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RECENT CASES

CRIMINAL LAW—INSANITY—TEST OF IRRESPONSIBILITY

Defendant was convicted of housebreaking. The defense asserted at trial was insanity at the time of the act. The conviction was appealed on the grounds that: (1) the court incorrectly applied the rules governing burden of proof on the defense of insanity and (2) the existing tests of criminal responsibility are obsolete and should be superseded. *Held,* reversed because of the incorrect application of the rules governing the burden of proof. The test of irresponsibility to be applied henceforth in the District of Columbia is that the accused is not criminally responsible if his unlawful act was the product of mental disease or defect. *Durham v. United States,* 214 F.2d 862 (D.C. Cir. 1954).

The paths of reform in this area of criminal law have taken two courses: procedural reform designed to achieve the "elimination of the battle of experts,"[1] and attempts, as in the instant case, to set up a more enlightened test which keeps abreast of medical advancement. The advocates of the first avenue of reform are interested only in a neutral and accurate application of the existing tests.[2] This goal may be attained by the enactment of statutes providing for (1) appointment by the court of impartial experts to examine the defendant and report their findings,[3] (2) commitment to a mental hospital for examination,[4] and (3) a routine psychiatric examination by experts appointed by the state's department of mental health.[5]

The instant case, however, deals specifically with the test to be applied to determine criminal insanity. The ability to distinguish between right and wrong is almost universally held to be the correct test of irresponsibility, so that a person so mentally disordered at the time of his act as to be incapable of knowing that a particular act is wrongful should not be punished.[6] An accused should not be held responsible if, as a result of mental disease, he did not know the nature and quality of his act; or, if he did know it, he did not

1. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 329 (1954).
2. *Ibid.*
3. *E.g.,* ALA. CODE tit. 15 § 428 Supp. 1953 (defendant's capacity to stand trial); R.I. GEN. LAWS c. 537, §§ 20, 21 (1938) (criminal responsibility); UTAH CODE ANN. § 77-24-17 (1953) (capacity, responsibility or both). *But cf.* State v. Cockriel, 314 Mo. 699, 285 S.W. 440 (1926); State v. Horne, 171 N.C. 787, 88 S.E. 433 (1916) (courts have common-law power to call witnesses).
4. *E.g.,* ARK. STAT. ANN. §§ 43-1301 *et seq.* (Supp. 1951); S. C. CODE § 32-966 (1952); TENN. CODE ANN. § 4459.1 (5) (Williams Supp. 1952).
5. MASS. ANN. LAWS c. 123, § 100 A (1942).
6. WEIHOFEN, *op. cit. supra,* note 1 at 81.

know that it was wrong. This so-called right-wrong test is the sole test of irresponsibility in England and in the majority of jurisdictions within the United States.[7] The test, in and of itself, however, is said to be defective, and its most persuasive critics attack the fact that it lacks any reference to the volitional aspects of conduct.[8] Criminal responsibility cannot be treated as a question of intelligence to the exclusion of the will.[9] That some insane persons retain, indefinitely, approved ethical concepts in relation to specific deeds, and to the wrongness of murder in particular, is generally accepted.[10]

The right-wrong test was the exclusive test of criminal responsibility in the District of Columbia until it was supplemented by the irresistible-impulse test in 1929.[11] This was in accord with a strong minority of jurisdictions within the United States[12] which now hold that the right-wrong test is not sufficient in all cases; in those states the irresistible-impulse test holds a person excused if, because of mental disease, he is incapable of controlling his impulse to commit a crime, though knowing it to be a wrong.[13] However, the irresistible-impulse test is attacked in the principal case as inadequate in that it gives no recognition to mental illness characterized by brooding and reflection, thus relegating acts caused by such illness to the application of the inadequate right-wrong test.[14]

Prior to the instant case only New Hampshire[15] had discarded the right-wrong test as laid down by the House of Lords in the famous *McNaghten's Case.*[16] The instant court, being of the opinion that all "tests" failed because they were attempts to lay down as law that which by its very nature is essentially a matter of fact, proceeded to

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7. Davis v. State, 44 Fla. 32, 48, 32 So. 822 (1902). Taylor v. State, 187 Md. 306, 49 A.2d 787 (1946); State v. Barton, 361 Mo. 780, 236 S.W.2d 596 (1951); State v. Lamm, 232 N.C. 402, 61 S.E. 188 (1950); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951); Temples v. State, 183 Tenn. 622, 194 S.W.2d 332 (1946) (definitely rejected irresistible impulse as defense); WEIHOFEN, *op. cit. supra* note 1, at 51.

8. Hall, *Mental Disease and Criminal Responsibility,* 45 COL. L. REV. 677, 717 (1945).

9. Barnes, *A Century of the McNaghten Rules,* 8 CAMB. L. J. 300, 310 (1944).

10. Tillim, *Mental Disorder and Criminal Responsibility,* 41 JOUR. CRIM. L. & CRIMINOLOGY 600, 604 (1951).

11. Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929), 70 A.L.R. 654 (1931).

12. Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Utah, Vermont, Virginia, Wyoming, and perhaps Montana, New Mexico, and Ohio. WEIHOFEN, *op. cit. supra* note 1, at 51.

13. Davis v. United States, 160 U.S. 469 (1895); Lakey v. State, 258 Ala. 116, 61 So. 2d, 117 (1952); Parsons v. State, 81 Ala. 577, 2 So. 854 (1887); Bradley v. State, 31 Ind. 492 (1870); Horn v. Commonwealth, 292 Ky. 587, 167 S.W.2d 58 (1943). *But see* Tunget v. Commonwealth, 303 Ky. 834, 198 S.W.2d 785 (1946).

14. Instant Case at 874.

15. State v. Pike, 49 N.H. 399 (1869).

16. 8 Eng. Rep. 718 (1843).

adopt as the new test for the District of Columbia one similar to that followed in New Hampshire.[17] The jury is to determine, as questions of fact, whether at the time of the act, the defendant had the mental capacity to entertain a criminal intent and whether he did entertain such intent.[18] Or, as the instant court phrased it, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[19]

The court has failed to establish a sufficient determining standard of causation between the act and the defective mind.[20] The criteria set forth depend upon the interpretation of "the product of mental disease." Must the defendant, to be exculpated, be incapable of the guilty intent required to constitute the crime?[21] If not, the court has so narrowed the area of criminal liability that a person with only a mild mental disturbance may be found to be irresponsible.[22] If the court is merely leaving it to the jury to determine the symptoms, phases, or manifestations indicative of lack of capacity to entertain a criminal intent, there can be no hope of establishing any definite and consistent rules regarding responsibility. It would seem wiser for the court to prescribe definite standards by proper charges defining causation, thereby limiting arbitrary elements.

That the instant court realizes the new test is not necessarily the definitive answer is obvious from its wait-and-see attitude adopted in *Stewart v. United States*.[23] There this same court denied reconsideration of its previous refusal to allow an instruction on diminished responsibility for a mental disorder short of insanity[24] until it could appraise the results of the test of criminal responsibility which was announced in the instant case.

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17. State v. Pike, 49 N.H. 399 (1869).
18. State v. Jones, 50 N.H. 369 (1871). But what if no criminal intent was required?
19. Instant Case at 874-875. "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."
20. Glueck, *Psychiatry and the Criminal Law*, 14 VA. L. REV. 155, 176 (1928).
21. State v. Jones, 50 N.H. 369 (1871).
22. Glueck, *Psychiatry and the Criminal Law*, 14 VA. L. REV. 155, 176 (1928).
23. 214 F.2d 879 (D.C. Cir. 1954).
24. Fisher v. United States, 149 F.2d 28 (D.C. Cir. 1945) (mental disorder short of legal insanity cannot reduce crime from first degree murder to second degree murder), *aff'd* 328 U.S. 463 (1946).

CRIMINAL PROCEDURE—CONTINUANCES—DELAY OF TRIAL BECAUSE OF CROWDED CIVIL DOCKET

Defendant, indicted for murder, pleaded not guilty. A statute[1] required that if the trial were not held during the next term of court after the indictment, the prosecution must be dismissed, unless "good cause" for the delay were shown. The trial was continued beyond the second term because of a full docket of civil cases, set by the trial judge after the plea in the instant case. Timely motions for dismissal, made at the end of the second term, and before end of the trial, were denied. After conviction, defendant appealed, alleging error in the court's refusal to dismiss. *Held,* conviction affirmed. The trial court may take notice of the condition of its own docket, and continue the case in the exercise of sound discretion. *State v. Kuhnhausen,* 272 P.2d 225 (Ore. 1954).

The question is clearly presented whether, under the statute referred to, a docket clogged with civil cases constitutes good cause for delay of a criminal trial beyond the statutory limit. The question assumes a position of importance, since most states have statutes similar to the Oregon statute, providing for a speedy trial.[2]

The right to a speedy trial has been one of the most guarded human rights since 1215, when it was incorporated, by demand, into the Magna Charta. It was later made a part of the Petition of Rights. As pointed out by the strong dissent in the instant case, these two great charters of Anglo-Saxon freedom have been the source of hundreds of constitutional and statutory provisions which guarantee the accused that he shall not languish in prison for an undue period of time awaiting trial, and that he shall not be oppressed by having a

1. ORE. COMP. LAWS ANN. § 26-2002 (1940). "If a defendant indicted for a crime, whose trial has not been postponed upon his application or by his consent, be not brought to trial at the next term of court in which the offense is triable, after it is found, the court must order the indictment to be dismissed, unless good cause to the contrary be shown."

2. ALA. CODE tit. 13, § 330 (1940); ARIZ. CODE ANN. § 44-1503 (1939); CAL. PEN. CODE § 1381 (1949); COLO. STAT. ANN. c. 48, § 485 (1935); REV. CODE DEL. c. 156, § 5341 (1935); FLA. STAT. ANN. § 915.01 (1944); GA. CODE ANN. § 27-2002 (1953); IDAHO CODE ANN. § 19-3501 (1947); ILL. ANN. STAT. c. 38, § 748 (1934); IND. ANN. STAT. § 9-1403 (Burns 1933); IOWA CODE ANN. § 795.2 (1950); KAN. GEN. STAT. § 62-1301 (1949); KY. CODES, CRIM. PRAC. § 188 (1948); LA. CODE CRIM. LAW & PROC. ANN. art. 318-320 (1943); ME. REV. STAT. c. 135, § 9 (1944); MASS. ANN. LAWS c. 277, § 72 (1933); MICH. STAT. ANN. § 28.978 (1938); MISS. CODE ANN. § 2518 (1942); MONT. REV. CODE ANN. § 94-9501 (1947); NEB. REV. STAT. § 29-1202 (1943); NEV. COMP. LAWS § 11194 (1929); N. J. REV. STAT. § 2-195-13 (1939); N. M. STAT. ANN. § 42-1104 (1941); N. Y. CRIM. CODE § 668 (1945); N. C. GEN. STAT. § 15-10 (1953); N. D. REV. CODE § 29-1801-1804 (1943); OHIO REV. CODE § 2945.71 (1954); OKLA. STAT. tit. 22, § 812 (1951); PA. STAT. ANN. tit. 19, § 781 (1930); R. I. GEN. LAWS c. 625, § 57 (1938); S. C. CODE § 17-509 (1952); S. D. CODE § 34.2202 (1939); TENN. CODE ANN. § 11717 (Williams 1934); TEX. CODE CRIM. PROC. ANN. art. 538-540 (1954); UTAH CODE ANN. § 77-51-4 (1953); VA. CODE § 19-165 (1950); WASH. REV. CODE § 10.46.010 (1951); W. VA. CODE ANN. § 6210 (1949); WIS. STAT. § 335.10 (1949); WYO. COMP. STAT. ANN. § 10-1312 (1945).

criminal prosecution suspended over him for an indefinite time.[3] Such is the background of the statute under which this case arose.

