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Recent Decisions

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RECENT DECISIONS

CONSTITUTIONAL LAW—DUE PROCESS—STATUTE ABSOLUTELY PROHIBITING THE USE OF CONTRACEPTIVES HELD CONSTITUTIONAL.

Buxton v. Ullman (Conn. 1959).

The plaintiffs, in four separate complaints, sought declaratory judgment on the constitutionality of two Connecticut statutes, one of which absolutely forbids the use of "any drug, medicinal article or instrument for the purpose of preventing conception," and the other of which forbids the counselling of such use. Three married women complainants alleged that because of their past medical experience, pregnancy would endanger either their lives or mental health, or would produce an abnormal child. Consequently, it was contended that the statute hinders their right to live normal married lives and thus deprives them of life and liberty without due process of law. The physician complainant alleged that the statutes deprive him, without due process, of his right to practice medicine. The trial court sustained demurrers to the complaints, and the Supreme Court of Errors of Connecticut affirmed, holding that the statutes were a valid exercise of the police power and that in view of the legislature's refusal to revise the statutes, the court could not inject any exceptions into them. Buxton v. Ullman, 156 A.2d 508 (Conn. 1959).

The passage of the Comstock Act by Congress in 1873 gave rise to the enactment of much state legislation designed to suppress traffic in pornographic materials and apparently restrictions on contraceptives were

3. 17 STAT. 598 (1873) prohibited the mailing, importation, and in places subject to the exclusive jurisdiction of the United States, the advertisement, gift or sale of articles for the prevention of conception. In 1897, the provision was extended to deposit with a common carrier. 29 STAT. 512 (1897). The provisions of these statutes are now embodied in 62 STAT. 718 (1948), 18 U.S.C. §552 (1959); 36 STAT. 1339 (1911) as amended June 28, 1955, c. 190 §§ 1-2, 69 STAT. 183, as amended 1958, PUB. L. 85, 796 § 1, 72 STAT. 962, 18 U.S.C. 1471 (1959); 41 STAT. 1060 (1920) as amended Aug. 28, 1959, PUB. L. 85, 796 § 2, 72 STAT. 962, 18 U.S.C. § 1462 (1959).
4. See, 45 HARV. L. REV. 723 (1931) for an analysis of the different types of statutes passed by the legislatures of various states. The statutes are collected in Ruppenthal, Criminal Statutes on Birth Control, 10 J. CRIM. L. C., & P.S. 48, 51-61 (1919).
thought to be incidental to this purpose.\textsuperscript{5} The constitutionality of the federal statutes prohibiting the mailing\textsuperscript{6} or interstate transportation\textsuperscript{7} of contraceptives was upheld under the commerce clause. The state regulation of contraception has been held to be a valid exercise of the police power\textsuperscript{8} and neither a denial of equal protection through class legislation,\textsuperscript{9} nor a deprivation of life or liberty without due process.\textsuperscript{10} However, only in Massachusetts\textsuperscript{11} and Connecticut\textsuperscript{12} is the prohibition against contraceptives and birth control instruction apparently absolute; elsewhere, either the statutes have made express exceptions for legitimate medical purposes,\textsuperscript{13} or the courts have read such exceptions into the statutes.\textsuperscript{14} But even in Massachusetts the courts have been willing to exclude from the terms of the statute devices sold and used for the prevention of disease, notwithstanding the fact that the use of these articles also prevents conception.\textsuperscript{15} Twice the Supreme Court of the United States has refused to rule on the constitutionality of statutes which absolutely prohibit the use or sale of contraceptives; it dismissed appeals for lack of substantial federal questions\textsuperscript{16} and lack of standing to sue\textsuperscript{17} where appellants, physicians affected by the statute, based their appeals on the ground that their patients were deprived of life or liberty without due process of law.

The power of a state to legislate for the health, morals, and general welfare of its citizenry is subject to the limitations that such legislation must not be arbitrary or oppressive, but must bear a real and substantial relation to the public health, safety, morals, or general welfare.\textsuperscript{18} The rights to life, liberty, property, and equal protection of the laws guaranteed by the Fourteenth Amendment are not absolute, but are held subject to the fair exercise of the police power.\textsuperscript{19} The question raised by the instant

