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Recent Cases

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RECENT CASES

CRIMINAL PROCEDURE—FACIAL EXPRESSIONS AND GESTICULATIONS OF TRIAL JUDGE—PREJUDICIAL EFFECT ON JURY

Defendant was charged with possession of marihuana and other narcotics in violation of federal statutes.[1] At the conclusion of the charge to the jury, counsel for defendant attempted to object to certain facial expressions and gesticulations made by the trial judge in the course of his instructions. The judge refused to allow either the objection itself or a description of the grounds therefor to be incorporated into the record, although he later tried to remedy this action by supplemental proceedings.[2] Defendant was convicted and appealed. *Held,* reversed. The accused is entitled to take exception to facial expressions and gesticulations of the trial judge, and the judge should so instruct the jury as to remove any erroneous impression from their minds. *Butler v. United States,* 188 F.2d 24 (D.C. Cir. 1951).

Cases involving objectionable physical conduct by the court in criminal proceedings have been few in number. This is no doubt due to the extreme difficulty of preserving any record either of the conduct in question[3] or of its effect on the outcome of the trial.[4] However, the problem is so closely akin to the cases involving comments or remarks by the judge in the course of the trial that the same rules will generally be applied. In both situations the same fundamental proposition is involved: prejudice to the rights of the parties materially affecting the outcome of the trial. One general principle has prevailed in the cases. Remarks or conduct of the trial judge must not be allowed to prejudice the jury and where prejudicial, they will constitute reversible error.[5]

However, the courts have not completely agreed as to the best method of applying this rule. There is a strict view, now rarely followed, under which remarks or conduct of a certain character are automatically error and result in reversal on seasonable objection.[6] Most of the courts, however, do not

1. The statutes violated were 50 STAT. 555 (1937), 26 U.S.C.A. § 2593(a) (1948); 35 STAT. 614 (1909), *as amended,* 21 U.S.C.A. § 174 (1948); 38 STAT. 785 (1914), *as amended,* 26 U.S.C.A. § 2553(a) (1948).

2. The appellate court held that the supplemental proceeding could not be used to supplement a record which was never made.

3. See 28 TEXAS L. REV. 122 (1949).

4. See, *e.g.,* Romney v. United States, 167 F.2d 521 (D.C. Cir. 1948).

5. 53 AM. JUR., *Trial* § 76 (1945); 23 C.J.S., *Criminal Law* § 987 (1940).

6. See *e.g.,* Sargent v. Roberts, 18 Mass. (1 Pick.) 337 (1823); State v. Murphy, 17 N.D. 48, 115 N.W. 84 (1908); State v. Duvel, 4 N.J. Misc. 719, 134 Atl. 283, (Sup. Ct. 1926); Vaughn v. State, 102 Tex. Crim. Rep. 207, 277 S.W. 646 (1925). See Note, 95 A.L.R. 785 (1935).

follow the strict view but hold the remarks to be error only if they appear to have resulted in prejudice.[7] Furthermore, it is almost always necessary that such action take place before the jury.[8] Both rules seek the same result—a fair and impartial trial. The judge must uphold the rights of the state and the rights of the defendant with equal vigor. To adopt the cause of either party is beyond the scope of the court's activities.[9]

There is little difficulty in deciding which of the views to apply in the case of physical conduct. To set forth precisely what motions, gesticulations or facial expressions might constitute prejudicial error, irrespective of the surrounding circumstances, would be a tremendous task. Thus, the better approach would be the liberal view holding the judge's conduct to be error only when it is actually considered injurious in the particular case.

What sort of conduct will be termed prejudicial? Obviously the answer will vary from case to case. Moreover, in some situations a timely instruction will cure the error by directing the jurors to disregard the conduct or by emphasizing that they are the final judges of the fact.[10] On the other hand, some conduct may be so prejudicial that no instructions can cure it.[11]

Conduct is prejudicial when it may sway the jury by indicating the feelings of the judge as to certain facets of the case. There are three primary areas in which his feelings must not be shown. First and most important, the judge must do nothing that indicates his opinion of the merits of the case.[12] One aspect of this area, however, concerns individual points of evidence and here the rules lack uniformity. In some courts the judge must not indicate his

7. See, *e.g.*, United States v. Lee, 107 F.2d 522 (7th Cir. 1939); Rettich v. United States, 84 F.2d 118 (1st Cir. 1936); Walden v. State, 29 Ala. App. 462, 198 So. 261 (1940); Burgunder v. State, 55 Ariz. 411, 103 P.2d 857 (1945); People v. Doss, 318 Ill. App. 387, 48 N.E.2d 213 (1943); People v. Crow, 304 Mich. 529, 8 N.W.2d 164 (1943); Little v. State, 72 Okla. Cr. Rep. 273, 115 P.2d 266 (1941); Commonwealth v. Petrillo, 338 Pa. 65, 12 A.2d 317 (1940); State v. Owings, 205 S.C. 314, 31 S.E.2d 906 (1944).

8. See People v. Bolton, 324 Ill. 322, 155 N.E. 310 (1927); State v. Talley, 22 S.W.2d 787 (Mo. 1929); Chase v. State, 103 Tex. Crim. Rep. 433, 281 S.W. 844 (1926); State v. Lloyd, 138 Wash. 8, 244 Pac. 130 (1926).

9. Trent v. State, 66 Okla. Cr. Rep. 302, 91 P.2d 790 (1939).

10. See, *e.g.*, United States v. Monjar, 147 F.2d 916 (3rd Cir. 1944); Goldstein v. United States, 63 F.2d 609 (8th Cir. 1933); Patterson v. State, 234 Ala. 342, 175 So. 371 (1937); Burgunder v. State, 55 Ariz. 411, 103 P.2d 256 (1940); Bell v. State, 164 Ga. 292, 138 S.E. 238 (1927); People v. Hanishch, 361 Ill. 465, 198 N.E. 220 (1935); Walters v. State, 156 Md. 240, 144 Atl. 252 (1929); People v. Van Roy, 227 Mich. 162, 198 N.W. 576 (1924).

11. See De Groot v. United States, 78 F.2d 244 (9th Cir. 1935); People v. Flanagan, 65 Cal. App. 268, 223 Pac. 1014 (1924); State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); Viadock v. State, 30 Okla. Crim. Rep. 374, 236 Pac. 56 (1925).

12. See, *e.g.*, Sturdivant v. State, 25 Ala. App. 148, 142 So. 116 (1932); Sneed v. State, 159 Ark. 65, 255 S.W. 895 (1923); Smith v. State, 52 Ga. App. 88, 182 S.E. 816 (1935); People v. Egan, 331 Ill. 489, 163 N.E. 357 (1928); People v. Prescott, 268 Mich. 606, 256 N.E. 564 (1934); Hansen v. State, 141 Neb. 278, 3 N.W.2d 441 (1942); People v. Raymond, 249 App. Div. 121, 291 N.Y. Supp. 198 (1st Dep't 1936). See 53 AM. JUR., *Trial* § 75 (1945).

opinion in any way.[13] The majority of courts allow him to marshal and review the evidence and state the tendency thereof but will not allow him to show his opinion in so doing.[14] However, in the federal and a few state courts the judge may express or show his opinion on the tendency, force and weight of the evidence.[15] Nevertheless, where such action is allowed, the jury should be left free to exercise its own judgment.[16] Secondly, he must avoid any word or act that might discredit the defendant with the jury.[17] Finally, in most jurisdictions, he may not comment on the credibility of witnesses.[18]

There are two factors which must be considered in determining the desirability of allowing an appeal in instances of objectionable physical behavior by the court. Making such conduct error may open the door to a flood of appeals, many of them groundless. Without some adequate means of recording the nature of the conduct, the appellate courts are faced with an awesome problem.[19] Despite this risk, the danger of conduct or comment of a prejudicial character is so serious, though it is generally unintentional, that the parties must be afforded protection. This same problem is equally important in civil suits. The average jury is inclined to put great weight on the opinions of the judge where ascertainable.[20] In our judicial system the function of the judge is neither that of moderator nor advocate, but of regulator. His duty is to preserve the rights of both parties, and he must be careful to restrain himself with these bounds.

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13. See Note, 95 A.L.R. 785 (1935); Parker, *The Judicial Office in the United States*, 23 N.Y.U.L.Q. REV. 225, 230 (1948).

14. See note 13 *supra*.

15. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 457 (1947); Note, 95 A.L.R. 785, 788 (1935); Note, 33 ILL. L. REV. 586 (1939).

16. 53 AM. JUR., *Trial* § 589 (1945).

17. Williams v. State, 18 Ala. App. 573, 93 So. 284 (1922); People v. Mahoney, 201 Cal. 608, 258 Pac. 607 (1927); People v. Berardi, 321 Ill. 47, 151 N.E. 555 (1926); People v. Crow, 304 Mich. 529, 8 N.W.2d 164 (1943); Commonwealth v. Brown, 309 Pa. 515, 164 Atl. 726 (1933); State v. Parris, 163 S.C. 295, 161 S.E. 496 (1931); State v. Jameson, 103 Utah 129, 134 P.2d 173 (1943).

18. Burns v. State, 226 Ala. 117, 145 So. 436 (1933); Williams v. State, 175 Ark. 752, 2 S.W.2d 36 (1927); People v. Van Cleave, 208 Cal. 295, 280 Pac. 983 (1929); People v. Rubin, 366 Ill. 195, 7 N.E.2d 890 (1937); Newton v. State, 147 Md. 71, 127 Atl. 123 (1924); People v. Lewis, 264 Mich. 83, 249 N.W. 451 (1933); Breland v. State, 180 Miss. 830, 178 So. 817 (1938); People v. DeMartino, 252 App. Div. 476, 299 N.Y. Supp. 781 (2d Dep't 1937); State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925). See 65 A.L.R. 1270 (1930). The federal rule here seems to allow such comment, 113 A.L.R.

19. For a discussion of the procedural problem in the principal case see 39 GEO. L.J. 499 (1951). See also 28 TEXAS L. REV. 122 (1949).

20. *See* Garber v. United States, 145 F.2d 966, 972 (6th Cir. 1944).
1308, 1309 (1938).

EMPLOYMENT SECURITY ACT—PERSONS COUNTED TO DETERMINE WHETHER AN EMPLOYING UNIT HAS REQUISITE NUMBER OF EMPLOYEES TO CONSTITUTE AN "EMPLOYER"—STUDENTS WORKING FOR SCHOOL TO PAY TUITION

In plaintiffs' art school certain financially needy students were allowed to work at odd jobs, thereby gaining credit against the school's charges for room, board and tuition. The school had five regular employees, and the students working in payment for their fees brought the total working force to more than the minimum of eight required by the Tennessee Employment Security Act for a taxable employing unit, if such students were to be considered employees within the meaning of the Act. The Commissioner of Employment Security ruled that they were employees, and the owners of the school paid the tax under protest and sued to recover the amount paid. From a judgment for plaintiffs, the commissioner appealed. *Held,* reversed. In the absence of any specific exclusion of students as employees, the services performed by the students in this case come within the terms of the statutory definition of employment. *Wiley v. Harris,* 237 S.W.2d 555 (Tenn. 1951).