A statute such as this, providing that one accused of a crime shall be brought to trial within a specified time, where delay is not attributable to the prisoner's act, is mandatory and imperative in its provisions, and the court has no discretion to grant an arbitrary continuance.[4] Certain delays are, of course, permissible; some events may make it absolutely essential to continue the case. It is these events which constitute good cause.

There is a wide split of authority on what does constitute good cause. Some courts hold that a crowded docket or lack of time is good cause,[5] while others hold expressly to the contrary.[6] The prosecution is, of course, entitled to a reasonable time for preparation of the case, but the fact that the prosecuting attorney simply finds himself unprepared does not constitute good cause for delay.[7] Where the defendant requested or acquiesced in a continuance or where the delay was due to the fault of the defendant, good cause for delay is uniformly held to be present.[8] Likewise, events outside human control, such as destruction of the court house by fire, or an epidemic which would prevent assembling a jury, would satisfy the requirements of good cause.[9] On the other hand, the fact that a defendant has not asked for trial would be no reason for delay, since it is not up to the defendant to set his own trial.[10]

The facts of the instant case take it outside even the split mentioned above. Here, the trial judge deliberately set a full docket of civil cases, after accepting the not guilty plea of the defendant. The case thus goes further than previous decisions, and amounts to a deliberate disregard of the rights of the defendant under the statute.

An important consideration in cases of this type is whether the discharge of the accused under the statute would be a bar to a subsequent prosecution for the same offense. While there is a split on this point, it is generally held that a person whose prosecution is once dismissed

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3. *See* State v. Clark, 86 Ore. 464, 168 Pac. 944, 946 (1917); 14 AM. JUR., *Criminal Law* § 134 (1936).
4. *Re* Begerow, 133 Cal. 349, 65 Pac. 828 (1901); *see Ex Parte* Ford, 160 Cal. 300, 116 Pac. 757, 759 (1911); 14 AM. JUR., *Criminal Law* § 134 (1936). *Contra*: State v. Barrett, 121 Ore. 57, 254 Pac. 198 (1927) (by implication).
5. State v. Weitzel, 153 Ore. 524, 56 P.2d 1111 (1936); *see Re* Edwards, 35 Kan. 99, 10 Pac. 539 (1886).
6. Van Buren v. People, 7 Colo. App. 136, 42 Pac. 599 (1895); State v. Kuhn, 154 Ind. 450, 57 N.E. 106 (1900).
7. Culver v. State, 11 Okla. Crim. Rep. 4, 141 Pac. 26 (1914); *cf.* Galliao v. State, 7 Boyce 488, 108 Atl. 279 (Del. 1919); State v. Hecht, 90 Kan. 802, 136 Pac. 251 (1913).
8. State v. Swain, 147 Ore. 207, 31 P.2d 745, 93 A.L.R. 921 (1934).
9. State v. Bateham, 94 Ore. 524, 186 Pac. 5 (1919) (by implication).
10. State v. Chadwick, 150 Ore. 645, 47 P.2d 232 (1935); State v. Rosenberg, 71 Ore. 389, 142 Pac. 624 (1914).

cannot be tried again.[11] Indeed, it would seem that the statutory provision could only be given effect by holding that a person once discharged is entitled to immunity from further prosecution for the offense.[12] A dismissal would accomplish very little if the accused could be tried again. While the majority in the instant case made no finding of whether the defendant would, on dismissal, be free from further prosecution, it is possible the idea was present.

The effect of this decision is to allow the trial courts almost unlimited power to continue criminal cases masking the reasons for the continuances behind the "iron veil" of judicial discretion. The judges and district attorneys now have a free rein to continue cases for insufficient reason, or, indeed, for no reason at all. The provisions of the statute will henceforth lose their mandatory character, and the requirement of good cause would be less confusing if left out of the statute book. As the dissent in the instant case so aptly observed, "Judicial discretion! Is there no limit to the excusable errors that may be committed in thy name?"[13]

ELECTIONS—UNDERAGE CANDIDATE—POWER OF JUDICIARY OVER NAMES APPEARING ON BALLOT

Prior to the general elections in Tennessee, a bill in chancery was filed by a candidate for state senator to enjoin the county board of election commissioners from allowing the name of another candidate, who was below the constitutional age, to appear on the ballot. The ineligible candidate was joined in the action. The injunction was granted on the ground that the law permitting any person to be nominated for public office means any person legally qualified. As the Supreme Court was not in session, a single justice granted certiorari to review the decree. *Held*, injunction dissolved. The courts have no jurisdiction over an election contest; the constitution provides that the senate is the judge of the qualifications and election of its members. *State* ex rel. *Sanborn v. Davidson County Board of Election Comm'rs and Richard Fulton*, No. 36391, Tenn. Sup. Ct., Oct. 29, 1954.[1]

The basic question in the instant case is the interpretation to be given the typical constitutional provision that each house of the legis-

11. State v. Crawford, 83 W. Va. 556, 98 S.E. 615 (1919); Note, 3 A.L.R. 519 (1919); *contra:* People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381 (1943); People v. Henwood, 65 Colo. 566, 179 Pac. 874 (1919).
12. People v. Grandstaff, 324 Ill. 70, 154 N.E. 448 (1926).
13. Instant Case at 256.

1. Unpublished. An unofficial report of the case appears in The Nashville Banner, Oct. 30, 1954, p. 2.

lature shall be the judge of the qualifications and election of its members.[2] There is general agreement that power over a particular subject matter conferred upon the legislature by the constitution is to be exercised exclusively by that body even though it be quasi-judicial in nature.[3] But does the exclusive jurisdiction attach upon nomination or after the general election? Upon this question hinges its corollary: over what phases of the election process may the courts exercise jurisdiction?[4]

The instant decision follows those which hold that each legislative body is the exclusive judge from the time of nomination.[5] The rationale is that under a tripartite division of governmental power, no branch may exercise the powers of another except as expressly directed by the constitution. The nominating process, ordinarily a primary election, is considered an integral part of the state election process,[6] and as power over election contests is reposed in the legislature, this exclusive jurisdiction embraces questions concerning the election and qualifications of legislators, notwithstanding that they arise prior to the general election.

The courts which hold that the primary is not under the exclusive control of the legislature rely on the fact that the constitutional provision does not mention nominees and nominations. As the history of the adoption of the constitution discloses no consideration of primary elections, the word "election" is found to refer only to the general election.[7] A candidate is not a member of the legislature until he is elected at the general election and presents himself for admission. Nomination in a primary is in no sense an election to office.[8] Therefore,

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2. TENN. CONST. Art. II, § 11; ALA. CONST. Art. IV, § 51; ARK. CONST. Art. V, § 11; CAL. CONST. Art. IV, § 7; COLO. CONST. Art. V, § 10.

3. *In re* McGee, 36 Cal.2d 592, 226 P.2d 1 (1951); Allen v. Lelande, 164 Cal. 56, 127 Pac. 643 (1912); State *ex rel.* Wahl v. Richards, 44 Del. 566, 64 A.2d 400 (1949); Rainey v. Taylor, 166 Ga. 476, 143 S.E. 383 (1928); State *ex rel.* Attorney-General v. Tomlinson, 20 Kan. 692 (1878); State v. Gilmore, 20 Kan. 551, 27 Am. Rep. 189 (1878); State *ex rel.* Schmeding v. District Ct., 67 N.D. 196, 271 N.W. 137 (1937); *Petition* of Dondero, 94 N.H. 236, 51 A.2d 39 (1947); Gates v. Long, 172 Tenn. 471, 113 S.W.2d 388 (1938); State v. Shumate, 172 Tenn. 451, 113 S.W.2d 381 (1938).

4. In those cases where court action is necessary to preserve to the claimant his right to have the legislature ultimately pass upon his qualifications, the courts generally assume jurisdiction. State *ex rel.* William v. Meyer, 20 N.D. 628, 127 N.W. 834 (1910) (right to have name placed on ballot in primary); State *ex rel.* Cloud v. Election Board, 169 Okla. 363, 36 P.2d 20, 94 A.L.R. 1007 (1934) (right of pardoned felon to have name placed on primary ballot).

5. *In re* McGee, 36 Cal.2d 592, 226 P.2d 1 (1951); State *ex rel.* McGrath v. Erickson, 203 Minn. 390, 281 N.W. 366 (1938).

6. *Cf.* Smith v. Allwright, 321 U.S. 649, 664, 151 A.L.R. 1110 (1944).

7. State *ex rel.* Gramelspacher v. Martin Cir. Ct., 231 Ind. 114, 107 N.E.2d 666 (1952).

8. See dissenting opinion in State *ex rel.* Gramelspacher v. Martin Cir. Ct., *supra* note 7, at 666, to the effect that in many voting districts the primary election is itself the election to office.

the legislature can confer on the court jurisdiction over recounts and contests on nominations in primaries. The court can then determine who has the right to the nomination and, thus, who is to be the candidate.

Much the same result has been reached by upholding a statute designed to prevent the names of persons disqualified by law from appearing on the ballot on the ground of the futility of electing an ineligible person.[9] Other courts have held that even though the legislature is the final judge, it may provide for the nominating and electing of candidates by enacting legislation to be enforced in the courts.[10]

The instant case illustrates the type of controversy which may arise under a strict application of the doctrine of separation of powers. It is, likewise, an example of a constitutional provision which, though recognized as legally binding on all, is not enforceable in a judicial proceeding.[11] It is closely analogous, therefore, to the doctrine of judicial self-limitation expressed in the "political question" exception to the normal power of courts to pass on constitutional issues.[12]

FEDERAL RULES OF CIVIL PROCEDURE—IMPLEADER UNDER RULE 14(a)—EFFECT OF JUDGMENT BETWEEN PLAINTIFF AND THIRD-PARTY DEFENDANT

Plaintiffs, New Mexico residents, brought action there in the Federal District Court against a Delaware company alleging as negligence the company's failure to inspect and repair its broken gas line which resulted in a fire destroying plaintiffs' building. The Delaware company, under Rule 14(a),[1] impleaded the present defendants, New Mexico residents, who had broken the line while digging a sewer. The jury found that the Delaware company was not negligent and in violation of their instructions answered other interrogatories, not necessary to the decision, finding the present defendant not negligent. Plaintiffs then sued the present defendants in the state court for negligently breaking the

9. Burroughs v. Lyles, 142 Tex. 704, 181 S.W.2d 570 (1944).
10. State *ex rel.* McAvoy v. Gilliam, 60 Wash. 420, 111 Pac. 401 (1910).
11. See Pacific States Tel & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (suit to enjoin enforcement of state law as violative of guarantee of a "republican form of government" dismissed for want of jurisdiction). *Cf.* Bullard v. Culpepper, 190 Ga. 848, 11 S.E.2d 19 (1940) (suit to invalidate primary election for violation of statutory election provision; *held,* a purely political right).
12. See South v. Peters, 339 U.S. 276 (1950), 4 VAND. L. REV. 691 (1951); Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation,* 39 HARV. L. REV. 221 (1926); Weston, *Political Questions,* 38 HARV. L. REV. 296 (1925).

