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RECENT CASES

CONFLICT OF LAWS — ANNULMENT FOR MENTAL INCAPACITY — APPLICABILITY OF LAW OF DOMICIL

Plaintiff, 92 years old, married defendant, age 69, in New Hampshire; both parties were domiciled in Massachusetts. On the day of the ceremony, they returned to Massachusetts, plaintiff to a nursing home where he had been living and defendant to her home in Boston. Under New Hampshire law,[1] this marriage was valid; whereas under Massachusetts law[2] it was invalid. Four days before the marriage took place, a conservator had been appointed for the plaintiff by reason of his incapacity through advanced years or mental weakness. This suit for annulment is brought by the conservator, as next friend of the plaintiff, in a Massachusetts court. *Held,* annulment granted;[3] Massachusetts law governs. *Davis v. Seller,* 108 N.E.2d 656 (Mass. 1952).

As a general rule in American courts, it is said that a marriage valid where contracted is valid everywhere.[4] However, the familiar aphorism that a rule of law serves merely as a basis for categorizing the

1. N.H. REV. LAWS c. 338, § 10 (1942).
2. MASS. GEN. LAWS c. 207 §§ 5, 10 (1932).
3. There is disagreement among the textwriters as to whether the court of domicil has jurisdiction to annul a marriage. See Beale, *Progress of the Law,* 33 HARV. L. REV. 1, 12 (1919); Goodrich, *Jurisdiction to Annul a Marriage,* 32 HARV. L. REV. 806 (1919); Note, 37 HARV. L. REV. 150 (1923); 26 HARV. L. REV. 253 (1913). But see McMurray and Cunningham, *Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country,* 18 CALIF. L. REV. 105 (1930); 16 CALIF. L. REV. 38 (1927). The weight of American decisions hold that the domicil does have jurisdiction. *Accord,* Hitchens v. Hitchens, 47 F. Supp. 73 (D.D.C. 1942); Hamlet v. Hamlet, 242 Ala. 70, 4 So.2d 901 (1941); Brill v. Brill, 38 Cal. App.2d 741, 102 P.2d 534 (1940); Schibi v. Schibi, 136 Conn. 196, 69 A.2d 831 (1949); Whelan v. Whelan, 346 Ill. App. 445, 105 N.E. 2d 314 (1952); Damaskinos v. Damaskinos, 325 Mass. 217, 89 N.E.2d 766 (1950); Antoine v. Antoine, 132 Miss. 442, 96 So. 305 (1923); Cross v. Cross, 110 Mont. 300, 102 P.2d 829 (1940); Foster v. Foster, 89 N.H. 376, 199 Atl. 367 (1938); Avakian v. Avakian, 69 N.J.Eq. 89, 60 Atl. 521 (1905); Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912); Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923); Barney v. Cunyes, 68 Vt. 51, 33 Atl. 897 (1895); Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500 (1910); Kitzman v. Kitzman, 167 Wis. 308, 166 N.W. 789 (1918); *see* Smith v. Smith, 226 P.2d 279, 288 (Nev. 1951). A minority of decisions hold the domiciliary state's jurisdiction to be exclusive. Antoine v. Antoine, 132 Miss. 442, 96 So. 305 (1923); *see* Gwin v. Gwin, 219 Ala. 552, 122 So. 648 (1929); Blumenthal v. Tannenholz, 31 N.J. Eq. 194, 197 (1879); Salvesen v. Administrator of Austrian Property, [1927] A.C. 641, 654. But it would seem the better view, both on reason and convenience, that the domiciliary state and the place of celebration should exercise concurrent jurisdiction to annul. *See* Feigenbaum v. Feigenbaum, 210 Ark. 186, 194 S.W.2d 1012, 1013 (1946); see STUMBERG, CONFLICT OF LAWS 296 (1937).
4. See generally, GOODRICH, CONFLICT OF LAWS § 116 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 255 (1937); Beale, Laughlin, Guthrie and Sandomire, *Marriage and the Domicil,* 44 HARV. L. REV. 501, 505 (1931); Goodrich, *Foreign Marriages and the Conflict of Laws,* 21 MICH. L. REV. 743 (1923); Taintor, *What Law Governs the Ceremony, Incidents and Status of Marriage,* 19 B.U.L. REV. 353 (1939).

exceptions to it seems particularly apropos here. Since the marriage relation, both in its creation and termination, is of utmost importance to the state in which the parties are domiciled, that state ultimately must determine the validity of the marriage.[5] In the interest of rendering certainty to such a basic relationship, the courts of the domicil will apply the *lex loci celebrationis* except where the marriage (1) is contrary to the laws generally recognized in Christian countries or (2) is prohibited by the law of the domicil from motives of strong public policy.[6] The first class of cases includes incestuous[7] and polygamous[8] marriages, and in these the courts uniformly declare that the law of domicil governs.[9] The second class of exceptions depends on what the particular state regards as a sufficiently strong policy consideration.[10] Among these prohibitions which some courts have so treated are: remarriage after divorce,[11] miscegenation,[12] marriage between parties of varying degrees of consanguinity[13] and marriage with a paramour.[14] Generally questions of capacity are determined by the *lex loci celebrationis*.[15] Insanity as a ground for annulment seems to be based on the incapacity of the parties to contract,[16] and at least two cases have

5. *See* Atkeson v. Sovereign Camp, W.O.W., 90 Okla. 154, 216 Pac. 467, 469 (1923); and see generally, GOODRICH, CONFLICT OF LAWS § 115 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 262 (1937); Beale, Laughlin, Guthrie and Sandomire, *Marriage and the Domicil*, 44 HARV. L. REV. 501, 505-06 (1931); Goodrich, *Foreign Marriages and the Conflict of Laws*, 21 MICH. L. REV. 743 (1923); Taintor, *Effect of Extra-State Marriage Ceremonies*, 10 MISS. L.J. 105 (1938).

6. *See* Commonwealth v. Lane, 113 Mass. 458, 463, 18 Am. Rep. 509, 513 (1873); *In re* Miller's Estate, 239 Mich. 455, 214 N.W. 428, 429 (1927).

7. Incest is here used to mean marriages between ascendants and descendants and between brother and sister. STUMBERG, CONFLICT OF LAWS 258 (1937). There is some confusion with regard to marriage between first cousins, uncle and niece, etc. See note 13 *infra*.

8. Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 4 S.E.2d 364 (1939); *cf.* People v. Kay, 141 Misc. 574, 252 N.Y. Supp. 518 (Mag. Ct. 1931).

9. The question of litigation in a third state (neither the domicil nor the place of celebration) is not within the scope of this article. For cases discussing this, see Note, 127 A.L.R. 437 (1940).

10. See Beale, Laughlin, Guthrie and Sandomire, *Marriage and the Domicil*, 44 HARV. L. REV. 501 (1931); Goodrich, *Foreign Marriages and the Conflict of Laws*, 21 MICH. L. REV. 743 (1923); Taintor, *Effect of Extra-State Marriage Ceremonies*, 10 MISS. L.J. 105 (1938); Note, 17 TENN. L. REV. 378 (1942).

11. See the excellent discussion of the problems arising under these statutes in Beale, *supra* note 10, at 514.

12. State v. Bell, 66 Tenn. 9 (1872); Kinney v. Commonwealth, 30 Grat. 858 (Va. 1878); *cf.* Stevens v. United States, 146 F.2d 120 (10th Cir. 1944) (Indian with Negro); *In re* Shun T. Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942) (Japanese).

13. Whelan v. Whelan, 346 Ill. App. 445, 105 N.E.2d 314 (1952); Weinberg v. Weinberg, 242 Ill. App. 414 (1926); Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500 (1910); *cf.* DeWilton v. Montefiore, [1900] 2 Ch. 481. *Contra*: *In re* Miller's Estate, 239 Mich. 455, 214 N.W. 428 (1927); Garcia v. Garcia, 25 S.D. 645, 127 N.W. 586 (1910); Fensterwald v. Burk, 129 Md. 131, 98 Atl. 358 (1916).

14. Stull's Estate, 183 Pa. 625, 39 Atl. 16 (1898); Pennegar and Hawey v. State, 87 Tenn. 244, 10 S.W. 305 (1889).

15. Seabold v. Seabold, 84 Ohio App. 83, 84 N.E.2d 521 (1948); see RESTATEMENT, CONFLICT OF LAWS § 121 (1934).

16. Cook v. Cook, 243 S.W.2d 900 (Ky. 1951); Seabold v. Seabold, 84 Ohio App. 83, 84 N.E.2d 521 (1948).

applied the *lex loci celebrationis* with regard to insanity.[17] A close analogy might also be drawn between insanity and nonage, since the object of both is to protect the parties from a contract in which they supposedly do not have the capacity to form the necessary intent. A few courts have applied the nonage statute of the domicil;[18] but the weight of authority is otherwise.[19]

Many states, to prevent domiciliaries from flouting their laws, have passed marriage evasion statutes. These declare void a marriage which the parties entered into in a sister state with intent to evade the law of the domicil.[20] In some states having statutes of this sort the application will depend upon the social stigma attached to the particular marriage and the policy behind the prohibition that has been evaded.[21] Massachusetts has enacted the Uniform Marriage Evasion Act,[22] and, construing it literally, has said that its purpose is to alter the general rule, that marriages valid where contracted will be invalid only when they are deemed "contrary to the law of nature as recognized in Christian countries."[23]

There is little question that the domicil does have the power to annul a marriage in violation of any of its laws.[24] It would also seem, under

17. Cook v. Cook, 243 S.W.2d 900 (Ky. 1951); Seabold v. Seabold, 84 Ohio App. 83, 84 N.E.2d 521 (1948). *Cf. Ex parte* Chace, 26 R.I. 351, 58 Atl. 978, 979, 981 (1904), wherein, with regard to a statute prohibiting the issuance of a marriage license to a person under guardianship, the court said, "but the general principle, as we gather it from the text-writers and decisions, both English and American, is that the capacity or incapacity to marry depends on the law of the place where the marriage is celebrated, and not on that of the domicile of the parties. [citations omitted] . . . even if the marriage might have been void if solemnized in this state, it is nevertheless not such a union that it can in any sense be considered so subversive of good morals, or so threatening to the fabric of society, as to fall within the exception to the general rule regarding foreign marriages." See also Taintor, *Effect of Extra-State Marriage Ceremonies*, 10 MISS. L.J. 105, 124 (1938).

18. Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1920); *cf.* Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912). In the latter case, the fact that there had been no cohabitation was stressed by the court.

19. Hitchens v. Hitchens, 47 F. Supp. 73 (D.D.C. 1942); Levy v. Downing, 213 Mass. 334, 100 N.E. 638 (1913); Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945); Simonin v. Mallac, 2 Swa. & Tr. 67 (Prob. 1860); *cf.* McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163 (1936); Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908); *Ex parte* Chace, 26 R.I. 351, 58 Atl. 978 (1904).

20. See the collection and discussion of these cases in Taintor, *What Law Governs the Ceremony, Incidents and Status of Marriage*, 19 B.U.L. REV. 353, 374 (1939); Note, 16 MINN. L. REV. 172 (1932). See also RHODES, ANNULMENT OF MARRIAGE (1945).

21. Keith v. Pack, 182 Tenn. 420, 187 S.W.2d 618 (1945), holding valid a Georgia marriage in evasion of a nonage statute, said that the marriage would be valid, notwithstanding, if only in evasion of laws governing " 'matters of form, ceremony, or qualification.' " *But cf.* Vital v. Vital, 319 Mass. 185, 65 N.E.2d 205 (1946). For a case holding valid a marriage in evasion of a nonage statute but where there was no statutory prohibition against going out of the state to evade, see McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163 (1936). See also Note, 32 A.L.R. 1116 (1924).

22. The Uniform Laws Commission withdrew approval of this act in 1943. It has been adopted also in Illinois, Louisiana, Vermont and Wisconsin.

23. Vital v. Vital, 319 Mass. 185, 65 N.E.2d 205, 207 (1946).

24. See note 5 *supra*.

the peculiar circumstances in the instant case where the parties obviously did not intend to live together as man and wife and the defendant probably was only seeking the plaintiff's estate, that the court reached a just result between the parties. But, even under the Massachusetts court's broad statement of the purpose of the Uniform Marriage Evasion Act, the question may be raised whether Massachusetts will extend this doctrine to annul marriages in evasion of matters of form or ceremony only.

CONFLICT OF LAWS — DAMAGES — EFFECT OF OUT-OF-STATE EMPLOYMENT CONTRACT

While making a delivery in New York, plaintiff, employed in New Jersey, was struck by a mail truck negligently operated by a servant of the federal government. In a New York action for damages under the Federal Tort Claims Act[1] plaintiff was allowed to recover for loss of earnings and hospital expenses in accordance with New Jersey law, although these expenses were paid by plaintiff's employer.[2] On appeal, defendant contended that New York law was applicable and that losses compensated by a third party are not allowable as damages. *Held* (2-1), affirmed. The propriety of damages for compensated loss is to be determined by the law of New Jersey, the place where the contract of employment and the payments were made. *Landon v. United States*, 197 F.2d 128 (2d Cir. 1952).[3]

Since the basic theory underlying tort damages for negligence is restoration of the plaintiff to his original position by monetary compensation,[4] damages are awarded only for pecuniary loss,[5] and if there

1. The act specifically states that the law of the state where the tortious act occurred is determinative of the liability of the government. 62 STAT. 933 (1948), as amended, 63 STAT. 62 (1949), 63 STAT. 101 (1949), 28 U.S.C.A. §§ 1346 *et seq.* (1950). Though the Act directs that the United States is to be treated as a private citizen for purposes of determining liability, this rule is qualified by 62 STAT. 983 (1948), 28 U.S.C.A. § 2674 (1950), which states that the United States shall not be liable for punitive damages. On this Act generally see Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1950).

2. The Federal Tort Claims Act specifically directs the federal court to look to the law of the place of the tort. 62 STAT. 933 (1948), as amended, 63 STAT. 62 (1949), 63 STAT. 101 (1949), 28 U.S.C.A. § 1346 (1950). When the court is bound by the law of a state it must look to the conflict of laws rules of that state. Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941) (diversity jurisdiction). The court here held that the New York conflict of laws rule would refer to New Jersey law to determine whether damages were allowable.

3. Majority opinion by Clark, J.; Frank, J., dissenting in part.

4. *See* Baker v. Drake, 53 N.Y. 211, 220 (1873). See MCCORMICK, DAMAGES § 137 (1935); 1 SEDGWICK, DAMAGES § 30 (9th ed. 1920); *Developments in the Law — Damages — 1935-1947*, 61 HARV. L. REV. 113, 116 (1947).