The Employment Security Act provides that "Subject to the other provisions of this subsection, 'employment' means service . . . performed for wages or under any contract of hire. . . ."[1] It defines "wages" as "all remuneration paid for personal services from whatever source. . . ."[2] The words of these definitions are sufficiently general that their literal interpretation could easily result in calling student services "employment" under the Act. However, the rule that a taxing statute should be strictly construed against the taxing authority has been applied to the Tennessee Unemployment Compensation Law of 1936,[3] and would seem to apply to the present Act as well. Many other jurisdictions have used the same rule in construing similar acts.[4] The application of this strict rule of construction to the language

1. TENN. CODE ANN. § 6901.26(F)(1) (Williams Supp. 1951).

2. *Id.* § 6901.26(L).

3. Guaranty Mortgage Co. of Nashville v. Bryant, 179 Tenn. 579, 168 S.W.2d 182 (1943). See Tenn. Pub. Acts 1936, c.1.

4. National School of Aeronautics, Inc. v. Division of Employment Security, 226 S.W.2d 93 (Mo. 1950); *accord,* Jack Ulmer, Inc. v. Daniel, 193 S.C. 193, 7 S.E.2d 829 (1940); Texas Unemployment Compensation Comm'n v. Bass, 137 Tex. 1, 151 S.W.2d 567 (1941); State v. Musselman, 59 S.E.2d 472 (W.Va. 1950). This should not be confused with the proposition that an exemption from a taxing statute should be strictly construed against the claimant of the exemption: Better Business Bureau of Washington, D. C., Inc. v. District Unemployment Compensation Board, 34 A.2d 614 (D.C. Mun. App. 1943); *In re* Gem State Academy Bakery, 70 Idaho 531, 224 P.2d 529 (1950), 4 VAND. L. REV. 929 (1951); R. C. Huffman Const. Co. v. Unemployment Compensation Commission, 184 Va. 727, 36 S.E.2d 641 (1946); Note, 55 HARV. L. REV. 1055 (1942); 5 VAND. L. REV. 105, 107 (1951). The taxpayer in the instant case is claiming that the services rendered the school were not employment, and is not claiming exemption as such.

of the Act could conceivably lead to a determination that the statute was not intended to cover student services.

A further guide to the intent of the Tennessee legislature may be derived from a comparison of the histories of unemployment compensation legislation in Tennessee and in the Federal Government. Since 1939 the federal Socal Security Act has specifically excluded student services from the definition of employment.[5] Plaintiffs argued that since the federal Act and the various state acts are intended to work in harmony the court should not infer an intent on the part of the legislature of Tennessee to call student services "employment." The court countered this by pointing out that the Tennessee Employment Security Act, as it stands today, was written in 1947, eight years after the first federal exclusion of student services.[6] The Tennessee Act includes a list of specific exclusions,[7] and the failure to include student services among them, in the face of the federal exclusion, was held to be indicative of an intent to include them in the definition of "employment." There is a modern trend to interpret statutes by reference to other similar legislation—even though on diverse subject matter or from another jurisdiction—as a means of ascertaining the "purpose and course of legislation in general."[8] The warning has been expressed, however, that this manner of construction "should be employed with caution for the reason that by way of contrast an inclusion or exclusion may show an intent exactly contrary to that expressed by the analogous legislation. . . ."[9] This latter view seems to be the theory followed by the court in the instant case.[10]

A previous Tennessee case construing the Unemployment Compensation Law of 1936 held that the court should "interpret the statute in the manner which . . . harmonizes all its parts and effectuates its intent" even though there were contrary interpretations of similar acts in other jurisdictions.[11] There is ample authority for the proposition that a state may "determine what

5. The first exclusion of students in the federal statutes was made by the Act of August 10, 1939, 53 STAT. 1385 (1939). The present exclusion, slightly broader in effect than the first, was made in 26 U.S.C.A. § 1426(b)(11)(B) (Supp. 1951).

6. 237 S.W.2d at 557-58.

7. TENN. CODE ANN. § 6901.26 (Williams Supp. 1951).

8. 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION c. 61 (2d ed., Horack, 1943). This trend should not be confused with the practice of reading statutes *in pari materia* where they are designed by a legislative body to operate in a complementary manner. The trend which Sutherland notes has to do with statutes which have no common purpose, but only happen to have a common application—or, as here, with statutes promulgated by two distinct sovereign bodies. A typical example of this practice is the interpretation of the Uniform State Laws by reference to interpretation by the same court of another uniform law. (*e.g.*, the interpretation of the Uniform Stock Transfer Act in the light of the Negotiable Instruments Law) and interpretations by one court of a single uniform law by reference to the interpretation given it by a court of another jurisdiction. *Id.* § 6102.

9. *Id.* § 6104.

10. 237 S.W.2d at 557-58.

11. Queener v. Magnet Mills, Inc., 179 Tenn. 416, 426, 167 S.W.2d 1, 5 (1942).

shall constitute employment subject to taxation without regard to existing definitions or categories . . . ,"[12] even though the state and federal legislation when taken together "contemplates a cooperative legislative effort by State and National Governments for carrying out a public purpose common to both."[13]

That the statute is a taxing statute should not obscure the fact that it is primarily concerned with involuntary unemployment, and that its purpose is "to prevent . . . spread [of unemployment] and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family."[14] With this in mind, the problem arises whether students, as a class, should be entitled to unemployment benefits (assuming that they could comply with the other eligibility requirements of the Act). Broad social problems are involved, and informational resources are said not to be adequate, at present, for a final determination of the question.[15] The leading text on the subject asserts that "To include their wages in the unemployment compensation tax base, while denying them benefits, as a class, is hardly honest."[16] Perhaps such a course is more illogical than dishonest, but it is evident that a host of subsidiary questions would be raised by such an inconsistent course. Should an employer of students, for example, be given an immediate "experience rating" and consequent tax reduction[17] based on the fact that his employees, as students, could not apply for benefits under the Act, rather than waiting out the 36 months period required by the Act?[18] If, on the other hand, students of a profit-making school who provide services to the school are to be eligible for benefits, is this not an unfair discrimination against students of nonprofit educational institutions, whose services are specifically excluded from the definition of employment?[19] The decision in the instant case and the problems it raises indicate that the whole subject of student employment might well be considered by the next session of the legislature with an eye to drafting into the Employment Security Act specific provisions dealing with students as employees.

12. Equitable Life Ins. Co. v. Iowa Employment Security Commission, 231 Iowa 889, 2 N.W.2d 262, 265, 139 A.L.R. 885, 890 (1942).

13. Unemployment Compensation Commission of North Carolina v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.W.2d 592 (1939). The Supreme Court of the United States has stated, "The federal Act, from the nature of its ninety per cent credit device, is obviously an invitation to the states to enter the field of unemployment insurance . . . but the absence of an invitation as to employers of maritime workers is not to be construed as a barrier to state action." Standard Dredging Corp. v. Murphy, 319 U.S. 306, 310, 63 Sup. Ct. 1067, 87 L. Ed. 1416 (1943). See also Northwestern Mut. Life Ins. Co. v. Tone, 125 Conn. 183, 4 A.2d 640 (1939); Unemployment Compensation Commission v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689 (1941).

14. TENN. CODE ANN. § 6901.25 (Williams Supp. 1951).

15. ALTMAN, AVAILABILITY FOR WORK 194-97 (1950).

16. *Id.* at 195.

17. TENN. CODE ANN. § 6901.31(C) (Williams Supp. 1951).

18. *Id.* § 6901.31(C) (6).

19. *Id.* § 6901.26 (f) (7) (i).

FEDERAL JURISDICTION—JURISDICTIONAL AMOUNT—INJUNCTION SUITS

Plaintiff, one of approximately five thousand members of a local labor union, brought suit as an individual, to enjoin the union from transferring $114,000 of its assets. From an order granting the injunction the defendant appealed. *Held,* reversed. This was not a class or representative suit, and plaintiff did not reasonably allege a pecuniary loss to himself in excess of $3000. Therefore, the federal district court was without jurisdiction. *Seslar v. Union Local 901, Inc.,* 186 F.2d 403 (7th Cir. 1951).

The federal district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between citizens of different states.[1] Generally the amount in controversy is said to be the value to the plaintiff of the right which he in good faith asserts in his pleading.[2] This rule, however, is not as well established as the statements of text-writers and judges indicate.[3] In suits for injunctive relief there is further refinement, in that the amount is sometimes said to be determined on the basis of a primary or secondary right.[4] The prospective nature of the rights involved in these injunction suits makes it difficult for any standard to attain actual uniformity.[5]

Apparently the plaintiff in the present case was relying on the above general rule to support his allegation of $114,000 as the amount in con-

1. 28 U.S.C.A. § 1332 (1949).

2. This is known as the plaintiff-viewpoint rule. See 1 MOORE, FEDERAL PRACTICE 511 (1st ed. 1938); Dobie, *Jurisdictional Amount in the United States District Court,* 38 HARV. L. REV. 733 (1925). For cases see, *e.g.,* McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 Sup. Ct. 780, 80 L. Ed. 1135 (1936); Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir. 1940); Shanesy v. Ford Motor Co., 7 F.R.D. 199 (N.D. Ill. 1946).

3. See, *e.g.,* Sterl v. Sears, 88 F. Supp. 431, 432 (N.D. Tex. 1950) where Dooley, J. states, ". . . but the rule is that the jurisdictional test of the amount in controversy takes in view the pecuniary result to either party in the suit." *Accord,* Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604 (10th Cir. 1940). For a discussion of the various methods and difficulties of determining the amount in controversy, see Associated Press v. Emmett, 45 F. Supp. 907 (S.D. Calif. 1942). For criticism of the asserted need for a test see Note, 4 VAND. L. REV. 146 (1950). For criticism of the jurisdictional amount requirement in general see Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROB. 216 (1948).

4. The primary right is the immediate right to be free from the action sought to be enjoined, while the secondary right is that of being free of the action generally in the future. The question is which is to be evaluated. See Note, 25 CALIF. L. REV. 336 (1937) (injunction suits).