1. FED. R. CIV. P. 14(a).

gas line and failing to give notice thereof. Defendants pleaded res judicata and moved for a summary judgment which was granted. *Held*, reversed. The plea of res judicata is invalid where in the subsequent action plaintiff proceeds on a different theory of negligence and the issues involved were not essential to the former decision and where the present defendant was an impleaded third-party defendant under Rule 14(a) against whom the plaintiff could not have originally proceeded due to lack of diversity between them. *Williams v. Miller*, 272 P.2d 676 (N.M. 1954).

Impleader is a procedural statutory remedy[2] allowing a defendant, at the court's discretion,[3] to introduce into an action a third party and assert a claim against him on the theory that such third party may be liable to the defendant for all or part of the plaintiff's claim.[4] It does not affect the existing substantive right of the parties[5] but provides a procedure whereby defendant's liability and his right to contribution,[6] indemnity,[7] subrogation,[8] or otherwise[9] may be determined in one lawsuit.[10] The asserted right to contribution or indemnity must exist independently before the procedural remedy of Rule 14(a) can be utilized.[11] If, therefore, the defendant's theory is that a third party is solely liable for the plaintiff's injury, the remedy of impleader is unavailable.[12] The proceeding is similar to the common-law process of

2. 3 MOORE, FEDERAL PRACTICE § 14.02 (2d ed. 1948). The procedure did not exist at common law, but was first provided for in England in 1873 and later adopted in the United States in Admiralty and various state practices. The scope of the present discussion is limited to the federal practice.

3. McPherrin v. Hartford Fire Ins. Co., 1 F.R.D. 88 (D. Neb. 1940); Tullgren v. Jasper, 27 F. Supp. 413 (D. Md. 1939); see Note, 148 A.L.R. 1185 (1944); 3 MOORE, FEDERAL PRACTICE § 14.05 (2d ed. 1948).

4. Watkins v. Baltimore & O.R.R., 29 F. Supp. 700 (W.D. Pa. 1939); *see* Kravas v. Great Atlantic & Pacific Tea Co., 28 F. Supp. 66 (W.D. Pa. 1939); 3 MOORE, FEDERAL PRACTICE § 14.08 (2d ed. 1948).

5. Brown v. Cranston, 132 F.2d 631 (2d Cir. 1942); *see* Malkin v. Arundel Corp., 36 F. Supp. 948, 951 (D. Md. 1941); Kravas v. Great Atlantic & Pacific Tea Co., 28 F. Supp. 66, 67 (W.D. Pa. 1939); see Note, 148 A.L.R. 1182 (1944); but see Keeffe and Cotter, *Service of Process in Suits against Directors: A Barrier to Justice*, 27 CORNELL L.Q. 74 (1941).

6. Yap v. Ferguson, 8 F.R.D. 166 (S.D.N.Y. 1948); Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943), 149 A.L.R. 1183 (1944). See Note, 149 A.L.R. 1186 (1944).

7. Tevington v. International Milling Co., 71 F. Supp. 621 (W.D.N.Y. 1945); Rappa v. Pittston Stevedoring Corp., 48 F. Supp. 911 (E.D.N.Y. 1943); Falcone v. City of New York, 2 F.R.D. 87 (E.D.N.Y. 1941); United States v. United States Fidelity & Guaranty Co., 1 F.R.D. 112 (D. Minn. 1940).

8. Goodard v. Shasta S. S. Co., 9 F.R.D. 10 (W.D.N.Y. 1948); Sabine State Bank & Trust Co. v. Schoonmaker, 5 F.R.D. 123 (W.D. La. 1946).

9. Fruit Growers Co-op. v. California Pie & Baking Co., 2 F.R.D. 415 (E.D.N.Y. 1942).

10. *See* Jones v. Waterman S. S. Corp., 155 F.2d 992, 997 (3d Cir. 1946); see 3 MOORE, FEDERAL PRACTICE § 14.04 (2d ed. 1948).

11. Lamport Co. v. Tepper & Slutzker, 3 F.R.D. 49 (D.N.J. 1943). The substantive right will be determined by state law where jurisdiction is based on diversity. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The right to contribution among joint tortfeasors may or may not exist within a state. However, all states allow indemnity between parties primarily and secondarily liable. See 3 MOORE, FEDERAL PRACTICE §§ 14.03 [3], 14.11 (2d ed. 1948).

12. FED. R. CIV. P. 14(a). See Notes of Advisory Committee on Rule 14 for

vouching to warranty where a warrantee calls upon his warrantor to come and defend the action.[13] In such an action the warrantee can not have judgment over against the warrantor, but the judgment is conclusive against the warrantor as to the warrantee's liability to the plaintiff.[14]

The practice under Rule 14(a) is regarded as being ancillary to the original suit and as not requiring independent jurisdictional grounds,[15] although the contrary has been asserted.[16] This obviates the requirement of diversity between the impleaded party and plaintiff or defendant in cases based on diversity.[17] The plaintiff, however, cannot amend his complaint so as to proceed against the third party unless diversity exists as between them. But given such diversity, the plaintiff can amend and proceed against the third-party defendant for any claim arising out of the transaction that is the subject matter of the plaintiff's claim against the original defendant.[18]

Either party to an action may assert the judgment therein as res judicata in a subsequent action between them on the same facts.[19] However, a defendant may plead res judicata even though he was not a party to the prior action when his liability is solely dependent upon the conduct of another who has been exonerated in the prior action.[20] Examples of the latter view are the cases exempting masters,[21] indemnitors,[22] and principals[23] from liability where the servant, indemnitee, and agent, as the principal actors causing plaintiff's injury, have been found not culpable. The theory of these cases is that an attempt to hold the party secondarily liable after a finding in favor of the party primarily liable would be inconsistent and illogical. In such cases the secondary party's responsibility rests on the same issues and

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the original rule which allowed such a practice. Compare the Pennsylvania practice which allows this procedure. PA. STAT. ANN. tit. 12, § 141 (1953).

13. *See* Morgan v. Muldoon, 82 Ind. 347, 352 (1882); see 3 MOORE, FEDERAL PRACTICE § 14.02 (2d ed. 1948); 67 C.J., *Voucher* p. 280 (1934).

14. City of Des Moines v. Barnes, 238 Iowa 1192, 30 N.W.2d 170, 174 (1947).

15. Sheppard v. Atlantic States Gas Co. of Pennsylvania, 167 F.2d 841 (3d Cir. 1948); Metzger v. Breeze Corporations, 37 F. Supp. 693 (D.N.J. 1941); Crum v. Appalachian Electric Power Co., 27 F. Supp. 138 (S.D. W. Va. 1939).

16. 3 MOORE, FEDERAL PRACTICE § 14.26 (2d ed. 1948). See Note, 148 A.L.R. 1185, 1186 (1944); Willis, *Five Years of Federal Third-Party Practice*, 29 VA. L. REV. 981, 1000 (1943).

17. Strawbridge v. Curtiss, 3 Cranch 267 (U.S. 1806).

18. FED. R. CIV. P. 14(a).

19. *See* Portland Gold Mining Co. v. Stratton's Independence, Ltd., 158 Fed. 63, 66 (8th Cir. 1907); see 30 AM. JUR., *Judgments* § 219 (1940).

20. Portland Gold Mining Co. v. Stratton's Independence, Ltd., 158 Fed. 63 (8th Cir. 1907); Coca-Cola Co. v. Pepsi Cola Co., 172 Atl. 260 (Del. 1934); *cf.* Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627 (1855); see RESTATEMENT, JUDGMENTS § 99 (1942).

21. Southern Ry. v. Lockridge, 222 Ala. 15, 130 So. 557 (1930); Supreme Lodge of the World v. Gustin, 202 Ala. 246, 80 So. 84 (1918); *see* Griffin v. Bozeman, 234 Ala. 136, 173 So. 857, 858 (1937).

22. Brobston v. Burgess, 290 Pa. 331, 138 Atl. 849, 54 A.L.R. 1285 (1927).

23. Emma Silver Mining Co. v. Emma Silver Mining Co. of New York, 7 Fed. 401 (C.C.S.D.N.Y. 1880); Marks v. Sullivan, 8 Utah 406, 32 Pac. 668 (1893).

cause of action that have formerly been adjudicated.[24] This exception is to be distinguished from the case where the party primarily liable cannot be joined with the one secondarily liable because the parties are not joint tortfeasors,[25] although, as was the case here, the former, by reason of his own default, may be liable over to the latter.[26] However, where two parties are jointly and severally liable with no right of contribution, a judgment against one does not bar an action against the other, since the plaintiff may have separate judgments against joint tortfeasors.[27]

Rule 14(a), being a procedural device, makes no provision for the substantive effect of a judgment.[28] Since the only purpose of the Rule is to determine the third party's liability to the defendant, which depends upon defendant's liability to the plaintiff, no occasion arises to determine a third party's liability when the defendant, as in the instant case, is found not to be liable to the plaintiff.

Any such determination is unnecessary to the decision and therefore cannot be asserted as a ground for collateral estoppel. Thus in the instant case, defendant could not rely on the defense of res judicata on the ground of a prior determination of his own non-liability since it was not essential to a determination of that prior action. Nor did he come within the exception to the rule since he was the party primarily liable and could not rely on the determination of non-liability of the party secondarily responsible.

When viewed in terms of the purpose of the third-party practice and the requirements of res judicata, the present decision appears unquestionable. A judgment under Rule 14(a) then has no effect as between plaintiff and the third-party defendant but will be confined to the adjudication of issues in the ancillary action between the defendant and the third-party defendant.

HUSBAND AND WIFE—EXPENSES OF LAST ILLNESS—HUSBAND'S RIGHT TO REIMBURSEMENT UNDER WIFE'S WILL

Wife died leaving a will directing that "all just debts which I may owe, including the expenses of my last illness . . . be paid."

24. *See* Griffin v. Bozeman, 234 Ala. 136, 173 So. 857, 859 (1937); see 30 AM. JUR., *Judgments* § 221 (1940).
25. Ader v. Blau, 241 N.Y. 7, 148 N.E. 771 (1925), 41 A.L.R. 1216 (1926).
26. George A. Fuller Co. v. Otis Elevator Co., 245 U.S. 489 (1918).
27. Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U.S. 111 (1912); Blann v. Crocheron, 19 Ala. 647, 54 Am. Dec. 203 (1851); *but cf.* Petticolas v. Richmond, 95 Va. 456, 28 S.E. 566 (1897).
28. FED. R. CIV. P. 14(a).

Husband filed a claim with the executor for reimbursement for medical expenses personally incurred in wife's last illness. The claim was approved by the probate court. Executor appealed. *Held,* reversed. As the husband was legally obligated to make the payments, the language of the will did not entitle him to reimbursements. *Barry v. Brittain,* 268 S.W.2d 12 (Ark. 1954.)