5. "In all cases, then, of civil injury . . . the declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it as he would have been if . . .

has been partial compensation by the defendant, the loss is lessened by that amount.[6] Where plaintiff is compensated by a third party, however, most states including New Jersey, feeling that the defendant should not be allowed a windfall[7] and that if anyone is to profit from such payment it should be the injured party,[8] have ruled that the defendant cannot plead that compensation in mitigation of damages.[9] New York has veered from this rule; thus in *Drinkwater v. Dinsmor*,[10] where the employer had paid plaintiff's wages for the period of incapacitation after the injury caused by another person's tort, plaintiff was denied recovery for lost wages on the theory that he cannot sue for what he has not lost even though the compensation came from a collateral source.[11]

The *lex loci delicti* is generally determinative of the substantive elements of tort liability.[12] Some courts, by viewing the measure of damages as a limitation on the amount that a jury may award, consider the measure of damages a procedural matter subject to the law of the forum;[13] but the majority consider the measure of damages as a sub-

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the tort [had] not [been] committed." 1 SEDGWICK, DAMAGES § 30 (9th ed. 1920). See 25 C.J.S., *Damages* § 3 (1941).

6. United States v. Brooks, 176 F.2d 482 (4th Cir. 1949). See 1 SEDGWICK, DAMAGES § 56 (9th ed. 1920); Note, 63 HARV. L. REV. 330 (1949).

7. See Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927). See McCORMICK, DAMAGES 310 (1935); Note, 63 HARV. L. REV. 330 (1949).

8. In the case of insurance payments it is felt that the defendant should not profit by the protection bought and paid for by another party. United States v. Brooks, 176 F.2d 482 (4th Cir. 1949); Gatzweiler v. Milwaukee Electric Ry. & Light Co., 136 Wis. 34, 116 N.W. 633 (1908). See generally, *Developments in the Law — Damages — 1935-1947*, 61 HARV. L. REV. 113 (1947).

9. McCarthy v. Palmer, 29 F. Supp. 585 (E.D.N.Y. 1939); Rusk v. Jeffries, 110 N.J.L. 307, 164 Atl. 313 (1933); Corish v. New Jersey St. Ry., 73 N.J.L. 273, 62 Atl. 1004 (1906); *cf.* C. F. Kress Co. v. Bullock Shoe Co., 56 F.2d 713 (5th Cir. 1932). See 1 SEDGWICK, DAMAGES § 67 (9th ed. 1920); 15 AM. JUR., *Damages* § 198 (1938); 25 C.J.S., *Damages* § 99 (1941).

10. 80 N.Y. 390 (1880).

11. Though the *Drinkwater* case expressly states that the proof allowed was not in mitigation of damages but rather to show the absence of damages claimed, the practical effect of such proof is to mitigate damages. 80 N.Y. at 392.

12. "Whatever variations of opinion and practice there may have been, it is the established law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of maximum recovery." Western Union Tel. Co. v. Brown, 234 U.S. 542, 546-47, 34 Sup. Ct. 955, 58 L. Ed. 1457 (1914). See Mattox v. News Syndicate Co., 176 F.2d 897 (2d Cir.), *cert. denied*, 338 U.S. 858 (1949); Phillips v. Belding Heminway Co., 50 F. Supp. 1915 (S.D.N.Y. 1943); Metcalf v. Reynolds, 267 N.Y. 52, 195 N.E. 681 (1935); M. Salimoff & Co. v. Standard Oil Co. of N.Y., 262 N.Y. 220, 186 N.E. 679 (1933); Hasbrouck v. New York Central & H.R.R., 202 N.Y. 363, 95 N.E. 808 (1911). See GOODRICH, CONFLICT OF LAWS § 92 (3d ed. 1949); 11 AM. JUR., *Conflict of Laws* § 182 (1937); RESTATEMENT, CONFLICT OF LAWS §§ 377 *et. seq.* (1934); Leflar, *Choice of Law: Torts: Current Trends*, 6 VAND. L. REV. 447 (1953).

13. *Compare* Hasbrouck v. New York Central & H.R.R., 202 N.Y. 363, 95 N.E. 808 (1911) (New York court refused to apply the New York statutory limitation of liability to an action because the tort was committed in Massachusetts), *with* Wooden v. Western N.Y. & P.R.R., 126 N.Y. 10, 26 N.E. 1050

stantive element of the tort action.[14]

Usually, only the laws of the state of the place of the tort and the forum state are relevant.[15] The *lex loci delicti* controls the measure of damages even though damages may accrue to the plaintiff in another place.[16] Similarly the fact that the law of a third state may determine the eventual recipient of the damages is not controlling. Thus, in *W. W. Clyde & Co. v. Dyess*[17] the contributory negligence of the plaintiff's husband did not bar the plaintiff's right to sue in the tort-forum state even though the spouses were domiciled in a community property state and he would share in the judgment; in *Traglio v. Harris*[18] the contributory negligence of the son which was imputed to the father by the law of the tort-forum state barred the father's but not the mother's cause of action, even though they were domiciled in a community property state.

Release or settlement by the injured party in a foreign state, however, may affect his right to or amount of recovery. In cases where an employee is injured in one state and accepts an award under the workmen's compensation act of another, the courts frequently hold that the compensation act can cut off his right for damages against the tort feasor.[19] But in the instant case the New Jersey Workmen's Compensa-

(1891). (New York court applied a statutory limitation on liability to a tort action that arose in Pennsylvania saying that the limitation was not a limitation upon the right of action or its inherent elements but was a limitation upon the discretion of the jury). See also Oceanic Steam Navigation Co., Ltd. v. Mellor, 233 U.S. 718, 34 Sup. 754, 58 L. Ed. 1171 (1914) (constitutionality of Rev. Stat. § 4283 pertaining to a limitation on admiralty actions upheld upon the grounds that if the parties chose to litigate in American courts they came in subject to the American limitations on damages). *Cf.* STUMBERG, CONFLICT OF LAWS 146 (1937).

14. Atchison, T. & S.F. Ry. v. Nichols, 264 U.S. 348, 44 Sup. Ct. 353, 68 L. Ed. 720 (1924); Hupp Motor Car Corp. v. Wadsworth, 113 F.2d 827 (6th Cir. 1940); Wynne v. McCarthy, 97 F.2d 964 (10th Cir. 1938) (where court does not decide whether action on implied contract or tort). See 2 BEALE, CONFLICT OF LAWS 1333 (1935); GOODRICH, CONFLICT OF LAWS § 91 (3d ed. 1949). *Cf.* STUMBERG, CONFLICT OF LAWS 146 (1937).

15. *But* cf. Lister v. McAnulty, [1944] Can. Sup. Ct. 317. There the plaintiff and his wife, domiciled in Massachusetts, had an automobile accident in Quebec. The plaintiff sued in Canada for (1) his wife's cause of action, (2) loss of services and consortium and (3) expenses to be incurred in the future in caring for his wife — all of which would be allowed under the Canadian law. The court refused recovery on the first two counts but allowed recovery on the third saying that the *lex loci delicti* controls the measure of damages but that since the laws of Massachusetts which defined the relationship of the plaintiff and his wife gave the plaintiff no right to his wife's cause of action or to his wife's services the plaintiff has not lost these and cannot recover in Canada for something that he had no right to. For comment on the case, see Hancock, *A Problem in Damages for Tort in the Conflict of Laws*, 22 CAN. B. REV. 843 (1944).

16. *Compare* Van Couver S.S. Co. Ltd. v. Rice, 288 U.S. 445, 53 Sup. Ct. 420, 77 L. Ed. 885 (1933) (jurisdiction), *with* Smith & Son, Inc. v. Taylor, 276 U.S. 179, 48 Sup. Ct. 228, 72 L. Ed. 520 (1928) (jurisdiction). See GOODRICH, CONFLICT OF LAWS § 105 (3d ed. 1949).

17. 126 F.2d 719 (10th Cir. 1942).

18. 104 F.2d 439 (9th Cir. 1939).

19. Barnhart v. American Concrete Steel Co., 227 N.Y. 531, 125 N.E. 675 (1920); Post v. Berger & Gohlke, 216 N.Y. 544, 111 N.E. 351 (1916). See GOOD-

tion Act does not bar the plaintiff's claim.[20]

In the instant case, though the tort and forum were both in New York, the court refused to apply the New York *Drinkwater* doctrine by reasoning that the contractual relationship of the plaintiff and his New Jersey employer required an application of the New Jersey law, which followed the general rule that contributions from a collateral source cannot be set up in mitigation of damages.[21] By conflict rules the New York law rather than the New Jersey law should be determinative.[22] If the *Drinkwater* doctrine had allowed payments to the injured party under his own accident insurance policies to be set up in mitigation of his damages, would the court have looked to the law governing the insurance policy to determine the effect of these payments on the tort obligation? It seems that this federal court, faced with a doctrine which it was unable to overrule and unwilling to apply, distorted the principles of conflict of laws to circumvent what it thought was bad law and to attain what it regarded as a just result in the case.

CONFLICT OF LAWS — DIRECT ACTION AGAINST INSURER — CONSTITUTIONALITY OF STATUTE REQUIRING APPLICATION TO OUT-OF-STATE INSURANCE POLICIES

Plaintiff, a Texan, brought an action in a Louisiana federal district court against defendant, a foreign corporation qualified to do business in Louisiana, for an injury sustained in an accident in Louisiana due to the negligence of defendant's insured, also a Texan. Defendant had complied with a Louisiana statute requiring liability insurance companies to file written consent to the bringing of a direct suit against the company in an action arising out of an accident in the state, regardless of where the insurance policy was contracted. The policy in issue contained a no-action clause, valid in Texas where the contract was made, which prohibited suit against the insurer until the liability of the insured had been adjudicated or agreed upon by the insurer. Defendant moved for dismissal, or, in the alternative, summary judgment. *Held,* case dismissed. The application of the direct-action statute to a policy contracted out of the state and containing a no-action clause valid where made would deprive defendant of property without due process of law in violation of the Fourteenth Amendment. *Mayo v.*

RICH, CONFLICT OF LAWS § 100 (3d ed. 1949); 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 87.32 (1952); Wade, *Joint Tortfeasors and the Conflict of Laws,* 6 VAND. L. REV. 464 (1953); Note, 80 U. OF PA. L. REV. 1139 (1932).

20. N.J. STAT. ANN. § 34:15-40 (1937).

21. 197 F.2d at 131.

22. The contractual relationship should therefore have no effect on the amount of damages due the plaintiff unless, as pointed out by the dissent, the contract required the plaintiff to reimburse his employer, in which case even the *Drinkwater* doctrine would allow the plaintiff to recover. 197 F.2d at 133.

Zurich General Accident & Liability Ins. Co., 106 F. Supp. 579 (W.D. La. 1952).

Plaintiff, a Louisiana citizen, directly sued defendant, a California corporation, in the Louisiana federal district court for injuries sustained by her in an accident in Louisiana involving the automobile of defendant's insured, a Texan. The insurance contract had been made in Texas and contained a no-action clause. Defendant moved to dismiss or for summary judgment. *Held*, motion denied. Louisiana law applies, as it is within that state's power to exact consent to a direct action on all policies issued by an insurer where the damages are sustained in Louisiana. *Buxton v. Midwestern Ins. Co.*, 102 F. Supp. 500 (W.D. La. 1952).

So-called direct-action statutes, allowing an injured person to maintain an action directly against the insurer before judgment against the tortfeasor, raise characterization[1] problems in the field of conflict of laws. The first problem involves a classification of the statute as procedural or substantive. If it is classified as procedural, the law of the forum governs.[2] If it is considered substantive, a further determination is necessary — namely, whether tort or contract choice-of-law rules are to be applied.[3] The decisions involving characterization of such a statute have offered opposing solutions to the two problems.[4] The Louisiana legislature avoided the problem of characterization by expressly extending the right of direct action to policies written and delivered outside the state and requiring foreign insurers to consent to direct suit as the price of doing local business.[5]

Such statutory provisions raise questions of legislative jurisdiction and constitutional due process.[6] It is clear that the Constitution imposes certain restrictions on the power of a state to create rights or interests "which under the principles of the common law will be recog-

1. For an extensive general study of characterization, see ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940). *But cf.* Morse, *Characterization: Shadow or Substance*, 49 COL. L. REV. 1027 (1949), minimizing its importance.

2. RESTATEMENT, CONFLICT OF LAWS § 585 (1934).

3. RESTATEMENT, CONFLICT OF LAWS § 65 (1934).

4. *E.g.*, Wells v. American Employers' Ins. Co., 132 F.2d 316 (5th Cir. 1942) (procedure); Rogers v. American Employers' Ins. Co., 61 F. Supp. 142 (W.D. La. 1945) (procedure); Coderre v. Travelers' Ins. Co., 48 R.I. 152, 136 Atl. 305, 54 A.L.R. 512 (1927) (contract); Riding v. Travelers' Ins. Co., 48 R.I. 433, 138 Atl. 186 (1927) (contract); Oertel v. Williams, 214 Wis. 68, 251 N.W. 465 (1933) (joinder statute held procedural). As to what law governs in determining whether the statute is procedural or substantive, see McArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 305, 120 A.L.R. 846 (1939), overruling Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938). See also Note, 120 A.L.R. 855 (1939).

5. LA. REV. STAT. tit. 22 §§ 655, 683 (1950), as amended by LA. STAT. 1950, Nos. 541-42.

6. *See* Home Insurance Co. v. Dick, 281 U.S. 397, 406, 50 Sup. Ct. 338, 74 L. Ed. 926 (1930). See CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS 63-84 (1942); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause*, 22 ORE. L. REV. 109 (1943).

nized as valid in other states."[7] The decisions of the Supreme Court, in determining whether an exercise of legislative jurisdiction is without due process, have not been consistent in indicating the extent to which constitutional law incorporates the rules of conflict of laws.[8] For example, there have developed two series of Supreme Court cases adopting two theories of constitutional due process; most of these cases have involved insurance, although no case has involved a direct-action statute. The first series, originating in *Allgeyer v. Louisiana*[9] and adopting a doctrine of "territoriality,"[10] is to the effect that a state is constitutionally without power to control or restrict obligations of insurance contracts entered into in another state.[11] Simultaneously, another group of decisions[12] has adopted a "governmental interest" test[13] of reasonableness and fairness based upon an examination of the

7. RESTATEMENT, CONFLICT OF LAWS §§ 42-43 (1934).

8. "The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of the land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned." Kryger v. Wilson, 242 U.S. 171, 176, 37 Sup. Ct. 34, 61 L. Ed. 229 (1916). See Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Hilpert and Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U.L.Q. 27 (1939); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause*, 22 ORE. L. REV. 109 (1943); Wolkin, *Conflict of Laws in the Federal Courts: The Erie Era*, 94 U. OF PA. L. REV. 293 (1946).