5. See *e.g.,* Dermody v. Smith, 88 F. Supp. 620, 621 (N.D. Ind. 1949), where Swygert, J., quoting from Vicksburg, S. & P.R. Co. v. Nattin, 58 F.2d 979, 980 (5th Cir. 1932), states, "Jurisdiction is based on actuality, not prophecy, the pressure of a grievance immediately felt and presently measurable in money of the jurisdictional amount." *But cf.* Walsh v. Boston & M.R.R., 87 F. Supp. 934, 935 (D. Mass. 1950), where Sweeney, J., quoting from Harris v. Brown, 6 F.2d 922, 924 (W.D. Ky. 1925), states, "In injunction eases . . . it is now well settled that the value of the matter in dispute, for jurisdictional purposes, is not tested by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business or property right from which protection is sought."

troversy.[6] Factually this is an unusual situation. Unlike suits where the plaintiff had the sole interest in the subject matter,[7] here he was only one of 5,000 members of the union each of whom had an equal, undivided interest in the total assets of the organization.[8] The problem then was whether an individual, as such, could allege as his personal interest the whole of such amount. Can one member enjoin the majority-approved action of the union? The court in the instant case said that such a result would allow one member of a class to obtain the same right to jurisdiction as though he had proceeded in a proper class action,[9] even though he acted without authority.[10] It was to prevent this anomaly that the court determined the jurisdictional amount on the basis of the plaintiff's *pro rata* interest in the $114,000 (*i.e.* $22.80). The result is logical and not without support.[11]

Though this court does not mention any existing authority by which a different result might be reached, the Supreme Court, in *Mississippi & Missouri, R.R. v. Ward*,[12] held that the amount in controversy is to be determined by the value of the object to be accomplished. Federal courts have not abandoned the reasoning of the *Ward* case nor the view that the amount in controversy can be the loss to defendants.[13] By applying either of these standards instead of the plaintiff-viewpoint rule the district court in the principal case would have had jurisdiction.[14]

6. He cites McNutt v. General Motors Acceptance Corporation, 298 U.S. 178, 56 Sup. Ct. 780, 80 L. Ed. 1135 (1936); Bitterman v. Louisville & Nashville R.R., 207 U.S. 205, 28 Sup. Ct. 91, 62 L. Ed. 171 (1907); Hunt v. New York Cotton Exchange, 205 U.S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821 (1907). All three of these cases look to the pecuniary value to the plaintiff for amount in controversy, but the *Hunt* and *Bitterman* cases evaluate the secondary rights involved while the *McNutt* case evaluates the primary right. See note 4 *supra*.

7. See note 6 *supra*.

8. This is the converse of the situation in Fitzgerald v. Santoianni, 95 F. Supp. 438 (D. Conn. 1950). There, where a member of a national union in a representative suit sought to enjoin the transfer of the property of a local union trying to disaffiliate itself, it was held that there was the requisite jurisdictional amount, determined by the value to the national union of preventing the transfer. See also Dermody v. Smith, 88 F. Supp. 620 (N.D. Ind. 1950).

9. FED. R. CIV. P. 23.

10. 186 F.2d at 407.

11. See, *e.g.*, Ames v. Mengel Co., 190 F.2d 344 (2d Cir. 1951) (suit by a shareholder to enjoin sale by corporation); Reiling v. Lacy, 93 F. Supp. 462 (D. Md. 1951) (tax case); Miller v. National City Bank of New York, 69 F. Supp. 187 (S.D.N.Y., 1946) (claim of a certificate holder on a loan); Reynolds v. Reynolds, 65 F. Supp. 916 (W. D. Ark. 1946) (creditor's suit).

12. 2 Black 485, 17 L. Ed. 311 (U.S. 1863); *cf.* Ridder Bros., Inc. v. Blethen, 142 F.2d 395 (9th Cir. 1944) (action for specific performance of a contract); MacCormick v. McCoy, 94 F. Supp. 772 (S.D. Mo. 1950) (trespass case); Ross v. Southern Ry., 20 F. Supp. 556 (W.D.S.C. 1937) (suit to enjoin construction by defendant of a plant).

13. See Frankline Life Ins. Co. v. Johnson, 157 F.2d 653 (10th Cir. 1946) (action by insurance company for declaration of liability under a policy); Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604 (10th Cir. 1940) (suit to enjoin use of water rights); Miller v. First Service Corp., 84 F.2d 680, 109 A.L.R. 1179 (8th Cir. 1936) (creditor's bill); Doggett v. Hunt, 93 F. Supp. 426 (S.D. Ala. 1950) (action to require drilling oil wells); Sterl v. Sears, 88 F. Supp. 431 (N.D. Tex. 1950) (action by landlord to evict tenant); Griffith v. Enochs, 43 F. Supp. 352 (W.D. La. 1942) (action to annul judgment); Morrow v. Mutual Cas. Co., 20 F. Supp. 193 (E.D. Ky. 1937); Enzor v. Jefferson Standard Life Ins. Co., 14 F. Supp. 677 (E.D.S.C. 1936).

14. See note 2 *supra*.

LEGAL ETHICS—SOLICITATION AND FEE SPLITTING—ATTORNEY CONTRACTING WITH LABOR UNION TO REPRESENT UNION MEMBERS FOR CONTIGENT FEE

Petitioners, three attorneys, were regional counsel under a contract with the Legal Aid Department of the Brotherhood of Railroad Trainmen as a part of a nationwide plan for providing legal services to its members. Under the original plan petitioners received a 20% contingent fee and turned 25% of this over to the Department. A second plan called for an aggregate contingent fee of 25% under two contracts, one with the petitioners for 19% and the other with the Brotherhood for 6%. A final plan called for a flat contingent fee of 25%, but the petitioners were required to pay on a *quantum meruit* basis the investigators who were kept on the staff of the Legal Aid Department and assigned to individual cases. While the members of the Brotherhood were not compelled to employ regional counsel for the handling of their lawsuits, they were subject to continuous and strong recommendation to do so through certain publications and circulars to the members, as well as by personal visits from officers. The Board of Governors of the State Bar recommended that petitioners be disciplined for violations of the "solicitation" rule and the "fee splitting" rule of the Rules of Professional Conduct of the State Bar of California.[1] This is a proceeding to seek a review of the recommendation. *Held* (5-2),[2] petitioners' conduct violated both rules. No disciplinary action should be taken in this case, however, thereby permitting the opinion, the first expression of this court's views upon the subject, to serve prospectively as a guide to the members of the profession generally, rather than to serve retrospectively to the detriment of petitioners. *Hildebrand v. State Bar of California,* 36 Cal.2d 504, 225 P.2d 508 (1950).

Since the Canons of Professional Ethics adopted by the American Bar Association contain, in effect, the same prohibitions as the rules involved in the instant case,[3] and since the legal aid plan of the union is

1. "Rule 2, section a, reads: 'A member of The State Bar shall not solicit professional employment by advertisement or otherwise.' 26 Cal.2d 32. . . Rule 3, so far as here pertinent, provides: 'A member of The State Bar shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; nor, except with a person licensed to practice law, shall he directly or indirectly share compensation arising out of or incidental to professional employment; nor . . . knowingly accept professional employment offered to him as a result of or as an incident to the activities of any person not so licensed or of any association or corporation that for compensation controls, directs or influences such employment . . . .' 26 Cal.2d 34." 225 P.2d at 510.

2. *Per curiam* opinion; separate dissents by Carter and Traynor, JJ.

3. Canons of Professional Ethics adopted by the American Bar Association. Rule 27 thereof provides: "It is unprofessional to solicit professional employment by circulars, advertisements . . . or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments . . . are reprehensible . . . ." Rule 28 provides: "It is disreputable . . . to breed litigation by seeking out those with claims for personal injuries . . . in order to secure them as clients, or to employ agents or runners for like

nationwide in scope[4] and represents a goal which may be sought by other plans in the future, the problem involved assumes paramount importance.

These rules have their origin in the early common law of England, and at one time any contingent fee contract was void for champerty and maintenance. At the present time, however, such contracts are not, in themselves, void; and the tendency is to depart from the severity of the old law and still preserve the principles necessary to prevent the evils that the old law was created to prevent.[5]

It has been suggested that since the union is a nonprofit organization, primarily seeking protection for its members rather than profit for itself or business for the attorney, there is no substantial danger that a division of the attorney's loyalty will lead to his placing the organization's interest ahead of the client's; and that the plan consequently does not fit within the policy of the prohibitions of the legal ethics canons.[6] This view is substantially supported by an Illinois decision involving the same union, in which the court held that the union's legal aid plan did not involve unethical solicitaton or fee-splitting and that the union's motive of providing cheap legal service to its members was praiseworthy.[7] Two subsequent cases have, however, rejected this view and held that the motive of the union was immaterial.[8] To hold that the motive is of no consequence is perhaps an over-technical way of reaching a decision; yet, not all the dangers are eliminated by the union's motive. The union, not the client, fixes the fee. The facts are investigated by its staff, who, under the plan considered in the instant case, are compensated by the attorney for such investigaton. The volume of business thrown to the attorney by the union creates an obligation on the part of the attorney that may conflict, to some degree not susceptible of exact measurement, with the duty the attorney owes his client and his profession. There would be no remedy of disbarment to protect the public against imposition or fraud.[9] In determining whether the plan comes within the literal meaning of the "fee-splitting" rule[10] the question arose as to whether or not

purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases. . . ." Rule 34 provides: "No division of fees for legal services is proper, except with another lawyer. . . ." Rule 35 provides: "The professional services of a lawyer should not be controlled or exploited by any law agency, personal or corporate. . . ."

4. Ryan v. Pa. R.R., 268 Ill. App. 364, 370 (1932).

5. 2 THORNTON, ATTORNEYS AT LAW § 383 (1914); 14 C.J.S., *Champerty and Maintenance* § 3 (1939).

6. 64 HARV. L. REV. 1374 (1951).

7. Ryan v. Pennsylvania R.R., 268 Ill. App. 364 (1932). *But cf.* Atchinson, Topeka & S.F. Ry. v. Andrews, 338 Ill. App. 552, 88 N.E.2d 364, 14 A.L.R.2d 728 (1949).

8. *In re* O'Neil, 5 F. Supp. 465 (E.D.N.Y. 1933); *In re* Petition of the Committee on Rule 28, 15 Ohio L. Abs. 106 (1933).

9. *Cf. In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15, 32 L.R.A. (N.S) 55 (1910).

10. 225 P.2d at 510.

the union, as prohibited by the rule, received compensation in controlling the employment of attorneys. The majority in the instant case felt that compensation was paid when the union received a percentage of the recovery under the first two variations of the plan. Under the latest plan, although the union, as such, received no money, the court held that compensation could be found in the intangible benefit to the union which results from being able to offer the service to its members, in that the service would be an inducement to join the union and pay membership dues. If the rule had been interpreted to mean that compensation to the employer must be the motive, the plan would not have been prohibited by this rule.[11]

In view of the attitude of the courts and the bar, generally, the interpretation of the above compensation requirement given by the majority opinion apparently accords with the intent of the drafters of the Rules. The Canons of Ethics adopted by the American Bar Association provide that compensation to influence litigation shall neither be direct nor indirect.[12] Corporations and unlicensed associations may not practice law[13] and nonprofit organizations are included in this prohibition.[14] Agreements between an attorney and a layman to divide fees or compensation received by the attorney for business of a third person are generally void as against public policy.[15] This rule applies even though the layman's compensation is for the actual work of investigation rather than for soliciting or bringing business to the attorney.[16]

A dissenting opinion in the instant case declared that the implications of the majority opinion would destroy both the legal aid bureaus for the indigent, approved by the American Bar Association, and group medical care plans.[17] The assertion may be true in connection with certain suggested legal aid clinics proposed by reputable members of the bar;[18] and some existing legal aid plans would also probably be destroyed by an application of the majority opinion.[19] However, the difference between the union's legal aid plan and

11. 3 STAN. L. REV. 549 (1951).

12. Canons of Professional Ethics adopted by the American Bar Association, Rule 28, as amended July 26, 1928.

13. People *ex rel.* Lawyers' Institute of San Diego v. Merchant's Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922); *In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15, 32 L.R.A. (N.S.) 55 (1910); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935); 1 THORNTON, ATTORNEYS AT LAW § 35 (1914).