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\item \textsuperscript{5} See, 6 U. Chin. L. Rev. 260, 261 (1939). The Connecticut statute, as originally enacted in 1879, was part of an obscenity law, but in 1887 it was separated into a separate section. 23 B.U. L. Rev. 115 (1943).
\item \textsuperscript{6} In re Jackson, 96 U.S. 727 (1878).
\item \textsuperscript{7} United States v. Popper, 98 Fed. 423 (N.D. Cal. 1899).
\item \textsuperscript{8} Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942); State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940); Commonwealth v. Allison, 227 Mass. 57, 116 N.E. 265 (1917); People v. Sanger, 222 N.Y. 192, 118 N.E. 637 (1918) writ of error dismissed, 251 U.S. 537 (1919); McConnell v. Knoxville, 172 Tenn. 190, 110 S.W. 2d 478 (1937); State v. Arnold, 217 Wis. 340, 258 N.W. 843 (1935).
\item \textsuperscript{9} People v. Byrne, 163 N.Y. Supp. 680 (Sup. Ct. 1916), motion for certificate of reasonable doubt denied, 99 Misc. 1, 163 N.Y. Supp. 682 (Sup. Ct. 1917).
\item \textsuperscript{10} Id. The court held that the statute did not constitute an unreasonable interference with peace of mind by reason of the fact that it impinged upon the right of women to engage in sexual intercourse without fear of conception.
\item \textsuperscript{11} Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 353 (1938).
\item \textsuperscript{12} Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942).
\item \textsuperscript{13} See People v. Sanger, 22 N.Y. 192, 118 N.E. 627 (1918); McConnell v. Knoxville, 172 Tenn. 190, 110 S.W. 2d 478 (1917).
\item \textsuperscript{14} United States v. One Package, 86 F.2d 737 (2d Cir. 1936).
\item \textsuperscript{15} Commonwealth v. Corbett, 307 Mass. 7, 29 N.E.2d 151 (1940).
\item \textsuperscript{16} Gardner v. Commonwealth, 305 U.S. 559 (1938).
\item \textsuperscript{17} Tileston v. Ullman, 318 U.S. 44 (1943).
\item \textsuperscript{18} Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936); Liggett Co. v. Baldridge, 278 U.S. 105, 111-112 (1928).
\item \textsuperscript{19} Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558 (1914); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).
\end{itemize}
case is whether the prohibition of the use of contraceptives by married women whose lives will be endangered by pregnancy is arbitrary, oppressive, or bears no direct substantial relation to the health, safety, morals, or general welfare of the public, and thus deprives the plaintiffs of life and liberty without due process of law. The fact that the statute in the instant case may be a deterrent to immorality, since it maintains one of the chief deterrents to fornication, that is, fear of pregnancy, would seem sufficient reason to sustain its constitutionality in the face of the objection that it bears no substantial relationship to health, safety, morals, and general welfare of the public. But it has been argued that by allowing distribution of contraceptives which have been approved as sanitary by a state agency only to married persons with a doctor’s prescription, immorality will in no way be encouraged, and thus the relationship between health, safety, morals, and general welfare of the public is removed unless birth prevention is to be deemed dangerous to the health, safety, morals, or general welfare, per se. It is further argued that many courts and legislatures have recognized a valid medical purpose in the use of contraceptives. Indeed, some courts have indicated, in dictum, that a statute which absolutely forbids the use of contraceptives might be unconstitutional. However, it should be noted that the police power is an extremely broad power. It is so broad that a state can absolutely prohibit the “manufacture, gift, purchase, sale or transportation of intoxicating liquors within its borders...” and can pass a law excluding any person who has not been vaccinated from a school. A statute which prohibits the manufacture or transfer of liquor, in effect forbids its use, yet certainly there are valid medical uses for liquor and valid medical reasons for refusing to be vaccinated; nevertheless, the state can absolutely prohibit the use of liquor and exclude any non-vaccinated person from school. Furthermore, it would appear the plaintiffs in the instant case are not deprived of life or liberty without due process for another reason since there is an alternative to artificial contraception, namely abstinence. In the last analysis, the constitutionality of the statute in question may depend upon whether or not the Supreme Court of the United States will be willing to follow the policy of judicial notice of sociological “facts,” set by footnote eleven in Brown v. Board of Education and decide that modern medical and sociological

21. Note, 6 U. Chi. L. Rev. 260 (1939). But cf. Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942); State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940) where it is indicated that the statutes are for the general welfare of society.
22. See cases cited at notes 14 & 15 supra.
25. Zucht v. King, 26 U.S. 174 (1905) where the court indicated that compulsory vaccination which admitted of no exception might be unconstitutional.
27. 347 U.S. 483, 494 (1953).
authority would support a finding that the absolute prohibition of devices for the prevention of conception would adversely affect the health of married people. One of the factors to be considered is the relative ineffectiveness of the statute because if contraceptive devices may be sold where labeled "for prevention of disease only," and these are the very devices which, in fact, encourage unlawful sexual intercourse the policy of the statute is thus undermined.

Robert E. Slota

CONTRACTS—STATUTE OF FRAUDS—AN ORAL CONTRACT FOR LIFETIME EMPLOYMENT IS UNENFORCEABLE BECAUSE IT VIOLATES THE STATUTE OF FRAUDS.

Dow v. Shoe Corp. of America (S.D. Ill.)

In January 1935, the sales agent of Walter Booth Shoe Company offered plaintiff an oral lifetime employment contract. Plaintiff left his job with another company and worked for the defendant and its predecessor, Booth, up to on or about September 10, 1957 when defendant discharged plaintiff. Plaintiff's suit for damages for breach of this lifetime contract was dismissed by the District Court for the Southern District of Illinois on the grounds that it did not state a cause of action, since under the Wisconsin Statute of Frauds, a contract for lifetime employment is void unless in writing, because it cannot be performed within a year. Dow v. Shoe Corp. of America, 176 F. Supp. 916 (S.D. Ill. 1959).

The majority of courts have held that contracts for lifetime employment need not be in writing under the Statute of Frauds, since death may bring about full performance within a year. It has also been held that contracts for life or permanent employment are indefinite hirings, terminable at will, if not supported by any consideration other than the obligation of services to be performed and wages to be paid. In determining what constitutes consideration, these courts have reasoned that it may consist of a claim for damages for personal injury, the giving up of a

1. Wis. Rev. Stat. c. 241 § .01 (1955) provides: "Every agreement that by its terms is not to be performed within one year from the making shall be void unless it shall be in writing." Wisconsin law governed the validity of the contract since it was both executed and performed in that state.

2. J.C. Millett & Co. v. Park & Tilford Distillers, 123 F. Supp. 484 (N.D. Cal. 1954); Pierson v. Kingman Mill Co., 91 Kan. 775, 139 Pac. 394 (1914); Wright v. Donaebauer, 137 Tex. 73, 154 S.W.2d 637 (1941); Kirkpatrick v. Jackson, 256 Wis. 208, 40 N.W.2d 372 (1941).


lifetime job with the government, or the conveyance of property to the employer, but in most jurisdictions the mere giving up of a job is not sufficient. The courts expressing the minority view hold, however, that if it is the intention of the parties that a lifetime oral contract is not to be terminable at will, the contract will be given that construction even though the only consideration for it as far as the employer is concerned is the promise of the servant to render the service called for by the contract. The only difference between the two views is that the minority view goes one step further by deciding the case on the intention of the parties rather than merely on the language of the agreement. The Wisconsin Statute of Frauds requires contracts which are not capable of performance within a year to be in writing, and the courts of Wisconsin have decided that under their Statute of Frauds a contract for hire for life or an indefinite time is terminable at will and is valid although not in writing. However, in the instant case the district court reasoned that contracts for life employment are indefinite hirings, and since the parties do not presume termination by death, they are not affected by the rule that contracts terminable on a stipulated contingency need not be in writing.