9. 165 U.S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832 (1896).

10. Greene, *The Allgeyer Case as a Constitutional Embrasure of Territoriality*, 2 ST. JOHN'S L. REV. 22 (1927). See Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923). *Cf.* Holmes, J., in Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 214, 42 Sup. Ct. 467, 66 L. Ed. 900 (1922): "The Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and consequences of the act."

11. Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 45 Sup. Ct. 129, 69 L. Ed. 342 (1924); Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 42 Sup. Ct. 467, 66 L. Ed. 900 (1922); New York Life Ins. Co. v. Dodge, 246 U.S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772 (1918); New York Life Ins. Co. v. Head, 234 U.S. 149, 34 Sup. Ct. 879, 58 L. Ed. 1259 (1914).

12. Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 63 Sup. Ct. 602, 87 L. Ed. 777, 145 A.L.R. 1113 (1943); Griffin v. McCoach, 313 U.S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941); Osborn v. Ozlin, 310 U.S. 53, 60 Sup. Ct. 758, 84 L. Ed. 1074 (1940); Pacific Employers' Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 59 Sup. Ct. 629, 83 L. Ed. 940 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 55 Sup. Ct. 518, 79 L. Ed. 1044 (1935); Home Ins. Co. v. Dick, 281 U.S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926 (1930); *cf.* American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U.S. 2, 39 Sup. Ct. 431, 63 L. Ed. 810 (1919) (decided the year after the *Dodge* case, *supra* note 14, but apparently adopting the governmental interest test.) As to application of the "governmental interest" test in cases involving judicial jurisdiction, see Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 Sup. Ct. 413, 96 L. Ed. 485 (1952); International Shoe Co. v. Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945).

13. The strong dissent of Brandeis, J., in New York Life Ins. Co. v. Dodge, 246 U.S. 357, 382, 38 Sup. Ct. 337, 62 L. Ed. 772 (1918), seems to be an early advocation of the test; and Brandeis, J., employed the governmental interest test in Home Ins. Co. v. Dick, 281 U.S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926 (1930), where it was held that the forum state, merely because one of the parties in suit was a citizen and because the suit was brought there, did not have sufficient

circumstances of each case.[14]

Another constitutional doctrine, ordinarily unrelated to the problem of legislative jurisdiction but called into play by the peculiarities of the Louisiana statute as applied to a foreign corporation, is the so-called doctrine of "unconstitutional conditions."[15] This doctrine, broadly stated, is that a "condition attached by a state to a privilege is unconstitutional if it requires the relinquishment of a constitutional right."[16] There has been no clear statement by the Supreme Court of the criterion, but it is usually said that the test of due process is whether the surrender of the right constitutes an undue interference with the workings of the federal system or whether it is for a purpose germane to the state's power to exclude corporations from local business.[17]

Of the instant cases, the *Mayo* case seems to have adopted a strict doctrine of territoriality[18] and an even stricter doctrine of unconstitutional conditions.[19] On the other hand, the *Buxton* opinion adopted

interest to apply its own statute of limitations allowing suit on a foreign policy containing a provision by which the obligation had lapsed. In Osborn v. Ozlin, 310 U.S. 53, 62, 60 Sup. Ct. 758, 84 L. Ed. 1074 (1940), Virginia was allowed to apply its statute requiring insurance contracts made in the state to be made through Virginia agents and requiring that the agents be paid half of the commission. The necessary interest was found in the presence in the state of the protected risk, and the Court said that Virginia was only claiming that her interest "in the risks which these contracts are designed to prevent warrants the kind of control" that was imposed. Finally, in Griffin v. McCoach, 313 U.S. 498, 503, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941), the Court said: "It is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the life of a Texas citizen to recover where no insurable interest in the decedent exists in the beneficiary. . . . But this is something to be decided according to Texas decisions, to none of which the opinion refers. . . . The decision must be reversed and remanded . . . for determination of the law of Texas as applied to the circumstances of this case."

14. "The issue here, at the constitutional level, is a like one of general fairness to the corporation. . . . The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case." Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445, 72 Sup. Ct. 413, 96 L. Ed. 485 (1952).

15. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COL. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. OF PA. L. REV. 879 (1929).

16. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COL. L. REV. 321 (1935).

17. *E.g.*, Terral v. Burke Construction Co., 257 U.S. 529, 42 Sup. Ct. 188, 66 L. Ed. 352 (1922). See Bothwell v. Buckbee, Mears Co., 275 U.S. 274, 48 Sup. Ct. 124, 72 L. Ed. 277 (1927). See also Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COL. L. REV. 321, 357 (1935). *Cf.* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 46 Sup. Ct. 605, 70 L. Ed. 1101 (1926).

18. "Insofar as the state statute here requires an insurance company to file a written consent to be sued in a direct action, with respect to contracts made outside of Louisiana, it constitutes an attempt to give that law effect, not merely within its own borders, but extending extra-territorially into all other states of the Union, as well as foreign countries, even though the rights of the contracting parties may have been validly fixed under the laws of the other states or countries." Mayo v. Zurich General Accident & Liability Ins. Co., 106 F. Supp. 579, 581 (W.D. La. 1952).

19. Without inquiry as to reasonableness of the statute exacting consent, the case holds the requirement of consent to direct suit is just as unconstitutional

the governmental interest test; sufficient interest was found in Louisiana by virtue of its being the place of injury and because of the public interest of the state in the regulation of insurance on local risks.[20] The former decision indicated that the same statutory provisions would be constitutional if applied to a contract made in Louisiana,[21] thus failing to consider whether Louisiana had sufficient interest in the transaction to characterize the question as procedural or tort so as to be governed by its law. It is possible that, even under the modern "governmental interest" test of due process, the fact that the plaintiff in the *Mayo* case was a Texan might be enough to render Louisiana's interest insufficient, although the *Buxton* opinion indicates that this one "contact" is not necessarily determinative.[22] This is the only possible basis for reconciling the two decisions, and it seems to be an inadequate distinction. The questions involved are of immediate importance; it is hoped that a higher court will soon consider them.

CONFLICT OF LAWS — JURISDICTION — FOREIGN ACTS AFFECTING COMMERCE

Defendant, an American citizen, assembled watches in Mexico from parts purchased in the United States and stamped them with the trade name that plaintiff, an American watch company, had registered under the laws of the United States. By registration in accordance with Mexican law defendant secured the right to use the trade name, but prior to the decision in the instant case the courts of that country had nullified the registration. Some of his finished products came into this country in the hands of purchasers who had acquired them in Mexico. Plaintiff sued in a federal district court in Texas to enjoin defendant's use of the trade name. The complaint was dismissed for lack of jurisdiction of the subject matter; the court of appeals reversed.

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a condition as one that compels relinquishment of the right to resort to federal court, citing Terral v. Burke Construction Co., *supra* note 17. 106 F. Supp. at 582-83.

20. "Even assuming, without deciding, that the right . . . is a substantive right . . . we are of the opinion that it voluntarily relinquished that right as the price of doing business here, which is a permissible regulation of the business of insurance by Louisiana, as insurance is a business affected by the public interest. . . . The State of Louisiana, for the protection of its citizens, and perhaps for the protection of the public generally while in this State, on its own public roads, requires all insurers alike to consent to this type of action beforehand, and voluntarily, as the price of doing business here. . . . Pacific is physically present within Louisiana boundaries — a resident here — and so bound to Louisiana by allegiance to its laws! Louisiana has a great degree of interest in regulating policies of insurance . . . especially on vehicles using its highways." Buxton v. Midwestern Ins. Co., 102 F. Supp. 500, 507, 509 (W.D. La. 1952).

21. 106 F. Supp. at 585.

22. See note 20 *supra*.

Held (6-2), affirmed.[1] Although defendant made use of plaintiff's trade name beyond the territorial limits of the United States, a United States district court had jurisdiction to grant injunctive relief, for such use of the trade name affected commerce within the expressed intent of the Lanham Trade Mark Act of 1946, "to regulate commerce within the control of Congress. . . ."[2] *Steele v. Bulova Watch Co.*, 344 U.S. 280, 73 Sup. Ct. 252, 97 L. Ed. 192 (1952).

The question in the instant case — whether the Lanham Act should be given extraterritorial effect — resolves basically to one of statutory interpretation of the Act. Effect without the territorial limits of the United States has been given some statutes on the basis of citizenship,[3] while extraterritorial application has been denied others by the Supreme Court's use of the presumption that statutes are primarily territorial unless Congress shows a contrary intention.[4] The first important case involving extraterritorial application of a United States statute concerning trade practices in foreign commerce was *American Banana Co. v. United Fruit Co.*[5] There the Supreme Court, finding no congressional intent that the Sherman Anti-Trust Act[6] should have extraterritorial effect, seemed to hold[7] that acts which were lawful in the country where they were committed, although constituting part of a conspiracy in restraint of our foreign commerce, were not a violation

1. Clark, J., delivered the opinion of the court; Reed, J., and Douglas, J., dissented.

2. 60 STAT. 427 (1946), 15 U.S.C.A. §§ 1051-1127 (1948).

3. See Skiriotes v. Florida, 313 U.S. 69, 61 Sup. Ct. 924, 85 L. Ed. 1193 (1941) (giving Florida statute dealing with unfair fishing practices extraterritorial effect); Blackmer v. United States, 284 U.S. 421, 52 Sup. Ct. 252, 76 L. Ed. 375 (1932) (statute allowing federal courts to subpoena witnesses); Cook v. Tait, 265 U.S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895 (1924) (Revenue Act); United States v. Bowman, 260 U.S. 94, 43 Sup. Ct. 39, 67 L. Ed. 149 (1922) (Criminal Code).

4. See Foley Bros., Inc. v. Filardo, 336 U.S. 281, 69 Sup. Ct. 575, 93 L. Ed. 680 (1949) (Eight Hour Law); New York Central R.R. v. Chisholm, 268 U.S. 29, 45 Sup. Ct. 402, 69 L. Ed. 828 (1925) (Employers' Liability Act); American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826 (1909) (Sherman Anti-Trust Act); *see* Blackmer v. United States, 284 U.S. 421, 437, 52 Sup. Ct. 252, 76 L. Ed. 375 (1932); *cf.* Southern Pacific R.R. of Mexico v. Gonzalez, 48 Ariz. 260, 61 P.2d 377 (1936) (Carmack Amendment to Interstate Commerce Act). See also Note, 106 A.L.R. 1029 (1937). *But cf.* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 69 Sup. Ct. 140, 93 L. Ed. 76 (1948), holding the island of Bermuda a "possession" for the purposes of the Fair Labor Standards Act on the basis of a ninety-nine year lease of military installations obtained from the British Government during the last war.

5. 213 U.S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826 (1909).

6. 26 STAT. 209 (1890), as amended 50 STAT. 693 (1937), 15 U.S.C.A. §§ 1-7 (1951).

7. The complaint in the *Banana* case alleged an effect upon the American market, but the court of appeals held that such damage was "incidental" to loss suffered by the complainant by the acts of officials of the government of Costa Rica. 166 Fed. 261, 264 (2d Cir. 1908). The Supreme Court found these acts to be beyond the reach of our law since they were acts of a sovereign, but they did not consider the question of effect on the American market. For an excellent criticism of this case, see Hunting, *Extra-territorial Effect of the Sherman Act: American Banana Company Versus United Fruit Company*, 6 ILL. L. REV. 34 (1911).

of the Act. Subsequent cases involving foreign commerce have departed from the doctrine of the *American Banana* case by placing emphasis on the effect of the conspiracy or acts on our foreign commerce.[8] Thus both a conspiracy entered into within the United States[9] and a conspiracy entered into abroad which restrains our foreign commerce[10] have been held to be subject to injunction under the Sherman Act. When, however, a conspiracy entered into in this country restrains the commerce of another country there would seem to be no power to enjoin.[11]

The intended scope of the Lanham Act is not made clear by the grant of power expressed therein,[12] but in other statutes dealing with commerce, "foreign commerce" is expressly included as an area Congress intends to regulate.[13] Under trade-mark statutes prior to the Lanham

8. See Note, 49 YALE L.J. 1312 (1940).

9. United States v. Sisal Sales Corp., 274 U.S. 268, 47 Sup. Ct. 592, 71 L. Ed. 1042 (1927); United States v. Pacific and Arctic Ry. and Nav. Co., 228 U.S. 87, 33 Sup. Ct. 443, 57 L. Ed. 742 (1913); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945); United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y. 1944). See also Branch v. Federal Trade Comm'n, 141 F.2d 31 (7th Cir. 1944) (Federal Trade Commission Act).

10. Thomsen v. Cayser, 243 U.S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597 (1917); Thomsen v. Union Castle Mail S.S. Co., 166 Fed. 251 (2d Cir. 1908); United States v. Imperial Chemical Industries Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952): United States v. Hamburg-Amerikanische Packet-Fahrtachtien-Gesellschaft, 200 Fed. 806 (C.C.S.D.N.Y. 1911). See also United States v. Nord Deutscher Lloyd, 223 U.S. 512, 32 Sup. Ct. 244, 56 L. Ed. 531 (1912) (giving Immigration Act extraterritorial effect).

Language in a recent anti-trust case involving foreign conspiracies in restraint of our commerce, United States v. General Elec. Co., 82 F. Supp. 753, 890 (D.N.J. 1949), citing United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), seems to lay down the rule that both an intent to affect our commerce and an effect in fact upon it are requisites for application of the Sherman Act. See 3 TOULMIN, ANTI-TRUST LAWS, §§ 11.10, 11.11 (1949).

11. Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 103 F.2d 315 (2d Cir. 1939) (by implication).

12. The statute's expressed intent is "to regulate commerce within the control of Congress. . . ." 60 STAT. 444 (1946), 15 U.S.C.A. § 1127 (1948). In the preface to the Act by Daphne Robert, appearing in United States Code Annotated, commerce is defined as embracing "foreign commerce." 15 U.S.C.A. 265, 268 (1948). See ROBERT, THE NEW TRADE-MARK MANUAL 12 (1947).

In the Senate Committee Report on the Lanham Trade-Mark Bill, SEN. REP. No. 1333, 79th Cong., 2d Sess. 5 (1946), one of the purposes of the Act is "2. To carry out by statute our international commitments to the end that American traders in foreign countries may secure the protection to their marks to which they are entitled." The Trade-Mark Act of 1905 by its express wording deals with unfair trade practices in "foreign commerce." 33 STAT. 724 (1905), as amended 52 STAT. 639 (1938).