14. People *ex rel.* Courtney v. Ass'n of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933).

15. 2 THORNTON, ATTORNEYS AT LAW § 436 (1914). See Note, 86 A.L.R. 195 (1933); 7 C.J.S., *Attorney & Client* § 174 (b) (1937).

16. Cates v. Kelley, 55 Ga. App. 786, 191 S.E. 384 (1937).

17. See Carter, J., dissenting, 225 P.2d at 516.

18. See BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 273 (1938): Llewellyn, *The Bar's Troubles, and Poultices—and Cures?* 5 LAW & CONTEMP. PROB. 104 (1938).

19. For detailed treatment of legal aid clinics, see BROWNELL, LEGAL AID IN THE UNITED STATES (1951); AMERICAN BAR ASSOCIATION, LEGAL AID IN NEW YORK (1941); AMERICAN BAR ASSOCIATION, FRONTIERS OF LEGAL AID WORK (1939).

that of the typical legal aid clinic for the indigent is material. The attorneys for such a clinic do not charge fees, as a rule, and there is no kickback to the clinic either by paying the clinic or its sponsors a percentage of the recovery or by paying their investigators on a *quantum meruit* basis. There could be no claim that such a bureau is compensated, either directly or indirectly, for the right to its services is not conditioned upon the payment of dues, as it is in the union's plan. The group medical plans mentioned in the dissent are generally legal if on a nonprofit basis, but there is some conflict in the decisions.[20] It is generally believed that the public benefits derived from such organizations outweigh any possible detriment to the profession.[21]

The public benefits sought to be attained by the legal aid plan of the union here are somewhat similar to those involved in the medical aid plans, and efforts to make them available will probably continue despite the holding in the instant case. Are there any variations of the plan actually used which might eliminate its objectionable features? The union might be able to avoid the effect of the rules by serving its contractual relationship with the attorneys while still recommending attorneys which it thought were well qualified to handle personal injury cases. If this were done, the attorney could not be justly charged with fee-splitting. Whether the attorney who participated in such a plan would be guilty of unethical solicitation is more questionable. Legal writers are not in agreement on whether the prohibitions against advertising should be strengthened or relaxed.[22] There should be no real objection, however, for a union to list qualified attorneys, as any layman is also free to tell any other layman what he thinks of any lawyer or group of lawyers. Could the union agree in advance with its members to prosecute all personal injury claims and to insure its members against personal injury in the course of their employment? Under this system the union would be prosecuting a claim which it was under a legal obligation to prosecute, or litigating on its own behalf and thus would not be an intermediary.[23] But such a plan raises other problems such as the application of the insurance laws, and it is still doubtful whether the canons of ethics would be held not to be violated by it.

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20. See Note, 167 A.L.R. 322 (1947).

21. See Hansen, *Laws Affecting Group Health Plans,* 35 IOWA L. REV. 209 (1950); Hansen, *Legal Problems in the Organization and Creation of Group Health Plans,* 5 VAND. L. REV. 14 (1951); Note, 35 MINN. L. REV. 209 (1950).

22. See Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139, 146 (1935); Sears, *A Minnesota Judgeship,* 26 ILL. L. REV. 121 (1931); Note, 11 J. AM. JUD. SOC'Y 53 (1927). But see Brennon, *The Bugaboo "Ambulance Chasing,"* 6 CAL. STATE BAR J. 37 (1931); Llewellyn, *The Bar's Troubles, and Poultices—and Cures?* 5 LAW & CONTEMP. PROB. 104 (1938).

23. *Cf. In re* Thibodeau, 295 Mass. 374, 3 N.E.2d 749 (1936); see Hicks & Katz, *The Practice of Law by Laymen and Lay Agencies,* 41 YALE L.J. 69, 93 (1931).

NEGLIGENCE—LANDOWNER'S DUTY OF CARE—DUTY OWED TO FIREMAN

Plaintiff, a fireman, was injured by the collapse of a wall while extinguishing a fire in defendant's warehouse. Defendant had been aware of the dangerous condition of the wall for some time prior to the fire, and during the fire his officers and agents were present but failed to give warning to plaintiff. The trial court overruled defendant's demurrer and defendant appealed. *Held,* affirmed. The complaint stated a cause of action in tort on the theory of failure of defendant to warn of the known danger. *Shypulski v. Waldorf Paper Products Co.*, 45 N.W.2d 549 (Minn. 1951).

Persons who enter upon the land of another are generally classed as trespassers, licensees or business visitors, depending upon whether or not they have the prior consent, express or implied, of the landowner to enter, and on whether the entry is for economic interest of the landowner. For years the courts have been concerned with the problem involving the legal status of public officials injured upon the land of another while performing their official duties. Any solution first necessitates a consideration of the status the injured official occupied at the time of his injury, so as to enable the courts to ascertain what duty was owed to the complaining party by the landowner. Once the public official's status is determined, the courts have then only to apply the general duties and obligations incident to the particular category.

For the most part, classification of various types of officials has been arrived at without too much difficulty. Postmen, city inspectors, meat inspectors, tax inspectors, air raid wardens, etc., have been fitted into one of the three usual categories and the duties owed them are generally ascertained.[1] With respect to policemen and firemen however, the courts have not been able to agree. Though they were technically trespassers at common law,[2] it is obvious that such a classification today would be unwise. Therefore, the courts generally call them "bare" licensees[3] on the basis of a license

1. See, *e.g.*, Cudahy Packing Co. v. McBride, 92 F.2d 737 (8th Cir. 1937) (meat inspectors); Miller v. Pacific Constructors, 68 Cal. App.2d 529, 157 P.2d 57 (1945) (city inspectors); Anderson & Nelson Distilling Co. v. Hair, 103 Ky. 196, 44 S.W. 658 (1898) (tax inspector). The courts imply an invitation from owner to enter and they are generally termed invitees or business invitees. Paubel v. Hitz, 339 Mo. 274, 96 S.W.2d 369 (1936) (postman); Rashild v. Weill, 46 N.Y.S.2d 711 (Sup. Ct. 1944) (air raid warden).

2. See Bohlen, *The Duty of the Landowner Toward Those Entering His Premises of Their On Right,* 69 U. OF PA. L. REV. 237-38, 340 (1920); Bohlen, *Fifty Years of Torts,* 50 HARV. L. REV. 725, 736 n.9 (1937); Eldredge, *Tort Liability To Trespassers,* 12 TEMP. L.Q. 32-34 (1937); Note, 14 MISS. L.J. 262 (1941).

3. Lunt v. Post Printing and Publishing Co., 48 Colo. 316, 110 Pac. 203 (1910); Todd v. Armour and Co., 44 Ga.App. 500, 162 S.E. 394 (1932); Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892); Aldworth v. F.W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936); New Omaha T.H.E.L. Co. v. Anderson, 73 Neb. 84, 102 N.W. 89

provided by law and necessity to enter.[4] There are a few jurisdictions, however, that refuse to term them bare licensees, and instead, place policemen and firemen in between the trespasser group and licensee group, and refer to the hybrid result as *sui generis*.[5]

In the present case, the court clearly states that it considers the fireman as a member of a class *sui generis*.[6] In comparison with the general holdings which refer to firemen as bare licensees, the difference is slight because the end result is the same. Often it is said that no duty is owed them in either instance by the landowner except to refrain from inflicting any willful or wanton injury.[7] These same general holdings impose upon the landowner no duty to use care to maintain his premises or buildings in constant repair awaiting the unexpected arrival of the fireman.[8] In a few instances firemen have been allowed recovery where the defect was characterized as a trap or nuisance,[9] but despite these occasional decisions the rule persists that a fireman accepts the land and buildings as he finds them.

The Minnesota court in this instance was presented with the problem of whether or not to allow a fireman to recover when the landowner, aware of an existing danger, failed to give warning of it and injury to the fireman resulted. Considering the question as one of first impression the court allowed recovery, stating that there is no valid reason why firemen, although assuming the usual risks incident to their entry upon another's premises in performance of duty, "should be required to assume the extraordinary risk

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(1905); Eckes v. Stetler, 98 App. Div. 76, 90 N.Y. Supp. 473 (1st Dep't 1904); Beehler v. Daniels, 18 R.I. 563, 29 Atl. 6 (1894); COOLEY, TORTS § 251 (4th ed., Haggard, 1932); POLLOCK, TORTS 397 (12th ed. 1923); PROSSER, TORTS 626-27 (1941). A private person entering to put out a fire is also termed a licensee. Minneapolis General Electric Co. v. Cronon, 166 Fed. 651 (8th Cir. 1908). Firemen were classified as invitees when the defendant's premises were situated outside the city limits and beyond the "call area" of the city fire department with no obligation to respond to owners summons. Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S.W. 646 (1922).

4. See Lunt v. Post Printing and Publishing Co., 48 Colo. 316, 110 Pac. 203 (1910).

5. See, *e.g.*, Smith v. Twin State Gas and Electric Co. 83 N.H. 439, 144 Atl. 57 (1928); Meirs v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920), apparently overruling Eckes v. Stetler, 98 App. Div. 76, 90 N.Y. Supp. 473 (1st Dep't 1904).

6. 45 N.W.2d at 550.

7. See Pennebaker v. San Joaquin Electric Co., 158 Cal. 579, 112 Pac. 459 (1910); Lunt v. Post Printing and Publishing Co. 48 Colo. 316, 110 Pac. 203 (1910); Todd v. Armour and Co. 44 Ga. App. 500, 162 S.E. 394 (1932); Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892); Woodruff v. Bowen, 136 Ind. 431, 34 N.E. 1113 (1893); Steinwedel v. Hilbert, 149 Md. 121, 131 Atl. 44 (1925); Mulcrone v. Wagner, 212 Minn. 478, 4 N.W.2d 97, 141 A.L.R. 580 (1942); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899); New Omaha T.H.E.L. Co. v. Anderson, 73 Neb. 84, 102 N.W. 89 (1905); Eckes v. Stetler, 98 App. Div. 76, 90 N.Y. Supp. 473 (1st Dept. 1904); Baker v. Otis Elevator Co., 78 App. Div. 513, 79 N.Y. Supp. 663 (Sup. Ct. 1903); Beehler v. Daniels, 18 R.I. 563, 29 Atl. 6 (1894).

8. See cases cited note 7, *supra*, and 18 HARV. L. REV. 397 (1905).

9. See, *e.g.*, Campbell v. Pure Oil Co., 15 N.J. Misc. 723, 194 Atl. 873 (Sup. Ct. 1937).

of hidden perils of which they might be warned."[10] Several other jurisdictions which have considered the same question have established precedents for this result.[11]

NEGLIGENCE—STANDARD OF CARE—ASSURED-CLEAR-DISTANCE-AHEAD RULE

Plaintiff was driving along a blacktop road at 50 miles per hour. While rounding a curve so sharp that his vision was limited to 70 feet, he met defendant's car, approaching from the opposite direction and a few feet over on plaintiff's side of the road. Unable to stop, plaintiff skidded and crashed. In an action for negligence the lower court ruled that plaintiff was contributorily negligent as a matter of law in failing to comply with the assured-clear-distance rule. *Held,* this rule will no longer apply as a matter of law where the motorist encounters a dangerous situation which in the exercise of reasonable care he had no reason to expect. *Halfacre v. Hart,* 241 S.W.2d 421 (Tenn. 1951).