The court in deciding that an oral lifetime contract is within the Statute of Frauds is going against the weight of authority which holds that, since the death of the employee may bring about full performance within a year, contracts for life employment need not be in writing. The basis on which the court could have decided the case and been supported by the weight of authority was that the contract was terminable at will because no consideration other than services were given the employer. Under either this view or that espoused by the court the plaintiff is not entitled to recover damages, because under the court's theory, since there is no writing, the contract is unenforceable, and under the other the contract may be terminated at anytime without liability after the termination date. However, it would seem that when a word as definite as life is used in a contract the parties do not expect the contract to be terminated except by death, and since to insure justice the court should decide the

12. J.C. Millett & Co. v. Park & Tilford Distillers, 123 F. Supp. 484 (N.D. Cal. 1954); Pierson v. Kingman Mill Co., 91 Kan. 775, 139 Pac. 394 (1914); Wright v. Donahue, 137 Tex. 73, 154 S.W.2d 637 (1941).
case on the intention of the parties, the court should give the agreement that effect even though there is no other consideration than the services to be performed by the employee. Since it seems that the parties intended the contract to be broken only by death, the plaintiff under this theory would be entitled to damages for breach of contract.

*Edward Broderick*

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**CRIMINAL LAW—MASTER-SERVANT—VICARIOUS CRIMINAL LIABILITY.**

*Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959).*

John Koczwara, the defendant, operated a tavern in Scranton, Pennsylvania under a restaurant liquor license issued by the Pennsylvania Liquor Control Board. The defendant was indicted and convicted of violating the Liquor Code although, in fact, the acts in violation had been committed by his bartender and occurred in the absence of the defendant. Koczwara had previously been convicted of violation of the Code provision prohibiting Sunday Liquor sales and was sentenced as a second offender, the court imposing an increased fine and imprisonment. The judgment and sentence were affirmed by the Superior Court, which held the fine and imprisonment mandatory under the provisions of the Liquor Code. An appeal was allowed to the Supreme Court because of the importance of the issues as to the extent of the criminal liability of owners of premises licensed by the State Liquor Board for acts in violation of the Liquor Code, committed by employees in the employer's absence and without his knowledge or consent. The court, modifying the judgment, held that the defendant could be criminally liable for acts committed by his employees in his absence and without his knowledge or consent, but that punishment by imprisonment would be a denial of due process in violation of the Pennsylvania Constitution. *Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959).*

Generally, a master or principal will be liable for the criminal acts of his servant or agent only if he counselled, incited, commanded or authorized the acts. But the idea of vicarious criminal liability, while

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2. 47 P.S. § 4-494.
3. In Regina v. Saunders, 2 Plowd. 473 (1575), the court construed the scope of criminal liability for the acts of another so strictly that the man who advised Saunders to poison his wife and supplied the poison was found not to be an accessory when Saunders's attempt on his wife's life resulted in the death of their three year old daughter. Today, while the principles are the same, it is likely that courts would hold the adviser's counsel and procurement a proximate cause of the death, thereby rendering him liable. And in Rex v. Huggins, 2 Strange 882 (1730), the English court clearly rejected the idea of applying the tort doctrine of *respondeat superior* to the criminal law. This is the view taken by Justice Musmanno in his dissent in the instant case. Commonwealth v. Koczwara, supra note 3 at 587, 155 A.2d at 831 (dissenting opinion).
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comparatively recent, is not a new one. As early as 1866, the courts began to hold employers liable for the criminal acts of servants even if the employer had no knowledge of the acts. At first, the principle was applied only in nuisance cases and these were considered an exception to the general rule, the courts reasoning that while the action is criminal in form, it is civil in substance, and the object is not to punish the defendant but to abate the nuisance. Libel cases were a second exception to the strict rules of criminal liability. However, here liability was imposed on the basis of presumed authorization. The publisher of a paper which printed libelous matter was held criminally responsible unless he could show that he had no knowledge of the act and that it had not occurred as a result of negligent supervision on his part. The growth of legislation creating statutory crimes has seen a consequent extension of the principles of vicarious liability of employers. Statutes in almost every jurisdiction have created petty misdemeanors which require no specific intent. Proof that the act was committed will be sufficient to impose liability. Many of these statutes in defining the crimes provide that a master shall be liable if a servant commits a forbidden act while engaged in the master's business eliminating the requirement that the master have knowledge of or authorize the act. Mere proof that the crime was committed by the employee in the course of his employment results in the employer's conviction. Even where statutes make no provision for vicarious liability courts have interpreted the lack of any requirement of criminal intent and the need to protect the public as warranting holding the master liable for the petty misdemeanors of his servants. As a result courts have held employers liable for misdeeds of their servants under statutes controlling distribution and sale of food and drugs, and milk and milk products, and regulating weights and measures, and the operation of motor vehicles. The Restatement of Agency states that "A principal may be subject to penalties enforced under the rules of the criminal law for acts done by a servant or other agent." And commenting that the master can

4. Queen v. Stephens, [1866] 1 Q.B. 702. Not only did the employer prove he had no knowledge of the action constituting the nuisance, but he also offered to show that his employees had acted against express orders. Nevertheless, he was held liable.
5. Ibid.
reasonably anticipate the commission of minor crimes in the conduct of business it states that an act even though consciously criminal may be within the scope of the employment.\textsuperscript{15} Statutes regulating the distribution and sale of intoxicating beverages fall into this category, as well. But there has been wide disagreement as to whether knowledge or acquiescence on the part of the employer is necessary to charge him with liability. Some courts adhere strictly to the classic principles for imposing criminal liability and require knowledge or acquiescence. Others impose liability without proof of such knowledge on the basis of statutory interpretation, on analogy to nuisance cases, or on the ground of public policy.\textsuperscript{16} And while generally, the penalty imposed is merely a fine, there are jurisdictions which have imposed imprisonment.\textsuperscript{17}

