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Criminal Law—After Trial

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which is not effected within the legally circumscribed area of propriety, whereby the arrest becomes illegal, endows the victim with a right to resist by using reasonably sufficient force to prevent the offense against his person.[97]

People v. Cherry[98] involved a concededly illegal arrest by police officers, one of whom was attacked by the victim biting his thumb in an effort to avoid such arrest. The Appellate Division, affirming a finding by the court below that defendant was guilty of assault, third degree,[99] in that he employed more force than was necessary or sufficient to prevent the offense committed upon him, was reversed by the Court of Appeals. The majority opinion by Judge Fuld was to the effect that since the officers were guilty of an illegal arrest,[100] and the defendant was thereby empowered to use sufficient force to *prevent* that improper detention,[101] defendant's bite did not constitute an assault, either as a revengeful counter-attack, or vindictive infliction of needless injury, regardless of the fact that the officers displayed their badges before making such arrest.

The dissenting opinion by Judge Desmond, in which Judge Froessel concurred, is based on the premise that since the court below found that defendant did use more force than was necessary for the purpose, which finding was affirmed by the Appellate Division, the latter authorized to pass on facts unlike the Court of Appeals, a reversal would be justified only if as a matter of law the defendant did not use more force than was reasonably necessary under the circumstances.[102]

After Trial

a. Legality of Judgment—Habeas corpus: Does the omission of a direction by the trial court for the enforcement of payment of a fine, which fine was a part of an original sentence including imprisonment, render the judgment on which the sentence is imposed defective? This question was presented to the Court of Appeals in *People ex rel. Sedotto v. Jackson,*[103] where the relator, who had been convicted of perjury, first degree,[104] instituted habeas

97. PENAL LAW § 246.
98. 307 N. Y. 308, 121 N. E. 2d 238 (1954).
99. 282 App. Div. 948, 125 N. Y. S. 2d 654 (2d Dep't 1953).
100. See note 96 *supra.*
101. See note 98 *supra* at 310, 121 N. E. 2d 238, 239.
102. *Id.,* at 315-317, 121 N. E. 2d 238, 243; see, *e. g., People v. Murray,* 54 Hun 406, 7 N. Y. Supp. 548 (1889); *Magar v. Hammond,* 183 N. Y. 387, 390, 76 N. E. 474, 475 (1906).
103. 307 N. Y. 291, 121 N. E. 2d 229 (1954).
104. PENAL LAW § 1633 (1) provides the punishment for perjury, first degree: "Perjury in the first degree and subornation of perjury in the first degree are felonies and are punishable by imprisonment for a term not exceeding five years, or by a fine of not more than $5,000, or by both."

corpus proceedings[105] to test the legality of the judgment by which he was imprisoned. He was sentenced to a term in state prison and fined the sum of $5,000. Following the imposition of sentence and imprisonment it was discovered that although a fine was recorded in the confinement papers as a part of the sentence, no provision was included to indicate how the fine was to be implemented in lieu of payment. The relator was thereupon resentenced to the same penal exactions with an amendment that in lieu of payment of fine he was to serve one extra year of imprisonment to run consecutively to sentence imposed, *nunc pro tunc* as of the date of the original sentence.

Special Term sustained the writ and relator was ordered discharged from custody. The Appellate Division reversed the order on the law, dismissed the writ and remanded relator to prison, concluding that the amendment upon resentence was related to a separable part of the judgment, a method of enforcing the fine that did not change or affect the prison term which prisoner had already commenced;[106] but that the omission of an alternative to the payment of the fine in the original judgment was a "defect in the judgment."[107] On this basis, it appears that the implementation effect of the amendment upon resentence constituted a valid correction of an erroneous sentence after its commencement.[108]

The Court of Appeals disagreed with the Appellate Division that the omission from the original sentence of the alternative provision in lieu of payment of the fine made the judgment defective and remitted the matter to Special Term. The court relied on the language of Section 718 of the Code of Criminal Procedure which provides for the imposition of an alternative in lieu of payment of a fine in terms which are permissive, not mandatory.[109] Hence the omission did not void the original sentence.[110] On the premise that the original sentence was not defective, but rather

105. See the discussion of the writ of habeas corpus, and its limitations in New York in 1 BFLO. L. REV. 268 (1952).

106. See PENAL LAW § 2188 which provides that once imprisonment has begun under a judgment, it shall not be interrupted. See also *Matter of Cedar*, 240 App. Div. 182, 269 N. Y. Supp. 733 (1st Dep't 1934).

107. 283 App. Div. 540, 541, 128 N. Y. S. 2d 872, 873 (3d Dep't 1954).

108. See *People ex rel. Mendola v. Murphy*, 237 App. Div. 529, 261 N. Y. Supp. 315 (2d Dep't 1932); *People ex rel. Miresi v. Murphy*, 253 App. Div. 441, 2 N. Y. S. 2d 731 (3d Dep't 1938).

109. CODE CRIM. PROC. § 718 provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied; specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine . . .." See also CODE CRIM. PROC. § 484.