13. Some statutes dealing with commerce in general, expressly provide for inclusion of foreign commerce. Sherman Anti-Trust Act, 26 STAT. 209 (1890), as amended 50 STAT. 693 (1937), 15 U.S.C.A. § 1 (1951); Federal Trade Commission Act, 38 STAT. 717 (1914), as amended 52 STAT. 111 (1938), 15 U.S.C.A. § 44 (1951); Clayton Act, 38 STAT. 730 (1914), 15 U.S.C.A. § 12 (1951). It is arguable from the fact that other statutes dealing with commerce and the prior Trade-Mark Act expressly included "foreign commerce" that Congress intended the omission of the field of foreign commerce in the Lanham Act.

Other legislation has been passed dealing solely with the regulation of foreign commerce. Anti-Dumping Act, 42 STAT. 11 (1921), as amended 46 STAT. 762 (1930), 19 U.S.C.A. § 160 (1937); Webb-Pomerene Export Trade Act, 40 STAT. 516 (1918), 15 U.S.C.A. § 61 (1951).

Act, relief has been given where a registered American trade name has been used by another American whose products, although manufactured in the United States, were sold in foreign countries, whether the trade name was affixed within the United States[14] or in the foreign country.[15] There is no right, however, to enjoin the use of a trade name where the user secures the right to use the name under the law of the foreign country where he is selling his product.[16]

In the instant case the defendant committed no acts within the United States except the purchase of parts.[17] If the doctrine of the *American Banana* case is to be invoked, the instant case seems erroneous, and the decisions under the prior trade-mark law irrelevant; for in those cases the defendants performed acts within the United States — they manufactured their products here and then shipped them abroad. Furthermore, in the cases giving the Sherman Act extraterritorial effect, although there has been some act or conspiracy within the United States, the real emphasis of the courts has been placed upon the question of whether or not there was an effect on our commerce.[18] The acts of the defendant in the instant case clearly affected foreign commerce, and though there were no acts within this country, the holding seemed sound, for a statute dealing with commerce, such as

14. See Hecker-H-O Co. v. Holland Food Corp., 31 F.2d 794 (S.D.N.Y. 1929).

15. See Vacuum Oil Co. v. Eagle Oil Co., 154 Fed. 867 (C.C.D.N.J. 1907).

16. George W. Luft Co. v. Zande Cosmetic Co., 142 F.2d 536 (2d Cir. 1944). This case enumerates three possible variations in the problem of use of a trade name in foreign countries by a person other than the American registrant: (1) Countries where both parties (American registrant and fraudulent user) are doing business and the latter has secured the right to use the trade name under the laws of the foreign country; (2) countries where both parties are doing business and the fraudulent user has not secured the right to use the trade name under the laws of the foreign country; and (3) countries where the fraudulent user is doing business and the American registrant fails to prove he is now or is likely to do business in the foreign country. 142 F.2d at 540. In the first and third situations the court finds no grounds for relief, but in the second situation, which is most similar to the instant case, the court, basing its view on Hecker-H-O-Co. v. Holland Food Corp., 31 F.2d 794 (S.D.N.Y. 1929), finds grounds for relief. These rulings, however, are accurately applied only to defendants who do their manufacturing within the United States, for the facts of the *Zande* case limit the holding to such defendant manufacturers. For a good discussion of the Lanham Act and its effect on international trade, see Ladas, *The Lanham Act and International Trade*, 14 LAW & CONTEMP. PROB. 269 (1949). See also Timberg, *Trade-Marks, Monopoly, and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323 (1949).

17. The dissent, by a mechanical breakdown of defendant's activities, found the purchase of parts within the United States not to be an illegal commercial act, nor did they find the fact that the defendant's watches were coming into the United States an illegal commercial act since there was no collusion between defendant and the purchasers to get the watches into this country. Further, the dissent found the use of the plaintiff's trade name in Mexico to be an act not within the control of Congress. It is significant that no mention is made in the dissenting opinion of the effect of defendant's activities on the plaintiff's advertising and selling campaigns. 344 U.S. at 289.

18. In the cases cited in notes 8 and 9 *supra*, some act, whether a conspiracy or a partial or complete carrying out of the plan in restraint of trade, took place within the United States.

the Lanham Act, should not be denied application by considering each of defendant's acts as independent of the other, when his over-all plan so obviously constitutes an unfair trade practice.

CONFLICT OF LAWS — JURISDICTION — SERVICE ON UNINCORPORATED NONRESIDENT

In a personal injury action against an international labor union, a foreign unincorporated association, process issued and was served on the secretary of state in accordance with local statute.[1] Defendant's plea in abatement was sustained on the grounds that the state has no jurisdiction over such nonresidents and that a statute attempting to establish such jurisdiction would be unconstitutional. *Held,* reversed. A state statute may constitutionally provide for service of process on a nonresident unincorporated association in causes of action arising out of its business activity within the state. *McDaniel v. Textile Workers Union of America (CIO)*, 254 S.W.2d 1 (Tenn. App. E.S. 1952).[2]

Basically, the details of local jurisdiction are matters of internal concern and procedure. However, they become important in the field of conflict of laws when a foreign judgment is presented to a court as determinative of the legal relations of the parties thereto, since the judgment, to be sustained, must be founded on proper jurisdiction. Further, the due process provisions of the United States Constitution restrict the unlimited assumption of jurisdiction. It is in this respect that the Supreme Court, as final arbiter of the Constitution, compels state recognition of jurisdictional limitations.

Where there existed no basis for jurisdiction, a judgment against a nonresident individual, who neither appeared nor was personally served, has been held void.[3] The basis of power over a foreign corporation has been found in the state's ability to require the corporation to consent to the jurisdiction as a condition of admission.[4] The state could exclude the corporation, and therefore, could make its consent to the admission of the corporation conditional upon the corporation's assent to the jurisdiction of the state; the corporation, by entering the state

1. TENN. CODE SUPP. § 8679.1 (1950); TENN. CODE ANN. §§ 8681.1-8681.3 (Williams Supp. 1952). The act provides that any unincorporated association or organization, resident or nonresident, doing business in the state by performing any of the acts for which formed, shall appoint an agent for service of process, and that failing such appointment, process may be served on the secretary of state who shall give notice "by registered return receipt mail" to the association or organization. The phrase "registered return receipt mail" is found only in TENN. CODE SUPP. § 8679.1 (1950).

2. Certiorari was denied by the supreme court of the state. A copy of the decision may be found in 22 CCH LAB. LAW REP. ¶ 67,284 (1952).

3. Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1877).

4. *See* Lafayette Ins. Co. v. French, 18 How. 404, 407, 15 L. Ed. 451 (U.S. 1855).

to do business, is treated as having assented to the jurisdiction.[5] In the leading case of *Flexner v. Farson*,[6] it was decided that, since the privileges and immunities clause deprives the state of the power to exclude a citizen, there can be no imposition of conditions before admitting an unincorporated business; accordingly, the Kentucky statute which provided for service of process on an Illinois partnership was declared unconstitutional. Thus there appeared to be no basis for jurisdiction over foreign partnerships or, since the same rules apply,[7] over foreign unincorporated associations. Recognizing the compulsion of the *Flexner* rule, the Tennessee court declared unconstitutional a statutory provision for service of process on the agent of a business in counties other than the place of residence where it attempted to reach nonresident partners.[8] The law appeared settled in Tennessee that a nonresident partnership could not be reached through the courts of the state.[9]

Inasmuch as the effect of the decision of the instant case is to upset this body of law, it becomes necessary to examine its soundness by recent standards. The Supreme Court has, since the *Flexner* case, modified its position to a great extent. A first encroachment on that rule came when the Court considered a nonresident motorist statute; there it was held that, the automobile being a dangerous machine, a state could constitutionally regulate its use by providing for substituted service of process on the erring nonresident driver.[10] Then in *Doherty & Co. v. Goodman*[11] a nonresident partnership dealing in the sale of securities was held subject to Iowa jurisdiction, the Court treating the business as particularly susceptible to state regulation.[12] A few courts have felt that the *Doherty* case and the nonresident motorist cases represent segments of the law not definitive of the broad question; they have thus declined to express themselves on the problem of jurisdiction over nonresident partnerships.[13]

5. For a study of the history and development of the law of jurisdiction over foreign corporations, see Note, 4 VAND. L. REV. 661 (1951).

6. 248 U.S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250 (1919).

7. GOODRICH, CONFLICT OF LAWS 207 (3d ed. 1949).

8. Knox Bros. v. Wagner & Co., 141 Tenn. 348, 209 S.W. 638 (1919). The code provision, TENN. CODE ANN. § 8669 (Williams 1934), was considered valid in the earlier case of Green v. Snyder, 114 Tenn. 100, 84 S.W. 808 (1905). In substance it is very similar to the Iowa statute found constitutional in Doherty & Co. v. Goodman, 294 U.S. 623, 55 Sup. Ct. 553, 79 L. Ed. 1097 (1935).

9. *See* Martin v. Slagle, 178 Tenn. 121, 124, 156 S.W.2d 403, 404 (1941); Frolich & Barbour v. Hanson, 155 Tenn. 601, 603, 296 S.W. 353 (1927).

10. Hess v. Pawloski, 274 U.S. 352, 47 Sup. Ct. 632, 71 L. Ed. 1091 (1927).

11. 294 U.S. 623, 55 Sup. Ct. 553, 79 L. Ed. 1097 (1935).

12. This may be the ground for a valid distinction. The court in the instant case however cites with approval a suggestion that the selling of securities is no more dangerous than any other type of business activity, and that in effect the *Doherty* case establishes the doing of an act as a basis of personal jurisdiction. See Overton, *Broadening the Bases of Individual In Personam Jurisdiction in Tennessee*, 22 TENN. L. REV. 237, 244 (1952).

13. *See* Sugg v. Hendrix, 142 F.2d 740, 743 (5th Cir. 1944) (construction of levies); Condon v. Snipes, 205 Miss. 306, 38 So.2d 752, 756 (1949) (termite

But more important, the Supreme Court in *International Shoe Co. v. Washington*,[14] has set forth an entirely new approach to the problem of jurisdiction: where a defendant has certain minimum contacts within the state so that the prosecution of a suit does not offend traditional ideas of fairness and justice, he will be held amenable to the jurisdiction of the state. This reasonable contact rule explodes the fictionalized concepts of consent and presence on which jurisdiction was previously based. Though the case involves a corporation, the rationale is broad enough to include the unincorporated nonresident in its solution of the jurisdictional problem.[15] Later cases, moreover, indicate that the standards of local jurisdiction are constantly being expanded.[16]

The instant case thus declares that a statute extending the jurisdiction to a non-resident unincorporated business is constitutional and that the basis of jurisdiction over such a business depends on its minimum contacts within the state.[17] This decision is not an innovation in the law; though their opinions are not controlling, lower federal courts and the courts of other states have in recent years sustained local jurisdiction over similar defendants.[18] That the state may consti-

eradication), 3 MIAMI L.Q. 623; Wein v. Crockett, 113 Utah 301, 195 P.2d 222, 231 (1948) (dissenting opinion).

14. 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945).

15. An Indiana court refused to apply the *International Shoe* doctrine on the ground that the law therein stated applied to foreign corporation. Travis v. Fuqua, 121 Ind. App. 440, 97 N.E.2d 867 (1951). The court in the instant case says the law with respect to foreign corporations has no applicability, but perhaps this statement could be restricted to the law prior to *International Shoe*. 254 S.W.2d at 4. A recent annotation discusses the basis of jurisdiction over nonresident individuals and suggests application of corporate rules. See note, 10 A.L.R.2d 200 (1950).

16. See Travelers Health Ass'n v. Virginia *ex rel.* State Corporation Comm'n, 339 U.S. 643, 70 Sup. Ct. 927, 94 L. Ed. 1154 (1950) (foreign insurance corporation subject to jurisdiction where solicitations mailed into state); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 Sup. Ct. 413, 96 L. Ed. 485 (1952) (state jurisdiction neither compelled nor prohibited where cause of action arises out of activity without the state if sufficient activity within the state). These cases are limited to corporate activity. A recent Vermont case also involving a corporation suggests that a single tortious act will be sufficient. Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

17. The adoption of the *International Shoe* test may not be clear from the decision; the state supreme court in denying certiorari is more emphatic. McDaniel v. Textile Workers Union, 22 CCH LAB. LAW REP. ¶ 67,284 at 82,678 (1952).

18. See Operative Plasterers International Ass'n v. Case, 93 F.2d 56 (D.C. Cir. 1937); Western Mutual Fire Ins. Co. v. Lamson Bros. & Co., 42 F. Supp. 1007 (S.D. Iowa 1941); Doggett v. Peek, 32 F. Supp. 889 (N.D. Tex. 1940), *aff'd*, 116 F.2d 273 (5th Cir. 1940); International Union of Operating Engineers v. Jones Construction Co., 240 S.W.2d 49 (Ky. 1951); Brotherhood of Railroad Trainmen v. Agnew, 170 Miss. 604, 155 So. 205 (1934) (Mississippi has reserved the question as to partnership; see note 13 *supra*); State *ex rel.* Cook v. District Court, 102 Mont. 424, 58 P.2d 273 (1936); Schluter v. Trentonian Pub. Co., 4 N.J. Super. 294, 67 A.2d 189 (1949); Moran v. International Alliance of Theatrical Stage Employees, 139 N.J. Eq. 561, 52 A.2d 531 (1947) (chancellor took jurisdiction in absence of statute); Quinn v. Pershing, 367 Pa. 426, 80 A.2d 712 (1951); Edgar v. Southern Ry., 213 S.C. 445, 49 S.E.2d 841 (1948); Wein v. Crockett, 113 Utah 301, 195 P.2d 222 (1948); *see* Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W.2d 212, 216 (1948); Stafford v. Wood, 234 N.C. 622, 68 S.E.2d 268, 271 (1951); *cf.* Gerut v. Poe, 11 F.R.D. 281 (N.D. Ill. 1951) (partnership an

tutionally extend its jurisdiction to these nonresidents has long been accepted by text-writers.[19] But, what is most important, if the question has not already been decided in the *Doherty* case, the attitude of the Supreme Court is clearly favorable toward expanded state jurisdiction through the use of nonresident process statutes. There should be little doubt, then, but that the Tennessee court in this case has correctly interpreted the pattern which removes the *Flexner* rule as a guide in the law of nonresident jurisdiction.

CONFLICT OF LAWS — JURISDICTION — TRESPASS TO LAND AS TRANSITORY ACTION

Suit was brought in Arkansas by a flying service to collect an account for having sprayed insecticide upon a cotton crop in Missouri. The crop owner answered that his cotton was damaged through use of adulterated insecticide, and, by cross-complaint against petitioner, sought damages for negligence in its manufacture. Its motion to dismiss overruled, petitioner brought a prohibition proceeding against the trial court to prohibit its taking jurisdiction of the cross-complaint. *Held,* writ denied. Arkansas courts can entertain a suit for injuries to realty situated in another state. *Reasor-Hill Corp. v. Harrison,* 249 S.W.2d 994 (Ark. 1952).