The view taken by the majority of the Pennsylvania Supreme Court regarding the imposing of penalties on employers held liable for acts of employees without the knowledge or acquiescence of the employer appears to be the better view. It is well to distinguish between true crimes involving participation, the requisite intent and moral delinquence, where guilt should be personal, and those petty misdemeanors which involve violations of statutes which utilize the criminal administration machinery to enforce social regulations substantially civil in nature. It can be reasoned that losses incurred through payment of fines levied for such violations are incident to the operation of the business, and are to be borne by those for whose profit the business is conducted. The operator of the tavern or restaurant should bear the risks and losses involved in its operation. Until now, it appears that Pennsylvania has been among those jurisdictions which considered the unlawful act of an employee to be prima facie evidence of assent thereto by the employer, and imposed liability unless the employer could rebut it.\textsuperscript{18} By holding the defendant liable, in the instant case, where the evidence showed he in fact could not have known, Pennsylvania is now among those jurisdictions which on the basis of statutory interpretation, hold that lack of knowledge is no defense.\textsuperscript{19} More significant is the Pennsylvania court's holding imprisonment of one vicariously liable unconstitutional as a denial of due process in violation of the Pennsylvania State Constitution. Both California\textsuperscript{20} and Colorado,\textsuperscript{21}

\begin{footnotes}
19. The Pennsylvania Superior Court, in an earlier case, Commonwealth v. Borek, 161 Pa. Super. 200, 54 A.2d 101 (1947), speaks in terms of ignorance of the facts or state of things as they are as being no excuse for violation, but in view of the clear language in Commonwealth v. Martin, \textit{supra} note 19, this view was not, at least until now, entirely accepted.
\end{footnotes}
at least, have permitted sentences, including short terms of imprisonment in similar cases. The decision of the Supreme Court of the United States in Lambert v. California,\(^{22}\) declaring unconstitutional, as a denial of due process, a statute making unknowing conduct criminal would appear to have no bearing on the constitutionality of the statutes of the type here in question.\(^{23}\) But whether or not imprisonment of persons convicted of statutory offenses without fault is constitutional under the Federal or any state constitution, such results are inimical to American standards of criminal justice. Where imprisonment is to be imposed, the individual interest of the defendant is far too serious to permit conviction without regard to intent or knowledge. In the interest of enforcing regulatory legislation, no one objects to the imposition of small fines against employers for violations of employees. And it is possible that there are only slight objections to short terms of imprisonment being imposed where an owner knowingly permits his employees to sell liquor to minors. The final answer may lie in shifting the burden of proof to the defendant to show that he in fact did not know of his employee’s violation and was not present when it occurred.

*Catherine McEntee*

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**EVIDENCE—Proof of Murder Without a Body—Sufficiency of Circumstantial Evidence To Prove the Corpus Delicti in a Murder Prosecution.**

*People v. Scott,* (Cal. 1960).

Defendant was tried for the murder of his wife after she disappeared from home not to be heard from thereafter. There was no evidence of violence or other means of death and no body or part of a body was ever found. The state sought to prove by circumstantial evidence not only that the defendant’s wife had no motive to run away or kill herself, but that it would be unreasonable for her to do so. Evidence was introduced tending to show that the alleged victim was intelligent, happy, possessed of a more than ample income, and was in good health both physical and mental.\(^1\) Part of the circumstantial evidence introduced to establish defendant’s guilt showed that his desire for her wealth was

\(^{22}\) 355 U.S. 225 (1957).

\(^{23}\) The Lambert case involved a parole violation, classically within the area of true crimes, rather than statutory crimes classed as petty misdemeanors. Furthermore, the Supreme Court has upheld the constitutionality of federal statutes imposing prison terms without regard to knowledge or criminal intent in cases of the petty misdemeanor type (although none are based on vicarious liability). See, United States v. Balint, 258 U.S. 250 (1922).

\(^1\) People v. Scott, 1 Cal. Rptr. 600, 604 (1960).
a possible motive for the murder, that after her disappearance he forged her name to thirteen instruments, that he told confusing and conflicting stories to account for her absence, and that he fled to Canada after his release on bail from the forgery offense because he feared that he would be charged with her murder. Although no body or part of a body was ever found, the state introduced a denture and two pairs of glasses belonging to the alleged victim which were found on a lot near defendant's home, and produced witnesses who testified that she could not read without her glasses and was never seen without her denture. In order to rebut the possible inference that the spouse was murdered, the defense introduced witnesses who testified that they saw the alleged victim after the date of her disappearance. The jury found defendant guilty of murder in the first degree and defendant appealed on the grounds, inter alia, that the evidence was insufficient to establish the corpus delicti. The district court of appeals affirmed, holding that the elements of the corpus delicti in a murder prosecution can be proved by circumstantial evidence, provided such evidence is sufficient to preclude every reasonable theory of innocence of the accused. People v. Scott, 1 Cal. Rptr. 600 (1960).

The confusion which surrounds the phrase corpus delicti would seem to arise from viewing these words as meaning the body of the victim of a murder, instead of according to them their proper meaning which is the body or essential elements of the crime. In truth all crimes have a corpus delicti which must be proved by the prosecution, but in a murder prosecution in which the corpus delicti must be proved solely by circumstantial evidence a special problem as to the sufficiency of such evidence may arise. The corpus delicti of a murder consists of two elements, the death of a human being and a criminal agency as the cause of that death. Probably because of the gravity of murder and the finality of the punishment which is sometimes meted out for this offense, some states by statute require direct evidence of the crime while the law of other states requires that the victim's body, or part of it, be found. But in the absence of statute, when a murderer disposes or attempts to dispose of his victim the court is usually faced with one of three possible factual situations. The first situation occurs when only fragments of the victim's body are

2. Id. at 608-609.
5. MONT. REV. STAT. § 10962 (1921) "No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent acts; the former by direct proof and the latter beyond reasonable doubt." See also State v. Cates, 97 Mont. 173, 33 P.2d 578 (1934); State v. Sogge, 36 N.D. 262, 161 N.W. 1022 (1917).
6. TEX. PENAL CODE art. 1204 (1948) "No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of death of the person charged to have been killed." See also Follis v. State, 51 Tex. Crim. 186, 101 S.W. 242 (1907).
In such a case there is direct proof of the death, albeit a problem of identification of the body may arise. However, since only the second element of the corpus delicti, the criminal agency causing the death, remains to be proved by circumstantial evidence, most courts will uphold a conviction founded upon such circumstantial evidence. The second possibility is that although no trace of the body of the victim is ever found, the accused has offered an extra-judicial confession which he later repudiates. In this situation most courts will not allow the corpus delicti to be established by the uncorroborated confession of the accused, but will allow the prosecution to use circumstantial evidence to corroborate the confession or to prove the corpus delicti independent of the confession.