At common law, a husband was liable for necessaries furnished to his wife.[1] It followed that he was primarily liable for the expenses of her last illness.[2] The common-law rule was that such expenses could not be charged against the wife's estate or recovered from her estate by her husband.[3] Some courts have said that the wife's estate is ordinarily liable only if the husband is insolvent.[4]

A close analogy may be drawn between expenses of the last illness and the expenses of burial. A husband is bound to bury his wife in a suitable manner.[5] Most courts cling to the theory that local statutes providing for the separate estate of married women do not abrogate the common-law rule which makes the husband primarily liable for his wife's funeral expenses.[6] Yet many courts have held that the husband may be reimbursed for such expenses, even in the absence of an attempt by the wife to bind her own estate for them.[7] This theory seems to spring from the idea that acts giving separate property rights to married women, construed in connection with statutes imposing generally on the estates of decedents the burden of paying funeral expenses, shift the primary burden to the estate.[8]

Several courts have held that while funeral expenses paid for by the husband are chargeable against the wife's estate, expenses

1. Edminston v. Smith, 13 Idaho 645, 92 Pac. 842 (1907), 14 L.R.A. (N.S.) 871, 121 Am. St. Rep. 294 (1908); Lentz v. Wallace, 17 Pa. 412 (1851), 55 Am. Dec. 569 (1910); 41 C.J.S., *Husband and Wife* § 50 (1944).
2. Hall v. Stewart, 135 Va. 384, 116 S.E. 469, 471 (1923), 31 A.L.R. 1489, 1492 (1924). See Charron v. Day, 228 Mass. 305, 306, 117 N.E. 347 (1917); Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915), 1917B Ann. Cas. 1161; *In re* McGinnis' Estate, 109 Pa. Super. 248, 250, 167 Atl. 616, 617 (1933); 27 Am. Jur., *Husband and Wife* § 462 (1940).
3. *In re* Wagner's Estate, 178 Okla. 384, 62 P.2d 1186 (1936); Moulton v. Smith, 16 R.I. 126, 12 Atl. 891 (1888), 27 Am. St. Rep. 728 (1892); 41 C.J.S., *Husband and Wife* § 340 (1944).
4. *See* Watt v. Atlantic Safe Deposit & Trust Co., 92 N.J. Eq. 224, 112 Atl. 186, 187 (1920) (funeral expenses).
5. *See In re* Skilman's Estate, 146 Iowa 601, 125 N.W. 343, 344 (1910), 140 Am. St. Rep. 295, 296 (1911); Pickett's Estate v. Pickett, 162 Md. 10, 158 Atl. 29 (1932).
6. Beverly v. Nance, 145 Ark. 589, 224 S.W. 956 (1920). See Notes, 31 A.L.R. 1499 (1924); 108 A.L.R. 1226 (1937).
7. Constantinides v. Walsh, 146 Mass. 281, 15 N.E. 631 (1888), 4 Am. St. Rep. 311 (1889); Pache v. Oppenheim, 93 App. Div. 221, 87 N.Y. Supp. 704 (App. Div. 1904); *In re* Wagner's Estate, 178 Okla. 384, 62 P.2d 1186 (1936); Moulton v. Smith, 16 R.I. 126, 12 Atl. 891 (1888), 27 Am. St. Rep. 728 (1892).
8. Nashville Trust Co. v. Carr, 62 S.W. 204 (Tenn. Ch. App. 1900). See Notes, 31 A.L.R. 1499 (1924); 108 A.L.R. 1226 (1937).

of her last illness are not so treated.[9] Such a distinction seems hardly tenable as both types of expense spring from the husband's duty with respect to his wife.[10]

It is widely held that, in view of statutes providing for a married woman's separate property rights, she may, by express provision or conduct, bind her estate for her funeral expenses,[11] the expenses of her last illness,[12] or both.[13] Provisions in the wife's will similar to the one in the instant case have been held sufficient to bind the decedent's estate.[14]

It would seem, therefore, that in the instant case, even though the court follows the older view that in the absence of express provision or conduct by the wife, the husband is not relieved of primary liability, the words employed by the wife would be sufficient to bind her estate for the expenses of her last illness and entitle the husband to reimbursement.[15]

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9. *In re* Wagner's Estate, 178 Okla. 384, 62 P.2d 1186 (1936); Moulton v. Smith, 16 R.I. 126, 12 Atl. 891 (1888), 27 Am. St. Rep. 728 (1892).

10. "While the expenses of last sickness differ from those of the funeral in that they are rendered during the life of the person on whose estate they are made a charge, the necessity for their rendition is similar to the latter, and the law authorizing their payment may be justified on like principles." *In re* Skilman's Estate, 146 Iowa 601, 125 N.W. 343, 346 (1910), 140 Am. St. Rep. 295, 299 (1911).

11. Morris v. Dosch, 194 Ark. 153, 106 S.W.2d 159 (1937); Pafford v. Hinson, 34 Ga. App. 73, 128 S.E. 207 (1925); Pickett's Estate v. Pickett, 162 Md. 10, 158 Atl. 29 (1932); Watt v. Atlantic Safe Deposit & Trust Co., 92 N.J. Eq. 224, 112 Atl. 186 (1920).

12. Charron v. Day, 228 Mass. 305, 117 N.E. 347 (1917); *In re* Oppenheim's Estate, 178 Misc. 1026, 37 N.Y.S.2d 43 (Surr. Ct. 1942); Glenn v. Gerald, 64 S.C. 236, 42 S.E. 155 (1902).

13. Schlotterback v. Ort, 103 Ind. App. 124, 5 N.E.2d 678 (1937); *In re* Skillman's Estate, 146 Iowa 601, 125 N.W. 343 (1910), 140 Am. St. Rep. 295 (1911); 27 AM. JUR., *Husband and Wife* §§ 457, 462 (1940); 41 C.J.S., *Husband and Wife* § 61 (1944).

14. "After all expenses, burial, Inheritance tax, etc., are paid, I want . . ." Morris v. Dosch, 194 Ark. 153, 106 S.W.2d 159, 160 (1937). (burial expenses).
"It is my will that all of my just and legal indebtedness, including the expenses of my last illness and my funeral expenses, be paid out of my estate . . ." Schlotterback v. Ort, 103 Ind. App. 124, 5 N.E.2d 678 (1937).
"All my just debts and funeral expenses . . . shall first be duly paid." Pickett's Estate v. Pickett, 162 Md. 10, 158 Atl. 29 (1932).

15. Due to the vagaries of federal tax statutes, it might be beneficial, tax-wise, to the husband either to have the illness expenses as a personal deduction under INT. REV. CODE § 213 (1954), or, under other circumstances, as a deduction to the estate under INT. REV. CODE § 2053(a)(3) (1954).

JOINT TORTFEASORS—RELEASE OF ONE AS RELEASE OF ALL—APPLICATION OF RULE WHEN FIRST TORTFEASOR IS NOT LEGALLY LIABLE

Plaintiff, employee of a railroad company, while spotting cars in a steel company's yard, was injured by an employee of the steel company. Plaintiff sued the steel company for the negligence of their employee. The steel company raised as a defense a release executed by the plaintiff to his employer, the railroad company, for the sum of $250.[1] Plaintiff appealed from a judgment for the steel company. *Held,* affirmed. The plaintiff in receiving consideration from the railroad company was precluded from denying that his employer was negligent, and therefore, under the rule that a release of one releases all joint tortfeasors, he had no action against the negligent steel company. *Connelly v. United States Steel Co.,* 161 Ohio St. 448, 119 N.E.2d 843 (1954).

A valid release of one joint tortfeasor is usually regarded as a release of the others and is a bar to suit against any of them.[2] The theory behind this rule is said to be that the release, evidencing receipt of consideration by the injured party, operates to extinguish the cause of action.[3] A covenant not to sue, however, is held not to release the other tortfeasors and not to be a bar to further suit.[4] For this reason a release reserving the right to sue other tortfeasors is called by many courts[5] a covenant not to sue. The so-called covenant not to sue is then held not to extinguish the plaintiff's cause of action and, therefore, not to prevent recovery against the other wrongdoers.[6] In addition to these court decisions many states by statue[7] have modified or eliminated this common-law rule of the release of joint tortfeasors.[8] In

1. The plaintiff received $180.00 as consideration for signing the release. He also was paid $70.00 in benefits from the United States Railroad Retirement Board. The railroad company repaid the $70.00 to the board under a law entitling the board to reimbursement for any amount paid to an employee as a result of settlement for injuries for which the board had also paid such employee. Instant Case, 119 N.E.2d at 845.

2. Cleveland, C.C. & St.L.Ry. v. Hilligoss, 171 Ind. 417, 86 N.E. 485 (1908); Muse v. De Vito, 243 Mass. 384, 137 N.E. 730 (1923); King v. Powell, 22 N.C. 511, 17 S.E.2d 659 (1941); PROSSER, TORTS 1108 and n. 94 (1941). See Notes, 50 A.L.R. 1057, 1060 (1927); 124 A.L.R. 1298, 1299 (1940); 148 A.L.R. 1270, 1272 (1944). For the English view of this rule see SALMOND, TORTS 90 (11th ed., Heuston, 1953).

3. See note 2 *supra.*

4. Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa 1953); Hicklin v. Anders, 253 P.2d 897 (Ore. 1953); RESTATEMENT, TORTS § 885(2) (1939). See Note, 148 A.L.R. 1270, 1288 (1944).

5. McWhirter v. Otis Elevator Co., 40 F. Supp. 11 (W.D.S.C. 1941). *Cf.* Wright v. Fisher, 24 Tenn. App. 650, 148 S.W.2d 49 (1940) (court allowed parties to substitute covenant not to sue for a document which was in fact a release).

6. McWhirter v. Otis Elevator Co., 40 F. Supp. 11 (W.D.S.C. 1941).

7. Mo. REV. STAT. § 537.060 (1949); N.Y. DEBTOR AND CREDITOR LAW §§ 231-240.

8. Kahn v. Brunswick-Balke-Collender Co., 173 Mo. App. 148, 156 S.W.2d 40 (1941) (common-law rule of release of tortfeasors is abolished by statute in

these states the plaintiff is generaly allowed to proceed until he has obtained full satisfaction.[9] In jurisdictions which do allow recovery against the other tortfeasors, the amount received from the first tortfeasor usually diminishes *pro tanto* the amount recoverable from the other wrongdoers.[10]

Where the release is given to a party who is not liable for the injury, however, the courts divide sharply on the applicability of the common-law rule regarding the release of joint tortfeasors. Some of the courts which do apply the common-law rule say that, irrespective of the source, the payment acts as a satisfaction and precludes the injured party from recovering again.[11] Others, as in the instant case, hold that a claim or demand for damages made on the innocent party, estops the plaintiff-releasor from denying that the releasee is a joint tortfeasor.[12] Just as in the case of the release of an actual tortfeasor, if the release has an express reservation as to the wrongdoers, or is construed as a covenant not to sue, the plaintiff may be allowed to recover against the true tortfeasor.[13]

Many courts, however, do allow recovery from the actual wrongdoer, notwithstanding a release to an innocent party.[14] Some of these courts say the "release of joint tortfeasors" rule cannot apply where the releasee is not a joint tortfeasor; they require the injured party to prove the releasee was not negligent before allowing him to recover against the actual tortfeasor.[15] Other courts hold the sum received to be a gift and not to extinguish the injured party's claim against the wrongdoer.[16] If the plaintiff made no demand or claim against the releasee, some courts will allow the injured party to proceed on the same claim against the tortfeasor.[17]

The courts that follow the "release of joint tortfeasors" rule seem to do so through a desire to prevent the plaintiff from being unjustly en-

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Missouri); Marcus v. Hinck, 28 F. Supp. 945 (S.D.N.Y. 1939) (New York statute allows reservation in release to preserve rights against other tortfeasors).