Well-settled, though much-criticized, is the rule that an action for trespass to realty is local[1] and may be maintained only in the courts of the state where the land is located.[2] This rule arose out of early practice requiring a case to be tried by a jury of the vicinage and survived the evolution of the idea that redress for a tort is a personal right

entity under Motor Carrier Act); Wilson & Co. v. United Packinghouse Workers of America, 83 F. Supp. 162 (S.D.N.Y. 1949) (labor union entity for purposes of the labor act); Bayci v. Rango, 304 Ill. App. 203, 25 N.E.2d 1015 (1940) (class action); Donahue v. Kenney, 327 Mass. 409, 99 N.E.2d 155 (1951) (class action). *But see* Travis v. Fuqua, 121 Ind. App. 440, 97 N.E.2d 867, 870 (1951).

19. 1 BEALE, CONFLICT OF LAWS § 84.3 (1935); GOODRICH, CONFLICT OF LAWS 207 (3d ed. 1949); Culp, *Process in Actions Against Non-Residents Doing Business within a State,* 32 MICH. L. REV. 909 (1934); Daum, *The Transaction of Business within a State by a Non-Resident as a Foundation for Jurisdiction,* 19 IOWA L. REV. 421 (1934); Scott, *Jurisdiction over Nonresidents Doing Business within a State,* 32 HARV. L. REV. 871 (1919).

1. Livingston v. Jefferson, 15 Fed. Cas. 660, No. 8,411 (C.C.D. Va. 1811) (question considered for first time in the United States); Doulson v. Matthews, 4 T.R. 503, 100 Eng. Rep. 1143 (K.B. 1792); Mostyn v. Fabrigas, 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774). "If a cause of action is one that might have arisen anywhere, it is transitory; but if it is one that could only have arisen in one place, it is local." Laslie v. Gragg Lumber Co., 184 Ga. 794, 193 S.E. 763, 765 (1937).

2. See 3 BEALE, CONFLICT OF LAWS § 614.1 (1935); RESTATEMENT, CONFLICT OF LAWS § 614 (1934); Note, 42 A.L.R. 196 (1926). The jurisdictional objection may not be waived. Ellenwood v. Marietta Chair Co., 158 U.S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913 (1895).

and may be asserted wherever the wrongdoer is found.[3] The most frequent criticism of the rule is that the historical bases upon which its technical distinctions are founded no longer exist in reason or in law.[4]

Some modifications and exceptions to the rule have been made. For example, some courts have held that, when the gravamen of an action for injury to land is negligence, it is in its nature personal and therefore transitory.[5] This distinction between an action of trespass *quare clausum fregit* for a direct injury and one of trespass on the case for an indirect and consequential injury has been largely refuted.[6] Most cases hold that damage to land, whether direct or consequential, is essentially a local matter. An exception is recognized, however, when an act in one state causes injury to land in another. Then an action can usually be maintained in either state.[7]

The general rule does not prevent maintenance of an action where the trespass has materialized into a conversion of timber or minerals, since, upon severance from the land, they become personalty and the action for their conversion is transitory.[8] This has led to the anomaly that a wrongdoer may be followed out of the jurisdiction if he cuts timber and disposes of it,[9] but not if he burns it down.[10] A few courts have refused jurisdiction, however, where title to the land has been put in issue.[11] It would seem that if the remedy elected governs,[12] actions in personam, as for injunctive relief against trespasses, should be considered transitory. It is held, however, that equity has no power to restrain trespasses to realty located without the forum state, notwithstanding its power to compel a conveyance of land outside the state.[13]

3. See Kuhn, *Local and Transitory Actions in Private International Law*, 66 U. OF PA. L. REV. 301 (1918).

4. See Note, *Jurisdiction of Foreign Trespass to Land*, 17 VA. L. REV. 691 (1931). See also Note, 28 KY. L.J. 462 (1940), which questions whether the rule was part of the common law of England adopted by the several states.

5. Home Ins. Co. v. Pennsylvania R.R., 11 Hun 182 (N.Y. 1877). *But cf.* Brisbane v. Pennsylvania R.R., 205 N.Y. 431, 98 N.E. 752 (1912). "'An action for consequential injuries to land. . . is, under our Code, not local, but transitory in character. . . .'" Snyder v. Clough, 71 Ohio App. 440, 50 N.E.2d 384, 387 (1942).

6. See, *e.g.*, Taylor v. Sommers Bros. Match Co., 35 Idaho 30, 204 Pac. 472 (1922); Brisbane v. Pennsylvania R.R., 205 N.Y. 431, 98 N.E. 752 (1912).

7. See Ducktown Sulphur, Copper & Iron Co. v. Barnes, 60 S.W. 593 (Tenn. 1900); RESTATEMENT, CONFLICT OF LAWS § 615 (1934). *But cf.* Worster v. Winnipiseogee Lake Co., 25 N.H. 525 (1852).

8. Rackow v. United Excavating Co., 67 F. Supp. 699 (D.N.J. 1946); Laslie v. Gragg Lumber Co., 184 Ga. 794, 193 S.E. 763 (1937). But if trespass upon land is the principal thing and the conversion only incidental, the action is local. Ellenwood v. Marietta Chair Co., 158 U.S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913 (1895).

9. Laslie v. Gragg Lumber Co., 184 Ga. 794, 193 S.E. 763 (1937).

10. See Little v. Chicago, St. P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846, 33 L.R.A. 423 (1896); instant case, 249 S.W.2d at 996.

11. See Ellenwood v. Marietta Chair Co., 158 U.S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913 (1895).

12. See Bybee v. Fairchild, 75 Cal. App.2d 35, 170 P.2d 54 (1946).

13. "[T]here can be no difference between a suit in equity to restrain future

The reason for the refusal to take jurisdiction most frequently given is that the trial may involve an issue of title to foreign land.[14] The justification is that, in the determination of an action of this kind, an investigation of the title and right and nature of possession — purely local questions — may be necessary; the necessity for surveyors and questions of boundary may arise.[15] However, an action of trespass to land is deemed local although plaintiff's title is admitted.[16] On the other hand, actions for slander of title,[17] breach of contract respecting land,[18] use and occupation,[19] injury to person or to personal property[20] and equitable compulsion of performance of acts relating to foreign lands[21] — in all of which title may be in issue — have never been considered local.[22] Actually, some justification for the rule might be offered in the doctrine of *forum non conveniens;* but that is a rule of convenience and expediency rather than one of jurisdiction.[23]

State statutes which require actions for injury to real estate to be brought in the county in which the land lies neither justify nor enforce the general rule. Since service may be made anywhere in the state, there is not the same denial of a remedy which is consequent under the general rule.[24]

As the reparation in an action for damages for injury to realty is purely personal, the action should be transitory in the same manner as are actions for other personal torts. The remedy sought should determine whether an action is local or transitory. If all the plaintiff seeks is pecuniary damages, he should not be confined to the *forum rei sitae.* Under the present rule, a wrongdoer may escape the consequences of his misdeeds by fleeing and gaining refuge in another state.[25]

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trespasses upon real property and an action at law for past trespasses upon the same." Ophir Silver Mining Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 74 (1905). *But cf.* Alexander v. Tolleston Club, 110 Ill. 65 (1884). A court of equity has no power to entertain such a suit where the land in question is without its territorial jurisdiction, notwithstanding the fact that it has jurisdiction of the persons of the alleged trespassers. Columbia Nat. Sand Dredging Co. v. Morton, 28 App. D.C. 288, 7 L.R.A. (N.S.) 114 (1906). See Note, 113 A.L.R. 940 (1938).

14. "[B]ut when the title is only incidentally affected . . . the action is transitory. . . ." Mills v. District Court, 187 Okla. 247, 102 P.2d 589, 591 (1940).

15. See Brown v. Dayton C. & I. Co., 3 Tenn. Civ. App. 395 (1912).

16. *Cf.* Wolff v. McGaugh, 175 Ala. 299, 57 So. 754 (1911).

17. Dodge v. Colby, 108 N.Y. 445, 15 N.E. 703 (1888).

18. *See* instant case, 249 S.W.2d at 996.

19. Sheppard v. Coeur d'Alene Lumber Co., 62 Wash. 12, 112 Pac. 932 (1911).

20. Stone v. United States, 167 U.S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127 (1897).

21. Alexander v. Tolleston Club, 110 Ill. 65 (1884).

22. See Weber v. Bruce, 198 Okla. 106, 175 P.2d 800 (1947).

23. Blaustein v. Pan American Petroleum & Transp. Co., 174 Misc. 601, 21 N.Y.S.2d 651 (Sup. Ct. 1940). See also Little v. Chicago, St. P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846, 33 L.R.A. 423 (1896).

24. See instant case, 249 S.W.2d at 995; Little v. Chicago, St. P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846, 33 L.R.A. 423 (1896).

25. "[P]laintiff would be in the position of having a right which the courts could not enforce. . . ." Laslie v. Gragg Lumber Co., 184 Ga. 794, 193 S.E. 763, 769 (1937) (dissenting opinion).

"Basic principles of justice demand that wrongs should not go unredressed."[26] Although the rule thus works an injustice, only Minnesota[27] and, now, Arkansas[28] have definitely changed the rule by judicial action.

CRIMINAL PROCEDURE — SUSPENDED SENTENCE — FACTORS CONSIDERED IN REVOCATION

Defendant was convicted in one county in North Carolina for transportation of whisky. Sentence was suspended and he was placed on probation. When later tried on a charge of another crime in another county in the same state, defendant entered a plea of *nolo contendere* and was convicted thereon. The court in the first county revoked the suspended sentence and imposed the original penalty on the ground that defendant, in disobeying a penal statute, had violated a condition of the suspended sentence. *Held,* reversed and remanded. A plea of *nolo contendere* by a defendant to an action in one county could not be used against him in another county as an admission of violation of probation from an earlier sentence in the latter county. *State v. Thomas,* 236 N.C. 196, 72 S.E.2d 525 (1952).

Where the plea of *nolo contendere* is accepted in a criminal action,[1] it has the same effect as a plea of guilty for the purpose of that case, but it may not be used against the defendant in a subsequent civil suit.[2] Some courts even refuse to admit it in a later criminal action based upon the same facts.[3] However, it has been held that a plea

26. Instant case, 249 S.W.2d at 996.

27. Little v. Chicago, St. P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846, 33 L.R.A. 423 (1896).

28. New York has changed the rule by statute. N.Y. REAL PROPERTY LAW § 536 (1945). Louisiana never had the rule. See Inman v. Harris, 219 La. 55, 52 So.2d 246, 247 (1951). See also City of Fostoria v. Fox, 60 Ohio St. 340, 54 N.E. 370 (1899).

1. The plea is not recognized in some states. People v. Miller, 264 Ill. 148, 106 N.E. 191 (1914); Mahoney v. State, 197 Ind. 335, 149 N.E. 444 (1925); State v. Hill, 145 Kan. 19, 64 P.2d 71 (1937); State v. Kiewel, 166 Minn. 302, 207 N.W. 646 (1926). In jurisdictions where it is recognized, its acceptance is entirely at the discretion of the court. Hudson v. United States, 272 U.S. 451, 47 Sup. Ct. 127, 71 L. Ed. 347 (1926); Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal. App.2d 476, 139 P.2d 681 (1943); Williams v. State, 130 Miss. 827, 94 So. 882 (1923); Orabona v. Linscott, 49 R.I. 443, 144 Atl. 52 (1928); State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928).

2. United States v. Norris, 281 U.S. 619, 50 Sup. Ct. 424, 74 L. Ed. 1076 (1930); State v. Burnett, 174 N.C. 796, 93 S.E. 473 (1917); Teslovich v. Fireman's Fund Ins. Co., 110 Pa. Super. 245, 168 Atl. 354 (1933); 14 AM. JUR., *Criminal Law* § 275 (1938).

3. In taking this position in the instant case the North Carolina court seems to rely solely on the *American Law Reports* and *American Jurisprudence.* 152 A.L.R. 280 (1944); 14 AM. JUR., *Criminal Law* § 275 (1938). In support of this opinion, however, A.L.R. cites only two cases, State v. La Rose, 71 N.H. 435, 52 Atl. 943 (1902), and Chester v. State, 107 Miss. 459, 65 So. 510

of *nolo contendere* or a conviction thereon is sufficient to impeach the credibility of a witness in a subsequent action,[4] to authorize the disbarment of an attorney[5] or to sustain a conviction as a second offender in an independent criminal action.[6]

In the instant case, consideration of such a plea in the revocation of a suspended sentence was overruled. Most statutes, when providing for such probation,[7] give the courts freedom to place certain restrictions thereon[8] and provide for revocation of probation for breach of such conditions.[9] Such legislation rarely provides for a procedure for revocation[10] but allows the courts to establish their own rules.[11]

Since the defendant has already been convicted of the crime, guilt or innocence is not a question in the revocation proceedings. Probation is only one method of rehabilitation.[12] If the court for any reason

(1914). The second of these relies almost solely on the *La Rose* case which was distinguished in Pfotzer v. Aqua Systems, 162 F.2d 779 (2d Cir. 1947), on the grounds that there was evidence of a plea of *nolo contendre* but no evidence of a conviction thereon. In the instant case there was both a plea and a conviction and both were shown.

4. Pfotzer v. Aqua Systems, 162 F.2d 779 (2d Cir. 1947); State v. Herlihy, 102 Me. 310, 66 Atl. 643 (1906); State v. Henson, 66 N.J.L. 601, 50 Atl. 468 (1901); State v. Conway, 20 R.I. 270, 38 Atl. 656 (1897).

5. Neibling v. Terry, 352 Mo. 396, 177 S.W.2d 502 (1944); State v. Estes, 130 Tex. 425, 109 S.W.2d 167 (1937). These cases are usually based on a statute making conviction of a felony involving moral turpitude sufficient grounds for disbarment. *Contra:* People v. Edison, 100 Colo. 574, 69 P.2d 246 (1937); *In re* Smith, 365 Ill. 11, 5 N.E.2d 227 (1936); *In re* Stiers, 204 N.C. 48, 167 S.E. 382 (1933).

6. State v. Fagin, 64 N.H. 431, 14 Atl. 727 (1888); People v. Daiboch, 265 N.Y. 125, 191 N.E. 859 (1934); State v. Moss, 108 W. Va. 692, 152 S.E. 749 (1930); State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928).