The third factual situation arises as in the instant case, where no body of the deceased is found and there is no confession by the accused. Although modern English cases have held that both elements of the corpus delicti may be proved by circumstantial evidence, there is a split of authority in this country on the matter.

Authority for the rule that there can be no conviction for murder unless the body of the alleged victim is produced or accounted for is usually traced to a statement made by Sir Mathew Hale. Some early cases seized on this dictum and applied it indiscriminately thereby giving it the effect of a rule of law which provided there must be a body produced in order that a conviction for murder may be sustained. Today with modern scientific methods available completely to destroy all traces of a cadaver such a rule would merely benefit the murderer most successful in disposing of his victim. Although there is a danger that a hapless defendant may be a victim of circumstances and convicted while the alleged victim is really alive, such situations are rare and notwithstanding their

12. State v. Kaufman, 329 Mo. 813, 46 S.W.2d 843 (1932); Black v. State, supra note 11.
16. "I would never convict any person of murder or manslaughter unless the facts were proved to be done or at least the body found." [emphasis added]. As quoted in Edwards, Murder Without A Body — The Legal Aspect, 1955 Crim. L. Rev. (Eng.) 205, 208. Note that the disjunctive word "or" was used.
17. Ruloff v. People, 18 N.Y. 179 (1858); R. v. Kersey, [1908] 21 Cox Crim. Cas. 690; See also Edwards, supra note 16.
possibility, society must be permitted to protect itself against the situation where a murder is committed and the body is completely destroyed. 19 Therefore the majority rule is that no body need be found and that both elements of the corpus delicti may be proved by circumstantial evidence 20 if that is the best evidence available. 21 In cases where the corpus delicti is proved solely by circumstantial evidence some courts have seemingly applied a standard of proof different from the usual “beyond all reasonable doubt” test. 22 It has thus been argued that some of the language used 23 sets up a standard of proof somewhere between the burden of proving guilt beyond a reasonable doubt and the unattainable positive proof of guilt. 24 The test applied in the instant case was whether circumstantial evidence was sufficient to supply proof of guilt so convincing as to preclude every reasonable hypothesis of innocence. 25 It is submitted that such a test as this, which demands that no reasonable hypothesis of innocence exist before a verdict of guilty can be justified, is the same as the test which requires proof of guilt beyond all reasonable doubt. In the final analysis each case will depend on its particular factual situation and no hard and fast rules should be laid down. It would seem however that in every case the best evidence available should be required and that the requisite standard of proof should be phrased in terms of the traditional “beyond all reasonable doubt.”

Joseph G. Manta

STARE DECESIS—Effect of Overruling Prior Decision—Judicial Abolition of Governmental Immunity for School Districts Given Prospective Application.

Molitor v. Kaneland Community Unit District No. 302 (Ill. 1959).

Plaintiff brought this action against defendant school district for personal injuries allegedly sustained as a result of the negligence of the school district’s agent. The complaint did not allege the existence of any

23. Id. at 214-15.
24. Id. at 215.
insurance or other non-public funds out of which a judgment might be satisfied, although in fact, the defendant did carry limited insurance pursuant to an Illinois statute\(^1\) which permitted a school district to carry insurance and thereby waive its immunity to the extent of the insurance coverage. Defendant’s motion to dismiss the complaint, on the ground that a school district is not liable for the torts of its agents, was sustained, and judgment was entered for defendant. The appellate court affirmed, but the Supreme Court of Illinois, with two Justices dissenting, overruled prior decisions to hold that a school district would no longer be immune from tort liability. However, except as to the plaintiff in the instant case,\(^2\) the rule herein established was held to be applicable only to cases arising\(^3\) but of future occurrences.\(^3\) *Molitor v. Kaneland Community Unit District No. 302*, 163 N.E.2d 89 (Ill. 1959).

Although overruling decisions are generally applied retroactively,\(^4\) an exception to this rule has arisen from a dictum in *Ohio Life Ins. & Trust Co. v. Debolt*,\(^5\) which proposed that an overruling decision should not be given retrospective operation so as to affect contract or property rights acquired in reliance upon the overruled decision.\(^6\) The cases recognizing this “contract or property exception” hold that a property or contract interest which has vested under an overruled decision should not be disturbed\(^7\) unless stronger policy considerations override those interests.\(^8\) Thus, the policy of protecting government revenues has generally led the federal courts to apply overruling decisions in tax cases either prospectively or retrospectively, whichever will better secure the tax for the government.\(^9\)

