domestic Relations Law, sections 112 through 114, which control adoptions, limit placement, and prescribe arrangements for care, were enacted in the context of those provisions. In New York, before any adoption may take place, it is necessary that the child reside in the home of the prospective parents for at least six months. Then, the prospective parents may go to a county or surrogate judge and apply for adoption. He must be certain that the child has been placed in the home for this time, and after making an investigation of his own, he may order the adoption to take place. The key point here is that the child must be first placed in a home for a six-month period before any officer of the state may consider granting an adoption. Therefore, the Social Welfare and Penal Laws sought to prevent such actual placement which was necessarily the first step to adoption. The law did not need to concern itself with anyone arranging, in the sense of taking initial steps, for such placement because its concern was actually keeping the children out of these prospective foster homes to prevent the basis for a claim to a right of adoption from later arising. Therefore, violation of the law requires that the child actually receive care before adoption. The change in wording from "provide" to "arrange" only refers to third persons bringing about this actual receiving of care. The intent was to

stop such third persons from bringing about unlawful situations of care and make them liable along with persons providing the care. However, the actual provision of care is necessary.

These defendants avoided violating New York law by arranging for proxy adoptions in Greece under federal law. The children received no care in New York before the time they were adopted by New York parents. Under federal law, orphans in Europe could be adopted by American citizens and brought to this country, or could be brought here first and then adopted. If they were adopted abroad, the law of that jurisdiction would hold so long as it was recognized by the United States. Greek law is recognized by the United States, and under Greek law proxy adoptions are permissible. It seems that even viewing the Penal Code in the most liberal light, "according to the fair import" of the terms of the statutes, these defendants are guilty of no crime that New York wrote into its Code. The situation was not foreseen, and no provision was made for it.

Had it been found that New York law had been violated, other questions would have presented themselves. Would New York have jurisdiction over acts legal under federal law when such acts are committed, by proxy by New York citizens, outside of New York? Would New York's attempts to apply penal sanctions impinge on the supremacy of federal over state legislation? Judge Burke declared that no language in the federal statute indicates an intention to supersede and negate state legislation controlling state citizens in their actions within the state. Is the fact that New York citizens remained in the state while the adoptions took place abroad significant? He pointed out that federal law may not be presumed to supersede state law unless it expressly so states.[5]

These basic constitutional issues remain unresolved. The problem itself, however, was solved by two separate pieces of legislation. New York passed an act containing pre-adoption requirements for admission of a child as an eligible orphan under the federal Immigration and Nationality Act. This act, New York Domestic Relations Law section 115-a, requires prospective foster parents who desire to adopt an orphan from abroad to appear first before a county or surrogate judge in New York and make written application, submit documentary evidence, undergo investigation, and receive a pre-adoption certificate. All of these procedures are necessary first to admit a child under the federal act and then to adopt him in a New York court. What, however, is to prevent proxy adoptions abroad as before? This is now prevented by a federal law which provides that to have a petition for non-quota immigrant status in behalf of a child approved by the Attorney General, the prospective foster parents must show that if the child is to be adopted abroad, the parents saw and observed the child prior to and during adoption proceedings; and if the

5. Schwartz v. Texas, 344 U.S. 199 (1952).

child is to be brought here and adopted, then the prospective foster parents must show that they have obeyed the pre-adoption requirements of the state, if such requirements exist, of the child's proposed residence.[6] Possible constitutional issues are thus apparently avoided by a combination of state and federal legislation.

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CONFESSION DURING PERIOD OF ILLEGAL DETENTION ADMISSIBLE IF VOLUNTARY

Defendants were arrested for illegal possession of firearms and were committed to the county jail by a formal written order of a city court judge, pending proceedings on the following day, which was Monday. Three hours after the commitment order, the defendants were removed from the county jail by police officers and were taken to a police station for questioning. During the interrogation, which lasted for ten to twelve hours, the defendants made inculpatory statements in connection with a felony murder for which they were subsequently indicted. At the trial the statements were admitted into evidence despite the fact that the trial court ruled as a matter of law that they were made during a period of illegal detention. The detention was illegal because of the unauthorized removal from the county jail, and the unreasonable delay in arraignment. The defendants were convicted of first degree murder and sentenced to death. On reargument of appeals from these convictions, *held,* reversed, two judges dissenting, and new trials ordered. No error was committed in submitting to the jury the voluntary nature of the statements of the defendants, although obtained after an illegal removal from the county jail, and during an unreasonable delay in arraignment. But, it was reversible error to allow the district attorney to make comments in his summation on the absence of police brutality toward one of the suspects. The reason that the comment was error was that the district attorney had been successful in excluding testimony at the trial pertaining to the physical treatment afforded this suspect. The majority concluded that this was prejudicial because it implied that the defendants in the case were not beaten. *People v. Lane,* 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961).

