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APPEALS OF RIGHT—FINALITY OF DETERMINATION

In the recent case of *People v. Scanlon*[49] the defendant applied to the Supreme Court for an order to vacate a final judgment rendered in 1939 permanently enjoining him from acting as a dealer in securities. The injunction was issued by consent of the defendant under Article 23-a of the General Business Law, commonly known as the Martin Act. The motion to vacate was grounded on the fact that the defendant's subsequent conduct had made the injunction unnecessary and inequitable. The Supreme Court granted the order to vacate.[50] On appeal the Appellate Division reversed, holding that after the expiration of two years from the entry of a permanent injunction under the Martin Act the Special Term was without power to vacate.[51] The Appellate Division determined that the Supreme Court lacked power to vacate the injunction on two grounds: (1) that the injunction in question was designed to protect the public and not to punish the defendant, hence the statute authorizing the injunction does not contemplate modification of the judgment on a mere showing of subsequent good conduct, and (2) that Section 528 of the Civil Practice Act, which sets a two year time limit on motions to set aside a final judgment for error in fact not arising upon the trial, is designed to insure the finality of judgments.[52]

The defendant appealed as a matter of right from the order of the Appellate Division. The Court of Appeals held that inasmuch as this was an appeal taken as of right and not under subdivision (3) of Section 588 of the Civil Practice Act, it must be dismissed as it is not from a final determination.[53] In Cohen and Karger, POWERS OF THE NEW YORK COURT OF APPEALS, there is a discussion of the finality attributable to orders on motion to vacate or amend prior determinations.[54] Among the several possible dispositions of such motions set out in the above named text, and the conclusion of finality arising from such dispositions, is situation (b), "motion to vacate granted and the Appellate Division reverses the decision," which is the situation in the instant case.[55] In such a situation, no change occurs in the original determination. The order of reversal merely requires adherence to the prior final determination and

49. 6 N.Y.2d 185, 189 N.Y.S.2d 143 (1959).
50. 15 Misc.2d 56, 178 N.Y.S.2d 374 (Sup. Ct. 1958).
51. 7 A.D.2d 648, 180 N.Y.S.2d 93 (2d Dep't 1958).
52. People v. Haynes, 2 Misc.2d 983, 150 N.Y.S.2d 53 (Sup. Ct. 1956); See People v. Riley, 188 Misc. 969, 64 N.Y.S.2d 348 (Sup. Ct. 1946).
53. N.Y. CIV. PRAC. ACT § 588, appeals as of right.
54. Cohen and Karger, POWERS OF THE COURT OF APPEALS § 36.
55. Other situations set out in the text follow: (c) "motion to vacate or amend denied, and order then affirmed." There can hardly be two final determinations reaching identically the same result in a single litigation. The final determination had already been made. (d) "motion to amend granted." It is an accepted rule that an order which alters a final determination and grants final relief different from that already settled is itself a final order. (e) "motion to amend granted, and order then reversed." This can be distinguished from the situation set out in (b) above on the rationale that the decision of the Special Term constitutes a new and original determination which cannot be altered by any act of the Appellate Division. A decision has been made in which the Court of Appeals should not be foreclosed from reviewing.

is not itself a final determination. As the Court of Appeals stated: "There is no question but that the judgment of permanent injunction issued in 1939 was a final determination. The order of the Appellate Division reversing the order to vacate that judgment neither adds to nor detracts from the rights of the parties as determined by such judgment—it merely adheres to the already final determination. That being so, it is non-final in character and the defendant's appeal therefrom must be discissed."[56]

OFFICIAL RECORDS ADMISSIBLE UNDER CPA SECTION 374-A WITHOUT CALLING ENTRANT AS WITNESS

Prior to the enactment of Section 374-a of the Civil Practice Act any memorandum or record of a business could not be introduced into evidence without first calling as witnesses all parties who had any part in making such memorandum or record.[57] This section allows such memorandum or record to be admitted into evidence without first calling the entrant as a witness if it was made in the regular course of such business.[58]

In *Kelly v. Wasserman*,[59] plaintiff attempted to introduce records kept by the Department of Welfare of two conversations between a representative of the department and the defendant. The records, if admitted, would have produced inconsistencies in defendant's testimony as to an oral agreement had between the defendant and plaintiff that led to a conveyance of plaintiff's house to the defendant. The trial court refused to admit the records into evidence. The Appellate Division affirmed,[60] and the Court of Appeals reversed and remanded for a new trial.[61]

It was unclear to the Court whether the records were excluded by the trial court because the statements were hearsay, or because they were put in evidence as contradictory statements made by the defendant out of court for the purpose of impeaching him. The Court noted, however, that the more probable grounds for exclusion was the former since the latter ground was dispelled in *Koester v. Rochester Candy Works*.[62]

56. *Supra* note 1 at 186, 189 N.Y.S.2d 144 (1959).
57. Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).
58. N.Y. CIV. PRAC. ACT § 374-a provides:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility.

59. 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959).
60. 6 A.D.2d 888, 177 N.Y.S.2d 1017 (2d Dep't 1958).
61. *Supra* note 59.
62. 194 N.Y. 92, 87 N.E. 77 (1909). The court said at 194 N.Y. 97, 98, "When, however, it is said that one cannot impeach his own witness by contradictory state-