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and therefore he could constitutionally refuse to answer such questions on the grounds that the answers would incriminate him.[63]

The Federal Communication Act prohibits interception of any communications and the publication or divulgence of the same, and prohibits the use in federal courts of any evidence so obtained,[64] thus limiting its effect to federal jurisdiction. It does not supersede the state's exercise of its police power in tapping telephone lines, since there is not clear manifestation to the contrary.[65] Under the New York Code of Criminal Procedure wire taps made under a court order are admissible in court as evidence,[66] even though obtained in violation of the Federal Communications Act.[67] Therefore it is clear that the federal act does not prevent the divulging, in state courts, of intercepted telephone conversations.[68] And this rule is not affected by the circumstance that requiring a witness to testify as to wire taps might cause him to violate the Federal Communications Act.[69] In any event, as the Court rightly pointed out, under the facts of this case, the defendant's testimony would not fall within the federal act. The act prohibits third persons from intercepting and publishing communications, and does not prohibit divulgence by the participants of a telephone conversation. Defendant's other objections as to the amount of his grand jury testimony admitted as evidence, and the manner in which he was indicted, were dispensed with on the grounds that the procedures used were proper in a contempt procedure.[70]

Though the merits of wire tapping, even for investigation purposes, may be questionable, and the objections to its admissibility as evidence numerous, the Court reached a proper result. It is clear that the federal rule does not control the use of wire taps in state proceedings, and that it does not constitute a defense in the state courts.

Criminal Negligence In Operation Of Motor Vehicles

In *People v. Decina*[71] the defendant, suffering from Jacksonian epilepsy, was convicted of criminal negligence under section 1053-a of the Penal Law as a result of losing control over his vehicle which struck five minor pedestrians, four of whom died from injuries sustained.

63. N.Y. CONST. art. II, §6 (1894).
64. Note 62, *supra*.
65. Black v. Impellineni, 281 App. Div. 671, 117 N.Y.S.2d 686 (1st Dep't 1952).
66. N.Y. CODE CRIM. PROC. §813-a.
67. Application of Order Permitting Interception of Telephone Conversation of Anonymous, 207 Misc. 69, 136 N.Y.S.2d 612 (Sup. Ct. 1955).
68. Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E.2d 854 (1946); Schwartz v. State of Texas, 344 U.S. 199 (1952).
69. People v. Stemmer, 298 N.Y. 728, 83 N.E.2d 141 (1948).
70. N.Y. PENAL LAW §600.
71. 2 N.Y.2d 133, 157 N.Y.S.2d 558 (1956).

The Court of Appeals granted a new trial holding it was error under section 352 of the Civil Practice Act to have admitted testimony of a staff physician who examined the defendant as part of his routine duties at the hospital. Although a police guard standing nearby overheard the conversation, the communication to the doctor remains privileged. The Court drew a statutory distinction to the attorney-client relationship where the presence of a third person, excepting a law clerk or secretary, often destroys the privilege.[72] A physican, dentist or nurse acting in their professional capacity are, by the foregoing statute, incompetent witnesses. However, it is interesting to note that the statute does not hold the communication, in itself, incompetent. For this reason there is a strong indication, disturbing as it may be, that the policeman could have testified as to what he overheard.[73]

Although the Court remanded on the grounds of inadmissible testimony, the opinion focused considerable attention to the applicability of the penal statute, *supra,* to the facts herein. Section 1053-a was enacted because of the difficulty in obtaining second degree manslaughter convictions for any death caused by the culpable negligent operation of a motor vehicle.[74] It provides that one operating a vehicle in a reckless or culpably negligent manner, causing the death of a human being, is guilty of criminal negligence.

Although the section is somewhat vague in its terms and scope, and questionable in regard to the requirement of due notice to the public for which a crime may be charged, it was upheld as being constitutional.[75]

However, the problem of scope remains perplexing to the courts. A conviction was sustained under section 1053-a where the defendant was intoxicated and was speeding on the wrong side of the road.[76] One who realized that he was sleepy or in danger of falling asleep but continued to drive, was held to be driving in a manner showing a reckless disregard for the life and property of others.[77] Driving at night on the wrong side of a curving road at a speed excessive of forty miles per hour was held sufficient grounds for a conviction.[78] And, conviction of a defendant who operated a vehicle on a foggy night

72. See Denaro v. Prudential Ins. Co., 154 App. Div. 840, 139 N.Y.Supp. 758 (2d Dep't 1913); Baumann v. Steingester, 213 N.Y. 328, 107 N.E. 578 (1915); see also a bill introduced recommending amendment to section 352 C.P.A. requiring the physician, dentist or nurse to testify in relation to prosecutions under the criminal negligence statute. (S. Int. 3427, Pr. 3617, Shultz, Codes; A. Int. 3510, Pr. 3652, Amann, Rules).
73. See RICHARDSON ON EVIDENCE, §438 (8th ed. 1955).
74. See Governor's Bill Jacket on L. 1936, c. 733.
75. People v. Gardner, 255 App. Div. 683, 8 N.Y.S.2d 917 (4th Dep't 1939).
76. People v. Kreis, 302 N.Y. 894, 100 N.E.2d 179 (1951).
77. Enos v. Macduff, 282 App. Div. 116, 121 N.Y.S.2d 647 (4th Dep't 1953).
78. People v. Marconi, 110 Cal. App. 683, 5 P.2d 974 (1931).