9. See note 8 *supra*.

10. See notes 4, 6, 8 *supra*.

11. Hawber v. Raley, 66 Cal. App. 701, 268 Pac. 943 (1928); Hartigan v. Dickson, 81 Minn. 284, 83 N.W. 1091 (1900). See 1 COOLEY, TORTS 265 and nn. 6, 7 (4th ed., Haggard, 1932).

12. Tompkins v. Clay-Street R.R., 66 Cal. 163, 4 Pac. 1165 (1884); Harris v. Roanoke, 179 Va. 1, 18 S.E.2d 303 (1942).

13. Holland v. Southern Public Utilities Co., 208 N.C. 289, 180 S.E. 592 (1935).

14. Hubley v. Goodwin, 91 N.H. 200, 17 A.2d 96 (1940); Gulf Refining Co. v. Jackson, 250 S.W. 1080 (Tex. Civ. App. 1923). 2 WILLISTON, CONTRACTS § 338B n. 4 (rev. ed., Williston and Thompson, 1936). For further cases see 76 C.J.S., *Release* § 50b n. 87 (1952).

15. Masters v. Philadelphia Transp. Co., 160 Pa. Super. 178, 50 A.2d 532 (1947).

16. Pickwick v. McCauliff, 193 Mass. 70, 78 N.E. 730 (1906); Gulf Refining Co. v. Jackson, 250 S.W. 1080 (Tex. Civ. App. 1923). *See* Lavelle v. Anderson, 197 Minn. 169, 266 N.W. 445, 446 (1930) (no written release).

17. Kentucky & I.B. Co. v. Hall, 125 Ind. 220, 25 N.E. 219 (1890); McClure v. Pennsylvania R.R., 53 Pa. Super. 638 (1912).

riched.[18] The other courts appear to go to any extreme, even that of allowing the plaintiff a double recovery, to punish the wrongdoer.[19] Perhaps a satisfactory compromise would be to allow the plaintiff adequate compensation by letting the consideration for the release operate *pro tanto* upon a judgment against the wrongdoer.[20]

The court in the instant case made no attempt to inquire into the satisfaction of the injured party. It followed the arbitrary rule that a release is conclusive admission of full satisfaction.[21] The court also appears to have felt that a possible liability of the railroad under the FELA in effect established the railroad as a joint tortfeasor with the steel company.[22] In the analogous situation of Workmen's Compensation, the statute is sometimes held not to bar an action against the wrongdoer even after a release is executed to an innocent party.[23] In the same manner a release given for payment under an employee insurance plan has been held not to bar action against the tortfeasor.[24] Also, under federal rules it has been held that a release of a joint tortfeasor does not release the others.[25]

It is suggested that a more equitable result can be obtained by allowing parol testimony as to the extent of satisfaction of the injured party. If the plaintiff has not been fully recompensed, he should be allowed to obtain a judgment from the party who actually caused his injury; at least for an amount which together with that obtained from the releasee will give him a satisfaction for his injury.

RESTRAINT OF TRADE — EMPLOYEE'S COVENANT NOT TO COMPETE — STATE-WIDE RESTRAINT

As part of an employment contract with plaintiff company, defendant, prospective salesman, agreed not to engage in similar activity for any rival concern during the life of the contract and for a period of ten months thereafter within any territory wherein plaintiff did

18. See Leff v. Knewbow, 47 Cal. App.2d 360, 117 P.2d 922 (1941); Harris v. Roanoke, 179 Va. 1, 18 S.E.2d 303 (1942).

19. See Pickwick v. McCauliff, 193 Mass. 70, 78 N.E. 730 (1906); Gulf Refining Co. v. Jackson, 250 S.W. 1080 (Tex. Civ. App. 1923); Papenfus v. Shell Oil Co., 254 Wis. 233, 35 N.W.2d 920 (1949). For a criticism of this double recovery see SEAVEY, COGITATIONS ON TORTS 53 (1954).

20. See Jacobsen v. Woerner, 149 Kan. 598, 89 P.2d 24 (1939) (covenant not to sue); Holand v. Southern Public Utilities Co., 208 N.C. 289, 180 S.E. 592 (1935), 49 HARV. L. REV. 160; SEAVEY, COGITATIONS ON TORTS 54 (1954).

21. See comment on this attitude in 2 WILLISTON, CONTRACTS § 338B (rev. ed., Williston and Thompson, 1936).

22. Instant Case, 119 N.E.2d at 847.

23. See Hubley v. Goodwin, 91 N.H. 200, 17 A.2d 96 (1940); Jacowicz v. Delaware, L. & W.R.R., 87 N.J.L. 273, 92 Atl. 946 (1915).

24. See Ridgeway v. Sayre Electric Co., 285 Pa. 400, 102 Atl. 123 (1917).

25. See United States *ex. rel.* Marcus v. Hess, 154 F.2d 291 (3d Cir. 1946).

business and wherein defendant represented plaintiff. Subsequently defendant resigned and immediately gained employment with plaintiff's competitor, whereupon plaintiff sought an injunction. *Held,* injunction denied. As plaintiff's business included at least the entire state of Ohio as well as three neighboring states, the covenant which would restrict trade in an area of that size is a general restraint of trade and void. *Hubman Supply Co. v. Irvin,* 119 N.E.2d 152 (Ohio 1953).

Any bargain which purports to restrict the right of either party to work or do business is a restraint of trade.[1] The employee's covenant not to compete is but one among many types of such agreements, but since essentially the same principles govern with respect to validity[2] in any given particular, the subject will be discussed in general.

The validity of a contract in restraint of trade,[3] insofar as it is ancillary to another valid contract[4] supported by a valuable consideration,[5] and tends not toward a dangerous monopoly,[6] is tested today, in absence of statute, exclusively by its reasonableness under the circumstances, without regard for rigid rules which might obtain in lieu of reasonableness.[7] An agreement is reasonable if it can be said fairly to protect the interests of the covenantee without unduly interfering with the public interest[8] or oppressing the covenantor.[9] The determina-

1. WILLISTON, CONTRACTS § 1633 (Rev. ed. 1937).

2. But see 5 *id.,* § 1643 (suggesting a tendency toward a differentiation between contracts in restraint of trade and those in restraint of employment). "The distinction however seems unadvisable as a positive rule of law . . . . The ultimate question should be the same in both cases — what is necessary for the protection of the promisee's rights and is not injurious to the public." *Ibid.*

3. In general see 2 RESTATEMENT, CONTRACTS § 512 *et seq.* (1932); 6 CORBIN, CONTRACTS § 1379 *et seq.* (1951); 5 WILLISTON, CONTRACTS § 1628 *et seq.* (Rev. ed. 1937). Perhaps the best review of the subject with particular emphasis on employee's covenants not to compete may be found in Authur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685 (Ohio 1952).

4. *See* Super Maid Cook-Ware Corp. v. Hamil, 50 F.2d 830, 831 (5th Cir. 1931); Milgram v. Milgram, 105 Ind. App. 57, 12 N.E.2d 394, 395 (1938). See also 2 RESTATEMENT, CONTRACTS § 515 (1932); 5 WILLISTON, CONTRACTS § 4582 (Rev. ed. 1937) (citing cases).

5. Employment is a sufficient consideration. City Ice and Fuel Co. v. Snell, 57 S.W.2d 440 (Mo. App. 1933); 17 C.J.S., *Contracts* § 257 (1939). For a good discussion of consideration necessary see 6 CORBIN, CONTRACTS § 1395 (1951).

6. Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N.E. 1030 (1898); 2 RESTATEMENT, CONTRACTS § 515 (1932).

7. Brecher v. Brown, 235 Iowa 627, 17 N.W.2d 377 (1945). See also Henderson v. Jacobs, 73 Ariz. 195, 239 P.2d 1082 (1952); Milwaukee Linen Supply Co. v. Ring, 210 Wis. 467, 246 N.W. 567 (1933); 2 RESTATEMENT, CONTRACTS § 514 (1932); 5 WILLISTON, CONTRACTS § 1636 (Rev. ed. 1937); 17 C.J.S., *Contracts* § 246 (1939) (citing cases).

8. Mattis v. Lally, 138 Conn. 51, 82 A.2d 155 (1951); Smithereen Co. v. Renfroe, 325 Ill. App. 229, 59 N.E.2d 545 (1945); Associated Perfumers, Inc. v. Andelman, 316 Mass. 176, 55 N.E.2d 209 (1944); Sherman v. Pfefferkorn, 241 Mass. 468, 135 N.E. 568 (1922).

9. Mattis v. Lally, 138 Conn. 51, 82 A.2d 155 (1951); Original New York Furriers Co. v. Williams, 133 N.J. Eq. 524, 33 A.2d 292 (1943); 2 RESTATEMENT,

tion of whether, in a given case, an agreement satisfies the criteria of reasonableness involves a consideration of the circumstances of the particular case,[10] with special regard for the subject matter of the contract, the nature of the business involved, and the situation of the parties.[11] A review of the cases seems to indicate that perhaps reasonableness has been the true test all along. The inflexible common-law rules, however, once definitive of reasonableness, have become, with the passing of the era whose policy gave them validity, ineffectual in implementing a policy which ascribes to reasonableness a different content.

At one time all agreements designed to restrict a person's right to exercise his trade were considered void as offensive to reasonableness and hence contrary to public policy.[12] However, at that particular time in history a craftsman was confined by statutory fetters to a single line of endeavor.[13] With the relaxation of these restrictions the courts, not impervious to the needs of an economically progressive society, began to sanction certain of these restraints denominated "partial," in which the agreement was reasonably limited in its scope and time of operation.[14] An agreement unlimited in either scope[15] or time[16] or both[17] was considered "general"[18] and was deemed invalid *per se*.

CONTRACTS § 515(b). Cases illustrating the various elements implicit in the test of reasonableness are collected in 17 C.J.S., *Contracts* § 247 (1939). A trenchant analysis of the cases having applied the test, with particular reference to employee's covenants not to compete may be found in 6 CORBIN, CONTRACTS § 1394 (1951). See also 5 WILLISTON, CONTRACTS § 1643 (Rev. ed. 1937). Burden of proof is on the employer to show reasonableness. Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 693 (Ohio 1952) (very thorough discussion of reasonableness in employee's covenants).

10. Heckard v. Park, 164 Kan. 216, 188 P.2d 926 (1948); Deuerling v. City Baking Co., 155 Md. 280 141 Atl. 542 (1928); Thomas v. Parker, 327 Mass. 339, 98 N.E.2d 640 (1951); Clark Paper & Mfg. Co. v. Stenacher, 236 N.Y. 312, 140 N.E. 708 (1923); Milwaukee Linen Supply Co. v. Ring, 210 Wis. 467, 246 N.W. 567 (1933).