7. Since the legislature makes the laws defining criminal offenses and the processes by which these laws are enforced, it has the power to modify or suspend punishment. *See* Lovelace v. Commonwealth, 285 Ky. 386, 147 S.W.2d 1029, 1034 (1941).

8. Some of the conditions which may be imposed are: that the defendant shall make reparations for his acts, United States v. Berger, 145 F.2d 888 (2d Cir. 1944), *cert. denied*, 324 U.S. 848 (1945); People v. Sidwell, 27 Cal.2d 121, 162 P.2d 913 (1945); or shall abstain from the use of alcoholic beverages, State v. Barnett, 110 Vt. 221, 3 A.2d 521 (1939). The requirement of "good behavior" is an understood condition in almost all instances. TENN. CODE ANN. § 11802.2 (Williams 1934); ILL. ANN. STAT. c. 38, § 786 (1934); MASS. ANN. LAWS c. 279, § 1A (1932); N.C. GEN. STAT. ANN. § 15-200 (1943).

9. Moyer v. State, 144 Neb. 673, 14 N.W.2d 220 (1944); TENN. CODE ANN. § 11802.3 (Williams 1934); ILL. ANN. STAT. c. 38, § 789 (1934); MASS. ANN. LAWS. c. 279, § 3 (1932); N.C. GEN. STAT. ANN. § 15-200 (1943).

10. For instance North Carolina statutes provide only that the defendant shall be brought before the court. N.C. GEN. STAT. ANN. § 15-200 (1943).

11. For instance Michigan allows the hearing to be summary, People v. Myers, 306 Mich. 100, 10 N.W.2d 323 (1943); Nebraska requires notice, counsel, testimony of witnesses and a fair and impartial trial, Moyer v. State, 144 Neb. 673, 14 N.W.2d 220 (1944); New York requires only that the defendant be informed of the facts alleged to constitute violation of his probation and be given an opportunity to inform the court of any facts which would tend to contradict, explain or mitigate the violation, People v. Hill, 164 Misc. 370, 300 N.Y.S. 532 (Co. Ct. 1937); while some states even allow an *ex parte* proceeding, People v. Blankenship, 16 Cal. App.2d 606, 61 P.2d 352 (1936); Dawson v. Sisk, 231 Iowa 1291, 4 N.W.2d 272, 141 A.L.R. 1219 (1942); Bowers v. Wilson, 143 Kan. 732, 56 P.2d 1212 (1936).

12. *See* Buhler v. Pescor, 63 F. Supp. 632, 637 (W.D. Mo. 1945).

feels that the attempt to rehabilitate in this manner is going for naught, it should have the power of revocation at its discretion since probation is not a matter of right[13] but of grace.[14] Nor are probation proceedings subject to the due process clause of the Constitution.[15] Since this is not an adversary proceeding the court should be allowed to consider all available, relevant information concerning the conduct of the defendant without regard to its admissibility as evidence in a regular trial.[16]

Consequently the holding of the instant case appears to be an unnecessary safeguard of the rights of the accused and is not supported by the majority of the limited authority on the subject.

FEDERAL PROCEDURE — RULE 50(b) — TRIAL COURT'S DISCRETION TO GRANT NEW TRIAL OR JUDGMENT

Plaintiff sued for wrongful death; after all evidence was in, defendant moved for a directed verdict. The trial court reserved decision on the motion and submitted the case to the jury, which rendered a verdict for plaintiff. Defendant moved to have the verdict set aside but did not expressly ask for new trial or for judgment n.o.v. That motion and the pre-verdict motion for directed verdict were denied. The court of appeals reversed,[1] holding that the motion for a directed verdict should have been granted. On certiorari to the United States Supreme Court, held (5-4), reversed. The failure to move for judgment n.o.v. denied the trial court an opportunity to exercise its discretion whether to grant a new trial or to grant judgment. Therefore, defendant is entitled only to a new trial, not to final judgment. *Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48, 73 Sup. Ct. 125 (1952).

If a motion for a directed verdict is made and denied at the close of all the evidence and a verdict is rendered against the movent, he may question the legal sufficiency of the evidence on appeal without having moved for judgment.[2] If his contention is sustained, the appellate court

13. People v. Kastel, 172 Misc. 784, 17 N.Y.S.2d 418 (Co. Ct. 1939).
14. Persall v. State, 31 Ala. App. 309, 16 So.2d 332 (1944).
15. 2 ATT'Y GEN. SURVEY OF RELEASE PROCEEDINGS, *Probation* 329 (1939).
16. In a hearing on the revocation of suspension of a sentence, even the North Carolina court has previously said that a judge is not bound by the strict rules of evidence required in a jury trial. State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942). A sentencing judge is permitted to rely on any information which will aid him in determining the appropriate punishment irrespective of admissibility at the trial. Williams v. New York, 337 U.S. 241, 69 Sup. Ct. 1079, 93 L. Ed. 1337 (1949).

1. Johnson v. New York, N.H. & H.R.R., 194 F.2d 194 (2d Cir. 1952).
2. Missouri Pacific R.R. v. Baldwin, 117 F.2d 510 (8th Cir. 1941). See also Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940).

must remand for a new trial.[3] Final judgment, before the Federal Rules, could not be given in any federal court as a means of correcting a failure to direct a verdict,[4] unless decision on the motion had been reserved by the trial judge and a timely motion for judgment n.o.v. had been made.[5] Rule 50(b)[6] automatically reserves the decision on the motion for directed verdict. The instant case raises the question whether a motion for judgment n.o.v. still must be made.

When such a motion for judgment n.o.v. has been made, however, a trial court retains discretion either to order a new trial or to enter judgment on the motion.[7] The court will not grant judgment where it appears that the defect may be cured on a new trial.[8] Therefore, unless the trial judge has had an opportunity to exercise this discretion, an appellate court ordinarily will not order final judgment.[9] In *Cone v. West Virginia Pulp & Paper Co.*,[10] the Supreme Court indicated that an appellate court was without power to direct entry of final judgment in accordance with a motion for a directed verdict, since Rule 50(b) provides that the trial judge in disposing of the reserved motion "may reopen the judgment and either order a new trial or direct the entry of judgment,"[11] and that only the trial court, not the appellate court, has that power.

Under Rule 50 (b),[12] a party having made a motion for a directed

3. Missouri Pacific R.R. v. Baldwin, 117 F.2d 510 (8th Cir. 1941). *But cf.* Lowden v. Bell, 138 F.2d 558 (8th Cir. 1943).

4. See, *e.g.*, Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879 (1913), in which it was held that the Seventh Amendment forbade United States courts to enter a judgment in favor of one party after jury verdict in favor of the other.

5. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 55 Sup. Ct. 890, 79 L. Ed. 1636 (1935). Motion for judgment n.o.v. is unauthorized where movent has not moved for a directed verdict. Southeastern Greyhound Lines v. McCafferty, 169 F.2d 1 (6th Cir. 1948). As to the right to move for judgment n.o.v. after entry of judgment, see Note, 95 A.L.R. 429 (1935).

6. FED. R. CIV. P. 50(b).

7. Fountain v. Filson, 336 U.S. 681, 69 Sup. Ct. 754, 93 L. Ed. 971 (1949); Globe Liquor Co. v. San Roman, 332 U.S. 571, 68 Sup. Ct. 246, 92 L. Ed. 177 (1948); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 Sup. Ct. 752, 91 L. Ed. 849 (1947).

8. If alternative motions are made for judgment n.o.v. and for a new trial, the trial judge should rule on the motion for judgment, and, whatever his ruling, should also rule on the motion for a new trial, indicating the grounds of his decision. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940).

9. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940).

10. 330 U.S. 212, 67 Sup. Ct. 752, 91 L. Ed. 849 (1947).

11. "[This determination] calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216, 67 Sup. Ct. 752, 91 L. Ed. 849 (1947). See also Globe Liquor Co. v. San Roman, 332 U.S. 571, 68 Sup. Ct. 246, 92 L. Ed. 177 (1948). A trial court may enter judgment n.o.v. and also order a new trial conditioned upon reversal; then if reversed, the ruling on granting new trial would govern on remand. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940).

12. As to practice under Rule 50(b), generally, see 2 BARRON & HOLTZOFF,

verdict may make a post-verdict motion for a new trial or may join a motion for a new trial with a motion "to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict."[13] Some courts of appeals had interpreted the Rule as permitting them to order final judgment in accordance with a motion for a directed verdict, even when no motion had been made for judgment.[14] Adoption of an amendment of the Rule allowing that procedure was refused for reasons indicated in the *Cone* case.[15]

In the instant case, the defendant moved to have the verdict set aside on grounds that would have justified either judgment on its reserved motion or the granting of a new trial, although it did not explicitly ask for either.[16] The Supreme Court, through Mr. Justice Black, held that the motion should be treated solely as one to set aside the verdict (and, *semble,* for a new trial), and, further, that the express reservation on its motion for a directed verdict did not relieve it of the necessity of making a motion for judgment after verdict.[17] Therefore, the form of the motion precluded the exercise of the discretion by the trial court required by the *Cone* case; the trial court could grant a new trial only. Consequently, the court of appeals had no power to grant final judgment and must remand for a new trial. The four dissenting justices[18] observed that this insistance upon a form of words was an overly technical construction of the Rules and not within their spirit.[19]

The trial court had before it the reserved motion for a directed verdict and the motion to set aside the verdict, which were on grounds which would have supported either judgment or a new trial. While

FEDERAL PRACTICE & PROCEDURE 754-89 (Rules ed. 1950); 5 MOORE, FEDERAL PRACTICE 2301-2350 (1951); 3-A OHLINGER, FEDERAL PRACTICE 156-76 (1948).

13. See also Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940); Bopst v. Columbia Casualty Co., 37 F. Supp. 32 (D. Md. 1940).

14. Berry v. United States, 111 F.2d 615 (2d Cir. 1940), *rev'd on other grounds,* 312 U.S. 450 (1941); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds,* 312 U.S. 492 (1941); United States v. Halliday, 116 F.2d 812 (4th Cir. 1941), *rev'd on other grounds,* 315 U.S. 94 (1942); Lowden v. Bell, 138 F.2d 558 (8th Cir. 1943). *Contra:* Missouri Pacific R.R. v. Baldwin, 117 F.2d 510 (8th Cir. 1941).

15. See 5 MOORE, FEDERAL PRACTICE ¶ 50.01 [6-9] (1951); ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE 63-5 (1946).

16. Defendant probably followed the New York practice of making his motion immediately after the return of the verdict and before the clerk had time to enter judgment.

17. Although the Court deemed Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 Sup. Ct. 752, 91 L. Ed. 849 (1947), controlling, in that case there had been neither an express reservation of decision on the motion for directed verdict, nor a motion for judgment n.o.v.

18. Justices Frankfurter, Jackson, Burton and Minton. 344 U.S. at 54.

19. Justice Minton added, in a separate dissent, that the provisions of 62 STAT. 963 (1948), 28 U.S.C.A. § 2106 (1950), gave the discretion to the court of appeals to grant a new trial or to direct a verdict according to law on the record already made. See also Bryan v. United States, 338 U.S. 552, 70 Sup. Ct. 317, 94 L. Ed. 335 (1950).

defendant did not expressly move for judgment or a new trial, his conduct did in fact induce the court to pass upon both points. The trial judge therefore did have an opportunity to exercise his discretion, as required by the *Cone* case, and, in effect, did pass upon both motions simultaneously. It would seem that the purpose rather than the letter of the rule should prevail.

LIMITATION OF ACTIONS — STATUTORY CONSTRUCTION — "ACT OR OMISSION COMPLAINED OF"

Plaintiff was injured in 1950 by a gun negligently manufactured by defendant and sold for retail in 1946. Plaintiff's cousin had bought the gun in 1949 and lent it to plaintiff. Plaintiff brought a suit in a federal district court in Connecticut. Defendant pleaded a Connecticut statute of limitations which reads: "No action to recover damages for injury to the person . . . caused by negligence . . . shall be brought but within one year from the date of the act or omission complained of. . . ."[1] The trial court granted defendant's motion for summary judgment. Plaintiff appealed. *Held,* affirmed. "The act or omission complained of" occurred, at the latest, in 1946, the date that defendant placed the gun on the market. Frank, J., dissented on the theory that until the injury occurred in 1950 the plaintiff had no cause of action upon which he could have maintained the suit. *Dincher v. Marlin Firearms Co.,* 198 F.2d 821 (6th Cir. 1952).

Almost every statute of limitations applicable to personal injuries employs the wording "from the time the cause of action accrues" to determine when the statutory period commences.[2] In actions brought where these "accrual" statutes are applicable, it is important to note the distinction between a technical breach of duty, for which only nominal damages can be recovered, and actual or "legal" damage, for which compensatory damages can be had.[3] The generally accepted view, where a technical breach of duty is followed by "legal damage," is that the statutory period commences at the occurrence of the latter.[4]

1. CONN. GEN. STAT. § 8324 (1949).

2. See, *e.g.,* ARIZ. CODE ANN. § 29-202, as amended (Supp. 1951); GA. CODE ANN. § 3-1004 (1935); ILL. ANN. STAT. c. 83, § 15 (1934); MO. REV. STAT. ANN. §§ 1012, 1014 (1939); N.Y. CIV. PRAC. ACT § 49; TENN. CODE ANN. § 8595 (Williams 1934).

3. See Ogg v. Robb, 181 Iowa 145, 162 N.W. 217, 220 (1917), citing 25 CYCLOPAEDIA OF LAW AND PROCEDURE, NEW YORK § 1135(18). For a discussion of this distinction, see Kitchener v. Williams, 171 Kan. 540, 236 P.2d 64 (1951).

4. National Lead Co. v. City of New York, 43 F.2d 914 (2d Cir. 1930) (property damage); Di Gironimo v. American Seed Co., 96 F. Supp. 795 (E.D. Pa. 1951) (personal injury); Wabash County v. Pearson, 120 Ind. 426, 22 N.E. 134 (1889) (personal injury); Kitchener v. Williams, 171 Kan. 540, 236 P.2d 64 (1951) (personal injury); White v. Schnoebelen, 91 N.H. 273, 18 A.2d 185 (1941) (property damage); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68

In the instant case, where the statute involved was not of the "accrual" type, the majority of the court held that the statutory period began to run prior to any "legal damage" — in fact, before the plaintiff had any cause of action against the defendant.

In cases involving implied warranties, whether for property damage[5] or for personal injury,[6] the statutory period is held to commence at the date of sale or delivery. This authority is inapplicable to the present case, however, for the court found the plaintiff to be without privity of contract, and, accordingly, barred from recovery on implied warranty.