Normally the decision as to when an actor's conduct is negligent is one for the jury, who are given only the general standard of care: that which a reasonably prudent person would exercise under the same or similar circumstance.[1] However, when a person's conduct is so clearly negligent that reasonable men could not disagree, the court will remove the issue from the jury and hold him negligent as a matter of law.[2] Sometimes appellate courts tend to crystallize frequently recurring fact situations into judicially framed rules of law, the violation of which is negligence *per se,* so that the jury no longer has discretion in the matter.[3] For example, some courts have held

10. 45 N.W.2d at 553.

11. See, *e.g.,* Smith v. Twin State Gas and Electric Co., 83 N.H. 439, 449, 144 Atl. 57, 61 A.L.R. 1015 (1928); Campbell v. Pure Oil Co., 15 N.J. Misc. 723, 194 Atl. 873 (1937); Jenkins v. 313-321 W. 37th St. Corp., 284 N.Y. 397, 31 N.E.2d 503 (1940); Mason Tire and Rubber Co. v. Lansinger, 15 Ohio App. 310, 316, *aff'd,* 108 Ohio St. 377, 140 N.E. 770 (1923). *But see* Pennebaker v. San Joaquin Light and Electric Co., 158 Cal. 579, 112 Pac. 459 (1910) (where an employee of defendant was present); RESTATEMENT, TORTS § 342 (1934); *cf.* Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S.W. 646 (1922).

1. Prickett v. Sulzberger & Sons Co., 57 Okla. 567, 157 Pac. 356 (1916); Virginia Electric & Power Co. v. Steinman, 177 Va. 468, 14 S.E.2d 313 (1941). For discussions of the relation of court and jury in regard to the standard of care, see PROSSER, TORTS § 40 (1941); GREEN, JUDGE AND JURY 153-85 (1930).

2. District of Columbia v. Moulton, 182 U.S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237 (1901); Knoxville Traction Co. v. Carroll, 113 Tenn. 514, 82 S.W. 313 (1904); Penoso v. D. Pender Grocery Co., 177 Va. 245, 13 S.E.2d 310 (1941). "[I]t has now become an almost uniform maxim of law throughout this country, that (1) where the facts are such that reasonable men might draw different conclusions from them, or (2) where the evidence with regard to the existence of facts alleged to constitute negligence is in conflict, the question is one for the jury; otherwise for the court." 1 THE LAW OF AUTOMOBILES IN TENNESSEE § 23 (3d ed., Michie, 1947).

3. PROSSER, TORTS, § 41 (1941); 2 RESTATEMENT, TORTS § 285 (1934). In Justice Holmes' opinion, when a particular state of facts recurs frequently in practice, the court

that it is negligence as a matter of law for a motorist to drive across a railroad track without stopping to look and listen.[4]

Many courts have held that it is negligence as a matter of law to operate a motor vehicle at such speed as to be unable to stop within the assured clear distance ahead as measured by the driver's range of vision.[5] Strict application of the assured-clear-distance rule will bar an action of a motorist who hits an unlighted obstruction in the road at night, on the ground that he was contributorily negligent in outdriving his headlights,[6] without regard to conditions which might cut down his range of vision.[7] Other courts have rejected the assured-clear-distance rule, holding that the question of a driver's negligence is, in most cases, for the jury.[8] Even in those jurisdictions which do apply the rule, the courts have found it necessary to make an increasing number of exceptions to its application. Thus it has been held that a driver is excused if his vision is impaired by blinding lights and fog,[9] or if the

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should determine for itself a definite standard to govern in similar situations. HOLMES, THE COMMON LAW 123 (1881). But see Bohlen, *Mixed Questions of Law and Fact*, 72 U. OF PA. L. REV. 111, 119 (1924), pointing out the dangers in such judicially formulated rules of conduct.

4. Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 48 Sup. Ct. 24, 72 L. Ed. 167, 56 A.L.R. 645 (1927), in which Justice Holmes states that, "It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once and for all by the Courts." This view did not long prevail in the Supreme Court, however, for the court in another "stop-look-listen" case limited the decisions in Baltimore & Ohio R.R. v. Goodman and indicated the "need for caution in framing standards of behavior that amount to rules of law. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal." Pokora v. Wabash Ry., 292 U.S. 98, 105, 54 Sup. Ct. 580, 78 L. Ed. 1149, 91 A.L.R. 1049 (1934). See also PROSSER, TORTS § 41 (1941).

5. See, *e.g.*, Spencer v. Taylor, 219 Mich. 110, 188 N.W. 461 (1922); West Construction Co. v. White, 130 Tenn. 520, 172 S.W. 301 (1914). Lauson v. Town of Fond du Lac, 141 Wis. 57, 123 N.W. 629 (1909), is the leading case. Also see Notes, 44 A.L.R. 1403 (1926), 58 A.L.R. 1493 (1929), 87 A.L.R. 900 (1933), 133 A.L.R. 967 (1941). In some other states this rule is covered by statute. See Lindquist v. Thierman, 216 Iowa 170, 248 N.W. 504, 87 A.L.R. 893 (1933); Smiley v. Arrow Spring Bed Co., 138 Ohio St. 81, 33 N.E.2d 3 (1941), 7 OHIO ST. L.J. 468. For a discussion of the rule's application under statute see Note, 24 IOWA L. REV. 128 (1938).

6. West Construction Co. v. White, 130 Tenn. 520, 172 S.W. 301 (1914); Tennessee Central Ry. v. Schutt, 2 Tenn. App. 514 (M.S. 1926). Even though the principle would be the same, the assured-clear-distance rule is seldom relied on by a plaintiff to show negligence of a defendant, since it is usually to the plaintiff's advantage to give the case to the jury. See, in this connection, Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476, 477 (1936).

7. The following conditions have in the past been held not to excuse a violation of the rule: Tyson v. Ford, 228 N.C. 778, 47 S.E.2d 251 (1948) (hill); Cormican v. Menke, 306 Pa. 156, 159 Atl. 36 (1932) (fog); Knoxville Ry. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S.W. 1117 (1915) (blinding lights of approaching car); Sterchi Brothers Stores, Inc. v. Bird, 15 Tenn. App. 240 (E.S. 1931) (curve in road).

8. Morris v. Sells-Floto Circus, Inc., 65 F.2d 782 (4th Cir. 1933); Coca-Cola Bottling Co. v. Shipp, 174 Ark. 130, 297 S.W. 856 (1927); Sprague v. Herbel, 90 Colo. 134, 6 P.2d 930 (1931); Murray v. Hawthorne, 117 Ore. 319, 244 Pac. 79, 44 A.L.R. 1397 (1926); Morehouse v. City of Everett, 141 Wash. 399, 252 Pac. 157, 58 A.L.R. 1482 (1936).

9. Watson v. Southern Bus Lines, 186 F.2d 981 (6th Cir. 1951).

object struck is indiscernible[10] or if a sudden occurrence cuts down the assured clear distance.[11]

The rule was first applied in Tennessee in 1914, in a case in which a driver, who hit an unlighted concrete mixer in the road, was held negligent as a matter of law for driving at a speed greater than would allow him to stop within his range of vision.[12] Later cases declined to apply the rule where the object struck was indiscernible even in the exercise of reasonable care.[13] The rule was further modified in *Main Street Transfer & Storage Co. v. Smith,*[14] where it was held that a driver could expect that an obstruction would be lighted according to law, with an indication that "[E]xceptional circumstances will render the rule inapplicable, as contrary to the practice and experience of persons of ordinary caution and prudence."[15]

The court in the instant case interpreted the decision in *Main Street Transfer & Storage Co. v. Smith* to mean that the assured-distance rule will no longer be applied in Tennessee as a matter of law, and that the issue of contributory negligence in such circumstances is one for the jury.[16] In declining to apply the rule as a mecbanical matter of law, the Tennessee court followed the trend of an increasing number of courts[17] and what is generally considered to be the better view of the matter.[18] The theory on which the rule rested, *i.e.* that all reasonable men would agree that to drive at such a speed

10. Tidwell v. Lewis, 174 F.2d 173 (6th Cir. 1949) (flatbed trailer in road); Foster & Creighton Co. v. Hale, 32 Tenn. App. 208, 222 S.W.2d 222 (E.S. 1949) (hidden depression in road); Westmoreland Heights v. Martin, 13 Tenn. App. 142 (E.S. 1930).

11. Fleming v. Hartrick, 100 W. Va. 714, 131 S.E. 558 (1926).

12. West Construction Co. v. White, 130 Tenn. 520, 172 S.W. 301 (1914). Followed in Knoxville Ry. & Light Co. v. Vangilder, 132 Tenn. 487, 178 S.W. 1117 (1915); Cleveland Transfer Co. v. Clark, 6 Tenn. App. 364 (E.S. 1927); Tennessee Central Ry. v. Schutt, 2 Tenn. App. 514 (M.S. 1926).

13. Westmoreland Heights v. Martin, 13 Tenn. App. 142 (E.S. 1930).

14. 166 Tenn. 482, 63 S.W.2d 665 (1933). Followed in Tidwell v. Lewis, 174 F.2d 173 (6th Cir. 1949); Trigg v. Ferguson Co., 30 Tenn. App. 672, 209 S.W.2d 525 (W.S 1947.)

15. Main Street Transfer & Storage Co. v. Smith, 166 Tenn. 482, 493, 63 S.W.2d 655, 668 (1933).

16. The court in the instant case indicated that the rule might still be applied where a motorist hits an obstacle which he should have expected, "for instance, a slow horse drawn wagon or vehicle proceeding properly on the highway. . . ." in the same direction as the motorist. 241 S.W.2d at 423. In these situations there is no indication of negligence on the part of the defendant; therefore a directed verdict would be in order regardless of the assured-clear-distance rule. Such a result was reached in Quarles v. Gregg, 30 Tenn. App. 216, 204 S.W.2d 535 (M.S. 1947), even though the court did speak in terms of the rule.

17. See, 4 ROCKY MT. L. REV. 231, 232 (1932). The trend away from the determination of contributory negligence by rules of law is also reflected in the constitutions of Arizona and Oklahoma, which require that all issues of contributory negligence be left for the jury. ARIZ. CONST. Art. XVIII, § 5; OKLA. CONST. Art. XXIII, § 5.

18. Law review commentators have been practically unanimous in criticising the assured-clear-distance rule. See, *e.g.*, 23 CALIF. L. REV. 498, 502 (1935); 12 MINN. L. REV. 283 (1928); 5 WIS. L. REV. 174 (1928). See also PROSSER, TORTS § 41 (1941), pointing out the reaction away from the stop-look-and-listen rule, the rule that a pedestrian must always look before crossing a street and other rules establishing negligence as a matter of law.

as to be unable to stop within the range of vision is negligence, seems untenable in light of the conditions of present day motor travel, with its safe and unobstructed highways.[19]

PERSONAL PROPERTY—TENANCY BY THE ENTIRETY—BANK ACCOUNTS

H and *W* established a bank account in the name of "Joe Tatum or wife." *W* predeceased *H* and on the latter's death his administrator claimed that the bank deposit had been held in tenancy by the entirety and had passed by right of survivorship to *H* at *W's* death. *W's* heirs allege the fund should go to them according to the laws of descent and distribution, and the lower court so decreed. *Held,* reversed. Though not previously decided in Tennessee, a tenancy by the entirety may be created in a bank account where intent to do so is clearly shown. *Sloan v. Jones,* 241 S.W.2d 506 (Tenn. 1951).