11. Pocohantas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S.E. 264 (1906).

12. *See* Wesley v. Chandler, 152 Okla. 22, 3 P.2d 720, 722 (1931); 17 C.J.S., *Contracts* § 239 (1939).

13. *Ibid.*

14. Wakenight v. Spear & Rogers, 147 Ark. 342, 227 S.W. 419 (1921). See also 17 C.J.C., *Contracts* § 241 (1939).

15. Carson v. Sun Life Assur. Co. of Canada, 56 Ga. App. 164, 192 S.E. 241 (1937); 17 C.J.S., *Contracts* § 243 (1939). As to limitation of scope as a factor in determination of reasonableness today see Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685 (Ohio 1952); 6 CORBIN, CONTRACTS § 1386 (1951); 5 WILLISTON, CONTRACTS § 1639 (Rev. ed. 1937).

16. Mandeville v. Harman, 42 N.J. Eq. 185, 7 Atl. 37 (1886) (unlimited time would be unreasonable). See also 17 C.J.S., *Contracts* § 244 (1939). As to the effect of time limitations in a determination of reasonableness see 6 CORBIN, CONTRACTS § 1391 (1951).

17. Boone v. Burnham & Dallas, 179 Ky. 91, 200 S.W. 315 (1918). See also 17 C.J.S., *Contracts* § 242 (1939).

18. Long considered the leading case on "general" and "partial" restraints of trade was Mitchel v. Reynolds, [1711] 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1903).

Though it was early recognized that agreements unlimited in time would not vitiate an otherwise unobjectionable contract,[19] since a reasonable time could be implied,[20] courts clung tenaciously to the notion that a limitation of scope was essential.[21] The "general" and "partial" distinction,[22] insofar as it related to scope, was seized upon as an absolute test of validity,[23] leading some courts in this country to the questionble conclusion that so long as the agreement was "limited" it was to be upheld as reasonable.[24] At the other extreme, some courts held void *per se* agreements purporting to restrict trade throughout an entire state, because of that fact alone.[25] The court in the instant case followed this latter rule which is simply an application of the early English notion that a restraint co-extensive with the limits of the kingdom[26] was in fact "unlimited" and "general" for purposes of testing validity. The court gives no consideration to the reasonableness of the agreement under the circumstances, albeit it was ostensibly fair. That such a rule should obtain in lieu of reasonableness (the reason for the rule) is anomalous, and it can be said that in the absence of statute[27] the great weight of authority, including perhaps the jurisdiction of the instant case,[28] is today to the con-

19. O. K. Transfer & Storage Co. v. Crabtree, 157 Ark. 323, 248 S.W. 271 (1923); 2 RESTATEMENT, CONTRACTS § 515 (1932); 5 WILLISTON, CONTRACTS § 1638 (Rev. ed. 1937); 17 C.J.S., *Contracts* § 244 (1939).

20. Schlag v. Johnson, 208 S.W. 369 (Tex. Civ. App. 1919); 5 WILLISTON, CONTRACTS § 1639 (Rev. ed. 1937) (citing cases).

21. See 6 CORBIN, CONTRACTS § 1386 (1951).

22. "The supposed test of legality in the distinction between the 'general' and the 'limited' has been abandoned by most of the courts . . . [in favor of the test of reasonableness]." 6 CORBIN, CONTRACTS § 1386 (1951).

23. "For a considerable period it seems to have been assumed by some of the American courts that legality of an agreed restraint of trade was determined by the distinction between 'general' and 'limited.'" 6 CORBIN, CONTRACTS § 1386 (1951).

24. Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887) (court felt that "general" meant whole country, hence agreement excluding several states is partial and enforceable).

25. Parish v. Schwartz, 344 Ill. 563, 176 N.E. 757 (1931); Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N.E. 1038 (1901); Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N.E. 1048 (1895); Handforth v. Jackson, 150 Mass. 149, 22 N.E. 634 (1889); Bishop v. Palmer, 146 Mass. 469, 16 N.E. 299 (1888); Western Wooden-Ware Ass'n v. Starkey, 84 Mich. 76, 47 N.W. 604 (1890); Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N.E. 1030 (1898) (relied on by court in instant case).

26. Mitchel v. Reynolds [1711] 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1903).

27. CAL. BUS. & PROF. CODE §§ 16600, 16601 (1951); N.D. REV. CODE § 9-0806 (1943); OKLA. STAT. tit. 15 §§ 217-19 (1951); S.D. CODE § 10.0706 (1939).

28. The case of Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685 (Ohio 1952), decided a year earlier in the same jurisdiction is perhaps the leading case in the country espousing the doctrine of reasonableness, citing literally hundreds of authorities. An injunction was there denied on the grounds that the covenant involved was unreasonable and that there was no irreparable injury shown. However, the court in the instant case, citing the *Murray* case, apparently missed its lesson, *i.e.*, that reasonableness should control.

trary.[29] Courts today in the application of the test of reasonableness have upheld covenants restricting trade throughout the entire United States[30] and several foreign countries[31] as well as those unlimited in space.[32] Furthermore, where the scope is unlimited and such would be unreasonable, every effort is made to imply a reasonable scope, at least where there is a limitation of time.[33] Under the test of reasonableness, today neither the duration nor the extent of the restraint is conclusive, but both, particularly the geographical extent, are important criteria for determining reasonableness.[34]

Equity, of course, may decline to enforce an otherwise enforceable agreement because of the lack of traditional grounds of equity jurisdiction or because of the presence in the case of traditional grounds for denying equitable relief,[35] though ordinarily such would offend reasonableness and thereby destroy validity from the outset. The decision in the instant case, unless the agreement is in fact unreasonable, can be justified only on this basis inasmuch as the court indicates there was no showing of present or impending irreparable injury.[36]

It is submitted in conclusion, that adherence to hard and fast rules is most undesirable in a field in which the equities of the affected parties vary so markedly from case to case. The employer should be entitled to that freedom of contract necessary to protect his business from the competition of employees trained at his expense; but, on the other hand, the employer should not be permitted to take undue

29. Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887); Thompson Optical Inst. v. Thompson, 119 Ore. 252, 237 Pac. 965 (1925); Sklaroff v. Sklaroff, 263 Pa. 421, 106 Atl. 793 (1919); Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 Atl. 988 (1910); Webster-Richardson Pub. Co., 46 S.W.2d 384 (Tex. Civ. App. 1932); 5 WILLISTON, CONTRACTS § 1639 (Rev. ed. 1937). Most of the cases cited deal with contracts of sale but the principle, it would seem, is the same, namely that reasonableness rather than fixed rules should govern.

30. Thomas W. Briggs Co. v. Mason, 217 Ky. 269, 289 S.W. 295 (1926); Voices, Inc. v. Metal Tone Mfg. Co., 119 N.J. Eq. 324, 182 Atl. 880 (1936); William T. Wiegand Glass Co. v. Wiegand, 105 N.J. Eq. 434, 148 Atl. 174 (1930); Eagle Pencil Co. v. Jannsen, 135 Misc. 534, 238 N.Y. Supp. 49 (Sup. Ct. 1929); Ward Baking Co v. Tolley, 222 N.Y. App. Div. 653, 225 N.Y. Supp. 75 (1st Dep't 1927); 6 CORBIN, CONTRACTS § 1386 (1951); 5 WILLISTON, CONTRACTS § 1639 (Rev. ed. 1937).

31. Thoms v. Sutherland, 52 F.2d 592 (3d Cir. 1931); Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535 (whole world included).

32. Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588 (7th Cir. 1915); Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 N.E. 548 (1909); United Shoe Mach. Co. v. Kimball, 193 Mass. 351, 79 N.E. 790 (1907); Anchor Electric Co. v. Hawkes, 171 Mass. 101, 50 N.E. 509 (1898); 5 WILLISTON, CONTRACTS § 1639 n.5 (Rev. ed. 1937).

33. Prame v. Ferrell, 166 Fed. 702 (6th Cir. 1909); 5 WILLISTON, CONTRACTS § 1639 (Rev. ed. 1937). For a discussion of divisibility with cases cited, see 5 WILLISTON, CONTRACTS §§ 1659, 1660; 6 CORBIN, CONTRACTS § 1390 (1951).

34. 2 RESTATEMENT, CONTRACTS § 515, comment c (1932).

35. Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685 (Ohio 1952).

36. Instant Case at 155, 156.

advantage of the public, which is interested in the maintenance of healthy competition, or the employee, who, eager to obtain employment, is often willing to sign an agreement restricting his right to work to a degree unnecessary for the protection of the interests of the employer. The scope and time limitation of the agreement, the nature, location, and scope of the employer's business, the public demand for the employer's product or services, and the other circumstances peculiar to the parties must be taken into consideration in a determination of the degree of protection to which the interested parties are equitably entitled. It is, therefore, at once obvious that inflexible rules will lead inevitably to inequity of result. Whereas the rule of reasonableness is subject to some criticism on the grounds that it leaves too much discretion in the court and offends the traditional notion of sanctity of contract, it seems that equity of result, which adherence to the rule will effect, makes "reasonableness" the more desirable test of validity.

SPECIFIC PERFORMANCE—CONVEYANCE OF LEASED PREMISES UPON LESSEE'S EXERCISE OF OPTION TO PURCHASE—DEFENSE OF HARDSHIP

Complainant leased a portion of defendant's land and erected a gas station thereon. Defendant lessor, who did not read the lease contract and was unaware that it contained an option to purchase, developed the remainder of her property as a trailer court. After some eighteen years under the lease, complainant exercised its option and sued for specific performance of the resulting contract. The chancellor found that if defendant were forced to convey the premises, direct access from a main highway to her trailer court would be cut off and its value virtually destroyed; on this ground, specific performance was denied and complainant appealed. *Held,* affirmed. A court of equity will in its discretion deny specific performance when, because of a material change in circumstances since the signing of the contract, performance would result in any particular hardship to the defendant. *Sinclair Refining Company v. Martin,* 270 S.W.2d 576 (Tenn. App. M.S. 1954).

It has long been established that a contract for the sale of land is within that category of contracts susceptible of specific enforcement by a court of equity;[1] but equally well established is the principle that the remedy is discretionary and may be denied if the performance required would be "oppressive" because of the hard-

1. Otis v. Payne, 86 Tenn. 663 (1888); WALSH, EQUITY § 59 (1930).

ship involved.[2] The exercise of the court's discretion in this respect, however, may not be arbitrary.[3] Rules governing the adequacy of the defense have evolved which seem to reveal two separate requirements: a type of hardship which may be recognized by the court, and a degree of hardship sufficient to make performance "oppressive."

Hardship caused by a mistake on the part of the defendant alone, unknown to and not contributed to by the plaintiff, may constitute a basis for denial of specific performance.[4] The degree of the defendant's negligence in making the mistake is immaterial insofar as recognition of the hardship is concerned,[5] but there must be hardship; a mistake alone is not an adequate defense.[6] Similarly, hardship produced by a change in circumstances since the making of the contract may be a defense,[7] but the change must be caused by extrinsic forces and not by the defendant's own acts.[8]

The instant case presents a situation wherein the defendant, mistaken as to her contractual obligations, wrought a change in circumstances which resulted in a possibility of hardship. No case cited by the court affords a precedent for this situation,[9] nor has research revealed a case involving similar facts in which resulting hardship was the basis for denial of relief.[10] In view of the fact that in those

2. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 185 (3d ed., Pomeroy and Mann, 1926).