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1. ILL. REV. STAT. c. 122, § 29-11a (1957).
2. The court reasoned that merely to announce the abrogation of the rule of immunity without applying it would render such announcement mere dictum and, moreover, deprive the appellant of the fruits of his appeal. *Molitor v. Kaneland Community Unit Dist. No. 302*, 163 N.E.2d 89, 97-98 (Ill. 1959).
3. For a discussion of the issue of judicial abolition of governmental immunity for school districts, see articles cited in *Molitor v. Kaneland Community Unit Dist. No. 302*, 163 N.E.2d 89, 90-91 (Ill. 1959). Although the courts and legislatures of many states have been chopping away, piecemeal, at the doctrine of governmental immunity from tort liability, especially in regard to schools and school districts, no court has gone as far as the Supreme Court of Illinois in the instant case, wherein it expressly repudiated the common law doctrine and overruled the prior cases which affirmed protection for school districts.
5. 57 U.S. (16 How.) 997 (1853).
6. Id. at 1003.
8. Such considerations may be that since a purchaser at a sheriff’s sale takes at his own risk, if the statute authorizing the sale is subsequently held unconstitutional, the sale is void. Barrett v. Brown, 26 Cal. 2d 328, 158 P.2d 568 (1945); or the interest of the public in the prohibition of gambling may precipitate the retrospective application of an overruling decision to invalidate a lease of premises to be used for pari-mutual wagering. Auditorium Kennel Club v. Atlantic City, 16 N.J. Misc. 354, 199 Atl. 908 (Super. Ct. 1938).
9. See, 60 HARV. L. REV. 437, 444-445 and cases cited therein. There seems to be no guiding principle, however, in the state courts decisions in this field.
In cases involving public officers who have acted in reliance upon statutes which have subsequently been declared unconstitutional, the courts have held that the officers are not civilly liable, provided that they acted in good faith.\textsuperscript{10} Another exception to the general rule of retroactivity has arisen in the field of personal liberty, where it has been held that an overruling decision, which makes what was formerly innocent conduct criminal, will only be given prospective application,\textsuperscript{11} and conversely, when that which was formerly declared to be criminal is held to be innocent, a conviction will not stand.\textsuperscript{12} In the field of tort law, however, prospective application of overruling decisions is rare and has only been applied in a few cases involving changes in rules of procedure and evidence peculiar to tort law.\textsuperscript{13} Thus, when the Supreme Court of New Jersey abolished the doctrine of charitable immunity,\textsuperscript{14} it denied merely prospective application of the overruling decision, reasoning that "reliance has very little place anywhere in the field of tort."\textsuperscript{15} Subsequently, the Superior Court of New Jersey held that a cause of action arising out of the tortious conduct of the defendant is a property right protected by the Fourteenth Amendment, and thus a child, who was tortiously injured by a charitable institution prior to the abolition of charitable immunity in New Jersey, did have a cause of action against the charity.\textsuperscript{16}

The rule announced in the instant case impliedly proposes that the doctrine of prospective application should not be dealt with as an exception to the general rule of retroactive application but, rather, that the

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\item Golden v. Thompson, 194 Miss. 241, 11 So.2d 906, 907 (1943); Dolton v. Harms, 327 Ill. App. 107, 125, 63 N.E.2d 785, 793 (1945); but see, Allen v. Holbrook, 130 Utah 319, 315 P.2d 242 (1943).
\item State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940).
\item Partain v. State, 77 Okla. Crim. 270, 141 P.2d 124 (1943); but see Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941) cert denied, 314 U.S. 678 (1941). A writ of habeas corpus was sought after a conviction based on a precedent subsequently overruled, and the court denied the writ.
\item Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952). There the rule determining the right of the defendant to instructions on damages in a personal injury suit was given prospective application. Courts have no difficulty applying rules of evidence prospectively, whether or not they are within the area of torts. See, County of Los Angles v. Faus, 48 Cal.2d 672, 312 P.2d 680 (1957).
\item Dalton v. St. Luke's Catholic Church, supra, note 14, 141 A.2d at 275, citing, Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law, 654 (10th ed. 1957). The court added, however, that the defendant charity did not allege any reliance upon the doctrine of governmental immunity in failing to protect itself by insurance, and moreover, that all of the courts which had previously rejected the immunity doctrine had done so retrospectively. See, McCaskill, Respondent Superior as Applied in New York to Quasi-Public and Eleemosynary Institutions, 5 Cornell L. Q. 409, 6 Cornell L. Q. 56 (1920) pointing out the extent to which the charity decisions have been influenced by the governmental rule and the extent to which the basis for the immunity of governments and charities is the same. Compare, Prosser, Torts, pp. 770-789 with 784-788 (2d ed. 1955).
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so called "contract exception" should be expanded to include all cases in which the parties have relied on the overruled precedent and would be prejudiced by retroactive application. Many courts have spoken of the application of the overruling decision in accordance with reliance, undue hardship, and the principles of fairness and justice, but no court has yet based a decision applying an overruling decision prospectively solely upon these principles. Among the objections raised to the reliance test as a criterion for the prospective application of overruling decisions are the evidentiary problems involved in proving reliance, the difficulties arising out of a situation where a party has not changed his position throughout a cycle of changes in the law, and the efficacy of reliance upon a clearly invalid law. A further objection, one voiced by the dissenting Justice in the instant case, is that others whose cause of action has arisen along with the plaintiff's in the instant case, and all those who have been tortiously injured as a result of the negligence of a school district, prior to the date of the decision in the instant case but before the running of the statute of limitations, are denied their right of recovery by the prospective application of the decision. This objection was disposed of by the Supreme Court of the United States in the case of Great Northern Ry. v. Sunburst Oil & Refining Co., where it was held that a state, in deciding its adherence to precedent, could choose for itself "between the principle of forward operation and that of relation backward." Whenever an appellate court assumes to overturn an established precedent the question of whether this particular precedent would have been better dealt with by the legislature arises. But it would certainly be strange for the very courts which have built and fortified the immunity rule to sit back and wait for the legislature to overturn the value judgments they have made. And if they choose to overturn such judgments, it is within their power to apply the new rule prospectively, but the problem of the formulation of a clear basis for prospective application of overruling decisions remains unsolved by decisions like the one in the instant case.

Robert E. Slota

17. See cases cited by Snyder, supra, note 4, at 140-153.
21. Ibid. at 365. For a further consideration of the constitutional problem see, Snyder, supra, note 4; Stimson, Retroactive Application of Law — A Problem In Constitutional Law, 38 Mich. L. Rev. 80 (1939).
22. 38 COLUM. L. Rev. 1485, 1489 (1938) speaking of the judicial abolition of charitable immunity.
TORTS—NEGLIGENCE—AN INFANT MAY MAINTAIN AN ACTION FOR PRENATAL INJURIES.


