NOTES

EQUITY PLEADING—WHAT CONSTITUTES A GERMANE AMENDMENT REDEFINED.—Until recently, under the decision in *Fodor v. Kunie*[1] a petition for annulment arising under statutory grounds could not be amended to include therein a prayer for annulment under the inherent jurisdiction of Equity (*e.g.,* on grounds of fraud), on the theory that the amended plea was in no "way related to the statutory action."[2]

This doctrine was over-ruled recently by specifically allowing the same amendment which had been refused in *Fodor v. Kunie, supra,* in the case of *Theismeier v. Theismeier.*[3] Here the wife filed suit for divorce alleging as her grounds the desertion of the husband. The husband counter-claimed alleging his own incurable impotency, existing at the time of the marriage, and asked for a decree of nullity. The wife then sought leave to amend her petition and to add a second, third, and fourth cause of action, and therein prayed for a decree of nullity. The proposed second cause of action alleged her husband's incurable impotency, a statutory ground for a decree of nullity. The third and fourth causes of action asked for a dissolution of the marriage on the grounds of fraud.

In the opinion,[4] it was said that if the court should follow the doctrine of *Fodor v. Kunie*[5] the second proposed cause of action would be allowed, but the third and fourth causes of action would be disallowed since they state causes of action "coming under the general or inherent jurisdiction of the court,"[6] and as such would not be germane to the original bill. The court, however, granted the petitioner

1. 92 N.J.Eq. 301, 112 Atl. 598 (Ch. 1920). In this case, the husband-petitioner sued for annulment of the marriage on the grounds of non-age of the defendant. After reference to a Special Master and taking testimony, it was advised that the petition be dismissed. At this stage of the proceedings a request to amend the petition to secure relief on the grounds of Fraud was denied.

2. 92 N.J.Eq. 301 at p. 304.

3. 124 N.J.Eq. 116 (Ch. 1938).

4. Opinion of Advisory Master approved and concurred in by the Chancellor.

5. *Supra,* note 1.

6. 124 N.J.Eq. 116 at p. 117.

leave to amend as to all the proposed amendments, and in over-ruling *Fodor v. Kunie*[7] gave as its reasons *inter alia* that the trend of the decisions (*i.e.*, since *Fodor v. Kunie, supra*) "has been towards a simplification of procedure and the establishing of a right to tender issues in pleadings so that all the questions * * * may be decided at the one time" and that on "applications for amendment the power of the court to allow amendments being so broad, * * * , that one opposing the amendment should be called upon to show, by some compelling decision or approved practice, that the proposed amendment should not be allowed."[8]

There are several questions which are raised when a case long established in the law has been over-ruled.[9] The first question which should be asked is whether the earlier case injected into the law any doctrine which, the subsequent case having over-ruled, should have been over-ruled. In any attempt to answer this question, it must first be ascertained whether the decision in the earlier case was on sound grounds. It will be remembered that, since in *Fodor v. Kunie*[10] the relief was an annulment of the marriage, and that the amended plea, which was denied, sought that very thing, the question of "germaneness" applied to grounds of relief stated "in the original petition rather than to the purpose or object of the suit."[11] It is submitted that the amendment should be allowed if the relief sought is still the same, irregardless of whether the facts on which the complainant relies are changed, or new facts are added. No hardship is placed on the defendant since, if subpoena has issued, or if he has made an appearance, the court directs the defendant to file his answer to the amended bill.[12]

7. *Supra*, note 1.

8. 124 N.J.Eq. 116 at p. 118. Although not mentioned in the opinion, it is suggested that Prof. Lewis Tyree's article *Germane Pleadings in the Court of Chancery* (1938), II UNIV. OF NEWARK LAW REVIEW 145, was persuasive upon the Advisory Master.

9. Fodor v. Kunie was decided in 1920. No attempt is here made to discuss the question of whether the decision in Theismeier v. Theismeier is consistent with recent cases and practice. The reader is referred, for that phase, to II UNIV. OF NEWARK LAW REVIEW 145, *et. seq.*

10. *Supra*, note 1.

11. II UNIV. OF NEWARK LAW REVIEW 146.

12. Chancery Rule 80.

It must be said that this type of an amendment is held to be making a new "case" in some jurisdictions.[13] If bills were allowed to be amended to include different theories, all directed towards the obtaining of the *same* relief, nothing new would be added to the law. All that would be necessary would be a re-interpretation of the concept of a "new case" or "cause of action." It is too well-settled that a party shall not introduce new matter which would constitute a new bill,[14] ever to place at the disposition of a litigant the power to amend in whatever manner he saw fit, and at any stage of the proceedings.