At common law tenancy by the entirety was in effect a joint tenancy modified by the fiction that husband and wife were one.[1] Its main features are: (1) tenants must be husband and wife and the tenancy exists only during coverture, (2) the tenancy cannot be terminated on the independent initiative of either spouse and (3) on the death of one the entire property passes to the surviving tenant free from the claims of creditors, legatees, heirs and devisees of the deceased.[2]

The modern status of tenancy by the entirety has been confused by the married woman's property acts and the concept is not recognized in some 29 jurisdictions.[3] In Tennessee tenancy by the entirety has been long recognized

19. In Lauson v. Town of Fond du Lac, 141 Wis. 57, 123 N.W. 629 (1909), in which the rule was first applied, the court said that every reasonable driver must expect that streets are torn up, bridges washed out and livestock roam the streets. There can be little doubt that a reasonable driver today does not expect such occurrences. Indeed the most frequent criticism of the rule is that it is out of line with present day traffic conditions. See 23 CALIF. L. REV. 498, 502, 503 (1935).

1. 2 TIFFANY, REAL PROPERTY § 430 (3d ed., Jones, 1939).

2. See generally, 2 TIFFANY, REAL PROPERTY §§ 430-36 (3d ed., Jones, 1939). For a valuable survey of tenancy by the entirety in the United States, see Phipps, *Tenancy by Entireties,* 25 TEMP. L.Q. 24 (1951).

3. This is in spite of Burby's statement that, "A tenancy by the entirety is a form of concurrent ownership which is recognized in most of the American states. . . ." BURBY, REAL PROPERTY 295 (1943). The following eight community property states do not recognize entireties: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington. Three states consider tenancy by entirety inconsistent with local views of common law: Connecticut, Bartholomew v. Murry, 61 Conn. 387, 23 Atl. 604 (1891); Nebraska, Kenner v. McDonald, 60 Neb. 663, 84 N.W. 92 (1900); Ohio, Sergeant v. Steinberger, 2 Ohio 305 (1826). Nine states have held that tenancy by the entirety was destroyed by the various married women's property acts: Alabama, Donegan v. Donegan, 103 Ala. 488, 15 So. 823 (1894); Colorado, Whyman v. Johnston, 62 Colo. 461, 163 Pac. 76 (1917); Illinois, Douds v. Fresen, 392 Ill. 477, 64 N.E.2d 729 (1946); Iowa, Fay v. Smiley, 201 Iowa 1290, 207 N.W. 369 (1926); Maine, Poulson

and certain local characteristics have developed. When one spouse transfers an interest in the property he transfers a right of survivorship only.[4] An attaching creditor of one spouse or a purchaser at an execution sale gets the same contingent interest.[5] The present case advances another proposed attribute of entireties—that they can be created in personal property, more specifically, a bank account. In 1925 the Tennessee Court of Appeals held such a concept untenable in the state.[6] Since then the rule has clearly been otherwise, entireties being allowed in furniture,[7] stocks,[8] and a monetary bequest.[9] Even before 1925 it was held that a chose in action held jointly by husband and wife would pass to the survivor.[10] As a leading decision in the state has observed, the chief objection to such tenancies—*i.e.*, the common law power of the husband exclusively to dispose of or use the entire property—has been removed by statute whereby the wife holds her property as a single woman.[11]

Text writers generally discuss entireties as applicable only to realty.[12] Yet at least ten of the twenty entirety jurisdictions extend the doctrine to all assets,[13] while eight limit it to realty[14] and two have no definite rulings

v. Poulson, 70 A.2d 868 (Me. 1950); Minnesota, Semper v. Coates, 93 Minn. 76, 100 N.W. 662 (1904); New Hampshire, Stilphen v. Stilphen, 65 N.H. 126, 23 Atl. 79 (1889); South Carolina, Green v. Connady, 77 S.C. 193, 57 S.E. 823 (1907); Wisconsin, Hass v. Williams, 218 Wis. 429, 261 N.W. 216 (1935). Georgia has abolished tenancy by implication. Lott v. Wilson, 95 Ga. 12, 21 S.E. 992 (1894). Kansas has reached the same result by inference. Holmes v. Holmes, 70 Kan. 892, 79 Pac. 163 (1905). Four states have abrogated tenancy by the entirety by relying on a combination of the married women's property acts and other legislation: Montana, Emery v. Emery, 200 P.2d 251, 263 (Mont. 1948) *semble;* North Dakota, N.D. REV. CODE § 47-0205 (1943); South Dakota, *In re* Lower's Estate, 48 S.D. 173, 203 N.W. 312 (1925); West Virginia, Irvin v. Stover, 67 W. Va. 356, 67 S.E. 1119 (1910). In three states tenancy by the entirety does not differ from joint tenancy: Wolfe v. Wolfe, 42 So.2d 438 (Miss. 1949); OKLA. STAT. tit. 60, § 74 (Cum. Supp. 1949) (levy and sale by a creditor may constitute severance); UTAH CODE ANN. § 80-12-5 (1943).

4. Sloan v. Sloan, 182 Tenn. 162, 184 S.W.2d 391, 392 (1945).

5. Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S.W. 1000 (1895).

6. Scholze v. Scholze, 2 Tenn. App. 80, 92 (M.S. 1925).

7. Moore v. Chase, 25 Tenn. App. 239, 156 S.W.2d 84 (E.S. 1941).

8. State v. Progressive Building & Loan Ass'n, 174 Tenn. 597, 129 S.W.2d 513 (1939).

9. Campbell v. Campbell, 167 Tenn. 77, 66 S.W.2d 990 (1934).

10. Smith v. Haire, 133 Tenn. 343, 181 S.W. 161, 164 Ann. Cas. 1916D 529 (1915); Pile v. Pile, 74 Tenn. 508, 40 Am. Rep. 50 (1880); Johnson v. Lusk, 46 Tenn. 113, 98 Am. Dec. 445 (1868); McMillan v. Mason, 45 Tenn. 263, 98 Am. Dec. 401 (1868).

11. Campbell v. Campbell, 167 Tenn. 77, 66 S.W.2d 992 (1934).

12. See, *e.g.*, 2 TIFFANY, REAL PROPERTY §§ 430-36 (3d ed., Jones, 1939).

13. Jordan v. Jordan, 228 S.W.2d 636 (Ark. 1950) (note); Cross v. Pharr, 221 S.W.2d 24 (Ark. 1949) (checking account); Black v. Black, 199 Ark. 609, 135 S.W.2d 837 (1940) (bank account); Hoyle v. Hoyle, 66 A.2d 130 (Del. Ch. 1949) (bank account); Rauht v. Reinhart, 180 Atl. 913 (Del. Orph. 1935) (mortgage); Flaherty v. Columbus, 41 App. D.C. 525 (1914) (money); Rader v. First Nat. Bk. in Palm Beach, 42 So.2d 1 (Fla. 1949) (war bonds); Dodson v. National Title Ins. Co., 159 Fla. 371, 31 So.2d 402 (1947) (sale price of land); American Cent. Ins. Co. of St. Louis v. Whitlock, 122 Fla. 363, 165 So. 380 (mortgage); Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925) (bank deposits); Beard v. Beard, 185 Md. 178, 44 A.2d 469 (1945) (stock); Young v. Cockman, 182 Md. 246, 34 A.2d 428 (1943) (stock); Hammond v. Dugan, 166 Md. 402, 170 Atl. 757 (1934) (bonds); Brell v. Brell, 143 Md. 443, 122 Atl. 635 (1923) (stock); Childs v. Childs, 293 Mass. 67, 199 N.E. 383 (1936) (bond); Splaine v. Morrissey, 282 Mass. 217, 184 N.E. 670 (1933) (saving

on the matter.[15] The states of the first group when confronted with the problem have applied entireties to bank accounts.[16]

One of the main advantages of tenancy by the entirety as an estate planning instrumentality is that it is a method of avoiding state inheritance taxes,[17] the property passing automatically at the death of the first dying spouse to the survivor. This avoidance is not effected in federal taxation,[18] nor does it now appear possible in Tennessee according to a recent decision which held that where the decedent has paid for the whole of the property his estate is taxed for the whole interest passing to the surviving spouse.[19] Despite the loss of certain tax advantages there appears to be no logical or practical basis for disagreeing with the present holding. Tenancy by the entireties is a useful tool in estate planning, especially where funds can be transferred at death merely by depositing money in a bank, thus providing substantial savings in probate, legal and administrative expenses. Personal property, including money, may clearly be held in joint tenancy or tenancy in common.[20] Since personalty has long since supplanted realty as the basis of our economy and the common law disabilities of women have been abolished, no cogent reason remains for withholding the useful planning device of tenancy by the entirety from such an integral element of present-day commercial life as the bank deposit.

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deposit); Marble v. Jackson, 245 Mass. 504, 139 N.E. 442 (1923) (bank deposit); McElroy v. Lynch, 232 S.W.2d 507 (Mo. 1950) (note); Cullom v. Rice, 236 Mo. App. 1113, 162 S.W.2d 342 (1942) (bank deposit); Kaufmann v. Kaufmann, 166 Pa. Super. 6, 70 A.2d 481 (1950) (bank account); Blumner v. Metropolitan Life Ins. Co., 362 Pa. 7, 66 A.2d 245, 248 (1949); U.S. Nat. Bank in Johnstown v. Penrod, 354 Pa. 170, 47 A.2d 249 (1946) (bank account); Swanton Sav. Bk. & Tr. Co. v. Tremblay, 113 Vt. 530, 37 A.2d 381 (1944) (cattle); George v. Dutton's Est., 94 Vt. 76, 108 Atl. 515 (1920) (store property). For Tennessee cases, see Notes 6-8, *supra*. See Note, 117 A.L.R. 915.

14. Koehring v. Bowman, 194 Ind. 433, 142 N.E. 117, 118 (1924) (entireties can exist in personal property derived from real property so held, *e.g.*, crops); Able-Old Hickory Building & Loan Ass'n v. Polansky, 47 A.2d 730, 731 (N.J. Ch. 1946) (stocks); Franklin Nat. Bk. v. Freile, 116 N.J. Eq. 278, 173 Atl. 93 (1934) (promissory note); *In re* McKinney's Estate, 175 Misc. 377, 24 N.Y.S.2d 906 (Surr. Ct. 1940); *In re* Maguire's Will, 277 N.Y. 527, 13 N.E.2d 458 (1938); *In re* Blumenthal's Estate, 236 N.Y. 448, 141 N.E. 911 (1923) (bond and mortgage); Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947) (funds from sale); Dozier v. Leary, 196 N.C. 12, 144 S.E. 368 (1928) (banknotes); Winchester Simmons Co. v. Cutler, 194 N.C. 698, 140 S.E. 622 (1927) (bonds); Manning v. U.S. Nat. Bank of Portland, 174 Ore. 118, 148 P.2d 255 (1944) (stock); Holman v. Mayo, 154 Ore. 241, 59 P.2d 392 (1936) (bank deposit); Nunner v. Erickson, 151 Ore. 575, 51 P.2d 839 (1935) (mortgage note). All of the Kentucky and Rhode Island eases deal only with land.