The Connecticut statute of limitations applicable to personal injuries is unique,[7] and consequently recourse to the vague and conflicting field of statutory construction[8] is necessary to determine the purpose of the statute. In 1935, the Connecticut legislature amended several statutes of limitations.[9] In the two statutes of limitations applicable to torts, "act or omission" was substituted for existing wording which determined when the statutory period commenced.[10] Further, to the

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A.2d 517 (1949) (personal injury); Rudman v. City of Scranton, 114 Pa. Super. 148, 173 Atl. 892 (1934) (personal injury); Pollock v. Pittsburgh, B. & L. E. R.R., 275 Pa. 467, 119 Atl. 547 (1923) (personal injury); Texas Employers' Ins. Ass'n v. Fricker, 16 S.W.2d 390 (Tex. Civ. App. 1929) (personal injury); Theurer v. Condon, 34 Wash.2d 448, 209 P.2d 311 (1949) (property damage). For cases where the initial breach of duty constitutes "legal damage" and is followed by or consummates in injury to the plaintiff, see Aachen & Munich Fire Ins. Co. v. Morton, 156 Fed. 654 (6th Cir. 1907) (insurance contract); Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917) (malpractice); Carter v. Harlan Hospital Ass'n, 265 Ky. 452, 97 S.W.2d 9 (1936) (malpractice); Cooke v. Holland Furnace Co., 200 Mich. 192, 166 N.W. 1013 (1918) (personal injury); Allison v. Missouri Power & Light Co., 59 S.W.2d 771 (Mo. App. 1933) (personal injury); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936) (personal injury); Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946) (personal injury).

5. Peterson v. Brown, 216 Ark. 709, 227 S.W.2d 142 (1950); Poole v. Terminix Co., 84 A.2d 699 (D.C. App. 1951); E. O. Painter Fertilizer Co. v. Kil-Tone Co., 105 N.J.L. 109, 143 Atl. 332 (1928); Allen v. Todd, 6 Lans. 222 (N.Y. Sup. Ct. 1872); Baucum v. Streater, 50 N.C. 70 (1857); Woodland Oil Co. v. A. M. Byers & Co., 223 Pa. 241, 72 Atl. 518 (1909); Cooper-Bessemer Corp. v. Shindler, 132 S.W.2d 450 (Tex. Civ. App. 1939); Fairbanks Morse & Co. v. Smith, 99 S.W. 705 (Tex. Civ. App. 1907). *But cf.* Sewall Paint & Glass Co. v. Booth Lumber & Loan Co., 34 S.W.2d 650 (Tex. Civ. App. 1930).

6. New Amsterdam Casualty Co. v. Baker, 74 F. Supp. 809 (D. Md. 1947); Liberty Mut. Ins. Co. v. Sheila-Lynn Inc., 185 Misc. 689, 57 N.Y.S.2d 707 (Sup. Ct. 1945). When the suit is for personal injuries to the plaintiff, but there exists an implied warranty of the service or article causing the injury, the statute of limitations applicable to personal injury is held to be controlling. See Notes, 1 A.L.R. 1313 (1919), 62 A.L.R. 1417 (1929), 157 A.L.R. 763 (1945). See also L.R.A. 1916 F 812.

7. The Connecticut statute of limitations applicable to personal injuries, CONN. GEN. STAT. § 8324 (1949), is apparently the only one in the nation which employs the wording "act or omission" to determine when the statutory period commences.

8. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

9. CONN. GEN. STAT. §§ 6006, 6015, 6029 (1930) were amended, and §§ 6011, 6016, 6026 of the same Code were repealed.

10. In the statute of limitations applicable to personal injuries (§ 6015 of the 1930 Code) "injury or neglect" was replaced by "act or omission." In general

statute which embraced injuries to the person and to personal property, the legislature added injuries due to reckless or wanton misconduct, injuries due to malpractice and injuries to realty.[11]

The important question is whether the legislature by its substitution of the words "act or omission" intended to adopt the policy of preventing endless liability for a negligent act by cutting off liability one year after the negligent act. Regrettably, neither the majority nor the dissent in the instant case discussed any collateral evidence tending to show legislative intent.[12] The majority, persuaded by the "presumption of change" rule[13] and giving the words "act or omission" a literal interpretation, adopted the view that the legislature did in fact intend to prevent liability beyond one year after the negligent act. In support of its holding, the majority cited cases involving malpractice[14] and injury to realty,[15] which were included in the statute by the 1935 amendment. Of the authority cited by the dissent there is only one case subsequent to the amendment[16] which held that the policy of the statute as interpreted by the Connecticut courts was that the statute shall not begin to run until there is "legal damage" to support a cause of action.

Although it is startling to say that a cause of action is barred before it ever exists, the majority, by a literal interpretation of the statute, rendered a technically correct decision. The last possible negligent "act" of the defendant was his placing the gun on the market without using reasonable care to make sure it would not harm the ultimate

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or catch-all statute of limitations on tort actions (§ 6006 of the 1930 Code) the words "next after the right of action shall accrue" were replaced by "act or omission complained of." Sections 6015 and 6006 of the 1930 Code are §§ 8324 and 8316 of the 1949 Code respectively.

11. CONN. GEN. STAT. § 8324 (1949). Malpractice by the words of the statute includes such by physicians, surgeons, dentists, chiropodists (added in 1941), hospitals or sanatoriums.

12. See 1 SUTHERLAND, STATUTORY CONSTRUCTION §§ 1930-31 (3d ed., Horack, 1943); 2 *id.* §§ 4701-06, 5001-16. Research has revealed no extrinsic aids to the determination of the legislative intent in regard to the statute in question.

13. "[A]ny material change in the language of the original act is presumed to indicate a change in legal rights." 1 *id.* § 1930.

14. Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940), in which a doctor gave a transfusion to plaintiff's wife using syphilitic blood, causing her death. Plaintiff sued two years after the transfusion, but less than one year after death. The court held plaintiff's cause of action in tort was barred, because the statute of limitations began to run from the date of transfusion, since at that time the injury was a complete one upon which plaintiff could have maintained suit.

15. Kennedy v. Johns-Manville Corp., 135 Conn. 176, 62 A.2d 771 (1948), in which plaintiff sued for property damage caused by defendant's negligent installation of insulation. The court held that, since there had been no fraudulent concealment by the defendant, the plaintiff had a cause of action at the date of installation notwithstanding her inability to discover the negligence, and the statute of limitations ran from the date of installation. The dissent in the instant case stated that this case was "wholly inapposite" for the majority's contentions, because it cited "with approval" Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936), which held, under a statute using the words "when the cause of action accrues," that there must be an injury sufficient to support a cause of action before the statutory period will commence.

16. See note 15 *supra*.

user, and, technically, the statutory period ran from this time. If the legislature intended to promote the policy of preventing endless liability for negligent acts, the practical result of the case, although harsh,[17] is consistent with that policy. However, if the legislature intended to effectuate the usual purpose of preventing litigants from sleeping on their rights, its choice of words seems quite unfortunate, because by any objective interpretation of the words "act or omission" the statutory period commenced at the time of the defendant's initial negligent act, whether or not there was "legal damage" to the plaintiff at that time.

PROCEDURE — COUNTERCLAIM STATUTE AMENDED TO APPLY IN CHANCERY

The Tennessee Code of 1932 provided a counterclaim statute which declared: "In actions or suits in which a resident of another state and a resident of this state are adversary parties, every claim or demand against the suing parties, or any of them, whether liquidated or unliquidated, sounding in tort or contract, expressed or implied, or whether arising in the same or a different transaction, may be set up by plea of set-off, or as counter-claim by counter-declaration. . . ." TENN. CODE ANN. § 8746 (Williams 1934). The 1953 General Assembly has amended the statute by adding the following provision: "In cases brought in equity such matters shall be set up by way of cross-bill." Tenn. Acts 1953, c. 144.

This amendment was occasioned by the recent case of *Hood Lumber Co. v. Five Points Lumber Co.*[1] in which a resident of Tennessee was sued by a Mississippi corporation in a Tennessee chancery court for the purchase price of lumber. The resident counterclaimed for unliquidated damages arising out of the breach of a prior and separate contract for the purchase of other lumber. The Tennessee Supreme Court, in a narrow holding, decided that the counterclaim statute was not applicable to suits in equity;[2] the court based its decision on (1) the common law names of pleadings — the statute declares that "every claim or demand" shall be set up by "counter-declaration"; and (2) the fact that the counterclaim statute is in chapter nine of the Code which

17. See United States v. Wurts, 303 U.S. 414, 58 Sup. Ct. 637, 82 L. Ed. 932 (1938).

1. 249 S.W.2d 896 (Tenn. 1952).

2. Set-off of unliquidated damages arising from the breach of a separate contract has been allowed on the basis of the doctrine of equitable set-off; the factors of nonresidence and insolvency furnish the reason for the allowance of the cross-action. Ewing-Merkel Electric Co. v. Lewisville Light & Water Co., 92 Ark. 594, 124 S.W. 509 (1909); Forbes v. Cooper, 88 Ky. 285, 11 S.W. 24 (1889); *see* Dexter-Portland Cement Co. v. Acme Supply Co., Inc., 147

is declared to be applicable to legal actions only,[3] though other sections of the same chapter have been applied to proceedings in equity.[4] This decision confines such a defendant to cross-actions which fall under set-off or recoupment even where the chancellor is exercising a jurisdiction concurrent with that of the circuit court[5] of a cause which originally would have been exclusively for a court of law. Thus a nonresident plaintiff could defeat the purpose of the statute by suing in chancery rather than in the circuit court.

Historically cross claims were limited to those which satisfied the requirements of (1) set-off or (2) recoupment.[6] Set-off, which is of statutory origin and is applicable only to actions on contracts[7] except as otherwise allowed by statute,[8] consists of a mutual,[9] liquidated[10] demand, which must exist at the commencement of the suit,[11] though it need have no connection with plaintiff's demand.[12] The doctrine of recoupment had its inception in case law. Any damages, even though unliquidated,[13] arising out of and in connection with plaintiff's claim

Va. 758, 133 S.E. 788, 792 (1926); Knaffle v. Knoxville Banking & Trust Co., 128 Tenn. 181, 185, 159 S.W. 838, 839, 50 L.R.A. (N.S.) 167, 168 (1913). See also 47 AM. JUR., *Set-off and Counterclaim* § 42 (1943). *Contra*: Duncan Lumber Co. v. Leonard Lumber Co., 332 Ill. 104, 163 N.E. 416 (1928) (distinguishable since it was an action at law, although the court suggests result would not be different in equity).

3. TENN. CODE ANN. § 8725 (Williams 1934).

4. Bowen v. Metropolitan Life Ins. Co., 17 Tenn. App. 322, 67 S.W.2d 164 (E.S. 1933) (applying to a suit in equity § 8784 which abolishes demurrers for formal defects and requires all demurrers to state the objection relied on); Furnish v. Burge, 101 Tenn. 538, 47 S.W. 1095 (1898) (applying to a suit in equity § 8789 which provides for plea of *non est factum*); Phoenix Iron Works Co. v. Rhea, 98 Tenn. 461, 40 S.W. 482 (1897) (applying to a suit in equity § 8770 which allows set-off by consent of co-maker or surety); John Finley v. McCormick, 53 Tenn. 392 (1871) (applies § 8784 to suits in equity).

5. TENN. CODE ANN. § 10377 (Williams 1934) (confers jurisdiction of breach of contract actions on the chancery court). For a case using the statute as basis of jurisdiction, see State *ex rel.* Morris Hooten v. Hazel Hooten, 1 Tenn. App. 154, 158 (M.S. 1925). See GIBSON, SUITS IN CHANCERY § 28 (Higgins and Crownover ed. 1937).

6. For the historical development of set-off and recoupment see Loyd, *The Development of Set-off*, 64 U. OF PA. L. REV. 541 (1916). See also CHITTY, PLEADINGS 595-602 (16th Am. ed. 1879); WATERMAN, SET-OFF § 1-10, 455-57, 466 (2d ed. 1872). Both set-off and recoupment must be specially pleaded. Scatchard v. Barge, 102 Tenn. 282, 52 S.W. 153 (1899); CARUTHERS, THE HISTORY OF A LAWSUIT § 242 (7th ed., Gilreath, 1951).

7. See Lewis v. Turnley, 97 Tenn. 197, 202, 36 S.W. 872, 873 (1896); TENN. CODE ANN. § 8768 (Williams 1934); CARUTHERS, THE HISTORY OF A LAWSUIT § 242 (7th ed., Gilreath, 1951).

8. TENN. CODE ANN. § 8745 *et seq.* (Williams 1934). See CARUTHERS, THE HISTORY OF A LAWSUIT § 156 (7th ed., Gilreath, 1951).

9. Flint v. Tillman, 49 Tenn. 202 (1870); Turbeville v. Broach, 45 Tenn. 270 (1868); *see* Blair v. Johnson & Sons, 111 Tenn. 111, 115, 76 S.W. 912, 913 (1903).

10. Fischer Lime & Cement Co. v. Suzore, 11 Tenn. App. 588 (W.S. 1930); Arco Company v. Garner & Co., 143 Tenn. 262, 227 S.W. 1025 (1920).

11. McGinnis v. Allen's Adm'rs, 32 Tenn. 645 (1853); Keith v. Smith, 31 Tenn. 92 (1851). See also TENN. CODE ANN. § 8768 (Williams 1934).

12. TENN. CODE ANN. § 8769 (Williams 1934). See POMEROY, CODE REMEDIES § 607 (5th ed. 1929).

13. Mack v. Hugger Bros. Const. Co., 153 Tenn. 260, 283 S.W. 448 (1925); Gibson, Lee & Co. v. Carlin, 81 Tenn. 440 (1884); Overton v. Phelan, 39 Tenn.

are allowed;[14] the common law limitation allowing no affirmative judgment for the defendant has been changed by statute.[15] The counterclaim, which first appeared in the amendments of 1852 to the New York Code, was an important contribution of code pleading to American civil practice. The counterclaim has the advantages of being broader than set-off or recoupment and of being free of the common law restrictions of these pleadings.[16]

Thus the Legislature has by express statute cured the anomalous result produced by the decision of the Tennessee Supreme Court; the resident's right to counterclaim under the statute is now the same whether he is sued at law or in equity.

TORTS — DAMAGES — MENTAL SUFFERING FOR TRESPASS TO BURIAL LOT

Plaintiff's wife was buried in the plaintiff's burial lot in a church cemetery. Many flowers were placed upon the new grave, and the next day the defendant florist wrongfully removed the flowers while still fresh. Plaintiff brought an action against the defendant, seeking damages for trespass and for mental anguish, humiliation and embarrassment, caused by the sight of the bare, new grave. The defendant's demurrer to the complaint was overruled in the recorder's court. *Held,* affirmed. The complaint stated a cause of action for nominal damages where the plaintiff simply showed an unauthorized entry by the defendant. Further, the plaintiff had a cause of action for compensatory damages for mental suffering endured as the consequence of the trespass to his burial lot, even though the mental suffering was not accompanied by any physical injury.[1] *Matthews v. Forrest,* 235 N.C. 281, 69 S.E.2d 553 (1952).

