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## Criminal Law—Breach of Peace

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Breach Of Peace

*People v. Carcel*<sup>39</sup> gave the Court an interesting opportunity to interpret subdivisions 2 and 3 of Penal Law section 722 which defines the offense of disorderly conduct. Subdivision 2 proscribes acts which annoy, interfere with, obstruct, or are offensive to, others; while subdivision 3 forbids congregating with others on a public street and refusing to move on when so instructed by the police. The defendants were walking back and forth before the visitors' entrance to the United Nations headquarters in New York, one defendant carrying a placard and the other attempting to distribute leaflets to passersby. The complaint charged that such conduct interfered with and obstructed the free entrance and egress of people through the visitors' entrance and that defendants refused to move when so ordered.

The Court of Appeals (5-2) reversed the conviction affirmed by the lower court<sup>40</sup> and held that the evidence was insufficient to show the interference with the pedestrians' right of way requisite to a conviction under subdivision 2 and that such conduct could not be considered congregating with others within subdivision 3.

Guided by the common law definition of "breach of peace,"<sup>41</sup> and reinforced by prior decisions,<sup>42</sup> the Court held that mere inconvenience was not sufficient to constitute disorderly conduct within subdivision 2 but rather there must be a serious annoyance or a threatening or abusive manner evinced by the defendants. With respect to congregating under subdivision 3, the Court pointed out that while the gravamen of the offense was the refusal to move when so ordered, there must first be a congregation. Such congregation, they held, requires at least three persons and since the defendants were only two in number and, according to the evidence in the record, were not even standing together, they could hardly be said to have been congregating with others.<sup>43</sup>

The dissent, while not discussing the congregating question, felt there was sufficient evidence upon which to base a conviction under subdivision 2 for interfering with pedestrians' right of way.

While one might take issue with the majority's interpretation of the facts,

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39. 3 N.Y.2d 327, 165 N.Y.S.2d 113 (1957).

40. 2 Misc.2d 827, 150 N.Y.S.2d 436 (Spec. Sess. 1956), affirming a conviction in Magistrate's Court of the City of New York.

41. *People v. Most*, 171 N.Y. 423, 64 N.E. 175 (1902).

42. *People v. Nixon*, 265 N.Y. 362, 193 N.E. 175 (1934); *People v. Perry*, 265 N.Y. 362, 193 N.E. 175 (1934).

43. See *People v. Lo Vecchio*, 185 Misc. 197, 56 N.Y.S.2d 354 (City Ct. 1945).

the result reached is consonant with the prevailing principle that a criminal statute should be strictly construed in favor of the defendant.<sup>44</sup>

### Conviction For Speeding Based Upon Speedometer Reading

In a prosecution for speeding, when the evidence includes the arresting officer's statement of his speedometer reading while following the defendant's car, must the People prove the accuracy of the instrument? Although a number of County Courts in New York have held that when there was no competent evidence of the accuracy of the speedometer, a conviction based upon a speedometer reading will be reversed,<sup>45</sup> there is an "almost tomb-like silence"<sup>46</sup> on this question in the state appellate courts.

The silence is rendered somewhat less than deafening by the opinion in *People v. Heyser*,<sup>47</sup> wherein the Nassau County Court's affirmation of defendant's conviction in a Court of Special Sessions is upheld. The Court declares: "In our opinion, evidence of the reading of an untested speedometer without more would be insufficient to sustain a conviction for speeding."<sup>48</sup> As a practical matter, this is indeed of premonitory value, even though it is dictum only. The case actually decided that evidence of the reading of an untested speedometer and an estimate of approximately the same speed made by the pursuing officer "independent of the speedometer," together are sufficient to sustain the conviction when there is also in the record supporting evidence as to the *expertise* of the officer in judging speed,<sup>49</sup> and as to the adequacy of the officer's opportunity for observation,<sup>50</sup> and when the speed as found by the speedometer reading and the officer's "independent" estimate exceeds the speed-limit by a substantial margin.<sup>51</sup>

In *People v. Marsellus*,<sup>52</sup> decided about two months later, the Court follows *People v. Heyser*, stating that therein, ". . . we held at least by implication that evidence as to what even an untested speedometer showed was admissible." A fortiori, according to *People v. Marsellus*, where evidence presented on trial before a Court of Special Sessions included the elements noted above, it was not error to

44. *People v. Ahearn*, 196 N.Y. 221, 89 N.E. 930 (1909).

45. *People v. Boehme*, 1 Misc.2d 629, 152 N.Y.S.2d 759 (County Ct. 1955); *People v. Rothstein*, 1 Misc.2d 516, 152 N.Y.S.2d 757 (County Ct. 1955); *People v. Rice*, 206 Misc. 999, 136 N.Y.S.2d 134 (County Ct. 1954); *People v. Matthews*, 4 Misc.2d 278, 155 N.Y.S.2d 873 (County Ct. 1956); *People v. Greenhouse*, 4 Misc.2d 692, 136 N.Y.S.2d 675 (County Ct. 1955).

46. Annot., 21 A.L.R.2d 1200 (1952).

47. 2 N.Y.2d 390, 161 N.Y.S.2d 36 (1957).

48. *People v. Heyser*, *supra* note 47 at 393, 161 N.Y.S.2d at 38.

49. *People v. Matthews*, *supra* note 45; *People v. Rothstein*, *supra* note 45 (cases distinguished by Court on grounds of no evidence in record of officer's *expertise*).

50. *People v. Greenhouse*, *supra* note 45 (distinguished by Court in that officer did not have adequate opportunity for observation).

51. See *People v. Boehme*, *supra* note 45.

52. 2 N.Y.2d 653, 163 N.Y.S.2d 1 (1957).