The New York rule on admissibility of confessions is based on whether or not the confession was made voluntarily.[1] Ordinarily the question of the voluntary nature of the confession is a question of fact to be decided by the jury.[2] But the law is well settled that when the evidence shows without dispute that the confession was extorted by force or fear, the judge should reject it as a matter

6. Immigration and Nationality Act, 8 U.S.C. § 1155(b) (1961).

1. N.Y. Code Crim. Proc. § 395, states that "a confession of a defendant . . . can be given in evidence against him, unless made under the influence of fear produced by threats. . . ."

2. People v. Elmore, 277 N.Y. 397, 14 N.E.2d 451 (1938); People v. Alex, 265 N.Y. 192, 192 N.E. 289 (1934); People v. Kelly, 264 App. Div. 14, 35 N.Y.S.2d 55 (3d Dep't 1942).

of law.[3] However, in the case at bar the defendants do not base their appeal solely on the fact that their confessions were involuntary. They contend that their confessions should be excluded from evidence because they were made during a period of illegal detention. The Court of Appeals has held that in certain situations confessions are to be excluded not because they were involuntary, but because their use would violate the defendant's fundamental constitutional rights. Voluntary confessions and statements made in the absence of counsel after indictment are inadmissible on the ground that the defendant's constitutional right to counsel and freedom from testimonial compulsion have been violated.[4]

In the instant case, the question is whether the statements made by the defendants, although voluntary, should be excluded because they were elicited during a period of illegal detention prior to arraignment. It is conceded by the prosecution that the provisions of the New York prompt arraignment statute[5] were violated, but this violation does not in itself make the statements inadmissible. This has been the rule in New York since 1880, when it was held that the People are not precluded from the use of a voluntary confession merely because the officer to whom it was made was exercising an illegal restraint over the defendant.[6] It is also settled New York law that the fact that a confession was given during a period of illegal detention is only one factor to be considered in determining whether or not it was involuntary.[7] But in a concurring opinion in the instant case, Judge Fuld said he would change the New York law to conform to the federal rule, as enunciated in the cases of *McNabb v. United States*[8] and *Mallory v. United States*,[9] to exclude all confessions made during an illegal detention period from being admitted into evidence. His contention was that this exclusionary rule should be adopted by New York because judicial integrity demands that the court should not sanction illegal enforcement of the criminal law. Chief Judge Desmond, in a dissenting opinion, dismisses the grounds for reversal relied upon by the majority as not being significant enough to justify reversal. His opinion, however, is chiefly concerned with replying to Judge Fuld, and is based primarily on the assertion that to exclude a confession merely because it was obtained during a period of unlawful detention does not take into consideration

3. People v. Valletutti, 297 N.Y. 226, 78 N.E.2d 485 (1948); People v. Barbato, 254 N.Y. 170, 172 N.E. 458 (1930); People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928).

4. People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961) said that there is a "constitutional . . . right of a defendant to the assistance of counsel at every stage of a criminal cause (N.Y. Const., art. I, § 6 . . .)." People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960) held that statements obtained from an accused in the absence of counsel, after indictment, which were admitted into evidence was testimonial compulsion.

5. N.Y. Code Crim. Proc. § 165, provides that upon arrest the defendant "must in all cases be taken before the magistrate without unnecessary delay."

6. Balbo v. People, 80 N.Y. 484 (1880).

7. People v. Alex, supra note 2; People v. Mummiani, 258 N.Y. 394, 180 N.E. 94 (1932); People v. Trybus, 219 N.Y. 18, 113 N.E. 538 (1916).

8. 318 U.S. 332 (1943).

9. 354 U.S. 449 (1957).