Courts have generally held possession of a burial lot entitles the possessor to bring an action of trespass *quare clausum fregit* against any-

43 (1859); *see* Sledge & Norfleet v. Bondurant, 5 Tenn. App. 319, 336 (W.S. 1927).

14. Fischer Lime & Cement Co. v. Suzore, 11 Tenn. App. 588 (W.S. 1930); Arco Company v. Garner & Co., 143 Tenn. 262, 227 S.W. 1025 (1920); Hulme v. Brown, 50 Tenn. 679 (1868); *see* Holland v. Forcum-James Cooperage & Lumber Co., 154 Tenn. 174, 177, 285 S.W. 569 (1926); Mack v. Hugger Bros. Const. Co., 153 Tenn. 260, 265, 283 S.W. 448, 449 (1925); Lewis v. Woodfold, 61 Tenn. 25, 40 (1872).

15. Sledge & Norfleet v. Bondurant, 5 Tenn. App. 319 (1927). See also TENN. CODE ANN. § 8772 (Williams 1934). For a statement of the original defensive character of recoupment, see Pennsylvania R.R. v. Miller, 124 F.2d 160, 162 (5th Cir.), *cert. denied,* 316 U.S. 676 (1941); 47 AM. JUR., *Set-off and Counterclaim* § 6 (1943); WATERMAN, SET-OFF § 469 (2d ed. 1872).

16. For the development of counterclaim see Loyd, *Development of Set-off* 64 U. OF PA. L. REV. 563 (1916); Clark and Surbeck, *The Pleading of Counterclaims,* 37 YALE L.J. 300 (1928).

1. Note, 31 N.C.L. REV. 122 (1952).

one who wrongfully interferes with the grave.[2] A trespasser is normally liable for all injurious consequences flowing as a natural and proximate result from an unlawful entry.[3] It is not unique for a possessor of a burial lot to bring a trespass action and recover compensatory mental damages where there has been an extreme interference with the property.[4]

Criminal statutes of various states typically make it a misdemeanor to deface graves and graveyards.[5] Action by the legislatures to protect possessors of burial lots indicates the strong public policy against defacing graves, including the theft of flowers therefrom. The protection given the grave owners by such legislation tends to show that legislators are of the opinion that the injury is of such a degree as to cause the possessors mental suffering due to the trespass. In one criminal case the court held that digging up and removing shrubbery from a cemetery was a wilful destruction of the grave and in violation of the statute.[6]

In the instant case, because the body of the plaintiff's wife was buried

2. "The adjudications have been sufficient, however, to establish the principle that where one is permitted to bury his dead in a public cemetery, even though this be by license or privilege, he acquires such a possession of the spot of ground in which the bodies are buried as will entitle him to maintain an action against the owners of the fee, or strangers, who without right so to do disturb it." Anderson v. Acheson, 132 Iowa 744, 110 N.W. 335, 339 (1907). See also Thirkfield v. Mountain View Cemetery Ass'n, 12 Utah 76, 41 Pac. 564 (1895). "Where one is permitted to bury his dead in a public cemetery by the express or implied consent of those in control of it, he acquires a sort of possession in the spot in which the body is buried." Rivers v. Greenwood Cemetery, Inc., 194 Ga. 524, 22 S.E.2d 134, 135 (1942).

3. "[A]nd the owner of the lot in which the body was deposited, might maintain trespass *quare clausum fregit* for its disinterment, and recover substantial damages in awarding which, the injury to the feelings would be taken into consideration. . . . [W]hen one buries his dead, therefore, in soil to which he has the freehold right, or to the possession of which he is entitled, it would seem there is no difficulty in his protecting their graves from insult and injury, by an action of trespass against a wrongdoer." Bessemer Land & Improvement Co. v. Jenkins, 11 Ala. 135, 18 So. 565, 567 (1895). "When one trespasses on land he is liable for the direct injury to . . . and the consequences naturally to be expected arising therefrom, in an action of trespass." Wyant v. Crouse, 127 Mich. 158, 86 N.W. 527, 528, 53 L.R.A. 626 (1901).

4. In Johnson v. Kentucky-Virginia Stone Co., 286 Ky. 1, 149 S.W.2d 496 (1941), the court held that where a trespasser had mutilated the grave of a child, the parents could recover mental damages. See also Humphreys v. Bennett Oil Corp., 195 La. 531, 197 So. 222 (1940), where the court allowed a brother and sister recovery of damages for mental anguish and suffering sustained when the trespassing oil company drilled an oil well where their father and sister were buried.

5. See, *e.g.*, ALA. CODE tit. 14, § 113 (1940): "Any person who wilfully or maliciously injures, defaces, removes, or destroys any tomb, monument, gravestone, or other memorial of the dead, or any fence, or any inclosure about any tomb, monument, gravestone, or memorial, or who wilfully and wrongfully destroys, removes, cuts, breaks, or injures, any tree, shrubs, or plant, within any cemetery or graveyard, shall, on conviction, be fined not less than one hundred nor more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year." See also S.C. CODE § 16-563 (1952); TENN. CODE ANN. § 10886 (Williams Supp. 1952); WASH. REV. CODE § 68.48.010 (1951).

6. State v. Johnson, 196 S.C. 497, 14 S.E.2d 24 (1941).

in the plaintiff's burial lot, he was in constructive possession of the burial lot and such possession was sufficient to enable the plaintiff to bring the trespass action.[7] The defendant's unauthorized entry upon the plaintiff's burial lot entitled the plaintiff to recover at least nominal damages.[8] The case is unusual in that compensatory mental damages were given to the possessor of the burial lot where the court viewed trespass as the entry alone and the theft of the flowers was viewed as an aggravation of the trespass.[9] The damages permitted were for mental anguish which was held to be a natural and probable consequence of the unlawful entry upon the lot and the theft of the flowers.

In the instant decision, the North Carolina Supreme Court has extended the two previously recognized policies of (1) limiting recovery for mental suffering to cases where the mental suffering is more clearly a natural and probable consequence of the trespass, and (2) protecting of the possessor's interest in a burial lot by the allowance of only nominal damages. As indicated in the action taken by the state legislatures,[10] the extension of these rules has considerable merit from the standpoint of public policy.

The court in allowing recovery for mental damages, refused to involve itself with the age-old argument of whether or not one could recover for mental injuries without having incurred physical injuries. The court felt that the type of trespass committed by the defendant was of such a nature as to warrant a recovery for mental injury without requiring the plaintiff to show a physical injury. This view is perhaps susceptible to the criticism that it is very difficult to determine the presence and degree of mental injury.[11] The mentioned criticism has been the favorite of those who have continued to hold that mental damages will not be allowed unless physical injury is also incurred.[12] It appears that the court in the instant case was not hindered by the operation of such an unfair rule.[13] It is probable that the trend in the

7. Holder v. Elmwood Corporation, 231 Ala. 411, 165 So. 235 (1936). "Gist of action of trespass to realty is injury to the plaintiff's possession, though title may be drawn in question." Lacy v. Morris, 215 Ala. 302, 110 So. 379 (1926). "Possession is of course sufficient for trespass." HOLMES, THE COMMON LAW 244 (1881).

8. See Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940), where the court held that when one's property is trespassed upon the aggrieved party is entitled to at least nominal damages. *Cf.* Schumpert v. Moore, 24 Tenn. App. 695, 149 S.W.2d 471 (1940). See also 52 AM. JUR., *Trespass* § 47 (1941); PROSSER, TORTS 81 (1941).

9. In one case, where the litigation concerned removal of the body of the plaintiff's kin, the court said: "People have so much respect for the final resting place of the dead, and there is so little to tempt one to disturb their repose, cases are of rare occurrence where such disturbances have become the subject of litigation and the adjudication of courts." Bessemer Land & Improvement Co. v. Jenkins, 11 Ala. 135, 18 So. 565, 567 (1895).

10. See note 5 *supra*.

11. For a general discussion of this problem, see PROSSER, TORTS 56, 63 (1940).

12. HARPER, TORTS § 67 (1933); PROSSER, TORTS 56, 63 (1940).

13. 69 S.E.2d at 556.

future will be to follow this holding because, as it has been stated, "They [the courts] have recognized that they are confronted with a subject matter so intimately entwined with human sentiments and feelings that ordinary rules of property are not wholly applicable."[14]

TORTS — LIABILITY FOR PRENATAL INJURIES

Plaintiff, now a six-year-old child, was born prematurely and was blind at birth. It was alleged that the blindness was caused by poisoning in the mother's system, a result of the consumption of unwholesome food purchased from the defendant. Plaintiff sues for damages and his father sues for loss of the child's services and for medical expenses. A demurrer to both petitions was sustained in the lower court. *Held,* affirmed. There may be no action for prenatal injury to a viable[1] child. *Cavanaugh v. First National Stores, Inc.,* 107 N.E.2d 307 (Mass. 1952).

The general rule denying recovery for injuries to a child *en ventre sa mere* was established in *Dietrich v. Northhampton,*[2] the same court deciding the instant case and was expanded to include a viable child in *Allaire v. St. Luke's Hospital.*[3] The rule was followed without exception,[4] though sometimes reluctantly,[5] for many years.[6] The basis of denial of recovery seems to be that the child is part of the mother before birth[7] and the difficulty in proving the proximate cause of the injury.[8] Many courts appear to have conceded a need for such a

14. 27 MICH. L. REV. 817, 819 (1929).

1. "[P]renatal age . . . when the destruction of life of the mother does not necessarily end its existence also. . . ." Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 641 (1900).

2. 138 Mass. 14 (1884).

3. 184 Ill. 359, 56 N.E. 638 (1900).

4. See, *e.g.,* Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Mays v. Weingarten, 82 N.E.2d 421 (Ohio App. 1943); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). See RESTATEMENT, TORTS § 869 (1939).

5. "We do not intimate what our decision would be if the question were presented for the first time." Bliss v. Passanesi, 326 Mass. 461, 95 N.E.2d 206, 207 (1950); see Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

6. For a more complete collection of cases, see Notes, 3 VAND. L. REV. 282 (1950), 1951 WIS. L. REV. 518.

7. Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939); Dietrich v. Northampton, 138 Mass. 14 (1884); Drabbels v. Skelley Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Berlin v. J.C. Penny Co., 339 Pa. 547, 16 A.2d 28 (1940); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

8. Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). "It may be that in a few instances hard cases may arise wherein a child may be burdened through life with an affliction produced before its birth, while, on the other hand, many cases might arise, should the rule be different, where the recovery would be based upon the merest conjecture or speculation

cause of action but have looked to the legislature to provide it.[9]

Quite recently a number of courts departed from this rule to allow recovery for injuries of this nature.[10] The old rule, criticized vigorously,[11] apparently had been replaced, and the new view was hailed by legal writers.[12] These recent decisions are based on viability, a distinction set out by Boggs, the dissenting justice in the *Allaire* case.[13] Many of the courts which had no precedent adopted this more logical rule.[14] A recent Ohio Supreme Court case[15] has affirmed a holding under the new rule, thus overruling an earlier lower court opinion.[16] New York has reversed its stand in favor of the new view,[17] overruling a decision of its own court of appeals.[18] In one state a wrongful death statute has been construed to provide for recovery.[19] The majority of recent cases allowed recovery where the child was born alive, though it may have subsequently died. One case has extended this principle even further, allowing recovery under a wrongful death statute to parents of a stillborn child.[20] It seems to be the only case yet to have taken such an extreme position; this view was rejected by a later case in another jurisdiction on the ground that the child was stillborn.[21]

The instant case seems to represent an affirmance of the old rule. Here, as in *Amann v. Faidy*,[22] another very recent decision following

as to whether or not the prenatal injury was the cause of the death or condition of the child." Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926).

9. Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Ry. of St. Louis, 248 Mo. 126, 154 S.W. 71 (1913).

10. See, *e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Tucker v. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Cooper v. Blanck, 39 So.2d 352 (La. App. 1923); Damasiewicz v. Gorsuch, 79 A.2d 550 (Md. App. 1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

11. See Frey, *Injuries to Infants En Ventre Sa Mere*, 12 ST. LOUIS L. REV. 85 (1927); Kerr, *Action by Unborn Infant*, 61 CENT. L.J. 364 (1905); Morris, *Injuries to Infants En Ventre Sa Mere*, 58 CENT. L.J. 143 (1904).

12. See Muse and Spinella, *Right of Infant to Recover for Prenatal Injury*, 36 VA. L. REV. 611 (1950); White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383 (1952); Winfield, *The Unborn Child*, 4 U. OF TORONTO L.J. 278 (1942); see Comment, 1949 ILL. L. FORUM 537 (1949); Notes, 35 CORNELL L.Q. 648 (1950), 26 NEB. L. REV. 431 (1947), 28 N.C.L. REV. 245 (1950).

13. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 640 (1900) (dissenting opinion).

14. *E.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Tucker v. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Cooper v. Blanck, 39 So.2d 352 (La. App. 1923); Damasiewicz v. Gorsuch, 79 A.2d 550 (Md. App. 1951).

15. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

16. Mays v. Weingarten, 82 N.E.2d 421 (Ohio App. 1943).

17. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

18. Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

19. Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678 (1939).

20. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

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

22. 348 Ill. App. 37, 107 N.E.2d 868 (1952).

the old view, precedent appears to be the controlling factor,[23] although it is conceivable that the court denied the existence of a cause of action because it was unwilling to trust the issue of causation to a jury on the facts of the case. The *Amann* case is decided wholly on precedent,[24] and both decisions represent an undesirable return to an illogical and outdated rule. It seems unlikely, however, that they will seriously curtail the application of the more modern view.[25]

23. "As lately as 1950 we decided not to depart from the Dietrich rule. . . . We are not prepared to overrule our earlier decisions, which began nearly seventy years ago." 107 N.E.2d at 308.

24. "It will readily be admitted that an erroneous decision ought not to prevail, but who has the right to declare it so? . . . [w]e are constrained to follow the law as promulgated in Allaire v. St. Luke's Hospital, supra." Amann v. Faidy, 348 Ill. App. 37, 107 N.E.2d 868, 874 (1952). The intermediate court here seems to imply that the Illinois Supreme Court should reverse its stand.

25. There seem to be no cases regarding the parent's right to recover for medical expenses and loss of services in the event that the child's cause of action is allowed. If the child were permitted recovery, it would seem that the father could recover expenses, since his right is dependent on that of the child.