15. See Nussbacher v. Manderfeld, 64 Wyo. 55, 186 P.2d 548 (1947); Richie, *Tenancies by the Entirety, etc., in Virginia*, 28 VA. L. REV. 608, 613 (1942).

16. See note 12, *supra*.

17. For an excellent treatment of the tax aspect of entireties, see Rudick, *Federal Tax Problems Relating to Property Owned in Joint Tenancy and Tenancy by the Entirety*, 4 TAX L. REV. 3 (1948).

18. INT. REV. CODE § 811(e).

19. Murfreesboro Bank & Trust Co. v. Evans, 241 S.W.2d 862 (Tenn. 1951).

20. See, *e.g.*, Manning v. U. S. Nat. Bank of Portland, 174 Ore. 118, 148 P.2d 255 (1944); Dozier v. Leary, 196 N.C. 12, 144 S.E. 368 (1928); *In re* Blumenthal's Estate, 236 N.Y. 448, 141 N.E. 911 (1923).

PLEADING—GENERAL ISSUE—SCOPE IN TENNESSEE

Defendants Rudd and Headrick were adjoining landowners. Plaintiffs purchased the land belonging to defendant Headrick on which there was a cinder block wall and building located a few feet from the boundary of Rudd's land. The defendants dumped dirt and rock into a gulley between these structures and Rudd's adjoining lot. Plaintiffs sued for damages resulting to the structures, alleging that the defendants by their wrongful, willful and negligent conduct completely destroyed the wall and permanently damaged the building. The defendants pleaded the general issue and at the trial were allowed to show by cross-examination of one of the plaintiffs that he had consented to this placing of the dirt upon his premises. Plaintiffs, appealing from a judgment in favor of defendants, alleged as error the admission of evidence of consent, asserting that the action was trespass and that justification was not admissible under a plea of the general issue. *Held,* affirmed. The action was one of trespass on the case[1] and the defense of justification was, therefore, admissible under a plea of the general issue. *Sing v. Headrick,* 236 S.W.2d 95 (Tenn. 1950).

The decision appears to be in accord with the principles of common law pleading, but its point of interest lies in the fact that Tennessee still requires a defendant to study the common law forms of action to determine the scope of the general issue.[2] By statute, one who has sustained injury to his person or property, in which money only is demanded as damage, may be redressed by an action on the facts of the case.[3] Similarly all contracts may be sued on in the same form of action.[4] The intent of the legislature in enacting these statutes was to abolish the distinctions between the various forms of action and to create in their stead actions of contract and tort, and even to abolish this distinction if it interferes with the intention of the pleader.[5] Any pleading is now sufficient if it conveys a reasonable certainty of meaning, and when by a fair and natural construction it shows a substantial cause of action or de-

1. The court found the action to be trespass on the case since the plaintiffs failed to allege a breaking and entering, but did allege negligence. Another factor was the plaintiffs allegation that they "were and are without fault." This indicates the plaintiffs' reliance on the allegation of negligence since if the defendant's conduct had been willful and wanton the exercise of care by the plaintiffs would be inconsequential.

2. Tennessee inherited the basic common law of England, and that body of rules constituting the common law system of practice and pleading was rigidly adhered to until 1932 when the first substantial reform in the field of pleading was enacted. The availability of defenses under the general issue depends on what the action would have been under the technical rules of common law pleading. Oliver Co. v. Greenwood, 4 Tenn. C.C.A. 535 (1913).

3. TENN. CODE ANN. § 8564 (Williams 1934).

4. *Id.* § 8563.

5. Besides actions of contract and tort the only other forms of action now in existence are detinue [TENN. CODE ANN. § 8566 (Williams 1934)], replevin (§ 8566) and ejectment (§ 8567).

fense.[6] The enactment of these statutes was a long step forward in the field of pleading in Tennessee. It eliminated the necessity for obtaining a writ in the required form of action where an error in the choice of writs was fatal to the plaintiff's case.[7] But there has been relatively little statutory reform from the defendant's standpoint. The code allows the defendant to enter a general denial to the plaintiff's cause of action, equivalent to the general issue at common law.[8] Thus, in an action based on the facts of the case the defendant must determine under what common law form of action the plaintiff is bringing his suit before he can ascertain the scope of his general denial. Although code section 8765 provides that a general denial shall be equivalent to the general issue at common law, the scope of the general issue in Tennessee has not remained the same in all instances as it was at common law, and it does not open the door to all defenses.

In trespass, whether to person or property, the plea "not guilty" denied the essential allegations of the declaration and in trespass to property "not guilty" also denied the plaintiff's possession.[9] In Tennessee the general denial puts into issue two facts, the alleged wrongful act and the title of the plaintiff.[10] If the defense is to rest upon any other facts the general issue will not apply, and the defendant must resort to a special plea. In actions of trespass on the case the plea "not guilty" permitted the defendant to show any defense by way of denial, excuse or discharge except the statute of limitations and except truth in an action on the case for libel or slander.[11] This is generally the rule in Tennessee but, contrary to the common law rule, an accord and satisfaction must be specially pleaded.[12]

At common law the plea of *non cepit* to an action of replevin denied the taking and the place of taking and put the plaintiff to the proof of these allegations only.[13] It did not deny the plaintiff's property in the chattel. But in Tennessee the general issue is much broader. It puts in issue not only the taking, but also the plaintiff's property in the chattel, and by statute all matters of defense may be shown in evidence without resort to special plea.[14]

In detinue the plea of *non detinet* denied the plaintiff's allegation of property in the chattel and its wrongful detention by the defendant, and put

6. TENN. CODE ANN. § 8728 (Williams 1934).
7. *E.g.*, 1 CHITTY, PLEADING 106 (16th Am. ed. 1879).
8. TENN. CODE ANN. § 8765 (Williams 1934).
9. 1 CHITTY, PLEADING 538; SHIPMAN, COMMON-LAW PLEADING § 170 (3d ed. 1923).
10. CARUTHERS, HISTORY OF A LAWSUIT § 216 (7th ed., Gilreath, 1951); HIGGINS AND CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES § 584 (1937).
11. CARUTHERS, HISTORY OF A LAWSUIT §§ 221-22; SHIPMAN, COMMON-LAW PLEADING § 173.
12. Gossett v. Railroad, 115 Tenn. 376, 89 S.W. 737 (1905); HIGGINS AND CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES § 582.
13. 1 CHITTY, PLEADING 553; SHIPMAN, COMMON-LAW PLEADING § 178.
14. TENN. CODE ANN. § 9297 (Williams 1934); CARUTHERS, HISTORY OF A LAWSUIT § 218; HIGGINS AND CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES § 586.

only these allegations in issue.[15] Since, as has been shown, a general denial is the equivalent of *non detinet,* only the aforementioned issues would appear to be admissible under a general issue plea, but the Supreme Court of Tennessee has held that the statute of limitations is included in the general issue, and need not be specially pleaded.[16]

In an action of debt, *nil debit* denies that the defendant owes the plaintiff anything, and so any defense which shows nothing due from the defendant to the plaintiff, whether by way of denial, excuse or discharge, is admissible under this plea.[17] However, in debt on a written instrument a denial of the execution of the instrument creating the debt can be made only by the special plea, *non est factum.*[18]

In an action for breach of covenant, *non est factum* denies that the defendant has executed the instrument. This plea admits the breach of covenant and a special plea is required to deny it.[19]

In actions of assumpsit on an oral or implied promise, the general issue, *non assumpsit,* is broad enough to admit any defense which shows that the defendant has not become legally liable for the breach of the alleged promise, that it was void or voidable or that it has been performed.[20] The statute of limitations, the statute of frauds, counter-claim, set-off and recoupment must be specially pleaded.[21]

In trover the general issue plea of "not guilty" was as broad as that in case, and today every defense is available except the statute of limitations and release.[22]

By pleading "not guilty" in an action of ejectment, the defendant denies that he is guilty of unlawfully withholding the premises claimed by the plain-

15. 1 CHITTY, PLEADING 561; SHIPMAN, COMMON-LAW PLEADING § 177.

16. Morrow v. Hatfield, 25 Tenn. 108 (1845). This case indicates that the statute of limitations operates on the right and not upon the remedy. *Contra:* Hunter v. Starkes, 27 Tenn. 656 (1848).

17. Gillespie v. Darwin, 53 Tenn. 21 (1871); McGavock v. Puryear, 46 Tenn. 34 (1868); 1 CHITTY, PLEADING 510; SHIPMAN, COMMON-LAW PLEADING § 184; HIGGINS AND CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES § 576.

18. CARUTHERS, HISTORY OF A LAWSUIT § 223; 1 CHITTY, PLEADING 511. In Tennessee there are two pleas of *non est factum.* General *non est factum,* which denies the execution of the instrument and special *non est factum* which alleges an alteration of the instrument, or seeks to avoid it upon some ground aside from the execution. Carter v. Turner, 37 Tenn. 178, 182 (1857).

19. 1 CHITTY, PLEADING 514; SHIPMAN, COMMON-LAW PLEADING § 187. It is suggested that the pleader pay particular attention to the common law rules before preparing his defenses for an action of covenant, and that special pleas be entered in actions founded on covenants of warranty, seisin and against incumbrances, and actions on covenants with collateral agreements attached. HIGGINS AND CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES §§ 579-80.

20. Bank of Commerce v. Porter, 60 Tenn. 447 (1872); CARUTHERS, HISTORY OF A LAWSUIT § 223; SHIPMAN, COMMON-LAW PLEADING § 182.

21. HIGGINS AND CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES § 571.

22. CARUTHERS, HISTORY OF A LAWSUIT § 220; SHIPMAN, COMMON-LAW PLEADING § 176.

tiff and upon such plea may avail himself of all legal defenses.[23] This plea, however, admits that the defendant is in possession of the premises sued for, and possession can be denied only by filing a special plea of disclaimer.[24]

The problems raised by the instant case and the foregoing discussion on the scope of the general issue indicate the difficulties of defensive pleading and the need for further reform in Tennessee. A satisfactory reform in pleading can best be accomplished by an elimination of the broad general denial and a requirement of special pleas on which the defendant intends to rely. This would eliminate most elements of surprise. The code provides that a plaintiff may by motion require the defendant to plead specially.[25] The intention of the legislators who enacted this section was to encourage special pleading,[26] but this statute has been weakened by the fact that its application lies within the discretion of the trial judge.[27] To bring about a better system of pleading in Tennessee the courts should not deny the request of the plaintiff requiring the defendant to plead specially in any case, and particularly in actions of debt, assumpsit and case.[28] In these actions there is virtually no limit to which the defendant may go in establishing a defense under a general denial. Much has been accomplished in the field of pleading in Tennessee, but there are many areas where conditions may be improved.