3. Howard v. Moore, 36 Tenn. 163 (1857); POMEROY, *op. cit. supra* note 2, §§ 35, 36.

4. Mechanics' Bank v. Lynn, 1 Pet. 376 (U.S. 1828) (injunction, as specific execution of agreement, denied); Malins v. Freeman, 2 Keen 25, 48 Eng. Rep. 537 (1837); MCCLINTOCK, EQUITY § 74 (2d ed. 1948); POMEROY, *op. cit. supra* note 2, § 245; WALSH, EQUITY 479. See Note, 15 L.R.A. (N.S.) 81, 82 (1908).

5. See MCCLINTOCK, EQUITY 203, 204.

6. *See* Stewart v. Kennedy, 15 A.C. 75, 105 (1890). *Compare* Malins v. Freeman, 2 Keen 25, 48 Eng. Rep. 537 (1837); *with* Van Praagh v. Everidge [1902] 2 Ch. 266. See POMEROY, *op. cit. supra* note 2, § 245 n.(1)(a); WALSH, EQUITY 481.

7. Willard v. Tayloe, 8 Wall. 557 (U.S. 1869); Columbia College v. Thacher, 42 Sickels 311 (N.Y. 1882); Hudson v. King, 49 Tenn. 560 (1871); POMEROY, *op. cit. supra* note 2, § 186; WALSH, EQUITY 483.

8. Helling v. Lumley, 3 DeG. & J. 493, 44 Eng. Rep. 1358 (1858); Hawkes v. Eastern Counties Ry., 1 DeG. M. & G. 737, 42 Eng. Rep. 739 (1852); *accord,* Fox v. Spokane International Ry., 26 Idaho 60, 140 Pac. 1103 (1914). *But cf.* Hoard v. Chesapeake & Ohio Ry., 123 U.S. 222 (1887); Whitney v. New Haven, 23 Conn. 624 (1855) (contracts for a public purpose); Murtfeldt v. New York, W.S. & B. Ry., 102 N.Y. 703, 7 N.E. 404 (1886); London v. Nash, 3 Atk. 512, 26 Eng. Rep. 1095 (1747) (remedy at law found to be adequate). See POMEROY, *op. cit. supra* note 2, § 187; WALSH, EQUITY 483.

9. See Saunders v. Davis, 31 Tenn. App. 674, 220 S.W.2d 883 (1949) (party intoxicated when he signed contract); Johnson v. Browder, 185 Tenn. 601, 207 S.W.2d 1 (1947) (inadequate consideration); Parsons v. Hall, 184 Tenn. 363, 199 S.W.2d 99 (1947) (terms of contract too indefinite to support remedy of specific performance); McCarty v. Kyle, 44 Tenn. 348 (1867); Cocke v. Evans' Heirs, 17 Tenn. 218 (1836) (change in circumstances, not fault of either party, which destroyed consideration).

10. See London v. Nash, 3 Atk. 512, 26 Eng. Rep. 1095 (1747) (change in circumstances brought about by defendant's performance of contract under possible mistake as to his obligation thereunder, but specific performance denied on ground that remedy at law was adequate).

cases where defendants were not allowed to assert as a defense the possibility of hardship created by their own acts each was aware of his contractual obligations, the fact that the defendant in the instant case brought about the change in circumstances seems less pertinent. Certainly as an equitable matter defendant's ignorance of her contractual obligations should allow recognition of the hardship which would result from her performance.

There remains, however, the requirement that the hardship to the defendant must be oppressive. Where the benefit to be derived by the plaintiff balances or outweighs the hardship which would result to the defendant, it would seem that the defendant's performance could hardly be termed "oppressive;" and so it has been held that the disparity between these conflicting interests measures the degree of hardship sufficient to constitute an adequate defense.[11] As the remedy of specific performance requires a determination that money damages for breach of the contract are inadequate, consideration should be given to the hardship which the plaintiff will suffer from denial of the remedy.

In the instant case, virtual destruction of defendant's business undoubtedly would have constituted a great hardship had conveyance of the leased premises been required.[12] On the other hand, the development of its trade and good will over a long period of time might have made complainant's retention of a favorable gas station site of considerable business value. The balancing of these interests might have revealed a disparity in favor of defendant. But no consideration was given to complainant's position other than loss of the increased value of the premises.[13] To deny specific performance on the basis of defendant's hardship alone, without balancing against that hardship all the possible benefits to be derived by complainant, seems an arbitrary exercise of discretion.

11. See Prospect Park & C.I.R.R. v. Coney Island & B.R.R., 144 N.Y. 152, 39 N.E. 17 (1894); Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 Fed. 603 (7th Cir. 1917); Crowell v. Woodruff, 245 S.W.2d 447 (Ky. 1952); Bush Terminal Bldgs. Co. v. Bush Terminal R.R., 249 N.Y. 723, 63 N.Y.S.2d 744 (1945), *cert. denied*, 331 U.S. 843 (1947); Smith v. Meyers, 130 Md. 64, 99 Atl. 938 (1917). See WALSH, EQUITY 489. *Compare* Fox v. Spokane International Ry., 26 Idaho 60, 140 Pac. 1103 (1914), *with* Linthicum v. Washington, B. & A. Electric R.R., 124 Md. 263, 92 Atl. 917 (1914).

12. *Cf.* Meister v. Steppach, 9 Tenn. App. 405 (1929) (egress and ingress to purchased property made extremely difficult by change in circumstances; specific performance denied). *But cf.* Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925) (rise in value of land since signing of long term lease contract containing option to purchase; specific performance granted).

13. Instant Case, at 581.

UNEMPLOYMENT COMPENSATION — "SUITABLE" EMPLOYMENT — REFUSAL OF SABBATH WORK ON RELIGIOUS GROUNDS

Plaintiff was a conscientious member of the Seventh-Day Adventist Church whose tenets condemn secular work on Saturday. Following the termination of her previous employment of about fourteen months which required no Saturday work, she applied for and received unemployment benefits. Employment opportunity was made available to her through the state employment service. When she refused to accept on the basis that the employment involved Saturday work, her unemployment benefits were suspended. The lower court reversed the Board, and the Board appealed. *Held,* affirmed. Sabbath work is unsuitable to a bona fide conscientious objector as a risk to morals. *Tary v. Board of Review,* 119 N.E.2d 56 (Ohio 1954).

The unemployment compensation laws of all American jurisdictions require claimants receiving benefits to accept an offer of suitable work, but forty-seven of the fifty-one American jurisdictions have statutes establishing as one of the criteria for determining suitability the degree of risk to claimant's health, safety and morals.[1]

Every claimant, to be eligible for benefits must meet the test of availability, which requires that he be willing, able and ready to accept suitable employment.[2] After becoming eligible, an individual may disqualify himself for further benefits by refusing, without good cause, an offer of suitable work.[3] These requirements are necessary to effectuate the legislative purpose which has been expressed in the unemployment compensation laws as an attempt to combat the hazard of "involuntary unemployment" or "unemployment through no fault of their own."[4] The law was designed to benefit only those who had

1. ALTMAN, AVAILABILITY FOR WORK 283 (1950); Menard, *Refusal of Suitable Work,* 55 YALE L.J. 134 (1945).

2. Schettino v. Administrator, 138 Conn. 253, 83A.2d 217, 220 (1951); Reger v. Administrator, 132 Conn. 647, 46 A.2d 844, 845 (1946); Ashmore v. Unemployment Comp. Comm'n, 86 A.2d 751, 753 (Del. 1952); Mohler v. Department of Labor, 409 Ill. 79, 97 N.E.2d 762, 764 (1951); Dewyer v. Appeal Bd. 321 Mich. 178, 32 N.W.2d 434, 438 (1948); Hunter v. Miller, 148 Neb. 402, 27 N.W.2d 638, 640 (1947); Roukey v. Riley, 96 N.H. 351, 77A.2d 30, 31 (1950); Velenti v. Board of Rev., 4 N.J. 287, 72 A.2d 516, 517 (1950); Leonard v. Unemployment Comp. Bd. of Rev., 148 Ohio St. 419, 75 N.E.2d 567, 568 (1947).

3. Garcia v. California Empl. Stabilization Comm'n, 71 Cal. App.2d 107, 161 P.2d 972 (1945); Bigger v. Unemployment Comp. Comm'n, 4 Terry 553, 53 A.2d 761 (Del. 1947); Muncie Foundry Division of Borg-Warner Corp. v. Review Bd. of Empl. Sec. Div., 114 Ind. App. 475, 51 N.E.2d 891 (1943); Pacific Mills v. Director of Div. of Empl. Sec., 322 Mass. 345, 77 N.E.2d 413 (1948); Grant Co. v. Board of Rev., 129 N.J.L. 402, 29 A.2d 858 (1943); Canton Malleable Iron Co. v. Green, 75 Ohio App. 526, 62 N.E.2d 756 (1944).

4. Bigger v. Unemployment Comp. Comm'n, 4 Terry 553, 53 A.2d 761, 766 (Del. 1947); Muncie Foundry Division of Borg-Warner Corp. v. Review Bd. of Empl. Sec. Div., 114 Ind. App. 475, 51 N.E.2d 891, 893 (1943); Fannon v. Federal Cartridge Corp., 219 Minn. 306, 18 N.W.2d 249, 251 (1945); Grant Co. v. Board of Rev., 129 N.J.L. 402, 29 A.2d 858, 860 (1943); Judson Mills v.

been workers and would presently be working but for lack of suitable work.[5] Therefore, claimants who refuse jobs for personal reasons have generally been denied benefits on the theory that the law looks objectively to the job and not subjectively to the man.[6]

Under the usual "suitability" provision, however, reasons peculiar to the individual may be of significance, for there the question is whether the job is suitable to the particular claimant. Working conditions and hours of work, though usually unmentioned in the statutes, may legitimately be considered under the question of the degree of risk to claimant's health, safety and morals. It would seem that the inclusion of these personal considerations shows the legislature's appreciation of the frailties and individual differences in human beings.

The issue of moral risk involves a consideration of where, when and with whom claimant would have to work. Whether claimant has good cause for refusing such work is a different question from whether, objectively, the work itself is suitable.[7] Good cause is a distinct concept and implies reasons personal to the employee and extraneous to the employment.[8] The offensive characteristic of the employment and the moral principle offended thereby should have a clear and direct connection. Therefore, it has been suggested that one who believes the sale and consumption of liquor to be immoral is not obligated under the penalty of disqualification to accept a job in a liquor-vending establishment. It would not necessarily follow, however, that where the objection is merely that an employee working at the same establishment is addicted to drink, refusal to accept employment would be with "good cause."[9]

Compensation has almost uniformly been allowed where the claimant has limited his availability by refusing offered employment because it required Sabbath work. This result may be reached on any one of the following theories: (1) he is nevertheless said to be "avail-

South Carolina Unempl. Comp. Comm'n, 204 S.C. 37, 28 S.E.2d 535, 536 (1944); Unemployment Comp. Comm'n v. Tomko, 192 Va. 463, 65 S.E.2d 524, 528 (1951); Harrison, *Statutory Purpose and "Involuntary Unemployment,"* 55 YALE L. J. 117 (1945).