An action was brought to recover damages for injuries, sustained in an auto accident caused by defendant's negligence, to an infant plaintiff while he was in his mother's womb. The Law Division dismissed the complaint on the ground that New Jersey law did not recognize a cause of action for negligently inflicted prenatal injuries. The Supreme Court reversed and remanded for trial and held that the infant plaintiff was entitled to recover for a prenatal injury thus overruling a previous decision to the contrary. Smith v. Brennan, 157 A.2d 497 (N.J. 1960).

Prior to 1949, American Courts of last resort held that under the common law an infant could not recover for prenatal injuries. The precedent for these decisions was established in Dietrich v. Northampton where the Supreme Judicial Court of Massachusetts held that there could not be recovery under a wrongful death statute because an unborn child is part of its mother and thus not a person, within the meaning of the statute, at the time of the injury. Notwithstanding that the Dietrich case was concerned solely with the construction of a wrongful death statute, in Allaire v. St. Luke's Hospital it was used as authority for denying recovery for prenatal injuries even where the infant had survived. While these two decisions carried considerable weight in the long line of cases denying recovery for prenatal injuries, additional grounds were advanced for such a result. One court denied recovery from a common carrier on the basis that there was no contractual relationship between it and the "non-existent" child, and therefore, it owed a duty of care only to the mother. Another ground advanced for dismissing such an action was the fear that it might be possible for an infant to maintain an

2. Dietrick v. Northampton, 138 Mass. 14 (1884); The line of Massachusetts cases following this case has recently been reversed in that state by the case of Keyes v. Construction Service Inc., 165 N.E.2d 912 (Mass. 1960) where the court allowed recovery for pre-natal injuries although adopting the viability test.
3. The infant's mother was between four and five months advanced in pregnancy when she fell because of the defective condition of the street of the defendant town. The fall resulted in a miscarriage, and it is doubtful that the child lived at all after birth though some signs of life were noted for a short period.
action against its mother for injuries caused by her negligence. However, the most frequent rationale appearing in cases dismissing actions for prenatal injuries was the belief that there was an inherent difficulty in proof of causation, and consequently a substantial number of fictitious claims would result. In 1946, the first significant break from this view occurred when a federal district court approved a prenatal injury petition in a case in which the common law was relied upon solely. Three years later the supreme courts of Ohio and Minnesota became the first state courts to adopt a view contrary to that established in the Dietrich case. These decisions provided the impetus for other state courts in which the question was an original one, and soon there was a substantial number of cases in which recovery for prenatal injuries was allowed where the child was born either alive or dead. In Illinois, Missouri and New York the question was not an original one but the impact of the newly developing trend was great enough to cause an overruling of earlier decisions denying recovery for prenatal injuries. However, even in the face of this liberal trend, recovery was still severely limited by the requirement that the injuries must have been inflicted at a time when the foetus was capable of extra-uterine existence. This requirement, known as the viability theory, was adhered to without any decisions of a court of last resort to the contrary until the Georgia supreme court in Horbuckle v. Plantation Pipe Line Co., held that the particular moment of the prenatal injury is immaterial since a human life comes into existence at the time of conception. While there is considerable merit to this view, it appears that it has been adopted by only one other state court of last resort.

The New Jersey court in overruling Stemmer v. Kline has rid itself of an outmoded precedent and has now taken its place with the in-
creasing number of jurisdictions which permit actions for prenatal injuries. This trend appears to be fully justified when examined in the light of the basic reasons advanced for denying the maintenance of such suits. First, it is argued that an unborn child is part of its mother, and hence no independent duty of care can be owed to it. Completely ignored by this rationale is the fact that medical authorities\textsuperscript{22} and other branches of the law\textsuperscript{23} have recognized that an unborn child has a separate existence at conception. The second reason advanced is the fear of fraudulent claims arising because of the difficulty of proof of causation, but this difficulty does not appear to be a valid reason for not permitting one to maintain an action. Fear of fraudulent claims should be relieved by requiring competent medical evidence to prove the necessary causal relationship. Since this is the approach taken in other cases in which a causal relationship must be shown, it should be an acceptable solution in prenatal injury cases. As a result of its rejection of the viability theory, the court in the instant case has adopted a position which is more liberal than that of most jurisdictions which allow these actions. By treating conception as that time when an unborn child acquires separate existence the court has adhered to a view which is entirely consistent with the treatment of the medical profession and other branches of the law. Such a result is fully justified on the grounds of both legal and medical principals.

\textit{Harry J. Oxman}

\section*{TORTS—Negligence—Liability of Tavern Keeper For Torts of Minor Patron.}

\textit{Rappaport v. Nichols (N.J. 1959).}

The defendants, owners of certain taverns in Newark, New Jersey, sold alcoholic beverages to another defendant, a minor. The minor then became involved in an automobile accident resulting from his negligence in which plaintiff’s intestate was killed and plaintiff’s car damaged. Plaintiff brought suit in the Superior Court of New Jersey alleging that the sales to the minor negligently caused the accident because the alcoholic beverages made him intoxicated and unfit to operate an automobile. The Superior Court ruled as a matter of law that the sale to the minor could not be the proximate cause of the accident. However, the Supreme Court

\textsuperscript{22} Prosser, Torts § 36 (2d ed. 1955).

\textsuperscript{23} Criminal law regards an unborn child as a separate entity. In re Vince 2 N.J. 443, 67 A.2d 111 (1949). The law of property and decedents estates considers the infant in being for purposes beneficial to his interests. In re Haines’ Will, 98 N.J.Eq. 628, 129 Atl. 867 (1925).  

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of New Jersey reversed the judgment on the grounds that if the tavern keepers negligently sold alcoholic beverages to a minor causing his intoxication which in turn resulted in his negligent operation of a motor vehicle, a jury could find that the selling of the alcoholic beverages was the proximate cause of plaintiff's injuries. *Rappaport v. Nichols*, 33 N.J. 183, 156 A.2d 1 (1959).