Chancellor Green in *Coddington v. Mott*[15] seems to base his reason for disallowing an amendment not on the grounds of stating a new cause of action, but the making of a new case *inconsistent* with that originally made. The requirement of consistency is a more beneficial standard than that of stating a *new cause of action.* In this case an amendment to change a bill for specific performance to one to rescind the contract on the grounds of fraud was denied. And further, in *Berla v. Strauss*[16] a bill to enforce a resulting trust was not allowed to be amended to obtain a bill to settle partnership accounts. Also, in *Carter v. Carter*[17] where in a suit to foreclose a mortgage by a trustee under an assignment, judgment creditors of the owner of the equity intervened and pleaded the assignment was fraudulent as against them as creditors of the owner. The court refused to allow these same parties to amend so as to allege that the assignment was fraudulent as against them as creditors of the trustee. The court said that this amendment constituted a distinct cause of action. In these cases, although the phrase used is "stating a new cause of action," the aim in the amendment was to *alter the relief sought,* not merely to change the theory upon which the *same relief* is sought.

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13. *Cf.* Patterson's Adm. v. Modern Woodmen of America, 89 Vt. 305, 95 Atl. 692. "The test of whether a proposed amendment to a complaint constitutes a departure from the original cause of action is whether it is different matter, or the same matter laid in different ways to meet the varying phases of testimony and prevent a variance.

14. DANIEL, CHANCERY PLEADING AND PRACTICE (6th ed.) 426.

15. 14 N.J.Eq. 430, 82 Am. Dec. 258 (Ch. 1862).

16. 74 N.J.Eq. 678, 75 Atl. 763, *aff'd* 76 N.J Eq 275 (Ch. 1908).

17. 63 N.J.Eq. 726, 53 Atl. 160, *aff'd* 65 N.J.Eq 766 (Ch. 1902).

In *Gery v. Gery*[18] a suit between wife and husband for the partition of lands, while the marriage relation still existed,[19] the complainant, after filing of petition, obtained an absolute divorce. She then sought to amend her petition by including an allegation of the fact of the divorce. The court in denying the amendment said that although amendments are made in Equity with great liberality,[20] it does not go so far "as to entitle a complainant as a matter of right to make a new case thereby." In this case, although the relief sought is the same, the amendment, if allowed, would give the complainant a cause of action which she did not have at the time of filing the petition.

No exact rule can be laid down in reference to amendments of equity pleadings that will govern all cases. It depends on the special circumstances of each case.[21] It is felt, however, that if the amendment does not attempt to vary the aim, or relief sought, and hence make the amendment "inconsistent with the original bill" within the meaning of the court in *Coddington v. Mott, supra,* the amendment should be allowed. Or, if the amendment does not attempt to give the petitioner a cause of action, which could not have been established at the time of filing the petition, as in the case of *Gery v. Gery, supra,* this type of amendment should also be permitted. Since the proposed amendment in *Fodor v. Kunie*[22] fell within the first of the above-mentioned classes it is felt that the over-ruling of it by *Theismeier v. Theismeier*[23] is a beneficial decision.

Specifically *Fodor v. Kunie* is over-ruled only in that the court felt that statutory and general equitable grounds for annulment of the marriage could be joined in the same bill, and that a bill under statutory grounds could be amended to include a prayer for relief

18. 113 N.J.Eq. 59, 166 Atl. 108 (E. & A. 1933).

19. Partition of an estate by the entirety will not lie between husband and wife. Platt v. Platt, 93 N.J.Eq. 395.

20. The court cited Coddington v. Mott, 14 N.J.Eq. 430, and Fodor v. Kunie, 92 N.J.Eq. 301.

21. Hardin v. Boyd, 113 U.S. 756, 5 S.Ct. 771, 28 L. Ed. 1141 (Sup. Ct. 1885).

22. *Supra,* note 1.

23. *Supra,* note 3.

under general equitable principles. The *ratio decidendi* of *Theismeier v. Theismeier, supra,* deals only with this question; nothing can be inferred from the decision that the concept of germane pleadings should be written out of the law. The court must have a limit within which to confine pleadings and amendments thereto, even though the limit of germaneness appears to be very vague, and at times indefinable.

It is submitted that the value of the decision in *Theismeier v. Theismeier*[24] lies not in the holding that a limited type of amendment will be hereafter allowed, but that it is a foreshadowing of a more liberalized procedure in the Court of Chancery,[25] and perhaps the ultimate discarding of the concept of "germaneness." The ends of justice should never be sacrificed to mere form or by rigid adherence to technical rules of practice.[26] Amendments should be allowed in the discretion of the court subject to the well-settled limitation of "new case"[27] defined as a variance from the relief sought in the original bill, not as a change of theory seeking the same relief.

THE NEW JERSEY GANGSTER ACT—A CRITICISM.—The appeal pending in the United States Supreme Court assailing the New Jersey statute commonly known as the "Gangster Act"[1] makes timely a

24. *Supra,* note 3.

25. In connection with the liberalizing of procedure *Cf.* new Federal Rules of Civil Procedure.

26. *Supra,* note 21.

27. Coddington v. Mott, *supra* note 15; Seymour v. Long Dock Company, 17 N.J.Eq. 169 (Ch. 1869).

1. 1 Rev. Stat. 1937, 2:136-4 Chap. 155, Pamph. L. 1934, p. 794. "any person, not engaged in any lawful occupation known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other state, is declared to be a gangster, but nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute." Section 5 of the act provides that "any person convicted of being a gangster under the provisions of this chapter shall be guilty of a high misdemeanor and shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding twenty years, or both."