5. ALTMAN, *op. cit. supra* note 1.

6. Leclerc v. Administrator, 137 Conn. 438, 78 A.2d 550 (1951); Ford Motor Co. v. Appeal Bd., 316 Mich. 468, 25 N.W.2d 586 (1947); Haynes v. Unemployment Comp. Comm'n, 353 Mo. 540, 183 S.W.2d 77 (1944); *Claim of* Delgado, 278 App. Div. 237, 105 N.Y.S.2d 142 (3d Dep't 1951); Judson Mills v. South Carolina Unempl. Comp. Comm'n, 204 S.C. 37, 28 S.E.2d 535 (1944); Keen v. Texas Unempl. Comp. Comm'n, 148 S.W.2d 211 (Tex. Civ. App. 1941); Unemployment Comp. Comm'n v. Tomko, 192 Va. 463, 65 S.E.2d 524 (1951); Jacobs v. Office of Unempl. Comp. and Placement, 27 Wash.2d 641, 179 P.2d 707 (1947).

7. *Accord,* Barclay White Co. v. Unemployment Comp. Bd. of Rev., 356 Pa. 43, 50 A.2d 336 (1947); Bliley Electric Co. v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A.2d 898 (1946).

8. See note 7 *supra.*

9. Menard, *supra* note 1, at 144.

able" for work;[10] (2) he is said to have refused with "good cause";[11] (3) he is said not to have refused "suitable work."[12] That "[t]he right to worship according to the dictates of the individual's conscience is guaranteed to him by the constitution of the United States and the State of Tennessee"[13] and that a contrary holding would "contravene the fundamental law of our land"[14] and "prevent and preclude an individual from attending worship services"[15] are some of the reasons given.

This type of case involves a policy decision as to how much individuality based on freedom of belief will be tolerated; the policy seems to be more liberal in peacetime than during war years when the emergency demands longer work weeks.[16]

Prior to the instant case, Ohio had denied compensation to an employee who refused to work on his Sabbath.[17] Under the rule prevailing in Ohio at that time, inquiry was directed merely to the question of whether the employee was "reasonably fitted" for the employment.[18] This test involved a consideration of the worker's training and experience and not whether the work was suitable for the individual. The instant case reaches its contrary decision under the standard suitability provisions added to the Ohio law in 1949.[19] This appears to be a sound decision in that it aligns Ohio with other states having similar provisions whose interpretation was settled at the time Ohio conformed her law, and reaches a result in conformity with the basic purpose and language of the statute.

WRONGFUL DEATH—UNBORN CHILDREN—LIABILITY FOR NEGLIGENT KILLING OF UNBORN VIABLE FOETUS

Defendant physician employed forcible instrumental measures in an unsuccessful attempt to deliver plaintiff's full-term child. A few hours later the baby was born naturally, but was dead and

10. 5 Ben. Ser. No. 2, 7054—Ga. R (1941); 6 Ben. Ser. No. 11, 8244—Mich. A (1943); 9 Ben. Ser. No. 1, 10197—N.Y. A (1945); 10 Ben. Ser. No. 5, 11459—Ind. A. (1946).
11. 10 Ben. Ser. No. 4, 11372—D.C. A (1946); 4 Ben. Ser. No. 12, 6765—D.C. A (1941); 9 Ben. Ser. No. 3, 10325—Ill. R (1945).
12. 5 Ben. Ser. No. 10, 7643—Cal. A (1942); 7 Ben. Ser. No. 12, 9007—N.C. A (1944).
13. 11 Ben. Ser. No. 9, 12796—Tenn. R (1948).
14. 5 Ben. Ser. No. 10, 7609—Okla. A (1942).
15. 7 Ben. Ser. No. 12, 9007—N.C. A (1944).
16. ALTMAN, *op cit. supra* note 1, at 17.
17. Kut v. Alberts Super Markets, 146 Ohio St. 522, 66 N.E.2d 643 (1946).
18. Chambers v. Owens-Ames-Kimball Co., 146 Ohio St. 559, 563, 67 N.E.2d 439, 442 (1946); Machuga, *Suitable Work under Unemployment Compensation Statutes*, 10 OHIO ST. L. J. 232 (1949).
19. OHIO CODE ANN. § 1345-6 (e) (Throckmorton 1952).

covered with bruises. Mother, father, and four minor children sued the physician under a wrongful death statute,[1] alleging that the death of the child was caused by the physician's negligent attempt to force the birth of the child. The trial resulted in a hung jury and an order of mistrial was entered. Defendant's motion for judgment notwithstanding the mistrial verdict was sustained and the suit was dismissed. *Held*,[2] reversed and remanded. An action for the negligent killing of an unborn viable child can be maintained under the statute and sufficient proof of negligence was submitted to raise a jury issue. *Rainey v. Horn*, 72 So. 2d 434 (Miss. 1954).

The question of whether there can be recovery by a child or his representative for prenatal injuries to the child first arose in 1884 in the case of *Dietrich v. Inhabitants of Northampton*[3] in which recovery was denied for injuries which resulted in the death of the child. An Irish case[4] in 1891 next considered the question and denied recovery for injuries inflicted prior to birth. In 1900 the Illinois court[5] denied recovery for such injuries, basing its decision in part on the two prior decisions. These three cases laid the foundation for what became the majority rule in denying recovery for prenatal injuries. These and subsequent cases raised these objections to recovery: lack of precedent,[6] the unborn child is still part if its mother,[7] and determination of the cause of the injury would be based on conjecture.[8]

Legal writers, however, for some time have advocated recovery in such actions[9] and recent cases tend to allow recovery,[10] at least where

1. MISS. CODE ANN. § 1453 (Supp. 1952).
2. Opinion by Mr. Justice Gillespie; all justices concurred.
3. 138 Mass. 14 (1884), 52 Am. Rep. 242 (1912).
4. Walker v. Great Northern Ry., 28 L.R. Ir. 69 (1891).
5. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900), *affirming* 76 Ill. App. 491 (1898).
6. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).
7. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Northampton, 138 Mass. 14 (1884), 52 Am. Rep. 242 (1912); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).
8. Stanford v. St. Louis San Francisco R. Co., 214 Ala. 611, 108 So. 566 (1926); Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). See Note, 3 VAND. L. REV. 282, 289 (1950), for a consideration of proof in cases of this type.
9. PROSSER, TORTS § 31 (1941); Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461 (1922); Anderson, *Rights of Action of an Unborn Child*, 14 TENN. L. REV. 151 (1936); Frey, Injuries to *Infants En Ventre Sa Mere*, 12 ST. LOUIS L. REV. 85 (1927); Morris, *Injuries to Infants En Ventre Sa Mere*, 58 CENT. L. J. 143 (1904). *But cf.* RESTATEMENT, TORTS § 869 (1939).
10. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Tucker v. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949). The allowance of recovery has found approval in numerous law review articles. See Gaines, *The Infant's Right of Action for Pre-Natal Injuries*, WIS. L. REV. 518 (1951); Winfield, *The Unborn Child*, 4 U. OF TORONTO L. J. 278, 285, 294 (1942); Comment 3 DE PAUL L. REV. 257 (1954); 3 DRAKE L. REV. 72 (1954); 3 VAND L. REV. 282 (1950).

the child is viable[11] at the time of the injury. Whereas the numerical weight of authority was formerly that there could be no recovery for prenatal injuries, today the jurisdictions are almost evenly divided on the question.[12] New York,[13] Illinois,[14] and Missouri,[15] all of whom formerly denied recovery, have recently overruled previous cases and now allow recovery. Since the instant case is the first Mississippi decision on the question,[16] it adds momentum to the trend toward allowing recovery. From all indications, it seems that recovery for prenatal injuries will soon be the majority rule.

It appears that jurisdictions allowing recovery for prenatal injuries will also permit recovery under wrongful death statutes in cases where, subsequent to its birth, a child dies as a result of prenatal injuries.[17] A different problem, however, is presented where the child dies prior to its birth because of prenatal injuries. There are few cases in point, but the question has arisen in several miscarriage cases where it is generally held that recovery cannot be had for the death of an unborn child.[18] *Verkennes v. Corniea,*[19] in which the facts were similar to the instant case, did allow a right of action for the wrongful death of an unborn child. A 1951 Nebraska case[20] rejected the *Verkennes* decision, stating that it stood alone as the only case allowing recovery in such circumstances. The instant case and the *Verkennes* case appear to be the only decisions allowing a

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11. "Viable. Livable, having the appearance of being able to live . . . capable of life." Black's Law Dictionary (4th ed. 1951); "A viable *foetus* has been defined as one sufficiently developed for extra-uterine survival, normally a *foetus* of seven months or older." Amann v. Faidy, 415 Ill. 422, 427, 114 N.E.2d 412, 417 (1953); "It is to be noted that there is a medical distinction between the term 'embryo' and a 'viable foetus.' The embryo is the foetus in its earliest stages of development, especially before the end of the third month, but the term 'viable' means that the foetus has reached such a stage of development that it can live outside the uterus." Bonbrest v. Kotz, 65 F. Supp. 138, 140 n. 8 (D.D.C. 1946).

12. Recovery for prenatal injuries is denied in Alabama, Ireland, Massachusetts, Michigan, Nebraska, New Jersey, Pennsylvania, Rhode Island, and Texas. Recovery is permitted in California, Canada, District of Columbia, Georgia, Illinois, Louisiana, Maryland, Minnesota, Missouri, New York, and Ohio. See Comment, 3 DE PAUL L. REV. 257, 264 (1954). The instant case adds Mississippi to the latter group.

13. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) *overruling* Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

14. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953) *overruling* Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

15. Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953) *overruling* Buel v. United Railways Co., 248 Mo. 126, 154 S.W. 71 (1913).

16. Instant Case, at 435.

17. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Cooper v. Blanck, 39 So.2d 352 (La. App. 1923).

18. Thomas v. Gates, 126 Cal. 1, 58 Pac. 315 (1899); Powell v. Augusta & S.R. Co., 77 Ga. 192, 3 S.E. 757 (1887); Webb v. Snow, 102 Utah 435, 132 P.2d 114 (1942); Malone v. Monongahela Valley Traction Co., 104 W. Va. 417, 140 S.E. 340 (1927).

19. 229 Minn. 365, 38 N.W.2d 838 (1949).

20. Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951).

wrongful death action for the death of an unborn child. The court in the instant case based its decision on the fact that unborn children are recognized for many legal purposes and that a viable child is entitled to protection of its person.

If the rule is to be extended to permit recovery for the death of an unborn child, the extension would seem most appropriate in circumstances similar to those in the instant case.[21] Here the injuries were inflicted directly on the unborn child at a time when it was about to be born, and not indirectly through its mother sometime prior to its birth. This case, coupled with the *Verkennes* case, may indicate a trend toward the extension of recovery to prenatal injury cases where the child is born dead. It is doubtful, however, that many of the jurisdictions permitting recovery for prenatal injuries when the child is born alive would extend their rulings to allow recovery in cases where the child is born dead. Permitting recovery in such circumstances would seem to revitalize the objections of conjecture and uncertainty in determining causation which these courts have rejected in actions where the child is born alive.

21. The court in the instant case did not limit the allowance of recovery to similar fact situations, but imposed only the limitation of the viability of the child at the time of injury. Instant Case, at 440.