It is generally held that there is no common law liability imposed on a tavern owner for injuries to a third party caused by a customer who consumes alcoholic beverages served by the owner. The common law absolved the vendor of liability on the theory that it is the consumption of the alcoholic beverages by the inebriate and not the sale which is the proximate cause of the injury to the third person. Furthermore, courts have frequently denied liability even though the sale of alcoholic beverages violates a statute or ordinance, as where the sale is to an intoxicated person or a minor, thus refusing to say that such violation is negligence per se. The inebriate or his wife has been denied recovery where the serving by the tavernkeeper was negligent, on the grounds of contributory negligence, but has been allowed recovery where the injury was inflicted intentionally or with wanton disregard. The common law rule has been modified in some jurisdictions to allow an injured third party to recover from the vendor where the intoxicated person had no volition when served in the defendant's establishment, as where addicted to alcohol or intoxicated to the point of helplessness. The reasoning the courts use in such cases is that the inebriate is in such a condition that it

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9. Nally v. Blanford, 291 S.W.2d 832 (Ky. 1956); McCue v. Klein, 60 Tex. 165 (1883).
is foreseeable by the tavern keeper that he may injure someone.\textsuperscript{13} Many states in order to avoid the harshness of the case law and to impose liability on tavern keepers\textsuperscript{14} have passed "Civil Damage" or "Dram Shop" Acts.\textsuperscript{15} However, in the principal case the court reasoned that even without a Dram Shop Act a jury could find that the selling of the alcoholic beverages was the proximate cause of the injury.\textsuperscript{16}

In some instances the court does rule as a matter of law on proximate causation, but it would seem that where reasonable men may differ the court should allow the jury to decide as a question of fact whether the selling of alcoholic beverages was the proximate cause of the plaintiff's injury. The tortfeasor's conduct was a cause of the event if it was a substantial factor in bringing it about,\textsuperscript{17} and it was the proximate cause if the injury sustained was foreseeable.\textsuperscript{18} The tavern keeper in the instant case violated a statute\textsuperscript{19} which was intended for the benefit of the public\textsuperscript{20} and thereby became liable for the foreseeable damages resulting from such violation.\textsuperscript{21} The grave danger connected with the operation of automobiles by drunken drivers under modern traffic conditions is a matter of common knowledge.\textsuperscript{22} The vital point of inquiry would seem to be whether the vendor knew or ought to have known that the vendee would drive on

\textsuperscript{13} Nally v. Blanford, 291 S.W.2d 832 (Ky. 1956).

\textsuperscript{14} The Dram Shop Acts were passed to encourage temperance and as a means of assuring compensation to those persons who are injured as a result of another person's intoxication. Ogilive, History and Appraisal of the Illinois Dram Shop Act, 1958 U. ILL. L.F. 175.

\textsuperscript{15} The Iowa Dram Shop Act provides: "Every wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support by an intoxicated person or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his own name against any person who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages." IOWA CODE ANN. § 129.2 (Supp. 1959). See ALA. CODE ANN. tit. 7, § 135 (Supp. 1959); COLO. REV. STAT. ANN. § 7 (Supp. 1953); ILL. REV. STAT. c. 43, § 135 (Supp. 1957); ME. REV. STAT. ANN. c. 61, § 95 (Supp. 1957); MICH. COMP. LAWS. § 436.22 (Mason Supp. 1956); MINN. STAT. ANN. § 340.95 (Supp. 1957); N.Y. CIV. RIGHTS LAW. § 16; N.D. REV. CODE § 5-0121 (Supp. 1959); OKLA. STAT. ANN. tit. 37, § 121 (Supp. 1958); VT. STAT. § 6214 (Supp. 1959). See also DEL. CODE ANN. tit. 4, § 716 (Supp. 1958) (only the spouse, child, or employer of the intoxicated person can sue); N.C. GEN. STAT. § 14-322 (Supp. 1959) (only the parent, guardian or employer of an unmarried minor can sue); ORE. Rev. STAT. § 30, 730 (Supp. 1957) (only the spouse, parent, or employer can sue).


\textsuperscript{17} Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1951); Walton v. Blauert, 256 Wis. 125, 40 N.W.2d 545 (1949).

\textsuperscript{18} Casey v. Burns, 7 Ill. App. 2d 316, 129 N.E.2d 440 (1955).


\textsuperscript{20} Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959); State v. Dahmke, 244 Iowa 599, 57 N.W.2d 533 (1955).

\textsuperscript{21} Larkins v. Kohlmeyer, 229 Ind. 391, 98 N.E.2d 896 (1951); Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1899).

\textsuperscript{22} It is estimated that in 1958, 37,000 persons lost their lives in motor vehicle accidents, and another 1,350,000 were injured. 1960 PHILADELPHIA BULLETIN ALMANAC 239.
the public highways in an intoxicated condition.\textsuperscript{23} If he had such actual or constructive knowledge, he should not be allowed to argue that such a consequence was unforeseeable, and hence an intervening cause which would relieve him from liability.\textsuperscript{24} It is submitted that even though the New Jersey legislature had earlier repealed a Dram Shop Act\textsuperscript{25} the court in the instant case did not usurp the function of the legislature by making law, but by deciding that the foreseeability of the consequences posed a jury issue, merely applied what the common law of negligence has always been.\textsuperscript{26} It would not seem that it was the court's intention to make tavern keepers insurers of the public, but to apply only the ordinary rules of negligence and hold them to the familiar duty of care of a reasonable man under the circumstances. This test would not deprive them of the opportunity factually to prove that they acted reasonably, nor preclude the opportunity to employ the doctrine of contributory negligence in the proper case.

\textit{Edward Broderick}

\textsuperscript{23} Campbell, \textit{Work of the Wisconsin Supreme Court}, 1941 Wis. L. Rev. 1, 117.


\textsuperscript{25} N.J. LAWS 1922 c. 257, p. 628.

\textsuperscript{26} Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450, 462 (1955) (dissenting opinion).