110. *People v. Robarge*, 142 Misc. 457, 462, 255 N. Y. Supp. 448, 454 (Sup. Ct. 1932), *aff'd*, 235 App. Div. 896, 257 N. Y. Supp. 1002 (4th Dep't 1932); *City of Buffalo v. Murphy*, 228 App. Div. 279, 287, 239 N. Y. Supp. 206, 216 (4th Dep't 1930); see also *Hill v. United States ex rel. Wampler*, 298 U. S. 460 (1936).

a valid exercise of judicial discretion, the trial court was without authority to vacate the sentence and impose a new one of the same penal exactions with an amendment corrective of an illusory error.[111] Upon remission of the matter to Special Term, the court called attention to the application of Section 220 of the Correction Law.[112]

b. Requirements of appeal from Courts of Special Sessions: In *People v. Omans*,[113] the Court of Appeals negatively answered the question whether a non-compliance with the proper provision of the Code of Criminal Procedure[114] was curable by resort to Section 524-a of the Code which permits the court to which appeal is taken to supply omissions inadvertently or excusably made.

Defendant, who was convicted of speeding[115] by a court of Special Sessions sought to perfect his appeal by serving a notice of appeal on the Justice of the Peace, the District Attorney, and County Clerk. Prior to appellate argument before County Court, the District Attorney appeared specially to dismiss the appeal because defendant had not served an affidavit of errors as required of appeals from courts of special sessions.[116] Defendant endeavored to cure his defect pursuant to Section 524-a of the Code,[117] but County Court denied his application.

The Court of Appeals, affirming the denial, pointed out (1) that Section 524-a, contained in Part IV of the Code is explicitly applicable only to proceedings in criminal actions prosecuted by indictments, whereas Section 751 is contained in Part V, which is applicable to proceedings in courts of special sessions and police courts, which proceedings are usually brought on the basis of a complaint or information. Part V, therefore, has a system of procedure completely independent of Part IV, unless specially provided otherwise.[118] There being no other provision in either

111. *E. g., People ex rel. Hirschberg v. Orange Co. Ct.*, 271 N. Y. 151, 156-157, 2 N. E. 2d 521, 523-524 (1936); *Schenectady Trust Co. v. Emmons*, 290 N. Y. 225, 229, 48 N. E. 2d 497, 499 (1943); see also *United States v. Murray*, 275 U. S. 347, 358 (1928).

112. CORRECTION LAW § 220 contains the provisions and limitations for discharge from parole.

113. 306 N. Y. 379, 118 N. E. 2d 566 (1954).

114. CODE CRIM. PROC. § 751.

115. VEHICLE AND TRAFFIC LAW § 56 (1).

116. See note 114 *supra; cf. People v. Belcher*, 299 N. Y. 321, 87 N. E. 2d 278 (1949).

117. CODE CRIM. PROC. § 524-a provides: "Where appellant, seasonably and in good faith, serves a notice of appeal, either upon the clerk with whom the judgment roll is filed, or upon the District Attorney of the county in which the judgment was rendered, but omits through mistake or inadvertence or excusable neglect, to serve it upon the other, or to do any other act necessary to perfect the appeal . . . the court, in or to which the appeal is taken, upon proof by affidavit of facts, may permit, in its discretion, the omission to be supplied . . . ."

118. See *People v. Giles*, 152 N. Y. 136, 138, 46 N. E. 326, 327 (1897).

part which may be construed as making Section 524-a referable to the procedure prescribed in Section 751, the provision for cure is inapplicable.[119] And the court further pointed out (2) that under Section 524-a, the express relation to the correction of errors in a case is confined to those instances where appeal is perfected by service of notice of appeal, whereas Section 751 expressly provides for effectuation of appeal by filing and service of an affidavit of errors.

VI. Decedent Estates

Testamentary Capacity

At common law, communications made by a patient to his physician for the purpose of receiving medical aid, even though made in the strictest confidence, were not privileged.[1] Consequently in 1828 the Legislature enacted what is now Section 352 of the Civil Practice Act, which created a privilege between physician and patient. This section provides, "a person duly authorized to practice physic or surgery, or dentistry, or a registered professional or licensed practical nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity . . ."

Courts construed this statute so as to preclude a physician from testifying even as to knowledge gained from observation of his patient's appearance during the period of attendance.[2] However a doctor could testify concerning the condition of a person where he did not attend him professionally.[3]

Judge Earl in *Renihan v. Dennin*,[4] commented on this construction and said "It is probably true that the statute, as we feel obligated to construe it, will work considerable mischief. In testamentary cases, where the contest relates to the competency of the testator it will exclude evidence of physicians, which is generally the most important and decisive . . . But the remedy is with the Legislature and not with the courts." Judge Earl later

119. See *People v. Cornell*, 186 Misc. 825, 59 N. Y. S. 2d 835 (Delaware County Ct. 1946).

1. *Dutchess of Kingston's Case*, 20 How. St. Tr. 613 (1776); *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 569 (1879).
2. *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185 (1876); *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281 (1880); *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320 (1886).
3. *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564 (1879).
4. 103 N. Y. 573, 580, 9 N. E. 320, 322 (1886).