at a speed in disregard of due caution was upheld.[79] However, the existence of excessive speed, without more, is not grounds for a conviction.[80] By allowing an inexperienced driver to operate an automobile resulting in a fatal accident, a criminal defendant was convicted of negligent homicide.[81] Although the *Decina* case involves the first conviction of negligent homicide in New York based upon prior knowledge of a disabling physical condition, other jurisdictions have sustained convictions in similar circumstances. Conviction was upheld of a defendant subject to frequent attacks of vertiga which caused him to lose consciousness.[82] Where one drove an automobile with the knowledge he might lose consciousness without warning from a disease known as Menieve's Syndrome, his act justified conviction under a criminal negligence statute.[83]

When the defendant's conduct manifests a disregard of the consequences and indifference to the rights of others, he subjects himself to possible prosecution under section 1053-a. However, New York has required that the evidence must disclose what would almost be tantamount to a willfulness to do harm.[84] The majority of the Court found that the defendant knew he might suffer an epileptic seizure without warning, and yet he deliberately chose to drive a vehicle disregarding the possible consequences. Possession or non-possession by the defendant of a driver's license was irrelevant in respect to the charge.

Judge Desmond, dissenting in part, argued that this decision subjects those suffering from diseases such as nephritis, diabetes, coronary ailments and similar physical conditions which may give rise to loss of control over a vehicle, to criminal prosecution. It is true that such a conclusion may be a result of this decision. But, there is danger in generalizing. A conviction under the statute is a matter of degree. One who suffers physical attacks without a moment's notice, thereby losing complete control over a vehicle (which is accepted to be a potentially dangerous instrumentality),[85] is unnecessarily risking his life as well as the lives of others. On the other hand, one suffering from such maladies is not, ipso facto, guilty of criminal negligence upon the occasion of a fatal accident. If the nature of a motorist's illness is one that gives warning of a pending seizure, it may be assumed that enough time would be available to the operator so as to bring the vehicle to a halt. Such a party would not be guilty of criminal negligence.

In *People v. Eckert*,[86] the defendant was convicted under Penal Law section 1053-a when he caused the death of another by an automobile as a result of an

79. People v. Emmons, 114 Cal. App. 26, 299 Pac. 541 (1931).
80. People v. Walker, 296 N.Y. 740, 70 N.E.2d 548 (1946).
81. People v. Ingersall, 245 Mich. 530, 222 N.W. 765 (1929).
82. Tift v. State, 17 Ga. App. 663, 88 S.E. 41 (1916).
83. State v. Gooze, 14 N.J. Super. 277,81 A.2d 811 (1951).
84. People v. Brocato, 32 N.Y.S.2d 689 (County Ct. 1942).
85. See note 71 *supra*.
86. 2 N.Y.2d 126, 157 N.Y.S.2d 551 (1956).

epileptic seizure. Where evidence supported every element of the crime, corroborative privileged statements by the defendant's doctor before the grand jury did not require dismissal of the indictment. The case differed from *People v. Decina*[87] in that privileged testimony was not introduced at the trial.

Right To Counsel

The Code of Criminal Procedure not only provides that a defendant has a right to counsel, but also that he must be afforded a reasonable opportunity to obtain such counsel.[88]

In *People v. Marincic*,[89] the Court held, reversing the City Court of Watertown and the County Court,[90] that a conviction of petit larceny could not be upheld where the lower court informed the defendant of her rights under section 699 and then, without waiting for any reply, immediately asked the defendant how she pleaded, and accepted a plea of guilty.

Section 699 specifically provides that "a magistrate must allow the defendant a reasonable time to send for counsel, and adjourn the proceedings for that purpose."[91] This section is not satisfied if the defendant is merely informed of his right to counsel.[92] He must be afforded a real opportunity to obtain such counsel.[93]

The Law Revision Report of 1940, which resulted in the enactment of section 699, makes it clear that the defendant must be given a reasonable opportunity to request counsel before being told to plead.[94] Since the lower court did not comply with either the spirit or the language of the statute, the Court of Appeals properly reversed the conviction.

Right To Speedy Trial

During the last term of the Court of Appeals, two problems concerning the defendant's waiver of his right to a speedy trial were adjudicated.

In *People v. White*,[95] although four years had elapsed from the filing of the indictment to the time of trial, counsel for the defense not only acquiesced in

87. See note 71 *supra*.
88. N.Y. CODE CRIM. PROC. §699.
89. 2 N.Y. 2d 181, 158 N.Y.S.2d 569 (1957).
90. 152 N.Y.S. 2d 382 (County Ct. 1956).
91. N.Y. CODE CRIM. PROC. §699(2).
92. People v. Pahner, 296 N.Y. 324, 73 N.E.2d 533 (1947).
93. People v. McLaughlin, 291 N.Y. 480, 53 N.E. 2d 356 (1943).
94. REPORT OF LAW REVISION COMMISSION 1940, p. 95.
95. 2 N.Y.2d 220, 159 N.Y.S.2d 168 (1957).