TORTS—CHARITABLE INSTITUTIONS—TORT LIABILITY OF CHARITABLE INSTITUTIONS UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR

Plaintiff, a patient in the defendant hospital, was being moved on a stretcher by a nurse's aide to an adjoining building. While going down a ramp the nurse's aide lost control of the stretcher which overturned causing injury to the plaintiff. From an order directing a verdict in favor of defendant, and from an order denying plaintiff's motion for a new trial, the plaintiffs appeal. *Held,* reversed. Charitable institutions are liable for the torts of their servants from which injury proximately results to a third person, whether such person is a stranger, paying patient or nonpaying patient. *Ray v. Tucson Medical Center,* 230 P.2d 220 (Ariz. 1951).

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23. TENN. CODE ANN. § 9128 (Williams 1934); CARUTHERS, HISTORY OF A LAWSUIT § 217; SHIPMAN, COMMON-LAW PLEADING § 188.

24. James v. Brooks, 53 Tenn. 150 (1871); TENN. CODE ANN. § 9129 (Williams 1934); CARUTHERS, HISTORY OF A LAWSUIT § 217.

25. TENN. CODE ANN. § 8767 (Williams 1934). The Supreme Court of Tennessee has held that one pleading specially under this section is not allowed to rely on a plea of the general issue previously entered, but must plead affirmatively all defenses to be relied on. Creekmore v. Woodard, 241 S.W.2d 397 (Tenn. 1951). See Comment, 5 VAND. L. REV. (1951).

26. HIGGINS AND CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES § 663.

27. *Id.* §§ 566, 664.

28. *Id.* § 664.

A master is subject to liability to third persons for injuries caused by the tortious conduct of servants within the scope of their employment.[1] Should there be an exception to the stated rule because the master happens to be a charitable institution? The initial decisions in American jurisdictions adopted the "trust fund" theory.[2] This theory had its foundation in the dictum of an early English case[3] which stated that to give damages out of a trust fund would not be to apply the fund to those objects which the author of the fund had in view, but would divert it to a different purpose. Though the "trust fund" theory had been repudiated in England,[4] it later found acceptance in the United States.[5] This laid the foundation for the confusion concerning the problem which followed. Three principal theories in addition to the above mentioned one were evolved in the effort to exempt charitable institutions from tort liability:[6] (1) the "waiver" theory assumes that the beneficiary of the charity impliedly waives any claim for damages;[7] (2) the "public policy" theory demands that the charity must be preserved for the public benefit and its funds should not be diverted to the paying of tort claims;[8] (3) the doctrine of respondeat superior is sometimes held not applicable to institutions not conducted for profit.[9] Almost from the time of their conception all of these theories have met with much criticism, which has been mounting in recent years.[10]

1. 3 COOLEY, TORTS § 391 (4th ed., Haggard, 1932); RESTATEMENT, AGENCY § 219(1) (1933); Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 VAND. L. REV. 260 (1951) *passim*. See Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895).

2. McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876); Perry v. House of Refuge, 63 Md. 20 (1885).

3. This dictum first appeared in Duncan v. Findlater, 6 Clark & Fin. 894, 7 Eng. Rep. 934 (H.L. 1839). It was repeated in The Feoffees of Heriot's Hospital v. Ross, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (H.L. 1846); and in Holliday v. The Vestry of the Parish of St. Leonard, 11 C.B.N.S. 192, 142 Eng. Rep. 769 (C.P. 1861).

4. Duncan v. Findlater, *supra* note 3, was overruled by Mersey Docks & Harbour Board, Trustees v. Gibbs, 11 H.L. Cas. 686, 11 Eng. Rep. 1500 (1866). Holliday v. The Vestry of the Parish of St. Leonard, *supra* note 3, was reversed by Foreman v. Mayor of Canterbury, L.R. 6 Q.B. 214 (1871). The English dicta had distinctly been changed prior to the Massachusetts case in 1876.

5. See Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991 (1905); Fire Insurance Patrol v. Boyd, 120 Pa. 674, 15 Atl. 553 (1888); see note 2 *supra*.

6. PROSSER, TORTS 1079-85 (1941); 10 AM. JUR., *Charities* §§ 145 *et seq.* (1937); Ball, *The Liability of Charitable Institutions for Torts of Agents and Servants*, 38 KY. L.J. 105 (1949); Note, 14 A.L.R. 572, 585-97 (1921); 30 B.U.L. REV. 419 (1950); 14 B.U.L. REV. 477 (1934).

7. Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294 (1st Cir. 1901), *cert. denied*, 183 U.S. 695 (1901); Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 Pac. 1008 (1918); Wilcox v. Idaho Falls Latter Day Saints Hospital, 59 Idaho 350, 82 P.2d 849 (1938).

8. Currier v. Trustees of Dartmouth College, 105 Fed. 886 (C.C.D.N.H. 1900); Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 45 Ariz. 507, 46 P.2d 118 (1935); Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Lindler v. Columbia Hospital of Richland County, 98 S.C. 25, 81 S.E. 512 (1914).

9. Union Pacific R.R. v. Artist, 60 Fed. 365 (8th Cir. 1894); Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595 (1895); Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1916).

10. See notes 17-21, *infra*.

Some courts, recognizing the untenable rationalization underlying these theories of immunity, have formulated other bases upon which to rest their conclusions. A substantial majority hold that in cases where the charity has not exercised due care in the selection and retention of its employees, it will be liable for injuries caused by the negligence of such employees.[11] Many courts make a distinction apparently in a manner similar to the waiver theory between strangers to the charity who are allowed to recover, and beneficiaries of it who are denied recovery.[12] Others, while making the same distinction, have held the charity liable to strangers and paying beneficiaries, but the question of liability to nonpaying beneficiaries has not yet arisen in the jurisdiction.[13] On the other hand, some courts have decided to deny recovery to beneficiaries, but have not passed on the problem involving strangers.[14] Some courts in jurisdictions which rely on the trust fund theory have allowed suits to be maintained if the judgment could be satisfied from funds other than those used to perpetuate the charity.[15] Most of the courts making this distinction have expanded it so that now the judgment may be satisfied by liability insurance obtained for this purpose.[16]

In recent years the trend away from immunity, which began almost coincident with the adoption of the rule itself,[17] and toward unqualified liability, has accelerated somewhat. This trend is a result of many concurring factors: the weaknesses in the theories of exemption,[18] constant criticisms in

11. Haliburton v. General Hospital Society of Connecticut, 133 Conn. 61, 48 A.2d 261 (1946); Morton v. Savannah Hospital, 148 Ga. 438, 96 S.E. 887 (1918); Medical & Surgical Memorial Hospital v. Cauthorn, 229 S.W.2d 932 (Tex. Civ. App. 1949). See Note, 14 A.L.R. 599 (1921).

12. President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Lusk v. United States Fidelity & Guaranty Co., 199 So. 666 (La. App. 1941); Winslow v. Veterans of Foreign Wars National Home, 328 Mich. 488, 44 N.W.2d 19 (1950); Jewell v. St. Peter's Parish, 10 N.J. Misc. 229, 76 A.2d 917 (Sup. Ct. 1950).

13. Brigham Young University v. Lillywhite, 118 F.2d 836, 842 (10th Cir. 1941); Tucker v. Mobile Infirmary Association, 191 Ala. 572, 68 So. 4 (1915); Nicholsen v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344 (1940).

14. Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Bruce v. Young Men's Christian Association, 51 Nev. 372, 277 Pac. 798 (1929); Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916).

15. Morton v. Savannah Hospital, 148 Ga. 438, 96 S.E. 887 (1918); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S.W. 510 (1918).

16. O'Connor v. Boulder Colorado Sanitarium Association, 105 Colo. 259, 96 P.2d 835 (1939); Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 284 (M.S. 1938). See James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431, 439 (1950); 1 VAND. L. REV. 470 (1948).

17. As early as 1879 Rhode Island repudiated the Massachusetts trust fund theory and held that an employer or master was liable for the negligence of his servants if committed in the course of the servant's employment. Glavin v. The Rhode Island Hospital, 12 R.I. 411 (1879). However, the legislature of this state changed the policy set forth above in R.I. GEN. LAWS c.248 § 95 (1923) in order to exempt the charity from liability to beneficiaries, but other parties may recover. Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912). The statute has since been repealed.

18. The weakness of the trust fund theory lies in the fact that it is contrary to the general rule that trust funds are not exempt from liability for torts committed in

legal periodicals and treatises[19] and court decisions criticizing previous holdings—some overruling,[20] some distinguishing so as to allow recovery in certain instances[21] and some deciding the issue for the first time.[22] Therein lies the importance of the instant case. It is the second court[23] within the last two years which has flatly overruled the law in its state and in conformity with the trend has declared the law to be that of unqualified liability. This trend will probably continue; it is likely that in the near future the majority rule will have shifted from partial immunity to that of unqualified liability.

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administering the trust and that, since they would not be exempt in the hands of the donor himself, he can scarcely confer such immunity upon them. See Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E. 626 (1910); Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912). The waiver theory does violence to the facts; a patient goes to the hospital because he expects better care than he would receive at home, and he certainly does not in reality consent to be treated with negligence. See Phillips v. Buffalo General Hospital, 239 N.Y. 188, 146 N.E. 199 (1924); Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S.W. 510 (1918). The public necessity which supported the public policy theory is no longer in existence. Charities are now sound institutions; any judgment granted against them would not impair the continuance of this worthy cause. See President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Glavin v. The Rhode Island Hospital, 12 R.I. 411 (1879). The doctrine of respondeat superior has been applied in cases of liability for injuries to strangers and servants but not applied to beneficiaries. There seems to be no valid basis for this inconsistency. See Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N.W. 951 (1907); Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888).

19. PROSSER, TORTS 1079-85 (1941); Appleman, *The Tort Liability of Charitable Institutions,* 22 A.B.A.J. 48 (1936); Ball, *The Liability of Charitable Institutions for Torts of Agents and Servants,* 38 KY. L.J. 105 (1949); Feezer, *The Tort Liability of Charities,* 77 U. OF PA. L. REV. 191 (1928); Notes, 22 VA. L. REV. 58 (1935); 48 YALE L.J. 81 (1938); 30 B.U.L. REV. 419 (1950); 14 B.U.L. REV. 477 (1934). *Cf.* Zollman, *Damage Liability of Charitable Institutions,* 19 MICH. L. REV. 395 (1921), rejecting all reasons but one. The court in the instant case was strongly influenced by law review discussions.

20. See the instant case and Haynes v. Presbyterian Hospital Ass'n. 45 N.W.2d 151 (Iowa 1950).

21. O'Connor v. Boulder Colorado Sanitarium Association, 105 Colo. 259, 96 P.2d 835 (1939); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Baptist Memorial Hospital v. Couillens, 176 Tenn. 300, 140 S.W.2d 1088 (1940). *Cf.* Justice Rutledge's opinion in President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

22. Durney v. St. Francis Hospital, Inc., 83 A.2d 753 (Del. Super. 1951); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344 (1940); Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A.2d 230 (1950); accord, Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946); *cf.* Mulliner v. Evangelische Diakonniessenvereln, 144 Minn. 392, 175 N.W. 699 (1920).

23. The other state referred to is Iowa. Haynes v. Presbyterian Hospital Association, 45 N.W.2d 151 (Iowa 1950). See Spencer, *Ray v. Tucson Medical Center, A Re-Appraisal of the Tort Liability of Charities,* 24 ROCKY MT. L. REV. 71 (1951).